because the conduct of a review may span two fiscal years and, also, reviews at each SRO are not usually conducted each and every year. An adjustment to actual costs may be made in order to relieve burden upon SROs with a disproportionately large share of program costs. That is, the Commission's formula provides for a reduction in the fee assessed if an SRO has a smaller percentage of U.S. industry contract volume than its percentage of overall Commission oversight program costs, as described below. The adjustment made is to reduce one-half of the costs so that, as a percentage of total Commission SRO oversight program costs, the costs are in line (in percentage terms) with the pro-rata percentage for that SRO of U.S. industry-wide contract volume. Following is a detailed description of the calculation:

The fee required to be paid to the Commission by each contract market is equal to the lesser of: actual costs based upon the three-year historical average of costs for that contract market or: (i) One-half of average costs incurred by the Commission pertaining to each contract market for the most recent three-years, plus (ii) a pro-rata share (based upon average trading volume for the most recent three years) of the aggregate of average annual costs of all the contract markets for the most recent three years. The formula for calculating the second factor mentioned above is: 0.5a + 0.5vt = current fee. In the formula, ''a'' equals the average annual costs, ''v'' equals the percentage of total volume across exchanges over the last three years and ''t'' equals the average annual cost for all exchanges. (The one registered futures association regulated by the Commission, the National Futures Association (NFA), has no contracts traded and, thus, the NFA's fee is based simply on costs for the most recent three fiscal years.)

Following is a summary of data used in the calculations and the resultant fee for each entity:

	3-year average actual costs	3-year average percentage of volume (percent)	2000 fee amount
Chicago Board of Trade	$207,586	44.6820	$207,586
Chicago Mercantile Exchange	283,444	35.3012	283,444
NYMEX/COMEX	226,295	15.8933	184,499
New York Board of Trade	165,269	3.5269	94,468
Kansas City Board of Trade	9,989	0.3975	6,779
Minneapolis Grain Exchange	5,295	0.1967	3,531
Philadelphia Board of Trade	0	0.0024	0
Sub-total	897,887	100.0000	784,306
National Futures Association	233,222	N/A	233,222
Total	1,131,099	100.0000	$1,017,528

Below is an example of how the fee was calculated for one exchange, the Minneapolis Grain Exchange:

(i) Actual 3-year average costs are $5,295;

(ii) Alternative computation is;

(.5)($5,295) + (.5)(.1967%)($897,877) = 3,531

(iii) The fee is the lesser of (i) or (ii) = $3,531.

As noted above, the alternative calculation, which is based upon contracts traded, is not applicable to the NFA because it is not a contract market and, thus, has no contracts traded. The Commission's average annual cost for conducting oversight review of the NFA rule enforcement program during fiscal years 1997 through 1999 was $233,222 (⅓ of $699,666). Therefore, the fee to be paid by the NFA for the current fiscal year is $233,222.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires agencies to consider the impact of rules on small businesses. The fees implemented in this release affect contract markets (also referred to as ''exchanges'') and registered futures associations. The Commission has previously determined that contract markets are not ''small entities'' for purposes of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* 47 FR 18618 (April 30, 1982). Registered futures associations also are not considered ''small entities'' by the Commission. Therefore, the requirements of the Regulatory Flexibility Act do not apply to contract markets or registered futures associations. Accordingly, the Chairman, on behalf of the Commission, certifies that the fees implemented herein do not have a significant economic impact on a substantial number of small entities.

Issued in Washington, DC on July 19, 2000, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 00–18729 Filed 7–28–00; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 241 and 271

[Release No. 34–43069; IC–24564]

Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers

AGENCY: Securities and Exchange Commission.

ACTION: Interpretation.

SUMMARY: We are publishing our views regarding the following issues: the disclosure and dissemination of tender offers that result in the bidder holding five percent or less of the outstanding securities of a company; and the disclosure for tender offers for limited partnership units. This interpretive guidance is intended to help bidders, subject companies and others participating in tender offers meet their obligations under the applicable statutes and rules, including the antifraud provisions.

EFFECTIVE DATE: July 31, 2000.

FOR FURTHER INFORMATION CONTACT: Dennis O. Garris, Chief, or Nicholas P. Panos, Special Counsel, Office of

Mergers and Acquisitions, Division of Corporation Finance at (202) 942–2920.

SUPPLEMENTARY INFORMATION: We are aware of questions about the applicability of the tender offer rules under the Securities Exchange Act of 1934 (''Exchange Act'')[1] to two specific situations: a tender offer resulting in ownership of not more than five percent of a company's securities (a ''mini-tender offer'') and a tender offer for limited partnership units. In the past, the staff has provided guidance on a case-by-case basis by responding to inquiries and through the review and comment process. This Commission interpretive release enhances investor protection by providing guidance in a broader context. It first describes the regulatory framework for tender offers and then sets forth our views on disclosure, dissemination and other obligations involving mini-tender offers and tender offers for limited partnership units. By following the guidelines set forth below, participants in tender offers will reduce the risk that they will violate the antifraud provisions of the statute and rules. However, in every instance, the determination will depend on the particular facts.

I. Tender Offer Regulatory Scheme

For purposes of determining whether our tender offer rules apply to a particular acquisition program, the threshold question is whether the transaction constitutes a ''tender offer'' within the scope of the Williams Act.[2] While the term ''tender offer'' has never been defined in any statutory provision or rule, the courts generally have applied an eight-factor test in determining whether a particular acquisition program constitutes a tender offer.[3] It is not necessary that all eight factors be present to conclude that the acquisition program is a tender offer.[4] Both mini-tender offers and offers for limited partnership units are tender offers subject to our rules.

Mini-tender offers generally are structured to result in ownership of not more than five percent of a class of securities to avoid the filing, disclosure and procedural requirements of Section 14(d) of the Exchange Act and Regulation 14D.[5] While Congress limited the application of Section 14(d) to tender offers that would result in ownership of more than five percent of a class of securities, Section 14(e) has no similar limitation. Security holders faced with a mini-tender offer therefore are entitled to the protections of Section 14(e) and Regulation 14E.[6]

Federal tender offer regulation is based on three statutory sections of the Exchange Act and our regulations adopted under those sections. The applicability of each section and its underlying regulations depends on: (i) The party conducting the offers, (ii) the nature of the subject security, (iii) whether the security is registered under Section 12 of the Exchange Act,[7] and (iv) whether or not the bidder would own more than five percent of the securities after the tender offer.

A. Section 14(d) and Regulation 14D

Section 14(d) of the Exchange Act and Regulation 14D apply to all tender offers for Exchange Act registered equity securities made by parties other than the target (or affiliates of the target), so long as upon consummation of the tender offer the bidder would beneficially own more than five percent of the class of securities subject to the offer.[8] A bidder must include any shares it owns before the commencement of the tender offer in calculating the five percent amount. For example, if a bidder owns four percent of the target's securities before it commences the tender offer, it could not make an offer for more than one percent of the target's securities without triggering Section 14(d) and Regulation 14D requirements.[9]

Regulation 14D requires the bidder to make specific disclosures to security holders and mandates certain procedural protections. The disclosure focuses on the terms of the offer and information about the bidder.[10] The procedural protections include the right to withdraw tendered securities while the offer remains open,[11] the right to have tendered securities accepted on a pro rata basis[12] throughout the term of the offer if the offer is for less than all of the securities, and the requirement that all security holders of the subject class of securities be treated equally.[13] Also, Regulation 14D requires the bidder to file its offering documents and other information with the Commission[14] and hand deliver a copy to the target and any competing bidders.[15]

Regulation 14D also requires the target to send to security holders specific disclosure about its recommendation, file a Schedule 14D–9 containing that disclosure, and send the Schedule 14D–9 to the bidder.[16]

B. Rule 13e–4

Rule 13e–4,[17] promulgated under Section 13(e) of the Exchange Act, applies to all tender offers by the issuer for its equity securities when the issuer has a class of equity securities registered under Section 12 or when the issuer files periodic reports under Section 15(d) of the Exchange Act.[18] Rule 13e–4 also applies to a tender offer by an affiliate of the issuer for the issuer's securities where the tender offer is not subject to Section 14(d). Rule 13e–4 is different from Regulation 14D because it applies even if the class of securities sought in the offer is not registered under Section 12. Also, Rule 13e–4 applies regardless of the amount of securities sought in the offer. Rule 13e–4 provides for disclosure, filing and procedural safeguards that generally mirror those provided under Section 14(d) and Regulation 14D.

C. Section 14(e) and Regulation 14E

Section 14(e) of the Exchange Act is the antifraud provision for all tender offers, including mini-tender offers and tender offers under Regulation 14D and Rule 13e–4.[19] Section 14(e) prohibits

[1] 15 U.S.C. 78a *et seq.*

[2] The Williams Act added a number of provisions to Sections 13 and 14 of the Exchange Act in 1968 addressing beneficial ownership disclosure, tender offers and changes in control, including Sections 13(d) and 13(e) [15 U.S.C. 78m(d)–(e)]; and Sections 14(d) and 14(e) [15 U.S.C. 78n(d)–(e)].

[3] These factors include whether the transaction: (1) Involves an active and widespread solicitation of security holders; (2) involves a solicitation for a substantial percentage of the issuer's stock; (3) offers a premium over the market price; (4) contains terms that are fixed as opposed to flexible; (5) is conditioned upon the tender of a fixed number of securities; (6) is open for a limited period of time; (7) pressures security holders to respond; and (8) would result in the bidder acquiring a substantial amount of securities. *SEC* v. *Carter Hawley Hale Stores, Inc.*, 760 F.2d 945 (9th Cir. 1985); *Wellman* v. *Dickinson*, 475 F.Supp. 783 (S.D.N.Y. 1979). *But see Hanson Trust plc* v. *SCM Corp.*, 774 F.2d 47 (2d Cir. 1985) (relevant determination is whether sellers need the protections of the tender offer rules).

[4] *Wellman* at 824.

[5] 17 CFR 240.14d–1 *et seq.*

[6] 17 CFR 240.14e–1 *et seq.; see also* Exchange Act Release No. 16384 (November 29, 1979) [44 FR 70326], n.7 and related text.

[7] 15 U.S.C. 78l.

[8] Section 14(d)(1) of the Exchange Act [15 U.S.C. 78n(d)(1)] and Rule 14d–1(a) [17 CFR 240.14d–1(a)].

[9] If the bidder acquires no more than two percent over a 12-month period, however, Regulation 14D will not be triggered notwithstanding the amount the bidder owned before the commencement of the tender offer. Section 14(d)(8) of the Exchange Act [15 U.S.C. 78n(d)(8)].

[10] Schedule TO [17 CFR 240.14d–100].

[11] Rule 14d–7 [17 CFR 240.14d–7].

[12] Rule 14d–8 [17 CFR 240.14d–8].

[13] Rule 14d–10 [17 CFR 240.14d–10]. This rule requires that the tender offer be made to all security holders and that the highest consideration paid to any security holder be paid to all security holders.

[14] Rule 14d–3(a)(1) [17 CFR 240.14d–3(a)(1)] and Schedule TO.

[15] Rule 14d–3(a)(2) [17 CFR 240.14d–3(a)(2)].

[16] Rule 14d–9 [17 CFR 240.14d–9] and Schedule 14D–9 [17 CFR 240.14d–101]. *Also see* the discussion of Rule 14e–2 in Section I.C below.

[17] 17 CFR 240.13e–4.

[18] 15 U.S.C. 78o(d).

[19] The antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b–5 also apply to all

fraudulent, deceptive, and manipulative acts in connection with a tender offer. Regulation 14E provides the basic procedural protections for all tender offers, including mini-tender offers and tender offers under Regulation 14D and Rule 13e–4.

Section 14(e) and Regulation 14E apply to all tender offers, even where the offer is for less than five percent of the outstanding securities and offers where the bidder would not own more than five percent after the consummation of the offer. Section 14(e) and Regulation 14E apply to tender offers for any type of security (including debt). These provisions apply both to registered and unregistered securities (including securities issued by a private company), except exempt securities under the Exchange Act, such as municipal bonds.

Regulation 14E requires that a tender offer be open for at least 20 business days,[20] that the offer remain open for 10 business days following a change in the offering price or the percentage of securities being sought,[21] and that the bidder promptly pay for or return securities when the tender offer expires.[22] Regulation 14E also requires the target company to state its position about the offer within 10 business days after the offer begins.[23] The target must state either that it recommends that its security holders accept or reject the offer; that it expresses no opinion and remains neutral toward the offer; or that it is unable to take a position on the offer.[24] With a tender offer not subject to Regulation 14D, however, the bidder is not required to send its offer to the target. Therefore, the target may not know about the tender offer. The target should take all steps to comply with its obligations under Regulation 14E within 10 business days or as soon as possible upon becoming aware of the offer.

II. Mini-Tender Offers

A. Background

We have observed an increase in tender offers that would result in the bidder holding not more than five percent of a company's securities. These so-called ''mini-tender offers'' are generally structured to avoid the filing, disclosure and procedural requirements of Section 14(d) and Regulation 14D. These offers are subject only to the provisions of Section 14(e) and Regulation 14E. Mini-tender offers have been common in the limited partnership area for several years. Bidders now make mini-tender offers for corporate securities and shares of closed-end funds that are traded on exchanges or quoted on the National Association of Securities Dealers Automated Quotation system (''Nasdaq'').

We are concerned that the substance of the disclosure in many of these offers is not adequate under Section 14(e) and Regulation 14E. We also are concerned that bidders are not adequately disseminating the disclosure to security holders. Further, we are concerned that many bidders are not paying for securities promptly at the expiration of the tender offer, as required by Regulation 14E. Recently, we have brought enforcement actions that address some concerns we have with mini-tender offers.[25]

The offering documents in mini-tender offers frequently are very brief and contain very little information. Often, these mini-tender offers are made at a price below the current market price.[26] However, frequently there is no disclosure of this fact in the offering documents or in any disclosure that the security holders ultimately receive. This lack of disclosure can mislead security holders because most tender offers, especially third-party offers, historically have been made at prices that are at a premium to the current market price. Many investors could reasonably assume that a mini-tender offer also involves a premium to market price. However, because of the lack of disclosure given to shareholders, it is often difficult for shareholders to determine the actual price that will be paid in the offer and whether it is below the market price.

Some bidders have devised schemes to confuse security holders about the actual offer price. For example, we have seen situations where a bidder makes an offer at a price above market price but never intends to purchase the shares in the offer at a premium. In these cases, the bidder holds the shares tendered and continuously extends the offer until the market price rises above the offer price. During this time, security holders generally are not permitted to withdraw their securities from the offer. Then the bidder purchases the shares at the offer price. In these situations, the bidder does not disclose this plan to security holders.[27] We believe these practices are ''fraudulent, deceptive or manipulative practices'' within the meaning of Section 14(e), and we recently brought an enforcement action to stop such practices.[28]

We have seen other situations where a bidder does not make it clear that certain fees or expenses will be deducted from the offer price. After deducting the amount of the fees, the offer price is often less than the market price. These fees often are disclosed only in the fine print in the documents that the security holders send back to the bidder to accept the offer, but not in the disclosure document itself.[29] We believe that these disclosure practices may, under certain circumstances, be ''fraudulent, deceptive or manipulative practices'' within the meaning of Section 14(e).

Disclosure in mini-tender offers is usually deficient in other respects that may harm security holders. For instance, since mini-tender offers are not subject to the specific requirements of Regulation 14D, these offers are generally structured as first-come, first-served offers without withdrawal rights and prorationing. This structure pressures security holders into tendering quickly. Once they have tendered, they are locked into their decision. Security holders are then unable to take advantage of new information or opportunities that may become available during the course of the offer, such as the opportunity to sell their stock outside the tender offer at a higher market price, the target's recommendation, or a higher offer. It is not typical for this aspect of a mini-tender offer to be disclosed.

This lack of disclosure is compounded by the fact that some bidders do not adequately disseminate the tender offer disclosure to security holders. Often, bidders in mini-tender offers will deliver the offering documents to The Depository Trust Company (''DTC'').[30] These bidders rely on DTC to forward a notice of the offer electronically to DTC's participant broker-dealers and banks. In some cases, the participants then send information to their customers for whom the

tender offers, including mini-tender offers. 15 U.S.C. 78j; 17 CFR 240.10b–5.

[20] Rule 14e–1(a) [17 CFR 240.14e–1(a)].

[21] Rule 14e–1(b) [17 CFR 240.14e–1(b)].

[22] Rule 14e–1(c) [17 CFR 240.14e–1(c)].

[23] Rule 14e–2 [17 CFR 240.14e–2].

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

[25] *In the Matter of IG Holdings, Inc.,* Exchange Act Release No. 41759 (August 19, 1999); *In the Matter of Peachtree Partners,* Exchange Act Release No. 41760 (August 19, 1999); *In the Matter of City Investment Group, LLC,* Exchange Act Release No. 42919 (June 12, 2000).

[26] In the case of an illiquid security, such as a limited partnership unit, the offer is frequently made at less than net asset value.

[27] *See* Section II.B.

[28] *See City Investment Group.*

[29] *See* Section III.B.

[30] DTC is a clearing agency registered with the Commission under Section 17A of the Exchange Act [15 U.S.C. 78q–1] that holds securities in custody on behalf of broker-dealers, banks and others. In this capacity, DTC is the depository for more than 90% of the securities held in the United States.

participants hold securities in street name. Generally, bidders make no effort to send offering documents to security holders who hold their securities in their own name, rather than through brokers or banks in street name.

The information sent by the broker-dealer or bank participants to customers often is limited to notice of the tender offer, the expiration date, and, in some cases, the price. The participants do not always request copies of the offering documents from DTC. Even if the participants do obtain the offering documents, they may decide not to send them to their customers. Therefore, security holders may make investment decisions without receiving material information about the tender offer.

In mini-tender offers, bidders often wait 30 days or more after the offers expire to pay for securities. During this period, the bidder sells the securities it obtains in the tender offer at the market price, which may well be higher than the price the bidder paid in the offer. The bidder then uses the proceeds from the sales in the market to pay security holders who tendered into the offer. By conducting the offer in this manner, a bidder generally is not at risk. However, security holders are harmed because their funds are withheld for a significant amount of time. This practice is inconsistent with the prompt payment requirements of Rule 14e–1(c).

B. Disclosure Guidelines

As discussed above, we believe security holders need better and clearer disclosure in mini-tender offers. To avoid ''fraudulent, deceptive or manipulative practices'' within the meaning of Section 14(e), we recommend that bidders in mini-tender offers consider the following issues in crafting disclosures in the tender offer documents that are provided to security holders.[31]

• Offer Price: Price information is material to security holders. Because tender offers typically are made at prices that are at a premium to market, investors could reasonably assume that a mini-tender offer also includes a premium. Bidders should disclose clearly if the offer price is below the market price.

If the price offered is below the market price when the offer commences, the disclosure should clearly explain this prominently in the document. Also, the explanation should include the market price (or the bid and ask prices) on the day of commencement, or the most recent practicable date. For closed-end funds, the disclosure also should include the net asset value on the date the offer commences, or the most recent practicable date. If there is no liquid market for the securities, the bidder should disclose, if known, the latest price at which the security sold, including the date of sale, or the latest bid and ask prices.

Some mini-tender offers have been made at, or slightly above, the market price of the security. The offer is then repeatedly extended until the market price rises above the offer price. These offers generally do not have withdrawal rights. The bidder then purchases the shares below the market price. If the bidder intended never to purchase the shares unless the market price rose above the offer price, and did not disclose this intent, we believe that this would be a ''fraudulent, deceptive or manipulative practice'' within the meaning of Section 14(e).[32]

• Price Changes: We believe that a bidder's intent to reduce the offering price based on distributions made to security holders by the target company and fees imposed by the bidder is material information. In describing the offer price, the bidder should disclose, if applicable, that the price may be reduced by any distributions or fees and the amount, if known. If the bidder changes the price, the tender offer would need to be extended for 10 business days as provided by Rule 14e–1(b).

• Withdrawal Rights: The ability to withdraw a tender while the offer is open can influence an investor's decision whether to tender. The bidder should disclose clearly whether security holders have the right to withdraw the shares they tendered during the offer. If no withdrawal rights exist, the disclosure should indicate that security holders who tender their shares cannot withdraw their shares. The disclosure should also clearly state, if applicable, that if the bidder extends the offer, the shares tendered before the extension still cannot be withdrawn and may be held through the end of the offer until payment. If withdrawal rights do exist, the disclosure should explain fully the procedures for withdrawing tendered shares.

• Pro Rata Acceptance: A pro rata provision has a direct bearing on the amount of time available for an investment decision. If no pro rata provision exists, the offer can, in effect, be open for less than 20 business days because shares will be purchased on a first come, first served basis. The bidder should disclose clearly whether tendered securities will be accepted on a pro rata basis if the offer is oversubscribed. If shares will not be accepted on a pro rata basis, the disclosure should describe the effect on security holders.

• Target Recommendation: Security holders should be advised, before an investment decision is made, that additional, material information will come from management of the target company. This disclosure is especially important in instances where withdrawal rights do not exist. The bidder should disclose that if the target is aware of the offer, the target is required to make a recommendation to security holders regarding the offer within 10 business days of commencement. We encourage the bidder to send the offering document to the target at the commencement of the tender offer so the target can comply with its obligation under Rule 14e–2 to make a recommendation regarding the tender offer.

• Identity of Bidder: Identification of the bidder provides security holders with insight regarding financial resources, capacity to pay for tendered securities, and historic business practices. The bidder should completely and accurately disclose its identity, including control persons of the bidder and promoters. For example, it may be meaningful to disclose the controlling security holders, executive officers and directors of a corporate bidder, or the general partner (and its control persons) of a partnership bidder. The bidder also should disclose any affiliation between the target and the bidder.

• Plans or Proposals: In deciding whether to tender, it may be material to know whether the bidder intends to continue the acquisition program at some future point. The bidder should disclose its plans or proposals regarding future tender offers of the securities of the same target.

• Ability to Finance Offer: Security holders need to know whether the bidder has the ability to buy the securities. The bidder should disclose whether it has the funds necessary to consummate the offer. If the bidder does not have the financing for the offer (*e.g.,* cash or a commitment letter from a bank) at the commencement of the offer, the bidder should clearly state it cannot buy the securities until it obtains financing.

Bidders in mini-tender offers often do not have the financing necessary to purchase the shares in the offer. In many cases they merely accept the

[31] If the mini-tender offer is for a limited partnership, the bidder also must consider the information specified below in Secton III. Further, guidance provided in this section also is applicable to tender offers that are subject to Section 14(d) and Regulation 14D.

[32] *See City Investment Group.*

shares in the offer and then attempt to sell those shares in the market and use the proceeds to pay the security holders who tendered. When the offer is made at a premium, bidders sometimes improperly hold the shares and wait for the market price to rise above the offer price before they attempt to sell the shares in the market. This plan is not disclosed to security holders. We believe this method of financing tender offers is inappropriate and may be a ''fraudulent, deceptive or manipulative practice'' within the meaning of Section 14(e).[33] Rule 14e–8(c) expressly prohibits a person from publicly announcing a tender offer if that person ''does not have the reasonable belief that the person will have the means to purchase the securities to complete the offer.'' [34] Furthermore, this method of financing does not comply with prompt payment as required by Rule 14e–1(c).[35]

• Conditions to the Offer: It is important for security holders to be able to evaluate the genuineness of the offer. We believe therefore that a tender offer can be subject to conditions only where the conditions are based on objective criteria, and the conditions are not within the bidder's control. If the conditions are not objective and are within the bidder's control (*e.g.,* the offer may be terminated for any reason or may be extended indefinitely), we believe the offer would be illusory and may constitute a ''fraudulent, deceptive or manipulative'' practice within the meaning of Section 14(e). We believe the bidder should disclose all material conditions to the offer.

• Extensions of the Offer: We believe that a bidder's ability and intent to extend the offer period is material information. This information is particularly important when there are no withdrawal rights. Security holders will be unable to withdraw shares tendered even if the offer is extended and shares are locked up for an unexpectedly long time. The initial disclosure materials should state whether the offer could be extended, whether the bidder intends to extend the offer, under what circumstances the bidder would extend, and, if the bidder intends to extend, the anticipated length of any extension. If the offer is extended after the initial disclosure materials are provided to security holders, the bidder should publicly announce this fact.

C. Dissemination Guidelines

In enacting the Williams Act, Congress stressed the importance of not merely specifying disclosure requirements but also ensuring that information is communicated to security holders.[36] The bidder in a tender offer must make reasonable efforts to disseminate material information about the tender offer to security holders. The failure to disseminate the disclosure frustrates the purpose of the tender offer rules.

Rule 14e–1(a) states that a tender offer must be held open for 20 business days from the date the offer is first ''published or sent to security holders.'' [37] Section 14(e) and Regulation 14E do not state how tender offers should be ''published or sent to security holders.'' However, Rule 14d–4,[38] which applies only to tender offers subject to Section 14(d) and Regulation 14D, provides guidance in this area. Rule 14d–4 sets out three alternative methods of dissemination for cash tender offers. The purpose of Rule 14d–4 is to add content and clarity to the term ''published or sent or given'' in Section 14(d)(1).[39] Dissemination under Rule 14d–4 is deemed ''published or sent or given to security holders'' for purposes of Section 14(d)(1). These dissemination methods are as follows:

1. Publishing the offering document in a newspaper;
2. Publishing a summary advertisement containing certain information in a newspaper and mailing to security holders a copy of the full offering document upon request; or
3. Mailing the offering document to security holders using a security holder list.

Rule 14d–4 also provides that these methods of dissemination are not exclusive or mandatory.

Depending on the facts and circumstances, adequate publication of a tender offer under Rule 14d–4 may require publication of the offering document in a newspaper with a national circulation or may only require publication in a newspaper with metropolitan or regional circulation.[40] Publication in all editions of a daily newspaper with a national circulation will always constitute adequate publication for purposes of Rule 14d–4.[41]

We believe that dissemination of material information using mechanisms the bidder knows or is reckless in not knowing are inadequate would be a ''fraudulent, deceptive or manipulative'' practice within the meaning of Section 14(e) and Rule 14e–1. For example, we believe that merely sending the offering documents to DTC is not an adequate means of communicating the information to security holders. DTC is not in business to, and in fact does not disseminate the tender offer materials to security holders. DTC sends only limited notice information to its participants about tender offers. Broker-dealers and banks have taken a variety of approaches in dealing with mini-tender offer materials. As a result, the bidder has no reasonable assurance that dissemination to DTC and then through broker-dealers or banks will satisfy the requirements of Section 14(e). Further, many bidders have refused to pay broker-dealers and banks the costs of forwarding information to security holders. Consequently, the tender offer document is not consistently reaching security holders to whom the offer is made. It is the bidder's obligation to assure that security holders get material information about the tender offer. If a bidder adequately disseminates the information to security holders through another method, such as one of the methods provided in Rule 14d–4, the bidder also may send the information to DTC for forwarding to its participants.

Also, we believe that only posting the information on a web site would not be adequate dissemination.[42] Not all security holders have access to the Internet. By merely posting a tender offer on a web site, the bidder does not adequately publish the offer, nor is the offer deemed sent to security holders.[43]

If a bidder makes a material change to the tender offer, the bidder must disseminate the changes in a manner reasonably likely to inform security holders of the change. The bidder generally should disseminate the change

[33] *See City Investment Group.*

[34] *See* Securities Act Release No. 7760, Section II.D.1. (October 22, 1999) [64 FR 61408].

[35] *See* Section II.D. of this release.

[36] ''[T]he legislative history and case law recognize that dissemination as indicated in the term 'published, sent or given to security holders' is part of the disclosure process of the Williams Act.'' Exchange Act Release No. 15548 (February 5, 1979) [44 FR 9956]. In addressing the importance of dissemination to our disclosure rules, Chairman Manuel Cohen in testimony emphasized, ''disclosure is useful if it reaches the people for whom it is intended.'' Hearings before the Subcommittee on Banking and Currency, United States Senate, March 21, 1967, p. 178.

[37] A primary reason for adopting a mandatory minimum offering period under Section 14(e) was to allow sufficient time for security holders to receive the offering materials. Exchange Act Release No. 16384 (November 29, 1979) [44 FR 70326].

[38] 17 CFR 240.14d–4.

[39] Exchange Act Release No. 15548 (February 5, 1979) [44 FR 9956].

[40] Rule 14d–4(b) [17 CFR 240.14d–4(b)].

[41] *Id.*

[42] Securities Act Release No. 7760, Section II.D.2.

[43] *See* Securities Act Release No. 7233 (October 6, 1995) [60 FR 53458] for our guidelines on the use of electronic media for delivery of information.

in the same manner as it disseminated the original offer.

D. Prompt Payment

Rule 14e–1(c) requires the bidder to pay the consideration offered or return the tendered securities promptly after the termination or withdrawal of the tender offer. The rule does not define ''promptly.'' However, we have stated that this standard may be determined by the practices of the financial community, including current settlement practices.[44] In most cases, the current settlement practice is for the payment of funds and delivery of securities no later than the third business day after the date of the transaction.[45] We view payment within these time periods as ''prompt'' under Rule 14e–1(c). We understand that some bidders have waited up to 30 days to pay tendering security holders. We believe that this delay in payment is inconsistent with the prompt payment requirements of Rule 14e–1(c).

Where the target is a limited partnership, and its securities are not listed on an exchange or quoted on an interdealer quotation system, it may not be possible to pay within three days, due to delays in transferring the limited partnership interests. Where the bidder is a third party and, therefore, cannot control the transfer and settlement process, we would not consider a reasonable extension of the three- to five-day period to be a violation of Rule 14e–1(c). The offer should disclose the anticipated time frame for settlement if it is expected to be delayed for these reasons. However, where the bidder is an affiliate and is able to control the settlement process, payment should not be delayed for these reasons and should be made as soon as possible.

III. Tender Offers for Limited Partnership Units

A. Background

Tender offers for limited partnership units, whether or not the bidder is affiliated with the target, raise significant disclosure issues due to the nature of limited partnership investments. Limited partnership units may be difficult to sell, and general partners face conflicts of interest in deciding when and whether to liquidate the partnership. These issues are particularly important in the limited partnership context since many investors in limited partnerships are unsophisticated retail investors.

In most cases, the price offered in a tender offer for limited partnership units is significantly lower than the original purchase price. It may also be below any recent appraisals of the partnership's assets. The tender offer may be the only way limited partners can sell their units because the markets for many limited partnership units are generally illiquid. Even when markets do exist, the limited partnership units usually trade at a significant discount to their appraised value.

Further, in many partnerships, the general partner has not liquidated the partnership within the time frame disclosed in the original offering of the units. Limited partners must, therefore, hold their investment longer than originally anticipated. General partners have a conflict of interest in determining whether to liquidate the partnership since, upon liquidation, they would no longer receive management and other fees associated with continuing the partnership.

B. Disclosure Guidelines for Limited Partnership Tender Offers

In order to avoid misleading investors,[46] we believe that bidders should consider disclosing the particular risks and conflicts of interest that arise in tender offers for limited partnership units. Cash tender offers do not always fall within our roll-up rules,[47] and partial offers usually do not trigger the going-private rule.[48] However, in the course of review and comment, the Commission staff often draws upon these rules in assessing the adequacy of the disclosure furnished to limited partners. As we said in 1991, in the release adopting the roll-up disclosure rules, these provisions must be considered and applied to a transaction that is not a roll-up within the rules, but raises the same concerns as a roll-up, in order to comply with the antifraud provisions.[49] Since bidders must not violate the antifraud provisions, we believe that all tender offers for limited partnership units should consider making these disclosures, whether subject to Regulation 14D or only Regulation 14E, as is the case for mini-tender offers.[50]

The following disclosure guidelines are drawn from the releases discussed above regarding limited partnership offerings and roll-ups, as well as the Division of Corporation Finance staff's practices in issuing comments on limited partnership tender offer filings.[51]

1. Bidder Disclosure Guidelines

Bidders must provide disclosure that is balanced so as not to be misleading. When determining the adequacy of disclosure, the key focus is the materiality of the information to security holders. If the disclosure document is lengthy, the disclosure should include a table of contents. All disclosure should be prepared in plain English.[52] To avoid misleading security holders, we recommend that bidders consider the following issues in crafting disclosures in limited partnership tender offer documents provided to security holders.

- Risk Factors: The offering document should prominently include a description of the risks of the transaction. These risk factors should be presented clearly and concisely, for example in bullet form. The risk factors should disclose any valuations (*e.g.,* market price, net asset value) that are higher than the offering price.
- Affiliated Bidder: Because of the potential conflict of interest, the bidder should disclose if it is affiliated with the target, describing the affiliation.
- Conflicts of Interest: It is important for security holders assessing the merits of an offer to know whether the bidder lacks independence in structuring and negotiating the offer's terms. If the bidder is affiliated with the target, it should disclose the benefits of the transaction to the bidder and the reasons for conducting the tender offer versus liquidating the partnership. If known, the bidder should also disclose the anticipated holding period of the assets as described in the original offering documents. The focus should be on the anticipated holding period,

[44] Exchange Act Release No. 16384 (November 29, 1979) [44 FR 70326].

[45] Rule 15c6–1(a) [17 CFR 240.15c6–1(a)]. Certain exceptions apply, including transactions involving limited partnership interests that are not listed on a securities exchange or quoted on an automated quotation system.

[46] Section 14(e) of the Exchange Act and Rule 14e–3 [17 CFR 240.14e–3]; Section 10(b) of the Exchange Act and Rule 10b–5.

[47] Section 14(h) of the Exchange Act [15 U.S.C. 78n(h)] and the 900 series of Regulation S–K [17 CFR 229.900 *et seq.*]. The roll-up rules may, however, apply to third party exchange offers.

[48] 48 Rule 13e–3 [17 CFR 240.13e–3].

[49] 49 Securities Act Release No. 6922 (October 30, 1991) [56 FR 57237].

[50] 50 The guidance in Section II also applies to limited partnership tender offers.

[51] In addition, the Division staff has provided public guidance in this area for several years in its ''Current Issues and Rulemaking Projects'' outline. This outline is available on our web site, www.sec.gov, and may be located at the icon ''Current SEC Rulemaking'' under the topic heading *Other Commission Notices and Information.*

[52] These requirements are contained in our release regarding the disclosure requirements for limited partnerships (Securities Act Release No. 6900 (June 17, 1991) [56 FR 28979]) and roll-ups (Securities Act Release No. 6922 (October 30, 1991) [56 FR 57237]).

not the legal termination date of the partnership.

• Market Price: Secondary market sales price information is material because an investment decision can be based, in whole or in part, upon the comparison between historical or currently reported values and the consideration being offered. The bidder should disclose the prices at which recent sales have been made, to the extent known or reasonably available, even when there is no established market.

• Method of Determining the Offer Price: Security holders need to know what valuation methodologies were used in deciding the amount of consideration offered. The bidder should summarize how the offer price was determined. If the bidder prepared a valuation for the partnership, it should disclose the value along with the basis for the value. If the bidder decided not to perform a valuation analysis, investors may want to know why. The bidder should disclose any liquidation value that was calculated.

• Third Party Reports: General partners sometimes have engineering, property valuation, or other reports about the underlying assets or asset value of the partnership. Investors may find this information useful in evaluating the price they are offered. The bidder should summarize any report received from a third party that is materially related to the transaction. It should also disclose the identity of the third party that prepared the report. In addition, it should file the report as an exhibit to the Schedule TO, if a Schedule TO is required to be filed.

• Valuations by the General Partner: General partners are in the best position to know the value of the partnership assets. The bidder should disclose any valuations or projections prepared by the general partner or its affiliates and obtained by the bidder that are materially related to the transaction.

• Purpose and Plans: A bidder's intention to conduct successive tender offers or execute additional market purchases upon consummation of the current offer can influence a security holder's investment decision. The bidder should disclose the purpose of the offer, the bidder's plans for the issuer, and whether or not the bidder intends to continue to acquire units in the future until control is obtained.

• Property/Business Disclosure: Property/business information provides security holders with basic information concerning the partnership's core operations and industry, as well as partnership, profit potential. In real estate partnerships, the bidder should provide disclosure similar to that required by Items 14 and 15 of Form S–11 (*e.g.,* occupancy rate, location, average rental per square foot).[53] In other partnerships, the bidder should disclose comparable information specific to that industry. An unaffiliated bidder need only provide information that is otherwise publicly available unless it has received non-public information from the target, in which case the non-public information also would need to be disclosed, if material.

• Financial Information: Because limited partnerships do not hold annual meetings, the proxy rules do not require them to send the annual report to security holders that contains financial statements.[54] Security holders, as a result, may not otherwise have material financial information regarding the partnership's operating performance. The bidder should disclose, to the extent known, financial information about the target similar to that required by Item 301 of Regulation S–K (selected financial data).[55] If the partnership is a public reporting partnership, the information can be obtained from the most recent Form 10–K.[56] A non-affiliated bidder may disclose the extent of its due diligence with respect to such information if taken from the target's Form 10–K.

• Tax Consequences: One of the primary investment objectives of those who invest in limited partnerships is often favorable tax treatment. The bidder should disclose the tax consequences and any limitations on transfers in order to preserve favorable tax status.

• Transfer or Processing Fees: General partners frequently charge a fee to investors for transferring ownership interests on the books of the partnership when investors sell their interests to third parties. In tender offers by affiliates of the partnership, the general partner typically waives the fee. These fees can be significant in relation to the amount of the sales price. The fees may be charged on a per unit basis or one fee per investor for as many units that the investor sells. The bidder should disclose the amount of the transfer fees and whether the fees are charged on a per unit basis or per investor basis. The bidder also should disclose whether it intends to subtract the amount of these fees from the proceeds to be paid in the offer.

• Price Reductions due to Distributions: We believe that a bidder's intent to reduce the offering price by any cash or other distributions to security holders made by the target company is material information. In describing the offer price, the bidder should disclose, if applicable, that the price may be reduced by any distributions and the amount, if known. If a distribution occurs and the price is reduced, the tender offer would need to be extended for 10 business days as provided by Rule 14e–1(b).

2. Target Disclosure Guidelines

The general partner has an obligation under Rule 14e–2 to respond to an offer, stating the reasons for its position, within 10 days of commencement of the offer. To avoid misleading security holders, we recommend that targets consider the following issues in crafting disclosures in the tender offer documents that are provided to security holders:

• Conflicts of Interest: It is important for security holders considering the target's recommendation to know what conflicts of interest could affect that recommendation. The target should disclose the conflicts arising in making the recommendation whether or not to tender (*e.g.,* interest in recommending against the offer in order to continue to collect management fees). It also should disclose, if true, why the partnership is not being liquidated in accordance with the terms in the original offering document.

• Valuations by the General Partner: The target should disclose any valuations prepared by the general partner or its affiliates that are materially related to the transaction. The target also should disclose the basis for the valuations.

• Third Party Reports: The target should summarize any report received from a third party that is materially related to the transaction, and disclose the identity of the third party preparer. In addition, the target should file the report as an exhibit to the Schedule 14D–9, if a Schedule 14D–9 is required to be filed.

List of Subjects

17 CFR Parts 241 and 271

Securities.

17 CFR Part 271

Investment companies, Securities.

Amendments to the Code of Federal Regulations

For the reasons set forth in the release, we are amending title 17,

[53] 17 CFR 239.18.

[54] Rule 14a–6 [17 CFR 240.14a–6] provides that a proxy or information statement relating to the election of directors must be accompanied or preceded by an annual report to security holders.

[55] 17 CFR 229.301.

[56] 17 CFR 249.310.

chapter II of the Code of Federal Regulations as follows:

PART 241—INTERPRETIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER

1. Part 241 is amended by adding Release No. 34–43069 and the release date of July 24, 2000 to the list of interpretive releases.

PART 271—INTERPRETIVE RELEASES RELATING TO THE INVESTMENT COMPANY ACT OF 1940 AND GENERAL RULES AND REGULATIONS THEREUNDER

2. Part 271 is amended by adding Release No. IC–24564 and the release date of July 24, 2000 to the list of interpretive releases.

Dated: July 24, 2000.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–19189 Filed 7–28–00; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8894]

RIN 1545–AE41

Loans From a Qualified Employer Plan to Plan Participants or Beneficiaries

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to loans made from a qualified employer plan to plan participants or beneficiaries. These final regulations provide guidance on the application of section 72(p) of the Internal Revenue Code. These regulations affect administrators of, participants in, and beneficiaries of qualified employer plans that permit participants or beneficiaries to receive loans from the plan, including loans from section 403(b) contracts and other contracts issued under qualified employer plans.

DATES: *Effective Date:* These regulations are effective July 31, 2000.

Applicability Date: For dates of applicability, see § 1.72(p)–1, Q&A–22 (a) through (c)(2).

FOR FURTHER INFORMATION CONTACT: Vernon S. Carter, (202) 622–6070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations (26 CFR Part 1) under section 72 of the Internal Revenue Code of 1986 (Code). These regulations provide guidance concerning the tax treatment of loans that are deemed to be distributed under section 72(p). Section 72(p) was added by section 236 of the Tax Equity and Fiscal Responsibility Act of 1982 (96 Stat. 324), and amended by the Technical Corrections Act of 1982 (96 Stat. 2365), the Deficit Reduction Act of 1984 (98 Stat. 494), the Tax Reform Act of 1986 (100 Stat. 2085), and the Technical and Miscellaneous Revenue Act of 1988 (102 Stat. 3342).

On December 21, 1995, a notice of proposed rulemaking (EE–106–82) was published in the **Federal Register** (60 FR 66233) with respect to many of the issues arising under section 72(p)(2). The preamble to the 1995 proposed regulations requested comments on certain issues that were not addressed. Following publication of the 1995 proposed regulations, comments were received and a public hearing was held on June 28, 1996. One of the issues on which comments were requested and received was the effect of a deemed distribution on the tax treatment of subsequent distributions from a plan (such as whether a participant has tax basis as a result of a deemed distribution). After reviewing the written comments and comments made at the public hearing, additional proposed regulations addressing this issue were published January 2, 1998 (REG–209476–82), in the **Federal Register** (63 FR 42). Written comments were received on the 1998 proposed regulations, but no public hearing was requested. After consideration of all comments received on both the 1995 and the 1998 proposed regulations, the proposed regulations are adopted as revised by this Treasury decision.

Explanation of Provisions

Section 72(p)(1)(A) provides that a loan from a qualified employer plan (including a contract purchased under a qualified employer plan) to a participant or beneficiary is treated as received as a distribution from the plan for purposes of section 72 (a deemed distribution). Section 72(p)(1)(B) provides that an assignment or pledge of (or an agreement to assign or pledge) any portion of a participant's or beneficiary's interest in a qualified employer plan is treated as a loan from the plan.

Section 72(p)(2) provides that section 72(p)(1) does not apply to the extent certain conditions are satisfied. Specifically, under section 72(p)(2), a loan from a qualified employer plan to a participant or beneficiary is not treated as a distribution from the plan if the loan satisfies requirements relating to the term of the loan and the repayment schedule, and to the extent the loan satisfies certain limitations on the amount loaned. For example, except in the case of certain home loans, the exception in section 72(p)(2) only applies to a loan that by its terms is to be repaid over not more than five years in substantially level installments.

For purposes of section 72, a qualified employer plan includes a plan that qualifies under section 401 (relating to qualified trusts), 403(a) (relating to qualified annuities) or 403(b) (relating to tax sheltered annuities [1]), as well as a plan (whether or not qualified) maintained by the United States, a State or a political subdivision thereof, or an agency or instrumentality thereof. A qualified employer plan also includes a plan which was (or was determined to be) a qualified plan or a government plan.

Summary of Comments Received and Changes Made and Summary of the Final Regulations

In general, comments received on the proposed regulations were favorable and, accordingly, the final regulations retain the general structure and substance of the proposed regulations, including a wide variety of examples illustrating the rules in the final regulations. However, commentators made a number of specific recommendations for modifications and clarifications of the regulations. The comments are summarized below, along with the IRS' and Treasury's consideration of those comments.

A. Cure Period for Missed Payments

The 1995 proposed regulations stated that the section 72(p)(2)(C) requirement that repayments be made in level installments at least quarterly would not

[1] With respect to coverage under Title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 829) (ERISA), the Department of Labor (DOL) has advised the IRS that an employer's tax-sheltered annuity program would not necessarily fail to satisfy the Department's regulation at 29 CFR 2510.3–2(f) merely because the employer permits employees to make repayments of loans made in connection with the tax-sheltered annuity program through payroll deductions as part of the employer's payroll deduction system, if the program operates within the limitations set by that regulation.