

§ 230.800

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

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

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

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

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

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

(3) Any such warrant or right; or

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

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

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

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

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

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

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

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

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

(1) Calculate the percentage of outstanding securities held by U.S. holders as of a date no more than 60 days before or 30 days after the public announcement of a business combination conducted under § 230.802 under the Act or of the record date in a rights offering conducted under § 230.801 under the Act. For a business combination conducted under § 230.802, if you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before public announcement.

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

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

and the jurisdiction that is the primary trading market for the subject securities, if different from the subject company's jurisdiction of incorporation;

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

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

(6) For exchange offers conducted pursuant to §230.802 under the Act by persons other than the issuer of the subject securities or its affiliates that are not made pursuant to an agreement with the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless paragraphs (h)(7)(i), (ii) or (iii) of this section indicate otherwise.

(7) For rights offerings and business combinations, including exchange offers conducted pursuant to §230.802 under the Act, where the offeror is unable to conduct the analysis of U.S. ownership set forth in paragraph (h)(3) of this section, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities so long as there is a primary trading market for the subject securities outside the United States, as defined in §240.12h-6(f)(5) of this chapter, unless:

(i) Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the business combination or of the record date for a rights offering exceeds 10 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

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

(iii) The acquiror or issuer knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent of such securities. As an example, an acquiror or issuer is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The acquiror in a business combination is deemed to know information about U.S. ownership available from the issuer. The acquiror or issuer is deemed to know information obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

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

[64 FR 61400, Nov. 10, 1999, as amended at 73 FR 60087, Oct. 9, 2008]

§230.801 Exemption in connection with a rights offering.

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

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

(2) *Limitation on U.S. ownership.* U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering (as

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determined under the definition of “U.S. holder” in § 230.800(h)).

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

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

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

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

(5) *Eligibility of securities.* The securities offered in the rights offering are equity securities of the same class as the securities held by the offerees in the United States directly or through American Depositary Receipts.

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

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

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

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

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

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

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

(2) *Equal treatment.* The offeror must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the

subject securities. The offeror, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the offeror must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

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

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

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

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

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

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the

issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

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

[64 FR 61400, Nov. 10, 1999, as amended at 73 FR 60088, Oct. 9, 2008]

REGULATION S—RULES GOVERNING OFFERS AND SALES MADE OUTSIDE THE UNITED STATES WITHOUT REGISTRATION UNDER THE SECURITIES ACT OF 1933

SOURCE: Sections 230.901 through 230.904 appear at 55 FR 18322, May 2, 1990, unless otherwise noted.

PRELIMINARY NOTES: 1. The following rules relate solely to the application of Section 5 of the Securities Act of 1933 (the *Act*) [15 U.S.C. 77e] and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the *Exchange Act*), whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and sale of securities.

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any applicable exemption from the registration requirements of the Act. The availability of the Regulation S safe harbor to offers and sales that occur outside of the United States will not be affected by the subsequent offer and sale of these securities into the United States or to U.S. persons during the distribution compliance period, as long as the subsequent offer and sale are made pursuant to registration or an exemption therefrom under the Act.

6. Regulation S is available only for offers and sales of securities outside the United

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States. Securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Nothing in these rules precludes access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers. Where applicable, issuers and bidders may also look to § 230.135e and § 240.14d-1(c) of this chapter.

8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act of 1940 [15 U.S.C. 80a-1 *et seq.*] (the *1940 Act*).

[55 FR 18322, May 2, 1990, as amended at 62 FR 53954, Oct. 17, 1997; 63 FR 9642, Feb. 25, 1998]

§ 230.901 General statement.

For the purposes only of section 5 of the Act (15 U.S.C. § 77e), the terms *offer*, *offer to sell*, *sell*, *sale*, and *offer to buy* shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

§ 230.902 Definitions.

As used in Regulation S, the following terms shall have the meanings indicated.

(a) *Debt securities*. “Debt securities” of an issuer is defined to mean any security other than an equity security as defined in § 230.405, as well as the following:

(1) Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution, or winding up of the issuer, but are not entitled to participate in residual earnings or assets of the issuer; and

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(2) Asset-backed securities, which are securities of a type that either:

(i) Represent an ownership interest in a pool of discrete assets, or certificates of interest or participation in such assets (including any rights designed to assure servicing, or the receipt or timeliness of receipt by holders of such assets, or certificates of interest or participation in such assets, of amounts payable thereunder), provided that the assets are not generated or originated between the issuer of the security and its affiliates; or

(ii) Are secured by one or more assets or certificates of interest or participation in such assets, and the securities, by their terms, provide for payments of principal and interest (if any) in relation to payments or reasonable projections of payments on assets meeting the requirements of paragraph (a)(2)(i) of this section, or certificates of interest or participations in assets meeting such requirements.

(iii) For purposes of paragraph (a)(2) of this section, the term “assets” means securities, installment sales, accounts receivable, notes, leases or other contracts, or other assets that by their terms convert into cash over a finite period of time.

(b) *Designated offshore securities market*. “Designated offshore securities market” means:

(1) The Eurobond market, as regulated by the International Securities Market Association; the Alberta Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse de Bruxelles; the Copenhagen Stock Exchange; the European Association of Securities Dealers Automated Quotation; the Frankfurt Stock Exchange; the Helsinki Stock Exchange; The Stock Exchange of Hong Kong Limited; the Irish Stock Exchange; the Istanbul Stock Exchange; the Johannesburg Stock Exchange; the London Stock Exchange; the Bourse de Luxembourg; the Mexico Stock Exchange; the Borsa Valori di Milan; the Montreal Stock Exchange; the Oslo Stock Exchange; the Bourse de Paris; the Stock Exchange of Singapore Ltd.; the Stockholm Stock Exchange; the Tokyo Stock Exchange; the Toronto Stock Exchange; the Vancouver Stock