SECURITIES AND EXCHANGE COMMISSION

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

(Release No. 33-7607; 34-40633; IC-23520; File No. S7-28-98)

RIN 3235-AG84

Regulation of Takeovers and Security Holder Communications

AGENCY: Securities and Exchange Commission

ACTION: Proposed Rules

SUMMARY: The Securities and Exchange Commission proposes to update and simplify the rules and regulations applicable to takeover transactions (including tender offers, mergers, acquisitions and similar extraordinary transactions). We propose to permit significantly more communications with security holders and the markets before the filing of a registration statement involving a takeover transaction, a proxy statement or tender offer statement. We also propose to put cash and stock tender offers on a more equal regulatory footing; integrate the forms and disclosure requirements in issuer tender offers, third-party tender offers and going private transactions and consolidate the disclosure requirements in one location; permit security holders to tender their securities during a limited period after the successful completion of a tender offer; more closely align merger and tender offer requirements; and update the tender offer rules to clarify certain requirements and reduce compliance burdens where consistent with investor protection. The proposals presented in this release should be considered together with the companion release issued today, the Securities Act Reform Release.

DATES: Comments should be submitted on or before (insert date 120 days after publication in the Federal Register).

ADDRESSES: Comments concerning the proposed amendments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, Mail Stop 6-9, 450 Fifth Street, N.W., Washington, D.C. 20549-6009. Comments also may be submitted electronically to the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File Number S7-28-98. This file number should be included on the subject line if e-mail is used to submit comments. Comment letters will be available for inspection and copying in the public reference room at the same address. Electronically submitted comment letters will be posted on our Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: James J. Moloney, in the Office of Mergers and Acquisitions, or P.J. Himelfarb, in the Office of Chief Counsel, Division of Corporation Finance, at (202) 942-2920. For questions regarding proposed Rule 14e-5, please contact Irene A. Halpin or Michael R. Trocchio, in the Office of Risk Management and Control, Division of Market Regulation, at (202) 942-0772.

SUPPLEMENTARY INFORMATION: We propose amendments to Rules 13e-1, 13e-3, 13e-4, 14a-4, 14a-6, 14a-11, 14a-12, 14c-2, 14c-5, 14d-1, 14d-2, 14d-3, 14d-4, 14d-5, 14d-6, 14d-7, 14d-9, 14e-1[1] and Schedules 14A, 14C, 13E-3, and 14D-9[2] under the Securities

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[1] 17 CFR 240.13e-1; 17 CFR 240.13e-3; 17 CFR 240.13e-4; 17 CFR 240.14a-4; 17 CFR 240.14a-6; 17 CFR 240.14a-11; 17 CFR 240.14a-12; 17 CFR 240.14c-2; 17 CFR 240.14c-5; 17 CFR 240.14d-1; 17 CFR 240.14d-2; 17 CFR 240.14d-3; 17 CFR 240.14d-4; 17 CFR 240.14d-5; 17 CFR 240.14d-6; 17 CFR 240.14d-7; 17 CFR 240.14d-9; and 17 CFR 240.14e-1.

[2] 17 CFR 240.14a-101; 17 CFR 240.14c-101; 17 CFR 240.13e-100; and 17 CFR 240.14d-101.

Exchange Act of 1934 ("Exchange Act").[3] We also propose an amendment to Item 10 of Regulation S-K[4] and a new subpart of Regulation S-K, the 1000 series ("Regulation M-A"); a new tender offer schedule, Schedule TO, that would replace Schedules 13E-4 and 14D-1;[5] a new tender offer Rule 14e-5 that would replace Rule 10b-13;[6] and new tender offer Rules 14d-11 and 14e-8. Further, we propose to amend Rule 13(d) of Regulation S-T and Rules of Practice 30-1 and 30-3.[7] We also propose amendments to Rules 145 and 432, and new Rule 162, under the Securities Act of 1933 ("Securities Act").[8] In addition, in the Securities Act Reform Release,[9] we propose new rules, forms and amendments under the Securities Act affecting the regulatory scheme for takeovers. Some of these proposals are republished in this release for the convenience of readers, as follows: portions of proposed new Forms C and SB-3 and proposed new Rules 166, 167 and 425.

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3 15 U.S.C. 78a et seq.

4 17 CFR 229.10.

5 17 CFR 240.13e-101; 17 CFR 240.14d-100.

6 17 CFR 240.10b-13.

7 17 CFR 232.13(d); 17 CFR 200.30-1; 17 CFR 200.30-3.

8 17 CFR 230.145; 17 CFR 230.432; 15 U.S.C. 77a et seq.

9 See Release No. 33-7606 (November 3, 1998).

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I. Executive Summary and Background

Over the last several years, takeover activity has surpassed the extraordinary levels seen during the 1980s.[10] In 1996, there were over 7,000 merger and acquisition transactions completed in the U.S. valued at more than $650 billion. In 1997, U.S. merger and acquisition activity increased to approximately 7,800 transactions valued at over $790 billion.[11] Global merger and acquisition activity totaled approximately (U.S.) $900 billion in 1996.[12] In 1997, global merger and acquisition activity increased to (U.S.) $1.6 trillion.[13] This wave of takeovers has continued into 1998 with approximately $626 billion in domestic mergers and acquisitions announced as of June, 1998.[14]

Three characteristics are common to many of today's takeover transactions. First, many acquirors are offering securities or a combination of securities and cash to the security holders of subject companies ("targets"). In 1996, almost half of the completed takeover transactions

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10 In 1988, approximately 3,000 domestic merger and acquisition transactions were completed with a total value of over $300 billion. In 1989, there were slightly more than 3,800 transactions valued at approximately $330 billion. See Mergers & Acquisitions, The Dealmaker's Journal, 1998 Almanac (March/April 1998), at 42.

11 Id.

12 See 1996 Mergers and Acquisitions, Corporate Financing Week (February 10, 1997).

13 See Steven Lipin, Murphy's Law Doesn't Apply: The Conditions Are Perfect For Continued Growth In Mergers, Wall St. J., Jan. 2, 1998, at R6.

14 See John R. Wilke & Bryan Gruley, In Merger Blitz, Regulators Vie to Bust Biggest Prizes, Wall St. J., June 11, 1998, at B1, citing Securities Data Corp. Although the boom in U.S. merger and acquisition activity has tempered slightly in recent months, it is expected to remain strong. See Third Q M&A Soars, but the Bear Lurks, Mergers & Acquisitions Report, October 5, 1998.

involved some form of stock as consideration, as opposed to cash only.[15] In 1997, the number of stock-based takeovers remained relatively constant at approximately half of all completed transactions.[16] During the first half of 1998, approximately 43% of the completed transactions involved securities as consideration.[17]

Second, there has been an increase in the number of hostile transactions involving proxy or consent solicitations. This trend appears to be the result of the adoption of anti-takeover devices by many public companies and the development of more stringent state anti-takeover laws in reaction to the wave of takeovers in the 1980s. Today's proxy and consent solicitations are primarily aimed at unseating incumbent directors, dismantling anti-takeover devices, and generally facilitating transactions opposed by management.

Third, significant technological advances in communications permit more frequent, timely and direct communications with security holders. These developments in technology affect how acquirors, targets, and other market participants communicate with security holders and the securities markets regarding proposed mergers and other extraordinary corporate transactions. For example, many companies post detailed information regarding corporate developments on their Internet web sites. In addition, companies use the Internet as a means of

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[15] Stock or a combination of stock and cash was offered to security holders in approximately 1,395 out of the 2,892 transactions announced in 1996. See Mergers & Acquisitions, The Dealmaker's Journal, 1998 Almanac (March/April 1998), at 47. The information reported in Mergers & Acquisitions 1998 Almanac was based on all completed mergers, acquisitions, and divestitures priced at $5 million and over, including purchases of partial interests of at least a 40% stake in the target company or an investment of at least $100 million. Id. at 42.

[16] Stock or a combination of stock and cash was offered to security holders in approximately 1,703 out of the 3,449 transactions announced in 1997. Id. at 47.

[17] See Mergers & Acquisitions, The Dealmaker's Journal, (September/October 1998) at p. 50.

communicating with security holders during proxy contests and in connection with tender offers and mergers.[18] These changes in how companies, security holders, and market participants communicate with one another prompted the Commission to issue several releases addressing the use of the Internet and other electronic media under the federal securities laws.[19]

While the takeover market has evolved dramatically over the past 20 years, the applicable regulatory framework has remained substantially the same.[20] As a result, the application of our existing rules to today's extraordinary transactions can often raise complex regulatory issues. These issues may, in some instances, cause unnecessary burdens for companies without corresponding benefits to security holders. Today's proposals are intended to reduce these costs while maintaining the same high level of investor protection.

In formulating the proposals, we have drawn on the staff's experience in reviewing takeover disclosure, the suggestions of practitioners, and the recommendations of the Task Force

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[18] Companies also have broadcast annual security holder meetings over the Internet, and are increasingly soliciting proxies via the Internet.

[19] See Release Nos. 33-7233 (October 6, 1995) (60 FR 53458) and 33-7288 (May 9, 1996) (61 FR 24644), expressing the Commission's views on the use of electronic media to satisfy information delivery requirements under the federal securities laws. See also Release No. 33-7516 (March 27, 1998) (63 FR 14806) interpreting jurisdictional issues involving the use of the Internet by issuers, investment companies, broker-dealers, exchanges and investment advisers to solicit offshore securities transactions.

[20] One exception is the Commission's revisions to the proxy rules in 1992. The Commission eliminated the regulation of certain communications with or among security holders relating to corporate performance and other matters of interest to all security holders when made in the context of an actual or potential proxy solicitation. See Release No. 34-31326 (October 16, 1992) (57 FR 48276).

on Disclosure Simplification.[21] We have examined all of the regulations relating to tender offers as well as other forms of takeovers with a view toward improving the regulatory scheme.

We encourage readers to keep in mind that these proposals were drafted, and should be considered, with the proposals presented in the Securities Act Reform Release also issued today. The goal underlying the proposals described below is the same as that underpinning the Securities Act Reform Release — making the regulatory scheme more workable for issuers and more effective for investors in today's capital markets. While we intend that both sets of proposals move towards adoption on the same track, we may adopt the proposals in either release without adopting those in the companion release.

The proposals vary in some respects from those in the Securities Act Reform Release because it is necessary to recognize the special nature of business combination transactions in contrast to capital-raising transactions. Specifically, we have considered that a security holder's decision regarding a proposed business combination is not always volitional, and that a change in security ownership can arise as a result of the security holder's inaction.[22] In addition, where the acquiror offers securities, the investment decision can be complex, requiring security holders to assess both the security of another company offered in exchange and the security they are asked to give up. They also must consider how the acquiror may change as a result of the acquisition, because they will receive securities in the combined entity. Therefore, it may be important for the companies involved to have the flexibility to announce and discuss the proposed acquisition,

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[21] The Commission staff's Report of the Task Force on Disclosure Simplification (March, 1996) recommended several of the proposals in this release. See "Significant Corporate Transactions" at pp. 51-57.

[22] See Form S-4 adopting release No. 33-6578 (April 23, 1985) (50 FR 18990, at 18991).

regardless of the size and seasoned status of the acquiror.[23] In addition, it is necessary for information about the transaction to be delivered timely to security holders who must evaluate the deal in order to protect their existing investment.[24]

In some cases, we have proposed significant modifications to the entire regulatory approach to takeovers. In doing so, we have attempted to treat different acquisition methods in a similar manner to the extent the different methods merit similar treatment. In other cases, we have focused on areas where current practice could be improved. Our goals are to update the regulations in order to reduce unnecessary regulatory burdens on participants, while maintaining investor protection and improving the quality of information that investors receive about business combination transactions.[25] We describe below three areas where the costs of compliance with the current rules applicable to takeovers may outweigh the benefits conferred upon security holders, and summarize the proposals in this release.

Restrictions on Communications to Security Holders and the Marketplace

A company's ability to communicate in a timely and effective manner with its security holders about a proposed takeover is limited by the Securities Act if the transaction involves an offering of securities. Although the impact of the Securities Act on capital formation has been

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23 By contrast, the Securities Act Reform Release conditions the extent to which communications will be liberalized on the size and seasoned status of the issuer.

24 The Securities Act Reform Release proposes to reduce the prospectus delivery requirements under certain circumstances with respect to offerings by large, seasoned issuers.

25 See Part II.A for a description of the basic methods of business combination and how they are treated under the current regulatory scheme.

the subject of great debate,[26] commentators have given somewhat less attention to the permissibility of communications relating to business combinations involving the issuance of securities. Offerors often have a compelling reason, and may under certain circumstances have an obligation under Rule 10b-5,[27] to disseminate promptly full, fair and accurate information regarding a planned extraordinary transaction to existing security holders as well as the securities markets. As a part of this release, we propose to increase significantly the ability of companies to communicate with security holders with respect to business combinations involving the registered offering of securities. In addition, many takeovers trigger the need for compliance with the tender offer and proxy rules, which also contain restrictions on the timing and content of communications. We propose to permit freer communications under the tender offer rules in connection with public announcements of tender offers. Similarly, we propose to permit freer communications under the proxy rules, whether or not the matter being voted on relates to a takeover.

Regulatory Disadvantage of Exchange Offers

Tender offers where the bidder is offering securities generally cannot commence until the Securities Act registration statement for the securities being offered becomes effective. In some cases, where the staff undertakes to review and comment during the waiting period,[28] the delay

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26 See the Securities Act Reform Release.

27 17 CFR 240.10b-5. Rule 10b-5 prohibits misleading statements or omissions and other fraudulent or deceptive practices in connection with the purchase or sale of a security.

28 The "waiting period" is the period of time between when a registration statement is first filed and when it becomes effective.

of effectiveness can be quite lengthy. This delay is particularly troublesome for bidders[29] in exchange offers.[30] 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. As a result, bidders that offer securities in takeover transactions may not be as successful in acquiring targets as cash bidders, even when the value of the stock offered is equal to or greater than the value of the cash offered in a competing offer. In response to the disparities in regulatory treatment, we propose to permit exchange offers to commence on a similar time frame to cash tender offers.

Costs of Compliance with Multiple Regulatory Schemes

Many of today's takeover transactions involve a combination of tender offer, proxy solicitation and Securities Act registration issues. As a result, participants in a merger or acquisition may be required to comply with several distinct regulatory schemes. Companies can incur additional costs analyzing and complying with the multiple filing and disclosure regimes that may apply to a transaction. For example, when a company conducts an exchange offer for all outstanding securities of an affiliated company, three regulatory schemes may be involved, including the tender offer rules, the "going-private" rule, and the provisions of the Securities Act

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29 The term "bidder" is used throughout this release to refer to the offeror or purchaser in a tender offer.

30 Exchange offers, sometimes called stock tender offers, are tender offers where the consideration offered to security holders includes securities; these transactions generally are registered under the Securities Act.

relating to the registration of securities. The proxy rules also can apply if the transaction involves a solicitation of votes or consents. We recognize that the application of multiple regulatory regimes to a single transaction can significantly increase the burdens and costs of compliance without necessarily benefiting investors. We propose to simplify the regulatory structure for takeovers by using combined forms and a uniform disclosure regulation.

In summary, we propose numerous revisions to the regulations to conform them to the realities of today's environment surrounding takeover transactions, while maintaining high quality investor protection and enhancing the timing and quality of information available to investors. The proposed revisions address changes in deal structure and advances in technology. Our principal proposals are to:

- relax the current restrictions on communications with security holders to provide the market with more information on a timely basis; in particular,
    - permit free communications before the filing of a registration statement in connection with either a stock tender offer or a stock merger transaction;
    - permit free communications before the filing of a proxy statement (whether or not a takeover transaction is involved);
    - permit free communications about a planned tender offer without triggering the "commencement" of the offer, requiring the filing and dissemination of information;
    - harmonize the various communications principles applicable to business combinations under the Securities Act, tender offer rules and proxy rules;
    - eliminate the confidential treatment now available for merger proxy statements;
- reduce the disparate treatment of stock and cash tender offers by permitting stock tender offers to commence upon the filing of a Securities Act registration statement;

- simplify the regulatory scheme by integrating the disclosure requirements for tender offers, going-private transactions, and other extraordinary transactions into a new 1000 series of Regulation S-K, referred to as "Regulation M-A";

- combine the current schedules for issuer and third-party tender offers into a single schedule available for all tender offers, entitled "Schedule TO";

- require a "plain English" summary term sheet in all cash tender offer, cash merger and going-private transactions;

- update the financial statement requirements for takeover transactions; in particular,

    - eliminate the need to file financial statements for target companies in most cash mergers, to harmonize with the treatment of cash tender offers;

    - clarify when financial statements of the acquiring company are not required in cash mergers, and when financial statements are required, reduce the financial statements required for the acquiror from three years to two;

    - clarify when the bidder's financial statements are not required in cash tender offers, and when financial statements are required in third-party offers, reduce the requirement from three years to two;

    - require pro forma and related financial information in cash tender offers where the bidder intends to engage in a back-end stock merger;

    - reduce the financial statements required for non-reporting target companies in stock mergers;

- permit a subsequent offering period, similar to that available in many United Kingdom tender offers, during which security holders can tender their shares for a limited period after completion of a tender offer;

- clarify the rule that requires issuers to report any intended repurchases of their securities after a third-party tender offer has commenced (Rule 13e-1), and require information to be disseminated on a timely basis; and

- clarify the rule that prohibits purchases outside a tender offer (Rule 10b-13), codify prior interpretations of and exemptions from the rule, and redesignate it as Rule 14e-5.

At this time we are not proposing, but are considering, whether we should:

- impose a federally mandated proxy solicitation period in merger transactions comparable to the current minimum tender offer period, to allow security holders at least a minimum time to consider the proxy statement disclosure;

- modify the proxy rules to permit direct delivery of proxy materials to non-objecting beneficial owners;

- create a broad safe harbor under the proxy rules that would permit "test the waters" communications with security holders without requiring the filing or delivery of a proxy statement, so long as no proxy card is delivered to security holders;

- require delivery of a disclosure document to security holders in cash tender offers, instead of permitting dissemination by summary advertisement alone, to conform the dissemination required in tender offers with that in proxy solicitations and securities offerings;

- permit proxy cards to be sent to security holders before a registration statement for a stock merger is effective; and

- expand by rule the coverage of the Private Securities Litigation Reform Act safe harbor from liability to include forward-looking statements made in connection with tender offers.

II. Discussion of Proposals

A. Overview of the Regulatory Schemes

It may be useful to discuss the regulatory schemes for different methods of business combination before addressing how our proposals would affect the current procedures. This release discusses two primary business combination methods: **tender offers** and **mergers**.[31] Tender offers may be made either by the **issuer** of the securities sought or by a **third party**.[32]

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[31] The discussion of "business combinations" in this release includes all mergers and tender offers addressed by our rules, including those that do not necessarily result in a "combination," such as issuer tender offers and tender offers where the bidder is not seeking control of the target.

[32] An offer by the company to purchase its own outstanding securities is an "issuer tender offer," while an offer by someone other than the issuer is a "third party tender offer." Third-

The essence of a tender offer is that the offeror, or bidder, can go directly to security holders of the target company with an offer to buy their shares. Each security holder makes an individual decision whether or not to tender. A tender offer may or may not have the cooperation of the target company's board of directors. Even if the tender offer is successful, the bidder is unlikely to receive 100% of the shares. In contrast, a merger is a collective, voting decision.[33] The acquiror acquires the entire company if security holders of the target company approve the merger.[34] The acquiror generally needs the approval of the target's board of directors in order to present the transaction for a security holder vote.

In either a tender offer or a merger, the offeror may offer **cash**, **securities**, or a combination. If the consideration consists all or partly of securities, the offeror generally will

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party tender offers for a class of equity securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l) must comply with the requirements of Regulation 14D. In addition, whether or not an offer is subject to Regulation 14D (17 CFR 240.14d-1 through 240.14d-101), the offer must comply with Regulation 14E (17 CFR 240.14e-1 through 240.14e-7) and the antifraud requirements of Section 14(e) of the Exchange Act (15 U.S.C. 78n(e)). Issuer tender offers for the equity securities of a public reporting company must comply with Rule 13e-4. Whether or not the issuer is a public reporting company, the issuer tender offer must comply with Regulation 14E and Section 14(e).

[33] Throughout the release, where we discuss mergers we also include reclassifications, consolidations and transfers of assets where security holders are asked to vote or consent. See Rule 145(a) (17 CFR 230.145(a)).

[34] The security holders of the target company almost always must vote on the merger; sometimes the acquiring company's security holders also must vote. This is determined by state law, the company's governing instruments, and requirements of applicable self-regulatory organizations. If either voting party's securities are equity registered under Section 12 of the Exchange Act, the voting party must comply with the proxy or information statement rules (Regulation 14A or 14C) (17 CFR 240.14a-1 through 240.14a-104 and 17 CFR 240.14c-1 through 240.14c-101).

have to register them under the Securities Act.[35] The offeror will have to give more information to security holders of the target company than if it were offering cash, since the investment decision is more complex. Security holders of the target need information about the issuer whose securities they will receive if the transaction is consummated, which really means information about the surviving, combined entity (the issuer plus the acquired company).

The following summarizes the regulatory process for the four basic business combination methods. These examples assume that the tender offers and proxy solicitations discussed are subject to our filing and dissemination requirements:

> 1. **Cash tender offer — either issuer or third party**. The bidder commences the offer by disseminating tender offer material to security holders, including a request that they tender their shares. On the same day, the bidder files this material publicly with the Commission, along with a tender offer schedule that contains additional information.[36] Unlike the other three transactions discussed below, the Commission staff does not have the opportunity to review the tender offer material until after the tender offer has begun. If the staff decides to review the filed material, and has comments, the staff gives comments to the bidder during the tender offer and the bidder addresses the comments appropriately. (For example, the bidder may need to send additional information to the security holders of the target and the offer may have to be extended.) The offer must remain open for at least 20 business days, and then the bidder can purchase the shares if all conditions to the offer have been satisfied or waived.[37]

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35 The offeror also must comply with the tender offer and proxy rules, if applicable. All business combination methods described in this release also are subject to the antifraud provisions of the federal securities laws. See Securities Act Section 17 (15 U.S.C. 77q); Exchange Act Section 10(b) (15 U.S.C. 77j(b)); Rule 10b-5, Rule 14a-9 (17 CFR 240.14a-9), and Exchange Act Section 14(e) and the rules under that section.

36 Third-party tender offer statements are filed with the Commission on Schedule 14D-1, while issuer tender offers are filed on Schedule 13E-4.

37 In a third-party tender offer, the target company must respond to the offer with a recommendation to its security holders. This recommendation is disseminated to the security holders and filed with the Commission along with a Schedule 14D-9 containing additional information. The staff may review the material and comment on it after it is filed, the same as with the bidder's material.

2. **Exchange offer (stock tender offer) — either issuer or third party**.[38] The bidder files a Securities Act registration statement containing a preliminary prospectus covering the securities it is offering to security holders of the target in exchange for their shares. The prospectus also contains the information about the exchange offer required by the tender offer rules. This is a public document. The bidder may disseminate the preliminary prospectus to security holders of the target company, but it usually does not do so because it cannot request tenders or buy any shares until the registration statement is declared effective. If the staff decides to review the registration statement, it may give comments to the bidder. After these comments are resolved, the bidder requests that the staff declare the registration statement effective. Once the registration statement is effective, the tender offer may "commence" — the bidder disseminates the combined final prospectus/tender offer document to security holders, and requests that they tender their shares. On the same day, the bidder files with the Commission the same tender offer schedule as for a cash tender offer.[39] The offer must remain open for at least 20 business days from this point before the bidder can purchase any shares.

3. **Cash merger**. The offeror files a preliminary proxy statement with the Commission that describes the transaction. This is usually a public document, but the offeror can request that the preliminary merger proxy statement be treated confidentially, with some exceptions. The offeror may mail the preliminary proxy statement to security holders, but often waits until the proxy statement is final, or "definitive." This is because the offeror can send the proxy card only with the definitive proxy statement. The offeror may mail the definitive proxy statement ten days after the preliminary proxy statement is filed. However, if the staff decides to review the proxy material, in most cases offerors wait to receive staff comments before mailing. Once all comments have been resolved, the offeror mails the definitive proxy statement along with a proxy card for security holders to mark and return. There is no federally mandated time period between the date the offeror mails the proxy material and the date of the security holder meeting,[40] but state law generally requires security holder notice of the meeting a specified time before the meeting. If the vote at the meeting is to approve the merger and all conditions have been met, the merger can close.

4. **Stock merger**. The offeror files a Securities Act registration statement with the Commission that contains a preliminary prospectus as well as the information required in a proxy statement. Registration statements are filed publicly, but the material may be

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38 In this release we sometimes refer to "stock tender offers" and "stock mergers," but in both cases it is possible for the consideration offered to be either equity or debt.

39 The target company has the same obligations as in a cash tender offer.

40 But see note 94.

filed as a confidential proxy statement if the offeror so chooses. The registration statement is then filed as a "wrap around" the proxy statement when the offeror is ready to make the information public. The offeror may disseminate the preliminary prospectus/proxy statement, but ordinarily will not do so because the offeror may not include the proxy card. If the staff decides to review the filing, it gives comments to the offeror. After comments are resolved, the offeror requests that the staff declare the registration statement effective. Once the registration statement is effective, the offeror can mail the combined final prospectus/definitive proxy statement along with a proxy card. The process then continues as it would for a cash merger.

Any of the above transactions also could be a "going-private" transaction if it meets the criteria set forth in the "going-private" rule.[41] In this case, the offeror and any other party engaging in the transaction must file another schedule and provide additional information to the Commission and security holders, in addition to complying with the other regulatory requirements discussed. Usually this information is combined into a single disclosure document with the proxy statement, tender offer material or prospectus.

B. Expand Communications Permitted In Tender Offers and Mergers

1. Overview and General Considerations

As discussed above, the fast pace of today's securities markets and the ready accessibility of information through electronic media have caused changes in the mergers and acquisitions environment. We understand that participants in many merger and acquisition transactions are providing extensive, deal-related information to the marketplace immediately following the execution of a definitive merger or purchase agreement. Frequently, parties to a merger or other similar transaction release information to the press containing pro forma financial information on the combined entity, as well as estimated cost savings or "synergies." The parties generally issue

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[41] See Rule 13e-3 and Schedule 13E-3. This rule covers specified transactions where a company may cease to be a public reporting company or a class of equity securities may cease to be registered or publicly traded.

this type of information through press releases, analyst conferences, and meetings with institutional investors and the press.[42] The information provided to analysts often goes beyond the information disseminated to all security holders through press releases.

Parties to merger agreements have asserted several reasons for the need to disclose deal-related information at an early stage, including the duty to make "full disclosure" of material information under Rule 10b-5.[43] Under Rule 10b-5, it is unlawful to make any misstatement or omission of material fact in connection with the purchase or sale of a security. The rule applies to mergers, exchange offers and other extraordinary transactions. The duty to disclose can be triggered by, among other things: (1) line-item disclosure requirements in filings with the Commission; (2) the issuer or insider's duty to "disclose or abstain" from trading while in

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42 "The boundaries of the 'gun jumping' prohibition are being pushed in the current environment. A careful balance must be made between deal announcement activities and broader disclosures, which may serve legitimate disclosure issues, covering expected timetables, managements financing plans, integration (of) operations and synergy expectations. Deal participants frequently are pressured for such information by analysts, reporters and institutional investors, and it is not uncommon for corporations to have full analyst presentations that announce, among other things, aggregate synergies/cost savings and CEO succession plans at the time of the announcement of an exchange offer, merger or spin-off transaction." See Brownstein & Cohen, "Navigating the M&A Waters: Greater Options, Greater Challenges," N.Y.L.J. (February 18, 1997), at p. 6 ("Brownstein & Cohen").

43 The Commission has long recognized the need for issuers to communicate with their security holders with respect to important business and financial developments. See Releases No. 33-4697 (May 28, 1964) (29 FR 7317) and 33-5180 (August 16, 1971) (36 FR 16506). See also Release No. 33-5927 (April 24, 1978) (42 FR 18163), in which the Division of Corporation Finance noted that compelling policy reasons exist, as reflected in the Williams Act disclosure requirements, to permit disclosure of information regarding contemplated "back-end" mergers in order to aid investors confronted with a tender offer investment decision that would otherwise "jump the gun" on a merger.

possession of material, non-public information;[44] (3) the duty to provide full and complete information when disclosing information to the markets;[45] and (4) the duty to correct false or misleading statements made by the company.[46] Companies also may be required by the particular rules of the stock exchange or inter-dealer quotation system upon which their securities trade to inform the marketplace in a timely manner of material corporate developments, including proposed mergers.[47]

We understand that parties involved in extraordinary transactions may have certain economic reasons as well for disclosing more information to the markets before a registration, proxy or tender offer statement is filed with the Commission. These reasons include: the need to

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44 See SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968).

45 Id. at 862; Basic v. Levinson, 485 U.S. 224 (1988).

46 See Ross v. A.H. Robins Co., Inc., 465 F. Supp. 904 (S.D.N.Y.), rev'd in part and remanded on other grounds, 607 F. 2d 545 (2d Cir. 1979), cert. denied, 446 U.S. 946 (1980); Naye v. Boyd, CCH ¶92,980 (W.D. Wash. Oct. 20, 1986); Sharp v. Coopers & Lybrand, CCH ¶96,952 (E.D. Pa. 1979); SEC v. Shattuck Denn Mining Corp., 297 F. Supp. 470 (S.D.N.Y. 1968); Fischer v. Kletz, 266 F. Supp. 180 (S.D.N.Y. 1967). Generally, however, there is no duty to correct statements issued by a third party unless the statements are attributable to the company. See Electronic Specialty Co. v. Int'l Controls Corp., 409 F.2d 937 (2d Cir. 1969); Zucker v. Sable, 426 F. Supp. 658 (S.D.N.Y. 1976). Under certain circumstances courts have found a duty to update information previously disclosed when it is rendered misleading by subsequent developments. See In re Time Warner, Inc., 9 F.3d 259 (2d Cir. 1993).

47 See NYSE Listed Company Manual §202.05 stating that "(a) listed company is expected to release quickly to the public any news or information that might reasonably be expected to materially affect the market for its securities"; and American Stock Exchange, Listing Standards, Policies and Requirements §402 requiring disclosure of material information "likely to have a significant effect on the price of any of the company's securities or . . . likely to be considered important by a reasonable investor in determining a choice of action," providing as an example information regarding mergers and acquisitions. See also the National Association of Securities Dealers, Inc. ("NASD") Manual, Rules 4310(c)(16) and 4320(e)(14).

maintain an orderly market for the securities to be offered as consideration;[48] the need to satisfy the market's increased demand for information regarding a proposed transaction;[49] and the need to inform customers, employees or other constituencies.

While there may be certain regulatory and economic reasons for early disclosure of deal-related information, provisions of the Securities Act and Exchange Act, including the Williams Act,[50] restrict the type of information that may be disseminated before the filing of a registration, proxy or tender offer statement. The flow of information to investors is constrained primarily by the concepts of "offer"[51] and "prospectus"[52] under the Securities Act, "solicitation" under the

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48 In the takeover heyday of the 1980s, the price of participants' stock frequently dropped following the announcement of the transaction. This also can happen today, but market reaction can be positive when a deal appears to make business sense. Steven Lipin, "Corporations' Dreams Converge in One Idea: It's Time to Do a Deal," Wall St. J. (February 26, 1997).

49 "Wall Street may require education due to the complexity of the transaction, the non-apparent nature of its value or the obscure nature of the business. In any case, assuring that the value created by a transaction is properly appreciated by Wall Street, and reflected in stock price, may be both a matter of responsibility to shareholders as well as protecting the deal itself." Brownstein & Cohen at p. 6. Indeed, commentators have argued that "winning the immediate favor of the market through disclosure of projections and other forward-looking information can be an essential element in ensuring the transaction's success." See, e.g., Victor I. Lewkow and Paul J. Shim, Law Puts Parties in a Bind When Announcing Merger, Nat'l. L. J. (Feb. 10, 1997), at p. B9.

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

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

52 The term "prospectus" is defined in Section 2(a)(10) to include any prospectus, notice, circular, advertisement, letter of communication, written or by radio or television, that offers

Exchange Act, and "commencement" under the Williams Act.[53] Each of these concepts reflect a judgment that the information needed to make an informed voting or investment decision should be provided within the four corners of a prescribed disclosure document.

We believe that alleviation of these regulatory constraints may be appropriate in today's marketplace, particularly given technological advances in communications. Information regarding a planned extraordinary transaction can be provided to all security holders on a more equal and timely basis. Restricting communications to one document may in fact serve to impede, rather than promote, informed investing and voting decisions. Of course, any proposed safe harbors permitting increased communications must be balanced to assure investor protection. Modifications to the existing regulatory scheme include conditions designed to provide full and fair disclosure to all investors and the broader marketplace and not simply to a limited audience of analysts and financially sophisticated market participants. Today's proposals are designed to reduce selective disclosure by permitting the widespread dissemination of information through a variety of media calculated to inform all security holders about the terms, benefits and risks of a proposed extraordinary transaction.

It is important to note that the proposals do not change the current requirement that before security holders are asked to vote or tender their shares, they must receive a mandated

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any security for sale or confirms the sale of the security, except for communications that are preceded or accompanied by a statutory prospectus. 15 U.S.C. 77b.

[53] "Solicitation" is broadly defined by the Commission to include "the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy." See Rule 14a-1(l) (17 CFR 240.14a-1(l)). The Williams Act provides that only very limited information can be announced without either commencing a cash tender offer or requiring the filing of a registration statement in a stock offer.

disclosure document — a prospectus, proxy statement, or tender offer statement — that sets forth complete and balanced information.[54] Our long-standing concern about communications conditioning the market before the dissemination of mandated disclosure documents (i.e., "gun-jumping") is alleviated by continuing to require this disclosure document before the investment decision, as well as by the liability that could attach to knowingly false offering materials.

2. Eliminate Restrictions on Pre-filing Communications

We propose to eliminate the current restrictions on communications about an upcoming merger, tender offer, or other business combination. Each of the regulatory schemes would provide for a safe harbor, as described below, for oral and written communications about the transaction before the registration, proxy or tender offer statement is filed. Recognizing that deal-related disclosure, including forward-looking information, is important to a complete understanding of a transaction, we do not propose any content limitation on the communications. However, we request comment on whether any content restrictions should be included in the proposed safe harbors. Of course, even without content restrictions, the antifraud rules will continue to apply.

We do not propose to limit eligibility for the proposed safe harbors to transactions involving large or seasoned issuers. We considered making distinctions by size and seasoned status along the same lines as in the Securities Act Reform Release (i.e., Form A and Form B), but believe that those distinctions are not as important as other considerations in the case of business combination transactions. In these transactions, the market does not need information about the offeror alone, but rather the combined entity, with which the market is unfamiliar in

[54] See the discussion of proposed Form C in Part II.D.2.d below.

any case. Thus, the need for freer disclosure stems in large part from the fact that the offeror is, in essence, becoming a new company. Therefore, the market-driven disclosure is not company information but "synergies" and similar information about the combined entity. Further, we believe that regardless of seasoned status, the reasons for full and timely disclosure in a business combination still exist.

Nevertheless, we request comment as to whether the size and seasoned status of the parties to the transaction should determine the availability of the free communication safe harbors. Should the safe harbor be limited to Form B companies?[55] If the safe harbor were based upon the size and seasoned status of the parties, should it be the status of the acquiror or the target that would govern, or both? If the status of the acquiror controlled, different acquirors for the same target could be subject to different rules. Would the lack of a level playing field for competing acquirors have adverse effects on competition or the target's security holders?

While we believe that the parties involved in a business combination transaction should be permitted to rely on the free communications safe harbors regardless of size, certain safeguards to protect investors are necessary. All written communications by those parties from the date of the first announcement of the transaction would be required to be filed with the Commission upon first use.[56] Although there would be no requirement to deliver this information to security holders, written communications would have to be filed upon first use in

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55 If the proposals in the Securities Act Reform Release are not adopted, then the proposals presented in this release could be limited to companies that are Form S-3 eligible, including the requirement that the aggregate market value of voting and non-voting common equity held by non-affiliates equal or exceed $75 million.

56 See Part II.B.5 below. Written communications include communications that are published in electronic media, such as videos and CD-ROMs.

order to assure that the information is available to all security holders — not just analysts and institutional investors — at the same time. Furthermore, written information about a proposed combined entity or the "synergies" that are expected to result from a proposed transaction could be verified or confirmed, and corrective disclosure could be required if needed.

Each communication would be required to include a prominent legend advising investors to read the registration, proxy or tender offer statement.[57] We solicit comment on whether certain basic information, including the name and description of the acquiror, also should be required in each communication.[58]

We believe that bidders would welcome the opportunity to disclose deal information earlier in the process and that the filing on first use requirement would not "chill" disclosure of forward-looking information because of continuing market demands. We request comment, however, as to whether parties involved in tender offers would be reluctant, in light of the filing requirement, to disclose forward-looking information absent a safe harbor from liability for that information. The safe harbor established by the Private Securities Litigation Reform Act

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[57] The legend also would advise investors that they can obtain copies of the filed documents for free at the Commission's web site and explain which documents are available for free from the issuer. See proposed Securities Act Rule 421(e) in the Securities Act Reform Release, as well as proposed Rules 14a-12(a)(2), 13e-4(c) and 14d-2(b)(2) in this release.

[58] As discussed below, free pre-filing communications are permitted under the current scheme only in contested proxy solicitations under Rules 14a-11 and 14a-12. Those rules require that certain basic information (the identity of the participants in the solicitation and a description of their interest in the transaction) be disclosed in each communication, whether written or oral.

currently applies to merger transactions but does not apply to tender offers. We discuss below the possibility of expanding by rule the scope of that safe harbor to tender offers.[59]

Would parties to a transaction communicate more freely if the written communications could be filed at a later date, whether along with the mandated disclosure document[60] or some other date, instead of filing upon first use? If so, should the communications required to be filed be limited to those made during a specified period of time, such as 30 calendar days or 30 business days before the disclosure document is filed? In addition to the filing requirement for written communications, would any market conditioning effect of the pre-filing communications be cured by the built-in time period between delivery of the disclosure document and the final voting or tendering decision? Would offerors tend to shorten this time period, to the extent permitted by law, if they could engage in more extensive communications at an earlier point? We also ask whether security holders would tend to sell into the market on the basis of pre-filing communications, rather than waiting for the disclosure document.

As noted, the proposed free communications safe harbors would apply to oral as well as written communications. We do not propose to require that oral communications be reduced to writing and filed. As one objective of the proposal is to reduce selective disclosure, we solicit comment on whether liberalizing oral communications would remove incentives for offerors to file information and disseminate it in a widespread manner.[61] Should the safe harbors be

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59 See Part II.E.6 below.

60 This is the way Form B issuers would be treated in capital-raising transactions, as proposed in the Securities Act Reform Release.

61 Of course, nothing in the proposal would affect a person's liability for trading on inside information. See Rules 10b-5 and 14e-3 (17 CFR 240.14e-3).

available to oral communications?[62] If so, would the need to provide information to the markets generally provide a sufficient incentive for offerors to disseminate full, fair and balanced information in a widespread manner? Should a "notice" filing be required when oral communications are made?

As proposed in the Securities Act Reform Release, business information that is factual in nature and relates solely to ordinary business matters, not to the pending transaction, would be exempt from the prohibition on offers and would not be required to be filed. This type of information generally does not have the potential for conditioning the market before an extraordinary transaction and, as the dissemination of such information is usually routine, we do not view it as specifically related to the transaction.[63] The proxy and tender offer rules would provide the same exclusion.[64]

3. Waiting Period and Post-Effective Period Communications

In the Securities Act Reform Release, we propose to permit free oral and written communications during the period between filing and effectiveness of the registration statement, in order to provide an opportunity for open dialogue between the company and its potential

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62 The current safe harbor in Securities Act Rule 145(b)(2), discussed below, is limited to written communications.

63 Proposed Rule 169. Also as proposed in the Securities Act Reform Release, there would be a safe harbor for regularly released forward-looking information (which would be filed under Rule 425), and the safe harbors for the publication of research reports by broker-dealers would be revised. All of these would apply to business combinations as well as to capital-raising transactions. See proposed Rule 168(b) and proposed revisions to Rules 137, 138, and 139 (17 CFR 230.137; 17 CFR 230.138 and 17 CFR 230.139).

64 Proposed Rules 13e-4(c), 14a-12 and 14d-2.

investors.[65] This Securities Act safe harbor also would apply to the period after effectiveness of the registration statement.[66] The rule would be available for business combinations as well as for capital-raising transactions. We also would extend this safe harbor to the proxy and tender offer rules.[67] Like pre-filing communications, written communications during these periods would be required to be filed upon first use. Free communications during the waiting period would be particularly important if our proposal to permit exchange offers to commence before effectiveness is adopted.[68]

4. Alternative Communications Proposals

We are considering alternatives to the free communications safe harbors that would provide more limited flexibility for pre-filing communications. In particular, we are considering whether to allow the companies conducting the transaction to make deal-related disclosure only during a 48-hour period following the public announcement of a definitive merger agreement or takeover plan. Similar to the "free communications" proposal, there would be no content restrictions on the companies' communications during the proposed 48-hour period, other than the antifraud provisions. After the 48-hour period, the companies would be required to remain quiet regarding the transaction until a registration, proxy or tender offer statement is filed. If this alternative proposal is adopted, should the 48-hour time period be shorter or longer (e.g., 24 or

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65 Proposed Rule 165.

66 Currently, "free writing" is permitted after a registration statement becomes effective, but the "free writing" material, such as sales literature, must be accompanied or preceded by a final prospectus.

67 Proposed Rules 14a-12 and 14d-2.

68 See Part II.C.1 below.

72 hours), or should it be based on a number of business days, such as one, three or five business days?

Under this alternative proposal, the safe harbor would not be available to a company if it disclosed deal-related information after the 48-hour period without the relevant disclosure document on file. The company, however, could take steps to regain protection under the safe harbor by discontinuing communications related to the transaction for at least 30 calendar days (the "30-day quiet period") before a registration statement is filed. The 30-day quiet period would serve to cure any conditioning effect that the communications may have had on the market for the companies' securities.

As a third alternative to the free communications proposal and the 48-hour model, we also solicit comment on whether to permit free communications for an unlimited period of time after the deal is announced, so long as the parties observe a 30-day quiet period before filing the registration statement, proxy statement or tender offer material. This would be similar to the treatment of Form A companies in capital-raising transactions, as proposed in the Securities Act Reform Release. We ask commenters whether it would be practicable in the business combination context to require a minimum of 30 days between announcing the deal and filing the registration statement, proxy statement or tender offer material.

We request comment on whether, under the alternative proposals, the 30-day quiet period would be sufficient to cure any conditioning effect that earlier communications may have on the market. Is a longer quiet period necessary (e.g., 45 days), or would a shorter period suffice (e.g., 15 or 20 days)? We also solicit comment on whether the time period for staff review should be included in the 30-day quiet period. Should companies be permitted to file the relevant

disclosure document as soon as it is prepared despite disclosure of deal-related information outside the 48-hour period? How should the announcement of a hostile transaction affect the type of communications permitted during the 30-day quiet period? Should the type of communications permitted outside the 48-hour period be different for friendly and hostile transactions? Should the communications be filed on first use, or not filed until the mandated disclosure document is filed?

Finally, we request comment as to whether either of the alternative proposals is preferable to the free communications safe harbors.[69] Commenters should keep in mind that we would conform the proxy rules and tender offer rules to whatever scheme we adopt under the Securities Act for business combinations.

5. Free Communications Under the Securities Act

To implement the overall scheme discussed above, we propose new Securities Act Rule 166(b) to permit free communications in connection with any registration statement for a business combination. As discussed above, this rule would not contain any content restrictions so that deal-related information could be disclosed to analysts and security holders alike. Given the potential breadth of the communications, these communications still would be considered offers under the Securities Act.

As discussed above, Section 5(c) of the Securities Act prohibits offers unless a registration statement is on file. In 1996, the Commission was granted exemptive authority

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[69] Like the free communications proposal, the alternative safe harbors would not restrict factual business communications at any time. These communications could occur throughout the pre-filing and waiting period without precluding reliance on the safe harbor or triggering a 30-day quiet period.

under Section 28 of the Securities Act.[70] For the reasons stated above — including the need to reduce selective disclosure and provide deal-related information to all security holders on an equal basis — we believe that an exemption from Section 5(c) of the Securities Act for persons making offers in business combination transactions is in the public interest and is consistent with the protection of investors.

The proposed safe harbor under this exemption would be available to the acquiring company — the offeror of the securities. The company to be acquired would not ordinarily be subject to restrictions on communications under the Securities Act, but under some circumstances it could be viewed as joining the acquiring company in making the offer. In this event, it also could avail itself of the safe harbor. In addition, we request comment as to whether any other parties should be exempted from Section 5(c) and eligible to rely on the proposed safe harbor for pre-filing communications. For example, should the parties' affiliates, dealer-managers and others acting on behalf of the parties to the transaction be permitted to take advantage of the safe harbor?[71]

In cases where deal-related information is disclosed before filing a registration statement, the current practice has been to file the communications on Form 8-K[72] and then incorporate these filings by reference into the registration statement. As a result, these communications are

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[70] The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions from any provision of this title or any rule or regulation issued under this title to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with protection of investors. 15 U.S.C. 77bb.

[71] See the discussion of research reports in the Securities Act Reform Release.

[72] 17 CFR 249.308.

subject to Section 11 liability.[73] As a condition to the proposed free communications safe harbor, written communications relating to the transaction would be filed upon first use as pre-filing prospectus supplements[74] that are subject to Section 12(a)(2) liability.[75] This is because we believe Section 12(a)(2) liability would adequately protect investors while not chilling parties' willingness to make these communications. However, we request comment on whether all written communications related to the transaction should be incorporated into the registration statement and subject to Section 11 liability under the Securities Act.[76] Would this encourage offerors to rely more on oral communications? We also ask whether it is necessary to condition the availability of the safe harbor on the timely filing of these communications, as proposed.

We note that relatively free written and oral pre-filing communications already are permitted under the current scheme for contested proxy solicitations. Such solicitations, if

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73 15 U.S.C. 77k.

74 Written communications would be filed as offering material under proposed Rule 425(b)(3). Like Rule 424 (17 CFR 230.424), proposed Rule 425 would provide the procedural requirements for filing the written communications as pre-filing prospectus supplements. Comparable filing requirements are proposed under the proxy and tender offer rules (proposed Rules 13e-4(c), 14a-12 and 14d-2). These communications would be filed on EDGAR to the same extent that the related prospectus, tender offer or proxy statement would be required to be filed electronically. For a discussion of materials in various electronic media and how they would be filed, see Part VII.B of the Securities Act Reform Release. If a Rule 425 filing was required, filers would not also have to file the same document under the proxy and tender offer rules.

75 15 U.S.C. 77l(a)(2). Oral communications also would be offers subject to Section 12(a)(2) liability.

76 In any event, if a pre-filing communication contains material information that is required to be in the registration statement, the filer will put the information in the registration statement, so Section 11 will apply.

written, currently are not deemed offers under the Securities Act.[77] Written communications must be filed in accordance with proxy Rule 14a-12(b), as discussed below.

To harmonize treatment of all merger transactions, whether contested or friendly, we propose to eliminate the provision that such communications are not offers under the Securities Act.[78] Thus, pre-filing communications in contested transactions also would be considered offers and pre-filing supplements to the prospectus subject to liability under Section 12(a)(2) of the Securities Act. We do not believe that communications would be chilled by this modification because of the heightened need for communications in hostile or competing transactions. In addition, we note that such communications already are subject to antifraud liability. We request comment, however, as to whether treating this information as offers — imposing Section 12(a)(2) liability under the Securities Act — would chill communications in hostile transactions.

Rule 135 notices are not currently, and are not proposed to be, filed with the Commission. We solicit comment, however, on whether Rule 135 notices involving prospective business combinations should be filed, since they could contain the initial public announcement of the transaction. The filing would be made under Rule 425, but since these notices are not

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[77] See Rule 145(b)(2) (17 CFR 230.145(b)(2)). Rule 145 is the rule that applies the registration requirements to business combinations involving security holder voting decisions.

[78] Rule 145(b)(2) would be rescinded. Rule 145(b)(1), which provides that certain written communications containing only specified information about mergers and similar transactions are not deemed offers, would be moved from Rule 145 to Rule 135 (17 CFR 230.135). Rule 135 already contains similar provisions for communications about exchange offers. See the Securities Act Reform Release for the text of proposed Rule 135 revisions.

considered "offers" they would not have liability as such; Rule 425 would be modified to make this clear.[79]

In the Securities Act Reform Release, the proposed scheme for capital-raising transactions for Form A issuers contemplates that communications more than 30 days before the filing of a registration statement do not constitute offers.[80] In contrast, the proposed scheme for business combinations treats all communications related to the transaction as offers, starting with the first communication relating to the transaction (except for communications among the participants in the transaction).[81] Thus, these communications would be subject to Section 12(a)(2) liability even if made more than 30 days before filing the registration statement. Should we treat business combinations the same as capital-raising transactions and apply the 30-day rule to both?[82] If we did this, we could still require communications before the 30-day window to be filed, but they would not have Securities Act liability as offers. We ask commenters to address whether the status of deal-related communications as offers should depend on how soon they are followed by the filing of a registration statement.

We also solicit comment on whether, if we do retain the first public announcement standard, we need to define "public announcement." We could define this as the first public communication about the transaction that gives more information than permitted by Rule 135.

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79 In any event, under the proposed scheme these communications would need to be filed under the proxy or tender offer rules.

80 See proposed Rule 167(c).

81 See proposed Rule 167(b).

82 In that case, we also would apply the 30-day rule to proxy and tender offer solicitations.

Alternatively, we could have a broader definition that includes any public communication identifying the offeror, the target company or class of securities, the number or percentage of securities sought, and the price or range of prices. Should the definition clarify what is meant by "public" (i.e., communications that go beyond the participants to the transaction)?

6. Free Communications Under the Proxy Rules

a. Expand Rule 14a-12 Safe Harbor

In 1992, we significantly enhanced security holders' ability to communicate with one another regarding corporate matters without furnishing a proxy statement, so long as no proxy card or other authorization is furnished to or requested from security holders.[83] The enhancements have worked well to improve the quality and amount of information flowing to and among security holders. Under the current regulatory scheme, however, there are still some restrictions on communications. For instance, management or security holders seeking proxy authority may not communicate without first furnishing a proxy statement, unless the solicitation is either in connection with an election contest under Rule 14a-11[84] or in opposition to an earlier solicitation, invitation for tenders, or certain other publicized activity under Rule 14a-12.[85] Both rules permit solicitations before furnishing security holders with a written proxy statement, so

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83 See Rule 14a-2(b)(1). (17 CFR 240.14a-2(b)(1)). The rule may not be used by the company itself. Also, there are various exceptions for persons with specified interests in the solicitation. For example, the rule may not be used by any person soliciting in opposition to a merger or other extraordinary transaction, when the soliciting person is a party to an alternative transaction.

84 17 CFR 240.14a-11.

85 17 CFR 240.14a-12. In addition, parties other than the company's management may solicit proxies from up to ten persons without being required to file a proxy statement. See Rule 14a-2(b)(2) (17 CFR 240.14a-2(b)(2)).

long as: (i) no form of proxy (i.e., proxy card) is furnished until a written proxy statement is furnished; (ii) the identity of the participants in the solicitation and a description of their interests are included in any communication published, sent, or given to security holders; and (iii) a written proxy statement is provided to security holders at the earliest practicable date. The rules apply to both oral and written solicitations.[86] Written soliciting material must be filed with, or mailed for filing to, the Commission no later than the date the material is first published, sent, or given to security holders.[87]

Despite the 1992 amendments, some have contended that the current rules may continue to unnecessarily restrict communications among security holders and/or between a company and its own security holders. Recent developments in information technology have enabled companies to engage in more frequent, direct and timely communications with their security holders about matters of particular interest. As the pace of the securities markets increases, there appears to be a greater need for some flexibility in the proxy rules to permit communications before filing and delivery of a written proxy statement. Accordingly, we propose to broaden the safe harbor in Rule 14a-12 to apply to all solicitations, not just to those involving opposed matters.

The other provisions in Rule 14a-12, including the condition that no form of proxy is furnished, the obligation to disclose participant information, and the delivery of a written proxy statement to all solicited security holders as soon as practicable, would be retained. We also would continue to require that written solicitations be filed upon first use. In addition, consistent

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[86] The proxy antifraud rule, Rule 14a-9, applies to these communications.

[87] See Rules 14a-11(c) and 14a-12(b) (17 CFR 240.14a-11(c) and 240.14a-12(b)).

with proposed changes to the Securities Act and tender offer rules, each communication would be required to prominently advise security holders to read the proxy statement.[88] These requirements, together with the antifraud provisions in Rule 14a-9, appear sufficient to assure the integrity and adequacy of the information and protect against misleading solicitations.[89]

Filing of written communications upon first use also would assure consistency with the requirements we propose for extraordinary transactions under the Securities Act. We request comment, however, on whether the filing upon first use requirement should be modified if under the Securities Act we permit filing later than upon first use (i.e., when the disclosure document is filed). We also request comment on whether to retain the requirement to disclose the identity of participants and their interests if we do not adopt a corresponding requirement under the tender offer rules and the Securities Act requirements for tender offers. If we change either the filing requirement or the participant information requirement, should the change apply only to proxy statements relating to business combinations?

We proposed expanding Rule 14a-12 in 1992 to permit solicitations before filing and delivering a written proxy statement regardless of the existence of an opposing solicitation.[90] We ultimately determined not to adopt the proposal because "the broad scope of current Rules 14a-11(d) (now Rule 14a-11) and 14a-12 reach virtually all contested and responsive

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88 Proposed Rule 14a-12(a)(2).

89 The proposed expansion of communications would not expand a company's ability to secure promises to vote a certain way before a proxy statement is provided. See the Securities Act Reform Release, however, for proposed Rule 159, which would provide exemptions from the proxy rules for certain "lock-up" arrangements.

90 Release No. 34-30849 (June 24, 1992) (57 FR 29564).

solicitations."[91] We further noted that the need to extend Rule 14a-12 to all solicitations was mitigated by the proposal to allow registrants and other persons planning a solicitation to begin their solicitation on the basis of a publicly filed preliminary proxy statement.[92] However, given the pressures — both regulatory and market-induced — to disclose deal-related information immediately upon announcement, we now believe that the current rules may overly restrict communications among security holders and/or between a company and its own security holders. Based upon our experience with the 1992 liberalization of communications, we do not believe that further easing of restrictions would lead to abuse.

Under the proposed expansion of Rule 14a-12, management could engage more freely in communications regarding a prospective or pending acquisition. However, this proposal is not limited to takeover-related matters. For example, management could rely on the proposed safe harbor to obtain security holders' views in connection with certain corporate governance items that may require a security holder vote, such as the adoption or amendment of executive and director compensation plans, an increase in the number of authorized shares that may be issued, and the adoption or redemption of a security holder rights plan. We believe that management's ability to disseminate information on a more timely basis may result in more informed voting decisions by security holders and may increase the amount and quality of information generally available to all security holders.

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91 Release No. 34-31326 (October 16, 1992) (57 FR 48276). Comments on the proposal were mixed. Those who objected "questioned whether there was a demonstrated need for the revisions and raised concern with the potential abuse that could arise." Id.

92 Id. When a soliciting party uses a preliminary proxy statement to begin a solicitation, the form of proxy may not be included with the material distributed.

We request comment as to whether there are certain instances when the requirement to deliver a proxy statement as soon as practicable would be too burdensome. In addition, are there any circumstances under which management or other parties may want to communicate that should not trigger the obligation to deliver a proxy statement at the earliest practicable date? For example, if a merger transaction was only under consideration by management, and no formal agreements were entered into, should it be necessary to send a proxy statement to security holders if the transaction does not materialize? As another example, management might find the proposed safe harbor useful to "road-test" an executive compensation proposal with large security holders, but not present the matter for a security holder vote if the reaction was negative. What impact would this have on smaller security holders?

We invite comments on whether the expansion of Rule 14a-12 to non-contested situations would have the intended effect of permitting management to communicate more freely with security holders and whether this would enhance the timing or quality of information given to security holders. One effect of the proposed expansion of Rule 14a-12 may be to eliminate any need for Rule 14a-11.[93] Would it be appropriate to eliminate Rule 14a-11 if we expanded Rule 14a-12 to cover all matters, whether or not they are contested?

As discussed above, one "check" on any conditioning effect that free communications might have on security holders is the fact that security holders will receive a mandated disclosure document in extraordinary transactions before making their tender or voting decision. In a tender offer, there is a mandated minimum 20-business day period between the time the disclosure document is disseminated and the expiration of the offer. As a general rule, however,

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[93] Currently, Rule 14a-12 excludes matters covered by Rule 14a-11.

there is no federally mandated time period for disseminating a proxy statement.[94] Many state laws, however, dictate that there be at least 10 and no more than 60 days between notice of the meeting and the meeting date. Generally, the state law notice and the federally mandated proxy statement are mailed together to security holders. During this period, security holders are able to assess the relevance and credibility of all written communications in light of the mandated disclosure. In some cases, state law permits a period so short that security holders may not have enough time to consider the information.

We request comment as to whether there should be a federally mandated solicitation period for mergers and similar transactions, given the free communications proposals and the need to digest the mandated disclosure in light of earlier communications. This period also would assure that record holders and beneficial owners alike would have enough time to consider the proxy materials. If a federally mandated solicitation period is adopted, how long should it be? Would 20 business days make sense so that it is harmonized with the mandated tender offer

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[94] Note, however, that there is a mandated 60-day solicitation period if the transaction is a roll-up. See Section 14(h)(1)(J) of the Exchange Act (15 U.S.C. 78n(h)(1)(J)); Rule 14a-6(l) (17 CFR 240.14a-6(l); General Instruction I.2 to Form S-4 (17 CFR 239.25) and General Instruction G.2 to Form F-4 (17 CFR 239.34). Also note that there is a requirement to send or give security holders a written information statement on Schedule 14C at least 20 calendar days before the meeting date or the earliest date on which corporate action may be taken if no meeting will be held. See Rule 14c-2(b) (17 CFR 240.14c-2(b)).

See also Release No. 34-33768 (March 16, 1994) (59 FR 13517). "Although the rules do not specify the number of days before the meeting by which registrants must make their proxy materials available for distribution to their beneficial owners, in order to comply with the timeliness requirement, the materials must be mailed sufficiently in advance of the meeting to allow five business days for processing by the banks and brokers and an additional period to provide ample time for delivery of the material, consideration of the material by beneficial owners, return of their voting instructions, and transmittal of the vote from the bank or broker to the tabulator." Id. (footnotes omitted).

time period? Should it be 20 calendar days to conform with the information statement requirement, or should the information statement requirement be changed to 20 business days? Should the solicitation period be required only as a condition of the free communications safe harbor? Should it apply only to votes on business combinations?

We are particularly concerned about giving security holders time to consider proxy material in the case of street name holders — beneficial owners of securities who obtain their proxy material through banks, broker-dealers, or other nominees holding record title to the securities. Do street name holders receive correcting or updating material in a timely fashion? Would modifying the security holder communications provisions of the proxy rules to permit direct delivery of proxy statements and other soliciting materials to non-objecting beneficial owners facilitate more timely and fully informed voting decisions?[95]

b. "Test the Waters" Proxy Solicitations

We also are considering a broader exemption from the proxy rules that would not require delivery of a proxy statement after communicating with security holders. The only condition would be that no proxy card or other authorization be requested or sent. In effect, such a rule would permit both written and oral "test the waters" proxy solicitations.[96] Such an exemption would be crafted as part of Rule 14a-2,[97] which sets forth a number of solicitations that are exempt from the proxy statement disclosure and dissemination requirements. Would a broad

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[95] See Rules 14a-13 (17 CFR 240.14a-13), 14b-1 (17 CFR 240.14b-1), 14b-2 (17 CFR 240.14b-2) and 14c-7 (17 CFR 240.14c-7).

[96] Rule 14a-9 would, of course, impose antifraud liability on these communications.

[97] 17 CFR 240.14a-2.

exemption remove the need for any of the current exemptions in Rule 14a-2?[98] Would it remove the need for Rules 14a-11 and 14a-12? Would the same purpose be accomplished by amending Rule 14a-2(b)(1) to eliminate the exceptions, so the rule could be used by the company itself and interested parties?[99] Should the "test the waters" communication be required to include any minimal information?

Unlike Rule 14a-12, the "test the waters" proxy rule would not require that written communications be filed with the Commission.[100] However, we are considering requiring communications to be filed in order to harmonize with the treatment of written communications under the Securities Act and the Williams Act. Commenters should address whether the need to file material would reduce the usefulness of the "test the waters" proxy exemption. Would a filing requirement provide benefits to security holders by assuring that information is available on a widespread basis? If we do require filing of material under this exemption, should it be a "notice" filing only as opposed to requiring the communication itself to be filed? Should the filing requirement be limited to the business combination context? Or should the "test the

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98 In particular, the exemption for solicitations that do not seek the power to act as a proxy for another security holder and do not furnish or otherwise request a form of revocation, abstention, consent or authorization in Rule 14a-2(b)(1) and the "ten person" exemption in Rule 14a-2(b)(2). (17 CFR 240.14a-2(b)).

99 A person relying on Rule 14a-2(b)(1) currently is not permitted to change the exempt proxy solicitation to a non-exempt one and send a proxy card to security holders. This position would have to be modified to accomplish the objectives of the "test the waters" proxy solicitation proposal.

100 Currently, communications exempt under Rule 14a-2 need not be filed, except that notice filings are required for certain communications under Rule 14a-2(b)(1) and the roll-up solicitation rule, Rule 14a-2(b)(4).

waters" proxy solicitation be unavailable for business combination communications, leaving Rule 14a-12 as the sole safe harbor for these communications?

We request comment on whether a "test the waters" proxy rule would benefit security holders. This change would be consistent with the general theme of easing restrictions on communications under the Securities Act as expressed in this release and the Securities Act Reform Release. On the other hand, does the current requirement to follow up communications with delivery of a proxy statement impose a beneficial discipline on the solicitation process by discouraging premature insupportable communications? Should we require a "cooling-off period" (e.g., 20 or 30 days) between the "test the waters" solicitation and a request for a proxy card? Commenters should advise whether they think the "test the waters" rule would work, not just in the context of takeover-related matters, but also in the context of any corporate governance matters or other topics that are likely to be the subject of a proxy solicitation.

c. Eliminate Confidential Treatment of Merger Proxies

Currently, preliminary proxy material relating to certain reclassifications and business combinations, other than going-private or roll-up transactions,[101] may be filed confidentially with the Commission.[102] In that case the proxy material is not filed on EDGAR and is not available

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[101] A roll-up transaction is any transaction or series of transactions that directly or indirectly, through acquisition or otherwise, involves the combination or reorganization of one or more "finite-life" entities (usually limited partnerships) where the securities to be issued are publicly registered. See Release No. 33-6900 (June 17, 1991) (56 FR 28979); Release No. 33-6922 (October 30, 1991) (56 FR 57237); Release No. 33-7113 (December 1, 1994) (59 FR 63676); and the 900 series of Regulation S-K.

[102] Rule 14a-6(e)(2) (17 CFR 240.14a-6(e)(2)).

for public inspection.[103] Due to the changing realities of today's markets, and the expressed need by many companies for an expanded safe harbor permitting early disclosure of information before a registration statement is on file, we propose to eliminate confidential treatment for merger proxy statements.[104] Often companies that invoke confidential treatment for their merger proxy statements already have made extensive pre-filing disclosure of information beyond what is permitted by current Securities Act Rule 145(b) and the proxy rules. It is unclear to us why a company that broadcasts extensive deal-related information to the securities markets soon after a definitive merger agreement is executed needs confidential treatment for the same information contained in its proxy materials. In some instances, the information disclosed to the market is more extensive than the information disclosed in the preliminary proxy statement filed confidentially.

We previously proposed to eliminate confidential treatment for all preliminary proxy statements, including those relating to mergers, in 1992.[105] The Commission ultimately decided to preserve confidential treatment for merger transactions in light of commenters' concerns that the inability to file documents relating to business combinations or acquisitions on a non-public basis would cause premature disclosure of information. The concern articulated was that merger negotiations might not be ripe at the time of filing and public disclosure "would adversely affect

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[103] The proxy material is filed publicly in definitive or final form when the staff has no further comments or when a related registration statement is filed that wraps-around (or incorporates) the information contained in the proxy statement.

[104] When the transaction is a stock merger, this would eliminate the need for the current practice of filing a (confidential) proxy statement before filing the related (public) registration statement.

[105] See Release No. 34-30849 (June 24, 1992) (57 FR 29564).

the timing of such transactions and thereby their costs, since they could not obtain Commission review of the offering documents while the participants were preparing for the public announcement of the transaction."[106] In light of the current practice of disclosing extensive deal-related information before the filing of a proxy statement, we do not believe that preliminary merger proxy materials continue to merit confidential treatment.

The elimination of confidential treatment of merger proxy statements would harmonize the treatment of preliminary proxy statements with preliminary prospectuses and tender offer materials, which are publicly available when filed. In addition, security holders would obtain faster access to information concerning extraordinary transactions. Without confidential treatment, security holders also would have more time to consider and respond to proposed mergers and acquisitions.

We request comment on whether confidential treatment should be retained under any limited circumstances. Should confidential treatment be available if the parties to the merger transaction do not rely on the new safe harbors permitting increased communications?

Some have expressed the view that confidential treatment makes registrants more comfortable with amending their materials to comply with staff comments, as the marketplace is not aware of the nature of the changes. If a proxy statement is filed publicly, the trading markets may act on the information disclosed and there may be liability concerns if the information disclosed is revised. Do commenters believe that these concerns outweigh the benefits of public filing? If so, how are merger proxies different from exchange offers and other types of filings that are not accorded confidential treatment?

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106 Id.

We note that when the wrap-around procedure is used, registration statement exhibits are filed on a delayed basis. Would registrants be put at a significant disadvantage if they were required to file all exhibits when they filed their registration statements publicly, or would they continue the practice of filing exhibits when available? Should we continue to permit the filing of a proxy statement before the wrap-around registration statement, even though the proxy statement would be public?

d. Timing of Filings

In addition to the substantive changes to the proxy rules proposed above, we propose procedural amendments to the proxy filing requirements. Rule 14a-6(b) requires definitive material to be "filed with, or mailed for filing to, the Commission not later than the date such material is first sent or given to any security holders." Several other proxy and information statement filing rules contain similar language.[107] The option to mail proxy materials to the Commission is no longer relevant because companies that are subject to the proxy rules are now required to file electronically.[108] We propose to update these filing rules to eliminate the "mailed for filing" language in the rules. Filers would be required to file definitive material with the Commission no later than the date they send or give proxy materials to security holders.

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

[108] See Rule 101(a)(iii) of Regulation S-T (17 CFR 232.101(a)(iii)). Registrants may use paper only if a hardship exemption is available. Foreign private issuers that are not required to file electronically are exempt from the proxy and information statement requirements. 17 CFR 240.3a-12-3.

We believe that making definitive material available to security holders, the market and the staff as promptly as possible is important. EDGAR, and other sources of electronic filings, including the Internet, have become essential in supplying the investment community with public information. Any discrepancy between the time information is first disseminated and the time it is filed with the Commission could place those who rely on our filings for public information at a disadvantage.

Filers (particularly those in time zones later than the Commission's) have argued that filing proxy materials on the same day is a hardship. It is not clear why this is the case, in view of the treatment of tender offer materials. Such materials must be filed "as soon as practicable" on the date the tender offer commences, and filers comply with that requirement without any apparent difficulty.[109] While the proposed electronic filing rule acknowledges that some information may be released when it is not possible to file it with the Commission, we believe that material distributed during Commission business hours should be available at that time to the public through our filing system.[110]

In connection with this change to the proxy filing rules, we propose to update our electronic filing rules to provide guidance to filers as to when to file material that is disseminated

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[109] See Rule 14d-3(a) (17 CFR 240.4d-3(a)). See also Rule 14d-3(b) (17 CFR 240.14d-3(b)) (filing of additional tender offer material).

[110] In an interpretive letter, the Division of Corporation Finance stated that, where it is impracticable to file proxy materials on the same business day, it is consistent with the intent of Rule 13(d) to allow issuers and others to file electronically "promptly on the next business day following distribution to security holders." See Henry Lesser, Esq. (November 28, 1995). This proposal would supersede that interpretation. Material disseminated during the Commission's business hours would be required to be filed on that day.

outside normal Commission business hours. The issue of when to file this type of material arises most often in the context of proxy soliciting material, although it may, on occasion, arise for tender offer filings. Our electronic filing rule already requires material that may be "mailed for filing" to be filed on or before publication or distribution; in the event of publication or distribution on a non-business day, the rule permits filing "as soon as practicable on the next business day."[111] We propose to modify this rule to eliminate "mailed for filing" and refer to material that is required to be filed on the same day it is disseminated. The revised rule would continue to permit filing as soon as practicable on the next business day if the material was disseminated on a non-business day, but would make it clear that dissemination after the Commission's business hours is treated the same as dissemination on a non-business day. The revised rule would apply to tender offer filings as well as proxy filings.

We solicit comment on the nature and extent of problems encountered with the timing requirement for filing proxy and tender offer material. Commenters should consider whether the proposed rule provides adequate guidance to filers disseminating materials outside of our business hours. Alternatively, the rule could be amended to require filing within one business day of dissemination instead of "as soon as practicable on the next business day," or by a certain time on the next business day (e.g., 9:00 a.m. or 12:00 noon). We believe security holders and the public in general should be able to access public filings at the earliest possible time. Currently, filings are accepted on EDGAR as late as 10:00 p.m., although filings submitted after 5:30 p.m. receive a filing date of the next business day and are not available to the public until the next business day. We could amend Rule 13(d) of Regulation S-T to require submission of

[111] See Rule 13(d) of Regulation S-T.

proxy material by 10:00 p.m. on the same day it is disseminated to security holders, unless dissemination occurs on a day that the Commission is not open.

7. Free Communications Under the Tender Offer Rules

A bidder's ability to communicate with security holders and the markets in general regarding a proposed offer is limited by the concept of "commencement" in the tender offer rules. A bidder is required to file and disseminate information regarding its offer upon "commencement." Commencement is the date an offer starts for purposes of the tender offer rules. A bidder's public announcement of certain minimal information about an offer may trigger commencement and can result in certain filing and disclosure obligations for the bidder, depending upon whether cash or stock is offered.[112] Similarly, the target cannot make a recommendation regarding the offer without triggering filing and disclosure obligations.

a. Disclosure Triggering Commencement

Currently, a third-party cash tender offer is deemed to commence on the date the bidder discloses certain information ("announcement"),[113] unless the bidder does one of two things within five business days of the announcement date. If the bidder files a tender offer statement with the Commission, and disseminates specified information to security holders, the offer is deemed to commence on the date of filing and dissemination, not on the date of

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[112] Issuer tender offers are not subject to pre-filing communication restrictions; thus no substantive change to the issuer tender offer rule is necessary, although we do propose some conforming changes.

[113] If solely cash and/or securities exempt from registration under Section 3 of the Securities Act are offered, then a public announcement of: the identity of the bidder, the identity of the subject company, the amount and class of securities sought and the price or range of prices offered will commence the tender offer. See Rule 14d-2(b) and (c). (17 CFR 240.14d-2(b) and (c)).

announcement.[114] If the bidder makes a subsequent public announcement that it has determined not to proceed with the offer, the initial announcement will not be deemed to commence an offer.[115] If the bidder neither complies with the tender offer rules nor withdraws the offer, the offer is deemed to commence upon public announcement, resulting in filing and disclosure violations. We refer to this requirement as the "five business day rule."

Stock tender offers are not subject to the same five business day rule. Instead, stock offers are deemed to commence when a final prospectus is first disseminated to security holders.[116] A bidder can publicly announce its intention to make a stock offer, so long as the announcement contains only the limited information permitted by the Securities Act.[117] This announcement will not constitute commencement of the offer if the bidder promptly files a registration statement relating to the securities offered.[118]

In 1979, we recognized the "unsettling and disruptive effects" that cash tender offers can have on the trading markets when we proposed the five business day rule.[119] In adopting the rule, we noted it was common practice for bidders to publicly announce the material terms of their cash offers in advance of formal commencement.[120] We observed that pre-commencement public

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114 See Rule 14d-2(b)(2). (17 CFR 240.14d-2(b)(2)).

115 See Rule 14d-2(b)(1). (17 CFR 240.14d-2(b)(1)).

116 See Rule 14d-2(a)(4) (17 CFR 240.14d-2(a)(4)).

117 See Rule 135(a)(4) (17 CFR 230.135(a)(4)).

118 See Rule 14d-2(e) (17 CFR 240.14d-2(e)).

119 See Release No. 34-15548 (February 5, 1979) (44 FR 9956).

120 See Release No. 34-16384 (November 29, 1979) (44 FR 70326).

announcements regarding cash tender offers can trigger market mechanisms, such as arbitrageur activity, and cause security holders to make investment decisions with respect to a tender offer on the basis of incomplete information. The five business day rule was designed to prevent bidders from publicly announcing the material terms of an offer before formally commencing the offer.

Based on our experience with tender offers and the factors influencing the treatment of communications discussed earlier, we now believe that the communications restrictions imposed on bidders in both cash and stock tender offers may unnecessarily restrict communications with security holders. We believe that the reasoning behind easing restrictions on communications for other types of business combinations applies equally to tender offers. Unrestricted communications should result in the availability of more information to security holders on a timely basis. As a result, security holders should have a greater opportunity to inform themselves and assess the specific terms of a proposed offer. In light of the fact that tender offers generally remain open for a short period of time, usually 20 business days, advance notice of an offer should benefit security holders.

In an effort to increase bidders' ability to communicate with security holders, we propose to amend the provisions relating to commencement. Specifically, we propose to eliminate the obligation to commence or withdraw a cash offer within five business days of making a public announcement. We also propose to eliminate the requirement to promptly file a registration statement after public announcement of a stock offer. The revised rule would permit bidders to engage in free communications before commencement.[121] The communications permitted under

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[121] Proposed revision to Rule 14d-2. Shortly after adopting the five business day rule, the Commission authorized the issuance of an interpretive release discussing the staff's views with respect to when certain tender offers commence under Regulation 14D and 14E. See

the safe harbor, however, would not include a transmittal form or instructions on how to tender into the offer.

In place of the five business day rule and the requirement to promptly file a registration statement, we propose to require bidders to file and disseminate the required information when tenders are first requested. The Williams Act and the tender offer rules were designed to assure that there is adequate information available to security holders so that they can make an informed investment decision before tendering into an offer. The public announcement of an offer should not trigger the need to file or disseminate information. Instead, the focus should be on when security holders are provided the means to tender their shares into the offer. That is the time when information required by the tender offer rules must be available to security holders.[122]

Under the proposal, we would require bidders in both stock and cash tender offers to satisfy the filing and dissemination requirements upon first disseminating transmittal forms (the tender offer equivalent of a proxy card) or disclosing to security holders instructions on how to tender into an offer. For example, if a bidder published an advertisement that instructed security

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Release No. 16623 (March 5, 1980) (45 FR 15521). If we rescind the five business day rule as proposed, many of the interpretations in the release regarding commencement would no longer be applicable.

[122] Although we propose to change the manner in which commencement of an offer is triggered, we are not defining the term "tender offer" or changing our position on what activities may be deemed to constitute a tender offer. Nothing in these proposals affects the fact that the tender offer rules may be triggered by activities that function as unconventional tender offers. We reiterate our position that the term "tender offer" should be interpreted flexibly in accordance with the intended purposes of Sections 14(d) and 14(e). A determination of whether a particular transaction or series of transactions constitutes a tender offer will, of course, depend on the particular facts and circumstances and is not limited to "conventional" tender offers. See Release No. 34-15548 (Feb. 5, 1979) (44 F.R. 9956).

holders how to contact the bidder and receive information on tendering securities in the offer (e.g., by publishing a telephone number for security holders to call to receive more information on how to tender), then the bidder would be required to comply with the filing and dissemination requirements at that time. The 20 business day period would begin to run at this time.

The five business day rule and the requirement to file a registration statement promptly may serve as a protection against bidders making tender offer announcements without the intent or ability to follow through. In order to prevent the development of such practices if these requirements are eliminated, we propose a new rule to make it clear that such conduct would be prohibited as fraudulent under the tender offer rules.[123] The rule would prohibit a person from announcing a tender offer: without the intent to commence and complete the offer; with the intent to manipulate the price of either the bidder's or the target's securities; or without a reasonable belief that the person will have the means to purchase the securities sought. Are there other provisions that should be included to prevent inappropriate use of the free communications safe harbor, while not deterring legitimate communications?

We solicit comment on whether the five business day rule or the requirement to file a registration statement promptly provide investors, bidders, targets or security holders with any benefits that the proposed rule would not provide. Do these requirements cause bidders to provide security holders with needed information sooner?

We also ask whether the proposed rules increase the risk that investors will make investment decisions based solely on a bidder's pre-commencement communications without adequate information. Security holders might sell into the market based on a bidder's pre-filing

[123] Proposed Rule 14e-8.

communications. This risk, however, exists today under the current rules, although for a more limited time. Should the tender offer rules focus on this risk? Is the risk of market activity, based on incomplete information, greater for cash offers than it is for stock offers? If so, is it more important to maintain the five business day rule than to harmonize cash tender offers with other types of business combinations? Would the proposed obligation to file and disseminate information when security holders are first solicited to tender using a transmittal form adequately protect security holders? Is there less of a need to permit bidders to provide information to the marketplace before filing than there is for other types of business communications because cash tender offer material may be prepared and disseminated so quickly?

Currently, bidders are required to hand deliver a copy of the tender offer statement and additional tender offer materials to the target company and any other bidder for the same class of securities.[124] In addition, we propose to require delivery to the same parties of the first written communication a bidder makes that sets forth its identity, that of the target company, the amount and class of securities sought, and the price or range of prices offered.[125] Is this needed, or would the fact that the communication must be filed with the Commission provide adequate notice to the target company and any other bidders?

Each communication made in reliance on the safe harbor would be required to prominently advise security holders to read the complete tender offer material, consistent with

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[124] See Rule 14d-3(a)(2).

[125] The current rule also requires telephonic notice and mailing of tender offer material to any securities exchange or the NASD on which the securities are listed or traded. We do not propose to extend this to cover pre-commencement communications, as the exchanges and the NASD are moving away from relying on paper filings and increasingly using electronic databases to obtain EDGAR filings.

the Securities Act and proxy rule proposals.[126] Should we require any additional information in these communications? For example, should a bidder be required to disclose information such as its identity, the target's identity, the form and amount of consideration offered, any conditions to the offer, and the bidder's interest(s) in the target, including security ownership? This would be similar to the current requirement in Rule 14a-12 that specified information be contained in any communications made before the filing of a proxy statement.

Currently, the tender offer rules require specified information to be included in any communications made after the bidder has commenced the offer and disseminated the complete tender offer disclosure document. These "additional tender offer materials" must include basic information about the identity of the bidder and subject company, the terms and the expiration date.[127] We propose to retain this requirement. Does the requirement serve a useful purpose in preventing confusion, particularly where there are competing offers? Would it be more important to require specific information in pre-commencement communications than in post-commencement additional material?

We also propose to revise the rules to permit targets the same freedom to make pre-commencement communications as bidders. A target (or other person who makes any solicitation or recommendation to security holders regarding the offer) must provide specified information to security holders and file a Schedule 14D-9 with the Commission on the same date

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[126] See proposed Rules 13e-4(c) and 14d-2(b)(2).

[127] See Rule 14d-6(c), proposed to be redesignated Rule 14d-6(b).

that it makes a recommendation regarding the offer.[128] This obligation is triggered by the target's communications even if the bidder has not yet commenced the tender offer. We propose to amend the rule so this obligation is not triggered by communications made by the target before the bidder has filed its tender offer statement and commenced the offer. Targets would be required to file pre-commencement communications on first use. This would put the bidder and target in an equal position to engage in free pre-commencement communications. We solicit comment on whether there is any reason to treat bidders and targets differently. We also ask whether the target's communications should be required to contain a statement advising security holders to read the complete recommendation when it is available.

b. Methods to Disseminate an Offer

The tender offer rules currently provide for several non-exclusive methods to "commence" an offer. If one or more of the specified methods are followed,[129] the tender offer will be deemed "published, sent or given to security holders" for purposes of Section 14(d)(1) of the Exchange Act. The methods of disseminating information that will commence an offer include: (i) long form publication;[130] (ii) summary advertisement;[131] (iii) summary

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[128] See Rule 14d-9. A target must respond to a tender offer by communicating a position on the offer no later than ten business days from the date the offer is disseminated. See Rule 14e-2.

[129] A bidder can use more than one method provided it complies fully with each method used.

[130] See Rule 14d-2(a)(1) (17 CFR 240.14d-2(a)(1)). See also Rule 14d-4 for these methods of dissemination, which also are means of publicizing changes to the initial tender offer information.

[131] See Rule 14d-2(a)(2) (17 CFR 240.14d-2(a)(2)).

advertisement or long form publication using stockholder lists and security position listings;[132] and (iv) if securities are to be offered as consideration, publishing, sending, or giving copies of a final prospectus to security holders.[133] While a tender offer can be commenced in other ways,[134] the methods listed above are generally regarded as safe harbors and will give the bidder comfort that the offer has commenced under the tender offer rules. Commencement is important because if an offer is not deemed to commence, the required 20 business day period will not begin to run.[135]

Long form publication requires the bidder to publish extensive information regarding the tender offer in a newspaper.[136] Before we adopted the summary advertisement method in 1979,[137] long form publication was the accepted means of dissemination. Due to escalating costs and scheduling problems associated with long form publication, summary publication has replaced long form publication as the common means of disseminating a tender offer. Given that long form publication is not viewed as cost-effective and is rarely used by bidders, we propose to

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132 See Rule 14d-2(a)(3) (17 CFR 240.14d-2(a)(3)).

133 See Rule 14d-2(a)(4) (17 CFR 240.14d-2(a)(4)).

134 See Rule 14d-2(a)(5) (17 CFR 240.14d-2(a)(5)) providing that an offer may commence when "the tender offer is first published, sent or given to security holders by the bidder by any means not otherwise referred to in paragraphs (a)(1) through (4) of this section."

135 See Rule 14e-1(a) (17 CFR 240.14e-1(a)).

136 A bidder must publish the information specified in Rule 14d-6(e)(1) (17 CFR 240.14d-6(e)(1).

137 See Release No. 34-16384 (November 29, 1979) (44 FR 70326).

eliminate it as a means of disseminating information about a tender offer.[138] We solicit comment, however, on whether the method should be retained, perhaps in connection with publication on the Internet in combination with other methods of dissemination.

Under the summary publication method, a bidder must publish an advertisement in a newspaper and furnish its tender offer materials with reasonable promptness to any security holder who requests a copy. The advertisement must contain, and is limited to, certain specified information.[139] Bidders are not permitted to include a transmittal form with the summary advertisement.[140] Security holders therefore must request and receive complete information from the bidder before they can tender into the offer.

Summary advertisements alone usually are not sufficient to prompt a large number of security holders to request a copy of the tender offer materials. Therefore, bidders generally will supplement their solicitation of tenders with a request for a stockholder list under Rule 14d-5, in addition to publishing a summary advertisement. Under this rule bidders can request a

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[138] We propose this change both for issuer and third-party tender offers. See Rule 13e-4(e)(i) (issuer) and 14d-4(a)(1) (third-party).

[139] See Rule 14d-6(a)(2) (17 CFR 240.14d-6(a)(2)). Bidders, however, generally disclose more information in their summary advertisements than is currently permitted under the rules. There is some judicial support for the disclosure of additional information. See Crouse-Hinds Co. v. Internorth, Inc., 518 F. Supp. 416 (N.D.N.Y. 1980) (permitting disclosure of conditions to an offer in a summary advertisement). Based on our proposals to permit free communications, we would amend Rule 14d-6(a)(2) to delete the language limiting the information that can appear in a summary advertisement. We would retain the prohibition against including a transmittal form with the summary advertisement. However, the summary advertisement could (and should, if it is designed to commence the offer) include the means to tender, e.g., a telephone number to call to obtain the complete tender offer materials, including the transmittal form.

[140] See Rule 14d-6(e)(3) (17 CFR 240.14d-6(e)(3)).

stockholder list from the target. The target has the option of either mailing the offering materials to security holders at the bidder's expense, or providing the bidder with a stockholder list of record holders prepared as of the most recent practicable date.[141]

We solicit comment on whether we should eliminate dissemination by summary advertisement alone (without the use of stockholder lists) to make the cash tender offer regulations more comparable to other business combination methods. Should the stockholder list requirement apply to amendments disclosing material changes as well as to initial tender offer material? We note that delivery is required if registered securities are offered, given that prospectuses must be delivered as required by the Securities Act. Similarly, delivery of a disclosure document would be necessary if security holder approval was solicited under the proxy rules.[142] While we note that bidders typically use stockholder lists, we solicit comment on whether there are circumstances when the use of stockholder lists is impracticable.

In addition, we solicit comment on whether to retain the current requirement that bidders using stockholder lists also publish summary advertisements. The summary advertisement serves as an additional means of publicizing tender offer information while it is in the process of being mailed to security holders. This may be particularly useful in the short time frame of a cash tender offer.

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141 In Part II.E.4 below, we propose to expand the stockholder list rule to make it more useful by including beneficial owner information.

142 When delivery is required by the rules, this can be accomplished by using electronic media, provided the bidder satisfies the guidelines set forth in Release No. 33-7233 (October 6, 1995) (60 FR 53458), regarding electronic delivery. For example, a summary advertisement for a tender offer could contain a consent form for a security holder to indicate his or her willingness to receive the complete tender offer materials by means of a specified electronic medium.

Finally, we request commenters' views on whether we should permit means of disseminating tender offer material other than those described. The increasing use of electronic media, particularly the Internet, provides an avenue for widespread access to information. On the other hand, many security holders rely on more traditional sources of information, such as newspapers and the mail. We do not want to put these security holders at a disadvantage in obtaining tender offer information. Therefore, we are not proposing that electronic media be permitted as a sole means of dissemination. We are, however, interested in comment as to how electronic media are currently used in the tender offer area and whether there are electronic sources of information that are as commonly available and widely followed as the newspapers of general circulation used for summary advertisements.[143]

C. Permit Exchange Offers to Commence On Filing

1. Early Commencement

The Commission first adopted the requirement for an effective registration statement before commencing an exchange offer in 1979.[144] In proposing the requirement, we noted that we intended to codify "the current practice of commencing the bidder's offer when its registration statement under the Securities Act becomes effective."[145] In 1983, a Commission Advisory Committee[146] noted the regulatory disincentives to offering securities as

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143 Rule 14d-4(b) (17 CFR 240.14d-4(b)) provides that publication in all editions of a daily newspaper with a national circulation is deemed to constitute adequate publication.

144 Release No. 34-16384 (November 29, 1979) (44 FR 70326, 70338).

145 Release No. 34-15548 (February 5, 1979) (44 FR 9956).

146 See Advisory Committee on Tender Offers Report on Recommendations (July 8, 1983). We established the Committee to examine the tender offer process and other techniques of

consideration[147] in a tender offer and recommended that exchange offers be permitted to commence as soon as the registration statement is filed.[148]

In order to put cash and stock tender offers on a more level playing field, we propose to permit "early commencement" of third-party exchange offers. Currently, stock tender offers commence on the date the related registration statement becomes effective. Under today's proposal, exchange offers could commence upon the filing of a registration statement, or on a later date selected by the bidder.[149] As a result, the regulatory bias against stock offers would be reduced. We request comment as to whether the current regulatory scheme is a significant factor in deciding how offers are structured. Is it important to harmonize the regulatory treatment of

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acquiring control of public issuers and to recommend legislative and/or regulatory changes deemed appropriate or necessary. Release No. 34-19528 (February 24, 1983) (48 FR 9111).

147 The Committee stated that "there are significant regulatory impediments to undertaking an exchange offer rather than a cash tender offer, which impediments are not necessary for the protection of shareholders" and that "regulation should not be a principal factor in determining the method of acquisition." Advisory Committee Report at 16. On that basis, the Committee issued Recommendation 5:

> Cash and securities tender offers should be placed on an equal regulatory footing so that bidders, the market and shareholders, and not regulation, decide between the two.

148 Recommendation 12 of the Committee's Report stated:

> Bidders should be permitted to commence their bids upon filing of a registration statement and receive tenders prior to the effective date of the registration statement. Prior to effectiveness, all tendered shares would be withdrawable. Effectiveness of the registration statement would be a condition to the exchange offer. If the final prospectus were materially different from the preliminary prospectus, the bidder would be required to maintain, by extension, a 10-day period between mailing of the amended prospectus and expiration, withdrawal and proration dates.

149 Proposed Rule 14d-4(b).

cash and stock offers? If so, does the proposal accomplish this goal while continuing to protect investors?

Under the proposal, a bidder that wished to "commence" an exchange offer by requesting tenders would have to satisfy several requirements. First, the bidder would have to file a registration statement relating to the securities offered. The preliminary prospectus would need to include all information, including pricing information, necessary to allow security holders to make an informed investment decision. Information could not be omitted under Rule 430 or Rule 430A of the Securities Act.[150] Second, the prospectus would have to be disseminated to all security holders. Third, a tender offer statement would have to be filed with the Commission. The filing of a registration statement alone would not suffice. The bidder would have to file both a registration statement and a tender offer statement[151] and furnish a preliminary or final prospectus to security holders.[152] Security holders would have the right to withdraw shares

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150 Generally, a prospectus that is used before effectiveness may omit certain pricing information including the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices or other matters dependent upon the offering price. See Rule 430 (17 CFR 230.430). A prospectus in a registration statement that is declared effective may also omit certain other information relating to the public offering price, including the underwriting syndicate, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other information that is dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date. See Rule 430A. (17 CFR 230.430A).

151 Generally, tender offer statements in exchange offers incorporate by reference substantial portions of the information contained in the prospectus in response to the various disclosure requirements. Incorporation by reference would continue to be available under the proposal.

152 Under the proposal, a bidder could disseminate a preliminary prospectus without requesting tenders, as permitted under the current rules, and not trigger commencement.

tendered at any time until they were purchased, and bidders could not purchase shares until after the registration statement was effective.[153]

The "early commencement" proposal is limited to third-party exchange offers because the need to put cash and stock offers on a more level playing field appears to arise most often in that context. We ask for comment, however, on whether issuer exchange offers present the same timing and competitive concerns. Should the proposal be expanded to issuer exchange offers?

Going-private and roll-up transactions involving exchange offers would not be permitted to commence before the effectiveness of a related registration statement. These types of transactions often involve material disclosure issues. We continue to believe that the staff should have a full opportunity to review and comment upon the documents filed in connection with these transactions before commencement of an exchange offer in order to ensure that the rules are complied with and the appropriate level of disclosure is made to security holders.

Under the proposal, early commencement would be at the option of the bidder. The filing of a tender offer statement would serve as notice to the Commission and the public that the offer commenced and a prospectus was disseminated to security holders. A bidder could commence upon filing the registration statement, or wait for staff comments or effectiveness before actually commencing its offer.

We request comment on whether a bidder should be required to commence its offer as soon as it files a registration statement. Alternatively, should bidders be free, as the rule proposes, to determine when a stock offer commences? If we do not require bidders to commence on filing the registration statement, should there be an outside date on which the

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[153] Proposed Securities Act Rule 162.

exchange offer must commence (e.g., no later than effectiveness of the related registration statement or no later than five or ten business days after effectiveness)?

The early commencement proposal is intended, in part, to provide bidders with an incentive to disseminate their offering materials broadly to all security holders at the earliest practicable date. The proposal would not prohibit bidders from making selective communications in addition to or instead of using the early commencement procedure to disseminate material to all security holders. When combined with the proposals above regarding communications, however, the availability of early commencement should encourage full and fair disclosure to all security holders. We request comment as to whether bidders would continue to communicate with large institutional investors to the exclusion of small retail investors. Is it necessary to require bidders to disseminate a prospectus to all security holders as soon as it is filed with the Commission? If we require delivery, however, the preliminary prospectus might include certain information that is not complete or accurate. In light of the inherent limitations on the information available to bidders that could be included in a preliminary prospectus, would mandatory dissemination to all security holders benefit or harm small retail investors?

The ability to commence upon filing may not be sufficient to level the playing field if bidders are not assured of having an effective registration statement within a reasonable period of time. While cash offers can expire after a minimum of 20 business days, stock offers could not expire under the proposal until the related registration statement became effective. Therefore, we solicit comment on whether expedited staff review is necessary to effectively harmonize the regulatory treatment of cash and stock tender offers. If so, how short would the Commission

staff's review and comment period need to be in order to assure timely completion of a stock tender offer? Would it be helpful if the staff committed to an expedited review of stock tender offers whenever a competing cash tender offer emerges? Would it be necessary to provide for some form of accelerated effectiveness for stock offers to fully balance the treatment of cash and stock offers?

One way to achieve this balance would be to allow or require some or all exchange offers registered on Form C and Form SB-3[154] to become effective on filing,[155] or allow the bidder to specify the date after filing on which the registration statement would become effective.[156] This approach would provide bidders with greater certainty as to when their offer could close and shares could be accepted in the offer. "Early commencement" would then be unnecessary. This approach would allow bidders to freely decide between offering cash or stock without concern for regulatory delay. Of course, the staff would not have an opportunity to review the information before it is disseminated to security holders, but could review it after effectiveness just as it now reviews cash tender offer materials after they are mailed to security holders. We

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154 As noted in the Securities Act Reform Release, Form C (and Form SB-3 for small business issuers) would be the successor to Forms S-4 and F-4. If Forms C and SB-3 are not adopted, then the proposals in this release would apply to exchange offers registered on Form S-1, S-4, F-4 and S-11.

155 The Task Force on Disclosure Simplification recommended that registration statements on Forms S-4 / F-4 relating to exchange offers by S-3 / F-3 eligible companies become effective automatically upon filing, so long as the securities offered are common stock traded on a national securities exchange or quoted in the Nasdaq NMS, or are investment grade debt or preferred stock. See Report of the Task Force on Disclosure Simplification (March 1996) at p. 56. If the Securities Act Reform Release proposals are adopted, we could provide automatic effectiveness on filing for Form B issuers, or we could provide it for all registration statements on Form C only and not Form SB-3.

156 This is how Form B would be treated in the Securities Act Reform Release.

would not extend this approach to going-private or roll-up transactions. If this approach were permitted, should it be limited to third-party tender offers or also extend to issuer tender offers? Do the same timing concerns apply to mergers? If so, and this approach is adopted, should it apply to mergers as well? Should automatic effectiveness be limited to bidders entitled to use Form B?

We also are considering whether to harmonize the proxy rules with the tender offer rules by providing a proxy analogue to the "early commencement" proposal. If we did this, we would permit proxy cards in connection with mergers and similar business combinations to be sent with a preliminary proxy statement/prospectus, rather than requiring that they accompany only a definitive proxy statement/final prospectus. Proxies may be revoked at any time before the vote, just as tenders may be withdrawn before the offer expires. The vote could not take place until after the proxy statement was definitive or the registration statement was effective, and security holders would have to be given information about material changes in sufficient time to act on it, as discussed below in connection with exchange offers. Would this procedure be useful in mergers? Is the merger situation different from the tender offer situation; would there be greater risk that security holders would vote on the basis of premature or incomplete information and not receive updating or corrective information in a timely fashion? In particular, would street name holders receive this information in sufficient time to make an informed voting decision?

We have considered how the "early commencement" proposal interacts with our rules regarding stock purchases outside a tender offer. Regulation M[157] prohibits purchases of the

[157] 17 CFR 242.100 through 242.105.

bidder's securities during an exchange offer's restricted period, while Rule 10b-13[158] prohibits purchases of the target's securities once the offer is publicly announced. The Regulation M restricted period begins as of the date that the exchange offer is commenced, i.e., when the bidder has first published, sent or given security holders the means to tender. In contrast, the restrictions of Rule 10b-13 start as of the time the offer is first publicly announced to security holders, which can be before the offer commences. We believe these rules would operate appropriately in the "early commencement" context, but solicit commenters' views.

2. Dissemination of a Supplement and Extension of the Offer

The Division of Corporation Finance staff decides whether to review a registration statement after it is filed, along with a related tender offer statement, based upon its selective review criteria. Under the "early commencement" proposal, the bidder already may have disseminated the combined prospectus/tender offer before staff comments are received. If the staff had material comments, the bidder would be required to file and disseminate a prospectus supplement, or possibly a post-effective amendment to the registration statement.

We propose to require bidders using "early commencement" to disseminate supplements to disclose any material changes, whether as a result of staff review, or due to any other material changes in the information previously disclosed. If a supplement contained material information, the exchange offer would need to remain open for a minimum period of time after a supplement was sent, as discussed below. The proposed rule would require a bidder to provide sufficient

158 17 CFR 240.10b-13. Rule 10b-13 is proposed to be revised and redesignated as Rule 14e-5. See Part II.E.5 below.

time for security holders to reconsider their investment decision (i.e., by withdrawing previously tendered shares or tendering shares not yet tendered) based upon the additional information.

The tender offer rules do not currently establish a specific minimum time period with respect to the disclosure and dissemination of material changes, except for those relating to price or the amount of securities sought.[159] In an interpretive release relating to the tender offer rules, however, the Commission provided the following guidelines:

> As a general rule, the Commission is of the view that to allow dissemination to shareholders in a manner reasonably designed to inform (them) of such change (17 CFR 240.14d-4(c)), the offer should remain open for a minimum of five business days from the date that the material change is first published, sent or given to security holders. If material changes are made with respect to information that approaches the significance of price and share levels, a minimum period of ten business days may be required to allow for adequate dissemination and investor response. Moreover, the five business day period may not be sufficient where revised or additional materials are required because disclosure disseminated to security holders is found to be materially deficient. Similarly, a particular form of dissemination may be required. For example, amended disclosure material designed to correct materially deficient material previously delivered to security holders would have to be delivered rather than disseminated by publication.[160]

Under the "early commencement" proposal, if the bidder had to send a supplement containing material changes either before or after effectiveness of the registration statement, the offer would need to remain open for at least a specified minimum period.[161] The original

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

160 Release No. 34-24296 (April 3, 1987) (52 FR 11458).

161 Proposed Rule 14d-4(d)(2).

expiration date would have to be extended if necessary. The offer would need to remain open at least:

- five business days for a supplement containing a material change other than price or share levels;
- ten business days for a supplement containing a change in price, the number of shares sought, the dealer's soliciting fee, or other similarly significant change;
- ten business days for a supplement included as part of a post-effective amendment; and
- 20 business days for a revised prospectus when the initial prospectus was materially deficient; for example, failing to comply with the going-private rules or filing a "shell" document solely to trigger commencement and staff review.[162]

We invite comment on whether these time periods are appropriate, and if not, what periods should be substituted. Would the ready availability of this information in electronic format (e.g., on the Commission's or the bidder's Internet web site) mean that these time periods could be shorter? On the other hand, would shortening these periods deprive security holders of essential information if they are not willing or able to take advantage of electronic media? As proposed, this rule would apply only to exchange offers where "early commencement" is used. Should it instead replace Rule 14e-1(b) and thus apply to all tender offers?

We also solicit comment on whether bidders would be likely to take advantage of "early commencement" before receiving staff comments or a notification that the filing would not be reviewed. Would the risk of having to disseminate additional information and possibly extend

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[162] This would, in effect, re-start the 20 business day period required by the tender offer rules. If the initial prospectus did not comply with the roll-up rules and was revised during the offering period, the minimum solicitation period under the roll-up rules would be tolled until a revised prospectus satisfying the roll-up rules was disseminated.

the offer deter bidders from using this procedure? Or would they take those uncertainties into account as they now do for cash tender offers?

The Securities Act Reform Release proposes to eliminate the requirement that a final prospectus be delivered to investors who have received a preliminary prospectus.[163] This exemption would not apply to business combinations, which have a distinct scheme for delivery of information. However, we solicit comment on whether bidders who use the "early commencement" rule should be required to deliver a final prospectus after effectiveness. The informational purpose of the prospectus may be best served by requiring security holders to be given supplements setting forth significant changes, rather than by requiring the prospectus to be re-delivered.

[163] Proposed Rule 173.

3. Tenders into an Offer Exempt from Sale Requirements of the Securities Act

Under the "early commencement" proposal, once a bidder commenced an offer, security holders could tender into the offer before the related registration statement became effective, but the bidder could not purchase securities tendered until the offer expired. Security holders would have the right to withdraw tenders until the offer expired, as they do now. As discussed above, expiration always would be after effectiveness of the related registration statement. In order to prevent the tendering of securities into an offer from being viewed as a "sale" without an effective registration statement, we propose a new rule to address this issue.[164] We would use our new exemptive authority[165] to provide that transactions involving tenders during the "waiting period" when the early commencement rule is complied with would be exempt from the Securities Act requirements for sales.

The purpose of this rule is to place cash and exchange offers on a more equal footing by allowing them to operate on a more comparable time schedule and minimizing any regulatory factors that may influence a bidder's decision to offer cash instead of securities in a tender offer. The proposed exemption is necessary to assure bidders that they would not be viewed as violating Section 5 of the Securities Act[166] when security holders tender into an exchange offer during the waiting period. Investors would continue to receive disclosure before making an investment decision. We believe that it is consistent with the public interest and the protection of

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[164] Proposed Securities Act Rule 162.

[165] Section 28 of the Securities Act (15 U.S.C. 77z-3).

[166] 15 U.S.C. 77e.

investors to reduce the regulatory bias towards cash so that the bidder's choice of consideration is not unduly affected by concerns about timing. However, we solicit comment on whether this is an appropriate use of the Commission's exemptive authority.

D. Integrate and Streamline the Disclosure Requirements for Tender Offers and Mergers

1. Subpart 1000 of Regulation S-K ("Regulation M-A") and Combination of Schedules

Currently, there is a different disclosure schedule for issuer tender offers, third-party tender offers and going-private transactions. Compliance with the line-item requirements in each of these schedules results in certain differences in the information disclosed to security holders.[167] These differences in the disclosure requirements can be particularly troublesome to companies that are seeking to comply with the disclosure requirements in today's fast-paced takeover environment. We believe that the cost of compliance could be reduced, and the quality of disclosure improved, if the disclosure requirements were integrated into one set of uniform regulations and unnecessary differences were harmonized.[168]

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[167] For example, while Schedules 14D-1, 13E-4 and 13E-3 all require disclosure of high and low bid quotations of the subject security for each quarterly period during the preceding two years, only Schedules 13E-4 and 13E-3 require disclosure of the source of such quotations. See Item 1(c) of Schedule 13E-4 and Schedule 13E-3. As another example, Schedules 14D-1 and 13E-3 both require disclosure of past contacts, negotiations or transactions between the parties subject to a proposed tender offer or going-private transaction. Schedule 13E-3 (which generally requires more disclosure because of the affiliated nature of the transaction) requires disclosure for only the two preceding years, while Schedule 14D-1 requires disclosure for the preceding three years. See Item 3 of Schedule 13E-3 and Item 3 of Schedule 14D-1.

[168] Integration has worked well in the past. In 1985, the Commission integrated the disclosure requirements of the registration statement most commonly used in stock-based extraordinary transactions, Form S-4, with the disclosure requirements for proxy statements on Schedule 14A. See Release No. 33-6578 (April 23, 1985) (50 FR 18990).

Accordingly, we propose to integrate the disclosure items contained in the schedules relating to issuer and third-party tender offers, tender offer recommendations, and going-private transactions. The disclosure items applicable to these transactions would be relocated into a new subpart of Regulation S-K called "Regulation M-A." The new series of items would contain the current disclosure requirements applicable to tender offers and going-private transactions, with minor modifications to harmonize and clarify the items as well as more substantive changes discussed below.[169] The new regulation includes some disclosure items for cash merger proxy statements and business combination registration statements as well. We have made an effort to use clear language and reduce legalese. We anticipate expanding the new regulation in the future to cover additional disclosure items.

We also propose to combine current Schedules 13E-4 and 14D-1 (the schedules now used for issuer and third-party tender offers, respectively), into a new schedule called "Schedule TO."[170] The information required in Schedule 13E-4 is substantially similar to that required in Schedule 14D-1. Combining the schedules would harmonize the disclosure requirements applicable to issuer and third-party tender offers. Any differences in the information required

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169 In some cases, disclosure requirements appear in the rules rather than the schedules. These requirements also would be moved to Regulation M-A. For instance, Schedule 14D-1 does not specifically require disclosure of the expiration date of the tender offer; that requirement appears in Rule 14d-6(e).

170 Schedules 13E-3 and 14D-9 would be revised so that the format and instructions harmonize with Schedule TO. These schedules would use clearer language and would refer to Regulation M-A for the substantive disclosure requirements. We do not propose to revise the schedules used in connection with the multijurisdictional disclosure system with Canada (i.e., Schedules 14D-1F, 14D-9F and 13E-4F).

due to the nature of the bidder (either issuer or third-party) would be addressed in items of the schedule and the applicable disclosure items in Regulation M-A.

In addition, we propose to permit a single filing to satisfy both the tender offer and going-private disclosure requirements. The disclosure items required by Schedules 14D-1, 13E-4 and 13E-3 could all be satisfied in one combined filing. For example, an affiliate engaging in a tender offer having a going-private effect could file a combined Schedule TO and Schedule 13E-3. Of course, all filing person(s) and applicable schedules would have to be identified on the cover page, but separate cover pages would not be required. Schedule 13E-3 would be filed separately when the underlying transaction was not a tender offer.

In permitting a combined tender offer and going-private filing, we would reduce the redundancy of having to file two schedules for what is essentially the same transaction. The disclosure requirements are generally satisfied in the same document — the offer to purchase. This will continue to be the case.

Schedule TO would contain an instruction specifying the items that need to be complied with for particular types of transactions.[171] In addition, we would revise the current instruction requiring information that is incorporated by reference to be filed as an exhibit to the Schedule. The revised instruction would permit document(s) previously filed electronically with the Commission to be incorporated by reference without filing the information as an exhibit. Documents filed electronically on EDGAR are readily available to security holders and the

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[171] An instruction will specify that certain items may be omitted when Schedule TO is combined with a Schedule 13E-3, to avoid redundant requirements. See General Instruction J to proposed Schedule TO.

public (e.g., through the Internet, our public reference room, brokers and investment advisors). This change also would apply to going-private statements.

We request comment on whether the ability to combine the disclosure currently required by Schedules 14D-1, 13E-4 and 13E-3 into one filing would be useful to filing persons. Would it be easier for the marketplace to follow this information if the filings were kept separate?[172]

Alternatively, should the Schedule 13E-3 be eliminated entirely for most transactions? Instead, the tender offer schedule, registration statement and proxy statement cover page would have a check box indicating a going-private transaction is involved. The document would be required to contain all of the disclosure and signatures currently called for by Schedule 13E-3.[173] If we took this approach, the Schedule 13E-3 would not be available as a place to provide negative answers to items. Currently, negative answers may be provided in the schedule rather than in the disclosure document disseminated to security holders.[174] Accordingly, if we

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[172] There would be check boxes on the cover page to indicate whether the filing was an issuer tender offer, third-party tender offer, and/or going-private transaction. EDGAR tags also would indicate this information. If this proposal is adopted, EDGAR would be programmed so that public users of information could quickly determine the nature of each filing.

[173] When a going-private transaction did not involve another Commission filing, the Schedule 13E-3 would be required as a stand-alone filing.

[174] See General Instruction A to Schedules 14D-1, 14D-9 and 13E-4; General Instruction B to Schedule 13E-3. As proposed, Schedule TO would include an instruction permitting filers to provide negative and "not applicable" answers in the schedule but not the disclosure document disseminated to security holders. A similar instruction is proposed for Schedules 13E-3 and 14D-9. See General Instruction E to proposed Schedules TO and 13E-3 and General Instruction C to proposed Schedule 14D-9. The ability to omit negative answers already exists to some extent for going-private and tender offer statements. See Instruction 1 to Rule 13e-3(e)(3); Instruction A to Rule 13e-4(d); and Rule 14d-6(e)(1)(vii). Negative answers are common in responding to items that call for information about civil and/or

eliminated Schedule 13E-3 we would either eliminate the requirement for negative answers or require negative answers to be provided in the disclosure document.

We also request comment on whether the concept of one filing satisfying all disclosure requirements should be applied to the Securities Act and proxy rules as well as the tender offer and going-private rules. Should one filing be permitted to satisfy all of these transactions? Currently, different signature pages may be required depending upon the schedules or forms combined.[175] If registration statements and proxy statements were permitted to be combined with tender offer and going-private schedules, then a uniform signature requirement would be necessary, or we could require that the more extensive signature requirements control.

Currently, security holders do not receive all of the information filed with the Commission in a tender offer or going-private schedule. Instead, the rules permit filers to send security holders a disclosure document that summarizes most of the information in the schedule. The schedule, as filed, consists of a cover page, list of items with their responses, exhibits and signatures. The disclosure document is filed as one of the exhibits. Many of the responses to the items in the schedule are incorporated by reference from the disclosure document. While we are not changing this basic approach, we propose two changes to streamline the requirements:

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criminal proceedings involving the filing person and certain control persons for the five-year period before the filing. See Item 2 (e) and (f) to Schedules 13E-3 and 14D-1.

[175] For example, no signature is currently required for Schedule 14A proxy statements while Securities Act registration statements require signatures by the registrant, the principal executive officer, the principal financial officer, the controller or principal accounting officer, and at least a majority of the board of directors or persons performing similar functions. The current signature requirements in Schedules 14D-1, 13E-4 and 13E-3 are substantially the same; the schedule must be signed by each person on whose behalf the statement is filed.

- Instead of specifying the items of each schedule required to be summarized, the rules would simply require that the document given to security holders summarize the entire schedule (except for exhibits). This is not intended to increase the information given to security holders, but rather to permit filers to exercise their judgment in determining what constitutes a fair and adequate summary. As discussed below, each disclosure document would include a Summary Term Sheet highlighting the basic information. Certain information required by the going-private rule would still be required to be set forth in full in the disclosure document.[176]

- Filers would no longer have to answer each item of the schedule with a statement that the information is incorporated by reference from specified pages or sections of the disclosure document.[177] It would be sufficient to have a general statement incorporating the required information from the disclosure document into the schedule. The schedule, as filed, would consist primarily of a cover page, exhibits and signatures. The item numbers from the schedule would be included only to provide information not required to be in the disclosure document, such as negative or "not applicable" responses or information that goes beyond what is summarized in the disclosure document. This change is designed to make the schedules easier to prepare. It would still be necessary, of course, for filers to provide all the required information.[178]

The rest of this release discusses the most significant changes to the rules and schedules, many of which are incorporated into proposed Regulation M-A. In addition, we propose a number of less substantive changes to harmonize and update the requirements. For the complete text of all the technical, clarifying and conforming changes, including amendments to the tender offer and going-private rules, please see the text of the proposed rules at Part VII below. We request comment on these proposals as well.

2. Streamline Disclosure Requirements and Improve Disclosure

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176 See Rules 14d-6(d), 14d-9(d), 13e-3(e) and 13e-4(d), as proposed to be revised.

177 As an example of the current requirement, see General Instruction B to Schedule 14D-1.

178 See General Instructions E and F to Schedules TO and 13E-3 and General Instructions C and D to Schedule 14D-9. Similarly, we propose to eliminate the requirement in General Instruction F of current Schedule 13E-3 to provide a cross reference sheet showing where the responses are located.

We believe that, in many cases, the current disclosure requirements can be simplified and clarified for filing persons. We also believe that disclosure to security holders can be improved. We discuss below several proposed amendments to the current rules and regulations that should help filing persons comply with their disclosure obligations and enhance security holders' understanding of tender offers and mergers.

a. "Plain English" Summary Term Sheet

The disclosure in tender offer and merger proxy statements often is lengthy, difficult to understand and uninviting to the reader. In many instances important information is buried in boilerplate. Security holders often must make a voting or investment decision within a relatively short period of time. With the increasing complexity of the transactions, filing persons should provide security holders with clear, concise and understandable disclosure as required by the Commission's rules.[179] Disclosure is not effective from an investor's perspective unless it is understandable, complete and timely.[180]

We propose to require that issuer and third-party cash tender offer statements, cash merger proxy statements, and going-private disclosure documents begin with a short "plain English" summary term sheet highlighting the most important features of the transaction.[181] The summary term sheet would be required to begin on the first or second page of the disclosure document. Each item covered in the summary term sheet would be presented in bullet point format with a cross-reference to a more detailed discussion found elsewhere in the tender offer, going-private or proxy materials.

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179 See Rule 421 of Regulation C (17 CFR 230.421). Bidders in exchange tender offers also are reminded that effectiveness of a registration statement may be denied or a stop order issued when there has not been a bona fide effort to present information in a reasonably clear, concise and readable manner. See Rule 461(b)(1) of Regulation C (17 CFR 230.461(b)(1)); see also, In the Matter of Franchard Corporation, 42 S.E.C. 163 (1964).

180 Report of the Task Force on Disclosure Simplification, "Presentation of Information" at p.17.

181 Proposed Item 1001 of Regulation M-A. "Plain English" would have the same meaning as in Rule 421, as amended, effective October 1, 1998.

In preparing a summary term sheet, filing persons would need to determine how best to highlight the most significant aspects of the transaction in a clear, concise and understandable manner. As noted by the Task Force, the summary term sheet should be used to answer the most common or frequently asked questions. In a tender offer, for example, the bidder should answer questions such as the following:

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

In the case of a merger proxy statement, the summary term sheet should contain, among other things, a brief outline of the matters proposed, the material terms of the proposals including the parties to the proposed transaction, the consideration to be received by security holders, the board's recommendation on how to vote (if any), the effect of a vote for and against each

proposal including the effects of not voting, the procedures for voting and changing or revoking a vote, and the existence of appraisal rights.

In going-private transactions, the summary term sheet would require a brief summary of the most material terms and consequences of the transaction. The summary term sheet should address, among other things, conflicts of interest, whether a fairness opinion was received, the identity, role and relationship of any affiliates involved in the transaction, the filing person's belief as to the fairness of the transaction to security holders, and any recommendations made to security holders regarding the transaction.

The proposed summary term sheet requirement would not specify the items to be addressed. Instead, the filing person would determine the most significant facts to highlight. We solicit comment, however, on whether the item should specify information that must be addressed in most situations. The information required could be specified in a manner similar to current Instruction 1 to Item 8 of Schedule 13E-3, which specifies factors that must normally be considered in determining the fairness of a going-private transaction to unaffiliated security holders. Other than the matters set forth above, what other information would rise to the level of requiring prominent disclosure in a summary term sheet?

Mergers or tender offers that involve the registration of securities are subject to the recently adopted "plain English" disclosure rules requiring issuers to write the cover page, summary, and risk factors section of their prospectuses in plain English.[182] In addition, Forms S-4 and F-4 currently require specified information about the transaction to appear in the front of the prospectus. This would be continued in proposed Forms C and SB-3. Therefore, we do not

[182] See Release No. 33-7497 (January 28, 1998) (63 FR 6370).

propose to require a summary term sheet for such transactions. Would a summary term sheet specifically adapted to these forms be useful?

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

To help issuers prepare disclosure documents, we propose to clarify the disclosure required in proxy statements. Item 14 of Schedule 14A is triggered when a vote or consent is solicited on any of the following matters: (i) a merger; (ii) a consolidation; (iii) the acquisition of assets, a business or securities; (v) the sale or transfer of all or substantially all the assets of the registrant; (vi) a liquidation; or (vii) a dissolution. The Item calls for information about the transaction, as well as business and financial information about the companies involved. Item 14 information is similar to the information that would be required in a Form S-4 registration statement if registered securities were being offered.

We propose to revise this Item to make it easier to understand and to adapt the disclosure scheme to Form A and B companies instead of Forms S-1, S-2 and S-3 companies. Instead of setting forth the detailed requirements for information about the acquired and acquiring companies, Item 14 would simply refer to the applicable requirements in Forms C and SB-3.[183]

The revised Item would modify financial statement requirements in three principal respects. First, we propose to clarify that financial statements and other information about the acquiror in a cash merger are necessary only if material to the voting security holders' evaluation

[183] As revised, Item 14 eliminates the ability to incorporate specified information by reference to the "glossy" annual report to security holders. This is consistent with proposed Form C, as discussed in the Securities Act Reform Release.

of the transaction.[184] Just as for financial statements of the bidder in a cash tender offer, discussed below, information about the acquiror in a merger generally is not needed if the target security holders are receiving cash and the acquiror has demonstrated the financial ability to satisfy the terms of the offer.[185]

Second, we propose to reduce the financial statements required for the acquiror under Item 14 from three years to two,[186] consistent with the proposed treatment of cash tender offers, as discussed below.[187]

Third, we propose to revise Item 14 with respect to when financial statements and other information about the target are required. Specifically, we propose to eliminate the requirement to provide information about the target in a cash merger when the acquiror's security holders are not voting on the transaction.[188] Security holders would receive a shorter document focusing on the terms and effect of the transaction. This revision would harmonize the disclosure required in cash merger transactions with that required in all-cash, all-share tender offers. Security holders are required to make substantially the same investment decision in both transactions.

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184 See Instruction 2 to Item 14 of Schedule 14A currently and as proposed to be revised. Pro forma information about the transaction also generally would not be required in a cash merger where only the target's security holders are voting on the transaction.

185 Even if the acquiror's security holders are voting, we propose to permit the omission of acquiror information, as those security holders presumably have access to information about their own company.

186 See proposed Item 14(c)(1) to Schedule 14A.

187 See Part II.E.2.b below. Financial statements of the target, when required, generally would continue to be required for three years in order to be consistent with other requirements for financial statements of acquired companies.

188 See Instruction 2 to Item 14 of Schedule 14A, as proposed to be revised.

Generally, financial statements of the target and other company information are not required in all-cash, all-share tender offers, although bidders sometimes provide this information in their tender offer materials on a voluntary basis. We do not believe the proxy rules should require disclosure of target information when the same transaction, structured as a cash tender offer, would not require disclosure of this information. In both types of transaction, security holders are asked to accept cash for their entire investment in the target, and most likely have received financial information previously with respect to the company whose security they already hold.

As proposed, we also would eliminate the requirement to provide information about the target when target security holders are voting on whether to approve a merger with the consideration consisting of acquiror securities exempt from Securities Act registration. This would be consistent with the requirements of the tender offer rules when exempt securities are being offered. Of course, information about the acquiring company would be material under these circumstances.

We do not propose to eliminate the requirement to provide financial statements of the target and other company information where the acquiror's security holders are voting on the transaction, since those security holders may not know anything about the target. In addition, we would continue to require target information in cash merger proxies that are going-private or roll-up transactions. We believe that target security holders have a need for current financial statements of their company if it is subject to one of these transactions.

We request comment on whether target security holders in mergers need financial statements and other information about their own company to determine whether or not to

exercise their dissenters' or appraisal rights under state law. Are there circumstances under which the target security holders may have difficulty obtaining financial statements of the company whose securities they hold? Of course, if the proxy rules apply to the target, the target would be a reporting company. Does the liability imposed on financial statements filed under the proxy rules provide an added degree of protection to investors? If so, should the financial statements be incorporated by reference into the proxy material? Should we require the proxy statement to contain either summary financial statements,[189] or an undertaking to provide financial statements to any requesting security holder?

[189] For example, we could require summary financial statements as specified in Rule 1-02(bb) of Regulation S-X (17 CFR 210.1-02(bb)) for the latest fiscal year and interim period.

c. Reduce Financial Statements Required for Non-Reporting Target Companies

If our proposal to eliminate financial statements of the target in a cash merger when the acquiror's security holders are not voting is adopted, there still will be circumstances under which target financial statements are required. In particular, financial statements are required when the transaction is a stock merger or stock tender offer.

The rules currently provide special treatment when the target is not subject to the Commission's reporting requirements. We believe the existing requirements can be further relaxed under certain circumstances. In many transactions involving the acquisition of a non-reporting company, the target's financial statements are not readily available or can be obtained only at great expense. In some cases, companies have chosen to structure acquisitions so an exception from registration was available rather than obtain the financial statements needed to register the transaction. We propose to reduce the costs of preparing proxy statements and registration statements for business combinations by reducing the financial statement requirements when the target is a non-reporting company and the acquiror's security holders are not voting on the transaction.

Currently, the rules require the filing person (the acquiror) to provide financial statements "that would have been required to be included in an annual report to security holders" had the non-reporting company been required to furnish an annual report that complies with Rule 14a-3(b).[190] Rule 14a-3(b) requires audited balance sheets for each of the two most recent fiscal

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[190] See Item 17(b)(7) of Form S-4, Item 17(b)(5) of Form F-4 and Item 14(b)(3)(ii)(A) of Schedule 14A. The item states that the balance sheet for the year preceding the latest full fiscal year and the income statements for the two years preceding the latest full fiscal

years and audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S-X.[191] We no longer believe non-reporting target companies (or their acquirors) should have to generate financial statements for three years when security holders of the non-reporting target most likely made their initial investment decision based on less extensive or different financial statements. The requirement to provide financial statements prepared in accordance with Regulation S-X going back three years can be costly and burdensome.

Under the proposal, when the acquiror's security holders are not voting on the acquisition, we would require financial statements of the target prepared in conformity with Generally Accepted Accounting Principles ("GAAP") for the latest fiscal year.[192] If the non-reporting target company previously provided its security holders with GAAP financial statements for either of the two fiscal years before the latest fiscal year (or both), GAAP financial statements also would be required for those years.

As is currently the case, the item would not require audited financial statements for years before the most recent fiscal year if the non-reporting target's financial statements were not audited previously. In addition, the financial statements for the latest fiscal year would have to be audited only to the extent practicable.

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year need not be audited if they have not previously been audited. The item further states that financial statements need be audited only to the extent practicable.

191 17 CFR 240.14a-3(b).

192 We propose to implement this change in proposed Forms C and SB-3. See Items 18(c) and 21(b) in Form C and Items 16(b) and 19(c) in Form SB-3. If these forms are not adopted, we would implement this amendment in Forms S-4 and F-4.

We would not change the existing requirement to provide pro forma financial information required by Article 11 of Regulation S-X**.** In addition, we are not changing the requirement to provide audited financial statements in accordance with Rule 3-05 of Regulation S-X if a registration statement is used for registering resales to the public by any person who, with regard to the securities being re-offered, is deemed an underwriter within the meaning of Rule 145(c). Further, the proposal would not change the financial statements currently required if the acquiror's security holders are voting on the transaction.[193] It should be noted that the Securities Act Reform Release includes a proposal to require certain additional non-financial information regarding non-reporting target companies.

If the non-reporting target is a foreign company, the proposed reduction in the required financial statements would operate in the same manner as for domestic companies. If the acquiror's security holders are not voting on the transaction, and the target's financial statements are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP ("foreign GAAP"), a reconciliation to U.S. GAAP would be required unless a reconciliation is unavailable or not otherwise obtainable without unreasonable cost or expense.[194]

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193 The proposal also would not affect the current requirement that the acquiror ultimately provide audited financial statements under Item 7 of Form 8-K when the transaction is significant to the acquiror.

194 At a minimum, however, filers should provide a narrative description of the material variations in accounting principles, practices and methods used in preparing the foreign GAAP financial statements from those accepted in the U.S.

The proposed change would not affect financial statements for a non-reporting target in roll-up transactions.[195] We believe that the acquiror's security holders have an independent need for financial statements of any non-reporting company that would be rolled-up into their company. We request comment on whether there are any other circumstances when this reduction in the target financial statements required should not apply. For example, should this reduction apply when the acquiror is a public shell company seeking to merge with or be acquired by a private company with substantial assets?

We invite comment on whether this proposal would provide sufficient regulatory relief to filers and still assure that target security holders have sufficient information. We also solicit comment on whether, if the acquiror's security holders are voting on the transaction and it is significant to the acquiror at the 50% level, audited financial statements of the target should be required.[196] Currently, if the target is a non-reporting company the rules provide for special treatment by permitting Rule 14a-3(b) financial statements, as described above.[197] We invite comment on whether this special treatment provides any benefit to acquirors who eventually will

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195 An exception from the going-private rules would not be necessary because the proposal is limited to the financial statement requirements of non-reporting companies, which are not subject to Rule 13e-3.

196 See Rule 3-05(b)(4)(i) of Regulation S-X (17 CFR 210.3-05(b)(4)(i)). Audited financial statements of the target are currently required in Form S-4 if the target is a reporting company, whether or not the acquiror's security holders are voting on the transaction. In addition, audited financial statements are required for other probable acquisitions (i.e., acquisitions other than the one being voted on by security holders) at the 50% significance level.

197 See note 190 above.

have to provide audited financial statements of the target in a Form 8-K or in connection with other securities offerings.

d. Registration Statement Form for Business Combinations

In the Securities Act Reform Release, we propose to replace Forms S-4 and F-4 with Form C (and Form SB-3 for small business issuers). These forms would be the only ones available for registered exchange offers, mergers and other business combinations.[198] Currently, Form S-1 is available for exchange offers and Form S-2 is available for issuer exchange offers. If these forms are rescinded, issuer exchange offers would be limited to Forms C and SB-3.

As discussed in more detail in the Securities Act Reform Release, Forms C and SB-3 would require basically the same information as the current forms about the transaction, the acquiror, the company to be acquired and the combined entity.[199] In that release, we propose to treat Form B issuers differently from other issuers in a number of respects. No information would be required to be delivered to investors until shortly before the investment decision; no final prospectus would be required to be delivered; and the registration statement would become effective upon filing, or upon a date designated by the filer. For the reasons discussed in Part II.B and C of this release, we do not propose the same scheme for Form C registration

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198 These forms would be available for all transactions that can be registered on Forms S-4 and F-4 today. Forms S-4 and F-4 permit incorporation by reference of information about the acquiring and acquired companies to the extent those companies are eligible to use Forms S-2 and S-3 instead of S-1 (Forms F-1; F-2; and F-3 for foreign private issuers). Forms C and SB-3 would adapt the incorporation by reference provisions to the proposed new regulatory scheme, permitting incorporation by reference for Form B, seasoned Form A, and seasoned Form SB-2 companies.

199 If the transaction is an exchange offer, the prospectus also must include certain information specified by the tender offer rules. See Rule 432. We propose a technical change to Rule 432.

statements, even when the issuer and/or the target would be eligible to use Form B. Instead, our proposed approach for business combinations permits free communications, so long as security holders ultimately receive a mandated disclosure document with specified information before they make their tender or voting decision. We do, however, solicit comment on the extent to which aspects of the Form B scheme could be adopted for business combinations.

Forms S-4 and F-4 currently require that the prospectus be delivered at least 20 business days before the date of the vote or the expiration of the exchange offer when incorporation by reference is used. The purpose is to assure that security holders have time to obtain the documents incorporated by reference and review their contents. The proxy rules impose a comparable provision for cash mergers.[200] We propose to eliminate these requirements because Commission filings incorporated by reference are now readily available from many sources, including our Internet web site, our public reference room, and presumably from brokers and investment advisers. We ask for comment as to whether security holders would still benefit from a mandated solicitation period when incorporation by reference is used.

E. Update the Tender Offer Rules

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[200] General Instruction A.2 to Form S-4; General Instruction A.2 to Form F-4; Note D.3 to Schedule 14A.

The tender offer rules have not been revised since 1986.[201] We are attempting to update them to correspond to the need of today's markets. We have already discussed several proposals affecting tender offers. These proposals involve expanding permissible communications, changing the timing and methods of commencement, combining tender offer schedules, integrating disclosure requirements and including a summary term sheet. In addition, as discussed below, we have several proposals to provide new tender offer procedures, revise and clarify the financial statements requirements and clarify the rules. We also solicit comment on whether the tender offer rules should include a safe harbor from liability for forward-looking information.

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[201] In 1986, the Commission adopted amendments to the tender offer rules to provide that a third-party or issuer tender offer must be open to all holders of the class of securities subject to the tender offer (both record and beneficial owners) and that any security holder must be paid the highest consideration paid to any other security holder during the tender offer. See Release No. 34-23421 (July 11, 1986) (51 FR 25373) and Rule 14d-10 (17 CFR 240.14d-10). More comprehensive revision of the tender offer rules has not been undertaken since 1979.

1. Permit Securities to be Tendered During a "Subsequent Offering Period" without Withdrawal Rights

We believe that there may be times when bidders should be able to accept shares in a tender offer after the tender offer is completed.[202] We propose to permit security holders to tender securities during a limited time after the initial offer, including all extensions, is completed, referred to as the "subsequent offering period."[203] The proposed subsequent offering period would be similar to the extended offering period that sometimes applies to tender offers made in the United Kingdom subject to the City Code on Take-overs and Mergers.[204] No withdrawal rights would be available during this period.[205] Security holders would be able to tender securities in the subsequent offering period only after all conditions to the offer were satisfied or waived and the shares tendered to that point were accepted for purchase and promptly paid for.[206] The subsequent offering period would be optional at the bidder's election.

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202 For example, when a bidder is successful in acquiring a sufficient number of target shares to approve a back-end merger (typically a majority or two-thirds is required), most remaining security holders want to get cashed out, knowing that a back-end merger to acquire the remaining shares is a relative certainty. Under most state laws, the bidder must own at least 85 or 90% of the target to merge without security holder approval in a short-form merger.

203 Proposed Rule 14d-11.

204 The City Code on Takeovers and Mergers and the Rules Governing Substantial Acquisition of Shares (the "City Code") Rule 31.4. See also Part IV.A of Release No. 34-29275 (June 5, 1991) (56 FR 27582).

205 Rule 14d-7 would be amended. The withdrawal rights that exist after 60 days following the start of the tender offer, pursuant to Section 14(d)(5) of the Exchange Act (15 U.S.C. 78n(d)(5)), similarly would not be available.

206 The proposed subsequent offering period could not be used where payment would be delayed. We have stated that payment may be delayed for certain governmental regulatory approvals. See Release No. 34-16623 (March 5, 1980) (45 FR 15521). However, the

We propose limiting the use of the subsequent offering period to third-party tender offers for all outstanding shares of the target. In addition, the bidder must intend to engage in a back-end merger with the target after the tender offer, either offering cash or securities. The bidder's intent to merge with the target would have to be publicly disclosed in its offering materials.

Under our proposal, a bidder would have to disclose its intention to provide a subsequent offering period in the initial tender offer materials filed and disseminated to security holders. The tender offer materials would have to adequately disclose the use of a subsequent offering period and explain how it would operate. If the "plain English" summary term sheet proposal is adopted, the subsequent offering period would be disclosed in the summary term sheet. If a bidder decided to include a subsequent offering period after the initial offering materials were filed and disseminated, that would be treated as a material change in information, requiring dissemination of a supplement and possibly an extension of the offer by up to five business days.[207]

The subsequent offering period would be strictly limited to offers for all outstanding shares.[208] The subsequent offering period would be a fixed ten business day period that would follow the date a bidder satisfied or waived all conditions to its offer and accepted for purchase any shares tendered to that point in time. The bidder's prompt payment obligation would apply

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proposed subsequent offering period could not be used unless all conditions to payment have been satisfied or waived.

[207] Similarly, if the bidder stated that a subsequent offering period would be provided and then decided not to make one available, this would be a material change requiring dissemination and adequate time for security holders to receive and act on the information.

[208] Application of the subsequent offering period in a partial offer could raise complex proration issues if the offer is oversubscribed.

to all shares accepted in the initial offering period before the subsequent offering period began. During the subsequent offering period, the bidder could solicit remaining security holders to tender. The bidder would be obligated to "promptly" pay for the shares tendered, with prompt payment running from the date of each separate tender.[209]

The subsequent offering period could not start until the offer was open at least 20 business days with withdrawal rights available to all tendering security holders. This would prevent bidders from offering withdrawal rights during the first ten business days of an offer but not the last ten business days.

The final amendment to reflect the results of the tender offer[210] would not be required until the end of the subsequent offering period. We solicit comment, however, on whether bidders should be required to issue a public announcement at the beginning of the subsequent offering period setting forth the number of shares tendered and accepted in the initial offering period.

The subsequent offering period would help security holders who do not tender into an offer, but then wish to participate in the offer after the bidder accepts shares and discloses the results. There may not be a very liquid trading market in the securities after the tender offer. As a result, security holders often are forced to either hold onto their shares until a back-end merger is completed or sell into the market below the offer price. Bidders may need to prepare and furnish a proxy statement or other disclosure documents before remaining security holders can

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209 Proposed revision to Rule 14e-1(c).

210 See current General Instruction D to Schedule 14D-1; proposed to be moved to Rule 14d-3(b)(2).

obtain their final payment. We believe the subsequent offering period would minimize the delay in liquidating the investment of the relatively small number of security holders that do not tender in an offer, but later decide they want to tender and receive the offer price.

Comment is solicited on whether this procedure would be useful to bidders and security holders. Would there be any disadvantages for security holders? Should the subsequent offering period be mandatory? Should the subsequent offering period be longer or shorter (e.g., five, seven, 15 or 20 business days)? Should the bidder be allowed to extend the subsequent offering period for either a limited number of days (e.g., five or ten business days) or for whatever time period the bidder specifies? Would the subsequent offering period encourage security holders to delay tendering until the completion of the offer, and if so, how much of a disadvantage would this be to the bidder? Should the availability of the subsequent offering period be limited to circumstances where a substantial percentage of shares (such as 50%) has already been tendered? As proposed, the subsequent offering period would be available for both cash and stock tender offers, and the consideration offered in the back-end merger could be either cash or securities. Is there any reason to limit the proposal to cash tender offers or to situations where only cash is offered in the back-end merger? Should the subsequent offering period be limited to third-party offers, as proposed, or would it also be useful for issuer tender offers?

2. Clarify the Financial Information Required for Bidders in Cash Tender Offers

a. When the Bidder's Financial Statements are Required in Cash Tender Offers

Under the current rules, the financial statements of a bidder in a cash tender offer must be disclosed if the information is "material."[211] There are several instructions in Schedule 14D-1 that help bidders determine the need for, and adequacy of financial statements. The first instruction states that materiality will depend on the facts and circumstances of the tender offer.

Once a bidder determines that financial statements are material, there is a provision in the instruction that details the type of financial statements deemed adequate for disclosure purposes. If a bidder provides financial statements that are prepared in compliance with Form 10, the financial statements requirement is deemed satisfied.[212] A second instruction permits incorporation by reference if the bidder is subject to the Exchange Act reporting requirements. A third instruction provides that non-reporting companies need not include audited financial statements if they are not available or obtainable without unreasonable cost or expense. Both third-party bidders and issuer offerors are required only to disseminate a fair and adequate summary of the financial information to security holders.[213]

In adopting the third-party tender offer rules, we identified four factors that should be considered when determining whether financial statements of the bidder are material in a cash tender offer:

- the terms of the tender offer, particularly those terms concerning the amount of securities sought, such as any-or-all, a fixed minimum with the right to accept additional shares tendered, all-or-none, and a fixed percentage of the outstanding;

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211 See Item 9 of Schedule 14D-1 and Item 7 of Schedule 13E-4.

212 (17 CFR 249.210). Financial statements prepared in accordance with Item 17 of Form 20-F will be deemed adequate for foreign bidders. (17 CFR 249.220f).

213 See Rules 14d-6(e) (17 CFR 240.14d-6) and 13e-4(d) (17 CFR 240.13e-4(d)).

- whether the purpose of the tender offer is for control of the subject company;
- the plans or proposals of the bidder; and
- the ability of the bidder to pay for the securities sought in the tender offer and/or to repay any loans made by the bidder or its affiliates in connection with the tender offer or otherwise.[214]

Under the staff's current interpretation, the above factors are not exclusive, and it is not necessary that all factors be present to meet the materiality test. Based on our experience with tender offers since 1977, we believe it would be more helpful to provide specific guidance to bidders as to when financial statements are not required. We propose to include an instruction in Schedule TO[215] stating that a bidder's financial statements are not material when:

- only cash is offered;
- there is no financing condition; and either:
- the bidder is a public reporting company under the Exchange Act; or
- the offer is for all outstanding securities of the target.

Under the above circumstances, we believe that the burden of providing the bidder's financial statements may outweigh the usefulness of the information to security holders.[216] Based on the information currently available on EDGAR (via the Internet and other sources), we believe there

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214 See Release No. 34-13787 (July 21, 1977) (42 FR 38341).

215 The proposed instruction would appear in both Schedules 14D-1 and 13E-4 if our proposal to combine the schedules is not adopted. See proposed Instruction 2 to Item 10 of Schedule TO. See also Part II.D.2. above. Thus, we propose to clarify the financial statements required in both issuer and third-party tender offers.

216 If the bidder is a reporting company, the financial statements could be incorporated by reference, as currently permitted.

is less need to require financial statements for bidders that are public reporting companies than for non-reporting entities.[217]

When the bidder is not a public reporting company, we believe financial statements should be provided when the offer is not for all outstanding shares of the target. Financial statements can be material in a partial tender offer because security holders may need to evaluate the bidder's financial condition in determining whether to tender into the offer or remain a security holder in a company in which the bidder will hold a substantial equity interest.[218]

We request comment on whether there are any other circumstances under which financial statements may not be material. Conversely, are there any circumstances under which we propose to exclude financial statements that the information would be material? For example, should we require financial statements of any non-reporting bidder unless the offer is for all shares and conditioned on acquiring a controlling interest in the target and the bidder intends a back-end merger? If an offer is not subject to a financing condition, could the bidder's financial statements be material even under our proposed instruction? Should the proposed instruction hinge upon whether financing for the offer is in place, as opposed to whether the offer is subject

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[217] If the bidder is offering securities, as well as cash, then financial statements are material. The registration statement form for the securities offered will specify the financial statements required. If the bidder offers securities that are exempt from registration, the financial statements specified in Schedule TO would be filed.

[218] At least one court has observed that the bidder's financial condition can be material in an offer for all outstanding securities. In Prudent Real Estate v. Johncamp Realty, 599 F.2d 1140 (2d Cir. 1979), Judge Friendly commented that: "If the bidder is in a flourishing financial condition, the stockholder might decide to hold his shares in hope that, if the offer was only partially successful, the bidder might raise its bid after termination of the offer or infuse new capital into the enterprise." An offer, however, by a company in poor financial condition "might cause the shareholder to accept for fear that control of the company would pass into irresponsible hands." Id. at 1147.

to a financing condition? If the offer is self-financed, are the bidder's financial statements needed even if there is no financing condition?

Should the criteria for determining when financial statements are required be applied differently when the bidder is a foreign company whose financial information may not be readily available?[219] To the extent that the financial statements of a foreign bidder are required and are prepared under foreign GAAP, a reconciliation to U.S. GAAP would be required unless a reconciliation is unavailable or not otherwise obtainable without unreasonable cost or expense.[220]

Finally, we note that, although Item 9 does not require financial statements of bidders who are natural persons, financial information concerning such bidders may be material under the circumstances of the offer.[221] The practice has developed of including disclosure regarding the net worth of a bidder who is a natural person. We think such information is useful and therefore propose to codify this practice with an instruction to Schedule TO.

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

When financial statements of the bidder are material, the rules currently require three years of historical financial statements for a third-party tender offer. In contrast, only two years of financial statements of the issuer are required in an issuer tender offer or going-private transaction. We propose to harmonize these requirements by reducing the financial statements

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219 Foreign private issuers are not required to file their Form 20-F electronically.

220 As noted above in Part II.D.2.c, at a minimum, bidders should provide a narrative description of the material variations in accounting principles, practices and methods used in preparing the foreign GAAP financial statements from those accepted in the U.S.

221 See Release No. 34-13787 (July 21, 1977) (42 FR 38348), at n. 22.

requirement for third-party tender offers to two years.[222] Currently, Instruction 1 to Item 9 of Schedule 14D-1 provides that financial statements prepared in compliance with Form 10 for a domestic bidder or Item 17 of Form 20-F for a foreign bidder will be deemed adequate for purposes of the disclosure requirement. We would eliminate this instruction and require the financial information specified in proposed Item 1010(a) and (b) of Regulation M-A, if material.

We solicit comment, however, on whether two years of financial statements are necessary to informed investor decisions. Should it matter if the bidder is offering securities that are exempt from registration rather than cash? Would one year of financial statements be adequate for third-party and issuer tender offers? Would one year of financial statements be adequate for a going-private transaction that is not subject to the more stringent registration or proxy statement requirements?

The current financial disclosure requirements in issuer tender offers and going-private transactions call for information regarding book value per share, as well as the pro forma effect of the transaction on the company's balance sheet and book value per share, as of the most recent fiscal year end and the latest interim balance sheet date.[223] In reviewing the disclosure items, we believe that it may be unnecessary to provide this data for both the latest fiscal year end and

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222 See proposed Item 1010 of Regulation M-A. Of course, if the bidder is offering registered securities, the registration statement requirements will control. As noted in Part II.D.2.b above, we also propose to reduce the financial statements of acquiring companies in merger proxy statements from three to two years.

223 See Item 14 to Schedule 13E-3 and Item 7 to Schedule 13E-4.

latest interim period, and propose to reduce the requirement to only the most recent balance sheet date.[224] This proposed change also would apply to third-party tender offers.

The current rules require that full financial statements of the bidder in a third-party tender offer and of the issuer in an issuer tender offer or going-private transaction be included in Schedule 14D-1, 13E-4 and 13E-3, respectively. Filers are permitted, however, to provide summary financial information instead of the full financial statements in the disclosure document sent to security holders. We believe the current requirements regarding summary financial information[225] are outdated and potentially confusing.[226] Therefore, we propose to revise the rules regarding summary information in all of these schedules to specifically require the information set forth in Rule 1-02(bb) of Regulation S-X.[227] The summary information would continue to be required for the same periods as the full financial statements. Rule 1-02(bb), however, calls for some information that is not currently required, specifically redeemable preferred stock, minority interests, and summarized financial information for

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224 See Item 1010 (a)(4), (b)(1) and (3) of proposed Regulation M-A. The book value per share change also would apply to merger proxy statements.

225 See Rule 14d-6(e)(1)(viii) (17 CFR 240.14d-6(e)(1)(viii)); Instruction B to Rule 13e-4(d)(1)(iv) (17 CFR 240.13e-4(d)(1)(iv)); and Instruction 2 to Rule 13e-3(e)(3) (17 CFR 240.13e-3(e)(3)).

226 At least one line item currently specified in the rules, "total assets less deferred research and development charges and excess cost of assets acquired over book value" is not an appropriate measure under GAAP because it is inconsistent with FASB Statement 2, which prohibits capitalization of research and development costs.

227 See proposed Item 10 to Schedule TO; proposed Item 13 to Schedule 13E-3; and proposed Item 1010 of Regulation M-A.

unconsolidated subsidiaries and 50 percent or less owned persons. We solicit comment on whether this information is useful to investors.

The rules regarding summary financial information in issuer tender offers and going-private transactions currently require ratio of earnings to fixed charges, book value per share and, if material, pro forma data. These items are not specifically covered by Rule 1-02(bb). As proposed, Schedules TO and 13E-3 would call for these additional items as well as the information specified in Rule 1-02(bb). The current rule regarding summary financial information in third-party tender offers does not require book value per share information. As proposed, Schedule TO would call for this information, if material.

We also propose to clarify the reconciliation required for a foreign bidder's summary financial information if the financial statements are prepared on the basis of foreign GAAP.[228] A reconciliation to U.S. GAAP would be required to the same extent that a reconciliation or narrative is required for the full financial statements, as discussed above.

Finally, we are considering whether, in light of the proposals to reduce the number of years for which financial statements are required, security holders should receive the full financial statements whenever they are required, rather than summary financial information. Should we eliminate the provisions in Rules 13e-3, 13e-4 and 14d-1 that permit the substitution of summary financial information for the full financial statements in the disclosure document sent to security holders?

c. Bidder's Source of Funds

[228] See Rule 14d-6(e)(ix) (17 CFR 240.14d-6(e)(ix)).

Regardless of the level of financial information security holders receive, we believe that a bidder's ability to pay for securities in an offer is a material disclosure item. The disclosure appearing in many tender offers relating to a bidder's ability to finance the offer has been meager at best, even when financial statements are provided. Therefore, we intend to clarify the information that is required in order to fully inform security holders of the bidder's ability to finance the offer. We propose to expand the "Source of Funds" item requirement in the tender offer and going-private rules[229] to require the specific source(s) of financing, any condition(s) to the financing, and the bidder's ability to finance the offer if the primary source of financing falls through.[230]

d. Pro Forma Financial Information in Two-Tier Transactions

A "two-tier" transaction is one in which the bidder first offers to acquire shares of the target in a cash tender offer with any securities remaining outstanding acquired in a back-end merger where securities are offered as consideration. In two-tier transactions, security holders are essentially asked to make an investment decision of whether to tender for cash in the front-end tender offer (to the extent pro ration allows their shares to be accepted), or hold on to their securities to receive securities of the bidder in the back-end. We believe security holders need pro forma financial information regarding the combined entity at the first tier so they can evaluate the second tier of the transaction when deciding whether to tender.[231]

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229 See Item 4 to Schedule 14D-1; Item 6 to Schedule 13E-3; and Item 2 to Schedule 13E-4.

230 See proposed Item 1007 of Regulation M-A.

231 See Rule 11-01(a) of Regulation S-X.

In addition to the general need for the information, disclosure of pro forma financial information would be in keeping with the general theme of free communications expressed in this release and the Securities Act Reform Release. Also, as discussed in Part II.B.1 above, many bidders currently disclose pro forma information in order to satisfy the market's demand for information on a proposed transaction and to effectively sell the transaction to the market. Thus, we propose to require pro forma and related financial information in the first tier when a second tier is contemplated.

The requirement to provide financial information would be based on the bidder's intent to engage in a back-end merger with target security holders receiving securities of the bidder. Under the proposal, bidders would be required to provide the financial information specified by Item 3(f), (g) and (h) and Item 5 of proposed Forms C or SB-3, [232] as appropriate. This information would be required to be included in the tender offer materials for the cash tender offer.[233] We believe that this information, which would be required in any Form C or Form SB-3 filed when the securities are offered to security holders in the back-end, is necessary for security holders to make an informed investment decision. Consistent with the summary information provisions discussed above, [234] the proposed instruction for two-tier transactions would permit third-party bidders to provide only the financial information specified in Item 3(f), (g) and (h) of

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232 Specifically, these items call for disclosure of: selected financial data; pro forma selected financial data; pro forma information; and pro forma information required by Article 11 of Regulation S-X (§§ 210.11-01 through 210.11-03).

233 See Instruction 5 to proposed Item 10 of Schedule TO.

234 See Part II.E.2.b above.

proposed Forms C or SB-3 in the disclosure document sent to security holders so long as the Schedule TO filed with the Commission included the information specified by Item 5.

The proposal is consistent with an interpretive position published in 1978 that the inclusion of certain information would not be considered an "offer to sell" under the Securities Act. In the interpretive release, the Division of Corporation Finance stated that the "gun jumping" doctrine, which is designed to prevent an issuer from conditioning the market by arousing investor interest before a registration statement has been filed, does not prevent bidders from providing material information regarding a planned back-end merger. The Division explained:

> The bidder's concern is purchasing the subject company's securities for cash, not priming the market for a subsequent registered offering of securities. Regardless of the bidder's intent, Schedule 14D-1 for compelling policy reasons reflected by the Williams Act requires (information regarding any negotiations, agreement in principle, or definitive merger agreement with the subject company) in order to provide full disclosure to investors confronted with an investment decision in the context of a tender offer.[235]

Of course, under the proposals to permit free communications in this release and the Securities Act Reform Release, disclosure of pro forma financial information at any stage would not result in "gun jumping" under the Securities Act.

We request comment on whether this could create practical difficulties for bidders by causing delays in disseminating the cash tender offer material, and if so, whether this would be offset by benefits to security holders receiving the information. Also, if commenters believe the

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[235] See Release No. 33-5927, also discussed in note 43 above. The position expressed in the release was limited, in the tender offer context, to disclosure required by Schedule 14D-1.

proposed requirement is too extensive, should we require some other level of information? For example, would the pro forma information specified in proposed Item 1010(b) of Regulation M-A be adequate?[236] Alternatively, would the pro forma information required by Article 11 of Regulation S-X be a sufficient basis for an investment decision regarding the cash tender offer?

We also request comment on whether, even if a transaction is intended, there could be reasons why the disclosure of pro forma information could be premature or unwarranted. Conversely, are there circumstances where pro forma financial information should be permitted or required if a back-end merger is not "intended"? In addition, we invite comment on whether the requirement to provide pro forma financial information needs to be modified to minimize difficulties for bidders in hostile transactions.

[236] See Part II.E.2.b above and Item 1010(b) of proposed Regulation M-A.

3. Clarify the Requirement that a Target Report Purchases of its Own Securities After a Third-Party Tender Offer is Commenced

Rule 13e-1 prohibits an issuer whose securities are the subject of a third-party tender offer from repurchasing any of its equity securities until information about the issuer's acquisition is filed with the Commission and is sent or given to security holders. We propose to update the rule, which was adopted in 1968,[237] and clarify its operation.

Once the required information is filed and sent to security holders, the issuer is free to repurchase its securities.[238] Under the current rule, an issuer can disseminate the required information to its security holders as early as six months before making any repurchases. As a result, issuers can send information regarding repurchases to security holders long before they become the target of a tender offer, diminishing the usefulness of this rule. We propose to revise the rule so that its purpose is to notify security holders that the issuer is purchasing its securities during a third-party tender offer for the securities. Therefore, the issuer's disclosure should be made only after a tender offer is made.

We also propose to rewrite the rule in plain English so that the rule is more understandable. It would call for the same information as the current rule, including the amount of securities to be purchased, identification of the sellers or market, purpose of the purchases, how the securities will be used, and the source of funds for the purchases. The revised rule would clarify that disclosure is required only when an issuer wants to repurchase its securities

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237 See Release No. 34-8370 (July 30, 1968) (33 FR 11015).

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

after a tender offer is made. The restriction on repurchases only applies during the term of the tender offer.

We invite comment on the timeliness of the information currently received under Rule 13e-1. Do security holders receive information either too early or too late to be of any use? We also solicit comment on whether the requirement to file and disseminate information during the limited time after a tender offer is made and before purchasing securities would impose an unreasonable burden on companies. How would this change affect companies with periodic stock repurchase plans? Should the rule not apply to routine purchases for employee benefit plans as to which the issuer has little or no discretion? If the issuer commences an issuer tender offer in response to the third-party tender offer, should the filing of the issuer's tender offer schedule satisfy the requirements of Rule 13e-1? Further, we request comment on the specific information that is required under the rule. Is there any information that either should or should not be required disclosure? Generally, the statement required by the rule consists of one or two pages of information.

We note that a limited number of statements are filed under the rule.[239] Given the relatively low number of filings, we question whether the rule provides any benefits to security holders and the market. Issuers may not be disclosing the required information, or they may not be triggering the reporting obligation. We invite comment on the usefulness of and the need for the information disclosed under the rule. Should we eliminate the rule entirely? If the information is beneficial, should issuers be required merely to make the filing with the Commission, and not disseminate the information to security holders?

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[239] Approximately six statements were filed under Rule 13e-1 during the past five years.

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

We propose to revise Rule 14d-5, the rule relating to dissemination of certain tender offers by use of stockholder lists and security position listings, to more closely align it with the 1992 amendments to Rule 14a-7 (the parallel rule relating to proxy materials).[240]

Both Rule 14d-5 and Rule 14a-7 currently allow the "requesting party" (the bidder under Rule 14d-5 and the security holder soliciting in opposition under Rule 14a-7), to ask the company either to provide a stockholder list or to mail the requesting party's materials. Until 1992, both rules required that the list provided by the company identify no more than record holders. In 1992, the Commission amended Rule 14a-7 to require a stockholder list that includes a reasonably current list of non-objecting beneficial owners, as well as record holders, if the company has obtained or obtains a list of beneficial owners for its own use before the meeting or security holder action.[241] In contested situations, both the company and parties soliciting in opposition could use the list to engage in personal solicitation of non-objecting beneficial owners.

If the free communications proposals in this release are adopted, security holders may ultimately receive final disclosure documents closer to the time they are asked to make an investment decision. As a result, it may become more important for bidders to have access to stockholder lists that include non-objecting beneficial owners as well as record holders,

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240 17 CFR 240.14a-7.

241 See Release No. 34-31326 (October 16, 1992) (57 FR 48276). The list of beneficial owners includes only those who have not objected to the bank or broker nominee disclosing their identity to the issuer.

particularly because of the time it takes for disclosure documents to be forwarded through street name holders to beneficial owners.

We propose to revise Rule 14d-5 to incorporate a stockholder list requirement in tender offers similar to that provided by Rule 14a-7 in proxy solicitations. Under the revised rule, a company that elects to provide a bidder with a stockholder list instead of mailing the bidder's materials would need to disclose the most recent list of names, addresses and security positions of non-objecting beneficial owners (as well as record holders) it has in its possession, or subsequently obtains. The list must be in the format requested by the bidder if this can be provided without undue burden or expense. The proposed amendment would give bidders the same ability as target companies to communicate directly with the non-objecting beneficial owners of securities.

This proposal would conform the stockholder list requirements so that the list required is the same whether security holders are solicited for proxies or for tenders. This should enhance a bidder's ability to timely communicate with non-objecting security holders of the target regarding the terms of its tender offer. Bidders would continue to be required to disseminate tender offer material to record holders (providing sufficient copies for the record holders to send to beneficial owners), but they would have the option also to send the material to non-objecting beneficial owners on the list. Would bidders find this useful? Should the rule permit bidders to send tender offer material to non-objecting beneficial owners instead of to record holders of those securities, and if so, should the issuer tender offer rule be revised the same way?[242] Would sending material, including transmittal forms, to beneficial owners unduly complicate the ability

[242] See Rule 13e-4(e)(1)(ii).

to keep track of tenders and count them accurately? Would beneficial owners receive tender offer material in a more timely manner than under the current system of dissemination through record holders?

5. Revise and Redesignate the Rule Prohibiting Purchases Outside an Offer

We propose to amend Exchange Act Rule 10b-13 and redesignate it as Rule 14e-5. The proposals would clarify the rule's text and codify several interpretations and exemptions.

Rule 10b-13 prohibits a person who is making a cash tender offer or exchange offer from purchasing or arranging to purchase, directly or indirectly, the security that is the subject of the offer (or any security that is immediately convertible into or exchangeable for the subject security) otherwise than as part of the offer.[243] The rule's prohibitions apply from the time the offer is publicly announced or otherwise made known to security holders until the time the bidder is required, by the offer's terms, either to accept or reject the tendered securities. Rule 10b-13 protects investors by preventing a bidder from extending greater or different consideration to some security holders by offering to purchase their securities outside the offer, while other security holders are limited to the offer's terms.[244] The rule applies to the bidder, whether the issuer or a third party, the bidder's affiliates, and the offer's dealer-manager.[245]

a. Proposed Amendments Redesignating and Clarifying the Rule

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243 17 CFR 240.10b-13.

244 Release No. 34-8712 (October 8, 1969) ("Rule 10b-13 Adopting Release").

245 See, e.g., Letter regarding Offers for Smith New Court PLC (July 26, 1995) ("Smith New Court Letter").

The Commission originally promulgated Rule 10b-13 under the provisions of Sections 10, 13 and 14 of the Exchange Act[246] to safeguard the interests of persons who sell their securities in response to a tender offer.[247] The dangers posed by a bidder's purchases outside an offer may involve fraud, deception and manipulation. Because the rule addresses conduct during tender offers, we believe it belongs with the other rules under Regulation 14E under the Exchange Act that directly address improper activities in the context of tender offers.[248]

The proposed amendments do not alter the rule's basic terms. Instead, they modify the rule's text to more clearly set forth the covered activities. New Rule 14e-5 would prohibit, in connection with a tender offer for equity securities, a covered person from purchasing or arranging to purchase any subject securities or any related securities otherwise than as part of the offer. As used in Regulation 14E, the term "tender offer" includes offers to exchange securities for cash and/or securities.[249]

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246 15 U.S.C. 78j; 15 U.S.C. 78m; 15 U.S.C. 78n.

247 Rule 10b-13 Adopting Release.

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

We propose to amend the rule delegating exemptive authority to the Director of the Division of Market Regulation, Rule 30-3, and to replace references to Rule 10b-13 with Rule 14e-5. We also propose to add a parallel provision to Rule 30-1 to delegate exemptive authority to the Director of the Division of Corporation Finance.

249 Thus, it is unnecessary to include paragraph (b) of Rule 10b-13 defining the term "exchange offer" in new Rule 14e-5.

We also propose to simplify the language describing the period during which the prohibition on purchases applies. Under proposed Rule 14e-5, this prohibition still would commence at the time the offer is first publicly announced or otherwise made known[250] to holders of subject securities and end with the offer's expiration. Under proposed Rule 14d-11, a tender offer could be extended under specific circumstances without offering withdrawal rights.[251] This gives security holders an additional opportunity to tender into the offer. We believe bidder purchases outside the offer during this subsequent offering period present the same concerns as during the initial offering period. Therefore, the proposed Rule 14e-5 restrictions would cover any subsequent offering period provided under proposed Rule 14d-11.

The rule applies from the time the offer is first publicly announced or otherwise made known to holders of subject securities. Should the rule apply if the bidder advises some but not all security holders that it intends to conduct a tender offer for the subject securities?

b. Persons and Securities Subject to the Rule

Scope of Persons Subject to the Rule

Rule 10b-13 applies to the person who makes the offer, which has been interpreted to cover the bidder, the bidder's affiliates, and the offer's dealer-manager.[252] Under proposed Rule 14e-5, the term "person" is replaced by "covered person" to codify this interpretation. Covered

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250 The phrase "otherwise made known" means any form of communication, other than public announcement, that notifies holders of subject securities of an offer.

251 See Part II.E.1 above.

252 See, e.g., Smith New Court Letter. See also In the Matter of Trinity Acquisition's Offer to Purchase the Ordinary Shares and American Depositary Shares of Willis Corroon Group plc, Release No. 34-40246 (July 22, 1998) (67 S.E.C. Docket 1320).

person is defined as: the offeror and its affiliates; the offeror's dealer-manager(s) and other advisors; and any person acting, directly or indirectly, in concert with them. The term "affiliate" is defined in proposed Rule 14e-5 as any person that "directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the offeror."[253]

[253] This definition is taken substantially from Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2).

Scope of Securities Subject to the Rule

Proposed Rule 14e-5 would apply only to offers for equity securities, just as Rule 10b-13 currently does. Moreover, Rule 10b-13 and proposed Rule 14e-5 prohibit purchases outside the offer of not only the target security, but also related securities. We propose several changes from Rule 10b-13 regarding the scope and treatment of related securities.

Proposed Rule 14e-5 would define "related securities" as "securities that are immediately convertible into, exchangeable for, or exercisable for subject securities." By covering securities that are immediately "exercisable for" subject securities, we are clarifying that securities, such as options, that can be exercised to receive target securities are included in the class of securities that a covered person cannot purchase outside the offer.

c. Excepted Transactions

Exercise of Related Securities

Rule 10b-13 specifies that if the person making the offer "is the owner of another security which is immediately convertible into or exchangeable for the security which is the subject of the offer, his subsequent exercise of his right of conversion or exchange with respect to such other security shall not be prohibited by this rule." We are amending this provision and relocating it in the part of proposed Rule 14e-5 covering excepted activities. When Rule 10b-13 was adopted, options were not nearly as common as they are today, and the text of this exception did not explicitly include the exercise of options. We believe the exercise of stock options is no more likely to lead to undesirable effects than the exchange or conversion of other related securities, so we want to make it clear that the exercise of options is included in this exception. Thus, we propose to permit a covered person to convert, exchange, or exercise related securities, as long as

the covered person owned the related securities before the offer was publicly announced or otherwise made known to security holders.[254]

Purchases by or for Plans

Since the adoption of Rule 10b-13, there has been an exception for purchases of the target security (or a related security) by the issuer, by participating employees of the issuer or the employees of its subsidiaries, or by the trustee or other person acquiring the security for the account of the employees, under certain types of plans.[255] For example, issuers conducting tender offers for their equity securities may purchase subject securities on behalf of an employee plan. Rule 10b-13 partly incorporates outdated Internal Revenue Code provisions to define these excepted plans.

We propose to eliminate references to Internal Revenue Code provisions to define permissible plan purchases and rely instead on the more expansive plan provisions contained in the Commission's Regulation M. The exception would permit purchases of subject securities or related securities for any "plan" if the purchases are made by an "agent independent of the issuer" as these terms are defined in Regulation M.[256] This exception would recognize the phenomenal growth in variety of employee, security holder, and affinity group plans in recent years. Moreover, requiring that these purchases be made by an "agent independent of the issuer"

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254 As discussed above, proposed Rule 14e-5 would prohibit a covered person from purchasing related securities from the time that the offer is publicly announced or otherwise made known to security holders.

255 17 CFR 240.10b-13(c).

256 17 CFR 242.100.

should help assure that such purchases do not lead to the abuses that proposed Rule 14e-5 is designed to prevent.

Does the proposal regarding plans adequately address circumstances when a bidder may need to purchase shares during an offer on behalf of a plan? Are there situations when it would be appropriate for the bidder to buy shares directly on behalf of the plan? Should the rule expressly prevent a bidder from establishing a plan around the time of an offer and then purchasing shares on behalf of that plan through an independent agent or otherwise?

Purchases during Odd-Lot Offers

We propose to add a new exception that permits purchases during an issuer odd-lot tender offer conducted in compliance with the provisions of Rule 13e-4(h)(5) under the Exchange Act.[257] Under Rule 13e-4(h)(5), an issuer tender offer is excepted from application of Rule 13e-4 if the offer is directed solely to odd-lot security holders and provides "all holders" and "best price" protections to tendering security holders. This proposal codifies a class exemption from Rule 10b-13 issued by the Commission in connection with a recent revision to Rule 13e-4(h)(5).[258]

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[257] 17 CFR 240.13e-4(h)(5).

[258] Release No. 34-38068 (December 20, 1996) (61 FR 68587).

Unsolicited Purchases by a Dealer-Manager

We propose to except unsolicited purchases by a dealer-manager that are made on an agency basis. This exception, which codifies a prior exemption,[259] would allow a dealer-manager to continue to conduct its customary brokerage activities during a tender offer. Those activities generally do not raise the concerns that proposed Rule 14e-5 is intended to address. Of course, the unsolicited orders must be from a person other than a covered person and must be made in the ordinary course of business.

Should the exception permit riskless principal transactions by dealer-managers as well? Is it necessary to define the term "dealer-manager?"

d. Solicitation of Comments on Proposed Rule 14e-5

We solicit comment on all aspects of proposed Rule 14e-5. Are the current exceptions appropriate? Aside from plan transactions and purchases during an odd-lot offer, are there other circumstances when it would be appropriate to permit the bidder to purchase subject or related securities outside the offer? For example, should the bidder be permitted to purchase shares outside the offer if a purchase contract was entered into before public announcement of the offer and the per share purchase price is no higher than the offer consideration? Should any such exception be limited to cash tender offers for all outstanding shares?

In addition, we invite commenters to address whether a rule prohibiting purchases outside of a tender offer continues to be appropriate. Should we consider implementing a rule like that

259 Letter regarding Reuters Holdings PLC (August 17, 1993).

in the City Code, which permits purchases outside the offer if, among other things, the bidder increases the tender offer consideration to the highest price paid for any shares so acquired?[260]

Under what circumstances would it be appropriate not to apply Rule 14e-5 to the offer's dealer-managers and advisors? Should we consider provisions like those contained in the City Code that permit market makers affiliated with the offeror's advisors to continue their market making functions when the market maker is sufficiently independent from the advisor and other protections are present?[261]

6. Safe Harbor for Forward-Looking Statements

In permitting substantially greater communications before the filing of a tender offer statement and the commencement of an offer, we recognize that bidders may be unwilling to communicate freely about an offer absent a safe harbor from liability for forward-looking communications. Currently, the safe harbor provisions in the Private Securities Litigation Reform Act of 1995 ("PSLRA") for forward-looking statements do not apply to statements made in connection with a tender offer,[262] although they do apply to statements made in connection with mergers.[263] We solicit comment on whether we should extend the provisions of the PSLRA

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260 City Code, Rule 6.2.

261 City Code, Rule 38; Statement 11.

262 See Section 27A(b)(2)(C) of the Securities Act and Section 21E(b)(2)(C) of the Exchange Act. The safe harbor in the PSLRA also is unavailable to penny-stock companies, companies involved in "blank check" offerings, roll-up transactions or going-private transactions. See Section 27A(b)(1)(B)-(E) of the Securities Act and Section 21E(b)(1)(B)-(E) of the Exchange Act.

263 The Commission's safe harbor rules, Securities Act Rule 175 (17 CFR 230.175) and Exchange Act Rule 3b-6 (17 CFR 240.3b-6), are available for certain forward-looking statements made in Commission filings, including those made in tender offers.

to forward-looking statements issued in connection with a tender offer. Just as with mergers, there are other policing mechanisms to protect against false and misleading forward-looking statements in the tender offer context.

Of course, under any extension of the PSLRA safe harbor, bidders would have to identify their forward-looking statements as "forward-looking" and the statements would need to be accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ significantly from those disclosed. In addition, bidders still may be subject to liability in any proceeding brought by the Commission. In order to promote balanced disclosure, we also would extend the safe harbor to statements made by targets as well as bidders.

We invite comment on whether the statutory safe harbor for forward-looking statements is necessary or appropriate to encourage bidders and targets to communicate fully and freely with security holders regarding proposed tender offers. What types of forward-looking information do bidders typically provide, or need to provide, before commencing a tender offer that merit safe harbor protection from private litigation? Could a safe harbor be abused in the fast-moving tender offer context? Are there any circumstances when a forward-looking information safe harbor should not be available? For example, should we limit our extension of the PSLRA safe harbor to only those communications made in reliance on the proposed free communications safe harbor?

III. General Request For Comments

If you would like to submit written comments on the proposals, to suggest additional changes, or to submit comments on other matters that might have an impact on the proposals, we

encourage you to do so. Besides the specific questions we asked in this release, we also solicit comment on the usefulness of the proposals to security holders, issuers, and the marketplace at large. We would like comments from the point of view of both bidders and targets, as well as security holders and market professionals involved in the mergers and acquisitions area. We also encourage the submission of written comments on any aspect of the initial regulatory flexibility analysis. We will consider any written comments we receive in preparing the final regulatory flexibility analysis if the proposed rules are adopted.

We believe that the proposals, if adopted, would promote efficiency, competition, and capital formation. However, we solicit comment on whether the proposals would promote efficiency, competition, and capital formation. We also request comment on whether the proposals, if adopted, would have an adverse effect on competition or would impose a burden on competition that is neither necessary nor appropriate in furthering the purposes of the Securities Act and the Exchange Act. We will consider these comments in complying with our responsibilities under Section 23(a)(2) of the Exchange Act.[264]

Please send three copies of your comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. You may also submit your comments electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-28-98; this file number should be included in the subject line if E-mail is used. Comment letters can be inspected and copied in the public reference room at 450 Fifth Street, N.W., Washington, D.C. We will post electronically submitted comments on our Internet Web site (http://www.sec.gov).

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[264] 15 U.S.C. 78w(a)(2).

IV. Cost-Benefit Analysis

The proposed new rules, schedules, and amendments would update and simplify the rules and regulations that apply to takeover transactions, including tender offers, mergers, and similar extraordinary transactions. We propose to enhance communications between public companies and investors before companies file registration statements involving takeover transactions, proxy statements or tender offer statements. We also propose to put cash and stock tender offers on a more equal regulatory footing; integrate the forms and disclosure requirements applicable to issuer tender offers, third-party tender offers and going private transactions; and consolidate the disclosure requirements in one location. We propose to allow security holders to tender their shares during a limited period after the successful completion of a tender offer; more closely align the merger and tender offer requirements; and update the tender offer rules to clarify certain requirements and reduce compliance burdens where consistent with investor protection. In this section, we examine the benefits and costs associated with the proposed revisions, focusing on the groups that might be affected. We request that commenters provide their views and supporting data as to the benefits and costs of the proposals.

A. Communications

We anticipate the proposals would enhance price discovery and market efficiency by permitting companies to communicate more freely with investors in business combination transactions. Today, the provisions of the Securities Act and Exchange Act, including the Williams Act, restrict the type of information that can be disseminated before a bidder files a registration, proxy or tender offer statement. The proposals would allow companies to communicate with security holders both before and after they file their registration, proxy, and

tender offer statements.[265] The proposed rules also would allow companies that are the target of a tender offer to communicate more freely with security holders.

We believe this increased flow of information would help security holders make more informed tender or voting decisions, despite the possibility that some deal participants might attempt to "condition the market" with false, misleading or confusing information. We believe security holders would benefit overall because they would receive issuers' registration, tender offer or proxy statements before having to tender or vote their shares. Therefore, security holders would have the opportunity to consider the statements in the disclosure document together with any other information disseminated by parties to business combination transactions. In addition, such information would be subject to high liability standards. Issuer communications made before filing with the Commission and during the waiting period would be subject to the anti-fraud provisions of Rule 10b-5 under the Exchange Act, as well as to the anti-fraud provisions of Rule 14a-9 and Section 14(e) if a transaction involves the proxy or tender offer rules, respectively. If the Securities Act is applicable, these communications also would be subject to the provisions of Section 12(a)(2) under the Securities Act. We have requested comment on whether these communications also should be deemed part of the registration statement and therefore subject to Section 11 of the Securities Act. We believe these standards of liability are sufficiently high to encourage parties to provide investors with fair and accurate information about transactions.

Does the benefit of greater freedom in communications outweigh the cost to security holders of obtaining and analyzing the additional information to determine its currency and

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[265] See proposed Rules 166(b), 14d-2, and 14a-12.

accuracy and the cost to companies of filing such information? We do not believe that permitting offerors to communicate with security holders before filing their registration statements and during the waiting period would present a significant burden to investors or offerors. We request comment on the type and magnitude of burden this filing requirement would represent to deal participants.

In addition, we believe the proposed communication rules would reduce the current regulatory uncertainty for companies. As discussed above, the provisions of the Securities Act and Exchange Act, including the Williams Act, restrict communications before companies file their registration, proxy or tender offer statements. Companies have told us that they are uncertain whether and in what circumstances these restrictions conflict with their duties to make full and fair disclosure under Rule 10b-5 of the Exchange Act. Consequently, many companies are unsure how to balance their duty to disclose with their duty to be silent before the filing of a disclosure document. By relaxing restrictions on communications, the proposed revisions would minimize this regulatory tension. This clarification would benefit offerors and security holders alike.

One potential cost of the proposals is that some security holders may make investment decisions based on information received before the filing of a disclosure statement.[266] To the extent that such activity could occur under the proposals, it also could occur today. The current rules limit companies from communicating with investors before they file their statements. By

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[266] The above proposals could cause some security holders to make premature investment decisions based on incomplete information if they buy or sell securities after an issuer announces a transaction, but before the issuer files its registration, proxy or tender offer statement.

allowing companies to publicly announce transactions before the filing of a mandated disclosure document and requiring companies to file their written communications on first use, we believe investors would be more likely to make informed investment decisions than under the current rules. We request comment on the accuracy of this view.

To further protect investors, we propose new Rule 14e-8 that would make it clear that it is unlawful to announce a tender offer without the intention of beginning and completing it with the intention of manipulating the market price of the bidder or target. It also would clarify that it is unlawful to announce a tender offer without the reasonable belief that the bidder has the means to purchase the securities in the offer. We believe such actions should be unlawful because it could cause investors to base their investment decisions on false or misleading information. We believe the proposed rule would help stem these activities, but request your comments on this viewpoint.

In addition to permitting increased communications between companies and investors, the proposed revisions would reduce the differential in information available to investors by requiring companies to file their written communications upon first use. This proposal would help assure that communications are immediately available to many more investors than currently is the case. The proposals also would increase the uniformity and timeliness of information received by investors.

We also propose to permit bidders to begin their exchange offers as soon as they file their registration statements; that is, they would no longer have to wait for the registration statements' effectiveness. We believe the ability to begin an exchange offer on filing would encourage issuers to file quickly with the Commission, thereby creating incentives for companies to

publicly disseminate information rather than selectively communicate with only a few security holders.

We recognize that our proposals to liberalize oral communications, which would not need to be filed, may encourage companies to use oral communications rather than written communications, which would have to be filed. On balance, however, we believe the proposals will reduce the selective disclosure of information to the market. We request comment on whether the benefits to security holders of greater access to written information would outweigh any potential costs from deregulating oral communications.

In proxy solicitations, whether or not they involve a business combination, we propose to permit companies to more freely communicate with security holders. Under the proposed rules, companies would be able to communicate freely with security holders without first furnishing a written proxy statement.[267] The proposal would allow security holders to receive more information on upcoming votes than they do today.

We also propose to require companies to provide a short "plain English" summary term sheet in all cash mergers, cash tender offers, and going-private transactions.[268] We believe that this would facilitate investors' understanding of the basic terms of transactions, and thus allow them to make better-informed choices. We do not anticipate that companies would incur significant costs in writing plain English term sheets because they need to generate the same

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[267] A company would, however, have to provide a proxy statement before or concurrently with soliciting a proxy card.

[268] Forms C and SB-3 would be subject to the current Form S-4 summary and plain English requirements; thus we would not need to require a term sheet for securities offerings, although we are soliciting comment on whether it would be useful.

information to comply with other disclosure requirements and many should have experience writing plain English disclosures in connection with the Securities Act requirements. We request comment on the accuracy of this view.

B. Filings

We anticipate that the proposals would lower the costs of complying with the business combination disclosure and other regulatory requirements for many offerors. The proposals would integrate and streamline the disclosure requirements for business combinations, thereby reducing compliance costs. Specifically, the proposals would harmonize and integrate the disclosure requirements for tender offer, merger proxy, and going-private transaction statements. The proposals would allow issuers to file one schedule, rather than two, to satisfy the tender offer and going-private disclosure requirements when both apply to the transaction.

The proposals would reduce the burden of complying with the merger proxy requirements by,[269] among other things:

- clarifying the disclosure requirements;
- clarifying that financial statements are required for an acquiror in a cash transaction only if an acquiror has not demonstrated the financial ability to satisfy the terms of the offer or the information is otherwise material;
- eliminating the requirement for financial statements of the target in a cash merger when the acquiror's security holders are not voting on the transaction;

[269] See Item 14 of Schedule 14A.

- reducing the financial statement requirements for non-reporting target companies (when security holders of the acquiring company are not voting on the transaction) to be only those financial statements the target previously furnished to its security holders (with a minimum of U.S. GAAP financial statements provided for the latest fiscal year) instead of financial statements for three years;[270] and
- reducing the financial statements needed for acquiring companies in cash mergers and third-party cash tender offers from three years to two years.

In addition, we propose one offsetting cost. We would require that a bidder in a two-tier transaction, where security holders are offered cash in a tender offer and securities in a back-end merger, provide security holders with pro forma financial statements and other related information for the combined entity at the time of the cash tender offer. Rather than being an additional requirement, this proposal would accelerate the time at which bidders are required to disclose the information.

For the purposes of the Paperwork Reduction Act, Table 2 in Section VI summarizes our preliminary estimates of the internal burden hours that parties would spend to comply with the proposals. These estimates include the burden hours incurred by companies from filing pre-filing communications. We base these estimates on current burden hour estimates and the staff's experience with these filings. The estimates in the table indicate that parties would expend approximately 234,759 internal burden hours/year complying with the proposals. If we assume that 70% of these burden hours would be expended by persons that cost the affected parties $85/hour and 30% of these burden hours would be expended by persons that cost $10/hour, then

[270] This revision would apply to Form C and SB-3 transactions.

the proposals would cost approximately $14,691,250/year in internal staff time. For the purposes of the Paperwork Reduction Act, we also estimate that parties would spend approximately $122,929,990/year on outside professional help to comply with the proposals. Thus we estimate that affected parties would spend approximately $137,621,240/year to comply with the proposals. Applying the same cost estimates to the burden imposed by the current rules, we estimate that companies and affected parties spend approximately $163,268,490/year.[271] Note that these estimates do not attempt to quantify the proposals' intangible benefits, such as the benefits to issuers and investors of enhanced communications and possible improvements in price discovery, nor its intangible costs, such as the cost to security holders of identifying misleading or incomplete pre-filing information. We request comment on the reasonableness of our estimates and our analysis of other costs and benefits.

We propose to eliminate confidential treatment of merger proxy statements. Today, many of the filings we accord confidential treatment are preceded by public announcements of the transactions. Consequently, we question whether eliminating confidential treatment of merger proxy statements would impose a burden or cost on companies. We solicit comment on the possible impact on companies of this proposal.

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

C. Tender Offers

We propose to reduce a regulatory bias against using securities as consideration in tender offers by allowing third-party bidders to begin an exchange offer upon filing and dissemination of their Form C or SB-3 registration statement (like bidders offering cash). This proposal would give bidders more flexibility in determining whether to offer cash or securities as consideration in transactions. Under the proposals, a bidder could not purchase tendered securities until its registration statement was declared effective and the mandatory 20-business day tender offer period had elapsed. Security holders could withdraw their securities at any time until purchased by the bidder. This proposal would likely shorten the period of time to complete stock tender offers relative to today, putting them on a more equal footing with cash tender offers. Of course, it may also increase the risk that bidders offering securities would have to disseminate supplements to the tender offer materials after their offers begin due to changes in material information. If so, they would have to provide sufficient time for security holders to receive the supplements and reconsider their investment decisions. This risk, however, would not be unique to exchange offers; issuers run the same risk today with cash offers. We solicit comment on this analysis and on any other costs and benefits that may arise from bidders commencing their exchange offers earlier than today.

We also propose to permit bidders to purchase (at the stated offer price) securities from holders who did not tender their shares during the offer in a "subsequent offering period." We believe the proposal would minimize the delay that security holders encounter in liquidating their investments in a target's securities when a bidder is successful in purchasing a significant or controlling interest in the target. Under the proposal, however, security holders might wait to

tender their shares in the subsequent offering period. We solicit comment on whether this would be likely to occur and whether it would outweigh the benefits of the proposal. We note that bidders would not be under any obligation to offer to purchase securities in a subsequent offering period.

We propose to eliminate the requirement for financial statements of the target in cash mergers when acquirors' security holders are not voting on the transaction, and require two, rather than three years of financial statements when they are material in third-party cash tender offers. If the security holders of the acquiror are not making a voting decision on the transaction, they do not need three years of historical financial statements. The reduction from three to two years of historical financial statements would thus lower acquirors' costs of complying with our rules, while continuing to protect security holders.

Finally, we propose to allow bidders greater access to security holders in tender offers by enabling them to contact non-objecting beneficial owners if the target company maintains a list of these persons. The proposed amendment would give bidders the same ability as target companies to communicate directly with the beneficial owners of securities similar to that provided under the proxy rules. We believe this proposal would benefit bidders and security holders because communications would be more efficient than today. We request your comments on the benefits and costs of this proposal.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[272] 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;

[272] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

We request information on the potential impact of the proposed rules, schedules, and amendments on the economy on an annual basis. Commenters should provide empirical data on: (i) the annual effect on the economy; (ii) any increase in costs or prices for consumers or individual industries; and (iii) any effect on competition, investment or innovation. We note that U.S. merger and acquisition activity in 1997 was valued at over $790 billion.[273]

In adopting rules under the Exchange Act, Section 23(a) requires the Commission to consider the impact that rules would have on competition and to not adopt any rule that would impose a burden on competition not necessary or appropriate in the public interest. Section 3(f) of the Exchange Act requires the Commission, when engaged in rulemaking, to consider or determine whether the action is necessary or appropriate in the public interest, and also to consider in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.[274]

V. Initial Regulatory Flexibility Analysis

A. Reasons for Proposed Action

We prepared this Initial Regulatory Flexibility Analysis under 5 U.S.C. §603 concerning the new rules, schedules, and amendments proposed today. We will consider your written comments in the preparation of the final analysis. The primary purposes of the proposed new rules, schedules, and amendments are to enhance communications with security holders;

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

[274] 15 U.S.C. § 78c(f).

harmonize the regulations affecting cash and stock tender offers; facilitate compliance with the rules and regulations associated with takeover and similar extraordinary transactions; and promote investor protection.

B. Objectives and Legal Basis

The resulting reduction in compliance costs for all persons subject to our rules and regulations would benefit small and large business entities alike. The proposals should result in security holders receiving more information on a timely basis. In addition, the proposals would give persons subject to our rules greater flexibility in structuring and completing tender offers, mergers, and other extraordinary transactions. We propose the new rules, schedules, and amendments under Sections 2(3), 5, 7, 8, 10, 12, 19, and 28 of the Securities Act, as amended, and Sections 3(b), 4(e), 10(b), 13, 14, 18, 23(a), 24, and 36 of the Exchange Act, as amended.

C. Small Entities Subject to the Rules

The proposals would affect small entities that are required to file registration statements, proxy statements, tender offer statements and other reports under the Securities Act, Exchange Act, and the Investment Company Act. For the purposes of the Regulatory Flexibility Act, the Securities Act and Exchange Act define a "small business" issuer, other than an investment company, to be an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less.[275] When used with respect to an issuer that is an investment company, the term is defined as an investment company and any related investment company with aggregate net assets of $50 million or less as of the end of its most recent fiscal year.[276]

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[275] See 17 CFR 230.157 and 17 CFR 240.0-10.

[276] See 17 CFR 240.0-10.

We currently are aware of approximately 1,100 reporting companies that are not investment companies with assets of $5 million or less. There are approximately 400 investment companies that satisfy the "small entity" definition. All of these companies would be subject to at least some of the proposed rules, schedules, and amendments and could be affected either as acquiring or as acquired companies. We have no reliable way, however, to determine how many reporting or non-reporting small businesses may actually rely on the proposed rules, or may otherwise be affected by the rule proposals. Nevertheless, we believe that the proposals would substantially benefit both small and large entities to the extent the proposals substantially reduce current restrictions on communications and facilitate compliance with existing rules and regulations.

D. Reporting, Recordkeeping, and Other Compliance Requirements

For the most part, the proposals are deregulatory in nature, significantly expanding the ability of businesses to structure and time their business combination transactions and communicate with security holders. Under the proposed rules, small businesses would report and file essentially the same information as today. One exception to this generalization is that offerors, both large and small, would be required to file pre-filing communications in business combination transactions with the Commission. This requirement arises, however, from the proposed deregulation of voluntary pre-filing communications. The proposed rules, schedules, and amendments in this release would treat all persons and entities alike, and would not distinguish among them based on size.

E. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small issuers. In connection with the proposed rules, schedules, and amendments, we considered several alternatives, including:

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

For the most part, the proposals are deregulatory in nature. They significantly expand the ability of businesses to structure and time their business combination transactions and communicate with security holders, while maintaining investor protections. Although we considered whether it would be appropriate to exclude smaller entities, we determined that the proposals should apply to all businesses regardless of their size; that is, we should not limit the rules and the corresponding benefits to large, seasoned issuers.

As a preliminary matter, we believe that there are no less restrictive alternatives to the proposed rules, schedules, and amendments that would serve the purposes of the proxy, tender offer, going-private, and registration requirements of the federal securities laws. We were unable to identify less burdensome alternatives to our proposals that would be consistent with our statutory mandate to require issuers to disclose material information fully and fairly to investors. We believe the proposed rules, schedules, and amendments should apply equally to all entities required to disclose information to enhance the protection of all investors. For these reasons, we also believe there would be no benefit in providing separate requirements for small issuers based on the use of performance rather than design standards.

F. Overlapping or Conflicting Federal Rules

We do not believe any current federal rules duplicate, overlap or conflict with the rules, schedules, and amendments that we propose to amend.

We request your written comments on any aspect of this Initial Regulatory Flexibility Analysis. We particularly seek comment on:

- the number of small entities that would be affected by the proposed rules, schedules, and amendments;
- the expected impact of the proposals as discussed above; and
- how to quantify the number of small entities that would be affected by, and how to quantify the impact of, the proposed rules, schedules, and amendments.

We ask commenters to describe the nature of any impact and provide empirical data supporting the extent of the impact.

VI. Paperwork Reduction Act

The proposed rules, schedules, and amendments affect several regulations and forms that contain "collection of information requirements" within the meaning of the Paperwork Reduction Act of 1995.[277] We have submitted proposed revisions to those rules, schedules, and amendments to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. §3507(d) and 5 CFR 1320.11. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Table 1 below includes the titles for the affected collections of information under the Exchange Act, current OMB control numbers, if applicable, a summary of the collection of information, and a description of the likely respondents to each collection of information.[278]

Table 1: Collections of Information under the Securities Act and Exchange Act

Title	OMB Control Number	Summary of the Collection of Information and Description of Likely Respondents
Schedule 14A	3235-0059	When a shareholder vote is required, persons soliciting proxies with respect to securities registered under Section 12 of the Exchange Act must furnish a proxy statement containing the information specified by Schedule 14A. The proxy statement is intended to provide security holders with the information necessary to enable them to vote in an informed manner on matters intended to be acted upon at security holders' meetings, whether the traditional annual meeting or a special meeting.
Schedule 14C	3235-	Companies with securities registered under Section 12 of the

[277] 44 U.S.C. §3501 et seq.

[278] Regulations S-K and S-B do not impose reporting burdens directly on public companies. For administrative convenience, each of these regulations is currently assigned one burden hour. The burden hours imposed by the disclosure regulations are currently included in the estimates for the forms that refer to the regulations.

	0057	Exchange Act must send an information statement to every holder of the registered security that is entitled to vote on any matter for which a security holder vote is held, but proxies are not solicited. Schedule 14C sets forth the disclosure requirements for these information statements.
Schedule 13E-3	3235-0007	Companies or their affiliates that engage in specified transactions that cause a class of the company's equity securities registered under the Exchange Act to be: 1) held by fewer than 300 record holders, or 2) de-listed from a securities exchange or inter-dealer quotation system must file a Schedule 13E-3. Filers must disclose detailed information about transactions, including whether they believe the transactions are fair.
Schedule 14D-9	3235-0102	Interested parties (including issuers and beneficial owners of securities) that make a solicitation or recommendation to security holders regarding a tender offer subject to Regulation 14D must file a Schedule 14D-9.
Schedule 13E-4	3235-0203	Reporting companies that make tender offers for their own securities must file a Schedule 13E-4.
Schedule 14D-1	3235-0102	Any person, other than the issuer, making a tender offer for equity securities registered under Section 12 of the Exchange Act, which offer, if consummated, would cause that person to own over 5 percent of that class of the securities, must at the time of the offer file a Schedule 14D-1 and send it to certain other parties, such as the issuer and any competing bidders.
Schedule TO	t.b.d.	Any party that the SEC would require today to file a Schedule 13E-4 or Schedule 14D-1.

The proposed new rules, schedules, and amendments would update and simplify the rules and regulations for business combinations. The information is needed so that security holders may make informed tender and voting decisions in tender offers, mergers, acquisitions, and other extraordinary transactions. We propose to enhance communications between public companies and investors before companies file registration statements involving takeover transactions, proxy statements, and tender offer statements. We also propose to put cash and stock tender offers on a more equal regulatory footing; integrate the forms and disclosure requirements in issuer tender offers, third-party tender offers and going-private transactions; and consolidate the

disclosure requirements in one location. We propose to allow security holders to tender their shares during a limited period after the completion of a tender offer; more closely align merger and tender offer requirements; and update the tender offer rules to clarify certain requirements and reduce compliance burdens where consistent with investor protection.

The affected schedules and regulations set forth the disclosures that the Commission would require offerors to make about business combination transactions and about themselves to the public. The requirements of the above schedules would largely be the same as today, except for a few changes. Specifically, under the proposals, Schedules 14A, 14C, 13E-3, 14D-9, and TO would require a short "plain English" summary term sheet, not currently required, in all cash mergers, cash tender offers, and going-private transactions.[279] The proposed rules would reduce the number of years of financial statements required by Schedules 14A and 14C for acquiring companies in cash mergers and cash tender offers from three years to two years. Under the proposals, Schedules 14A and 14C would no longer require the financial statements of the target in a cash merger when the acquiror's security holders are not voting on the transaction.[280] Proposed Schedule TO would replace current Schedules 13E-4 and 14D-1, harmonizing and clarifying their requirements. Under the proposals, Schedule TO would require a bidder in a

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[279] Forms C and SB-3 would be subject to the current Form S-4 summary and plain English requirements; thus we would not need to require a term sheet for securities offerings, although we are soliciting comment on whether it would be useful.

[280] For transactions offering stock as consideration (i.e., Form C and SB-3 transactions), the proposals would reduce the financial statement requirements for non-reporting target companies (when security holders of the acquiring company are not voting on the transaction) to be only those financial statements the target previously furnished to its security holders (with a minimum of U.S. GAAP financial statements provided for the latest fiscal year) instead of financial statements for three years.

two-tier transaction, where security holders are offered cash in a tender offer and securities in a back-end merger, provide security holders with pro forma financial statements and other related information for the combined entity at the time of the cash tender offer. The proposals would allow issuers to file one schedule, rather than two, to satisfy the tender offer and going-private disclosure requirements when both apply to the transaction.

The information collection requirements imposed by the schedules and regulations are mandatory to the extent that companies are publicly owned and undertake business combination transactions. There are no mandatory retention periods for the information disclosed. The information gathered is made publicly available,[281] unless granted confidential treatment. However, the release proposes to eliminate the confidential treatment of preliminary proxy statements.

As discussed in detail in Section IV, the proposals, if adopted, would reduce the burden of complying with the business combination disclosure and transaction requirements for many issuers. Public companies would expend approximately 988,986 burden hours/year to comply with the proposed rules, schedules, and amendments, cumulatively saving at least 191,592 burden hours/year. Table 1 of Section IV shows the estimated burden hours for the proposed forms and the approximate number of filings of each schedule under the proposed rules, schedules, and amendments.

The proposals would integrate and streamline the disclosure requirements for business combinations, thereby reducing issuers' compliance costs. For the purposes of the Paperwork

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[281] If, however, a bank finances all or part of a tender offer, we permit the offeror to conceal the bank's name if the offeror files a request and the bank's name with the Secretary of the Commission. See Item 4 of Schedule 14D-1.

Reduction Act, Table 2 below summarizes our preliminary estimates of the burden hours that parties would spend to comply with the proposals. These estimates include the burden hours incurred by companies from filing pre-filing communications. We base these estimates on current burden hour estimates and the staff's experience with these filings. The estimates in the table indicate that parties would expend approximately 234,759 burden hours/year to comply with the proposals. In addition, as discussed in more detail below, we estimate that parties would spend approximately $122,929,990/year on outside professional help to comply with the proposals. Note that these estimates do not attempt to quantify the proposals' intangible benefits, such as the benefits to issuers and investors of enhanced communications and possible improvements in price discovery. We discuss our preliminary estimates in greater detail below. We request comment on the reasonableness of our estimates.

Table 2: Burden Hour Estimates

	Estimated Burden Hours/Filing		Estimated Filings/Year[282]		Estimated Burden Hours	
Schedule	Before Revisions (A)	After Revisions (B)	Before Revisions (C)	After Revisions (D)	Before Revisions (E) = A*C	After Revisions (F) = B*D
14A	87.00	13.12	9,892	13,255	860,604	173,906
14C	87.00	13.12	253	339	22,011	4,448
13E-3	139.25	34.31	96	96	13,368	3,294
14D-9	354.25	64.43	258	353	91,397	22,744
13E-4	232.00	0.00	139	0	32,248	0
14D-1	354.25	0.00	257	0	91,042	0
TO	0.00	43.50	0	705	0	30,668
Total					1,110,670	234,060

We anticipate the proposals would reduce the number of hours required to file a full

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

Schedule 14A from 87 hours today to 70 hours under the proposals.[283] Of the 70 hours, we estimate that 25% (17.5 internal burden hours) would be provided by corporate staff, and 75% (52.5 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other parties would file approximately 9,892 full Schedule 14As/year. Under the proposed rules, companies and other parties also would be required to file under cover of Schedule 14A any pre-filing written communications (in addition to the required proxy statement) concerning business combinations for cash.[284] The rule would require filers to attach their written communications and would have few specific information requirements. For fiscal year 1998, we estimate 34% of the 9,892 full Schedule 14As filed involved cash rather than securities.[285] We estimate that parties, on average, would file one written communication (in addition to the required proxy statement) for each cash transaction. We estimate that a firm's corporate staff would expend approximately 15 burden minutes (0.25 internal burden hours) to

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

284 Under the proposed rules, bidders would file under Rule 425 any pre-filing communications in transactions where securities are offered as consideration. Because we are proposing Rule 425 in the Securities Act Reform Release, we estimate the burden hours for filings of pre-filing communications for those transactions in that release.

285 According to Securities Data Corporation, in 1996 security holders received only cash in 34% of merger transactions.

file a written communication under the proposed rules.[286] Thus, we estimate parties would file 9,892 full Schedule 14As/year (expending 17.5 internal burden hours/filing) and 3,363 written communications/year (expending 0.25 internal burden hours/filing). On average, filers would require approximately 13.12 internal burden hours to file 13,255 full Schedule 14As and written communications. In addition, we anticipate filers would spend, at an estimated $175/hour, approximately $9,188/filing in professional labor costs to file a full Schedule 14A.[287] We request your comments and supporting empirical information on the reasonableness of these estimates.

We anticipate the proposals would reduce the number of hours required to file a full Schedule 14C from 87 hours today to 70 hours under the proposals. Of the 70 hours, we estimate that 25% (17.5 internal burden hours) would be provided by corporate staff, and 75% (52.5 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other parties would file approximately 253 full Schedule 14Cs/year. Under the proposed rules, companies and other parties also would be required to file under cover of Schedule 14C any pre-filing written communications (in addition to the required proxy statement) concerning business combinations for cash.[288] The rule would require filers to attach

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

[287] We estimate filers would spend $9,188/filing in professional labor costs. We base this estimate on 52.50 hours of professional labor/full Schedule 14A filing * $175/hour. In aggregate, we estimate that filers would spend $90,887,696/year to file 9,892 full Schedule 14As/year.

[288] Under the proposed rules, bidders would file under Rule 425 any pre-filing communications in transactions where securities are offered as consideration. Because

their written communications and would have few specific information requirements. For fiscal year 1998, we estimate 34% of the 253 full Schedule 14Cs filed involved cash rather than securities.[289] We estimate that parties, on average, would file one written communication (in addition to the required information statement) for each cash transaction. We estimate that a firm's corporate staff would expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the proposed rules. Thus, we estimate parties would file 253 full Schedule 14Cs/year (expending 52.50 burden hours/filing) and 86 written communications/year (expending 0.25 internal burden hours/filing). On average, filers would require approximately 13.12 internal burden hours to file 339 full Schedule 14Cs and written communications. In addition, we anticipate filers would spend, at an estimated $175/hour, approximately $9,188/filing in professional labor costs to file a full Schedule 14C.[290] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposals would clarify and make several technical changes to Schedule 13E-3. We anticipate a savings of two hours, from 139.25 hours/filing to 137.25 hours/filing, to file Schedule 13E-3 under the proposals. Of the 137.25 hours, we estimate that 25% (34.31 internal burden hours) would be provided by corporate staff, and 75% (102.94 hours) by external

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we are proposing Rule 425 in the Securities Act Reform Release, we estimate the burden hours for filings of pre-filing communications for those transactions in that release.

[289] According to Securities Data Corporation, in 1996 security holders received only cash in 34% of merger transactions.

[290] We estimate filers would spend $9,188/filing in professional labor costs. We base this estimate on 52.50 hours of professional labor/full Schedule 14C filing * $175/hour. In aggregate, we estimate that filers would spend $2,324,564/year to file 253 full Schedule 14Cs/year.

professional help. Based on filings in fiscal year 1998, we estimate parties would file 96 Schedule 13E-3s/year. In addition, we anticipate filers would spend, at an estimated $175/hour, approximately $18,015/filing in professional labor costs to file a full Schedule 13E-3.[291] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposals would clarify and make several technical changes to Schedule 14D-9. We anticipate a savings of two hours, from 354.25 hours/filing to 352.25 hours/filing, to file a full Schedule 14D-9 under the proposals. Of the 352.25 hours, we estimate that 25% (88.06 internal burden hours) would be provided by corporate staff, and 75% (264.19 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other parties would file approximately 258 full Schedule 14D-9s/year. Under the proposed rules, companies and other parties also would be required to file under cover of Schedule 14D-9 any pre-filing written communications (in addition to the required proxy statement) concerning business combinations for cash.[292] The rule would require filers to attach their written communications and would have few specific information requirements. For fiscal year 1998,

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[291] We estimate filers would spend $18,015/filing in professional labor costs. We base this estimate on 102.94 hours of professional labor/full Schedule 13E-3 filing * $175/hour. In aggregate, we estimate that filers would spend $1,729,440/year to file 96 full Schedule 13E-3s/year.

[292] Under the proposed rules, bidders would file under Rule 425 any pre-filing communications in transactions where securities are offered as consideration. Because we are proposing Rule 425 in the Securities Act Reform Release, we estimate the burden hours for filings of pre-filing communications for those transactions in that release.

we estimate 37% of the 258 full Schedule 14D-9s filed involved cash rather than securities.[293] We estimate that parties, on average, would file one written communication (in addition to the required information statement) for each cash transaction. We estimate that a firm's corporate staff would expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the proposed rules. Thus, we estimate parties would file 258 full Schedule 14D-9s/year (expending 88.06 internal burden hours/filing) and 95 written communications/year (expending 0.25 internal burden hours/filing). On average, filers would require approximately 64.43 internal burden hours to file 353 full Schedule 14D-9s and written communications. In addition, we anticipate filers would spend, at an estimated $175/hour, approximately $46,233/filing in professional labor costs to file a full Schedule 14D-9.[294] We request your comments and supporting empirical information on the reasonableness of these estimates.

The proposals also would replace Schedules 13E-4 and 14D-1 with a new tender offer schedule, Schedule TO. Schedule TO would harmonize and clarify the requirements in current Schedules 13E-4 and 14D-1. Based on the number of Schedule 13E-4 and Schedule 14D-1s filed in fiscal year 1998, and the number of hours required to complete them, we estimate that bidders would require approximately 309 hours to file a full Schedule TO under the proposed

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293 According to Securities Data Corporation and Mergerstat, in 1996 security holders received only cash in 37% of merger and tender offer transactions.

294 We estimate filers would spend $46,233/filing in professional labor costs. We base this estimate on 264.19 hours of professional labor/full Schedule 14D-9 filing * $175/hour. In aggregate, we estimate that filers would spend $11,928,114/year to file 258 full Schedule 14D-9s/year.

rules.[295] Of the 309 hours, we estimate that 25% (77.25 internal burden hours) would be provided by corporate staff, and 75% (231.75 hours) by external professional help. Based on filings in fiscal year 1998, we anticipate that companies and other parties would file approximately 396 full Schedule TOs/year. Under the proposed rules, companies and other parties also would be required to file under Schedule TO written communications (in addition to the required tender offer statement) concerning business combinations for cash.[296] The rule would require filers to attach their written communications and would have few specific information requirements. We estimate that parties, on average, would file one written communication (in addition to the required information statement) for each cash transaction. We estimate that a firm's corporate staff would expend approximately 15 burden minutes (0.25 internal burden hours) to file a written communication under the proposed rules. Based on data from fiscal year 1998, we estimate parties would file 396 full Schedule TOs/year (expending 77.25 internal burden hours/filing) and 309 written communications/year (expending 0.25

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

[296] Under the proposed rules, bidders would file under Rule 425 any pre-filing communications in transactions where securities are offered as consideration. Because we are proposing Rule 425 in the Securities Act Reform Release, we estimate the burden hours for filings of pre-filing communications for those transactions in that release.

internal burden hours/filing).[297] On average, filers would require approximately 43.50 internal burden hours to file 705 full Schedule TOs and written communications. In addition, we anticipate filers would spend, at an estimated $175/hour, approximately $40,556/filing in professional labor costs to file a full Schedule TO.[298] We request your comments and supporting empirical information on the reasonableness of these estimates.

In accordance with 44 U.S.C. §3506c(2)(B), we solicit comment on the following:

- whether the proposed changes in each collection of information are necessary for the proper performance of the function of the agency;
- the accuracy of our estimate of the burden of the proposed changes to each collection of information;
- the quality, utility, and clarity of the information to be collected; and
- whether there are ways to minimize the burden of any of the collections of information on those who are required to respond, including through the use of automated collection techniques or other forms of information technology.

Anyone desiring to submit comments on any or all of the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan

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297 According to Mergerstat, in 1996 security holders received only cash in 78% of tender offer transactions.

298 We estimate filers would spend $40,556/filing in professional labor costs. We base this estimate on 231.75 hours of professional labor/ full Schedule TO filing * $175/hour. In aggregate, we estimate that filers would spend $16,060,176/year to file 396 full Schedule TOs/year.