

**SECURITIES AND EXCHANGE COMMISSION
17 CFR PARTS 230, 232, 239, 240, and 249**

[RELEASE NOS. 33-8917; 34-57781; FILE NO. S7-10-08]

RIN 3235-AK10

**REVISIONS TO THE CROSS-BORDER TENDER OFFER, EXCHANGE OFFER,
AND BUSINESS COMBINATION RULES AND BENEFICIAL OWNERSHIP
REPORTING RULES FOR CERTAIN FOREIGN INSTITUTIONS**

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: After eight years of experience with the current cross-border exemptions adopted in 1999, the Commission is proposing changes to expand and enhance the utility of these exemptions for business combination transactions. Our goal continues to be to encourage offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers, to permit U.S. security holders to participate in these transactions in the same manner as other holders. Many of the rule changes we propose today would codify existing interpretive positions and exemptive orders in the cross-border area. In several instances, we request comment about whether the rule changes we propose also should apply to tender offers for U.S. companies. In this release, we also address certain interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations. We hope that this guidance will prove useful in structuring and facilitating these transactions in a manner consistent with U.S. investor protection.

DATES: Comments should be received on or before [insert date 45 days after Federal Register publication].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-10-08 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-10-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Christina Chalk, Senior Special Counsel, or Tamara Brightwell, Senior Special Counsel, at (202) 551-3440, in the Division of Corporation Finance, and Elizabeth Sandoe, Branch Chief, at (202) 551-5720, in the Division of Trading and Markets (for questions relating to the proposed changes to Rule 14e-5), U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: We propose to amend Rules 162,¹ 800² and 802³ under the Securities Act of 1933⁴ and Rule 101⁵ of Regulation S-T.⁶ We also propose to amend Rules 13d-1,⁷ 13e-3,⁸ 13e-4,⁹ 14d-1,¹⁰ and 14e-5¹¹ under the Securities

¹ 17 CFR 230.162.

² 17 CFR 230.800.

³ 17 CFR 230.802.

⁴ 15 U.S.C. 77a et seq.

⁵ 17 CFR 232.101.

⁶ 17 CFR 232.10 et seq.

⁷ 17 CFR 240.13d-1.

⁸ 17 CFR 240.13e-3.

⁹ 17 CFR 240.13e-4.

¹⁰ 17 CFR 240.14d-1.

¹¹ 17 CFR 240.14e-5.

Exchange Act of 1934.¹² We also propose changes to Form S-4,¹³ Form F-4,¹⁴ Form F-X,¹⁵ Form CB,¹⁶ Schedule 13G¹⁷ and Schedule TO.¹⁸

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¹² 15 U.S.C. 78a *et seq.*

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¹⁷ 17 CFR 240.13d-102.

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I. BACKGROUND

A. Introduction

Securities markets today are characterized by increasing globalization. Advances in information technology, the increased use of ADR¹⁹ facilities giving U.S. investors an ownership interest in the securities of foreign companies, and other factors have increased significantly the number of U.S. and foreign companies engaged in cross-border business combination transactions.²⁰ Computerization and the advent of the Internet age have fueled a revolution in investor participation in global capital markets. With increasing globalization of worldwide securities markets, U.S. investors frequently purchase securities issued by foreign companies, including foreign private issuers.

The Commission has undertaken several recent rulemaking initiatives that impact foreign private issuer reporting and registration requirements. For example, we recently revised our rules to make the U.S. capital markets more attractive to foreign private issuers by allowing the use of financial statements prepared in accordance with International Financial Reporting Standards (or IFRS) as issued by the International Accounting Standards Board (or IASB), without a reconciliation to U.S. GAAP.²¹ In addition, we amended the deregistration rules for exiting the U.S. regulatory system when

¹⁹ “ADRs” refer to American Depositary Receipts. We use this term synonymously with American Depositary Shares, or ADSs.

²⁰ See Jessica Hall, Cross-Border Mergers Defy U.S. Slump, REUTERS (October 18, 2007)(noting that cross-border deals reached record highs through mid-October 2007, and were up 82 percent over levels for the same period in 2006, according to figures compiled by the research firm Dealogic).

²¹ Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Release No. 33-8879 (December 21, 2007) [73 FR 986].

the level of U.S. interest in a foreign private issuer's securities has decreased, such that continued registration is no longer justified.²² We also have proposed a change to the manner of determining the availability of the Rule 12g3-2(b) exemption from Exchange Act registration.²³ Further, we have proposed rule revisions applicable to foreign issuers, intended to improve the accessibility of the U.S. public capital markets and enhance the information available to investors.²⁴

We believe these changes benefit investors and issuers. U.S. investors benefit from additional investment opportunities in securities of foreign companies, while issuers benefit from the potential for increased investor interest and a reduction in the cost of regulatory compliance. Consistent with these recent efforts to enhance our regulatory system applicable to foreign private issuers, we are proposing enhancements to our rules governing cross-border business combination transactions.

The rule revisions we propose today are based on our experiences in the cross-border area during the eight years since the current cross-border exemptions were adopted. The revisions are intended to address the areas of conflict or inconsistency with foreign regulations and practice that acquirors frequently encounter in cross-border

²² Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 34-55540 (March 27, 2007) [72 FR 16934] ("Deregistration Release").

²³ Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-57350 (February 19, 2008) [73 FR 10102] ("Rule 12g3-2(b) Release").

²⁴ Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008) [73 FR 13404].

business combination transactions.²⁵ Whether non-U.S. issuers list their securities on a U.S. market or U.S. investors access overseas trading markets to purchase their securities, cross-border business combination transactions frequently present conflicts between U.S. and foreign regulatory systems.²⁶ The cross-border exemptions are premised on the status of the target company in a business combination, or the issuer in a rights offering, as a foreign private issuer as defined in our rules.

We believe the revisions we propose today represent an appropriate balance between the need to protect U.S. investors through application of the protections afforded by U.S. law, and the desirability of facilitating and enabling transactions that may benefit all security holders, including those in the United States. We also believe expanding the availability of the cross-border exemptions will serve the public interest by encouraging bidders to include U.S. holders in cross-border business combination transactions from which they otherwise might be excluded, thereby extending the benefits of those transactions to U.S. investors.

²⁵ The proposed revisions are, with a few exceptions, limited to cross-border business combination transactions. “Cross-border” refers to business combinations in which the target company is a “foreign private issuer” as defined in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)], and rights offerings where the issuer is a foreign private issuer, as so defined. In the past under very limited circumstances, offerors have obtained no-action and exemptive relief for business combinations in which the target company was a foreign issuer but did not meet the definition of foreign private issuer in Rule 3b-4. Such relief continues to be considered only in special circumstances and will be as narrowly tailored as practicable.

²⁶ “Business combination” is defined in Securities Act Rule 800(a) as any “statutory amalgamation, merger, arrangement or reorganization requiring the vote of security holders of one or more participating companies. It also includes a statutory short form merger that does not require a vote of security holders.” In this release, we use the term more broadly to include those kinds of transactions, as well as tender and exchange offers. See Securities Act Rule 165(f)(1) [17 CFR 230.165(f)(1)] (defining the term more broadly, to include the types of transactions listed in Rule 145(a) [17 CFR 230.145(a)], as well as exchange offers).

1. Treatment of U.S. target security holders before the adoption of the cross-border exemptions

Before the cross-border exemptions became effective in January 2000, U.S. holders²⁷ of a foreign issuer or foreign target company frequently were excluded from cross-border business combination transactions or rights offerings because of actual or perceived conflicts between U.S. and foreign law. Where U.S. security holders held a relatively small percentage of a foreign target's securities, their participation was not necessary to the successful completion of the business combination transaction and acquirors frequently excluded them.²⁸ Even where the percentage of securities held in the United States was significant, acquirors and issuers in business combination transactions and rights offerings sometimes avoided extending the offer into the United States because of perceived litigation risks or conflicts in rules or practice, or the desire not to engage in the process of preparing and filing a Securities Act registration statement.²⁹ Exclusion deprived U.S. investors of some or all of the benefits of such cross-border transactions.

2. Overview of the cross-border exemptions

In an effort to facilitate the inclusion of U.S. security holders in primarily foreign

²⁷ See, e.g., Instruction 2 to Exchange Act Rules 14d-1(c) and 14d-1(d) (defining "U.S. holder" as "any security holder resident in the United States").

²⁸ See Cross-Border Tender Offers, Business Combinations and Rights Offerings, Release No. 33-7611 (November 13, 1998) [63 FR 69136] ("1998 Cross-Border Proposing Release"), Section II.A. The U.K. Takeover Panel (the entity that regulates tender offers in the United Kingdom) provided us with information it compiled in 1997 based on a random sample of 31 tender offers (out of 171 possible mergers or tender offers). When the U.S. ownership of the target was less than 15 percent (30 offers), the bidders excluded U.S. persons in all of the offers. When the U.S. ownership was more significant, such as 38 percent (one offer), the bidders included U.S. persons. In the 30 offers that excluded U.S. persons, the ownership percentage was as follows: in 27 offers, U.S. persons held less than 5 percent; in the remaining three offers, U.S. persons held 7 percent, 8 percent and 10-15 percent, respectively.

²⁹ Id.

transactions, we adopted the cross-border exemptions on October 26, 1999.³⁰ These exemptions represented the culmination of efforts since 1991, when we issued two proposing releases addressing cross-border issues.³¹ Between 1991 and 1999, the staff gained valuable experience addressing numerous individual requests for no-action and exemptive relief in the cross-border area.³² The cross-border exemptions addressed areas of frequent regulatory conflict or differences in practice encountered by the staff during those years.

Generally speaking, the cross-border exemptions are structured as a two-tier system based broadly on the level of U.S. interest in a transaction, measured by the percentage of target securities of a foreign private issuer held by U.S. investors.³³ Where no more than ten percent of the subject securities are held in the United States (Tier I and

³⁰ Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 33-7759, 34-42054 (October 22, 1999) [64 FR 61382] (“Cross-Border Adopting Release”). In this release, we refer to the cross-border exemptions adopted in the Cross-Border Adopting Release as the “cross-border exemptions.” The cross-border exemptions may be found in Securities Act Rules 800 - 802 [17 CFR 230.800 - 802] and Exchange Act Rules 13e-3(g)(6) [17 CFR 240.13e-3(g)(6)], 13e-4(h)(8) [17 CFR 240.13e-4(h)(8)], 13e-4(i) [17 CFR 240.13e-4(i)], 14d-1(c) [17 CFR 240.14d-1(c)], 14d-1(d) [17 CFR 240.14d-1(d)], and 14e-2(d) [17 CFR 240.14e-2(d)].

³¹ See International Tender and Exchange Offers, Release No. 33-6897 (June 5, 1991) [56 FR 27582] and Cross-Border Rights Offers; Amendments to Form F-3, Release No. 33-6896 (June 4, 1991) [56 FR 27564]. Additionally, we addressed a number of issues presented in the cross-border context in a concept release in 1990. See Concept Release Multinational Tender and Exchange Offers, Release No. 33-6866 (June 6, 1990) [55 FR 23751].

³² Where we refer in this release to “relief,” we mean exemptive or no-action relief provided by letter in the context of an individual transaction, unless otherwise indicated. See footnote 49 below referring to the staff’s delegated authority to provide exemptive relief from U.S. rule provisions for specific cross-border transactions. Where we refer to “interpretive guidance,” we mean oral positions taken by the staff or written interpretations promulgated by the Division of Corporation Finance in the Manual of Publicly Available Telephone Interpretations available on our Web site. We refer to “Commission guidance” or “Commission interpretive guidance” to mean positions expressed by the Commission in releases.

³³ Although the target (or issuer in a rights offering) must be a foreign private issuer, the acquiror relying on the cross-border exemptions need not be a foreign private issuer and, in fact, may be a U.S. company.

Rules 801 and 802), a qualifying cross-border transaction will be exempt from most U.S. tender offer rules³⁴ and from the registration requirements of Section 5 of the Securities Act of 1933.³⁵ Tier I provides a broad exemption from the filing, dissemination and procedural requirements of the U.S. tender offer rules and the heightened disclosure requirements applicable to going private transactions as defined in Rule 13e-3.³⁶ Tier I also exempts the subject company of a tender offer from the obligation to express and support a position with respect to that tender offer.³⁷ At the same level of U.S. ownership, Rules 801 and 802 also provide relief from the registration requirements of Securities Act Section 5 for securities issued in rights offerings and business combination transactions.

Issuers relying on Rule 801, offerors relying on Rule 802, and third-party bidders and issuers relying on the Tier I cross-border exemption, must furnish a Form CB to the Commission.³⁸ Form CB is a cover sheet for an English translation of the disclosure document used in the foreign home jurisdiction and disseminated to U.S. target security holders.³⁹ This form must be submitted to the Commission by the next business day after the disclosure document attached and used in the foreign home jurisdiction is published

³⁴ The U.S. anti-fraud and anti-manipulation rules and civil liability provisions continue to apply to these transactions. See Cross-Border Adopting Release, Section I.A.

³⁵ 15 U.S.C. 77e.

³⁶ Exchange Act Rules 13e-3(g)(6), 13e-4(h)(8) and 14d-1(c).

³⁷ Exchange Act Rule 14e-2(d).

³⁸ Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i), and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii).

³⁹ Item 1 of Form CB [17 CFR 239.800].

or otherwise disseminated in accordance with home country rules.⁴⁰ The materials submitted under cover of Form CB are not deemed filed with the Commission, and the filer is not subject to the liability provisions of Section 18 of the Exchange Act.⁴¹

A bidder relying on the Tier I exemption must submit a Form CB only if the tender offer would have been subject to Regulation 14D⁴² or Rule 13e-4, but for the Tier I exemption. No filing requirement exists for a tender offer subject only to Exchange Act Section 14(e) and Regulation 14E; accordingly, furnishing a Form CB is not necessary.⁴³

Where U.S. holders own more than ten percent but no more than 40 percent of the target securities (Tier II), the cross-border exemptions provide targeted relief from some U.S. tender offer rules to address certain recurring areas of regulatory conflict. The Tier II exemptions encompass narrowly-tailored relief from certain U.S. tender offer rules, such as the prompt payment, extension and notice of extension requirements in Regulation 14E. The Tier II exemptions do not provide relief from the registration requirements of Securities Act Section 5, nor do they include an exemption from the

⁴⁰ Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 14d-1(c)(3)(iii) and 13e-4(h)(8)(iii). If the bidder is a foreign company, it must also file a Form F-X with the Commission appointing an agent for service of process in the United States. See, e.g., Exchange Act Rule 14d-1(c)(3)(iii).

⁴¹ 15 U.S.C. 78r. See also, the Cross-Border Adopting Release, Section II.A.2. However, an acquiror or other person submitting Form CB is subject to U.S. anti-fraud provisions. See footnote 34 above.

⁴² Exchange Act Rules 14d-1 through 14d-11.

⁴³ See Cross-Border Adopting Release, Section II.A.2. Regulation 14E applies to all tender offers, including those not subject to Section 13(e) or 14(d) of the Exchange Act. These include tender offers for non-equity securities and securities that are not registered under Section 12 of the Exchange Act [15 U.S.C. 78l], as well as partial offers for less than all of the subject class, where the bidder will not own, based on purchases in the tender offer and ownership in the target before the offer commences, more than five percent of the subject class of equity securities after the tender offer.

additional disclosure requirements applicable to going private transactions by issuers or affiliates.

The scope of the Tier I and Tier II cross-border exemptions and the exemptions from the Securities Act registration requirements provided in Rules 801 and 802 are based broadly on the level of U.S. interest in a given transaction, as illustrated by the percentage of shares held by U.S. persons. In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.⁴⁴ This approach differs from our approach in adopting revisions to the deregistration rules applicable to foreign private issuers in 2007⁴⁵ and more recently, in our proposed revisions to Rule 12g3-2(b) recommending the use of an average daily trading volume test (“ADTV”).⁴⁶

B. Summary of rule proposals and interpretive guidance

We believe the existing cross-border exemptions have facilitated the inclusion of U.S. security holders in foreign transactions in a manner consistent with our investor

⁴⁴ Securities Act Rules 801(a)(3) and 802(a)(2) [17 CFR 230.801(a)(3) and 230.802(a)(2)]; Exchange Act Rules 13e-4(h)(8)(ii) and (i)(2)(ii); and 14d-1(c)(2) and (d)(2)(ii).

⁴⁵ See the Deregistration Release.

⁴⁶ See the Rule 12g3-2(b) Release and the discussion in Section II.A.4 below.

protection mandate.⁴⁷ We recognize that in some instances, however, the exemptions are not operating as optimally as intended, or do not address continuing and recurring conflicts of law and practice not anticipated when we adopted them.⁴⁸ As a result, companies repeatedly call upon the Commission’s staff to address particular areas of conflict in the context of individual cross-border transactions.⁴⁹

The rule revisions we propose today address recurring issues and unintended consequences that have impeded the usefulness of the cross-border exemptions. We believe the proposed changes will encourage more offers to be extended into the United States. Generally speaking, the proposed revisions represent an expansion and refinement of the current exemptions, and in some areas, would codify relief previously granted only on an individual basis. Our proposed codification of various staff interpretive positions would make such relief available as a matter of right, thereby

⁴⁷ Another area in which we have modified our rules in the foreign private issuer context is the Multijurisdictional Disclosure System (“MJDS”) with Canada. See Exchange Act Rule 14d-1(b). That system allows a bidder in a cross-border tender offer to conduct its offer in accordance with Canadian rules and/or the rules of any applicable Canadian province instead of U.S. tender offer requirements, where the conditions in the rule are met. These include the requirement that the target company in the tender offer be a foreign private issuer and not an investment company, and that U.S. holders own less than 40 percent of the subject securities. The bidder must file its offer materials, prepared in accordance with Canadian requirements, on Form 14D-1F [17 CFR 240.14d-102] with the Commission. See Rule 14d-1(b)(1). MJDS also specifies certain forms to be used by Canadian companies issuing securities to U.S. persons. See, e.g., Forms F-8 [17 CFR 239.38], F-9 [17 CFR 239.39], F-10 [17 CFR 239.40], and F-80 [17 CFR 239.41]. Except for limited solicitations of comment below, this release does not propose changes to MJDS.

⁴⁸ For a general discussion of the cross-border exemptions and a broad overview of how they operate, see Steven Davidoff & Brett Carron, “Getting U.S. Security Holders to the Party: The SEC’s Cross-Border Release Five Years On,” 26.3 U. Pa. J. Int’l Econ. L. 455 (2005); and John Basnage, William Curtin III & Jeffrey Rubin, “Cross-Border Tender Offers and Other Business Combination Transactions and the U.S. Federal Securities Laws: An Overview,” 61.3 Business Lawyer 1071 (2006).

⁴⁹ Pursuant to Rule 30-1 of the SEC’s Rules of General Organization [17 CFR 200.30-1], the staff has delegated authority to exempt individual bidders and issuers from application of our rules. No-action and exemptive letters issued by the staff in connection with cross-border transactions may be found on our Web site at <http://www.sec.gov/divisions/corpfin/cf-noaction.shtml> and <http://www.sec.gov/divisions/marketreg/mr-noaction.shtml#rule14e5>.

reducing the burdens and costs for bidders and issuers of extending cross-border offers to U.S. holders when conducting cross-border transactions.

In some instances, the changes we propose would address practical problems that have limited the ability of bidders and issuers to rely on the exemptions. For example, we hope the proposed changes relating to the calculation of U.S. ownership of the target foreign private issuer will provide greater certainty and ease of use for those seeking to rely on the exemptions. In proposing these rule revisions, we hope to better address the burdens on bidders and issuers who must comply with two or more regulatory systems in the context of cross-border transactions.⁵⁰ As a result, we hope the revisions we propose today will make bidders more likely to extend offers to U.S. holders.

In this release, we also provide guidance on some of the interpretive issues that have arisen during the years since the cross-border exemptions were adopted. In some instances, we propose to codify existing staff interpretive positions. We also discuss our views on some of the interpretive matters addressed in the 1998 Cross-Border Proposing Release and the Cross-Border Adopting Release. The rule changes we propose today include:

- Refinement of the tests for calculating U.S. ownership of the target company for purposes of determining eligibility to rely on the cross-border exemptions in both negotiated and hostile transactions, including changes to:

⁵⁰ Although the focus of the rule changes we propose is cross-border business combinations, in some instances, we solicit comment on whether certain of these changes should also apply to business combinations where the target company is a U.S. issuer. We may adopt these changes at the time we adopt changes to our cross-border business combination rules. For example, we ask for comments on whether domestic exchange offers not subject to Rule 13e-4 or Regulation 14D should be permitted to commence early. We also solicit comment on whether the rule changes we propose to facilitate “mix and match” tender offers and the relaxation of our rules relating to subsequent offering periods also should apply to tender offers for domestic companies.

- Use the date of public announcement of the business combination as the reference point for calculating U.S. ownership;
- Permit the offeror to calculate U.S. ownership as of a date within a 60-day range before announcement;
- Specify when the offeror has reason to know certain information about U.S. ownership that may affect its ability to rely on the presumption of eligibility in non-negotiated tender offers;
- Expanding relief under Tier I for affiliated transactions subject to Rule 13e-3 for transaction structures not covered under our current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash;
- Extending the specific relief afforded under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act;
- Expanding the relief afforded under Tier II in several ways to eliminate recurring conflicts between U.S. and foreign law and practice, including:
 - Allowing more than one offer to be made abroad in conjunction with a U.S. offer;
 - Permitting bidders to include foreign security holders in the U.S. offer and U.S. holders in the foreign offer(s);
 - Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;
 - Allowing subsequent offering periods to extend beyond 20 U.S. business days;

- Allowing securities tendered during the subsequent offering period to be purchased within 14 business days from the date of tender;
- Allowing bidders to pay interest on securities tendered during a subsequent offering period;
- Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods;
- Codifying existing exemptive orders with respect to the application of Rule 14e-5 for Tier II tender offers;
- Expanding the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act;
- Requiring that all Form CBs and the Form F-Xs that accompany them be filed electronically;
- Modifying the cover pages of certain tender offer schedules and registration statements to list any cross-border exemptions relied upon in conducting the relevant transactions; and
- Permitting foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, without individual no-action relief.

In addition to these proposed rule changes, we provide guidance or solicit commenters' views on the following issues:

- The ability of bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date;
- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;

- The application of the all-holders provisions of our tender offer rules to foreign target security holders;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The ability of bidders to use the vendor placement procedure for exchange offers subject to Section 13(e) or 14(d) of the Exchange Act.

II. DISCUSSION

A. Eligibility threshold – determining U.S. ownership

Business combination transactions are extraordinary events for target companies and their security holders. When U.S. persons hold a significant percentage of a target’s securities in a cross-border business combination transaction, we believe U.S. tender offer and other rules should provide certain basic protections in transactions that will significantly impact their ownership interest in that target company.⁵¹ When U.S. persons do not hold a significant stake in the subject target class, we believe that by allowing the acquiror to conduct the transaction in accordance with the applicable foreign law, while including U.S. persons and treating them at least as favorably as all other target holders, U.S. persons are better protected than they would be if the acquiror chose

⁵¹ We believe these protections are even more critical in cross-border tender offers, where home country law may not allow acquirors to eliminate minority security holders under the same circumstances as in the United States. For example, in some foreign jurisdictions, the ability of bidders to “squeeze out” target security holders remaining after a tender offer may be more limited than in the United States, where this generally be accomplished whenever the bidder purchases a majority of target shares. See discussion in footnote 155 below. Therefore, a decision whether to tender into an offer and the procedural protections associated with that offer may be even more critical, because target security holders who remain after the offer may not be cashed out in a back-end merger, as would be typical in the United States.

to exclude them from the transaction so that the transaction would not be subject to U.S. regulations.

When we adopted the cross-border exemptions, we established a threshold eligibility test for use of the exemptions based on the percentage of target shares held by U.S. persons.⁵² The current test, based on the level of U.S. ownership in the target company, has worked well conceptually. However, we have become aware of certain difficulties that can make application of our threshold eligibility test problematic in practice, including issues that can arise when conducting both the look-through analysis for negotiated transactions and the alternate test for non-negotiated deals, as discussed below. We believe the recommended changes will enhance the utility of the cross-border exemptions because they will make it easier for bidders and issuers to determine whether they are eligible to rely on them.

- 1. Methods for determining U.S. ownership under the existing cross-border exemptions**

- a. Negotiated transactions**

As discussed above, under our current rules, eligibility to rely on the cross-border exemptions is determined in part by the percentage of U.S. beneficial holders of the

⁵² For rights offerings, eligibility to rely on Rule 801 is determined by the percentage of subject securities of the issuer held by U.S. persons. See Securities Act Rule 800(h).

relevant class of target securities.⁵³ U.S. ownership of the target company is determined by reference to the target's non-affiliated float⁵⁴ and holders of greater than ten percent of the subject class are excluded from the calculation of U.S. ownership.⁵⁵ Any securities held by the acquiror in the business combination transaction similarly are excluded from the calculation.⁵⁶

The rules specify the manner in which a bidder in a negotiated transaction must determine which target securities are held by persons resident in the United States.⁵⁷ They require the acquiror to “look through” securities held of record by nominees in specified jurisdictions to identify those held for the accounts of persons located in the

⁵³ Note that in response to inquiries from U.S. bidders regarding the availability of Securities Act Rules 801 and 802 when there are no U.S. holders in the issuer (in a rights offering) or subject company (in an exchange offer or other business combination), or when an offer is not extended to U.S. holders, the Division of Corporation Finance has taken the position that the cross-border exemptions do not apply unless there is at least one U.S. security holder of the subject class of securities. See Section II.C. Question 1 in the Third Supplement to the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>. This is consistent with the intent of the exemptions: to facilitate the inclusion of U.S. security holders of foreign private issuers in business combinations and rights offerings.

⁵⁴ We use “float” to refer to the aggregate market value of the subject securities held by non-affiliates. See generally, the definition of “Small Business Issuer” in Securities Act Rule 405 [17 CFR 230.405] and the Note to that provision. We do not include in that definition securities held by persons or entities that individually own more than ten percent of the subject securities.

⁵⁵ See Instruction 2.ii. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and 14d-1(d). See also Securities Act Rule 800(h)(2).

⁵⁶ Id.

⁵⁷ See Instruction 2 to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d); Securities Act Rule 800(h).

United States.⁵⁸ If after “reasonable inquiry,” the acquiror is unable to obtain information about the location of the security holders for whom a nominee holds, the rules allow the acquiror to assume that the customers are residents of the jurisdiction in which the nominee has its principal place of business.⁵⁹ The relevant date for determining U.S. ownership is the 30th day before a benchmark date that varies with the type of transaction for which the exemption is sought.⁶⁰

b. Non-negotiated transactions

In adopting the eligibility standard for negotiated transactions described in the preceding section, we recognized that the required look-through analysis would be more difficult for third-party offerors in non-negotiated transactions because they would not have the cooperation of the issuer.⁶¹ In particular, obtaining information from nominees who hold for the account of others is difficult for third-party acquirors and may have the

⁵⁸ See, e.g., Instruction 2.iii. to Exchange Act Rules 14d-1(c) and 14d-1(d) (instructing the bidder to limit its inquiry as to securities held in nominee form to nominees located in the United States, the subject company’s jurisdiction of incorporation and the jurisdiction that is the primary trading market for the subject securities, if different from the target’s jurisdiction of incorporation). We recently revised the rule pertaining to termination of registration to include a definition of “primary trading market” that may include trading in more than one foreign market. See Exchange Act Rule 12h-6(f)(5) [17 CFR 240.12h-6(f)(5)]. This does not change the meaning of “primary trading market” as used in the cross-border exemptions and in the instruction to the definition of foreign private issuer in Exchange Act Rule 3b-4 and Securities Act Rule 405 [17 CFR 230.405]. An acquiror’s or issuer’s obligation to look through nominees in calculating U.S. ownership continues to be limited to the jurisdiction of the single, principal foreign trading market for the target’s securities, if different from the target’s jurisdiction of incorporation.

⁵⁹ See Securities Act Rule 800(h)(3) and Instruction 2.iv. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d).

⁶⁰ See Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d) (specifying that U.S. ownership must be calculated as of the 30th day before commencement of a tender offer). For the Securities Act Rule 801 and 802 exemptions, see Rule 800(h) (stating that U.S. ownership must be calculated as of the record date for a rights offering or as of the 30th day before the commencement of an exchange offer or the solicitation for a business combination other than a tender offer).

⁶¹ See discussion in the Cross-Border Adopting Release, Section II.F.3.

effect of alerting the market to a contemplated offer before the acquiror wishes to make its intentions known. For that reason, the cross-border exemptions include a presumption available for non-negotiated or “hostile” transactions.⁶² The “hostile presumption” allows a third-party bidder in a non-negotiated tender or exchange offer to assume that U.S. ownership in the target company is no more than ten percent or 40 percent, the thresholds for Tier I and Rule 802, and Tier II respectively, so long as average daily trading volume in the United States does not exceed ten percent or 40 percent of the average daily trading volume worldwide over a twelve-month period ending 30 days before commencement, and the bidder has no reason to know that actual U.S. ownership is inconsistent with that figure (either based on the issuer’s informational filings with the Commission or foreign regulators or based on the bidder’s actual or imputed knowledge from other sources).⁶³

2. Current eligibility test for negotiated transactions

a. Concerns

Although we believe the current tests for determining eligibility to rely on the cross-border exemptions generally have worked well, changes in several areas would be

⁶² We distinguish a “hostile” tender offer from one made pursuant to an agreement with the target company, which we refer to as a negotiated or recommended transaction.

⁶³ See, e.g., Instruction 3.i.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d) (stating that the presumption is available unless the aggregate trading volume in the U.S. exceeds certain levels, or the bidder knows or should know that actual levels of U.S. ownership exceed the ceiling for the applicable exemption). The instruction, as currently written, refers to the Nasdaq market and the trading volume of securities on the over-the-counter (OTC) market as reported to the NASD, but since the adoption of Exchange Act Rules 14d-1(c) and 14d-1(d) and the corresponding instruction, the Nasdaq market has become an exchange, the NASDAQ OMX Group, Inc. Additionally, the trading volume of securities on the OTC market is now reported to the Financial Industry Regulatory Authority, Inc., or FINRA, which was created through the consolidation of the NASD and the member regulation, enforcement and arbitration functions of the NYSE. We therefore propose a technical change to the rules to reflect these changes.

appropriate to address timing and informational restrictions that have impeded the application of the current exemptions. Many of these problems relate to the threshold eligibility determination for negotiated transactions.

In particular, the requirement that U.S. ownership be calculated as of the 30th day before the commencement of a tender offer or exchange offer, or before the solicitation for other kinds of business combination transactions⁶⁴ presents practical difficulties for acquirors in certain jurisdictions. In some countries, the look-through analysis we require for negotiated transactions takes longer than 30 days to perform.⁶⁵ Numerous acquirors have advised us that in some jurisdictions, it is not possible to calculate U.S. ownership as of a set date in the past. In others, information about the location of target security holders is only published at fixed intervals.⁶⁶ Additionally, the exact date of commencement is not within the control of the acquiror in some jurisdictions.⁶⁷ In recognition of these problems, issuers have sought guidance from the staff regarding the date of calculating U.S. ownership for purposes of determining eligibility to rely on the cross-border exemptions. The staff has stated that, where the 30th day before

⁶⁴ See Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and 13e-4(i), and Instruction 2.i. to Rules 14d-1(c) and 14d-1(d).

⁶⁵ See, e.g., Serono S.A. (September 12, 2002) (“Serono S.A.”) (stating that approximately six to eight weeks is necessary to complete a look-through analysis to obtain information about the level of U.S. beneficial ownership of a French company).

⁶⁶ See Section II.E. Question 8 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

⁶⁷ In some foreign jurisdictions, for example, a bidder is obligated to commence an offer within a certain number of days of receiving home country regulatory approval of its offer materials. As noted above, bidders cannot always obtain information about U.S. ownership as of a date in the past; rather, they can request that information only as of a current date going forward 30 days to the anticipated date of commencement. When the date of commencement is uncertain, it becomes difficult for offerors to comply with our rules.

commencement is impracticable for reasons outside of the acquiror's control the acquiror may use the date within the 30-day period before commencement that is as close as possible to the 30th day.⁶⁸ However, the staff continues to receive inquiries from acquirors who cannot definitively use a date within the 30 days before commencement because of logistical problems in the time needed to conduct the mandated look-through analysis, or because of the regulatory review process.⁶⁹ In the case of an exchange offer where the acquiror will issue securities in exchange for target securities, more than 30 days may be needed to prepare offering materials and complete the regulatory review process.

The reference date for assessing U.S. ownership under the cross-border exemptions also creates logistical problems in certain cases. The current exemptions key the determination of U.S. ownership to the date of commencement of the tender offer or the commencement of the solicitation for other types of business combinations, or to the record date for a rights offering.⁷⁰ If the announcement of the transaction predates the commencement by more than 30 days, an acquiror will not know with certainty when it announces a transaction whether it will be eligible to rely on the cross-border exemptions at all, or whether it will be eligible for Tier I/Rule 802 or Tier II. The staff has been

⁶⁸ See Section II.E. Question 7 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

⁶⁹ For example, shares of listed French companies are not certificated and the majority of such shares are held in bearer form, meaning that the only ownership records for such shares are maintained by Euroclear France, the French clearing system. It generally takes more than 30 days to request and analyze the position listing known as a "TPI report." See, e.g., Alcan, Inc. (October 7, 2003)("Alcan") and Equant N.V. (April 18, 2005)("Equant N.V.") and footnote 65 above.

⁷⁰ See Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and Instruction 2 to Exchange Act Rules 14d-1(c) and (d).

advised that this is problematic in some foreign jurisdictions because by law, the announcement must provide detailed information about the transaction, including information about how U.S. target security holders will be treated.⁷¹ Even where such information is not legally required at the time of announcement, issuers may wish to inform target security holders and the market at large of this information.

In addition, keying the look-through analysis to commencement creates a discrepancy for purposes of the exemption from Rule 14e-5. Rule 14e-5 generally prohibits purchases of target securities outside of a tender offer from the date of announcement of that offer through its expiration.⁷² Tender offers conducted in reliance on the Tier I exemption are exempt from the application of Rule 14e-5.⁷³ However, because Rule 14e-5 applies from the date of announcement of the tender offer, a bidder will not necessarily know at the time of announcement whether it will qualify for the cross-border exemptions as of the 30th date before commencement.

Finally, from time to time the suggestion is made that excluding holders of greater than ten percent of the subject securities disproportionately elevates the levels of U.S. ownership in target companies. In the 1998 Cross-Border Proposing Release, we proposed to exclude from the calculation of U.S. ownership securities owned by non-U.S. target holders who individually held more than ten percent of the subject class, on the

⁷¹ The staff has been contacted by counsel for bidders in certain European countries with concerns about calculating U.S. ownership as of the date specified under current rules, where an announcement of the transaction must be made more than 30 days before commencement and under home country regulation the announcement must include detailed information about the treatment of U.S. target holders.

⁷² Exchange Act Rule 14e-5 [17 CFR 240.14e-5]. We propose to extend this exemption to encompass Tier II-eligible tender offers.

⁷³ Exchange Act Rule 14e-5(b)(10)(i).

grounds that such large investors were affiliates and the securities they held were not part of the target's public float.⁷⁴ When the exemptions were adopted, they excluded securities held by both U.S. and non-U.S. persons holding greater than ten percent of the target company's securities because of commenters' concerns that excluding only large non-U.S. holders, as originally proposed, would skew the U.S. ownership percentages upward.⁷⁵ We continue to receive feedback from various constituencies, however, that exclusion of large holders results in reduced eligibility to rely on the cross-border exemptions. We would be interested in commenters' views on this requirement under our current rules and whether it should be modified or eliminated.

Request for Comment

- Should we continue to exclude from the calculation of U.S. ownership target securities held by the acquiror in the contemplated transaction?
- Should we eliminate the requirement to exclude subject securities held by greater than ten percent holders in calculating U.S. ownership of the target company? Would U.S. interest in a transaction more appropriately be measured by considering all of the outstanding securities, without excluding large holders? Would changing the rule in this manner result in extending the exemptions to circumstances where U.S. investors could be adversely affected?
- Should we eliminate greater than ten percent holders only where such holders are otherwise affiliated with the issuer?

⁷⁴ See 1998 Cross-Border Proposing Release, Section II.H.2.

⁷⁵ See Cross-Border Adopting Release, Section II.F.2.

- Are there problems in determining who is a greater than ten percent holder that should be addressed in revised rules?
- If the requirement to exclude large holders is retained, is a greater than ten percent holding the appropriate level for exclusion? Should the percentage be higher, such as 15 or 20 percent?
- Is there any reason to eliminate the exclusion of greater than ten percent holders only for non-U.S. holders and not for U.S. holders, or vice-versa? What would the impact of such change be on the number of companies eligible for Tier I or Tier II?
- Should we maintain the same tests, with the revisions proposed, but raise the maximum U.S. ownership level for Tier I and Rules 801 and 802 to 15 percent? What effect would this have on the number of cross-border transactions eligible to be conducted under these exemptions? Would expanding the availability of Tier I and Rules 801 and 802 be in the interests of U.S. investors?

b. Proposed changes to the eligibility standard for negotiated transactions

We believe that by revising the eligibility tests for negotiated cross-border business combination transactions as proposed, we would eliminate many of the issues that have arisen. As discussed above, the first problem with the current test is the requirement that U.S. ownership be calculated as of a single, specified date.

Accordingly, we propose that acquirors be permitted to calculate U.S. ownership within a

specified 60-day range rather than using a single date.⁷⁶ This approach is consistent with the position taken by the staff interpretively in considering timing issues in the cross-border context.⁷⁷ It also would provide greater flexibility where the timing of a transaction is driven by market forces or a regulatory process that is, to some extent, outside the control of the acquiror.

While we propose to provide greater flexibility as to the date on which U.S. ownership in the target company may be assessed, we remain concerned about the possibility that a date for calculation would intentionally be chosen to present less than a representative picture of the target security holder base. The instructions to the cross-border exemptions make it clear that the exemptions are not available for any transaction or series of transactions that technically comply with our rules but are, in fact, part of a plan or scheme to evade them in practice.⁷⁸

As discussed above, another logistical problem with the cross-border exemptions centers on the use of commencement as the triggering event for the calculation of U.S. ownership. We now propose to require that U.S. ownership be calculated within a 60-day period before the public announcement of the cross-border tender offer or business combination transaction.⁷⁹ For these purposes, public announcement generally means the

⁷⁶ As discussed below, we also propose to change the reference point for calculation of U.S. ownership from commencement to announcement. We are not currently proposing a change to the requirement to calculate as of the record date for rights offerings. See Rule 800(h)(1).

⁷⁷ See, e.g., Section II.E. Questions 6, 7 and 8 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

⁷⁸ See General Note 2 to Securities Act Rules 800, 801 and 802, Instruction 4 to Exchange Act Rules 13e-4(h)(8) and 13e-4(i), and Instruction 5 to Exchange Act Rules 14d-1(c) and 14d-1(d).

⁷⁹ See proposed revisions to Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and Instruction 2.i. to Exchange Act Rules 14d-1(c) and (d).

same as in Instruction 5 to Rule 14d-2(b)(2).⁸⁰ By using announcement instead of commencement as the triggering event for purposes of the calculation, we hope to enable acquirors planning cross-border transactions to determine at an earlier point how they will treat U.S. holders.

This change also would allow the application of the exemptions to be based on the characteristics of the target security holder base before it is influenced by the announcement of the transaction.⁸¹ Further, it would permit acquirors to meet home country requirements, which may mandate that the acquiror include information about the treatment of U.S. holders in the announcement of the transaction. In addition, it would encourage bidders to provide the markets and target security holders with valuable information at an earlier stage in the transaction process, including alerting investors who may acquire the target company's securities after the announcement whether they will have the full protections of Regulations 14D and 14E.

Where U.S. ownership levels do not permit the acquiror to rely on the Tier I exemption or Rule 802, calculating the level before announcement would provide more time to plan and put together the necessary offering materials. For those who plan to rely on the Tier II exemption, the proposed change would afford more time to determine and seek any necessary exemptive or no-action relief. In addition, because announcement

⁸⁰ Instruction 5 to Exchange Act Rule 14d-2(b)(2) [17 CFR 240.14d-2(b)(2)] states that “‘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.”

⁸¹ See Section II.E. Question 6 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm> (discussing the rationale for why the staff has permitted announcement to be used as the reference point for calculating U.S. ownership in “pre-conditional offers” conducted under U.K. or Irish law).

also is the triggering event for application of Rule 14e-5, this change would further harmonize Tier I and Tier II relief as it relates to that provision. However, we are aware that for some business combination transactions, several weeks or months may elapse between the time of announcement and commencement of the transaction, because of home country regulatory review or other reasons. The target security holder base, including the percentage of those securities held by U.S. persons, may change significantly between announcement and commencement. We do not propose to change the relevant date for calculation of U.S. ownership for rights offerings. Issuers will continue to calculate U.S. ownership as of the record date for a rights offering.⁸² Because issuers control the record date for rights offerings and generally have greater access to information about their own security holders, the test for calculating U.S. ownership for rights offerings has not been the subject of requests for relief. Therefore, we do not propose to change that test today.

The existing cross-border exemptions provide that where one acquiror is eligible to rely on a particular cross-border exemption based on the level of U.S. ownership in the target, a second acquiror who makes an offer for the same target company may rely on the same exemption.⁸³ We do not propose to change this result with the rule modifications we propose today. We believe it provides an important safeguard to place competing transactions on an equal footing with respect to calculation of U.S. ownership and eligibility to rely on applicable cross-border exemptions.

⁸² See Securities Act Rule 800(h)(1).

⁸³ See, e.g., Exchange Act Rule 14d-1(d)(1)(ii). The second bidder may choose not to rely on the same exemption as the first bidder. See also Cross-Border Adopting Release, Section II.F.1.

Request for Comment

- Should we revise the date as of which U.S. ownership is calculated for purposes of determining eligibility to rely on the cross-border exemptions for business combination transactions, as proposed?
 - Should we revise the rules to provide for a range of dates as proposed, or should we continue to specify a date certain for the calculation? If we continue to specify a date certain, should we specify a date earlier than the 30th day before commencement? For example, should we specify the 30th day before announcement?
- Is a range of 60 days before announcement sufficient time to allow bidders and issuers maximum flexibility while avoiding the potential for manipulation of the calculation of U.S. ownership? Or would 75 or 90 days be more appropriate?
- Is announcement the appropriate reference point for determining eligibility to rely on the cross-border exemptions? Or should we retain commencement as the reference point? Are there other alternative reference points we should consider?
- Should we keep commencement as a reference point, but use a range, such as within 60 days before commencement?
- Is it appropriate to use announcement as the reference point, even where a significant period of time may elapse between announcement and commencement, and the makeup of the target security holder base may change in response to announcement or because of the lapse of time? Should

we establish a limit on the period of time which may elapse between the reference point for calculation of U.S. ownership and the commencement of the business combination transaction?

- Should we change the date as of which U.S. ownership is calculated for rights offerings in the same or in a similar manner? If so, please explain what issues may arise under the current test and what changes should be made.
- If we adopt the proposed rule changes allowing bidders and offerors to choose a date within a range for purposes of the calculation of U.S. ownership, should we provide guidance on what dates may not be chosen because of an event or events significantly affecting the target security holder base? For example, if an event occurs that the bidder or offeror knows significantly impacted the U.S. ownership of the target securities within the relevant sixty-day range, but the bidder or offeror did not cause or contribute to such event, should the bidder or offeror be prohibited from using that date as the reference point for the calculation of U.S. ownership?

3. The current test for non-negotiated or hostile tender offers

a. Concerns

Where a third-party tender offer is not made pursuant to an agreement between the bidder and the target company, the current cross-border exemptions allow a bidder to presume eligibility to rely on the exemptions based on a test outlined in our rules, which focuses on information readily available to the bidder.⁸⁴ The hostile presumption was adopted in recognition of the difficulties third parties face in obtaining information about

⁸⁴ See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and 14d-1(d).

U.S. ownership without the cooperation of the target company.⁸⁵ Because issuers have greater access to information about their own security holders, the hostile presumption is not available for issuer tender offers.

The eligibility standard for hostile transactions is based in part on the trading volume of the target's securities in the United States, as compared to worldwide trading volume, over a 12-month period.⁸⁶ However, the presumption of U.S. ownership derived under the trading volume element of the test is qualified by information about U.S. ownership reported in the target's most recent annual report filed with the Commission or its home country regulators.⁸⁷ In addition, the bidder cannot rely on the hostile presumption if it knows or has reason to know that the actual level of U.S. ownership of the subject securities exceeds the relevant thresholds for Tier I and Tier II.⁸⁸ Knowledge or "reason to know" may come from sources other than reports filed with the Commission or the target's home country regulator and disqualifies the bidder from being able to rely on the cross-border exemptions.

These elements of the hostile presumption have resulted in certain issues in practice. First, acquirors appear to be uncertain about what constitutes "reason to know" with respect to the level of U.S. ownership of the target, other than information reported

⁸⁵ See Cross-Border Adopting Release, Section II.F.3.

⁸⁶ Securities Act Rule 802(c)(2) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and 14d-1(d). Trading volume in the hostile presumption is not calculated in the same way as the average daily trading volume used for purposes of deregistration and the threshold proposed for Rule 12g3-2(b). The trading volume in the hostile presumption is calculated using a 12-calendar-month period ending 30 days before commencement of the offer, although we propose to change this calculation to a 12-calendar-month period ending no later than 60 days before announcement of the offer, as discussed below.

⁸⁷ Securities Act Rule 802(c)(3) and Instruction 3.iii. to Exchange Act Rules 14d-1(c) and 14d-1(d).

⁸⁸ Securities Act Rule 802(c)(4) and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

in filings with the Commission or the home country regulators. Acquirors have expressed uncertainty about whether they have any obligation, and if so, the extent of their obligation to seek out information about U.S. ownership levels. Questions also arise as to the timing of that knowledge. For example, because average daily trading volume is calculated as of the 12-calendar-month period ending 30 days before commencement,⁸⁹ acquirors often are unsure of whether their actual or imputed knowledge of U.S. ownership similarly should be as of that date.

It also is possible that targets may use the reporting and knowledge elements of the hostile presumption defensively. For example, targets that learn of a possible hostile offer could file reports preemptively with the Commission stating a percentage of U.S. ownership that precludes the hostile bidder's reliance on certain exemptions, or they may contact the bidder's counsel directly to assert levels of U.S. ownership that disqualify the bidder from relying on Tier I and Rule 802 in particular.⁹⁰ In the latter case, bidders have asked whether such an assertion as to U.S. ownership must be substantiated (and if so, how) in order to preclude reliance on the hostile presumption. Even when a target has filed a periodic report with the Commission indicating a certain percentage of U.S. ownership as a defensive measure, we have seen targets reduce those ownership figures when the transaction becomes recommended. These types of situations create a level of uncertainty for unsolicited bidders that may make it difficult to apply the presumption of U.S. ownership in unsolicited offers.

⁸⁹ Securities Act Rule 802(c)(2) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and 14d-1(d).

⁹⁰ It also is possible that a target may attempt to provide information preemptively before announcement of a hostile bid, but we believe this may happen less frequently when the determination of U.S. ownership is made as of a date before announcement, because the negotiations may begin in a friendly manner.

b. Proposed changes to the presumption for non-negotiated transactions

Today we propose changes to the hostile presumption for determining eligibility to rely on the cross-border exemptions. First, we propose to clarify the “reason to know” element of that test.⁹¹ In the years since the adoption of the cross-border exemptions, bidders frequently have asked what constitutes “reason to know” information about U.S. ownership for purposes of the hostile presumption. We propose to amend our rules to specify that an acquiror has reason to know information that is publicly available. This would include information appearing in reports compiled by independent information service providers that generally are available to the public. However, neither our current rules nor the changes we propose today affirmatively would require an acquiror seeking to rely on the hostile presumption to engage such a third-party service at its own expense.

The proposed rule also would make it clear that acquirors are presumed to know information about beneficial ownership reflected in filings by third parties with the Commission, such as beneficial ownership reports on Schedule 13D, 13F⁹² or 13G. Similarly, acquirors are presumed to know about similar reports filed by third parties in the target’s home country and in the country of its primary trading market, if different. Acquirors may not ignore credible information about target securities held by U.S. persons from non-public sources, such as from investment bankers or other market participants, including the target company, from whom they receive information. As discussed below, however, such information would have to be available before announcement to disqualify the acquiror from relying on the hostile presumption.

⁹¹ Securities Act Rule 802(c)(4) and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

⁹² 17 CFR 249.325.

We also propose to specify the time periods applicable to the hostile presumption. For purposes of the element of that test relating to the average daily trading volume calculation, we propose to modify the instruction to our rules to mandate a calculation over a twelve-calendar month period ending no later than 60 days before announcement.⁹³ This time period for calculation is the same as the period we are proposing for negotiated transactions. We believe it is appropriate that the time periods for measuring levels of U.S. ownership be comparable for both hostile and negotiated transactions.

We also propose to add a timing element to the other components of the hostile presumption test. These changes to the instructions and to the rules would provide that the acquiror's knowledge or "reason to know" refers to knowledge as of the date of announcement. As proposed, our rules would allow an acquiror to ignore conflicting information received after announcement.⁹⁴ These changes are intended to address our concern that some target companies may be manipulating their disclosure of U.S. ownership with respect to unsolicited offers. They also would eliminate uncertainties created by changes in the target's security holder base that may be caused by the announcement of the offer.

Request for Comment

- Is it helpful to specify in the rule, as proposed, examples of information that the acquiror has reason to know, or should the rule remain more general?

⁹³ See proposed revisions to Securities Act Rule 802(c)(2) and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d).

⁹⁴ See proposed Securities Act Rule 802(c)(3) and (4) and Instructions 3.iii. and iv. to Exchange Act Rules 14d-1(c) and (d).

- Would the clarifications we propose to the reason to know element of the test prevent the abuse of U.S. ownership information by targets? Are there currently sufficient safeguards to prevent misuse of this information?
- For purposes of the hostile presumption, should we change the date for comparison of the average daily trading volume of the target securities to a twelve-month period ending no later than 60 days before announcement, as proposed?
 - Should we limit the knowledge or reason to know element of the test to the same time, as proposed, so that acquirors will not be disqualified from relying on the presumption if they learn of conflicting U.S. ownership information after the date of announcement? Or should we require acquirors to take into account any information they learn at any time before commencement?
 - Would the proposed cut-off date for the actual knowledge test be disadvantageous for U.S. investors in the target company?
 - Where the target asserts levels of U.S. ownership that are inconsistent with reliance on an applicable presumption in the context of a hostile transaction, should the rules provide any guidance on the extent to which such assertions must be substantiated? Should we allow acquirors to ignore such assertions by the target, absent adequate substantiation or in the face of conflicting information known to the acquiror?

- If the rule changes are adopted as proposed, should we make corresponding changes to the date of comparison in the “actual knowledge” element of the test for the MJDS with Canada?⁹⁵
- Should we decline to make any changes in the reason to know element of the hostile presumption, leaving acquirors to assess the facts and circumstances in a specific situation on a case-by-case basis?

4. Possible new eligibility standards for negotiated and hostile transactions

Instead of adopting the proposed changes to our current eligibility standards for hostile and negotiated cross-border business combinations discussed above, we could adopt a different approach based on different measures of U.S. investor interest in target securities. For example, for negotiated transactions, we could consider a test based on twelve-month ADTV in the United States as compared to worldwide trading volume over the same period. Alternatively, we could consider a test based on the percentage of shares that are held in the form of ADRs. It is possible that there are other, more suitable tests that we have yet to identify. We could adopt an alternate test for business combination transactions only, or we could adopt it for both business combinations and rights offerings.

As discussed above, the existing hostile presumption available for non-negotiated business combination transactions contains an element based on a comparison of U.S. and worldwide ADTV,⁹⁶ and we have recently used this test as a reference in other

⁹⁵ See Exchange Act Rule 14d-1(b).

⁹⁶ See Securities Act Rule 802(c) and Instructions 3.i.-iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

areas.⁹⁷ Based on an analysis performed by the staff comparing U.S. beneficial ownership figures yielded by the look-through analysis mandated by our current rules to the figures that would result by using an ADTV-based measure, it appears that trading volume may not reflect beneficial holdings of U.S. investors in a target company. To perform this analysis, the staff considered negotiated business combination transactions conducted under the existing cross-border exemptions using the current look-through analysis and compared the resulting percentages of U.S. beneficial ownership with the figures that would have resulted using the ratio of U.S. to worldwide ADTV. Based upon the transactions considered, the analysis suggests that the correlation between the ADTV-based measure and the percentage of target securities beneficially held by U.S. persons is low.

Using such a test may result in target companies with significant U.S. ownership qualifying for the Tier I and Rules 801 and 802 exemptions. Where a bidder, including a U.S. company, is eligible to rely on the Tier I cross-border exemptions, it may issue securities without registration under Securities Act Rule 802. We are concerned that use of an ADTV test for eligibility to rely on the cross-border exemptions would allow bidders, including U.S. bidders, to issue significant amounts of bidder securities to U.S. holders, without the protections of registration. For cash tender offers and other kinds of business combination transactions, we do not believe the requirements of the U.S. tender offer and other rules applicable to business combinations are onerous. Unlike continuing Exchange Act registration and reporting requirements, these rules apply to a single,

⁹⁷ See footnotes 45 and 46 above.

discrete transaction and, in many instances, are specifically tailored to address potential conflicts with foreign law and practice.

We are concerned that extraordinary events in the life of a corporation, such as tender or exchange offers or other kinds of business combination transactions, may pose unique opportunities and risks to security holders that are not present in the context of deregistration, where we have adopted an ADTV test for measuring U.S. interest in a transaction, or exemption from Exchange Act Section 12(g) registration under Rule 12g3-2(b), where we have proposed an ADTV test. In a tender or exchange offer, where the bidder may present its offer directly to target security holders even where the target company itself does not support the offer, the disclosure and procedural protections of our rules provide critical safeguards for U.S. investors. Unlike capital-raising transactions, the interests of all target security holders, including U.S. holders, are affected by business combinations, whether or not they are permitted to participate in them. As noted above, the requirement to comply with U.S. rules for a business combination transaction is generally less burdensome than the continuous reporting requirements under the Exchange Act. For these reasons, we have historically viewed a test based on U.S. beneficial ownership of target securities as the approach that best aligns U.S. investor interests with application of our rules. Therefore, we are not proposing the use of an ADTV test to determine eligibility to rely on the cross-border exemptions.

Similarly, we are not currently proposing a test based solely on a measure of the percentage of target securities held in ADR form. When the current cross-border exemptions were proposed, we considered an eligibility standard that presumed that

target securities held in ADR form were beneficially held by U.S. persons.⁹⁸

Commenters were critical of any presumption that securities held in ADR form were held only by U.S. persons.⁹⁹ An ADR-based test need not rest on a presumption that securities held in ADR form are held by U.S. persons; rather, ADRs could, in general, be considered a proxy for U.S. beneficial ownership, or for a component (e.g., direct retail) of U.S. beneficial ownership. Since some foreign target securities are traded in direct share form in the United States, any test based on securities held in ADR form would be inapplicable to those companies.

We believe that information about the percentage of target shares held in ADR form is not currently readily accessible to third-party bidders in non-negotiated offers. The information might become available through the introduction of registrant disclosure requirements, however. In the case of such disclosure, an ADR-based test could provide a solution for both hostile and negotiated transactions. A weakness of the ADR-based measure is that, as discussed above, because some foreign target securities are traded in direct share form in the United States, any test based on securities held in ADR form would be inapplicable to those companies. We also would need to consider the relevant time period for which we would look at the percentage of target securities held in ADR form if such a test were to be considered, and whether ADRs held by the acquiror and large holders would continue to be excluded from the calculation of U.S. ownership under such a test. If we did not exclude ADRs held by the bidder, the bidder could potentially influence the percentage of such securities held by U.S. persons by changing

⁹⁸ See 1998 Cross-Border Proposing Release, Section II.H.1.

⁹⁹ See Cross-Border Adopting Release, Section II.F.1.

the form of its securities held from ADRs into the underlying securities. We are interested in obtaining comments as to whether an ADTV test or a test based on target securities held in ADR form would be appropriate.

Request for Comment

- Is our continued focus on the percentage of target securities beneficially held by U.S. persons as the relevant test for measuring U.S. interest appropriate and in the best interests of U.S. investors?
 - If we change the rules as proposed, would this alleviate sufficiently the practical difficulties with the calculation of U.S. ownership, so that our rules will be more workable and will better encourage and facilitate the inclusion of U.S. security holders in cross-border transactions? Or would there still be a reason to move from the current focus on the percentage of securities held by U.S. investors to another standard?
 - Are there other practical difficulties involving the beneficial ownership standard that we have not addressed and that it would be helpful to address?
- Should we propose a different test for Tier I and Tier II eligibility, based on U.S. ADTV compared to worldwide ADTV over a twelve-month period?
 - Using U.S. ADTV compared to worldwide ADTV would likely result in many more transactions being eligible for Tier I, and some additional transactions being eligible for Tier II if we maintain the existing ten percent and 40 percent thresholds. Should the thresholds be adjusted so that the transactions eligible for the cross-border

exemptions are equivalent, in terms of number of transactions eligible, before and after changing the eligibility test? If ADTV levels in the United States are very low even where beneficial ownership is high, should we adjust the thresholds to account for this situation? For example, should we lower the Tier I threshold to five percent? One percent? Less than one percent? If we do this, should we also adjust the thresholds in the hostile presumption correspondingly? What would be the appropriate adjustments for Tier II?

- Are there reasons for or against adopting an ADTV test? For example, would an ADTV test be an adequate measure for gauging U.S. retail versus institutional ownership of the target securities?
- Should we qualify the ADTV test based on other factors, such as an acquiror's actual knowledge or U.S. ownership as reported by the target?
- If we adopt an ADTV test, should we adopt the concept of "primary trading market" as defined in Exchange Act Rule 12h-6(f)(5)?¹⁰⁰ That is, should we establish the requirement that the issuer maintain a listing for the subject securities on one or no more than two exchanges in a foreign jurisdiction that, alone or together, constitute 55 percent of the trading in the subject securities over a specified period as a comparison point for U.S. trading volume? Should we adopt the concept that the "primary trading market" for the subject securities

¹⁰⁰ See footnote 58 above.

may encompass one or no more than two foreign markets, and if more than one market, the requirement that the aggregate trading volume in one of those two foreign markets must be greater than the trading volume in the U.S., as specified in Rule 12h-6(f)(5)?

- Should we propose a different test for Tier I and Tier II eligibility, based on the percentage of shares held in ADR form?
 - Is the percentage of shares held in ADR form an effective proxy for U.S. investor ownership? For U.S. institutional ownership? For U.S. direct retail investor ownership?
 - Are there reasons why U.S. persons may choose to hold target securities in direct share form instead of holding ADRs?
 - Under a test based on the percentage of shares held in ADR form, should Tier I and Tier II eligibility thresholds remain constant at their current values (10 percent and 40 percent), or should they change? What criteria should we use, and what evidence should we consult in establishing eligibility thresholds for Tier I and Tier II?
 - If we adopt such a test, as of what date should we measure the securities held in ADR form? Should we exclude from the calculation ADRs held by certain persons, such as the bidder, as we do under our current test for some kinds of business combination transactions?
 - How should we handle securities of foreign private issuers that trade in direct share form?
 - If we adopt a test based on the percentage of shares held in ADR form,

should we amend Form 20-F to require reporting of sponsored ADRs outstanding, so that targets, acquirors and their investors understand eligibility status? How costly or difficult would it be for the issuer to obtain information about the number of sponsored ADRs outstanding? If this information were reported only once each year in the Form 20-F, would the information be current enough for use in cross-border transactions that might occur months later?

- Are there reasons for or against adopting a test based on the percentage of shares held in ADR form?
- ADTV- and ADR-based standards may effectively place companies with no U.S.-traded securities in Tier I. What implications would this have for investor protection?
 - If we move toward a different standard for determining U.S. interest, should this new standard apply only to companies with securities traded in the U.S., with the beneficial ownership standard continuing to apply to companies with no securities traded in the U.S.?
Alternatively, for securities not traded in U.S. markets, do U.S. investors adequately understand the distinct risks of ownership?
- If we make any changes to the standard for determining Tier I and Tier II eligibility, should we also change the standard for the hostile presumption? Should we adopt this alternative standard for business combination

transactions only, or should we adopt it for both business combinations and rights offerings?

- If we change the standard, should we also change the standard for the tender offer rules in Rule 14d-1(b) under the MJDS with Canada?
- Should we propose a different eligibility test(s) for determining eligibility to rely on the cross-border exemptions? What general criteria are important in selecting a measure for U.S. investor interest, for the purposes of this rule? Several potential criteria are (i) the ease of public access to information related to the measure; (ii) the difficulty of manipulation of the measure; and (iii) the alignment of the measure with the percentage of target securities beneficially held by U.S. investors. Are these criteria appropriate? Are there others we should consider?

B. Proposed changes to Tier I exemptions

1. Expanded exemption from Rule 13e-3

Rule 13e-3 establishes specific filing and disclosure requirements for certain kinds of affiliated transactions, because of the conflicts of interest inherent in such situations.¹⁰¹ Rule 13e-3 applies to these kinds of transactions by issuers or their

¹⁰¹ The kinds of transactions covered by Exchange Act Rule 13e-3 include tender offers, purchases of securities, mergers, reorganizations, reclassifications and sales of substantially all the assets of a company. See Rule 13e-3(a)(3)(i)(A) - (C). Rule 13e-3 requires that a Schedule 13E-3 be filed for these kinds of transactions. See Exchange Act Rule 13e-3(d)(1).

affiliates, where the transactions would have a “going private” effect.¹⁰²

Cross-border transactions conducted by the issuer or its affiliates under Exchange Act Rules 13e-4(h)(8), 14d-1(c) and Securities Act Rule 802 are exempt from the requirements of Rule 13e-3.¹⁰³ The scope of the current Tier I exemption from Rule 13e-3 does not apply to some transaction structures commonly used abroad. These include schemes of arrangement,¹⁰⁴ cash mergers, compulsory acquisitions for cash,¹⁰⁵ and other types of transactions. We do not believe there is a reason for excluding these kinds of transactions from the exemption from Rule 13e-3, assuming they would otherwise qualify for Tier I. We believe the form of the transaction structure should not prevent an otherwise-eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3. We therefore propose to expand the scope of the Tier I exemption from Rule 13e-3 to remove any restriction on the category of transactions covered.

The heightened disclosure requirements of Rule 13e-3 may represent a significant disincentive for acquirors to include U.S. security holders in cross-border

¹⁰² Exchange Act Rule 13e-3(a)(3)(ii) lists the effects that will cause the rule to apply to a specified transaction: (A) causing any class of equity securities of an issuer which is subject to section 12(g) or section 15(d) of the Act to be held of record by less than 300 persons; or (B) causing any class of equity securities of the issuer which is listed on an exchange or quoted on an interdealer quotation system to no longer be so listed or quoted. For foreign private issuers engaged in transactions that would have a going private effect under our rules, we interpret Rule 13e-3 to apply where the transaction results in fewer than 300 security holders of record in the United States. See Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008).

¹⁰³ Exchange Act Rule 13e-3(g)(6).

¹⁰⁴ We use this term to refer to a court-approved business combination transaction. See, e.g., U.K. Companies Act, Parts 26 and 27.

¹⁰⁵ By “compulsory acquisition,” we mean a transaction where an acquiror purchases the specified minimum percentage of target securities set by applicable law or the governing instruments of the target company, thereby allowing it to acquire any remaining target securities it does not own without the consent of the holders. A compulsory acquisition may occur after a tender offer for all target securities. A compulsory acquisition of target securities remaining after a tender offer will sometimes be exempt from the application of Exchange Act Rule 13e-3 under existing rules. See Exchange Act Rule 13e-3(g)(1).

transactions that do not currently fit within the Rule 13e-3(g)(6) exemption, particularly where U.S. holders make up no more than ten percent of the target shareholder base. In several instances, the staff has granted individual no-action requests for transaction structures not covered within the scope of current Rule 13e-3(g)(6), but which otherwise met the conditions for reliance on that exemption.¹⁰⁶ The revised rule we propose today is consistent with the staff's approach in these no-action letters.

We believe exempting acquirors from the application of Rule 13e-3 in Tier I-eligible transactions is consistent with our goal of facilitating the inclusion of U.S. investors in primarily foreign transactions. Therefore, we propose to eliminate the restriction on the kinds of cross-border transactions that qualify for the Tier I exemption from Rule 13e-3. The proposed rule would include within the exemption any kind of transaction that would otherwise meet the conditions for Tier I or Rule 802 eligibility.¹⁰⁷ By omitting reference to specific kinds of transaction structures, we hope the revised exemption will focus on substance rather than form.

¹⁰⁶ See, e.g., SUNDAY Communications Ltd. (November 1, 2006)(involving a scheme of arrangement); SUNDAY Communications Ltd. (November 7, 2005)(involving a privatization scheme); and Equant N.V. (involving a synthetic merger).

¹⁰⁷ In order to qualify for the Tier I exemption, an offer must meet the following requirements of Exchange Act Rules 13e-4(h)(8) and 14d-1(c): (i) the acquiree must be a foreign private issuer as defined in Rule 3b-4 of the Exchange Act; (ii) U.S. holders of the acquiree must hold ten percent or less of the securities subject to the offer; (iii) the acquiror must submit an English language translation of the offering materials to the SEC under cover of Form CB and, in the case of an acquiror who is a foreign private issuer, submit to service of process on Form F-X; (iv) U.S. holders must be treated on terms at least as favorable as those offered to any other security holders of the acquiree; and (v) U.S. holders of the acquiree must be provided the offering circular or other offering materials, in English, on a comparable basis as non-U.S. acquiree security holders. See also Securities Act Rule 802(a).

Request for Comment

- Should the proposed expansion of the Tier I exemption from Rule 13e-3 specify the particular types of affiliated transaction structures that will be exempt from Rule 13e-3, as the current rule does?
- If so, what kinds of transactions should be covered?
- Is it preferable to phrase the exemption more generally, as proposed, to avoid limiting the focus on the transaction structure? Are there any kinds of affiliated transactions that should not be included in the exemption?

2. Technical changes to Rule 802

We are proposing a technical change to Rule 802 to clarify the application of Rules 802(a)(2) and (3). When read in context, it is clear that the term “issuer” in those rules is intended to refer to the “offeror” in an exchange offer. We believe it is appropriate to revise those rules to use the term “offeror” instead. This is consistent with the reference to “offeror” in Rule 802(c)(4). These revisions are not intended to change the scope or operation of the existing rule.

In some foreign jurisdictions, local rule or practice dictates that the offeror and the target company jointly prepare a single offer document that is disseminated to target holders. In other jurisdictions, the offeror may prepare the offer materials but they are disseminated by the target company. Our rule change is not intended to change the obligation of the offeror to submit the Form CB with attached offer materials, even where the offer document is technically distributed by another party to the transaction on its behalf.

C. Proposed changes to Tier II exemptions

As discussed above, the Tier II cross-border exemptions currently provide targeted relief from specific U.S. tender offer rules, where U.S. persons hold more than ten percent but no more than 40 percent of the relevant class of target securities.¹⁰⁸ The Tier II exemptions address certain common procedural and practical problems associated with conducting offers in accordance with two or more different regulatory regimes. This relief is limited in scope, in recognition of the substantial U.S. interest in such transactions.

Unlike the Tier I exemptions and the Rule 801 and 802 exemptions, the Tier II exemptions do not exempt third-party bidders or issuers from applicable U.S. filing, disclosure, dissemination and procedural requirements for tender offers or going-private transactions subject to Rule 13e-3. In addition, no exemption is provided from the filing and disclosure requirements of Schedules TO and 13E-3. Accordingly, no Form CB is required for Tier II cross-border tender offers. Unlike Securities Act Rules 801 and 802, the Tier II exemptions do not provide relief from the registration requirements of Section 5 of the Securities Act.

Since the adoption of the cross-border exemptions, we have become aware of specific areas in which the Tier II exemptions do not function as smoothly as intended. We also have identified other instances of conflict between U.S. and foreign regulation or practice which we believe warrant expanded relief. The no-action and exemptive letters issued for Tier II cross-border transactions since the adoption of the exemptions reveal a number of common areas in which further regulatory relief may be appropriate. By

¹⁰⁸ Exchange Act Rules 13e-4(i) and 14d-1(d).

broadening the relief provided for Tier II-eligible transactions as we propose today, we hope to obviate the need for many of these individual requests for relief in the future. This expanded relief is specifically targeted and narrowly tailored, and as a result, we believe it maintains an appropriate balance between investor protection and the promotion of cross-border transactions, particularly in transactions involving target companies with significant levels of U.S. ownership.

Request for Comment

- In addition to the proposed revisions described below, are there other areas in which Tier II should be expanded to better address the needs of bidders and U.S. target security holders in cross-border tender offers?
- Are there areas in which the existing Tier II exemptions or the revisions we propose should be limited or modified?

1. Extend Tier II relief where target securities are not subject to Rule 13e-4 or Regulation 14D

The Tier II exemptions apply to transactions governed by Regulation 14D and Rule 13e-4 under the Exchange Act.¹⁰⁹ As currently written, it is unclear whether the Tier II exemptions are available when a tender offer is not subject to those rules, *i.e.*,

¹⁰⁹ Rule 13e-4 and Regulation 14D apply only to tender offers for equity securities. Regulation 14D applies only where the equity security that is the subject of the tender offer is registered under Section 12 of the Exchange Act, and where the bidder makes a partial offer for less than all of the outstanding securities of the subject class, where the bidder could own more than 5 percent of those securities when purchases in the tender offer are aggregated with its existing ownership of those securities. Rule 13e-4 applies to an issuer tender offer where the subject securities are not themselves registered under Section 12, but where the issuer has another class of securities that are so registered.

when the tender offer is governed by Regulation 14E¹¹⁰ only. We believe the Tier II exemptions should be available if the conditions specified in our rules are satisfied, and therefore we propose to amend the rules accordingly to clarify that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D.

Since the adoption of the Tier II cross-border exemptions, the staff has periodically received inquiries from offerors in tender offers that would have qualified for the Tier II cross-border exemptions, but for the fact that the tender offer was not subject to Rule 13e-4 or Regulation 14D. The staff has taken the position that bidders otherwise meeting the conditions for reliance on the Tier II cross-border exemptions may rely on that relief in making tender offers for a subject class of securities not subject to Rule 13e-4 or Regulation 14D, to the extent applicable. Today we propose to codify this position by changing the language of the Tier II exemptions to specifically expand the scope of the exemptions to these kinds of offers.¹¹¹

Some of the relief afforded under the Tier II exemptions will not be necessary in the case of offers not subject to Rule 13e-4 or Regulation 14D. For example, because our “all-holders” requirement¹¹² does not apply to such offers, the Tier II provision

¹¹⁰ Exchange Act Rule 14d-1(a) defines the scope of Regulation 14E and currently includes within the scope of that regulation only Exchange Act Rules 14e-1 and 14e-2. Exchange Act Rule 14d-1(a) was not amended to reflect the increased scope of Regulation 14E, beginning with the adoption of Exchange Act Rule 14e-3 in 1980. See Tender Offers, Release No. 34-17120 (September 4, 1980) [45 FR 60410]. Today we propose a change to the definition of Regulation 14E in Rule 14d-1(a), to encompass Exchange Act Rules 14e-1 through 14e-8.

¹¹¹ See proposed Exchange Act Rules 13e-4(i) and 14d-1(d).

¹¹² See Exchange Act Rules 13e-4(f)(8) and 14d-10(a) [17 CFR 240.14d-10(a)].

permitting the use of the dual offer structure¹¹³ may be unnecessary. However, where the relief provided in Tier II is needed, we see no reason to restrict its application only to tender offers subject to Rule 13e-4 or Regulation 14D.

Request for Comment

- Is the proposed expansion of the application of the Tier II exemptions to tender offers not subject to Rule 13e-4 or Regulation 14D appropriate?
- Should we condition the proposed extension of the relief provided under Tier II on any other factors besides general eligibility to rely on the Tier II exemptions?
- Are there other areas in which we should provide targeted relief (other than those currently proposed for Tier II offers) for tender offers not subject to Rule 13e-4 or Regulation 14D?

2. Expand Tier II relief for dual or multiple offers

a. Offeror may make more than one non-U.S. offer

U.S. tender offer rules require that when a bidder makes a tender offer that is subject to Section 13(e) or 14(d) of the Exchange Act, that tender offer must be open to all target security holders of that class.¹¹⁴ The Tier II cross-border exemptions currently contain a provision permitting a bidder conducting a tender offer to separate that offer into two separate offers – one U.S. and one foreign – for the same class of securities.¹¹⁵ This exemption for dual offers provides bidders with maximum flexibility to comply with

¹¹³ Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

¹¹⁴ Exchange Act Rules 13e-4(f)(8) and 14d-10(a)(1).

¹¹⁵ Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

two sets of regulatory regimes and to accommodate frequent conflicts in tender offer practice between U.S. and foreign jurisdictions. By permitting the use of two separate but concurrent offers – one made in compliance with U.S. rules and the other conducted in accordance with foreign law or practice – the dual offer provision facilitates cross-border tender offers.

In practice, however, issues have arisen because of the language of the dual offer provision contained in the Tier II exemptions. First, the text of the exemption specifically permits only two offers for the target class of securities.¹¹⁶ Bidders may be required to (or may wish to) make more than one offer outside of the United States. This may be the case, for example, where the primary trading market for the target’s securities differs from the target’s country of incorporation.¹¹⁷

We see no reason to limit a bidder to only two offers for target securities. Where a bidder is subject to more than one foreign regulatory scheme, greater potential for regulatory conflicts may exist. We note that companies have, upon request, received relief permitting multiple foreign offers.¹¹⁸ We propose to eliminate the restriction on the number of non-U.S. offers a bidder may make in a cross-border tender offer by changing the references to “dual offers” to refer instead to “multiple offers.”¹¹⁹

¹¹⁶ Id.

¹¹⁷ See, e.g., Mittal Steel Company N.V. (June 22, 2006)(“Mittal”). This letter states that it may be relied upon by any similarly-situated offeror or affiliate meeting the conditions outlined in the letter.

¹¹⁸ See, e.g., Alcan; Asia Satellite Telecommunications Holdings Limited (May 25, 2007); BCP Crystal Acquisition GmbH & Co (February 3, 2004)(“BCP”) and Mittal (providing relief for purchases outside of a U.S. offer for a tender offer that included more than one offer conducted outside of the United States).

¹¹⁹ See proposed Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

b. U.S. offer may include non-U.S. persons and foreign offer(s) may include U.S. persons

The existing Tier II dual offer exemption provides that the U.S. offer can be open only to security holders resident in the United States.¹²⁰ This limitation creates a problem because bidders frequently seek to include all holders of ADRs, not only U.S. holders, in the U.S. offer. In many instances, the target's home country regulations do not apply, by their terms, to ADRs.¹²¹ Similarly, the existing Tier II dual offer provision mandates that the foreign offer be available only to non-U.S. holders.¹²² The prohibition against permitting U.S. holders from participating in the foreign offer may conflict with the law of the target's home country if those rules do not permit the exclusion of any security holders, including those in the United States.¹²³

Companies frequently are forced to seek individual relief from the staff to address these issues.¹²⁴ The staff often has granted relief to permit a U.S. offer in a dual offer structure to include all holders of ADRs, including foreign holders.¹²⁵ We propose to change our rules so that acquirors will no longer need to seek individual relief to structure

¹²⁰ Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

¹²¹ See, e.g., Portugal Telecom, SGPS, S.A. (December 19, 2006) ("Portugal Telecom") (noting that the provisions of the Portuguese Securities Code and the rules and regulations of the Portuguese Comissão de Mercado de Valores Mobiliários did not apply to the offer for ADSs of the target company listed on the New York Stock Exchange).

¹²² Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

¹²³ See, e.g., Gas Natural SDG, S.A. (March 6, 2006) (involving Spanish law).

¹²⁴ See Harmony Gold Mining Company Limited (November 19, 2004) ("Harmony Gold 2004"); Discount Investment Corporation Ltd. (June 14, 2004); Alcan; Serono S.A.; and Southern Cross (March 5, 2002).

¹²⁵ See e.g., Royal Bank of Scotland Group plc (July 23, 2007) ("Royal Bank"); E.ON Aktiengesellschaft (December 6, 2006) ("E.ON"); Koninklijke Ahold N.V. (September 10, 2002).

their offers in this manner. We are not aware of a transaction for which acquirors have sought to extend the U.S. offer to foreign target holders who do not hold in ADR form. Therefore, we are not proposing to allow these holders to participate in U.S. offers.

We also propose to change our rules to allow U.S. holders to participate in non-U.S. offers where required under foreign law and where U.S. holders are provided with adequate disclosure about the implications of participating in the foreign offer. When relief has been granted to permit the inclusion of U.S. persons in a non-U.S. offer, it has been conditioned on appropriate disclosure in the offer materials concerning the risks for U.S. holders of participating in the foreign offer.¹²⁶ Relief also has been conditioned on the existence of an express legal requirement in the foreign target company's home jurisdiction to include U.S. target holders.¹²⁷

Today we propose to change our rules to address these issues by revising the equal treatment provisions in Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) to allow a U.S. offer to be made to U.S. target holders and all holders of American Depositary Receipts representing interests in the subject securities. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the subject securities. We note that the proposed changes are not intended to enable an offer to be made only to holders of ADRs or only to holders of the underlying securities, where the target shares are registered under Section 12 or where Rule 13e-4 otherwise applies. We

¹²⁶ See, e.g., Endesa, S.A. (July 3, 2007)(“Endesa”).

¹²⁷ Id.

view ADRs and the underlying securities as a single class for purposes of our tender offer and beneficial ownership reporting rules.¹²⁸

In addition, revised Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) would provide that one or more foreign offers may be conducted in conjunction with a U.S. offer for the same subject securities. U.S. persons may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. persons from the foreign offer(s) and where the offer materials distributed to U.S. persons fully and adequately disclose the risks of participating in the foreign offer(s).

c. Proration and the use of the dual or multiple offer structure

When a bidder makes a partial tender offer¹²⁹ subject to Section 13(e) or 14(d) of the Exchange Act, our rules require tendered securities to be purchased on a pro rata basis if the offer is oversubscribed.¹³⁰ This is to assure equal treatment of security holders who have tendered their securities.

We are not proposing a change to this requirement. We are clarifying that bidders relying on the dual offer provision in the Tier II exemptions to conduct separate U.S. and non-U.S. offers for less than all of a class of target securities must use a single proration

¹²⁸ See American Depositary Receipts, Release No. 33-6894 (May 23, 1991) [56 FR 24420], Section II.D.2 (explaining that, for purposes of determining beneficial ownership reporting requirements under Section 13 of the Exchange Act, ADRs and the underlying securities are to be considered a single class). The staff takes the same view that they are one class for purposes of the tender offer rules.

¹²⁹ A “partial tender offer” is a tender offer where the bidder is offering to purchase less than all of the outstanding securities of that the subject class.

¹³⁰ See Section 14(d)(6) of the Exchange Act [15 U.S.C. 78n(d)(6)], and Rules 13e-4(f)(3) and 14d-8 [17 CFR 240.14d-8].

“pool,” in accordance with the existing requirements of our rules.¹³¹ This is not a change in how the staff has interpreted existing proration rules; however, it has come to our attention that in the past, certain bidders may have separately pro rated tenders made into the U.S. and foreign offers.¹³² In this release, we clarify that where a bidder makes a partial tender offer for less than all outstanding target securities of a given class, and relies on the provision in Tier II allowing the use of a dual or multiple (as proposed) offer structure, the securities tendered into the U.S. and non-U.S. offers must be pro rated on an aggregate basis in order to comply with proration rules. Otherwise, if different proration factors were used, U.S. security holders could be disadvantaged as compared to target holders tendering into a foreign offer.

Request for Comment

- Should we permit the use of multiple offers outside of the United States for Tier-II eligible tender offers?
- Should we allow all non-U.S. holders to be included in a U.S. offer, or only non-U.S. holders of ADRs, as proposed?
- Should we allow U.S. holders to be included in the foreign offer(s) open to target security holders outside of the United States?
 - Should we permit this, as proposed, only when applicable foreign law does not allow exclusion of U.S. holders from the foreign offer, even where a concurrent U.S. offer is available to them?
 - Is the requirement that the implications of participating in the foreign

¹³¹ Id.

¹³² See AES Corporation (October 22, 2001)(advising against this practice in the context of a partial cross-border tender offer).

offer(s) be disclosed in the U.S. offering materials adequate to protect U.S. investors?

- Should we impose additional conditions on the ability of offerors to include U.S. target holders in the foreign offer(s)?
- Are there situations where bidders in cross-border tender offers should be permitted to separately pro rate securities tendered into U.S. and foreign offers?

3. Termination of withdrawal rights while tendered securities are counted

We are proposing rule revisions to eliminate issues relating to the “back-end” withdrawal rights required under Section 14(d)(5) of the Exchange Act and Rule 13e-4(f)(2)(ii) for tender offers conducted under the Tier II cross-border exemptions. Under today’s proposed changes, new provisions would be added to the Tier II exemptions permitting the suspension of back-end withdrawal rights during the time after the initial offering period, when tendered securities are being counted and before they are accepted for payment.¹³³ Both of the back-end withdrawal rights provisions require bidders to provide withdrawal rights after a set date, measured from

¹³³ See proposed Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(viii).

the commencement of a tender offer.¹³⁴ Thus, even where a tender offer has technically closed and tenders are no longer being accepted, back-end withdrawal rights may exist until the offeror accepts tendered shares for payment.¹³⁵

Section 14(d)(5) of the Exchange Act grants us the authority to modify the back-end withdrawal rights afforded under that provision.¹³⁶ We exercised this authority in adopting Rule 14d-11, which permits the use of a “subsequent offering period” during which securities may be tendered but not withdrawn.¹³⁷ Practical considerations influenced our willingness to modify the withdrawal rights provisions of Section 14(d)(5) for subsequent offering periods. Permitting withdrawal rights during a subsequent offering period, when tendered shares are required to be purchased on a “rolling” or as tendered basis,¹³⁸ would interfere with the payment process.

¹³⁴ Section 14(d)(5) of the Exchange Act [15 U.S.C 78n(d)(5)] states that “[s]ecurities deposited pursuant to a tender offer ... may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer ... are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer ..., except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.” Exchange Act Rule 13e-4(f)(2)(ii) includes a similar mandate for issuer tender offers: “The issuer or affiliate making the issuer tender offer shall permit securities tendered pursuant to the issuer tender offer to be withdrawn... if not yet accepted for payment, after the expiration of forty business days from the commencement of the issuer tender offer.” Where the tender offer is subject to Rule 13e-4 and Regulation 14D, bidders also must provide withdrawal rights during the “initial offering period.” We do not propose to modify this requirement.

¹³⁵ Whether back-end withdrawal rights arise also will depend on the length of the tender offer period; if the initial offering period and the payment process are completed before such rights arise, back-end withdrawal rights will not be triggered.

¹³⁶ See footnote 134 above.

¹³⁷ Exchange Act Rule 14d-7(a)(2) [17 CFR 240.14d-7(a)(2)].

¹³⁸ Exchange Act Rule 14d-11(c) [17 CFR 240.14d-11(c)].

The Tier II cross-border exemptions provide that a bidder need not extend withdrawal rights from the close of the initial offering period and before the commencement of the subsequent offering period, where the bidder announces the results of the initial offering period and pays for tendered securities in accordance with home country law or practice, so long as the subsequent offering period begins immediately thereafter.¹³⁹ Due to similar practical considerations, we propose to extend this suspension of the back-end withdrawal rights provisions for all tender offers conducted under Tier II during the counting of tendered securities. This would allow withdrawal rights to be terminated at the end of an offer and during the counting process for bidders that do not provide a subsequent offering period.¹⁴⁰

Differences in the tender, acceptance and payment procedures between U.S. and foreign offers necessitate this relief. In a U.S. offer, tendering security holders generally tender their shares to a single exchange agent employed by the bidder.¹⁴¹ Thus, bidders generally are in a position to know at any point in the offering period the number of securities tendered. Because bidders know how many target securities have been tendered into the offer at the expiration, acceptance of tendered securities in a U.S. offer

¹³⁹ Exchange Act Rule 14d-1(d)(2)(v).

¹⁴⁰ For example, the subsequent offering period structure is available for third-party offerors subject to Regulation 14D, but not for issuer tender offers subject to Exchange Act Rule 13e-4. Applicable foreign law may also impact a third-party offeror's ability to provide a subsequent offering period.

¹⁴¹ Tenders may be made through nominees, such as broker-dealers, who hold the target securities in "street name," or directly by the ultimate beneficial holder of the target securities.

can occur almost immediately after the expiration of an offer.¹⁴² Therefore, bidders in domestic offers are able to terminate the back-end withdrawal rights almost immediately after expiration by accepting securities tendered (assuming all offer conditions have been satisfied or waived). Bidders can begin the payment process promptly after expiration of the offer, consistent with their obligations under U.S. law to pay promptly.¹⁴³

The mechanics of the tender process in non-U.S. tender offers are generally very different. Tenders often are made through many different financial institutions instead of through a single tender agent, as in the United States.¹⁴⁴ The process of centralizing and counting tendered securities therefore may take an extended period of time.¹⁴⁵ In some countries, entities other than the bidder or its agents undertake the counting process and the announcement of the result of the tender offer.¹⁴⁶

Because of these differences in procedure, the bidder in a cross-border tender offer may not know whether the minimum tender condition has been satisfied immediately after the end of the initial offering period. The bidder cannot accept

¹⁴² See Exchange Act Rule 14e-1 [17 CFR 240.14e-1] (stating that a bidder must promptly pay for or return tendered securities after the expiration or withdrawal of a tender offer). According to Rule 14e-1(d), in a U.S. offer, the bidder has only until 9:00 a.m. Eastern time on the next business day after the expiration of the tender offer to announce the extension of the offer.

¹⁴³ “Prompt payment” in U.S. offers is generally understood to mean payment within three days of expiration. See Guidance on Mini-Tender Offers and Limited Partnership Tender Offers, Release No. 34-43069 (July 24, 2000) [65 FR 46581].

¹⁴⁴ See, e.g., Technip, S.A. (August 30, 2001)(describing the tender process through banks, and other financial institutions and intermediaries) and Vodafone AirTouch Plc (December 22, 1999)(noting that under German law, tenders of target securities could be made through any branch of over 300 depositary banks through which such securities were held).

¹⁴⁵ See, e.g., Business Object S.A. (December 5, 2007).

¹⁴⁶ Id. (The letter states that once the French Offer has expired, securities tendered in the French Offer are “centralized” at Euronext, which then counts the total number of securities tendered. The Autorite des Marches Financiers (the French regulator) then announces the results of the offer).

tendered securities until all offer conditions, including the minimum tender condition, have been satisfied or waived and the counting process is completed.¹⁴⁷ We already have recognized that the mechanics of the tendering and counting regimes in other countries justifies different treatment under our rules,¹⁴⁸ and for the same reasons, we believe it is appropriate to provide an exemption in this area.

Bidders previously have sought relief from the back-end withdrawal rights provisions for Tier II cross-border tender offers, during the period in which tendered securities are being counted and until the announcement of the results of the offer, where no subsequent offering period is provided.¹⁴⁹ The relief requested generally is premised on the following factors:

- The initial offering period of at least 20 business days has expired, and withdrawal rights were provided during that period;

¹⁴⁷ While a bidder technically could accept tendered securities immediately after the expiration of a cross-border tender offer by waiving the minimum tender condition, we believe this would be a significant hardship for bidders and would negatively impact bidders' ability to conduct cross-border tender offers.

¹⁴⁸ See Exchange Act Rules 13e-4(i)(2)(iv) and 14d-1(d)(iv). As a result of the differences in process between the U.S. and various foreign jurisdictions, Tier II currently includes prompt payment relief to allow a bidder meeting the conditions of that exemption to pay for tendered securities in accordance with home country law or practice.

¹⁴⁹ See, e.g., Barclays PLC tender offer for ABN AMRO Holding N.V. (August 7, 2007) ("Barclays") (period of no longer than five Dutch trading days); Endesa, S.A. (when the tendered shares are being counted and until payment occurs, in accordance with Spanish law and practice); Portugal Telecom (three Portuguese business days after the special session of Euronext Lisbon); E.ON (when the tendered shares are being counted and until payment occurs, in accordance with Spanish law and practice); and Bayer AG (April 28, 2006).

- All offer conditions, other than the minimum tender condition, are satisfied or waived as of the expiration of the initial offering period;¹⁵⁰ and
- Back-end withdrawal rights are suspended only during the period necessary to centralize and count the tendered securities, and are reinstated immediately at the end of that process, to the extent they are not terminated by acceptance of tendered securities immediately afterwards.¹⁵¹

As proposed, both third-party bidders for securities of a foreign private issuer and foreign private issuers repurchasing their own securities would be permitted to suspend back-end withdrawal rights while tendered securities are being counted, even where no subsequent offering period is provided. The revised rules would be conditioned on the following factors:

- The Tier II exemption must be available;
- The offer must include an offering period, including withdrawal rights, of at least 20 U.S. business days;

¹⁵⁰ If a bidder counts the number of securities tendered as of the expiration date in determining whether the minimum acceptance condition has been satisfied, we view this condition as having been satisfied as of expiration. This is the case even though the counting process may, as a logistical matter, take some period of time after expiration to be completed.

¹⁵¹ See the letters listed in footnote 149 above. Note that the only conditions that may survive the expiration of the initial offering period are regulatory approvals necessary to consummate the tender offer. We believe that the existence of the back-end withdrawal rights provided in Exchange Act Rule 13e-4(f)(2)(ii) and Section 14(d)(5) of the Exchange Act provide a critical safeguard where a regulatory condition survives the expiration of the initial offering period. These provisions allow tendering security holders to withdraw their tendered securities after a certain period of time. Certain regulatory approval processes, such as anti-trust approvals, may be lengthy and back-end withdrawal rights may provide an important safeguard in such cases. See generally, ProSiebenSat.1 Media AG (January 30, 2007)(in granting no-action relief from the prompt payment requirements of Exchange Act Rule 14e-1(c) where a regulatory condition was expected to survive the expiration of a tender offer, the staff explicitly noted that tendering target holders would have withdrawal rights through the date of receipt of such regulatory approvals). The staff will continue to consider limited relief under those circumstances only where a compelling reason exists.

- At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is still counting tendered securities to determine if the minimum acceptance condition has been satisfied; and
- Withdrawal rights are suspended only during the necessary centralization and counting process period and are reinstated immediately thereafter, except to the extent that they are terminated by the acceptance of tendered securities.

Request for Comment

- Is it appropriate and in the best interests of U.S. investors to permit the suspension of back-end withdrawal rights, as proposed?
- Do the proposed conditions address bidders' practical concerns while still protecting tendering security holders?
- Should we permit back-end withdrawal rights to be suspended only during the counting process? Or should this relief be provided through the announcement of the results of the tender offer?

4. Expanded relief for subsequent offering periods

Since the adoption of the cross-border exemptions, foreign requirements and practices relating to tender offers have frequently led to conflicts with the Commission's rule on subsequent offering periods.¹⁵² Today we propose to address some of the more common areas of conflict. The most frequent area of conflict relates to the maximum

¹⁵² Exchange Act Rule 14d-11. At the same time we adopted the existing cross-border exemptions, we also changed our rules for domestic tender offers to permit the use of subsequent offering periods. See Regulation of Takeovers and Security Holder Communications, Release No. 33-7760 (October 22, 1999) [64 FR 61408] ("Regulation M-A Adopting Release"). We made this change in part because of years of experience with the subsequent offering period in cross-border tender offers.

limit on the length of the subsequent offering period of 20 U.S. business days imposed by our rules.¹⁵³ In some instances, foreign law mandates a subsequent offering period of longer than 20 U.S. business days.¹⁵⁴ In other non-U.S. jurisdictions, market practice dictates a subsequent offering period of longer than 20 business days.¹⁵⁵ In these jurisdictions bidders must seek relief to extend the permissible time period of their subsequent offering periods to reconcile U.S. rules with foreign law or customary practice.¹⁵⁶

We believe establishing a maximum time period for subsequent offering periods in cross-border tender offers is no longer necessary, in part because it creates unnecessary conflict between U.S. and foreign law or practice. Therefore, we propose to eliminate this time limit for cross-border tender offers eligible to rely on the Tier II exemptions by

¹⁵³ Our rules permit (but do not require) a bidder in a third-party tender offer to provide a subsequent offering period of between three and 20 U.S. business days, under certain conditions. The conditions outlined in Exchange Act Rule 14d-11 are: (a) the initial offering period of at least 20 business days has expired; (b) the offer is for all outstanding securities of the class, and if the bidder offers security holders a choice of different forms of consideration, there is not a 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 by 9:00 a.m. Eastern standard time on the morning after expiration 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 in the subsequent offering period; and (f) the bidder offers the same form and amount of consideration in both the initial and subsequent offering periods.

¹⁵⁴ See, e.g., Embratel Participacoes S.A. (December 6, 2006)(“Embratel”); and Barrick Gold Corp. (January 19, 2006).

¹⁵⁵ See RWE Aktiengesellschaft (March 22, 2002)(“RWE”)(noting that subsequent offering periods lasting significantly longer than 20 business days are the custom in Great Britain and are permitted under The City Code on Takeovers); Serono S.A. (noting that French law does not set a maximum for the number of days in a subsequent offering and requesting relief for a 30 trading day subsequent offering period, with immediate acceptance of tendered shares on an “as tendered” basis); Rio Tinto plc (July 24, 2007)(“Rio Tinto”)(noting that Canadian law sets no maximum period for subsequent offering periods); STATs ChipPAC Ltd. (March 15, 2007)(relief for a subsequent offering period of up to four months from the commencement date); and Harmony Gold 2004 (requesting relief for a subsequent offering of longer than 20 U.S. business days, as permitted under South African law and as is customary market practice in that jurisdiction).

¹⁵⁶ Id.

adding a new provision specifically allowing Tier II cross-border tender offers to include subsequent offering periods longer than 20 U.S. business days. Allowing subsequent offering periods in cross-border tender offers to extend beyond the current 20-day maximum period is consistent with one of the primary reasons we revised our rules to permit subsequent offering periods generally: to enable bidders to reach the necessary thresholds for acquiring the remaining target securities not tendered in an initial offering period and to pay tendering security holders before they would receive payment in a second-step “squeeze out” process.¹⁵⁷ In some foreign jurisdictions, the ability of a bidder to acquire securities of the target that remain outstanding after a tender offer is more limited than in the United States.¹⁵⁸ We believe the ability to extend the subsequent offering period for longer than 20 U.S. business days will provide an opportunity for remaining target security holders to tender into a successfully-consummated offer, after which the market for their securities may be very limited.¹⁵⁹ The subsequent offering period allows target security holders to be paid before a compulsory acquisition can be

¹⁵⁷ See Regulation M-A Adopting Release, Section II.G.1. (“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.”).

¹⁵⁸ Where an acquiror obtains more than 50 percent of the target securities of a domestic company, it generally can acquire the remaining target shares through a back-end merger. In some foreign jurisdictions, the bidder’s ability to “squeeze out” remaining target shareholders is more limited. See, e.g., In the Matter of Texas Utilities Company (March 27, 1998)(“Texas Utilities”)(noting that under U.K. law, the compulsory acquisition process is available only when the bidder owns at least 90 percent of the subject securities and this process is the only means to acquire 100 percent of the subject class).

¹⁵⁹ See Regulation M-A Adopting Release, Section II.G.1. and footnote 157 above.

completed, in a circumstance where an offer has become unconditional and will certainly be consummated.¹⁶⁰

Request for Comment

- Are there any other conflicts between U.S. and foreign laws or practice arising out of the subsequent offering period structure that should be addressed through additional rule revisions?
- Is it appropriate, as proposed, to eliminate the 20 U.S. business day limit on the length of the subsequent offering period for Tier II cross-border tender offers?
- Should we eliminate the 20 U.S. business day limit on the length of the subsequent offering period for all tender offers generally, including those for domestic issuers?
 - Do bidders for U.S. companies face any practical difficulties because of the 20 U.S. business day limit?
- Is the limit on the length of the subsequent offering period necessary for investor protection, either in the U.S. or in cross-border offers? Should we retain a limit but increase it, for example, to 30 or 60 U.S. business days?

a. Proposed revisions to prompt payment rule

Another area of conflict in subsequent offering period practice that we address today relates to the requirement under U.S. rules that bidders must immediately accept and promptly pay for all securities “as they are tendered during the subsequent offering

¹⁶⁰ See footnote 157 above.

period.”¹⁶¹ The requirement to purchase securities tendered during the subsequent offering period on a rolling basis exists because, in the absence of withdrawal rights, which need not be provided during a subsequent offering period,¹⁶² tendering security holders should receive the offer consideration as quickly as possible. Bidders in cross-border tender offers often are required to, or for practical reasons need to, follow local practices when paying for securities tendered in a subsequent offering period.¹⁶³ We have been advised, however, that the requirement that securities be paid for on an as tendered basis in the same manner as in the United States may conflict with market practice in certain non-U.S. jurisdictions, and is in many instances practicably unworkable there.¹⁶⁴

Today we propose to allow, under certain circumstances, securities tendered during the subsequent offering period for a Tier II cross-border tender offer to be purchased on a modified rolling basis. We do this by including language in proposed new Rule 14d-1(d)(2)(iv) that defines “prompt payment” for purposes of the requirement under Rule 14d-11(e) to purchase on an as tendered basis. Instead of requiring daily aggregation of securities tendered during the subsequent offering period, the proposed

¹⁶¹ Exchange Act Rule 14d-11(e).

¹⁶² See Note to Exchange Act Rule 14d-11.

¹⁶³ See Barclays (relief granted to permit payment for securities tendered in the subsequent offering period within five Dutch trading days after the end of that period); Rio Tinto plc (shares tendered during a subsequent offering period may be taken up and paid for within ten calendar days of the date of tender, in accordance with Canadian law); Aventis (June 10, 2004)(relief granted to permit payment for securities tendered into a French offer to be made within 12-18 French trading days after the expiration of that period).

¹⁶⁴ See Barrick Gold Corporation (October 10, 2006)(discussing multiple “take-up” dates required under Canadian rules). See also Singapore Technologies Semiconductors Pte Ltd. (March 15, 2007) and BCP.

rule would permit such securities to be “bundled” and paid for within 14 business days from the date of tender. We chose 14 business days as the time period because, in our experience, that amount of time is sufficient to cover the subsequent offering periods used in most foreign jurisdictions.¹⁶⁵ Depending on the length of the subsequent offering period and the payment practice in the applicable foreign jurisdiction, this may allow payment for securities tendered during the subsequent offering period to be made at the end of that period. We understand that this is market practice in some foreign jurisdictions.¹⁶⁶

Another practical difficulty involving subsequent offering periods arises because, in certain foreign jurisdictions, bidders are legally required to pay interest on securities tendered during the subsequent offering period. Generally, the rate of interest is set by law and is calculated from the date on which securities are tendered.¹⁶⁷ Sometimes

¹⁶⁵ In this context, we propose to define “business day” without reference to a business day in the United States. A business day as used in proposed Rule 14d-1(d)(2)(iv) is determined with reference to the relevant foreign jurisdiction. By not defining business day in accordance with the U.S. calendar, we hope to make this rule modification more useful because U.S. and non-U.S. holidays will vary.

¹⁶⁶ See Barclays (Dutch practice requires payment for securities tendered during a subsequent offering period to be made within five Dutch trading days after the end of that period); Alcan (noting that French practice is to pay for securities tendered in the subsequent offering period at the end of that period); and Smith & Nephew Group plc (April 4, 2003)(payment within ten Swiss trading days after the end of the subsequent offering period is required under Swiss law).

¹⁶⁷ For example, in Brazil, bidders must pay interest at a statutory rate on securities “put” to the bidder after the termination of a successful voluntary offer. We consider such a put right to be a tender offer or to constitute the subsequent offering period in a voluntary offer. See the description of this feature of Brazilian law in Embratel and Telemar Participacoes S.A. (October 9, 2007)(“Telemar”). See also, Bayer AG (September 26, 2006)(“Bayer 2006”)(describing a similar requirement under German law).

interest is calculated as of a set reference point not directly tied to the tender offer timetable.¹⁶⁸

Under either scenario, paying interest on securities tendered during a subsequent offering period conflicts with U.S. tender offer rules in several respects. U.S. rules specify that for offers subject to Regulation 14D, a bidder must pay the same form and amount of consideration for securities tendered during the subsequent offering period as it pays for those tendered into the initial offering period.¹⁶⁹ For those types of offers, it is also impermissible to pay different amounts of consideration for securities tendered within either the initial or the subsequent offering periods.¹⁷⁰ Companies have addressed this conflict by seeking exemptive relief.¹⁷¹

We propose to revise our rules to permit the payment of interest for securities tendered during a subsequent offering period in a Tier II cross-border tender offer where required under foreign law.¹⁷² The proposed new provision explicitly notes that paying interest on securities tendered during the subsequent offering period would not be deemed to violate the equal treatment principles in Rule 14d-10(a)(2).¹⁷³ As discussed

¹⁶⁸ Under German law, for example, we have been advised that if a bidder acquires a sufficient percentage of a target's shares in a voluntary tender offer, it may enter into a "domination agreement" with the target. The bidder is then required to pay interest at a rate set by German law on all securities tendered during the subsequent offering period, from the date that such domination agreement becomes effective. See Blackstone Entities (December 16, 2004) ("Blackstone").

¹⁶⁹ Exchange Act Rule 14d-11(f).

¹⁷⁰ Exchange Act Rule 14d-10(a)(2).

¹⁷¹ See e.g., Telemar; Embratel; and Blackstone.

¹⁷² See proposed Exchange Act Rule 14d-1(d)(2)(vii).

¹⁷³ See proposed Exchange Act Rule 14d-1(d)(2).

above, under the equal treatment and all-holders provisions of the tender offer rules,¹⁷⁴ a bidder could not pay interest only on securities tendered into a foreign offer.

Request for Comment

- Is it appropriate to permit payment for securities tendered during the subsequent offering period in cross-border tender offers to be made up to 14 business days after the date of tender?
 - Is 14 business days a sufficient period to make this relief useful for cross-border tender offers that include a subsequent offering period? Would a shorter (five, seven or 10 business days) or longer period (15, 20 or 30 business days) of time better serve the interests of bidders or tendering security holders?
 - Should we permit payment for securities tendered during the subsequent offering period to be made within a certain number of days after the end of that period, such as within five, 10 or 14 business days, even if we eliminate the time limit on the length of the subsequent offering period? Or would this disadvantage tendering security holders?
- Should we revise our rules to permit the payment of interest on target securities tendered during the subsequent offering period, as proposed?
- Should we expand the proposed relief to encompass interest paid on securities tendered during the initial offering period?

¹⁷⁴ Exchange Act Rule 14d-10.

- Should we provide this relief only where interest is required to be paid under foreign law, as proposed?
- Should the proposed amendment only permit de minimis interest payments?
If so, what limits are appropriate?

b. Prompt payment and “mix and match” offers

The final issue we address with respect to subsequent offering periods involves “mix and match” offers. The requirement to pay for shares on an as tendered basis during the subsequent offering period is particularly problematic in cross-border tender offers that include a mix and match election feature. In this offer structure, target security holders are offered a set mix of cash and securities of the bidder – often referred to as the “standard entitlement” – with the option to elect a different proportion of cash and securities, to the extent that other tendering security holders make opposite elections.¹⁷⁵ The bidder typically sets a maximum amount of cash or securities that it will issue in the offer; to the extent that more tendering target security holders elect cash or bidder securities, their elections are prorated to the extent they cannot be satisfied through “offsetting elections” made by other target security holders.¹⁷⁶

Mix and match offers often conflict with U.S. requirements applicable to the subsequent offering period. First, those rules provide that a bidder may offer a choice of different forms of consideration in the subsequent offering period, but only if there is no

¹⁷⁵ See Barclays and SERENA Software Inc. (April 13, 2004)(setting a cap on the number of bidder shares and cash that would be issued in a mix and match election, with elections for more cash or shares being offset against one another).

¹⁷⁶ Id.

ceiling on any form of consideration offered.¹⁷⁷ In addition, the rules require a bidder to offer the same form and amount of consideration to tendering security holders in both the initial and subsequent offering periods.¹⁷⁸ Both requirements present difficulties in the context of mix and match offers. In these kinds of offers, bidders want to impose a maximum limit on either (or both) the number of securities or the amount of cash they will be obligated to deliver if the offer is successful.¹⁷⁹ In addition, the offset feature characteristic of mix and match offers is inconsistent with the prohibition on offering different forms and amounts of consideration in the initial and subsequent offering periods.

Because of the prompt payment and other requirements of U.S. rules and the requirements of foreign law or practice in cross-border offers, bidders in mix and match offers often request relief to use two different proration and offset pools in their offers: one for securities tendered during the initial offering period and another for those tendered in the subsequent offering period.¹⁸⁰ That is, bidders match elections made during the initial offering period against each other to determine offsets and proration and begin the payment process for those securities as promptly as practicable after the end of the initial offering period.¹⁸¹ Similarly, securities tendered during the subsequent

¹⁷⁷ Exchange Act Rule 14d-11(b).

¹⁷⁸ Exchange Act Rule 14d-11(f).

¹⁷⁹ See letters cited in footnote 175 above.

¹⁸⁰ Id.

¹⁸¹ This is necessitated by foreign rules, which typically require those securities to be accepted and paid for while the subsequent offering period is ongoing. U.S. rules also require that securities tendered in an initial offering period be accepted and promptly paid for at the end of that period. Exchange Act Rule 14d-11(c).

offering period are matched against each other, not against those tendered during the initial offering period, so as not to delay the payment process. As a result, the mix of consideration provided to tendering security holders may be different in the initial and subsequent offering periods.

Today we propose to revise our rules to specifically allow separate offset and proration pools for securities tendered during the initial and the subsequent offering periods.¹⁸² We view these changes as necessary and appropriate to facilitate the prompt payment for securities tendered during these offer periods, and to permit the use of the mix and match offer structure generally. Because of the same practical considerations, we also propose to eliminate the prohibition on a “ceiling” for the form of consideration offered in the subsequent offering period, where target security holders are given the ability to elect between two or more different forms of offer consideration. These changes would be accomplished by adding a provision in Rule 14d-1(d)(2) that specifies that such practices are permissible for Tier II cross-border offers.¹⁸³

Request for Comment

- Would these proposed rule changes address the practical needs of cross-border offerors? Would there be any disadvantages for target security holders?
- Should we extend these changes to all tender offers, including tender offers for U.S. issuers? Would bidders for U.S. issuers use the ability to make mix and match offers? Would such a structure be workable in the U.S. and in the best interests of U.S. investors?

¹⁸² See proposed Exchange Act Rule 14d-1(d)(2)(ix).

¹⁸³ See id.

5. Additional guidance with respect to terminating withdrawal rights after reduction or waiver of a minimum acceptance condition

U.S. tender offer rules generally provide that a bidder must allow an offer to remain open for a certain period of time after a material change in its terms is communicated to target security holders.¹⁸⁴ The minimum time periods established allow target security holders time to learn of and react to information about material changes. Some target holders may want to tender in response to the new information, while others who already have tendered may seek to withdraw their securities. For this reason, U.S. rules mandate that, for tender offers subject to Section 13(e) or 14(d) of the Exchange Act, in addition to keeping the offer open for a set period of time after providing notice of a material change, the bidder must provide withdrawal rights during such period.¹⁸⁵

In the years leading up to the adoption of the existing cross-border exemptions in 1999, we found that in practice, this U.S. withdrawal rights requirement created a conflict with foreign practice in cross-border tender offers. We discussed in the 1998 Cross-Border Proposing Release how the U.S. requirement to provide withdrawal rights for a

¹⁸⁴ Exchange Act Rule 14d-4(d)(2)(i)-(iv) sets forth the minimum time periods for which an offer must remain open after certain specified types of changes in the terms of that offer are communicated to target security holders. The Rule states that an offer must remain open for: (1) ten business days after dissemination of a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee or other similarly significant change; (2) ten business days for a prospectus supplement included as part of a post-effective amendment; (3) twenty business days for a prospectus supplement when the initial prospectus was materially deficient; and (4) five business days for a material change other than price or share levels. Exchange Act Rule 14d-4(d)(2) by its terms applies only to third-party tender offers for Exchange Act registered securities. However, we have stated that we view the time periods established in that rule as general guidelines applicable to all tender offers, including those subject only to Regulation 14E. See the discussion in the Regulation M-A Adopting Release, Section II.E.2. In addition, Rule 14e-1(b), applicable to all tender offers, specifies that a tender offer must be kept open for a minimum of ten business days after an increase or decrease in the amount of securities sought or the consideration offered or a change in the dealer's soliciting fee.

¹⁸⁵ Id.

set period after the waiver or reduction in a minimum acceptance condition created a conflict with U.K. practice, the jurisdiction with which we had the most experience at that time.¹⁸⁶ We noted that the staff had granted relief to bidders to address this conflict in individual cases.¹⁸⁷

In adopting the cross-border exemptions, we affirmed the staff's interpretive position that a bidder meeting the conditions of the Tier II exemptions may waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining in the tender offer after the waiver or reduction.¹⁸⁸ We conditioned a bidder's ability to rely on this guidance on the following:

- The bidder must announce that it may reduce or waive the minimum condition at least five business days before it reduces or waives it;¹⁸⁹
- The bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, which may include placing an advertisement in a newspaper of national circulation in the United States;¹⁹⁰

¹⁸⁶ See 1998 Cross-Border Proposing Release, Section II.C.2.f.

¹⁸⁷ See *id.* citing e.g., In the Matter of Pacificorp and The Energy Group, Exchange Act Release No. 38776 (June 25, 1997).

¹⁸⁸ Cross-Border Adopting Release, Section II.B.

¹⁸⁹ A statement at the commencement of the offer that the bidder may reduce or waive the minimum acceptance condition is insufficient to satisfy this element. See Cross-Border Adopting Release, Section II.B.

¹⁹⁰ Some bidders have asked for the elimination of the requirement that the notice of a potential waiver or reduction in the minimum acceptance condition be placed in a newspaper of national circulation in the United States. We continue to believe that this requirement serves an important function in notifying target security holders about a possible change in the terms of the offer, and therefore we are retaining it.

- The press release must state the exact percentage to which the condition may be reduced. The bidder must announce its actual intentions once it is required to do so under the target's home country rules;
- During the five-day period after the announcement of a possible waiver or reduction, security holders who have tendered into the offer must be afforded the right to withdraw tendered securities;
- The announcement must advise security holders to withdraw their tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition;
- The procedure for reducing or waiving the minimum acceptance condition must be described in the offering document; and
- The bidder must hold the offer open for acceptances for at least five business days after the reduction or waiver of the minimum acceptance condition.

When the bidder terminates withdrawal rights pursuant to this interpretive position, all offer conditions must be satisfied or waived so that the offer is wholly unconditional when withdrawal rights terminate.¹⁹¹ A bidder may not terminate

¹⁹¹ We note that this is consistent with the interpretive position previously expressed by the staff. See Section II.A. Question 1 in the Third Supplement to the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

withdrawal rights where an extension is otherwise required under our rules because of another material change in the terms of the offer.¹⁹²

While we continue to recognize that bidders in cross-border tender offers may need the flexibility afforded by this interpretive position, we are aware of certain issues arising from its application. When we adopted the interpretive position regarding waiver or reduction of a minimum acceptance condition, we did so primarily on the basis of the staff's experience with U.K. law and practice.¹⁹³ The regulatory accommodation was necessitated by U.K. practice and the particular circumstances common to the U.K. markets. The vast majority of the transactions for which the staff had granted this relief before we adopted the interpretive position involved cash tender offers.¹⁹⁴

In the years since the Commission adopted the interpretive position, we have become aware of the unintended consequences of this position in the context of certain kinds of offers, including exchange offers and competed offers. We believe it is necessary to provide additional guidance on the circumstances under which bidders may rely upon this interpretive position in cross-border tender offers to waive or reduce a minimum acceptance condition without providing withdrawal rights after such waiver. For these reasons, today we are limiting the interpretive position adopted in the Cross-Border Adopting Release.

¹⁹² See, e.g., STATS ChipPAC Ltd. (March 15, 2007) (“STATS ChipPAC”) (noting that a bidder may not terminate withdrawal rights or close an offer during any extension mandated under Regulations 14D or 14E). In addition to the extension requirements in Rule 14e-1(b), we note that the Commission has expressed the view that the minimum time periods set forth in Rule 14d-4(d)(2) represent “general guidelines that should be applied uniformly to all tender offers, including those subject only to Regulation 14E.” See Regulation M-A Adopting Release, Section II.E.2.

¹⁹³ See Cross-Border Adopting Release, Section II.B.

¹⁹⁴ See, e.g., Texas Utilities.

The interpretation originally was premised on bidders' need to reduce the minimum acceptance condition in order to declare the offer wholly unconditional, thereby permitting the participation of certain institutional holders that were prevented by charter from tendering into conditional offers.¹⁹⁵ The interpretive guidance about the ability to waive or reduce the minimum acceptance condition was and continues to be limited to instances where it is necessary because of specific features of home country law or practice that make it impossible or unnecessarily burdensome to comply with the extension requirements of U.S. law.

We also think it is important to note that, where bidders may seek to waive or reduce a minimum acceptance condition in a Tier II-eligible tender offer without extending withdrawal rights after the waiver or reduction, the initial offering materials or a supplement must fully discuss the implications of the waiver or reduction.¹⁹⁶ We note that this necessary disclosure may be challenging to provide in the context of an exchange offer, but we believe security holders need this disclosure to make an informed investment decision about the potential impact of the bidder accepting a lesser percentage of securities than originally proposed as the minimum acceptance condition.

¹⁹⁵ See, e.g., Willis Corroon Group plc (July 22, 1998) and Thorn plc (June 30, 1998). For example, we were advised that certain U.K. institutional holders are prohibited from tendering into an offer until all offer conditions have been satisfied or waived. For that reason, it is critical that the bidder reduce the minimum tender condition in an effort to induce these institutions to tender, which in turn may allow the bidder to reach the 90 percent ownership level necessary to effect a compulsory acquisition under U.K. law.

¹⁹⁶ This is a general requirement under the tender offer rules. See, e.g., Item 1 of Schedule TO and Item 101 of Regulation M-A (requiring the filer to describe the essential terms and to describe the significance of the transaction for target security holders). See also, footnote 254 below for transactions subject to the registration requirements of Section 5 of the Securities Act.

In addition to the potential need to provide alternate sets of pro forma financial statements under our existing disclosure rules,¹⁹⁷ we believe reducing the minimum acceptance condition significantly below the level at which it is initially set may fundamentally change the nature of the transaction and the relationship between the offeror and the target company going forward. For example, an offeror could go from potentially holding a majority interest in the target to a minority stakeholder with limited ability to influence the management of the target. This change has implications for both the target holders who choose to tender into the offer and receive bidder shares, as well as those who elect not to tender and remain as target security holders. It also has implications with respect to the acquiror's ability to consolidate the financial statements of the target.

Consequently, even for cash tender offers, the staff has conditioned the granting of no-action relief in the cross-border context on bidders adequately disclosing in the initial offer materials the impact of a potential waiver or reduction.¹⁹⁸ For example, where a bidder initially includes an 80 percent minimum acceptance condition in its offer, but seeks the flexibility to reduce this condition to 51 percent and purchase tendered securities immediately without affording withdrawal rights, the staff has noted that the disclosure document must fully and fairly present the potential impact of both outcomes for target shareholders. In addition, the staff also has encouraged bidders to consider the

¹⁹⁷ See Item 5 of Forms S-4 and F-4 and Exchange Act Rule 11-02(b)(8) of Regulation S-X [17 CFR 210.11-02(b)(8)]. Rule 11-02(b)(8) mandates that where a transaction is structured in such a way that significantly different results may occur, additional pro forma presentation must be provided which give effect to the range of possible results.

¹⁹⁸ See, e.g., Royal Bank.

disclosures necessary with regard to the ability to govern or otherwise integrate the target company after any acquisition at a lower level.

The difficulty in providing the necessary disclosure is heightened where there are two or more competing bids, creating an even greater level of uncertainty. In that circumstance, a bidder that waives or reduces its minimum acceptance condition to purchase a minority stake in the target may nevertheless be able to thwart the minimum acceptance condition of a competing bidder, thereby defeating the competing bid. Under these circumstances, target security holders are disadvantaged because they have no opportunity to react to the change in the terms of the offer by withdrawing their securities and accepting the competing bid. As noted above, this may also affect the success of the competing bid.

Today we are refining our prior guidance to clarify that, in addition to the conditions outlined in the Cross-Border Adopting Release and the general disclosure obligations discussed above, the relief from the extension requirements of Rule 14d-4(d)(2) adopted in the Cross-Border Adopting Release may not be relied upon unless the bidder is eligible to rely on the Tier II exemptions and the bidder undertakes not to waive or reduce the minimum acceptance condition below a majority.¹⁹⁹ This will limit the impact on target security holders of allowing this type of change without providing withdrawal rights, while balancing the needs of bidders to meet the requirements of foreign home country law or practice. In addition, this interpretive position is limited to circumstances where there exists a requirement of law or practice in

¹⁹⁹ By a majority, we mean more than 50 percent of the outstanding target securities that are the subject of the tender offer.

the foreign home country justifying a bidder's inability to extend the offer after a waiver or reduction in the minimum offer condition. Furthermore, it does not apply to mandatory extensions for changes related to the offer consideration, the amount of target securities sought in the offer, and a change to the dealer's soliciting fee.²⁰⁰

Bidders seeking to rely on this guidance, as modified, must fully disclose and discuss all of the implications of the potential waiver or reduction, including at the specific levels contemplated, in its offering materials. For example, in some foreign jurisdictions, the ability to operate and fully integrate the target company as a subsidiary of the bidder after a tender offer depends on the bidder's ability to purchase a percentage of target securities higher than a simple majority.²⁰¹ In those jurisdictions, the impact of waiving or reducing the minimum acceptance condition below the levels necessary to operate and fully integrate the target as a subsidiary must be fully explained in the initial offering materials disseminated to target security holders. Where such disclosure is not provided, the bidder may not rely on the interpretive guidance set forth in the Cross-Border Adopting Release, as modified today. In those circumstances, the bidder must disseminate additional disclosure and also must allow adequate time in the offer period, including extension of withdrawal rights, as mandated by our rules.²⁰²

²⁰⁰ See Exchange Act Rules 13e-4(e)(3)(ii), 14d-4(d)(2)(ii) and 14e-1(b).

²⁰¹ We have been advised that Germany is one such foreign jurisdiction. Under German law, 75 percent of a target's security holders must approve a "domination agreement" between the target and the bidder in order for the bidder to effectively exercise control of the target company after a tender offer. Therefore, unless the bidder can obtain at least 75 percent of the target's securities in the tender offer, it cannot be assured of the ability to fully integrate the target company. See, e.g., Bayer 2006 and Blackstone.

²⁰² See footnote 197 above.

Request for Comment

- Should we continue to allow bidders in Tier II-eligible offers to waive or reduce the minimum acceptance condition without providing withdrawal rights?
- Are the conditions set forth in the Cross-Border Adopting Release adequate? Or overly burdensome?
- Is it appropriate to modify such relief, as discussed above?
- Should we condition the ability to waive or reduce the minimum acceptance condition without providing withdrawal rights on the undertaking by the bidder not to waive below a majority, as proposed? What should constitute a “majority” for these purposes?
- Should we continue to require bidders seeking to rely on the interpretation to place an advertisement in a newspaper of national circulation in the United States? Does this serve a useful function under current market practice? Does it constitute an undue burden?
- Is the guidance, as modified above, clear? Should it be codified in rules?

6. Early termination of the initial offering period or a voluntary extension of the initial offering period

Under U.S. tender offer rules, the initial offering period in a tender offer must remain open for specified minimum time periods after a material change in the terms of

an offer.²⁰³ The minimum time periods vary with the materiality of the change.²⁰⁴ For a change other than one related to the tender price or the number of securities sought in the offer, five business days may be sufficient to allow security holders time to learn of, and react to, new information.²⁰⁵ We believe that where the expiration of a tender offer has been set, whether at the outset of the offer or through a voluntary extension, a change in that expiration date constitutes a material change requiring an offer to remain open within the time periods established by our rules. These minimum time periods are important because they allow security holders who have already tendered into the offer to react to the change by withdrawing their tendered securities; similarly, those who have not tendered may choose to do so in response to the change.

The minimum time periods established by our rules for changes to the terms of a tender offer may conflict with foreign law or practice, where bidders may be required to terminate an offer and withdrawal rights immediately after all offer conditions are satisfied.²⁰⁶ Thus, in some foreign jurisdictions, bidders must accept tendered securities and begin the payment process as soon as all offer conditions are satisfied, even if this

²⁰³ Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2) set forth the minimum required time periods for “registered securities offers,” where the bidder is offering registered securities and commences an offer before the effectiveness of its registration statement. See footnote 184 above with respect to the Commission’s statement concerning the broader applicability of those time periods for other kinds of tender offers. In addition, Rule 14e-1(b) also sets forth timing requirements with respect to certain kinds of changes in the terms of the offer.

²⁰⁴ See Exchange Act Rules 13e-4(e)(3)(i) through (iv) and 14d-4(d)(2)(i) through (iv) and 14e-1(b).

²⁰⁵ See Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2)(i). Of course, additional time may be needed for specific types of new information that is of particular importance to target security holders. See Exchange Act Rules 13e-4(e)(3)(ii) and 14d-4(d)(ii) (stating that ten business days is the required period for a change “similarly significant” to a change in price or the number of securities sought).

²⁰⁶ We refer to the time when all offer conditions have been satisfied or waived as the time when the offer becomes “wholly unconditional.”

occurs before the scheduled expiration date of the initial offering period or any voluntary extension of that period.²⁰⁷ In other foreign jurisdictions, longstanding practice dictates early termination of a voluntary extension of the initial offering period when an offer becomes wholly unconditional.²⁰⁸ These jurisdictions take the view that once the offer is wholly unconditional and is therefore certain to be consummated, the initial offering period should close immediately and tendering security holders should receive the offer consideration as soon as possible. Security holders who did not tender before the end of the initial offering period can tender into the subsequent offering.

In the Cross-Border Adopting Release, we adopted a staff interpretive position relating to a change in a specific type of offer condition, the minimum acceptance condition.²⁰⁹ Such a change represents a modification of the original conditions of the tender offer, not the satisfaction of an existing offer condition. However, we did not provide similar guidance with respect to early termination of the initial offering period, or any extension of that period, for changes other than to the minimum acceptance condition.

²⁰⁷ See STATS ChipPAC (stating that under the Singapore Code, payment for securities tendered in a tender offer must be made within 21 calendar days after such offer is declared unconditional or after the relevant holder accepts the offer, whichever is later); Jilin Chemical Industrial Company Limited (December 21, 2005) (“Jilin Chemical”) (stating that under the Hong Kong Code, once a tender offer becomes wholly unconditional, the bidder must pay for tendered securities within ten days of that date); and Harmony Gold Mining Ltd. (March 10, 2005) (“Harmony Gold 2005”) (describing South African legal requirements for prompt payment that are triggered by the offer going unconditional, which may occur before the scheduled expiration of the initial offering period or any voluntary extension of that period).

²⁰⁸ This is the case in the United Kingdom. See, e.g., RWE.

²⁰⁹ See Cross-Border Adopting Release, Section II.B. Today, as discussed above in Section II.C.5, we are modifying our guidance with respect to the bidder’s ability to waive or reduce the minimum acceptance condition in a Tier-II tender offer without providing withdrawal rights.

Both before and after the adoption of the cross-border exemptions, bidders in cross-border tender offers frequently have sought additional relief from the staff to terminate the initial offering period before its scheduled expiration, thereby terminating withdrawal rights, upon the satisfaction of all offer conditions.²¹⁰ In connection with early termination, some bidders also have concurrently requested relief from the requirement under our rules to promptly “publish, send or give” to target security holders information concerning any material change in the terms of a tender offer.²¹¹

Under specified circumstances, bidders have been given relief to permit the early termination of the initial offering period (or any voluntary extension of that period).²¹² A voluntary extension is an extension that is not required under U.S. tender offer rules. Early termination of the initial offering period is not permitted, however, where U.S. rules require mandatory offer extensions for certain changes to the terms of an offer, including those arising from changes in the offer consideration, the dealer’s soliciting fee, or the percentage of target securities for which the offer is made, or other material changes.²¹³ Thus, bidders making any of these kinds of changes to the terms of a tender offer may not terminate an initial offering period (or any of that period) before the scheduled expiration of the mandatory extension.

The relief granted by the staff in this area is contingent on several conditions similar to those we established for bidders wishing to waive or reduce a minimum

²¹⁰ See AstraZeneca PLC (May 23, 2006); Harmony Gold 2005; and In the Matter of Central and South West Corp. (September 27, 1995).

²¹¹ See Exchange Act Rule 14d-4(d). See Jilin Chemical (requesting no-action relief under Exchange Act Rules 14d-4(d) and 14d-6(c)).

²¹² See footnote 210 above.

²¹³ See Exchange Act Rules 13e-4(f)(1)(ii) and 14e-1(b).

acceptance condition.²¹⁴ Bidders seeking to terminate the initial offering period before its scheduled expiration may do so only if, at the time the initial offering period expires and withdrawal rights terminate:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied;²¹⁵
- The bidder has adequately discussed the possibility of and the impact of the early termination in the original offer materials;
- The bidder provides a subsequent offering period after early termination of the initial offering period;
- All offer conditions have been satisfied when the initial offering period terminates;²¹⁶ and
- The bidder does not terminate the initial offering period during any mandatory extension of the initial offering period required under U.S. tender offer rules.²¹⁷

²¹⁴ See, e.g., RWE.

²¹⁵ Id.

²¹⁶ A bidder may not waive an offer condition without providing withdrawal rights after the waiver to allow security holders who have already tendered into the offer the opportunity to react to information about the waiver. Because a waiver is entirely within the control of the bidder and represents a change in the terms of the offer, the bidder must afford tendering security holders the right to withdraw their securities in response to the change. To the extent that foreign law would permit a waiver of the offer conditions to trigger a requirement to immediately terminate the initial offering period or any voluntary extension of that period, requests for relief will be considered on a case-by-case basis. As noted above, we address the specific circumstance of a bidder that seeks to waive the minimum acceptance condition in a tender offer in another section of this release. See Section II.C.5. above. However, the ability of a bidder to waive an offer condition in a cross-border tender offer may be more limited than in a domestic offer, because in some foreign jurisdictions, the waiver of an offer condition is permitted only with the permission of the home country regulator. In addition, foreign rules may limit the type of conditions that may be included in a cross-border tender offer.

²¹⁷ See discussion above for the definition of “mandatory extension” as we use that term here.

At this time, we are not codifying the guidelines set forth in staff no-action precedent for cross-border tender offers regarding the ability to terminate an initial offering period or a voluntary extension of that period early. Considering the responses we receive to our requests for comment below, we will determine whether to revise our rules to codify this relief, under the conditions specified.

Request for Comment

- Is this relief necessary to alleviate practical difficulties? If so, should the relief be codified in rules?
- Should we allow a bidder in a Tier II-eligible cross-border tender offer to terminate the initial offering period or any voluntary extension of that period upon the satisfaction of all offer conditions? Or should the rules limit this relief only to early termination of the initial offering period or only to early termination of a voluntary extension of the initial offering period?
- Should we allow early termination only where it is specifically required under the law of the target's home jurisdiction? Or should this be permitted when customary under foreign practice as well?
- Should we condition this relief on any other conditions besides those listed above? For example, should we require the same kind of advance notice as we propose for a waiver of the minimum acceptance condition in a tender offer?

7. Codification of Rule 14e-5 cross-border exemptions

We propose to modernize and enhance the utility of Exchange Act Rule 14e-5 by codifying exemptive relief issued in the context of cross-border tender offers.²¹⁸ Rule 14e-5 safeguards the interests of persons who sell their securities in response to a tender offer. As we noted in 1999, the rule protects investors by preventing an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms.²¹⁹ The rule prohibits the disparate treatment of security holders, prevents the avoidance of proration requirements, and guards against the dangers posed by a bidder's purchases outside an offer that may involve fraud, deception and manipulation.²²⁰

Specifically, Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer.²²¹ The rule's prohibitions apply from the time of public announcement of the tender offer until the offer expires.²²² The rule applies to "covered persons"²²³ as that term is defined in the

²¹⁸ See footnotes 231 through 233 below.

²¹⁹ Cross-Border Adopting Release [64 FR 61382 at 61387].

²²⁰ Regulation of Takeovers and Security Holder Communications, Release No. 34-40633 (November 3, 1998) [63 FR 67331 at 67359].

²²¹ "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. 17 CFR 229.1000(g). "Related securities" means securities that are immediately convertible into, exchangeable for, or exercisable for subject securities. See Exchange Act Rule 14e-5(c)(6).

²²² Exchange Act Rule 14e-5(a).

²²³ Exchange Act Rule 14e-5(c)(3).

rule. Covered persons include the offeror and its affiliates,²²⁴ the offeror’s dealer-manager and its affiliates,²²⁵ any advisor to the offeror and its affiliates or the offeror’s dealer-manager and its affiliates whose compensation is dependent on the completion of the offer,²²⁶ as well as any person acting, directly or indirectly, in concert with the abovementioned persons in connection with any purchase or arrangement to purchase any subject securities or any related securities.²²⁷

In the Cross-Border Adopting Release, we adopted an exception to allow purchases or arrangements to purchase made outside of, but during, Tier I tender offers.²²⁸ As limited to Tier I tender offers, the exception extends only to tender offers for the securities of foreign private issuers “where U.S. persons hold of record ten percent or less of the class of securities sought in the offer.”²²⁹ We determined to “continue to review requests for relief from Rule 14e-5 for offers other than Tier I eligible offers on a case-by-case basis.”²³⁰ Since that time, we have received numerous requests for relief to allow purchases outside of tender offers conducted under the Tier II exemptions.

Over the past several years in the cross border context, frequent exemptions from Rule 14e-5’s prohibition have been granted for Tier II tender offers in three recurring areas: purchases and arrangements to purchase securities of a foreign private issuer (1)

²²⁴ Exchange Act Rule 14e-5(c)(3)(i).

²²⁵ Exchange Act Rule 14e-5(c)(3)(ii).

²²⁶ Exchange Act Rule 14e-5(c)(3)(iii).

²²⁷ Exchange Act Rule 14e-5(c)(3)(iv).

²²⁸ Exchange Act Rule 14e-5(b)(10).

²²⁹ Cross-Border Adopting Release [64 FR 61382 at 61388].

²³⁰ Id.

pursuant to the non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers,²³¹ (2) by offerors and their affiliates outside of a tender offer,²³² and (3) by financial advisor's affiliates outside of a tender offer.²³³ In 2006 and 2007, three class exemptive letters were issued in these areas.²³⁴ The rule changes we propose today are intended to codify this exemptive relief.

As discussed above, a Tier II tender offer for a foreign target company may be structured as two concurrent but separate tender offers: one made to U.S. security holders and another made to target security holders outside the U.S.²³⁵ If purchases pursuant to the foreign offer are made during the Rule 14e-5 prohibited period,²³⁶ those purchases would run afoul of the rule because they technically constitute purchases outside the U.S. tender offer. Exemptive relief has been commonly provided in connection with Tier II offers to allow purchases or arrangements to purchase in the foreign offer where there are safeguards to protect the interests of U.S. tendering security holders. This relief facilitates cross-border tender offers and encourages the inclusion of U.S. security holders in such offers. We propose to change Rule 14e-5 to codify that

²³¹ See, e.g., Mittal (providing class relief for similarly situated parties, under the conditions specified).

²³² See, e.g., Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007) ("Sulzer") (providing class relief to similarly situated parties, under the conditions specified).

²³³ See, e.g., Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007) ("Financial Advisors") (providing class relief for similarly situated parties, under the conditions specified).

²³⁴ See notes 231 through 233 above. As noted there, the class exemptive letters indicate that they may be relied upon by all similarly-situated parties.

²³⁵ Exchange Act Rule 14d-1(d)(2)(ii).

²³⁶ The Rule 14e-5 prohibited period is the period of time from public announcement of the tender offer until expiration.

relief today, to allow purchases or arrangements to purchase the subject securities pursuant to a foreign offer (or multiple foreign offers)²³⁷ and during a U.S. tender offer.

Proposed Rule 14e-5(b)(11) would permit purchases or arrangements to purchase pursuant to a foreign tender offer (or in more than one foreign offer) during the Rule 14e-5 prohibited period if certain conditions are satisfied. This proposed exception would permit purchases in a foreign offer or offers made concurrently or substantially concurrently with a U.S. offer under Rule 14d-1(d)(2)(ii). The tender offer must qualify as a Tier II tender offer under Rule 14d-1(d).²³⁸ Thus, the subject company must be a foreign private issuer.

The proposed exception is conditioned on the existence of certain safeguards to help protect U.S. security holders. These conditions address the economic terms, consideration, and procedural terms of the tender offer. The conditions require that U.S. security holders are treated at least as favorably as non-U.S. tendering security holders. The proposal also permits any cash consideration to be paid to U.S. security holders to be converted from the currency paid in the foreign offer to U.S. dollars at the exchange rate disclosed in the U.S. offering documents. In addition, the conditions require transparency regarding the offeror's intent to make purchases pursuant to a foreign offer in the U.S. offering documents. As the activity that the proposed exception covers is quite narrow,

²³⁷ As discussed above, we propose to allow bidders eligible to rely on the Tier II exemption to separate their offer into a U.S. offer and multiple non-U.S. offers. We also propose to extend relief from Exchange Act Rule 14e-5 for purchases in more than one non-U.S. offer during the term of the U.S. offer.

²³⁸ Consistent with Mittal, the proposed exception is limited to tender offers that qualify as Tier II tender offers under Rule 14d-1(d). Tender offers that do not qualify as Tier II tender offers, such as issuer tender offers, would not meet the requirements of this proposed exception.

the exception is limited to purchases in foreign tender offers and does not apply to open market transactions, private transactions, or other transactions outside the tender offer.

The second and third recurring relief requests under Rule 14e-5 for cross-border tender offers concern purchases and arrangements to purchase by an offeror and its affiliates, as well as by a financial advisor's affiliates.²³⁹ Some cross-border tender offers are structured as a single global offer made in the U.S. and other jurisdictions. Purchases and arrangements to purchase the subject securities outside the tender offer, including open market purchases and privately negotiated purchases, very often are permitted under foreign law. The staff has granted relief to allow purchases outside a tender offer when this activity is permissible under the laws of the target's foreign home jurisdiction if certain conditions designed to promote the fair treatment of tendering security holders are met. We propose to change Rule 14e-5 to codify that relief.²⁴⁰

Proposed Rule 14e-5(b)(12) would permit purchases or arrangements to purchase outside of a Tier II tender offer by (i) an offeror and its affiliates; and (ii) an affiliate of a financial advisor if certain conditions are satisfied. This rule revision is intended to address situations where the subject company is a non-U.S. company, the majority of whose shareholders reside outside the U.S. Thus, the subject company must be a foreign private issuer, and the covered person must reasonably expect that the tender offer

²³⁹ An affiliate of a financial advisor includes a separately identifiable department of the financial advisor.

²⁴⁰ The proposed Rule 14e-5(b)(12) exception does not impose any additional conditions to those provided in the Sulzer and Financial Advisors letters. However, some conditions from those letters are not incorporated into the proposal in an effort to streamline the rule text in a manner that would not compromise the fair treatment of security holders. For example, condition number ten in the Financial Advisors letter concerns voluntary compliance with the United Kingdom's City Code and condition numbers three and five in Sulzer concerns compliance with the laws of the target's home jurisdiction and bilateral or multilateral memorandum of understanding are not included in the proposal.

qualifies as Tier II.²⁴¹ The proposal prohibits any purchases or arrangements to purchase in the U.S. otherwise than pursuant to the tender offer. Further, it contains conditions to enhance the transparency of the excepted activity. For example, the proposal would require that the U.S. offering materials prominently disclose the possibility of or the intention to make purchases or arrangements to purchase outside the tender offer. The proposal also would require disclosure in the U.S. of purchases made outside the tender offer to the extent that such information is made public in the home jurisdiction.

Where an offeror or its affiliate purchases or arranges to purchase outside of a tender offer, the proposed exception would impose one additional condition regarding consideration. In order to safeguard against the disparate treatment of security holders, the proposed exception would require that the tender offer price be raised to equal any higher price paid outside of the tender offer.

Where an affiliate of a financial advisor purchases or arranges to purchase outside of a tender offer, our proposed exception would impose additional conditions. In order to prevent the flow of information that may result in a violation of U.S. securities laws, these conditions relate to information barriers and common officers or employees. Specifically, the proposal would require that the financial advisor and affiliate maintain and enforce written policies and procedures designed to prevent the flow of information among the financial advisor and the affiliate that might result in a violation of the federal securities laws and regulations. It also would require that the affiliate have no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or

²⁴¹ We would modify the reasonable expectation condition if the proposal to change the timing of the Tier II calculation to a date no earlier than 60 days before the tender offer announcement is adopted.

support personnel) in common with the financial advisor that directly effect or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services. The proposed exception also would require that the financial advisor have a registered broker-dealer affiliate under Section 15(a) of the Exchange Act.²⁴² As the exception is premised on the affiliate of the financial advisor carrying out its normal business activity when purchasing outside a tender offer, it would not permit purchases or arrangements to purchase to be made to facilitate the tender offer. Accordingly, purchasing activity effected in reliance on the proposed exception should be consistent with the affiliate's prior levels of activity. We note that risk arbitrage is excluded from the exception applicable to the financial advisor's affiliate.²⁴³ Risk arbitrage is so closely related to the tender offer that the incentive for abusive behavior is significant. Finally, we propose to add definitions of subject company²⁴⁴ and home jurisdiction²⁴⁵ to Rule 14e-5, consistent with existing definitions.

Request for Comment

- We solicit comment on all aspects of the proposed exceptions, including each of the enumerated conditions.

²⁴² 15 U.S.C. 78o.

²⁴³ Risk arbitrage may involve the purchase of the subject security and the sale of stock in the proposed acquirer. See Financial Advisors and the attached request dated April 3, 2007 regarding Blanket Exemptive Relief Request under Rule 14e-5 excepting risk arbitrage from the list of trading activities at page 3.

²⁴⁴ 17 CFR 229.1000.

²⁴⁵ Exchange Act Rule 14d-1.

- We solicit specific comments on each of the conditions in the Rule 14e-5(b)(11) proposal concerning Tier II status, economic terms, consideration, currency conversion, procedural terms, disclosure and purchases being made solely pursuant to the foreign tender offer.
- We solicit specific comments on each of the conditions in the Rule 14e-5(b)(12) proposal concerning foreign private issuer and Tier II status, no purchases or arrangements to purchase in the U.S. other than pursuant to the tender offer, and disclosure. We also solicit comment on the price matching condition applicable to the offeror and its affiliates, as well as each of the additional conditions applicable to a financial advisor’s affiliate, including the financial advisor having an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act.
- Are there additional means besides analyzing prior purchasing activity by the financial advisor’s affiliate to assure that routine trading activity outside the tender offer is not conducted with the intent to affect the tender offer?
- Are there additional conditions that should be added to the proposed exceptions to safeguard the interests of persons who sell their securities in response to a tender offer? In particular, should conditions number ten from the Financial Advisors letter²⁴⁶ and numbers three and five from the Sulzer

²⁴⁶ Condition number ten states: “The Financial Advisor, through its Affiliates and Departments, conduct the Trading Activities voluntarily in compliance with the pertinent provisions of the United Kingdom’s City Code on Takeovers and mergers and Rules Governing Substantial Acquisitions of Shares (the ‘City Code’), and the Affiliates and Departments conduct themselves as if they were connected exempt principal traders as defined in the City Code, including complying with regulations with respect to the establishment and maintenance of information barriers, conflict of interest provisions and other requirements, other than with respect to the notification of relevant trades to the Panel...”. Financial Advisors at p. 3.

letter²⁴⁷ be incorporated into the Rule 14e-5(b)(12) proposal?

- Are there other alternatives that would better protect the interests of security holders?
- We solicit comment on suggested definitions of risk arbitrage.
- In addition to risk arbitrage, is there any other purchasing activity that should be excluded from the proposed Rule 14e-5(b)(12) exception?

D. Expanded availability of early commencement for exchange offers

In 1999, we adopted rule revisions intended to minimize the regulatory disparity between cash and stock tender offers.²⁴⁸ Before those changes, exchange offers in which the bidder offered its shares as part or all of the offer consideration were at a disadvantage compared to cash offers because of the regulatory review process associated with the filing of a Securities Act registration statement.²⁴⁹ Cash tender offers could commence on the date of the filing of a tender offer statement with the Commission. Before the 1999 rule revisions, exchange offers, by contrast, could not begin until the staff completed its review of the registration statement filed by the bidder and it had been declared effective. This disparity was of particular concern in the tender offer context,

²⁴⁷ Condition number three states: “The Prospective Purchasers comply with the applicable laws and regulations of the ‘home jurisdiction’ as defined in Rule 14d-1.” Sulzer at p. 2. Condition number five states: “The Commission and the home jurisdiction are parties to a bilateral or multilateral memorandum of understanding (MOU) as to the consultation and cooperation in the administration and enforcement of securities laws.” Sulzer at p. 3.

²⁴⁸ See Regulation M-A Adopting Release, Section II.3.A.

²⁴⁹ See Regulation M-A Proposing Release, Section I. (“In some cases, where the staff undertakes to review and comment during the waiting period, the delay of effectiveness can be quite lengthy. This delay is particularly troublesome for bidders in exchange offers. In contrast, cash offers, which may compete with exchange offers, can commence as soon as the required information is filed with the Commission and disseminated to security holders. The delay in commencing an exchange offer can place the bidder at risk that a competing all-cash bid will commence and close before the exchange offer can even commence.”).

where multiple bidders may make contemporaneous offers for the same target company through competing offers.

To address this disparity in the regulatory process for cash tender offers and exchange offers, we adopted rule changes permitting exchange offers to commence upon the date of the filing of a registration statement under specified conditions.²⁵⁰ However, bidders exercising the option to “early commence” an exchange offer may not terminate that offer and purchase tendered shares until the registration statement has been declared effective by the Commission.²⁵¹ We recognized in proposing the early commencement option that a regulatory disparity in the treatment of cash and stock tender offers could continue to exist because the staff review process might delay the effectiveness of the registration statement in an exchange offer and thus could delay the bidder’s ability to close the exchange offer.²⁵² In adopting the early commencement option, however, the staff undertook to expedite the review of such exchange offers so that they could compete on an equal footing with cash tender offers.²⁵³ We believe the staff generally has been successful in meeting this commitment.

Since we made early commencement available, we have recognized that a regulatory disparity continues to exist because the early commencement option is not

²⁵⁰ See Regulation M-A Adopting Release, Section II.E.1.

²⁵¹ See Securities Act Rule 162(a) [17 CFR 230.162(a)].

²⁵² See Regulation M-A Proposing Release, Section II.A.3.A.

²⁵³ See Regulation M-A Adopting Release, Section II.E.1.

available for exchange offers that are not subject to Rule 13e-4 or Regulation 14D.²⁵⁴ In certain foreign jurisdictions, the staff has been advised that applicable non-U.S. tender offer rules provide that, where a bidder makes a tender offer for one class of target securities, it also must make an offer or offers for any other class or classes of securities issued by the same target and convertible into the subject securities. Because these offers are made contemporaneously and through a single offer document, if one class of target securities is not subject to Rule 13e-4(e) or Rule 14d-4(b), the bidder effectively loses the ability to commence early under our existing rules. This may create an undue burden for bidders, where the offer for each class of target securities is made in accordance with the requirements of Regulation 14D or Rule 13e-4, as modified by the Tier II cross-border exemptions.

We believe that all exchange offers eligible for the Tier II cross-border exemptions should be able to take advantage of the early commencement procedure, regardless of whether the exchange offer is subject to the provisions of Regulation 14E only, where the offeror voluntarily provides protections required in an offer subject to Rule 13e-4 or Regulation 14D. Since its adoption, the early commencement procedure has worked well in facilitating exchange offers and we believe extending the procedure to all Tier II offers would be appropriate. Under the expanded rules we propose today, bidders for foreign securities that are not registered under the Exchange Act would be

²⁵⁴ Securities Act Rule 162(a) provides an exemption from the registration requirements of Section 5(a) of the Securities Act only for exchange offers subject to Rule 13e-4(e) or 14d-4(b). Since those rules apply only to tender offers for target securities registered under Section 12 of the Exchange Act and in limited other circumstances, early commencement is not currently available for all exchange offers. See footnote 109 above for a discussion of when Exchange Act Rule 13e-4 and Regulation 14D apply.

able to take advantage of the early commencement option, subject to the conditions discussed below.

Today we propose to expand the availability of early commencement for cross-border exchange offers not subject to Rule 13e-4 or Regulation 14D under the conditions outlined in our proposed rules.²⁵⁵ A new provision in the Tier II exemptions would permit early commencement, where the exchange offer meets the conditions of the exemptions. We also propose a corresponding change to Securities Act Rule 162 to extend the exemption from Section 5(a) in that rule for exchange offers not subject to Rule 13e-4 or Regulation 14D that otherwise meet the conditions for the Tier II exemptions.

Initially, the Commission did not make this option available because we were concerned that such offers were not subject to all of the disclosure and procedural protections applicable to registered offers.²⁵⁶ In particular, the absence of the requirement to provide withdrawal rights in offerings for unregistered classes of securities caused us to retain the requirement that a bidder could not commence such offers before the registration statement filed to register the share issuance had been declared effective by the Commission.²⁵⁷ The proposed rules would address these

²⁵⁵ Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

²⁵⁶ See Section I.E. Question 4 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm> (noting that the early commencement option is not available for debt restructurings under existing rules, because Regulation 14D and Rule 13e-4 apply to tenders for equity securities only).

²⁵⁷ Securities Act Rule 162(a) states that an exchange offer subject to Exchange Act Rule 13e-4(e) or 14d-4(b) may commence upon the filing of a registration statement “so long as no securities are purchased until the registration statement has been declared effective and the tender offer has expired in accordance with the tender offer rules.”

concerns by permitting early commencement for exchange offers for unregistered securities only where the bidder provides withdrawal rights in the offer to the same extent as would be required under Regulation 14D or Rule 13e-4.²⁵⁸ In addition, the proposed rule would require the same minimum time periods after the occurrence of specified changes as are required for other “early commencement” offers.²⁵⁹

Request for Comment

- Should the expanded eligibility to commence early be limited, as proposed, to cross-border exchange offers eligible to rely on the Tier II exemptions only?
- Should the expanded eligibility be conditioned on the bidder providing withdrawal rights and keeping the offer open for certain minimum time periods after information about material changes is disseminated to security holders, as proposed? Are there any other procedural protections applicable to offers subject to Regulation 14D or Rule 13e-4 besides withdrawal rights that should be required in an early commencement offer not subject to Regulation 14D or Rule 13e-4?
- Should the early commencement option be made available for all exchange offers, including those for domestic target companies not within the scope of current Rule 162? For example, would this be useful in the case of tender offers for debt securities, which are not covered by Regulation 14D or Rule 13e-4?

²⁵⁸ Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

²⁵⁹ Proposed Securities Act Rule 162(a).

- Are there certain types of exchange offers for which early commencement should not be permitted, whether in the cross-border context or otherwise? For example, should transactions in which an issuer privately places securities and, shortly thereafter, conducts an exchange offer to exchange them for registered securities²⁶⁰ be permitted to commence early, where such offers are not subject to Rule 13e-4?
- What have been bidders' experiences with the usefulness of the early commencement option in our current rules, in light of the staff review and comment process?

E. Proposed changes to schedules and forms

1. Form CB

When an offeror or issuer relies on the Tier I cross-border exemptions in connection with a cross-border business combination transaction or rights offering, it may be required to furnish to the Commission an English translation of the offer materials, submitted under cover of Form CB.²⁶¹ When we adopted Form CB in 1999, we specified that the form could be submitted in paper form only. In 2002, however, the Commission adopted rule changes mandating electronic filing for persons already reporting under

²⁶⁰ See the no-action letter issued to Exxon Capital Holdings Corp. (April 1988). These offers are commonly known as "Exxon Capital exchange offers."

²⁶¹ Exchange Act Rules 14d-1(c)(3)(iii) and 13e-4(h)(8)(iii). Form CB must be furnished to the Commission by the first business day after publication or dissemination of the attached disclosure document in the applicable foreign jurisdiction(s). See Securities Act Rules 801(a)(4)(i) and 802(a)(4)(i), and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii). The obligation to furnish a Form CB arises only when the bidder in a tender offer otherwise would have been required to file a Schedule TO or a registration statement for an exchange offer; thus, no Form CB is required for cash tender offers subject only to Regulation 14E.

Section 13(a)²⁶² or 15(d)²⁶³ of the Exchange Act.²⁶⁴ If the person furnishing the Form CB is not an Exchange Act reporting entity, it may currently submit the Form CB in paper or via the Commission's Electronic Data Gathering, Analysis, and Retrieval system, or EDGAR.²⁶⁵

As a result of advances in technology and its widespread use, we believe it would be appropriate to require all Form CBs to be filed electronically via our EDGAR system. We therefore propose to amend Item 101(a) of Regulation S-T to require that all Form CBs be submitted electronically.²⁶⁶ For the same reasons, we also propose to require the electronic filing of the form for appointment of an agent in the United States for service of process, which must be filed by all foreign companies that furnish a Form CB to the Commission.²⁶⁷ For purposes of the current cross-border exemptions, our rules require Form F-X²⁶⁸ to be filed electronically only when the Form CB must be so filed, *i.e.*, when the foreign company filing it is already subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act.²⁶⁹

²⁶² 15 U.S.C. 78m.

²⁶³ 15 U.S.C. 78o(d).

²⁶⁴ See Rule 101(a)(1)(vi) of Regulation S-T [17 CFR 232.101(a)(1)(vi)].

²⁶⁵ See Rule 101(b)(7) of Regulation S-T [17 CFR 232.101(b)(7)].

²⁶⁶ See proposed Rule 101(a)(1)(vi) of Regulation S-T.

²⁶⁷ See proposed Rule 101(a)(1)(vii) of Regulation S-T.

²⁶⁸ Form F-X is a form for appointing an agent in the United States for service of process. It must be filed by foreign filers only.

²⁶⁹ See Rules 101(a)(vii) and 101(b)(8)(i) of Regulation S-T.

We note that, in order to file electronically, an offeror or issuer that is not already doing so would need to obtain filing codes required to file on EDGAR. An offeror or issuer that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a “Central Index Key (CIK)” code, would obtain the codes by filing electronically a Form ID²⁷⁰ at <https://www/filermanagement.edgarfiling.sec.gov> and filing, in paper by fax within two business days before or after filing the Form ID, a notarized authenticating document. The authenticating document would need to be manually signed by the applicant over the applicant’s typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID.²⁷¹ If the authenticating document is filed after electronically filing the Form ID, it would need to include the accession number assigned to the electronically filed Form ID as a result of its filing.²⁷²

Electronic filing in all cases would benefit investors by enabling them to more easily access these forms through the Commission’s website. If adopted, this requirement would have no impact on the liability of the persons furnishing their offer materials under cover of Form CB.²⁷³ Additionally, it would not change the circumstances under which a Form CB or Form F-X must be filed.

²⁷⁰ 17 CFR 239.63, 249.446, 269.7 and 274.402.

²⁷¹ An offeror or issuer could confirm the authenticity of a Form ID by, for example, stating that “[name of offeror or issuer] hereby confirms the authenticity of the Form ID [filed] [to be filed] on [specify date] containing the information contained in this document.”

²⁷² 17 CFR 232.10(b). An “accession number” is a unique number generated by EDGAR for each electronic submission. Assignment of an accession number does not mean that EDGAR has accepted a submission.

²⁷³ We note that persons furnishing Form CB are not subject to Section 18 liability with respect to the information provided.

We are not currently proposing, but we solicit comment on, whether we should change the cover page of the Form CB to make it easier for the staff to monitor the application of the cross-border exemptions. We could amend the cover page of the Form CB to include a space where persons furnishing the form would specify the U.S. ownership interest in the foreign target company or in the issuer for rights offerings supporting reliance on the exemptions. This would help us monitor the application and effectiveness of the cross-border exemptions. This information already would be available to the person furnishing the Form CB, since it is required for the Tier I calculation.²⁷⁴

Request for Comment

- Should we require all Form CBs to be furnished to the Commission in electronic form via our EDGAR system, as proposed? Would this requirement present a hardship for non-reporting entities submitting the form? For example, would the process for procuring a notarized authenticating document in a foreign jurisdiction for purposes of obtaining a Form ID present a hardship for non-reporting entities?
- If we change our rules to require the electronic submission of all Form CBs, should we adopt the same requirements for electronic filing of Form F-Xs, as proposed, when required to be submitted with the Form CB?
- Are there reasons why electronic filing would not be desirable?

²⁷⁴ For bidders relying on the hostile presumption available for non-negotiated transactions, the Form CB would list the percentage of U.S. ownership of the target yielded by the ADTV calculation, unless the bidder had reason to know a different level of U.S. ownership.

- Should we require the filing person to fill in a box on the cover page of the Form CB specifying the level of U.S. ownership of the target or issuer that permits reliance on the cross-border exemptions?

2. Proposed changes to Schedule TO, Form F-4 and Form S-4

We also propose to add a box on the cover page of the Schedule TO and Forms F-4 and S-4 that a filing person would be required to check to indicate reliance on one of the applicable cross-border exemptions.²⁷⁵ This would be helpful to the staff as well as to filing persons. For example, the inclusion of this information on the cover page of a tender offer statement or registration statement, filed in connection with a cross-border transaction in which the filer is seeking to rely on an applicable cross-border exemption, would enable the staff to perform the review process more efficiently. The availability of this information would eliminate staff comments that are based on misperceptions about which exemption the filer is seeking and which U.S. rules apply to the transaction, thereby reducing the time and cost involved for the filer in responding to staff comments. Currently, there is often no way to tell from reading the tender offer materials whether filers are relying on the cross-border exemptions.

We also solicit comment on whether we should include a space or box on the cover page of these schedules and forms requiring the filer to specify the U.S. ownership percentage that permits reliance on the exemption claimed. We do not propose this change today, but we believe it could be helpful in certain circumstances and are interested in commenters' views on whether this would present an undue burden or liability risk for filers. If we were to require this, it would be required only if one or more

²⁷⁵ Existing Form CB contains such a box.

of the cross-border exemptions is being relied upon. As with Form CB, filers already would possess this information in determining eligibility to rely on the applicable cross-border exemption.

Request for Comment

- Would the proposed requirement to check a box identifying the cross-border exemption relied upon be a burden for filers? Would the information be useful to the public?
- Should we also add a box or blank space on the cover page of Schedule TO and Forms S-4 and F-4 where filers would list the percentage of the target securities held by U.S. persons that permits reliance on the applicable cross-border exemption? Would this requirement represent an undue hardship or liability for filers?
- Would investors or others find this information useful in connection with their consideration of the transaction?

F. Beneficial ownership reporting by foreign institutions

1. Background

The beneficial ownership reporting requirements in Sections 13(d)²⁷⁶ and 13(g)²⁷⁷ of the Exchange Act²⁷⁸ and the corresponding regulations²⁷⁹ provide investors and the issuer with information about accumulations of securities that may have the potential to

²⁷⁶ 15 U.S.C. 78m(d).

²⁷⁷ 15 U.S.C. 78m(g).

²⁷⁸ 15 U.S.C. 78a et seq.

²⁷⁹ Regulation 13D-G, Exchange Act Rule 13d-1 et seq. [17 CFR 240.13d-1 et seq.].

change or influence control of the issuer. This statutory and regulatory framework establishes a comprehensive reporting system for gathering and disseminating information about the ownership of equity securities.

The beneficial ownership reporting provisions require, subject to exceptions, that any person who acquires more than five percent of a class of equity securities registered under Section 12 of the Exchange Act²⁸⁰ and other specified equity securities report the acquisition on Schedule 13D within ten days. Persons holding more than five percent of a class of such securities at the end of the calendar year, but not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. These Schedule 13G filers include persons exempt from the requirements of Section 13(d),²⁸¹ as well as specified institutional investors holding securities in the ordinary course of business and not with a control purpose.²⁸² As specified in Rule 13d-1(b)(1)(ii), the types of institutional investors that may file on Schedule 13G under that rule include a broker or dealer registered under Section 15(a) of the Exchange Act,²⁸³ a bank as defined in Section 3(a)(6) of the Exchange Act,²⁸⁴ an insurance company as defined in Section 3(a)(9) of the Exchange Act,²⁸⁵ an investment company registered

²⁸⁰ 15 U.S.C. 78j.

²⁸¹ This category consists of persons filing on Schedule 13G because their acquisitions are statutorily or administratively exempt from reporting on Schedule 13D.

²⁸² Exchange Act Rule 13d-1(b)(1)(ii).

²⁸³ 15 U.S.C. 78o(b).

²⁸⁴ 15 U.S.C. 78c(a)(6).

²⁸⁵ 15 U.S.C. 78c(a)(9).

under Section 8 of the Investment Company Act of 1940,²⁸⁶ an investment adviser registered under Section 203 of the Investment Advisers Act of 1940,²⁸⁷ an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act,²⁸⁸ and related holding companies and groups. The list of institutional investors in Rule 13d-1(b)(1)(ii) currently does not include non-domestic institutions generally, and is limited to institutions such as brokers, dealers, investment advisers and investment companies registered with the Commission, or regulated banks, pension funds or insurance companies.

In 1977, we proposed an amendment to the precursor to Rule 13d-1(b)(1)(ii)²⁸⁹ which would have allowed non-domestic entities similar to domestic brokers, dealers, banks, investment companies, investment advisers, employee benefit plans, and parents and groups of these persons to use the short form Schedule 13G to report beneficial ownership, provided that such persons agreed to make available to the Commission the same information they would be required to furnish in responding to the disclosure requirements of Schedule 13D.²⁹⁰ When we adopted final rules in 1978, however, we

²⁸⁶ 15 U.S.C. 80a-8.

²⁸⁷ 15 U.S.C. 80b-1 et seq.

²⁸⁸ Codified principally in 29 U.S.C. 1001-1461.

²⁸⁹ Exchange Act Rule 13d-5 was the precursor to Exchange Act Rule 13d-1(b).

²⁹⁰ See Beneficial Ownership Disclosure Requirements, Release No. 34-13292 (February 24, 1977) [42 FR 44964].

declined to amend the rule to allow foreign entities, who otherwise qualified, to use the short form available to U.S. institutions.²⁹¹

The 1978 adopting release indicated that applications for exemptive orders by foreign entities would be entertained to enable them to report on Schedule 13G. The release discussed several conditions to the availability of such exemptive orders, and stated that the Commission would entertain applications when the acquisitions are in the ordinary course of business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect. It stated that the Commission may consider any further conditions that may be appropriate when granting exemptive orders.

Historically, use of the Schedule 13G by foreign institutions filing as qualified institutions under Rule 13d-1(b)(i)(ii) has been limited to institutions that have obtained an exemptive order from the Commission²⁹² or, under the current practice, a no-action position from the Division of Corporation Finance based upon the requester's undertaking to grant the Commission or the staff access to information that would otherwise be disclosed in a Schedule 13D and the comparability of the foreign regulatory

²⁹¹ The release stated that we determined not to adopt the amendment “in view of the substantial enforcement difficulties encountered in seeking to assure compliance by foreign persons with the provisions of Section 13(d).” See Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (April 21, 1978) [43 FR 18484].

²⁹² Id.

scheme applicable to the particular category of institutional investor.²⁹³ In connection with the amendments to the beneficial ownership reporting requirements proposed in 1996, we noted that we “believe[d] that a non-U.S. institution seeking relief to file pursuant to Rule 13d-1(b)(1) should be subject to a regulatory scheme in its country comparable to the U.S. regulatory scheme for the particular category of institution and that such institutions should undertake to grant the Commission access to information that would otherwise be disclosed on Schedule 13D.”²⁹⁴ We stated that no change to the practice of issuing exemptive orders or staff no-action positions was proposed.²⁹⁵ We requested comment regarding whether the rules should be amended to expressly allow foreign institutional investors that are the functional equivalent of our domestic institutions to file on Schedule 13G.²⁹⁶

When we adopted amendments to the beneficial ownership reporting rules in 1998, we stated that we were not expanding the list of qualified institutional investors in Rule 13d-1(b)(1)(ii) to include foreign institutions.²⁹⁷ Further, we stated that the use of

²⁹³ See, e.g., Canada Pension Plan Investment Board (May 5, 2006)(granting relief for the Canada Pension Plan (CPP) Investment Board to file on Schedule 13G where the Board represented that the Canadian Pension Plan was the functional equivalent of a U.S. private pension fund and the regulatory regime governing the CPP Investment Board was substantially similar to the regulations applicable to U.S. pension funds under the Employee Retirement Income Security Act of 1974) and Citigroup Inc. (May 27, 2004)(granting relief for certain qualifying subsidiaries of Citigroup organized under the laws of England and Wales; the subsidiaries conducted investment banking business, including market-making, through trading in their own accounts and for their customers and represented that they were subject to regulation in the United Kingdom that was comparable to U.S. regulations).

²⁹⁴ See Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-37403 (July 3, 1996) [61 FR 36521] (the “Reproposing Release”).

²⁹⁵ Id.

²⁹⁶ Id.

²⁹⁷ See Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (January 12, 1998) [63 FR 2854].

Schedule 13G pursuant to the provisions of Rule 13d-1(b)(1) would continue to be limited to institutions such as brokers, dealers, investment companies, and investment advisers registered with the Commission, or regulated banks, pension funds, or insurance companies, and its availability would not be extended to foreign institutions generally.²⁹⁸ The adopting release noted that foreign institutional investors that do not have a disqualifying purpose or effect would be able to rely on the passive investor provisions of Rule 13d-1(c) to file a Schedule 13G.²⁹⁹ To the extent that any foreign institutional investor sought to report on Schedule 13G as a qualified institutional investor, the institution would be required to obtain an exemptive order or no-action position. We continue to receive and grant requests from foreign institutions seeking to file on Schedule 13G as qualified institutional investors.³⁰⁰

2. Proposed rules

The past ten years have brought tremendous change to our capital markets. As the capital markets become increasingly global, we believe we need to continually re-evaluate our regulatory scheme to determine whether it is efficiently and effectively protecting investors and not imposing unnecessary burdens. We recognize that the

²⁹⁸ Id.

²⁹⁹ The passive investor provision was adopted in 1998 to expand the class of investors eligible to file on the short form Schedule 13G. See Release No. 34-39538. Under Exchange Act Rule 13d-1(c), a passive investor choosing to file a Schedule 13G must file within ten calendar days after acquiring beneficial ownership and must certify that it does not have a disqualifying purpose or effect. Qualified institutional investors filing on Schedule 13G pursuant to Exchange Act Rule 13d-1(b) must file the form within 45 calendar days after the calendar year end of the year in which, on the last day of the year, its beneficial ownership of the subject class exceeds 5 percent. Under the amendments we propose today and discussed below, a foreign institution would be permitted to file on Schedule 13G as a qualified institutional investor if it meets the specified conditions.

³⁰⁰ See footnote 293 above.

burden imposed on foreign institutions that must file a Schedule 13D (or obtain an individual no-action letter) is more extensive than the filing requirements applicable to comparable U.S. institutions that are able to report beneficial ownership on Schedule 13G. We also recognize that foreign institutions filing as passive investors pursuant to Rule 13d-1(c) are subject to more stringent requirements than institutions eligible to rely on Rule 13d-1(b).³⁰¹ We weigh these burdens against the important safeguards that the provisions of Rule 13d-1(b) provide. We believe that it may be possible to extend Schedule 13G filing eligibility pursuant to Rule 13d-1(b) to foreign institutions, while maintaining the protections of the rule.³⁰²

Accordingly, we propose to amend Rule 13d-1(b)(1)(ii) to include foreign institutions that are substantially comparable to the U.S. institutions listed in subparagraphs (A) - (J) of the current rule. In this regard, to be eligible to file on

³⁰¹ Currently, a difference exists for passive investors and qualified institutional investors in the timing requirements for filing an initial Schedule 13G, as discussed above, and filing amendments to Schedule 13G. Passive investors amend Schedule 13G in a manner similar to qualified institutional investors, but more promptly. Another difference in the filing requirements for passive investors and qualified institutional investors is the applicable certification. Finally, an investor beneficially owning more than 20 percent of a class of securities may not file as a passive investor. A qualified institutional investor is not subject to the 20 percent limit. These differences present a significant burden for institutions that do a significant amount of trading or engage in securities transactions on behalf of clients. Allowing foreign institutions to file as qualified institutional investors would reduce the filing burden for those foreign institutions and decrease the disparities in the way U.S. and foreign institutions are treated under the rules.

³⁰² We note that in 2004, the Commission adopted a rule that remedied disparate treatment of domestic and foreign banks. See Foreign Bank Exemption from the Insider Lending Prohibition of the Exchange Act Section 13(k), Release No. 34-49616 (April 26, 2004) [69 FR 24016].

Schedule 13G, the foreign institution would be required to determine,³⁰³ and certify on Schedule 13G, that it is subject to a regulatory scheme comparable to the regulatory scheme applicable to its U.S. counterparts.³⁰⁴ Additionally, in its certification on Schedule 13G, the foreign institution would need to undertake to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D. If these proposed rule changes are adopted, Rule 13d-1(b) would continue to be available only to institutions that acquired and held the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer.³⁰⁵

Under Rule 13d-1(e), when a passive investor or qualified institutional investor

³⁰³ Similar to a domestic institution, a foreign institution would need to determine whether it qualified to use the short-form Schedule 13G at the time it exceeded the beneficial ownership threshold. This initial determination as to form eligibility would require a foreign institution to determine, at the time it exceeds the beneficial ownership threshold, whether it is subject to a foreign regulatory scheme applicable to the particular category of institutional investor comparable to the applicable U.S. regulatory scheme. If the foreign institution made such a determination, it would be eligible to file on Schedule 13G as a qualified institutional investor, as long as it could provide the certification required by Schedule 13G. If at any time before filing a Schedule 13G pursuant to proposed Rule 13d-1(b)(1)(ii)(K) the foreign institution determined that it was no longer able to rely on the provision, it would be required to file a Schedule 13D in accordance with the rules.

³⁰⁴ When determining whether the foreign regulatory scheme is comparable to the U.S. regulatory scheme, the foreign institution should consider a number of factors, including whether the institution is engaged in a business similar to the business engaged in by the qualified institutional investors listed in Rule 13d-1(b)(1)(ii), and whether the institution affords protections similar to those offered by domestic institutions (such as minimum capital requirements, deposit guarantees, licensing requirements, periodic reporting of information in the home country, power of inspection by home country regulators, etc.). See, e.g., Natixis S.A., Banque Fédérale des Banques Populaires and Caisse National des Caisses d'Epargne (October 9, 2007)(granting relief where the requestor and its subsidiaries represented they were engaged in businesses similar to those engaged in by one or more qualified institutional investors listed in Rule 13d-1(b)(1)(ii) and that they were subject to regulation in France that was substantially comparable to the U.S. regulatory scheme) and DnB NOR ASA and Qualifying Subsidiaries (January 9, 2008)(granting relief where DnB NOR and its qualifying subsidiaries represented that they were engaged in businesses similar to those engaged in by one or more classes of persons identified in Rule 13d-1(b)(1)(ii) and that they were subject to extensive regulation in the jurisdictions in which they operate analogous to U.S. regulations).

³⁰⁵ See Exchange Act Rule 13d-1(b).

determines that it holds subject securities with a disqualifying purpose or effect, it must file a Schedule 13D no later than 10 calendar days after the change in investment purpose.³⁰⁶ Therefore, in the event that an institution – foreign or domestic – determines that it holds subject securities with a disqualifying purpose or effect, it would be required to file a Schedule 13D. In addition, the institution would be subject to a “cooling-off period.”³⁰⁷ During the cooling-off period, the reporting person is prohibited from voting or directing the voting of the subject securities or acquiring additional beneficial ownership of any equity securities of the issuer or any person controlling the issuer. We believe the cooling-off period provides an important safeguard for the market and investors and allows them time to react to the information in the Schedule 13D filing.

As noted above, in the past we expressed concern regarding possible difficulties with enforcement in the event that we sought additional information from a foreign institution. We believe that such difficulties are mitigated by various factors. First, we are proposing that any foreign institution availing itself of Schedule 13G certify that it is subject to a comparable regulatory scheme and that it will provide Schedule 13D-type information upon request. Second, much of the additional Schedule 13D-type information already may be provided to the primary home country regulator and may be publicly available or available in the event of a formal request.

³⁰⁶ Exchange Act Rule 13d-1(e).

³⁰⁷ We adopted the cooling-off period in 1998, and it applies to both passive investors and qualified institutional investors; therefore, it would apply to a foreign institution filing under proposed Exchange Act Rule 13d-1(b). The cooling-off period begins with the change in investment purpose and lasts until the expiration of the tenth calendar day from the date the investor filed a Schedule 13D.

Request for Comment

- Would the proposed amendments alleviate practical difficulties for foreign beneficial owners without affecting the quality of information available to U.S. investors?
- Should a foreign institution be required, as proposed, to certify on Schedule 13G that it is subject to a regulatory scheme comparable to the U.S. regulatory scheme for the particular category of institution?
 - Would foreign institutions find it difficult to certify that they are subject to comparable regulation? How should we alleviate any difficulty?
 - Should the certification be different or include any other information? Should the certification language include a statement that the foreign institution is subject to comprehensive supervision or regulation in its home jurisdiction,³⁰⁸ rather than the language we proposed? Why or why not?
- Should filing on Schedule 13G only be available, as proposed, to non-U.S. persons who undertake on Schedule 13G to furnish the staff with information, at its request, that would otherwise be disclosed in a Schedule 13D?

³⁰⁸

Similar language is used in Exchange Act Rule 13k-1, which provides an exemption for foreign banks from the insider lending prohibition of Section 13(k). The rule provides a definition of a foreign bank and includes conditions that foreign banks must meet, such as being required to insure deposits or being subject to a deposit guarantee.

- Should a foreign institution that seeks to use a Schedule 13G also be required to file a Form F-X? Should the Form F-X, like Schedule 13G, be required to be filed electronically?
- Should a foreign institution that intends to rely on proposed new Rule 13d-1(b)(1)(ii)(K) be required to file a public notice of such intent? If such a notice was required to be filed, when should the notice be filed and should the filer be required to make the proposed certification at the time the notice is filed?
- Should we also require foreign institutions filing as passive investors under Rule 13d-1(c) to file a Form F-X?
- Should the use of Schedule 13G by foreign institutions relying on the proposed rule be limited to institutions from jurisdictions that have a bilateral enforcement memorandum of understanding (MOU) with the SEC or institutions that are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation, cooperation and the exchange of information?

G. Interpretive Guidance

1. Application of the all-holders rule to foreign target security holders

Most of this release deals with cross-border business combination transactions where the target is a foreign private issuer. In this section, however, we address an issue involving the treatment of foreign target security holders in tender offers generally, including those for U.S. target companies. The issue of bidders' ability to exclude foreign target security holders is addressed here because it closely relates to the issue of

the exclusion of U.S. target security holders in cross-border tender offers, which we discuss in the next section below. As we continue to encourage our fellow international securities and takeover regulators to minimize the ability of bidders to exclude U.S. holders from business combination transactions, we recognize the need to take similar steps with regard to the ability of bidders to exclude non-U.S. holders pursuant to our rules.

In 1986, we adopted Rule 14d-10 and amended Rule 13e-4(f) to require that all target security holders in a tender offer subject to either of those rules be included in the tender offer and treated equally.³⁰⁹ These rules require that third-party tender offers subject to Section 14(d) of the Exchange Act, as well as issuer tender offers subject to Section 13(e) of the Exchange Act, be open to all holders of the subject class of securities.³¹⁰ This equal treatment provision does not prohibit tender offers for less than all outstanding securities of a subject class, but it does require that all security holders be able to accept the tender offer if they choose.³¹¹

The all-holders provisions in Rules 14d-10 and 13e-4(f) apply equally to U.S. as

³⁰⁹ See Amendments to Tender Offer Rules: All-Holders and Best-Price, Release No. 34-23421 (July 11, 1986) [51 FR 25873] (“All-Holders and Best Price Adopting Release”).

³¹⁰ Pursuant to these provisions, the bidder may not restrict the offer to target holders as of a particular record date only. See footnote 35 in All-Holders and Best Price Adopting Release. While as a practical matter, the bidder will look to beneficial holders as of a recent date in distributing the offer materials, the offer must be open to all target security holders, including those who purchase after the tender offer commences. See In the Matter of Application of WHX Corp., Exchange Act Release No. 47980 (June 4, 2003), vacated on other grounds, WHX Corp. v. SEC, 362 F.3d 854 (D.C. Cir. 2004).

³¹¹ If the tender offer is for less than all of the securities of the subject class and the offer is oversubscribed, the bidder must purchase tendered securities on a pro rata basis. See Section 14(d)(6) of the Exchange Act and Exchange Act Rules 13e-4(f)(3) and 14d-8.

well as non-U.S. target holders.³¹² However, we are aware that certain bidders are purporting to exclude foreign target security holders in tender offers subject to these rules. Therefore, we wish to reiterate our position that the all-holders requirement does not allow the exclusion of any foreign or U.S. target holder in tender offers subject to those rules. We believe it is in the interests of U.S. investors to enforce U.S. equal treatment principles for the benefit of non-U.S. target security holders. This is particularly true today, where comparable foreign all-holders requirements may protect U.S. investors by preventing their exclusion from cross-border offers.

We recognize, however, that the requirement to make an offer available to all foreign target holders, particularly for registered exchange offers, may present a burden for bidders that may need to comply with both foreign and U.S. rules. We are soliciting comment on whether any amendments to the U.S. equal treatment provisions are necessary or advisable to allow certain target security holders to be excluded from the offer. In this regard, we note the exception in Rule 14d-10(b), which states that the all-holders rule will not “prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.”³¹³ We are soliciting comment as to whether this rule

³¹² See All-Holders and Best-Price Adopting Release, Section III.A.2., which stated “While a tender offer subject to Sections 13(e) and 14(d) of the Williams Act must be held open to all holders of the subject class of securities, including foreign persons, Rules 14d-10(b)(1) and 13e-4(f)(9)(i) make clear that the all-holders requirement does not affect the required dissemination of tender offers. . . . The Commission has not interpreted these provisions as requiring dissemination of tender offer materials outside of the United States, and the adoption of the all-holders requirement is not intended to impose any additional requirements in this regard.” (emphasis added; footnotes omitted).

³¹³ Exchange Act Rule 13e-4(e)(9) contains a comparable provision for issuer tender offers.

should be amended to include a similar provision with respect to target holders in foreign jurisdictions. We are also soliciting comment as to whether we should specifically define what a “good faith effort” means.

Notwithstanding the requirements of Rule 14d-10 and Rule 13e-4(f) to extend an offer to all holders of a target company’s securities, these provisions have not been interpreted to require that offering materials be mailed into foreign jurisdictions.³¹⁴ We recognize that disseminating a U.S. offer document in non-U.S. jurisdictions may implicate applicable foreign laws. Certain foreign jurisdictions allow bidders not to mail offer materials into certain foreign jurisdictions. For instance, the U.K. Takeover Panel has adopted a “de minimis” exception permitting bidders not to mail offer materials to target holders in jurisdictions where few target securities are held. Under that rule, bidders for U.K. target companies may choose not to mail offer materials to target security holders outside the U.K. and outside the European Economic Area (the “EEA”) when a particular jurisdiction presents significant risks of civil, regulatory or criminal liability to the bidder and less than three percent of the securities of the target are held of

³¹⁴ See footnote 312 above.

record in that jurisdiction.³¹⁵ We note that even when the U.K. Code does not require the dissemination of offer materials into a particular foreign jurisdiction pursuant to this provision, it does not sanction a prohibition on tenders from security holders located there.

We further note that certain bidders have required target holders to certify that tendering their securities complies with local laws or that an exemption applies that allows such tenders without further action by the bidder to register or qualify its offer. We do not believe it is appropriate to shift this burden of assuring compliance with the relevant jurisdiction's laws to target security holders because target security holders may not be in possession of relevant facts regarding the bidder's action and the provisions of local law in their home jurisdiction necessary to make this determination.

³¹⁵ The City Code on Takeovers and Mergers, Rule 30.3. The note to Rule 30.3 provides an exception to the UK's dissemination requirement with respect to shareholders outside of the EEA. The note states:

Where local laws or regulations of a particular non-EEA jurisdiction may result in a significant risk of civil, regulatory or, particularly, criminal exposure for the offeror or the offeree company if the information or documentation is sent or made available to shareholders in that jurisdiction without any amendment, an unless they can avoid such exposure by making minor amendments to the information being provided or documents being sent or made available either:

(a) the offeror or the offeree company need not provide such information or send or make such information or documents available to registered shareholders of the offeree company who are located in that jurisdiction if less than 3% of the shares of the offeree company are held by registered shareholders located there at the date on which the information is to be provided or the information or documents are to be sent or made available ...;

or

(b) in all other cases, the Panel may grant a dispensation where it would be proportionate in the circumstances to do so having regard, notably, to the cost involved, any resulting delay to the transaction timetable, the number of registered shareholders in the relevant jurisdiction, the number of shares involved and any other factors invoked by the offeror or the offeree company.

Request for comment

- Is it necessary or appropriate for bidders in tender offers for U.S. target companies to exclude foreign target security holders in certain non-U.S. jurisdictions? Why? Is the answer different for cash tender offers versus exchange offers?
- Should bidders be allowed to condition tendering into an offer on the subject security holder certifying to compliance with the securities law requirements of its jurisdiction?
- Would permitting exclusion of some foreign target holders result in decreased protections for U.S. holders in cross-border tender offers?
- Should Rule 14d-10 and Rule 13e-4 be amended to include a provision expressly stating that those rules will not prohibit a bidder from excluding shareholders in a particular foreign jurisdiction, where the bidder is prohibited from making the tender offer by foreign law after a good faith effort by the bidder to comply with the law?
 - What should be considered a “good faith effort” for purposes of such a rule change?
 - Should the number or percentage of security holders in a particular jurisdiction or the cost or additional timing requirements of complying with a particular jurisdiction’s rules impact the good faith determination?

- Should our rules be revised to permit exclusion of foreign target security holders in any jurisdiction where a minimal number of target holders are located? If so, what would be an appropriate de minimis threshold? Three percent? Five percent?
 - If the rules should be amended as described, should such a provision be expanded to specifically include situations where a bidder is unable to determine the beneficial ownership of the securities in a foreign jurisdiction?
 - If we were to adopt a de minimis exclusion, should we permit exclusion only where the bidder also establishes a significant risk of civil or criminal liability by extending the offer into that jurisdiction?
- Should we require dissemination of offering materials to all holders of a target's securities, whether or not they are located in the United States? If we adopted such a requirement, should there be exceptions? If so, what should they be?

2. Ability of bidders to exclude U.S. target security holders

As discussed above, one of the primary motivations of the Commission in adopting the cross-border exemptions was to facilitate the inclusion of U.S. security holders in cross-border business combination transactions. We believe those exemptions have been successful generally in encouraging offerors in cross-border business combination transactions to include U.S. security holders in those transactions. At the request of commenters, the Cross-Border Adopting Release also provided guidance on whether and under what circumstances offer materials for offshore tender and exchange

offers may be posted on the Internet without triggering U.S. tender offer and registration rules.³¹⁶ This followed earlier Commission guidance on the use of Internet Web sites to solicit securities transactions and to offer securities.³¹⁷ The issue of using Internet Web sites in offshore tender and exchange offers is part of a broader question as to whether and how bidders in cross-border business combination transactions legitimately may avoid the application of U.S. registration and tender offer rules. Based on our experience with these matters since 1999, we believe it may be helpful to provide additional guidance on issues specific to cross-border tender offers.

Whether U.S tender offer rules apply in the context of a cross-border tender offer depends on whether the bidder triggers U.S. jurisdictional means in making a tender offer.³¹⁸ Today foreign jurisdictions commonly require information about a tender offer or business combination transaction to be posted on a publicly-available and unrestricted Web site.³¹⁹ In addition, it is common for both bidders and target companies in business combination transactions to post information about the transactions on their own Internet

³¹⁶ See Cross-Border Adopting Release, Section II.G.

³¹⁷ See Statement of the Commission regarding use of Internet Web sites to offer securities, solicit securities transactions or advertise investment securities offshore, Release No. 33-7516 (March 23, 1998) [63 FR 14806] (“1998 Internet Release”).

³¹⁸ Section 14(d)(1) of the Exchange Act reads in relevant part: “It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title ... if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such information as the Commission may by rules or regulations prescribe....”

³¹⁹ See, e.g., ProSiebenSat.1 Media AG (September 12, 2005)(describing the procedure in Germany of posting the offer documents on an Internet web site). Such foreign provisions may include a requirement to post the offer documents themselves, or notice of the offer with instructions on how to obtain the offer materials.

Web sites, whether or not they are required by the law of the foreign home jurisdiction to do so.

As discussed above, the Commission has provided guidance on measures acquirors may take to avoid triggering U.S. jurisdictional means.³²⁰ We have recognized that bidders who are not U.S. persons³²¹ may structure a tender offer to avoid the use of the means or instrumentalities of interstate commerce or any facility of a national securities exchange in making its offer and, thus avoid triggering application of our rules.³²² A bidder making a tender offer for target securities of a foreign private issuer may exclude U.S. target security holders if the offer is conducted outside the United States and U.S. jurisdictional means are not implicated.³²³ However, a bidder may implicate U.S. jurisdictional means if it fails to take adequate measures to prevent tenders by U.S. target holders while purporting to exclude them. While we encourage bidders to allow U.S. target security holders to participate in cross-border tender offers, when a bidder permits them to participate in a tender offer, it must follow U.S. rules unless an exemption applies. The relevant question thus becomes how bidders may conduct

³²⁰ See generally, the 1998 Internet Release and the Cross-Border Adopting Release.

³²¹ In our view, it generally is inappropriate for a U.S. bidder to exclude U.S. target security holders when making a tender offer for a foreign private issuer target company. We continue to believe that, in light of the cross-border exemptions adopted in 1999, a U.S. bidder generally would not have reason to exclude U.S. target security holders in making an offer for the securities of a foreign private issuer. See Cross-Border Adopting Release, Section II.G.4. The rule revisions proposed today, if adopted, would reinforce this view.

³²² See All-Holders and Best Price Adopting Release, Section III.A.3. (finding that amendments to the all-holders and best price provisions specifically exempting offshore exclusionary offers from those provisions were unnecessary, given the application of the jurisdictional means test).

³²³ See footnote 319 above.

exclusionary offers that are limited to non-U.S. holders³²⁴ without implicating U.S. tender offer rules, particularly where those offers are subject to the equal treatment principles in Section 13(e) or 14(d) of the Exchange Act.³²⁵

The Commission has recognized, and we reaffirm today, that business combination transactions present special considerations not common to capital-raising issuances.³²⁶ Because of their pre-existing investment in a target company, target security holders, including U.S. holders, are likely to seek out any information about the target company, the acquiror, and the proposed transaction.³²⁷ U.S. security holders also may have a greater incentive and opportunity to find a means to participate in transactions involving the target securities they own. Even where they are not able to do so, U.S. holders' interest in those securities may be affected significantly by a business combination transaction involving the target company.³²⁸

For these reasons, bidders seeking to avoid the application of U.S. law should take special precautions to assure that their offer is not made in the United States. We have

³²⁴ We use the term “exclusionary offer” to mean tender offers that exclude U.S. target holders of the subject class of securities for which the offer is made.

³²⁵ For tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act, such as third-party offers for a target class of securities that is not registered under Section 12 of the Exchange Act, no all-holders requirement exists. Therefore, U.S. target security holders technically may be excluded from those offers even where the U.S. jurisdictional means are triggered; however, these offers would need to comply with the procedural and anti-fraud requirements of applicable U.S. rules.

³²⁶ See Cross-Border Adopting Release, Section II.G.2.

³²⁷ This is particularly true today, where advances in technology permit investors to establish online alert systems to inform them of any news relating to a target company.

³²⁸ This is particularly the case in cross-border tender offers, where bidders' ability to “squeeze out” target security holders remaining after a tender offer may be more limited than in the United States. For example, in some countries, bidders must achieve ownership levels significantly in excess of 51 percent of target securities to be able to compulsorily acquire the remaining target securities. Where target securities are delisted after the tender offer, U.S. holders excluded from the offer may be left with an illiquid security.

provided guidance on how they may do so in the context of cross-border tender offers.³²⁹ Perhaps the most basic measure is to include legends on the offer materials themselves and on any Internet Web site on which they are posted, indicating that the offer is not being made in the United States.³³⁰ In addition, the bidder should take special precautions to assure that tenders are not accepted from nor sales of bidder securities made (in the case of exchange offers) to target security holders resident in the United States.³³¹ These may include, in responding to inquiries and processing letters of transmittal, obtaining adequate information to determine whether the target security holder is a U.S. investor.³³² In addition, the bidder could require representations by the tendering security holder, or anyone tendering on that person's behalf, that the tendering holder is not a U.S. holder or someone tendering on behalf of a U.S. holder.³³³

Several issues have come to light with respect to these measures to keep a tender offer outside of the United States. First, we reiterate that a legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself because, as discussed in the preceding paragraph, if the bidder wants to support a claim that the offer has no jurisdictional connection to the United States, it also will need to take special precautions

³²⁹ See Cross-Border Adopting Release, Section II.G.2.

³³⁰ See 1998 Internet Release, Section III.B.

³³¹ See Cross-Border Adopting Release, Section II.G.2. We note that business combinations other than tender offers, where the target company is being merged out of existence, are different because once such transactions are approved, all target holders' securities will be acquired. In business combinations other than tender offers, we have stated that we do not believe the acquiror should avoid the payment of consideration to U.S. target holders. Id.

³³² Id.

³³³ Id.

to prevent sales to or tenders from U.S. target holders.³³⁴ In some cases, bidders purporting to make exclusionary tender offers offshore have attempted to circumvent foreign all-holders requirements by including statements that the tender offer is not “being made into the United States.” We do not view such statements as sufficient in themselves to avoid being subject to the U.S. federal securities laws if, as a practical matter, U.S. holders are not and may not be prevented from participating in the offer using U.S. jurisdictional means.

Bidders may require a representation or certification from tendering holders that they are not U.S. holders to avoid triggering U.S. law.³³⁵ We recognize the possibility that target security holders could misrepresent their status in order to be permitted to tender into an exclusionary offer. We have stated that where this occurs, bidders will not be viewed as having targeted U.S. investors, thereby invoking U.S. jurisdictional means.³³⁶ However, this position is premised on the bidder having taken adequate measures reasonably designed to guard against purchases from and sales to U.S. holders.³³⁷ It is also premised on the absence of indicia that would or should put the bidder on notice that the tendering holder is a U.S. investor.³³⁸ Where tenders in

³³⁴ See Cross-Border Adopting Release, Section II.G.2.

³³⁵ See Cross-Border Adopting Release, Section II.G.2.

³³⁶ See 1998 Internet Release, Section III.C.

³³⁷ Id.

³³⁸ These would include receipt of payment drawn on a U.S. bank, provision of a U.S. taxpayer identification number or statements by the tendering holder that notwithstanding a foreign address, the tendering holder is a U.S. investor. We have explicitly noted that if, after implementing measures intended to safeguard against tenders by U.S. persons, the bidder discovers it has purchased securities from U.S. holders, it should consider other measures that may avoid this lapse in the future. Id.

exclusionary offers are made through offshore nominees, bidders could require that these nominees certify that tenders are not being made on behalf of U.S. holders. We recognize that this may be problematic where the law of the applicable foreign jurisdiction prevents the nominee from knowing the identity or location of beneficial holders on whose behalf they hold.

While we encourage the participation of U.S. target security holders in cross-border tender offers and other business combination transactions, their participation should be accomplished in compliance with U.S. rules or through applicable cross-border exemptions. In the future, the staff will more closely monitor exclusionary offers to determine whether Commission action is necessary to protect U.S. target holders.

Request for comment

- Should the Commission provide additional guidance on the specific measures an acquiror may or should take to avoid triggering U.S. jurisdictional means in the context of cross-border business combination transactions?
- What measures are reasonable and effective, and in the best interests of U.S. investors?
- Should we also consider further rulemaking to address the situation where a bidder seeks to avoid U.S. jurisdictional means by excluding U.S. target security holders, but is subject to foreign home country rules mandating that all target security holders must be permitted to participate in the offer? How would such rules balance the practical needs of bidders with the requirement to protect the interests of U.S. investors?

3. Vendor placements

In many business combination transactions, the offer consideration may include securities of the bidder. In some transactions, cash may be offered together with the bidders' securities and, in other transactions, no cash will be offered and the bidder's securities will constitute the sole consideration offered to tendering holders of the target's securities.

For Tier I-eligible tender offers, for purposes of complying with the equal treatment requirement, bidders are permitted to offer cash consideration to U.S. holders in lieu of offering securities so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders. In addition, most Tier I-eligible offers should be eligible for the exemption from Securities Act registration provided by Rule 802. If Rule 802 or another exemption from registration is not available, then the bidder is required to register the securities being offered under the Securities Act.

In certain cross-border exchange offers, bidders may seek to avoid the registration requirements under the Securities Act by establishing a vendor placement arrangement for the benefit of U.S. target security holders who tender into the offer. In a vendor placement, the bidder generally employs a third party to sell in offshore transactions the securities to which tendering U.S. security holders are entitled in the offer. The bidder (or the third party) then remits the proceeds of the resale (minus expenses) to those U.S. target security holders that tendered into the offer.

Where permissible, the vendor placement process allows bidders in cross-border exchange offers to extend the offer into the United States but avoid the Securities Act

registration requirements. In effect, the vendor placement is an effort to convert an exchange offer involving the offer and sale of the bidder's securities (which would require Securities Act registration) into an offer involving solely cash (which does not require registration) as it relates to tendering U.S. security holders.

The staff often receives inquiries about the use of the vendor placement structure in cross-border offers and has in the past issued no-action letters permitting the use of the structure in limited situations.³³⁹ Although tendering holders receive cash in a vendor placement, the amount of cash received is largely dependent on the market value of the underlying security. The protections of the Securities Act are intended to give investors access to information when making an investment decision with respect to the purchase of a security. A vendor placement does not in all circumstances eliminate the requirement for Securities Act registration, because tendering U.S. holders may be effectively making an investment decision with respect to the purchase of a security.

In the no-action letters issued by the staff, there are a number of factors the staff looks to in deciding whether the vendor placement arrangement obviates the need for Securities Act registration. These factors include:

- the level of U.S. ownership in the target company;
- the amount of bidder securities to be issued overall in the business combination as compared to the amount of bidder securities outstanding before the offer;

³³⁹ See, e.g., Singapore Telecommunications Ltd (May 15, 2001); Oldcastle, Inc. (July 3, 1986); Electrocomponents PLC (September 23, 1982), Equitable Life Mortgage and Realty Investors (December 23, 1982); Getty Oil (Canadian Operations) Ltd. (May 19, 1983) and Hudson Bay Mining and Smelting Co., Ltd. (June 19, 1985).

- the amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer;
- the liquidity and general trading market of the bidder's securities;
- the likelihood that the vendor placement can be effected within a very short time after the termination of the offer and the bidder's acceptance of shares tendered in the offer;
- the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales; and
- the process used to effect the vendor placement sales.

We believe these factors are relevant to whether registration is required. In addition to the other factors listed above, offerors should be particularly cognizant of U.S. target ownership levels.

We believe that a vendor placement arrangement in cross-border exchange offers would be subject to Securities Act registration unless the market for the bidder securities to be issued in the exchange offer and sold pursuant to the vendor placement procedure is highly liquid and robust and the number of bidder securities to be issued in the exchange offer and for the benefit of tendering U.S. holders is relatively small compared to the total number of bidder securities outstanding. We also would consider:

- the timeliness of the vendor placement process; that is, whether sales of bidder securities through the vendor placement process are effected within a few business days of the closing of the offer;

- whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before that process is complete; and
- whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

In tender offers subject to Section 14(d) of the Exchange Act, the all-holders and best price requirements in Rule 14d-10 also are implicated by the use of the vendor placement structure because U.S. target security holders would receive different consideration from their non-U.S. counterparts. We generally believe that the parameters of the Tier I cross-border exemptions should represent the appropriate limits under which a bidder in a tender offer subject to Regulation 14D may offer cash to U.S. security holders while issuing shares to their counterparts outside the United States.

Bidders making a cross-border exchange offer sometimes ask whether they may exclude some U.S. target holders and include in the exchange offer only those U.S. target holders (such as accredited investors) for whom an exemption from the registration requirements of the Securities Act may be available. We have stated that exchange offers for securities subject to Section 14(d) of the Exchange Act may not be made in the United States on a private offering basis, consistent with the all-holders provisions of Rule 14d-10.³⁴⁰ Thus, even where the bidder is eligible to rely on an exemption from Securities Act Section 5 for such offers, it would violate the equal treatment provisions applicable to such offers by excluding target security holders for whom an exemption was not available. Similarly, as discussed above, offering cash under a vendor placement

³⁴⁰ See footnote 91 in the Cross-Border Adopting Release.

arrangement to some U.S. holders and bidder securities to others (such as institutions) is not permitted in tender offers subject to the all-holders rule.

Bidders may continue to use vendor placement arrangements in accordance with the guidance set forth here. Where a bidder seeks to use the vendor placement structure for a tender offer subject to Rule 14d-10 at U.S. ownership levels above Tier I, it must seek an exemption from those rules. As noted above, such relief will be granted only where it is in the interests of U.S. investors.

III. GENERAL REQUEST FOR COMMENT

We request and encourage any interested person to submit comments on any aspect of our proposals or guidance and any of related matters that might impact the proposed amendments or guidance. We request comment from investors, issuers, and other users of the information that may be affected by the proposed rule changes and interpretive guidance. We also request comment from service professionals, such as law and accounting firms. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiatives if accompanied by supporting data and analysis of the issues addressed in those comments.

IV. PAPERWORK REDUCTION ACT

Some provisions of the proposed rule amendments require the “collection of information” within the meaning of the Paperwork Reduction Act of 1995 (the “PRA”).³⁴¹ We will submit our proposed revisions to the Office of Management and

³⁴¹ 44 U.S.C. 3501 *et seq.*

Budget (“OMB”) for review in accordance with the PRA.³⁴² The titles for the collections of information are:

- (1) “Form S-4” (OMB Control No. 3235-0065);
- (2) “Form F-4” (OMB Control No. 3235-0325);
- (3) “Form ID” (OMB Control No. 3235-0328);
- (4) “Form CB” (OMB Control No. 3235-0518);
- (5) “Form F-X” (OMB Control No. 3235-0379);
- (6) “Schedule TO” (OMB Control No. 3235-0515); and
- (7) “Securities Ownership - Regulation 13D (Commission Rules 13d-1 through 13d-7 and Schedules 13D and 13G)” (OMB Control No. 3235-0145).

We adopted these existing forms and schedules pursuant to the Securities Act and Exchange Act. Forms F-4 and S-4 contain disclosure requirements for registration statements that are prepared by issuers to provide investors information to make informed investment decisions in registered offerings of securities. Form CB and Schedule TO provide investors with information to make informed investment decisions regarding certain business combination transactions and rights offerings. Regulation 13D was adopted pursuant to the Exchange Act and sets forth the disclosure requirements for securities ownership reports filed by investors.

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by these regulations constitute reporting and cost burdens imposed by each collection of information. An agency may

³⁴² 44 U.S.C. 3507(d); 5 CFR 1320.11.

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.

A. Summary of Proposals

1. Proposed amendments to the Tier I exemption and Form CB

The proposed rule amendments would add to the types of affiliated transactions that could be effected in reliance on the Tier I exemption from Rule 13e-3(g)(6). A Form CB would be required when an issuer or acquiror relies on the expanded Tier I exemption proposed and publishes or otherwise disseminates an informational document to holders of the subject securities. Because more transactions would become eligible to rely on the exemption from Rule 13e-3 for cross-border transactions, this rule change may result in additional submissions of Form CB. If the rule were not expanded, however, the issuer or affiliate would be required to comply with the more burdensome filing requirements of Schedule 13E-3 if the issuer or affiliate sought to include U.S. security holders in the transaction. We believe the proposed rule and reduced filing requirement would encourage issuers or affiliates to include U.S. security holders in transactions that otherwise may have excluded them to avoid Rule 13e-3 and the corresponding Schedule 13E-3 filing requirements. Domestic or foreign entities or persons engaged in cross-border business combination transactions would likely be the respondents to the collection of information requirements.

Unlike Schedule 13E-3, Form CB is a notice filing that is little more than a cover sheet that incorporates offer documents sent to security holders pursuant to applicable foreign rules in the issuer's or target's home country. The party furnishing the form must attach an English translation of the offer materials disseminated abroad. Form CB must

be submitted by the next U.S. business day after that document is disseminated under home country rules.

We propose to require all Form CBs to be filed electronically. Under existing rules, only persons who are already subject to reporting obligations under Section 13(a) or 15(d) of the Exchange Act are required to submit Form CB electronically and all others may submit the form in paper. We also propose to require that Form F-Xs filed in connection with Form CBs to be filed electronically. We do not expect these amendments to affect the overall collection of information burden of these forms.

Form ID is filed by registrants, individuals, transfer agents, third-party filers or their agents to request the assignment of access codes that permit the filing of securities documents on EDGAR. This form enables the Commission to assign an identification number (CIK), confirmation code, password and password modification authorization code to each EDGAR filer, each of which is designed to protect the security of the EDGAR system. While we do not expect that the proposed amendments will affect the overall collection of information burden of Forms CB and F-X, we do expect that it will cause additional respondents to file a Form ID each year and, as a result, will increase the annual collection of information burden for that form. We estimate that 65,700 respondents file Form ID each year at an estimated burden of .15 hours per response, all of which is borne internally by the respondent for a total annual burden of 9,855 hours. For fiscal year 2007, a total of 189 Form CBs were filed with the Commission. Of those 189 Form CBs, 100 were filed in paper. We expect the proposed amendments will cause an additional 100 respondents to file a Form ID each year and, as a result, cause an

additional annual burden of 15 hours (100 x .15). For purposes of the PRA, we estimate that the additional burden cost resulting from the proposed amendments will be zero.

2. Proposed amendments to Forms S-4, F-4, and Schedule TO

We propose amendments to the cover page of Forms S-4 and F-4 and Schedule TO that would require the filer to check a box specifying the applicable cross-border exemption being relied upon in connection with the transaction. Domestic and foreign persons or entities filing these documents would be the respondents to the collection of information requirement. This change would not affect the substantive obligation to file the forms or schedule. This additional information would allow the staff to better process such filings and monitor the application of the cross-border exemptions. For our proposal regarding Schedule TO and Forms S-4 and F-4, the amount of information required to be included in each schedule or form would change minimally with the addition of a check box. Accordingly, for purposes of the PRA, our preliminary estimate is that the amount of time necessary to prepare each schedule or form, and hence, the total amount of burden hours, would not change.

3. Proposed Amendments to Schedule 13G

Exchange Act Schedule 13G is a short-form filing for persons to report ownership of more than five percent of a class of equity securities registered under Section 12 of the Exchange Act. Generally, the filer must certify that the securities have not been acquired and are not held for the purpose of, or with the effect of, changing or influencing the control of the issuer of the securities. For purposes of the PRA, we currently estimate that compliance with the Schedule 13G requirements under Regulation 13D requires 98,800 burden hours in aggregate each year, broken down into 24,700 hours (or 2.6 hours

per respondent) of respondent personnel time and costs of \$22,230,000 (or \$2,340 per respondent) for the services of outside professionals.³⁴³

The proposed amendment to Rule 13d-1 would expand the availability of Schedule 13G to foreign institutions governed by a regulatory system substantially comparable to the U.S. regulatory system for domestic institutions. We propose to allow specified foreign institutions to report beneficial ownership of more than five percent of a subject class of securities on Schedule 13G instead of Schedule 13D. Foreign institutions of the type specified in amended Rule 13d-1(b) would be the likely respondents to the collection of information requirements. These institutions either currently would be filing on Schedule 13D as required by existing rules, or would be required to seek no-action letters from the staff to permit them to file on Schedule 13G to the same extent as their domestic counterparts, so long as they satisfy certain conditions. Amending the rule would enable foreign institutions meeting the conditions in the rule to file the Schedule 13G without seeking a no-action letter. Therefore, the amended rule may result in only a slight increase in the number of Schedule 13G filers.³⁴⁴

³⁴³ These figures assume 9,500 respondents file Schedule 13G with the Commission annually. We estimate that 25 percent of the burden of preparation is carried by the company internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the issuer. These figures assume an average cost of \$300 per hour for the services of outside professionals. We have increased the cost estimate to \$400 since our last estimate provided to OMB, based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission. Therefore, the revised cost for the service of outside professionals would be \$29,640,000 (\$400 x 74,100 hours) or \$3,120 per respondent.

³⁴⁴ Based on the number of no-action requests in this area in recent years, we believe that approximately three filers per year would benefit from this proposed change and would avoid the time and expense of submitting a no-action request to the staff. In addition, foreign institutions currently filing on Schedule 13D who have not sought no-action relief to file on Schedule 13G would also benefit by becoming eligible to use the shorter Schedule 13G. See discussion above.

For purposes of the PRA, we estimate that the proposed amendments to Schedule 13G would create an incremental burden of two hours per response, which we would add to the existing Schedule 13G burden resulting in a total burden of 117,800 hours.³⁴⁵ We note that the burden associated with the proposed amendments to Schedule 13G initially would be higher with an estimated burden of five hours. Over time, however, we believe that on average the burden would lessen and therefore estimate an incremental burden of two hours per response. Each additional filer would incur a burden of approximately .50 hours of respondent personnel time (25 percent of the total burden) and costs of \$450 for the services of outside professionals (75 percent of the total burden). In sum, we estimate that the amendments to Schedule 13G would increase the annual paperwork burden by approximately 1.50 hours of respondent personnel time³⁴⁶ and a cost of approximately \$1,350 for the services of outside professionals.³⁴⁷

We estimate that Schedule 13D has a total burden of approximately 14.5 hours per response to prepare and is filed by 3,000 respondents annually. For purposes of the PRA, we currently estimate that compliance with the Schedule 13D requirements under Regulation 13D requires 43,500 burden hours in aggregate each year, broken down into

³⁴⁵ We currently estimate the burden for preparing a Schedule 13G filing to be 10.4 hours, resulting in a total of 98,800 burden hours in aggregate each year. If each additional filer incurred an additional two hours, the resulting burden would be 117,800 total burden hours ((10.4 hours + two hours) x 9500 respondents).

³⁴⁶ Three additional filers x .50 hours of respondent personnel time = 1.50 aggregate burden hours.

³⁴⁷ Three additional filers x \$450 = \$1,350.

10,875 hours (or 3.6 hours per respondent) of respondent personnel time and costs of \$9,787,500 (or \$3,263 per respondent) for the services of outside professionals.³⁴⁸

Based upon these estimates, a foreign institution currently filing a Schedule 13D that would be eligible to file a Schedule 13G pursuant to the proposed rule would benefit from a cost reduction of \$473 per respondent.³⁴⁹ As noted above, however, for a number of years, the staff has provided no-action relief to foreign institutions seeking to file a Schedule 13G rather than a Schedule 13D. For those institutions that are already filing a Schedule 13G pursuant to no-action relief, the proposed rules should only increase the cost associated with providing the required certification in Schedule 13G and will not significantly impact the cost of complying with the requirements of Regulation 13D.

B. Solicitation of comments

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond,

³⁴⁸ As noted above, we have increased the cost estimate to \$400 since our last estimate provided to OMB, based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission. Therefore, the revised cost for the service of outside professionals would be \$13,050,000 (\$400 x 10,875 hours) or \$4,350 per respondent.

³⁴⁹ We calculate this figure in the following manner: $\$3,263 - (\$2,340 + \$450) = \473 . The total cost burden of Schedule 13G is estimated currently at an aggregate burden of \$22,230,000, or \$2,340 per respondent ($\$22,230,000/9,500$ respondents = \$2,340).

including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090, with reference to File No. S7-10-08. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-10-08, and be submitted to the Securities and Exchange Commission, Office of the Secretary – Records Management Branch, 100 F Street, NE, Office of Filings and Information Services, Washington, DC 20549. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is assured of having its full effect if OMB receives it within 30 days of publication.

V. COST-BENEFIT ANALYSIS

We are proposing amendments to our rules that would reduce the overall cost for issuers and acquirors engaged in cross-border business combination transactions. We also provide interpretive guidance regarding the application of certain rules. Under current rules, where there are conflicts between U.S. and foreign law or practice, acquirors in cross-border business combination transactions frequently seek no-action or exemptive letters from the staff. Under the proposed rule amendments, much of the relief sought in the past would be available without the need for no-action or exemptive letters.

As a result, the benefits of the rule amendments would include an increase in regulatory certainty about the U.S. rules governing cross-border business combination transactions and a substantial savings in the cost of preparing letters requesting no-action or exemptive relief. Decreasing the burden on acquirors of complying with U.S. rules governing business combination transactions is designed to encourage them to extend more transactions to U.S. target holders; therefore, we believe the proposed rule revisions would be in the interests of U.S. investors while continuing to provide appropriate protections. In order to more fully characterize these benefits, we seek comments on the average cost of preparing such letters and the amount of time spent working through concerns raised during the staff's review of such letters. We also solicit comments on any incremental costs of undertaking cross-border transactions that might arise from the proposed rule amendments. We request any relevant data from commenters that would help us quantify these costs and related benefits.

In analyzing the costs and benefits of the proposed rules, we compare estimated future cross-border transaction activity that would likely occur under the proposed rules with what would occur in a benchmark case without the rules. Because the proposed rules would assure parties of their ability to engage in practices that are permitted now only through the request and issuance of a no-action or exemptive letter, the benchmark case is the level of transaction activity that would occur if parties did not have access to such regulatory relief.

A. Proposed changes to the eligibility test for determining eligibility to rely on the cross-border exemptions

1. Proposed changes

The changes we propose to the test for determining eligibility to rely on the cross-border exemptions for business combination transactions are limited in nature and scope and do not represent a significant departure from our current rules. They are intended to address specific problems acquirors have faced in determining whether they can rely on the cross-border exemptions. These changes are not intended to expand or reduce the number of parties eligible to use the cross-border exemptions. The changes will not materially affect the cost of undertaking such transactions relative to what would occur if parties could not reliably obtain no-action or exemptive letters, as currently is the case.

We propose to allow acquirors to calculate the required U.S. beneficial ownership figure within a range of dates that is no more than 60 days before a specified reference date. Currently, our rules require the calculation to be done as of a set date. We also propose to change the reference date for purposes of the required calculation for business combination transactions. Under current rules, the calculation was required to be done as of the 30th day before commencement of a cross-border business combination transaction. As proposed, we would require the calculation to be done no more than 60 days before the public announcement of the cross-border business combination transaction. We also propose limited changes to the manner in which U.S. ownership may be calculated for cross-border tender offers accomplished on a non-negotiated or hostile basis. These changes are intended to clarify certain elements of the “hostile presumption” test for these kinds of offers that have created uncertainty for acquirors in the past. As discussed above, the reference date for the negotiated transaction and hostile

presumption tests for business combination transactions also would be changed to key off of the public announcement of the transaction. Finally, in this release and the proposed rules, we provide some guidance on the “reason to know” element of the hostile presumption test, which we hope would make the application of the test simpler and more certain for acquirors.

2. Benefits

We anticipate that the enhanced flexibility to choose a date within a range may make it easier for acquirors to accomplish the required calculation as specified under our rules, thereby promoting use of the exemptions and the inclusion of U.S. holders while reducing the acquirors’ burden of seeking no-action or exemptive letters in this area. Changing the reference point for the calculation of U.S. ownership to the public announcement of the transaction would mean that the calculation would be done as of a date when the target’s security holder base may be unaffected (or less affected, if there are some changes in response to rumors in the market) by the announcement of the transaction, which would provide a more accurate picture of the security holder base. This change also would allow acquirors more flexibility in planning cross-border business combination transactions and therefore, we expect bidders would be encouraged to engage in these transactions. It is unclear whether using public announcement as the reference point for the calculation would have the effect of increasing or reducing U.S. ownership in the target company.

3. Costs

Under the proposed amendments, U.S. investors may lose certain protections under the U.S. rules governing cross-border business combination transactions if the

foreign private issuer in which they own securities becomes the subject of such a transaction and the acquiror relies on the cross-border exemptions. To the extent that the applicable cross-border exemptions would exempt the acquiror from compliance with U.S. registration, filing and disclosure requirements, U.S. investors would lose these protections. In such circumstances, however, we believe that the benefit to U.S. investors of being included in the transaction rather than being excluded justifies the cost of reduced protections under U.S. law. Otherwise, we do not believe that U.S. investors would be harmed by the proposed flexibility in calculation of U.S. ownership.

B. Changes to the Tier I cross-border exemptions

1. Expansion of the Tier I exemption from Rule 13e-3

We propose to expand the set of cross-border business combination transactions that are exempt from the requirements of Rule 13e-3. Currently, the cross-border exemption from Rule 13e-3 applies only to tender or exchange offers or business combinations conducted under Tier I.³⁵⁰ We propose to expand the exemption to encompass any kind of affiliated transaction that otherwise meets the conditions of the Tier I exemption, including schemes of arrangement, cash mergers, compulsory acquisitions for cash, and other types of transactions.

a. Benefits

The expansion of the Tier I exemption from Rule 13e-3 would likely result in fewer filings of Schedule 13E-3, thus reducing the costs for issuers and affiliates in cross-border transactions that would otherwise be subject to those rules. Under the current

³⁵⁰ As noted previously, the Tier I exemption is available when U.S. holders beneficially own no more than ten percent of the foreign private issuer target's securities.

rules, the burden of complying with Rule 13e-3 and Schedule 13E-3 may be greater for foreign filers than domestic filers. Foreign filers may not have a counterpart to these rule provisions in their home jurisdiction and may not be subject to the same fiduciary duty standards that form the basis for this heightened disclosure system for affiliated transactions.

Currently, some entities engaged in affiliated cross-border business combination transactions that would have been subject to Rule 13e-3 under our current rules and cross-border exemptions request individual exemptive relief from the staff. The staff has routinely granted these requests. To the extent that these kinds of requests would no longer be necessary, the rule change we propose today would further reduce the costs for these entities. Issuers and affiliates may have excluded U.S. holders from transactions where they would have been required to file a Schedule 13E-3. We have been told that entities may have avoided making an offer to U.S. holders to avoid application of these rules, although it is difficult to isolate the effect of this provision on the number of entities that chose not to include U.S. holders. During 2007, approximately 110 Schedules 13E-3 were filed, 10 of which were filed by foreign private issuers. During that same period, no requests for no-action relief on this issue were granted. Therefore, we assume the overall effect would not be significant, although we are not able to estimate the number of transactions that may have been structured to avoid U.S. jurisdictional means, thereby avoiding the requirement to file a Schedule 13E-3. We solicit comment regarding the number of entities or persons that the rule amendment would affect and the increases or decreases in cost that are likely to result. We believe the rule amendment would result in a cost reduction because it would lower the costs and

burdens associated with extending these kinds of transactions into the United States. This amendment would be in the interests of U.S. investors to the extent that the expanded exemption from Rule 13e-3 motivates an acquiror to include U.S. investors in the transaction. Since the exemption applies only where U.S. security holders make up no more than ten percent of the subject security holder base, and because the heightened disclosure requirements of Schedule 13E-3 may be onerous for foreign filers, we believe this exemption may result in more cross-border transactions being extended to U.S. investors.

b. Costs

U.S investors of foreign private issuer targets in cross-border business combination transactions that would have been subject to Rule 13e-3 but for our proposed rule amendment would lose the benefits of the disclosure in Schedule 13E-3, to the extent that such disclosure is not required under applicable foreign law.

We seek data regarding the number of Schedules 13E-3 filed with respect to the securities of foreign private issuers, the number of entities or persons that the rule amendment would affect, and the increases or decreases in cost that are likely to result, so we may be able to estimate the costs and benefits associated with any possible reduction of Schedule 13E-3 filings.

2. Technical change to Rule 802 of Regulation C

We also propose technical changes to the language of Rule 802. These changes are not intended to substantively change the filing obligations under the current rule, and we do not believe they would have any impact on the way that rule currently functions,

except to clarify how it may be used. Therefore, the proposed changes would likely confer no significant costs or benefits.

C. Proposed changes to the Tier II cross-border exemptions

The rule changes we propose represent an expansion of the current cross-border exemptions available to tender offers that meet the conditions outlined in our rules. The Tier II exemptions – which exempt certain tender offers for foreign target companies in which U.S. persons beneficially own more than ten percent but not more than 40 percent of the target’s subject securities – currently apply to tender offers conducted by third parties, issuers or affiliates, where those tender offers are subject to Rule 13e-4 or Regulation 14D. The rule changes we propose would expand the relief provided in the Tier II exemptions, and clarify that the Tier II exemptions also may be used for cross-border tender offers subject only to Regulation 14E of the Exchange Act. We also propose to expand Tier II relief for dual offers by allowing offerors to make more than one concurrent non-U.S. offer, and to allow certain U.S. offers to include non-U.S. persons and certain foreign offers to include U.S. persons. Additionally, we propose changes to Rule 14e-5 to codify recent exemptive relief for Tier II-eligible tender offers.

1. Benefits

These changes to the Tier II cross-border exemptions would expand the relief provided for eligible cross-border tender offers.³⁵¹ The rule changes would reduce the need for bidders to seek individual no-action or exemptive relief from the staff. Since they represent areas in which relief is most frequently requested and granted for these

³⁵¹ See the discussion above regarding the changes to the threshold eligibility determination relating to the calculation of U.S. ownership.

kinds of transactions, the changes would reduce the associated costs and burdens of applying for relief. Where we already have reduced the associated costs and burdens of requesting and granting relief through Rule 14e-5 class exemptive letters, the codification of that relief in rule text benefits market participants by modernizing the rule and enhancing its utility by providing one readily-accessible location for exempted activities. Because the proposed rule changes will make it easier to make purchases outside of a U.S. tender offer in a manner consistent with relief frequently granted by the staff in this area, we believe the proposed changes also would have the effect of encouraging acquirors and bidders to extend cross-border tender offers to U.S target holders on the same terms as all other target security holders.

To the extent that some of these proposed rule changes were not contemplated in the 1999 Cross-Border Adopting Release and came about only as a result of the staff's issuance of no-action and exemptive letters, we analyze the benefits and costs of the proposed revisions against the rules adopted in 1999 rather than against the perceived state of the rules as created by the issuance of no-action relief. When the Tier II exemption was adopted in 1999, by its terms it only applied to tender offers subject to Rule 13e-4 or Regulation 14D. However, we believe the benefits of the Tier II exemption would apply equally to cross-border tender offers governed by Regulation 14E only. By expanding the Tier II exemption to cover such offers, the changes we propose would allow more acquirors to take advantage of the exemption and thus allow more U.S. investors to benefit from being included in the offer. Expanding the category of offers for which Tier II relief is granted also would allow more flexibility in structuring offers and encourage more acquirors to take advantage of the exemption. Similarly, the

proposed changes to the Tier II relief for dual offers and the proposed changes to Rule 14e-5 are intended to address certain foreign regulatory conflicts that were not fully appreciated when the Tier II exemption was adopted in 1999. By revising our rules to address these conflicts, we hope to enhance the applicability of the Tier II exemption and the exemptions to Rule 14e-5 and therefore encourage more acquirors to take advantage of the exemptions and include U.S. holders in cross-border transactions.

2. Costs

As with transactions governed by Regulation 14D and Rule 13e-4, the cost of reducing the protections of the Williams Act may include reduced procedural and informational safeguards for U.S. investors; however, the exemptions have been designed to reduce such a possibility. We are not aware of any other cost that would be incurred by expanding Tier II relief to tender offers governed by Regulation 14E only. In addition, because these amendments would not change the filing obligations of acquirors, investors would not lose the benefits of any required disclosure. Neither the existing or proposed changes to Tier II affect the registration requirements of Section 5 of the Securities Act, which are not covered by these exemptions.

The codification of Rule 14e-5 class exemptive letters into rule text should not increase costs to market participants, as the substance of the relief is not being altered. It is only a mechanism for the relief that is being changed from class exemptive letters to propose rule exemptions. While permitting purchases outside of a tender offer might negatively impact U.S. investors by weakening the equal treatment and proration protections of our rules, we believe that the conditions imposed on the ability to purchase outside of a Tier II tender offer under the proposed rules should help to safeguard the

interests of U.S. security holders. We solicit comment on any increases or reductions in costs to security holders that may result from the proposals.

D. Expanded availability of early commencement

1. Proposed change to Rule 162

The rules we propose today would expand the ability to commence an exchange offer before the registration statement filed with respect to the securities offered is declared effective by the Commission. Our current rules permit “early commencement” only where an exchange offer is subject to Rule 13e-4 or Regulation 14D. For tender offers conducted under Tier II, we propose to extend the option to all exchange offers, so long as withdrawal rights are provided to the same extent as would be required under Rule 13e-4 or Regulation 14D.

2. Benefits

The proposed rule change would further harmonize the treatment of exchange offers and cash tender offers. It would not impact the filing and disclosure obligations of the acquiror under the Securities Act, or the requirement to comply with the tender offer rules in Regulation 14E. Because foreign law may provide that a tender offer for one class of securities will trigger an obligation to make a contemporaneous offer for a related class, this rule change could enhance the ability of such exchange offers to commence early, and therefore could enhance the speed with which such offers may be effected. The proposed rule change also could allow combined offers to compete with cash bids.

The rule would provide the benefit to investors of receiving withdrawal rights when they otherwise would not have been required under U.S. rules. It also could cause offerors to extend an exchange offer to U.S. target security holders, where concerns about

delays arising from the U.S. registration process might otherwise have caused them to exclude U.S. investors.

3. Costs

As discussed above, allowing an early commencement option for an exchange offer may result in informational costs for target security holders. Broadening the availability of early commencement may mean that investors may be more likely to receive updates to the original prospectus, to the extent that staff review results in material changes to that document. In addition, this may present increased costs for offerors who must recirculate in circumstances where they have elected to commence their offer early, before the staff comment process (where applicable) is complete.

E. Proposed changes to forms and schedules

In this release, we propose changes to the manner in which several forms and schedules are filed. We propose that all Form CBs, and Form F-Xs filed in connection with a Form CB, be required to be filed electronically. Currently, Form CB must be filed electronically only where the person furnishing it already is subject to Exchange Act Sections 13(a) or 15(d) reporting requirements. A Form F-X filed in connection with a Form CB must be filed electronically under the same circumstances.

In addition, we propose to add a box to the cover page of Schedule TO and Forms S-4 and F-4 where the filing person would specify the applicable cross-border exemption or exemptions being relied upon to conduct the applicable transaction. The cover page of Form CB already requires disclosure of this information. However, that form needs to be filed only for some cross-border transactions, and only for those conducted under Tier I or Rules 801 or 802. Under the rules proposed today, filers

relying on the Tier II cross-border exemptions and filing a Schedule TO also would be required to indicate which, if any, cross-border exemption they are relying on in conducting their tender offer.

Similarly, filers of Form S-4 or F-4 that are conducting a cross-border transaction under the Tier II exemptions would be required to specify the cross-border exemption claimed on the cover page of those forms. In some cases, they also would be filing a Schedule TO, where the exchange offer is subject to Rule 13e-4 or Regulation 14D. However, Form S-4 or F-4 may be filed before Schedule TO, where an exchange offer commences early, and it would be helpful to have this information at the earliest possible time in the offering process (see discussion of benefits below). In other cases, where the subject class of securities is not subject to Rule 13e-4 or Regulation 14D, but the filer is relying on the Tier II exemptions under the expanded availability we propose today, requiring this information on the cover page of the Form S-4 or F-4 would be the only source of this information. The changes we propose to Schedule TO and Forms S-4 and F-4 would have no impact on the obligation of an offeror to file those forms.

1. Benefits

Requiring all Form CBs and related Form F-Xs to be filed via the Commission's electronic data gathering and retrieval system, or EDGAR, would make those forms more quickly and easily accessible to the public, including U.S. investors. Instead of having to come in person or through an agent to the Commission's public reference room to conduct a search for these paper forms, investors would be able to access them electronically through the Commission's Web site or through any commercial service that links to EDGAR. Requiring Form CB to be filed electronically also would enable

the press and other market participants to access these forms more easily and quickly, thereby benefiting the market participants and investors by possibly making information about the transaction more readily available.

Filers should further benefit from increased efficiencies in the filing process. Electronic filing avoids the delays and uncertainties sometimes associated with manual delivery of paper filings. Not having to submit multiple copies of paper documents to the Commission may reduce burdens on filers, especially if they are located outside of the United States. In addition, the longer filing hours for the direct electronic submission of documents (until 10 p.m., Eastern Standard Time or Eastern Daylight Saving Time, whichever is in effect) would allow filers additional flexibility in meeting their obligation to submit Form CB and Form F-X (where required) on the next business day after the attached disclosure document is disseminated pursuant to home country law.³⁵²

As to the information sought in Form S-4 or F-4 or Schedule TO, we believe this information would serve an important function for purposes of the staff review process and also would benefit filers. Currently, the staff may not be aware when reviewing a registration statement or tender offer statement that the filer is relying upon an applicable cross-border exemption to modify the terms of its offer. Consequently, the staff may not know whether non-compliance with all the rules that would govern a particular transaction is a matter that the staff should pursue through the comment process.

³⁵² Although filings are accepted until 10 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, Regulation S-T Item 13(a)(2) states that except as otherwise provided in the rule, “all filings submitted by direct transmission commencing on or before 5:30 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, shall be deemed filed on the same business day, and all filings submitted by direct transmission commencing after 5:30 p.m. Eastern Standard Time or Eastern Daylight Savings Time, whichever is currently in effect, shall be deemed filed as of the next business day.” Therefore, offerors or issuers would be able to submit documents after Commission business hours on the day of dissemination and have the filing date be the next business day.

Providing this information when the Form S-4 or F-4 or Schedule TO is initially filed would eliminate the need for the staff to issue, and the bidder to respond to, unnecessary comments based on a lack of knowledge about reliance on a cross-border exemption.

2. Costs

There are costs associated with requiring all Forms CBs and related Form F-Xs to be filed electronically. During the fiscal year ended October 1, 2007, 45 initial Form CBs and 57 amendments were filed in paper. Initial costs of electronic filing include those associated with purchasing compatible computer equipment and software, including EDGAR software if obtained from a third-party vendor and not from the Commission's Web site. Initial costs also include training of existing employees to make the required EDGAR filings, or engaging a third-party to make them on the filer's behalf. Additional costs may be associated with the formatting and transmission of a filer's document on EDGAR. However, today financial printers and other information technology specialists capable of electronic document processing for the EDGAR system are widely available in the United States and abroad.

In addition, there would be initial costs associated with filing a Form ID in order to obtain the access codes needed to file a Form CB and Form F-X electronically.³⁵³ To file Form ID, an offeror or issuer must learn the related electronic filing requirements, obtain access to a computer and the Internet, use the computer to access the

³⁵³ Offerors and issuers that already have EDGAR access codes would not need to file a Form ID. We assume, however, that about 53 percent of Form CB filers do not or would not already have codes. Assuming a cost of \$175 per hour for in-house professional staff, we estimate the current Form ID aggregate burden cost at \$2,625 per year (\$175 per hour x 15 hours per year). The additional Form ID burden cost resulting from the proposed amendments and the total Form ID burden cost that will result from adding the estimated additional Form ID burden cost to the estimated current Form ID burden cost will be \$1,727,250 (9,855 hours per year + 15 hours per year = 9,870 hours per year); 9,870 hours per year x \$175 per hour = \$1,727,250.

Commission's EDGAR Filer Management Web site, respond to Form ID's information requirements and fax to the Commission a notarized authenticating document. We expect that offerors or issuers would incur few, if any, additional costs related to obtaining computer and Internet access. We believe the vast majority of offerors and issuers already would have access to a computer and the Internet.

Since a Form CB and the accompanying Form F-X required for foreign filers are not forms associated with periodic reporting on a regular basis and are required only for certain specified kinds of extraordinary transactions, we believe ongoing costs associated with the proposed rule amendments may not be significant. We solicit comments regarding the initial and ongoing costs that would be incurred by filers submitting Form CB and related Form F-X electronically.

We believe the costs associated with our proposed changes to Schedule TO and Forms S-4 and F-4 would be minimal. As discussed above, these changes would not impact the obligation to file the schedule or form, nor would they change the substantive disclosure required. Filers would already know whether, and if so, what cross-border exemption they will rely upon in conducting their transaction. The proposed rule change would require them only to specify that information for the benefit of the staff and others viewing the filings.

F. Changes to the beneficial ownership reporting rules

We propose to amend our rules to allow foreign institutions of the same type as the domestic institutions listed in Rule 13d-1(b)(1)(ii) to file on Schedule 13G instead of Schedule 13D. The proposed rule would permit filing on Schedule 13G for certain specified types of institutions, where they have acquired securities in the ordinary course

of their business and not with the purpose or effect of changing or influencing control of the issuer of the subject securities. In order to use Schedule 13G to the same extent as their U.S. counterparts, these foreign “qualified institutional” filers also would have to meet certain conditions currently set forth in the staff’s no-action letters. One such condition is the requirement to certify that the regulatory scheme applicable to that type of institution in its home country is comparable to the regulatory system applicable to its U.S. counterpart. Another such condition is an undertaking to provide to the Commission staff, upon request, the information that would have been required under Schedule 13D.

1. Benefits

Currently, the staff commonly grants requests from foreign institutions comparable to the types of institutions listed in Rule 13d-1(b) to file on Schedule 13G if they meet the conditions outlined in the no-action letters. In the release adopting amendments to the beneficial ownership rules in 1998, the Commission discussed the fact that in the past, foreign institutional investors requested exemptive and no-action letters.³⁵⁴ The Commission also stated that foreign institutions that wanted to use Schedule 13G as a qualified institutional investor should continue to request no-action relief from the staff. Because the staff’s issuance of no-action letters was contemplated at the time of the 1998 amendments to the beneficial ownership rules, we only consider the costs and benefits of the proposed rule relevant to the staff’s current practice of issuing no-action letters. From this perspective, the proposed rule change would eliminate the costs and burdens on foreign institutions of seeking such relief individually. For foreign

³⁵⁴ See Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (January 12, 1998) [63 FR 2854].

institutions that would otherwise have been eligible to file on Schedule 13G as passive investors under current rules, filing under Rule 13d-1(b) reduces the burden on those filers because the initial filing obligation is less onerous for qualified institutional filers. For example, qualified institutions filing under Rule 13d-1(b) are required to file a Schedule 13G within 45 days after the end of the calendar year in which they own over five percent of the subject class as of the last day of that year. By contrast, passive investors reporting on Schedule 13G pursuant to Rule 13d-1(c) must file their initial report within ten days of the acquisition of more than five percent of the class. Unlike qualified institutional filers, passive investors may not file on Schedule 13G when their ownership equals or exceeds 20 percent of the subject class. No such limit exists for qualified institutional filers.

2. Costs

Schedule 13D requires more extensive disclosure than Schedule 13G. Therefore, to the extent that a filer taking advantage of the proposed rule revisions otherwise would be required to file a Schedule 13D (or a Schedule 13G as a passive investor), there may be some information cost to U.S. investors by permitting the filer to use Schedule 13G. For instance, Schedule 13D requires information about the purpose of the beneficial owner's transaction in the securities, investment intent, and sources of funding. To the extent that such information may be of value to investors in making informed investment decisions, there would be a cost in permitting these institutions to file on Schedule 13G. We seek comment on the usefulness to investors of requiring these foreign institutions to file on Schedule 13D.

Foreign institutions wishing to take advantage of the proposed rule change would incur certain costs to satisfy the conditions for filing on Schedule 13G. In particular, foreign institutions would need to assess whether their home country regulatory scheme is comparable to the regulatory scheme applicable to their U.S. counterparts. This might involve seeking the advice of home country or U.S. legal counsel. However, we believe the incremental costs of complying with the proposed rule would be minimal because foreign institutions are commonly granted no-action relief to file on Schedule 13G under the same circumstances as we propose to permit under the new rule.

Request for Comment

We are sensitive to the costs and benefits imposed by our rules, and have identified certain costs and benefits related to these proposals. We request comment on all aspects of this cost-benefit analysis, including identification of any additional costs and benefits. We encourage commenters to identify and supply relevant data concerning the costs and benefits of the proposed amendments.

VI. CONSIDERATION OF IMPACT ON ECONOMY, BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 2(b) of the Securities Act³⁵⁵ and Section 3(f) of the Exchange Act³⁵⁶ require us, when engaged in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation. When adopting rules under

³⁵⁵ 15 U.S.C. 77b(b)

³⁵⁶ 15 U.S.C. 78c(f).

the Exchange Act, Section 23(a)(2) of the Exchange Act³⁵⁷ requires us to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. We request comment on whether the proposals, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their view, if possible.

The proposed changes to the test for determining eligibility to rely on the Tier I and Tier II cross-border exemptions and Rule 802 under Regulation C are intended to facilitate the application of those exemptions. When the exemptions were adopted in 1999, we determined that the cross-border exemptions are important tools to promote the inclusion of U.S. investors in transactions required to be conducted in accordance with a foreign regulatory system. Streamlining and improving the eligibility standards for the cross-border exemptions enhances their utility by promoting their ease of use, thereby encouraging the inclusion of U.S. investors in cross-border transactions.

The purpose of the proposed amendment to Rule 13e-3(g)(6) is to expand the exemption from Rule 13e-3 for cross-border transactions meeting the conditions of Tier I. This proposed amendment should reduce regulatory compliance burdens for issuers and affiliates engaged in affiliated cross-border transactions that would otherwise be subject to Rule 13e-3. The ability to avoid the application of Rule 13e-3 for certain cross-border transactions is expected to benefit U.S. investors, because an issuer or affiliate may

³⁵⁷ 15 U.S.C. 78w(a)(2).

choose to exclude them if it is the only means to avoid the heightened disclosure burdens of Rule 13e-3.

The purpose of the proposed changes to the Tier II tender offer exemptions in Rules 13e-4(i), 14d-1(d) and 14e-5 is to expand those exemptions to better address areas of recurring regulatory conflict. By codifying relief previously granted by the staff for individual transactions, the changes would reduce compliance burdens on issuers and bidders who would no longer need to seek such relief for each individual transaction. By enhancing the flexibility of U.S. tender offer rules in cross-border transactions, where those rules conflict with common elements of foreign law or practice, the changes would increase the likelihood that bidders would include U.S. investors in these transactions.

We do not anticipate that the proposed changes to Rule 14e-5 will have a significant impact, if any, on the economy because they simply codify the current scope of activities exempted from that rule's prohibitions through existing class exemptive letters. We believe that the proposed changes to Rule 14e-5 should not place any burden on competition as the proposed rule changes apply equally to all market participants covered by the rule. We believe that the Rule 14e-5 class exemptive letters concerning Tier II cross-border transactions have promoted efficiency and capital formation by eliminating the time and cost burdens associated with individual grants of relief. We believe that the codification of those letters similarly should foster efficiency and cross-border capital formation.

The proposed amendment to Rule 162(a) expanding the ability of offerors to commence an exchange offer early where a tender offer is not subject to Regulation 14D or Rule 13e-4 would further equalize the regulatory burden between cash tender offers

and exchange offers. Because foreign rules often contain a mandatory offer requirement, obligating an offeror to make a tender offer for a given class of securities, these rule changes would place mandatory offers for unregistered classes of securities on an equal footing with offers for registered equity securities.

The proposed changes to require that Forms CB and F-X be filed electronically on EDGAR could impose additional compliance costs on filers. Since Form F-X is filed only by foreign companies, the proposed change to that form would not impact U.S. companies. Requiring these forms to be filed electronically by all entities would level the playing field, since the forms are currently required to be filed electronically only by entities subject to a reporting obligation under Exchange Act Section 13(a) or 15(d).

The proposed changes to Schedule TO and Forms S-4 and F-4 would result in negligible additional compliance costs for filing persons. Because the proposed changes would require filers to publicly disclose information that they would already know if they are relying on the cross-border exemptions, we believe there would be little cost in implementing this change. Where the filer of a Schedule TO or Form S-4 or Form F-4 is not relying on the cross-border exemptions, no action would be required. In addition, this requirement applies equally to domestic and foreign filers. The proposed changes with respect to this schedule and these forms would not alter in any way the circumstances under which an offeror would incur a filing obligation under our rules.

The proposed rule changes generally would enhance efficiency in conducting cross-border tender offers and business combination transactions by streamlining the application of U.S. and foreign rules that may apply to those transactions. We expect that they would promote capital formation by facilitating cross-border business combination

transactions conducted under multiple and possibly conflicting regulatory systems. Some of the proposed rule revisions, such as the changes that would broaden the availability of early commencement for exchange offers and the applicability of the Tier II exemptions for tender offers not subject to Rule 13e-4 or Regulation 14D, may be viewed as enhancing competition between competing offers for the same target securities, because they would make these provisions available to different kinds of offers. Furthermore, the proposed rule changes would reduce the regulatory burden on entities engaging in cross-border business combination transactions generally, which may promote competition by encouraging additional entities to engage in these types of transactions. We solicit comment on whether the proposed rule changes would impose a burden on competition or whether they would promote efficiency, competition and capital formation. For example, would the proposals have an adverse effect on competition that is neither necessary nor appropriate in furtherance of the purposes of the Exchange Act? Would the proposals have an adverse effect on U.S. or foreign issuers? Commenters are requested to provide empirical data and other factual support for their views where possible.

VII. INITIAL REGULATORY FLEXIBILITY ANALYSIS

This Initial Regulatory Flexibility Analysis in accordance with 5 U.S.C. 603. It relates to proposed revisions to the rules and forms.³⁵⁸

³⁵⁸ Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress does not appear to have intended the Act to apply to foreign issuers. Therefore, we are analyzing the impact on small U.S. entities only.

A. Reasons for, and objectives of, proposed action

The proposed rule changes are intended primarily to facilitate the inclusion of U.S. target security holders in cross-border business combination transactions. The rule changes would result in further reductions in the cost and burdens associated with including U.S. target holders in those transactions. U.S. target holders previously excluded from such transactions would benefit by having additional transactions extended to them.

The proposed rule changes are incremental in nature and would not be a significant departure from the current cross-border exemptions. The changes would further harmonize U.S. and foreign law and practice, and to facilitate greater inclusion of U.S. target holders in cross-border transactions. In many instances, the proposed changes would codify existing staff interpretations and exemptive relief. We do not believe any less restrictive alternative to the proposed rule amendments exists that would serve the purpose of the tender offer and registration requirements of the federal securities laws. We did not identify alternatives to the proposed rules that are consistent with their objectives and our statutory authority. The proposed rules would not duplicate or conflict with any existing federal rule provisions.

B. Legal basis

We are proposing the amendments to the forms and rules under the authority set forth in Sections 3(b), 7, 8, 9, 10, 19, and 28 of the Securities Act, and Sections 12, 13, 14, 23, 35A, and 36 of the Exchange Act.

C. Small entities subject to the proposed rules

The Regulatory Flexibility Act defines “small entity” to mean “small business,” “small organization,” or “small governmental jurisdiction.”³⁵⁹ The Commission’s rules define “small business” and “small organization” for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.³⁶⁰ A “small business” and “small organization,” when used with reference to an issuer other than an investment company, generally means an issuer with total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers that may be considered reporting small entities.³⁶¹ The proposed rules may affect each of the approximately 1,100 issuers that may be considered reporting small entities. We have no data to determine how many reporting or non-reporting small businesses may actually rely on the proposed rules, or may otherwise be impacted by the rule proposals. Acquirors relying on the exemptions may or may not have reporting obligations under the Exchange Act prior to engaging in a cross-border business combination transaction. An acquiror’s ability to rely on the exemptions is not determined by the acquiror’s size or market capitalization. However, we believe that small businesses are not typically acquirors in cross-border transactions. We believe that the proposed amendments would result in savings to entities (both small and large) that

³⁵⁹ 5 U.S.C. 601(6).

³⁶⁰ Securities Act Rule 157 (17 CFR 230.157) and Exchange Act Rule 0-10 (17 CFR 240.0-10) contain the applicable definitions.

³⁶¹ The estimated number of reporting small entities is based on 2007 data, including the Commission’s EDGAR database and Thomson Financial’s Worldscope database.

qualify for the exemptions. We request comment on the number of small entities that would be affected by our proposals, including any available empirical data.

D. Reporting, recordkeeping and other compliance requirements

The proposed amendments would not impose any new reporting, recordkeeping or other compliance requirements on issuers that are small entities.

E. Duplicative, overlapping or conflicting federal rules

The Commission believes that there are no rules that duplicate, overlap or conflict with the proposed amendments.

F. Significant alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (ii) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the proposed amendment, or any part thereof, for small entities.

The proposed amendments are designed to expand and enhance the usefulness of the current cross-border exemptions. The Commission believes that different compliance or reporting requirements are not necessary because the proposed amendments do not establish any new reporting, recordkeeping, or compliance requirements for small entities. Establishing a different standard for small business entities would impose a

greater compliance burden on small entities and would be inconsistent with the benefits provided for all entities that are able to avail themselves of the exemptions.

G. Solicitation of comment

The Commission encourages the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. We will consider any comments in preparing the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and the comments will be placed in the same public file as comments on the proposed amendments themselves. In particular, we request comments regarding:

- The number of small entities that may be affected by the proposals;
- The existence or nature of the potential impact of the proposals on small entities discussed in the analysis; and
- How to quantify the impact of the proposed rules.

Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact.

VIII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (the “SBREFA”),³⁶² a rule is “major” if it has resulted, or is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

³⁶² Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996)(codified in various sections of 50 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. §601).

We request comment on whether our proposals would be a “major rule” for purposes of the SBREFA. We solicit comment and empirical data on:

- The potential effect on the U.S. economy on an annual basis;
- Any potential increase in costs or prices for consumers or individual industries; and
- Any potential effect on competition, investment or innovation.

IX. STATUTORY BASIS AND TEXT OF PROPOSAL

We propose amendments to the forms and rules under the authority set forth in Sections 3(b), 7, 8, 9, 10, 19 and 28 of the Securities Act, and Sections 12, 13, 14, 23, 35A, and 36 of the Exchange Act.

List of Subjects

17 CFR Parts 230, 232, 239, 240, and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF PROPOSALS

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

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

1. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. Revise §230.162(a) 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, and in exchange offers conducted under § 240.13e-4(i) or § 240.14d-1(d) of this chapter that are not subject to § 240.13e-4(e) or § 240.14d-4(b) of this chapter to the extent permitted under § 240.13e-4(i)(2)(vi) and § 240.14d-1(d)(2)(x) 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.

* * * * *

3. Revise § 230.800(h)(1) to read as follows:

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

* * * * *

(h) * * *

(1) Calculate percentage of outstanding securities held by U.S. holders as of the record date for a rights offering and as of a date no more than 60 days before the public announcement of an exchange offer or a business combination.

* * * * *

4. Amend § 230.802 by revising paragraphs (a)(2), (a)(3), (c)(2), (c)(3) and (c)(4) to read as follows:

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

* * * * *

(a) * * *

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

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

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

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

* * * * *

(c) * * *

(2) The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States or on the OTC market, as reported to the Financial Industry Regulatory Authority Inc., over the 12-calendar-month period ending on a date no more than 60 days before public announcement of the offer, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the same period;

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

(4) The offeror knows, or has reason to know, before the public announcement of the offer, that U.S. ownership exceeds 10 percent of the subject securities. As an example, for purposes of this paragraph, an offeror is deemed to have reason to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. This example is not intended to be exclusive.

PART 232 – REGULATION S-T – GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

5. The authority citation for Part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 78ll, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, and 7201 et seq.; and 18 U.S.C. 1350.

* * * * *

6. Amend § 232.101 by:

- a. Revising paragraphs (a)(1)(vi) and (a)(1)(vii);
- b. Removing and reserving paragraph (b)(7); and
- c. Revising paragraph (b)(8) to read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(vi) Form CB (§§ 239.800 and 249.480 of this chapter) filed or submitted under § 230.801 or 230.802 of this chapter or § 240.13e-4(h)(8), 240.14d-1(c), or 240.14e-2(d) of this chapter;

(vii) Form F-X (§ 239.42 of this chapter) when filed in connection with a Form CB (§§ 239.800 and 249.480 of this chapter);

* * * * *

(b) * * *

(8) Form F-X (§ 232.42 of this chapter) if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251-230.263 of this chapter);

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

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

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z-2, 77z-3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u-5, 78w(a), 78ll, 78mm, 80a-2(a), 80a-3, 80a-8, 80a-9, 80a-10, 80a-13, 80a-24, 80a-26, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

8. Form S-4 (referenced in § 239.25) is amended by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the “Calculation of Registration Fee” table to read as follows:

Note – The text of Form S-4 does not and this amendment will not appear in the Code of Federal Regulations.

FORM S-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Issuer Tender Offer)

Exchange Act Rule 14d-1(d) (Third Party Tender Offer)

* * * * *

9. Amend Form F-4 (referenced in §239.34) by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the “Calculation of Registration Fee” table to read as follows:

Note – The text of Form F-4 does not and this amendment will not appear in the Code of Federal Regulations.

FORM F-4

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

If applicable, place an X in the box to designate the appropriate rule provision relied upon in conducting this transaction:

Exchange Act Rule 13e-4(i) (Issuer Tender Offer)

Exchange Act Rule 14d-1(d) (Third Party Tender Offer)

* * * * *

10. Amend Form F-X (referenced in §239.42) by revising the Note to General Instruction II.B.(2) to read as follows:

Note – The text of Form F-X does not and this amendment will not appear in the Code of Federal Regulations.

FORM F-X

**APPOINTMENT OF AGENT FOR SERVICE OF PROCESS AND
UNDERTAKING**

GENERAL INSTRUCTIONS

* * * * *

II. * * *

B. * * *

(2) * * *

Note: Regulation S-T Rule 101(b)(8) only permits the filing of the Form F-X in

paper if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251 - 230.263 of this chapter).

* * * * *

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

11. 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, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et. seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

12. Amend § 240.13d-1 by:

- a. Removing “; and” from the end of paragraph (b)(1)(ii)(I);
- b. Adding paragraph (b)(1)(ii)(K); and
- c. Removing the authority citation following the section.

The addition reads as follows:

§ 240.13d-1. Filing of Schedules 13D and 13G.

* * * * *

(b)(1) * * *

(ii) * * *

(K) A non-U.S. institution that is the functional equivalent of any of the institutions listed in paragraphs (b)(1)(ii)(A) through (J) of this section, so long as the non-U.S. institution is subject to a regulatory scheme that is comparable to the regulatory scheme applicable to the equivalent U.S. institution; and

* * * * *

13. Amend § 240.13d-102 by:

a. Revising Instruction 12 to the Instruction for the Cover Page before the

Notes:

b. In Item 3 removing the period at the end of paragraphs (a), (b), (c), and (d) and in each place adding a semicolon;

c. In Item 3 removing the period at the end of paragraph (j) and in its place adding a semicolon and adding paragraph (k); and

d. In Item 10 redesignating paragraph (b) as paragraph (c) and adding new paragraph (b).

The revision and additions read as follows:

§ 240.13d-102 Schedule 13G – Information to be included in statements filed pursuant to § 240.13d-1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d-2.

* * * * *

Instructions for Cover Page:

* * * * *

(12) Type of Reporting Person--Please classify each “reporting person” according to the following breakdown (see Item 3 of Schedule 13G) and place the appropriate Symbol on the form:

Category	Symbol
Broker Dealer.....	BD
Bank.....	BK
Insurance Company.....	IC
Investment Company.....	IV
Investment Adviser.....	IA
Employee Benefit Plan or Endowment Fund...	EP

Parent Holding Company/Control Person.....	HC
Savings Association.....	SA
Church Plan.....	CP
Corporation.....	CO
Partnership.....	PN
Individual.....	IN
Non-U.S. Institution.....	FI
Other.....	OO

* * * * *

Item 3. * * *

(k) [] A non-U.S. institution that is the functional equivalent of any of the institutions listed in paragraphs (a) - (j) of this Item. Please specify the type of institution: _____

* * * * *

Item 10. Certification

* * * * *

(b) The following certification shall be included if the statement is filed pursuant to § 240.13d-1(b)(1)(ii)(K):

By signing below I certify that, to the best of my knowledge and belief, the foreign regulatory scheme applicable to [insert particular category of institutional investor] is comparable to the regulatory scheme applicable to the functionally equivalent U.S. institution(s). I also undertake to furnish to the Commission staff, upon request, information that would otherwise be disclosed in a Schedule 13D.

* * * * *

14. Amend § 240.13e-3 by revising paragraph (g)(6) to read as follows:

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

* * * * *

(g) * * *

(6) Any tender offer or business combination made in compliance with § 230.802 of this chapter, § 240.13e-4(h)(8) or § 240.14d-1(c) or any other kind of transaction that otherwise meets the conditions for reliance on the cross-border exemptions set forth in § 240.13e-4(h)(8), 240.14d-1(c) or 230.802(a) of this chapter except for the fact that it is not technically conducted under those rules.

15. Amend § 240.13e-4 by:

- a. Revising the introductory text of paragraph (i);
- b. Revising paragraph (i)(2)(ii);
- c. Adding paragraphs (i)(2)(v) and (vi); and
- d. Revising paragraph 2.i. to the Instructions to paragraph (h)(8) and (i).

The revisions and additions read as follows:

§ 240.13e-4 Tender offers by issuers.

* * * * *

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

requirements of section 14(e) of the Act and Regulation 14E (§§ 240.14e-1 through 240.14e-8) thereunder that meets the conditions in paragraph (i)(1) of this section also shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section, to the extent needed under the requirements of Regulation 14E provided the tender offer complies with all other requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section:

* * * * *

(2) * * *

(ii) Equal treatment—separate U.S. and foreign offers. Notwithstanding the provisions of paragraph (f)(8) of this section, an issuer or affiliate conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into multiple offers: one offer made to U.S. holders and all holders of American Depositary Receipts representing interests in the subject securities and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

* * * * *

(v) Suspension of withdrawal rights during counting of tendered securities. The issuer or affiliate may suspend withdrawal rights required under paragraph (f)(2) of this section at the end of the offer and during the period that securities tendered into the offer

are being counted, provided that:

(A) The issuer or affiliate has provided an offer period including withdrawal rights for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the issuer or affiliate is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(vi) Early commencement. Notwithstanding the requirements of section 5(a) of the Act (15 U.S.C. 77e(a)), the issuer or affiliate in an exchange offer not subject to this section may solicit tenders before a registration statement is effective as to the security offered to the same extent as would be permitted pursuant to paragraph (e)(2) of this section, so long as no securities are purchased until the registration statement is effective and the tender offer has expired, and the issuer or affiliate provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of section 13(e) of the Act (15 U.S.C. 78m(e)) and paragraph (f)(2)(i) of this section. If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate must comply with the provisions of paragraph (e)(3) of this section in disseminating information about the material change to security holders, including the minimum periods during which the offer must remain open after notice of such change is provided to security holders.

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

* * * * *

2. * * *

i. Calculate the U.S. ownership as of a date no more than 60 days before the public announcement of the tender offer;

* * * * *

16. Amend § 240.14d-1 by:

a. Revising paragraph (a);

b. Revising paragraph (d) introductory text, paragraphs (d)(2)(ii) and (d)(2)(iv);

c. Adding paragraphs (d)(2)(vi), (d)(2)(vii), (d)(2)(viii), (d)(2)(ix), and (d)(2)(x); and

d. Revising Instructions 2.i., 3.ii., 3.iii., and 3.iv. to the Instructions to paragraphs (c) and (d).

The revisions and additions read as follows:

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

* * * * *

(a) Scope. Regulation 14D (§§ 240.14d-1 through 240.14d-101) shall apply to any tender offer which is subject to section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), including, but not limited to, any tender offer for securities of a class described in that section which is made by an affiliate of the issuer of such class. Regulation 14E (§§ 240.14e-1 through 240.14e-8) shall apply to any tender offer for securities (other than exempted securities) unless otherwise noted therein.

* * * * *

(d) Tier II. A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section. In addition, a person conducting a tender offer subject only to the requirements of section 14(e) of the Act (15 U.S.C. 78n(e)) and Regulation 14E thereunder that meets the conditions in paragraph (d)(1) of the section also shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, to the extent needed pursuant to the requirements of Regulation 14E, provided that the tender offer complies with all requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

* * * * *

(2) * * *

(ii) Equal treatment—separate U.S. and foreign offers. Notwithstanding the provisions of § 240.14d-10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into multiple offers: one offer made to U.S. holders and all holders of American Depositary Receipts representing interests in the subject securities and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such

foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

* * * * *

(iv) Prompt payment. Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e-1(c). Where payment may not be made on a more expedited basis under home jurisdiction law or practice, payment for securities tendered during any subsequent offering period within 14 business days of the date of tender will satisfy the prompt payment requirements of § 240.14d-11(e). For purposes of this paragraph, a business day is determined with reference to the target's home jurisdiction.

* * * * *

(vi) Length of subsequent offering period. Notwithstanding the provisions of § 240.14d-11, the maximum time period for a subsequent offering period may extend beyond 20 U.S. business days.

(vii) Payment of interest on securities tendered during subsequent offering period. Notwithstanding the requirements of § 240.14d-11(f), the bidder may pay interest on securities tendered during a subsequent offering period, if required under applicable foreign law. Paying interest on securities tendered during a subsequent offering period in accordance with this section will not be deemed to violate § 240.14d-10(a)(2).

(viii) Suspension of withdrawal rights during counting of tendered securities. The bidder may suspend withdrawal rights required under section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) at the end of the offer and during the period that securities tendered

into the offer are being counted, provided that:

(A) The bidder has provided an offer period including withdrawal rights for a period of at least 20 U.S. business days;

(B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and

(C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(ix) Mix and match elections and the subsequent offering period.

Notwithstanding the requirements of § 240.14d-11(b), where the bidder offers target security holders a choice between different forms of consideration, it may establish a ceiling on one or more forms of consideration offered. Notwithstanding the requirements of § 240.14d-11(f), a bidder that establishes a ceiling on one or more forms of consideration offered pursuant to this subsection may offset elections of tendering security holders against one another, subject to proration, so that elections are satisfied to the greatest extent possible and pro rated to the extent that they cannot be satisfied in full. Such a bidder also may separately offset and pro rate securities tendered during the initial offering period and those tendered during any subsequent offering period, notwithstanding the requirements of § 240.14d-10(c).

(x) Early commencement. Notwithstanding the requirements of section 5(a) of the Act (15 U.S.C. 77e(a)), the bidder in an exchange offer not subject to § 240.14d-4(b)

may solicit tenders before a registration statement is effective as to the security offered to the same extent as would be permitted pursuant to § 240.14d-4(b), so long as no securities are purchased until the registration statement is effective and the tender offer has expired, and the bidder provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of § 240.14d-7. If a material change occurs in the information published, sent or given to security holders, the bidder must comply with the provisions of § 240.14d-4(d) in disseminating information about the material change to security holders, including the minimum periods during which the offer must remain open after notice of such change is provided to security holders.

Instructions to paragraphs (c) and (d):

* * * * *

2. * * *

i. Calculate the U.S. ownership as of a date no more than 60 days before the public announcement of the tender offer;

* * * * *

3. * * *

ii. The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States or on the OTC market, as reported to the Financial Industry Regulatory Authority, Inc. over the 12-calendar-month period ending on a date no more than 60 days before public announcement of the offer, exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of the worldwide aggregate trading volume of that class of securities over the same period;

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

iv. The bidder knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of such securities. As an example, for purposes of this Instruction, a bidder is deemed to have reason to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. This example is not intended to be exclusive.

* * * * *

17. Amend §240.14d-100 by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the General Instructions 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.

**Schedule TO
Tender Offer Statement under Section 14(d)(1) or 13(e)(1) of the Securities
Exchange Act of 1934**

* * * * *

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

[] Rule 13e-4(i) (Issuer Tender Offer)

[] Rule 14d-1(d) (Third Party Tender Offer)

* * * * *

18. Amend § 240.14e-5 by:

a. Removing “and” at the end of paragraphs (b)(9) and (c)(6);

b. Removing the period at the end of paragraphs (b)(10) and (c)(7) and in its place adding “; and”; and

c. Adding paragraphs (b)(11), (b)(12), (c)(8), and (c)(9).

The additions read as follows:

§ 240.14e-5. Prohibiting purchases outside of a tender offer.

* * * * *

(b) Excepted activity. * * *

(11) Purchases or arrangements to purchase pursuant to a foreign tender offer(s).

Purchases or arrangements to purchase pursuant to a foreign offer(s) where the offeror seeks to acquire subject securities through a U.S. tender offer and a concurrent or substantially concurrent foreign offer(s), if the following conditions are satisfied:

(i) The U.S. and foreign tender offer(s) meet the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d-1(d);

(ii) The economic terms and consideration in the U.S. tender offer and foreign tender offer(s) are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer(s) to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;

(iii) The procedural terms of the U.S. tender offer are at least as favorable as the

terms of the foreign tender offer(s);

(iv) The intention of the offeror to make purchases pursuant to the foreign tender offer(s) is disclosed in the U.S. offering documents; and

(v) Purchases by the offeror in the foreign tender offer(s) are made solely pursuant to the foreign tender offer(s) and not pursuant to an open market transaction(s), a private transaction(s), or other transaction(s); and

(12) Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates.

(i) Purchases or arrangements to purchase by an affiliate of a financial advisor and an offeror and its affiliates that are permissible under and will be conducted in accordance with the applicable laws of the subject company's home jurisdiction if the following conditions are satisfied:

(A) The subject company is a foreign private issuer as defined in § 240.3b-4(c);

(B) The covered person reasonably expects that the tender offer meets the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d-1(d);

(C) No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States;

(D) The United States offering materials disclose prominently: the possibility of, or the intention to make, purchases or arrangements to purchase subject securities or related securities outside of the tender offer, and if there will be public disclosure of purchases of subject or related securities, the manner in which information regarding such purchases will be disseminated;

(E) There is public disclosure in the United States, to the extent that such information is made public in the subject company's home jurisdiction, of information regarding all purchases of subject securities and related securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires;

(F) Purchases or arrangements to purchase by an offeror and its affiliates must satisfy the following additional condition: the tender offer price will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price; and

(G) Purchases or arrangements to purchase by an affiliate of a financial advisor must satisfy the following additional conditions:

(1) The financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws and regulations through the establishment of information barriers;

(2) The financial advisor has an affiliate that is registered as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a));

(3) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and

(4) The purchases or arrangements to purchase are not made to facilitate the tender offer.

(ii) The provisions of paragraph (b)(12)(i) of this section shall not apply to risk arbitrage trading by an affiliate of a financial advisor.

(c) Definitions. * * *

(8) Subject company has the same meaning as in § 229.1000 of this chapter.

(9) Home jurisdiction has the same meaning as in the Instructions to paragraphs (c) and (d) of § 240.14d-1.

* * * * *

PART 239 – FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

PART 249 – FORMS, SECURITIES EXCHANGE ACT OF 1934

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

Authority: 15 U.S.C. 78a et seq., 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

20. Amend Form CB (referenced in § 239.800 and § 249.480) by:

a. Removing the line “Filed or submitted in paper if permitted by Regulation S-T Rule 101(b)(8) []” and the corresponding Note on the cover page;

b. Revising General Instruction II.A.(1);

c. Removing General Instruction II.A.(2) and redesignating General Instruction II.A.(3) and (4) as General Instruction II.A.(2) and (3); and

d. Revising General Instructions B and D.

Note – The text of Form CB does not and this amendment will not appear in the Code of Federal Regulations.

Form CB

TENDER OFFER/RIGHTS OFFERING NOTIFICATION FORM

(AMENDMENT NO. _____)

* * * * *

GENERAL INSTRUCTIONS

* * * * *

II. Instructions for Submitting Form

A. (1) Regulation S-T Rule 101(a)(1)(vi) (17 CFR 232.101(a)(1)(vi)) requires a party to submit the Form CB in electronic format via the Commission's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR) in accordance with the EDGAR rules set forth in Regulation S-T (17 CFR Part 232). For assistance with technical questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 551-8900.

* * * * *

B. When submitting the Form CB in electronic format, the persons specified in Part IV must provide signatures in accordance with Regulation S-T Rule 302 (17 CFR 232.302). When submitting the Form CB in paper in accordance with a hardship exemption, the persons specified in Part IV must sign the original and at least one copy of the Form and any amendments. You must conform any unsigned copies. The specified persons may provide typed or facsimile signatures in accordance with Securities Act Rule 402(e) (17 CFR 230.402(e)) or Exchange Act Rule 12b-11(d) (17 CFR 240.12b-11(d)) as

long as the filer retains copies of signatures manually signed by each of the specified persons for five years.

* * * * *

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

* * * * *

By the Commission.

Nancy M. Morris
Secretary

Dated: May 6, 2008