SECURITIES AND EXCHANGE COMMISSION

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RIN 3235–AD97

Cross-Border Tender Offers, Business Combinations and Rights Offerings

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rules.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') today is proposing tender offer and Securities Act registration exemptive rules for cross-border tender offers, business combinations, and rights offerings. We are proposing these exemptions to facilitate the participation in these types of transactions by U.S. holders of the securities of foreign companies.

DATES: Comments should be received on or before February 16, 1999.

ADDRESSES: 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. S7–29–98; this file number should be included in the subject line if E-mail is used. Comment letters can be inspected and copied in our 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).

FOR FURTHER INFORMATION CONTACT: Laurie L. Green, Special Counsel or Christina Chalk, Special Counsel, Office of Mergers and Acquisitions, Division of Corporation Finance at (202) 942–2920; Nancy J. Sanow, Senior Special Counsel, or Margaret A. Smith, Attorney-Advisor, Office of Risk Management and Control, Division of Market Regulation, at (202) 942–0772; at Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: We are proposing new Rules 800, 801 and 802 under the Securities Act of 1933 (''Securities Act''),[1] and Rule 4d–10 under the Trust Indenture Act of 1939 (''Trust Indenture Act''),[2] revisions to Form F–X and Rule 144 under the Securities Act,[3] revisions to Rules 10b–13, 13e–3, 13e–4, 14d–1, 14d–2, 14d–7, 14d–10, 14e–1 and 14e–2 [4] under the Securities Exchange Act of 1934 (''Exchange Act'') [5] and Rules 30–1 and 30–3 [6] of the Commission's Rules Delegating Authority to the Directors of the Division of Corporation Finance and Market Regulation, respectively. We are also publishing for comment a new Form CB under the Securities Act and the Exchange Act.

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I. Executive Summary

In today's global market, it is very common for U.S. persons to hold securities of foreign companies. Foreign offerors, however, often exclude U.S. security holders from tender offers,[7] exchange offers,[8] rights offerings and business combinations [9] involving the securities of a foreign company. Offerors often exclude U.S. security holders due to conflicts between the U.S. regulation and the regulation of the home jurisdiction or the perceived burdens of complying with multiple regulatory regimes. U.S. security holders, therefore, often are unable to receive any benefits offered in these types of transactions.

Today, we are proposing exemptions [10] to encourage issuers and bidders to extend tender offers, rights offerings and business combinations to the U.S. security holders of foreign private issuers.[11] The proposed exemptions balance the need to provide U.S. security holders with the protections of the U.S. securities laws against the need to promote the inclusion of U.S. security holders in these types of cross-border transactions. The specific exemptions are:

- First, certain tender offers for the securities of foreign private issuers would be exempt from the provisions of the Exchange Act and rules thereunder governing tender offers.[12] Bidders could

[1] 15 U.S.C. 77a *et seq.*

[2] 15 U.S.C. 77aaa *et seq.*

[3] 17 CFR 239.42 and 17 CFR 230.144.

[4] 17 CFR 240.10b–13, 240.13e–3, 240.13e–4, 240.14d–1, 240.14d–2, 240.14d–7, 240.14d–10, 240.14e–1 and 240.14e–2.

[5] 15 U.S.C. 78a *et seq.*

[6] 17 CFR 200.30–1 and 200.30–5.

[7] For purposes of this release, the term ''tender offer'' includes tender offers where either cash or stock is issued in the offer.

[8] For purposes of this release, the term ''exchange offer'' means a tender offer where stock is issued in the offer.

[9] For purposes of this release, the term ''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 or ''squeeze out'' merger that does not require a vote of security holders.

[10] The Commission has also recently proposed significant revisions to the tender offer regulations. These revisions would update and simplify the rules and regulations applicable to takeover transactions. Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 7607 (November 3, 1998).

[11] ''Foreign private issuer'' is defined in Rule 3b–4 under the Exchange Act and Rule 405 under the Securities Act [17 CFR 240.3b–4(c) and 230.405].

[12] 15 U.S.C. 78m(e) and 78n(d); 17 CFR 240.13e–4, 14d–1 to 14d–10, 14e–1 and 14e–2.

use the exemption when U.S. security holders hold of record 10 percent or less of the subject securities. We refer to this exemptive relief in this release as the ''Tier I'' exemption.

• Second, when U.S. security holders own more than 10 percent of the class of securities sought in the offer, limited tender offer exemptive relief would be available to eliminate frequent areas of conflict between U.S. and foreign regulatory requirements. Bidders could rely on this exemptive relief when the record holdings of U.S. security holders do not exceed 40 percent of the subject class. We refer to this exemptive relief in this release as the ''Tier II'' exemption. The relief proposed under the Tier II exemption represents a codification of current Commission exemptive and interpretive positions.

• Third, under proposed Securities Act exemptive Rule 801, securities issued in certain rights offerings by foreign private issuers would be exempt from the registration requirements of the Securities Act. A foreign private issuer could rely on the exemption when U.S. security holders hold of record five percent or less of the issuer's securities that are the subject of the rights offering.

• Fourth, under proposed Securities Act exemptive Rule 802, securities issued in exchange offers for foreign private issuers' securities would be exempt from the registration requirements of the Securities Act of 1933 (the ''Securities Act'') [13] and the qualification requirements of the Trust Indenture Act of 1939 (the ''Trust Indenture Act'').[14] Securities issued in certain business combinations involving foreign private issuers would also be exempt. Offerors could rely on these exemptions when U.S. security holders hold of record five percent or less of the subject class of securities.

• Fifth, tender offers for the securities of foreign private issuers would be exempt from Rule 10b–13 under the Exchange Act. Under certain circumstances, this exemption would allow purchases outside the tender offer during the offer. This exemption would be available when U.S. security holders hold of record 10 percent or less of the subject securities.

The U.S. anti-fraud and anti-manipulation rules would, however, continue to apply to these transactions.

In addition to the above exemptions, we are proposing amendments to the Commission's general organization rules. These amendments would delegate to the Directors of the Divisions of Corporation Finance and Market Regulation authority to exempt certain tender offers from specific tender offer requirements.

II. Discussion

A. Background

1. Reasons for Proposals

Generally, if a bidder wants to acquire a foreign private issuer, it must comply with the securities or takeover laws of the target company's home jurisdiction. If the target has U.S. security holders, the bidder must also comply with U.S. securities laws. Bidders often simply exclude U.S. holders from the opportunity to participate in the transaction to avoid the application of U.S. laws.[15]

The same is true of exchange offers and business combinations. Foreign offerors often are unwilling to register securities under the Securities Act when the amount of holdings in the United States is relatively small. Further, they are unwilling to incur a continuous reporting obligation under the Exchange Act as a result of registration under the Securities Act. These concerns are also significant deterrents to extending rights offerings to U.S. holders.

When bidders exclude U.S. security holders from tender or exchange offers, they deny U.S. security holders the opportunity to receive a premium for their shares and to participate in an investment opportunity. Similarly, when issuers exclude U.S. security holders from participation in rights offerings, U.S. security holders lose that opportunity to purchase shares at a possible discount from market price.

Nevertheless, these transactions may affect the interests of U.S. security holders. For example, market activity in the target company's stock after announcement of a tender offer may affect the price of the stock. Even though U.S. security holders cannot participate in the tender offer, they must react to the event by deciding whether to sell, hold, or buy additional securities. They must make this decision without the benefit of information required by either U.S. or foreign securities regulation. Indeed, to avoid triggering registration, filing and disclosure requirements under U.S. securities laws, bidders and issuers will often take affirmative steps to prevent their informational and offering materials from being transmitted to U.S. holders. Thus, U.S. holders receive information about extraordinary transactions affecting their interests only indirectly (for example, through the financial press) and often after a significant delay.

2. Prior Commission Action to Facilitate Inclusion of U.S. Security Holders in Cross-Border Tender Offers, Business Combinations and Rights Offerings

On June 6, 1990, we published a concept release seeking comment on a suggested conceptual approach to U.S. regulation of international tender and exchange offers. We sought to encourage bidders for foreign companies to extend these offers to U.S. security holders.[16] After reviewing the public comments,[17] we published releases in June 1991, proposing exemptive rules, registration forms and schedules, and the issuance of an exemptive order for tender offers subject to the U.K. City Code on Takeovers and Mergers (the ''City Code''),[18] that would implement the concept release with respect to cross-border tender and exchange offers.[19] We also proposed new exemptive rules with respect to cross-border rights offerings to address similar concerns regarding the common practice of excluding U.S. security holders (together, the ''1991 proposals'').[20]

The commenters generally supported the 1991 proposals. They indicated that when U.S. security holders have already invested in a foreign private issuer's securities, the benefits of having the opportunity to tender their securities in a tender offer at a premium price or purchase additional securities in a rights offering, often at a discount,

[13] 15 U.S.C. 77a *et seq.*

[14] 15 U.S.C. 77aaa *et seq.*

[15] Because a large percentage of foreign companies have only a small number of U.S. security holders, it is quite common for bidders for the securities of those foreign companies to exclude U.S. holders. For example, based on a sample of 31 tender offers compiled in 1997 by the U.K. Takeover Panel (the entity that regulates tendered offers in the United Kingdom), when the U.S. ownership of the target was less than 15% (30 offers), the bidders excluded U.S. persons in all of the offers. When the U.S. ownership was more significant, such as 38% (one offer), the bidders included U.S. persons. In the 30 offers that excluded U.S. persons, the ownership percentage was as follows: in 27 offers, U.S. persons held less than 5%; in the remaining three offers, U.S. persons held 7%, 8% and 10–15%, respectively.

[16] Concept Release on Multinational Tender and Exchange offers, Securities Act Release No. 6866 (June 6, 1990) [55 FR 23751].

[17] The Commission received 31 letters of comment on the concept release. Those letters and a summary of the comments can be obtained for public inspection and copying by requesting File No. S7–10–90 through our public reference room in Washington, D.C.

[18] The City Code on Takeovers and Mergers and the Rules Governing Substantial Acquisition of Shares (Fifth Edition, Dec. 12, 1996) (the ''City Code''). The City Code states general principles for the regulation of takeovers conducted in the United Kingdom and the Republic of Ireland.

[19] International Tender and Exchange Offers, Securities Act Release No. 6897 (June 5, 1991) [56 FR 27582].

[20] Cross-Border Rights Offers, Securities Act Release No. 6896 (June 4, 1991) [56 FR 27564].

outweigh the detriments of not receiving the full protections offered by U.S. securities laws.[21]

3. The Current Proposals

Encouraging bidders to include U.S. security holders in multinational offers for the securities of foreign private issuers is even more important in today's global market than in 1991 because of the broader ownership of foreign securities by U.S. security holders[22] and the increase in both the number and dollar value of cross-border transactions since 1991.[23] Since the last time we proposed regulatory relief, we know that many tender offers have excluded U.S. security holders.[24] Similarly, foreign private issuers continue to cash out U.S. security holders in rights offerings.[25]

Today we propose, with significant modifications, exemptive rules and forms similarly proposed in 1991. We modified the 1991 proposals based upon our experience with cross-border tender offers, rights offerings, and business combinations. Since that time, we have granted relief on a case-by-case basis.[26]

We also make some of these proposals today because recent legislative action granted us general exemptive authority under the Securities Act and the Exchange Act.[27] This authority provides greater flexibility to address these issues in a meaningful fashion.

We have competing concerns. While we want to encourage bidders to include U.S. security holders, we would like to extend the protections of the U.S. federal securities laws to investors. The ramifications to a bidder could be significant. Making an offer to U.S. holders of foreign securities ordinarily may trigger: (i) disclosure and filing obligations under the Securities Act and the Exchange Act, and (ii) corresponding rights and protections for the U.S. security holders that are (iii) enforceable in a U.S. court (*e.g.*, Section 11 of the Securities Act). The proposed exemptions would balance these competing concerns by focusing relief in the areas where U.S. ownership is smallest or where there is a direct conflict between U.S. and foreign regulations.

The proposed rule changes, however, do not affect the rights and claims of U.S. security holders arising under the anti-fraud and anti-manipulation provisions of the federal securities laws. For example, if a foreign private issuer uses one of the proposed exemptions to make an offer to a U.S. security holder that includes a material misrepresentation or omission, that U.S. security holder would have a cause of action under the anti-fraud provisions. It may be difficult, however, for a security holder to enforce any judgments under the U.S. federal securities laws against the foreign private issuer whose assets, senior management and directors may be located in a foreign country. We think the benefit of allowing U.S. security holders to participate in multinational offers outweighs any possible diminution in protection U.S. security holders would have under the federal securities laws.

U.S. security holders would still have the full anti-fraud protection of Section 14(e). For example, the Tier I exemption for certain tender offers includes an exemption from all provisions of Rule 14e–1. The specific requirements of Rule 14e–1 are prophylactic in nature, as ''means reasonably designed to prevent'' fraudulent or deceptive acts.[28] Notwithstanding the exemption, the anti-fraud protections under Section 14(e) of the Exchange Act still apply.[29] Accordingly, although Tier I exempts bidders from the specific duration, notice, and payment requirements of Rule 14e–1, a bidder who, for example, fails to provide any notice to U.S. holders that it has extended the duration of any offer and materially increased the amount of the consideration, or that it may fail to pay the consideration for an unreasonably long time period could violate the anti-fraud provisions including Section 14(e).

The proposed exemptions require that U.S. security holders be treated at least as favorably as foreign security holders in the transaction.[30] The exemptions would not be available if only U.S. security holders were permitted to participate in the transaction. This minimizes the possibility that the exemptions would be used solely as a means to create a market for the offeror's securities in the United States. It also minimizes the risk that a bidder could buy out only the U.S. security holders in a tender offer without complying with the U.S. security laws.

Q1. In proposing these exemptive rules, we are seeking comment on whether the underlying premise that this approach is in the interest of investors is still valid. For example, have Commission rulemaking and informal initiatives in the last decade to facilitate cross-border offerings and acquisitions rendered the proposed exemptive relief unnecessary or inappropriate? Does the opportunity for U.S. security holders to participate in multinational tender offers justify the proposed use of the exemptive authority and possible diminished protection of U.S. securities laws?

The proposals are intended to facilitate inclusion of U.S. security holders in offshore transactions, rather than provide means to avoid U.S.

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[21] The Commission received a total of 52 comment letters on the two 1991 proposals. Those letters and a summary of the comments can be obtained for public inspection and copying by requesting File No. S7–17–91 and File No. S7–18–91 at our public reference room in Washington, D.C.

[22] U.S. ownership in foreign companies increased from $158.8 billion in 1991 to $558.9 billion in 1996. *Federal Reservice Statistical Release, Flow of Funds Accounts of the United States,* March 14, 1997. The number of foreign companies reporting under the Exchange Act has more than doubled since 1991 (439), with over 1,100 foreign companies reporting as of June 1998.

[23] The number of cross-border mergers and acquisitions in Europe increased from 1,434 in 1991 to 1,648 in 1997. The dollar value of such transactions increased from $40.4 billion in 1991 to $136.9 billion in 1997. *Mergers & Acquisitions,* March/April 1998.

[24] *See, e.g., John Labatt Ltd.* v. *Onex Corp.,* 890 F. Supp. 235 (S.D.N.Y. 1995) (Court held that the failure to extend the offer to U.S. security holders did not violate U.S. securities laws. The U.S. ownership in the target was approximately 12%). Two of the 10 largest tneder offers completed in 1996 excluded U.S. holders: Central & South West's offer for Seeboard PLC (tender offer price represented a 20% premium to the share price) and General Public Utilities' offer for Midlands Electricity PLC (tender offer price represented a 14.3% premium to the share parice). *Mergers & Acquisitions,* March/April 1997. *See also* Note 15 (discussing other tender offers that excluded U.S. security holders).

[25] Based on information received from the follwoing depositary banks, investors holding American Depositary Receipts (''ADRs'') through the Bank of New york were cashed out in 29 of the 37 rights offerings from 1994 to 1996. Investors holding ADRs through Morgan Guaranty Trust Company of New York received cash in lieu of rights in 23 of the 24 rights offerings. Of the 23, six of the offers permitted qualified U.S. institutional buyers to participate in the rights offerings.

[26] Since 1990, bidders in 54 transactions sought exemptive relief from the staff to facilitate including U.S. shareholders. Twenty of those transactions would have been eligible for the Tier I exemption proposed today and 31 would have been eligible to use the Tier II exemption. Three of these transactions would have been ineligible for either Tier I or Tier II exemptions, since U.S. persons held more than 40% of the securities sought in the offer. Thus, based on transactions that were open to U.S. holders, on average, the Tier II exemption could have been invoked approximately four times a year since 1990.

[27] *See* National Securities market Improvement Act of 1996, 104 Pub. L. No. 290, 110 Stat. 3416 (1996) (the ''National Securities Markets Improvement Act'').

[28] 17 CFR 240.14e–1.

[29] Section 14(e), 15 U.S.C. 78n(e), provides in part:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer.

[30] See proposed Rules 801(a)(3); 802(a)(2); 13e–4(h)(8)(i); and 14d–1(c)(1).

jurisdiction. Nevertheless, we are considering whether to provide guidance regarding when U.S. security holders can be provided information about the offshore transaction without triggering U.S. requirements. Specifically, if a bidder could use the Internet to disseminate materials relating to an offshore tender offer without causing U.S. tender offer requirements to apply to that offer, U.S. security holders might obtain more timely and reliable information about the offer and its effect on their investment, even though they may not be permitted to participate in the offer.[31] We, of course, would be concerned that posting offshore tender offer materials on the Internet could amount to a solicitation of U.S. security holders, that in effect urges them to find indirect means to participate in the tender offer.

Q2. We request comment on whether materials relating to offshore tender offers could be posted on the Internet without triggering U.S. tender offer requirements with respect to that offer. Would these postings be helpful in providing U.S. security holders with timely information concerning extraordinary transactions affecting their holdings? If so, what conditions should attach to dissemination of offshore tender offer materials over the Internet?

B. Proposed Tier I Exemption

Under the proposed Tier I exemption, eligible tender offers would not be subject to Rules 13e–3, 13e–4, Regulation 14D or Rules 14e–1 and 14e–2.[32] These provisions contain disclosure, filing, dissemination, minimum offering period, withdrawal rights and proration requirements that are intended to provide security holders with equal treatment and adequate time and information to make a decision whether to tender into the offer. Under the proposed Tier I exemption, tender offers for the securities of foreign private issuers are exempt from these U.S. tender offer requirements, so long as:

- U.S. security holders of record hold 10 percent or less of the class of securities sought in the tender offer;
- In the case of a class of securities subject to Rule 13e–4 or Regulation 14D under the Exchange Act, bidders submit, rather than file, an English language translation of the offering materials to the Commission under cover of Form CB and file a consent to service on Form F–X;
- U.S. security holders participate in the offer on terms at least as favorable as those offered to any other holders, including price, type of consideration and choice among different alternatives being offered; and
- Bidders provide U.S. security holders with the tender offer circular or other offering document, in English, on a comparable basis as provided to other security holders.

The exemption would be available to U.S. and foreign bidders. The domicile or reporting status of the bidder is not relevant. Instead of complying with the U.S. tender offer rules, a bidder taking advantage of the Tier I exemption would comply with any applicable rules of the foreign target company's home jurisdiction or exchange.

1. U.S. Ownership Limitation

The Tier I tender offer exemption is substantially similar to the exemption for cash tender offers contained in the 1991 proposals. Like in the 1991 proposals, we propose 10 percent as the maximum level of ownership by U.S. security holders that a target company can have and be eligible for the exemption.[33] Under the 1991 proposals, we solicited comment on whether to increase the 10 percent limitation for U.S. ownership to 15 or 20 percent.

Commenters on the 1991 proposals largely favored adopting a higher eligibility percentage. As proposed, however, we preliminarily have decided that 10 percent is an appropriate level of U.S. ownership for exclusive reliance on home jurisdiction requirements. At and below that level of U.S. ownership, broad-based exemptions may be necessary to encourage inclusion of U.S. security holders. Above that level, more tailored relief of the type envisioned by Tier II to address conflicting regulatory mandates and offering practices appears to be sufficient, based on our experience in granting exemptive relief for those offers. When U.S. ownership does not exceed 10 percent of the target securities, we believe that U.S. holders' interests are best served by being able to participate in, rather than being excluded from, the tender offer, even though they do not receive the full protections of the U.S. tender offer rules.

Q3. We seek comments on the appropriateness of the 10 percent limitation on U.S. ownership. Should the threshold be higher, for example 20 percent, or lower, such as five percent? If the threshold were higher, would the Tier II exemption be necessary?

2. Disclosure and Dissemination—Proposed Form CB

A bidder relying on the Tier I exemption must submit any offer materials prepared under foreign law to the Commission for notice purposes only, under the cover of proposed Form CB. Also, if the target company, or any officer, director or other person provides a recommendation with respect to the offer, they may satisfy their disclosure obligations under Rules 14e–2 and 14d–9 by submitting the recommendation to the Commission on Form CB. If the tender offer is subject only to Section 14(e) and Regulation 14E, the offering document would not need to be submitted to the Commission, since the current regulations do not require a filing in connection with those offers. The materials submitted under cover of Form CB would not be deemed filed with the Commission. Therefore, the person submitting the materials would not be subject to the express liability provisions of Section 18 of the Exchange Act.[34]

Form CB must be received by the Commission no later than the next business day after the tender offer is commenced. A number of countries, such as the United Kingdom, provide that an offer commences when the offering document is first physically sent to security holders. A number of commenters on the 1991 proposals expressed concern that it would be difficult to submit documents to the Commission contemporaneously with the publication or mailing of documents overseas. Thus, offerors and targets will have one extra day from the date the offering circular or disclosure document is first published, sent or given to security holders to submit the offering circular or disclosure document to the Commission under the cover of Form CB. If the bidder is a foreign company, it must also file a Form F–X with the Commission contemporaneously with the submission of the Form CB.[35]

Offerors must disseminate any tender offer circular or other informational document to U.S. security holders in English on a comparable basis as provided to security holders in the foreign target company's home jurisdiction. If the foreign target company's home jurisdiction permits

[31] We recently gave written guidance with respect to registration requirements under the federal securities laws. Statement of the Commission Regarding Use of Internet Websites, Securities Act Release No. 7516 (March 23, 1998) [63 FR 14806].

[32] Rules 13e–3, 13e–4, 14d–1 through 14d–10 and 14e–1 and 14e–2, 17 CFR 240.13e–3, 240.13e–4, 240.14d–1 through 240.14d–10 and 240.14e–1 and 240.14e–2.

[33] *See* Section II.H, *infra*, for a discussion of how U.S. ownership is determined.

[34] 15 U.S.C. 78r.

[35] Form F–X is used by certain non-U.S. companies to appoint an agent for service in the United States.

dissemination solely by publication, the offeror must likewise publish the offering materials simultaneously in the United States.

As now proposed, eligible Tier I transactions also would be exempt from the Commission's going private disclosure requirements under Rule 13e–3.[36] Rule 13e–3 mandates the filing of a Schedule 13E–3. Schedule 13E–3 requires disclosure about the fairness to unaffiliated security holders of the transaction that may cause an equity security to lose its public trading market. Those disclosure requirements would, however, remain applicable to offers subject to the Tier II exemption.

Rule 13e–3 disclosure is important in assessing the fairness of a going private transaction. However, it may not be practical to impose Rule 13e–3 procedural, disclosure and filing requirements when there are no other U.S. requirements, including disclosure requirements about the background, terms or conditions of an offer. For Tier I offers, the home jurisdiction would establish the basic disclosure and dissemination requirements applicable to the offer. In a predominantly foreign transaction, compliance with Rule 13e–3 has been problematic when the affiliated transaction would not be subject to challenge under home country law solely on the basis of lack of fairness. In these transactions, the staff has permitted modified disclosure that focuses on how the board of directors arrived at their determination to purchase the interests of unaffiliated security holders at the offering price rather than requiring a fairness determination.[37]

The proposed rules would not affect the beneficial ownership reporting requirements of Sections 13(d), 13(f) and 13(g) of the Exchange Act, because the need for disclosure of the ownership and control of reporting companies, domestic and foreign, outweighs any burdens related to filing reports under those rules.[38]

Q4. Should Sections 13(d), 13(f) and 13(g) apply to non-U.S. persons owning securities in foreign private issuers? Should these rules apply only if U.S. record ownership exceeds a certain percentage, such as 5 or 10 percent?

As noted, the anti-fraud and anti-manipulation provisions contained in the Exchange Act also would continue to apply.[39] In 1991 a number of commenters expressed concern that if the anti-fraud provisions continue to apply, bidders will not extend the offer to U.S. security holders. We nevertheless continue to believe that the anti-fraud and anti-manipulation rules are necessary for the protection of U.S. security holders.

3. Equal Treatment

Offerors relying on the Tier I exemption must permit U.S. security holders to participate in the offer on terms at least as favorable as those offered to any other security holders of the subject securities. This requirement would mandate that U.S. security holders be offered the same amount and form of payment, including securities if offered elsewhere. Also, the procedural terms of the tender offer, that is, duration and withdrawal rights, must be the same for all security holders.

Q5. We request comments on whether the tender offer exemptive rules should permit U.S. security holders to be offered cash consideration only, even if securities are offered to non-U.S. security holders. If bidders can offer a cash-only alternative to U.S. security holders, should we impose protections to ensure that U.S. security holders are receiving equivalent value for their securities? Similarly, we are aware that as a practical matter, holders of American Depositary Shares (''ADSs'') may have a shorter time period in which to tender. Would the requirement that the procedural terms of the tender offer be the same for all holders prevent reliance on the exemption when the subject securities are held in ADS form in the United States?

An exception to this equal treatment requirement would provide that if the transaction is exempt from registration under the Securities Act, the offeror may exclude target company security holders residing in any state that does not provide an exemption from registration.[40] Similarly, if the offeror registers securities under the Securities Act, the offeror may exclude target company security holders residing in any state that refuses to register or qualify the offer and sale of securities in that state after a good faith effort by the offeror.

In both cases, however, the offeror must offer those security holders cash consideration instead of excluding them, if it has offered cash consideration to security holders in another state or in a jurisdiction outside the United States. The offeror must offer the cash consideration only if it previously offered a cash-only alternative consideration—not merely a partial cash alternative consideration.

Another exception to the equal treatment requirement would provide that the offeror does not need to offer a ''loan note'' alternative to U.S. security holders. It is quite common in the United Kingdom for a bidder in a cash tender offer to extend a loan note option to the target company's security holders instead of paying cash. This procedure allows target security holders to receive a short-term note, which may be redeemed in whole or in part for cash at par on any interest date in the future.[41] This exception would be available when the purpose of the loan notes is the deferral of the recognition of income and capital gains on the sale of securities and such a deferral is not available to U.S. security holders. Also, the offeror cannot list the loan notes on any exchange or organized securities market, or register them under the Securities Act and still qualify for the Tier I exemption.

The Tier I exemption contemplates that the bidder may have to comply with more than one jurisdiction's regulations.[42] The chartering jurisdiction may mandate more protections or disclosure than the principal foreign market. If the bidder cannot or does not wish to extend these additional protections or disclosure to

[36] 17 CFR 240.13e–3.

[37] *See* In the Matter of Procordia Aktiebolag and Aktiebolaget Volvo, Securities Exchange Act Release No. 27671 (Feb. 2, 1990)(7.9% U.S. record holders); In the Matter of Incentive AB and Gambro AB, Securities Exchange Act Release No. 36793 (Jan. 31, 1996)(1.89% U.S. record holders).

[38] 15 U.S.C. 78m(d), 78m(g), and 78m(f).

[39] For example, Sections 10(b) and 14(e) of the Exchange Act, 15 U.S.C. 78(b) and 78n(e), and Rules 10b–5 and 14e–3 thereunder, 17 CFR 240.10b–5, and 240.14e–3 would continue to apply.

[40] In some cases, securities issued under proposed Rules 801 and 802 may be subject to state registration requirements. Rights offerings under proposed Rule 801 are less likely to pose conflicts with state securities laws. The securities laws of many states contain a provision patterned after Section 402(14) of the Uniform Securities Act exempting from registration securities offerings to existing security holders of the issuer. Exemptions from state law registration requirements for securities offered through exchange offers, such as those covered by proposed Rule 802, are much more rare.

[41] ''Loan notes'' generally are unsecured short-term debt obligations, which are guaranteed as to principal and interest by a bank and permit the holder to require all or any part of the principal amount of the loan notes to be repaid at par together with any accrued interest on any interest payment date. Under U.K. tax laws, a security holder who receives loan notes and does not own more than five percent of the outstanding shares of the target company would not be subject to a capital gains tax to the extent the security holder receives loan notes. A U.S. security holder, on the other hand, would be subject to a capital gains tax under the Internal Revenue Code, since the security holder would not be accorded special treatment under the installment sales method of income recognition. I.R.C 453(k)(2)(A).

[42] Commenters on the 1991 proposals raised concerns that a home country may have no regulatory safeguards. They suggested that in those instances, it would be fair to require the U.S. offer to comply with the regulatory structure of the target company's principal foreign market.

U.S. security holders, under today's proposals, the bidder would not have Tier I exemptive relief. The bidder, therefore, would need to seek relief from the Commission in order to extend the tender offer to U.S. security holders without complying fully with Exchange Act tender offer requirements. The bidder would need to submit a written request for exemptive relief to the Commission. In determining whether to grant relief, we would consider whether the additional protections or disclosures are necessary, under the particular facts and circumstances of the transaction, to protect the interests of U.S. security holders.

C. Proposed Tier II Exemption

1. Conditions for the Exemption

Under the Tier II offer exemption, bidders would be entitled to limited relief from the U.S. tender offer rules to minimize conflicts with the foreign regulatory schemes. A bidder may rely upon the Tier II exemption if:

- The target company is a foreign private issuer; and
- U.S. security holders do not hold of record more than 40 percent of the securities sought in the offer.

The exemption would be available to U.S. and foreign bidders. The domicile or reporting status of the bidder is not relevant.

We preliminarily believe that there should be a ceiling on the maximum percentage of U.S. security holders of the subject class to ensure that when U.S. ownership is significant, the full protections of the U.S. tender offer rules apply. When U.S. ownership exceeds 40 percent, it is unlikely that the offer would exclude U.S. security holders. We will consider relief on a case-by-case basis when there is a direct conflict between the U.S. laws and practice and those of the home jurisdiction. Any relief would be limited to what is necessary to accommodate conflicts between the regulatory schemes and practices.[43]

In no event will the Division exempt application of the anti-fraud and anti-manipulation provisions, including Section 14(e).[44] Section 14(e) provides that it is unlawful for a person to make a material untrue statement, or material omission, or to engage in fraudulent, deceptive, or manipulative acts in connection with any tender offer. Receipt of an exemption from the bright-line prophylactic requirements of Rule 14e–1[45] does not obviate the need to comply with the anti-fraud and anti-manipulation requirements, including those contained in Section 14(e). Thus, for example, while an exemption from the requirement under Rule 14e–1(b)[46], which provides a bright-line threshold of ten days notice if the offeror increases or decreases the consideration offered, may be appropriate, the anti-fraud provisions may require notice of material changes in an offer.

The areas of exemptive relief under Tier II have been identified by bidders as common impediments to extending offers into the United States in past requests for exemptive relief.[47] They include:

(1) an offer is deemed to commence upon mailing or publication pursuant to the home jurisdiction's requirements rather than upon announcement;

(2) a bidder may terminate withdrawal rights before the expiration of the offer if it has met all conditions to the offer and satisfied all duration requirements of the U.S. tender offer rules;

(3) a bidder may divide the offer into two separate offers having the same terms in which the U.S. offer would comply with the U.S. regulatory scheme and the non-U.S. offer would comply with the home jurisdiction rules, excluding U.S. security holders from the foreign offer and limiting the U.S. offer to U.S. security holders;

(4) whether the bidder meets the requirements for prompt payment for, or return of, tendered securities will depend on home jurisdiction requirements and practice; and

(5) bidders may announce extensions of the offer in accordance with the practices of the home jurisdiction, rather than before the commencement of trading on the next business day as required by the U.S. rules.

In Section II.C.2, we discuss each aspect of the proposed Tier II exemption in more detail. We also provide guidance on a bidder's ability to reduce the minimum tender condition without extending the offer if certain conditions are met.

Q6. We request comments on the scope of the proposed relief and the conditions proposed in the Tier II exemption. Are there any other areas where relief should be granted? Are there areas of relief proposed that should not be granted? Should there be more conditions attached? For example, should a foreign bidder relying on the Tier II exemption be required, as proposed, to File a Form F–X appointing an agent for service of process in the United States?

If relief beyond the proposed Tier II exemption is necessary, the Commission staff would consider requests on an expedited basis under the proposed delegated authority. In such a case, the bidder would need to submit a written application requesting relief, along with a discussion of the basis for the request.[48] The application must comply with the requirements of Rule 0–12 under the Exchange Act.

The Tier II exemption would be available regardless of the home jurisdiction of the foreign subject company.[49] By creating an approach

[43] *See* In the Matter of Trinity Acquisition PLC, Exchange Act Release No. 40246 (July 22, 1998) (U.S. persons held 45.46% of the target's securities); In the Matter of GE Capital Corp., Exchange Act Release No. 38888 (July 30, 1997) (U.S. persons held 58.27% of the target's securities). Because of the significant U.S. ownership interest in the target companies, the relief was narrowly tailored to accommodate direct conflicts between U.S. and U.K. law or practice and to allow the offers to proceed in a manner that did not impair the interests of U.S. persons.

[44] 15 U.S.C. 78n(e)

[45] 17 CFR 240.14e–1.

[46] 17 CFR 240.14e–1(b).

[47] We granted relief in the following transactions based on common conflicts between foreign and U.S. regulatory schemes:

AUSTRALIA: Australian National Indus. Ltd.; Palmer Tube Mills Ltd., SEC No-Action Letter (Aug. 30, 1994).

CANADA: Varity Corp., SEC No-Action Letter (Oct. 15, 1991).

FRANCE: Rhône-Poulenc S.A., SEC No-Action Letter (July 8, 1993); Pechiney Privatization, SEC No-Action Letter (Dec. 6, 1995).

IRELAND: In the Matter of Den norske stats oljeselskap a.s. and Statoil (U.K.) Ltd., Exchange Act Release No. 36379 (Oct. 17, 1995).

SWEDEN: In the Matter of Pharmacia & Upjohn, Inc., Pharmacia Aktiebolag and The Uphohn Co, Exchange Act Release No. 36240A (Sept. 27, 1995); In the Matter of Incentive AB and Gambro AB, Exchange Act Release No. 36793 (Jan. 31, 1996).

SWITZERLAND: Ciba Specialty Chemicals Holding Inc., SEC No-Action Letter (Feb. 18, 1997).

UNITED KINGDOM: Pacificorp, Exchange Act Release No. 38776 (June 25, 1997); In the Matter of Amersham International PLC and Nycomed ASA, Exchange Act Release No. 38797 (July 1, 1997).

[48] If the request relates to an issuer tender offer, the request should be directed to the Office of Risk Management and Control in the Commission's Division of Market Regulation or the Office of Mergers and Acquisitions in the Commission's Division of Corporation Finance. If the request relates to a third party tender offer, the request should be directed to the Officer of Mergers and Acquisitions.

[49] The proposed Tier II exemption differs from the 1991 proposals. The 1991 proposals granted relief through an order that was limited to third-party tender offers for the securities of U.K. target companies subject to the City Code (the ''U.K. Exemptive Order''). The U.K. Exemptive Order would have allowed the bidder to proceed on the basis of U.K. offering documents without complying with U.S. disclosure requirements, and would have allowed tender offers to proceed simultaneously in the United Kingdom and the United States on the same terms and in accordance with both the Williams Act and the City Code. The Tier II offer exemption is modeled after the accommodations reflected in the U.K. Exemptive Order. However, because of the extensive ownership by U.S. persons of securities of foreign issuers from jurisdictions other than the United Kingdom, and our experience in granting accommodations for offers based on

Continued

that is not country-specific, U.S. security holders will have the greatest opportunity to participate in offers for foreign companies without regard to national boundaries. Because the Tier II exemptive relief is limited, it is not necessary to determine whether the tender offer rules and practices of a particular jurisdiction are adequate. Also, a bidder need not demonstrate that there is an actual conflict between U.S. tender offer rules and rules of the home jurisdiction in order to rely on the Tier II exemption. The offers relying upon the proposed exemption would still be subject to any disclosure, filing, and most of the procedural and equal treatment requirements of the U.S. tender offer rules that would otherwise apply to the offer, as well as the going private disclosure and procedural requirements of Rule 13e–3. Further, the exemption requires that certain conditions be met to ensure an adequate level of investor protection while at the same time removing common impediments to including U.S. security holders in foreign tender offers. Consistent with the broader approach of the proposed Tier II exemption, the exemptive relief would be available to both issuer [50] and third-party offers.

Q7. We request comments on whether the non-country specific exemption is appropriate.

Q8. Is the Tier II exemption necessary at all since, based on transactions filed with us, it appears that there will be relatively few offers for the securities of foreign private issuers that will be ineligible for the Tier I exemption if the proposed 10 percent (or possibly higher) threshold is adopted? Instead, should we continue our current practice of granting relief on a case-by-case basis, but in an expedited manner pursuant to the proposed delegated authority provision?

For tender offers conducted under Canadian law, an additional option exists. The rules under the Multijurisdictional Disclosure System (''MJDS'') with Canada permit bidders for the securities of Canadian foreign private issuers to conduct cash tender offers and exchange offers in the United States on the basis of Canadian regulations and disclosure standards.[51] Eligibility is subject to certain conditions, including that U.S. record ownership of the subject class may not exceed 40 percent. Thus, a bidder for the securities of a Canadian foreign private issuer could proceed under the MJDS or the rules proposed today, depending on the level of U.S. ownership of the target securities.

The Tier II exemption would not allow the offer to proceed on the basis of the home country disclosure documents. The 1991 proposals were based on our finding that the disclosure standards applicable to cash tender offers in the United Kingdom were similar to those imposed by the U.S. tender offer rules. We have not, and could not, make this finding with respect to each jurisdiction that would be covered by the Tier II exemption. In addition, there appears to be little need for this relief, since we have not been required to grant exemptive relief with respect to the disclosure requirements of Schedule 14D–1. Bidders typically do not need regulatory relief when the target's home jurisdiction simply requires more disclosure than our rules, or vice versa. We believe that we can resolve problems caused by conflicts between the different disclosure standards of different jurisdictions on a case-by-case basis, through our comment process. Compliance with U.S. disclosure requirements also is appropriate in light of the relief proposed for Tier I offers; only offers for foreign private issuers with more than 10 percent of their shares held in the United States would be subject to our disclosure standards.

Q9. Are there particular disclosure items under Schedule 14D–1 or other tender offer rules that should be the subject of exemptive relief? For example, should offers conducted pursuant to the Tier II exemption remain, as proposed, subject to the Commission's going private disclosure requirements?

The proposed exemption also does not provide relief from the U.S. dissemination standards.[52] This requirement is appropriate since the dissemination of information does not appear to impose significant burdens.

Q10. Are there aspects of the U.S. dissemination requirements that create conflicts with foreign requirements or practice or are otherwise unduly burdensome in the case of predominantly foreign offers?

Q11. We request comments on whether the 40 percent threshold is appropriate. Is a 30 percent threshold more appropriate? Should an offer for any foreign private issuer be excluded from the Tier II exemption whenever the primary trading market for the subject security is in the United States?

2. Scope of Tier II Exemptive Relief

a. *Commencement of an offer.* The U.S. tender offer rules applicable to third-party cash offers for registered equity securities require a bidder to file with the Commission and to disseminate a mandated disclosure document within five business days of a public announcement of the significant terms of the offer.[53] Some foreign jurisdictions, however, require a bidder to publicly announce its intention to make a tender offer even though the bidder is not yet prepared to commence the offer.[54] In addition, the subject company triggers an obligation to file a Schedule 14D–9 by making an announcement that could be deemed to be a recommendation or solicitation with respect to the offer.[55]

The proposed exemption provides that an offer would commence only upon mailing or publishing the offer, even if the bidder makes a public announcement that would otherwise trigger the commencement requirements under the U.S. tender offer rules, as long as the announcement:

(1) Is required by home jurisdiction law or practice;

(2) Contains no information beyond the requirements of the home jurisdiction law or practice;

(3) If disseminated in written form in the United States, contains a legend noting that the offer will not commence until the bidder mails or publishes the offering document, which may not occur for a specified period, as permitted by the home jurisdiction; and

(4) Any offer documents are mailed no later than 30 days following the announcement or the bidder makes a public announcement if it decides not to commence the offer.

In addition, anyone making such an announcement would not be making a solicitation or recommendation with respect to the offer within the meaning of Rule 14d–9. Requirements (1), (2) and (4) were contemplated in the 1991 proposed U.K. Exemptive Order. Requirement (3) was not contemplated in the 1991 proposed U.K. Exemptive Order.

regulatory schemes in other jurisdictions, the Tier II offer exemption would not be limited to offers governed by the City Code.

[50] The U.K. Exemptive Order would have covered only third-party offers, since the City Code does not govern issuer tender offers.

[51] Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Exchange Act Release No. 29354 (June 13, 1991) [56 FR 30036].

[52] Rules 13e–4(e), 14d–4, 14d–9 and 14e–2, 17 CFR 240.13e–4(e), 240.14d–4, 240.14d–9 and 240.14e–2.

[53] Rule 14d–2(b), 17 CFR 240.14d–2(b).

[54] Under U.K. law, once a bidder forms a firm intention to make an offer, the bidder must make a detailed announcement of the terms of its offer. *See* City Code, Rule 2.2(a). The bidder must then mail the offer document within 28 days of that announcement. *See* City Code, Rule 30.1.

[55] Rule 14d–9, 17 CFR 240.14d–9.

Including the legend on the announcement when disseminated into the United States will ensure that U.S. investors are aware that commencement of the offer may be delayed. The 30-day maximum time limit for mailing the offer documents will ensure that there is not a significant delay in mailing the materials. This requirement is consistent with the U.K. requirement that the materials be mailed within 28 days of the announcement.[56]

Q12. We request comment on whether it is necessary to require that offers commence within 30 days of announcement. Is a different time period more appropriate? Further, would the proposed legend concerning the delay in commencement add meaningful protection for U.S. investors?

b. *Withdrawal Rights.* Under U.S. law, the bidder must permit tendering security holders to withdraw shares throughout the term of the offer, including any extension, and even following the close of the offer if the bidder has not accepted the tendered securities for payment within 40 days after the commencement of the offer.[57] As highlighted in previous Commission exemptive orders and the 1991 proposed U.K. Exemptive Order, U.S. withdrawal rights may conflict with withdrawal rights available to security holders in other jurisdictions.

Under the U.K. City Code, for example, the bidder must provide security holders the right to withdraw previously tendered shares only if an offer does not become ''unconditional as to acceptances'' within 21 days after the first closing date of the initial offer.[58] The City Code also requires that an offer remain open for at least 14 days after going unconditional as to acceptances and that shares be immediately purchased once the offer goes wholly unconditional.[59] Allowing withdrawal rights after the offer has received the required level of acceptances would jeopardize the regulatory policy embodied in the City Code that offers may not proceed unless the bidder obtains control in the offer.

Since 1991, the Commission has consistently granted relief from the U.S. withdrawal rights requirements in U.K. offers during the mandatory extensions following the offer going wholly unconditional. Withdrawal rights are less important at this stage in the offer, because shares could have been purchased by the bidder at that time under U.S. law (*i.e.*, when all conditions have been met). U.S. law does not require the bidder to extend the offer after obtaining its minimum acceptance level.

Under the Tier II exemption proposed today, the bidder could terminate withdrawal rights before the expiration of the offer if the offer is for all outstanding shares[60] and if the bidder:

(1) Satisfies or waives all conditions to the offer;

(2) Satisfies all minimum time periods;

(3) Extends withdrawal rights during all minimum time periods;

(4) Accepts and promptly pays for all previously tendered securities; and

(5) Immediately accepts and promptly pays for all securities tendered thereafter.[61]

If the bidder satisfies all these conditions, and if it has previously advised U.S. security holders of the possibility of early termination, the bidder may terminate withdrawal rights even if a previously announced voluntary extension of the initial offering period has not expired.[62]

This exemption provides relief from the requirement that withdrawal rights be extended throughout the term of the offer and the requirement that withdrawal rights be provided if the securities have not been accepted for payment within 40 days after commencement of the offer.

Q13. Should bidders be permitted to terminate withdrawal rights earlier than the satisfaction of certain conditions, such as before governmental regulatory approval? Should we consider requests for this relief on a case-by-case basis rather than incorporating it into the Tier II exemption?

c. *All-holders/best price.* The U.S. rules require that a bidder open the tender offer to all security holders and that the consideration paid to any security holder be as high as the consideration paid to any other security holder (the ''all-holders/best price rule'').[63] The Commission has issued exemptive relief from this requirement to permit a bidder to divide its offer into two separate offers. The U.S. offer would comply with the U.S. regulatory scheme and the non-U.S. offer would comply with the home jurisdiction rules. The bidder would exclude U.S. security holders from the foreign offer and limit the U.S. offer to U.S. security holders.[64] We have also granted relief when bidders have offered a ''loan note'' alternative (a form of installment payment common in U.K. offers) only to U.K. security holders and not to U.S. security holders.[65] The loan notes provide certain U.K. tax benefits that are not applicable to U.S. security holders. Therefore, it is not necessary to offer U.S. security holders that alternative. The proposed Tier II exemption would extend both kinds of relief to all offers eligible for the exemption.

The proposed Tier II exemption would not address the situation where the bidder seeks to offer cash-only consideration to U.S. security holders to avoid registering the exchange offer under the Securities Act. This would include the device of ''vendor

[56] We recently adopted a safe harbor under the tender offer rules. The safe harbor provides that a bidder or target company does not trigger the disclosure or filing requirements of the tender offer rules by granting representatives of the press access to offshore press conferences or meetings with management, or to press releases and other materials, even though a proposed tender offer is discussed at those meetings or in the materials. A bidder or target company would not need to satisfy the requirements imposed by the Tier II exemption to avoid triggering Rule 14d–2(b) or 14d–9 as a result of these types of offshore press activities. Bidders will have to rely on the Tier II exemption only when the announcement of the offer is disseminated in a manner inconsistent with the requirements of the offshore press safe harbor, for example, by publishing the announcement in the United States. Rule 14d–1(c), 17 CFR 240.14d–1(c).

[57] Exchange Act Section 14(d)(5), 15 U.S.C. 78d(5); Rule 14d–7, 17 CFR 240.14d–7.

[58] City Code, Rule 34. An offer typically becomes ''unconditional as to acceptances'' when the bidder receives enough tendered securities that (when combined with the securities already owned or purchased) constitute more than 50% of the aggregate number of the target company's outstanding shares. *See* City Code, Rule 10.

[59] City Code, Rule 31.4. An offer normally becomes ''wholly unconditional'' once all conditions to the offer have been satisfied.

[60] If we permitted this relief in a partial offer, security holders who tendered prior to the termination of withdrawal rights would be prorated on a different basis than those who tender after the termination of withdrawal rights. Because we are requiring that security holders who tender prior to the termination of withdrawal rights be paid promptly upon that termination, a bidder would not know at the time of purchase the amount of tenders that would come in after the termination of withdrawal rights. Consequently, the bidder would need to prorate security holders differently depending on when they tendered.

[61] This position would also apply in situations such as Swedish transactions where withdrawal rights are terminated for a ten-day period during which the bidder determines whether the minimum condition has been satisfied. *See, e.g.*, In the Matter of Incentive AB and Gambro AB, Exchange Act Release No. 36793 (Jan. 31, 1996). The Commission has granted exemption relief in those situation, since all conditions (other than the minimum tender condition) and minimum time periods have been satisfied prior to terminating withdrawal rights. If the bidder determines that the minimum tender condition is not satisfied and extends the offer instead of returning the tendered shares, withdrawal rights must be extended during this additional offering period.

[62] *See, e.g.*, In re Central and South West Corp. and Houston Indus., Exchange Act Release No. 36285 (Sept. 27, 1995).

[63] Rule 14d–10, 17 CFR 240.14d–10.

[64] *See, e.g.*, In the Matter of Incentive AB and Gambro AB, Exchange Act Release No. 36793 (Jan. 31, 1996).

[65] *See, e.g.*, In re Central and South West Corp. and Houston Indus., Exchange Act Release No. 36285 (Sept. 27, 1995).

placements,'' where U.S. security holders receive a cash payment that is funded by the sale into the market overseas of any securities received in the offer.[66] In adopting the all-holders rule, we contemplated that, under appropriate circumstances, we would grant requests for relief in connection with exchange offers by foreign bidders.[67] This relief would permit U.S. security holders to receive cash, rather than the bidder's securities which would trigger the registration requirements of the Securities Act. We have demonstrated in numerous registered exchange offers, both negotiated and hostile, that the registration requirements of the Securities Act are not an insurmountable obstacle to meeting foreign time schedules. Moreover, relief may be unnecessary because foreign regulators may not permit bidders to offer U.S. security holders cash-only consideration when that consideration is not offered to all holders. We will continue to address these kinds of relief on a case-by-case basis.

Q14. We request comments on whether the Tier II exemption should include relief permitting a bidder to offer cash, rather than securities, to U.S. security holders. Would the need to treat U.S. security holders differently be greatly diminished if we adopt proposed Rule 802?

d. *Notice of extensions.* Under the U.S. tender offer rules, all tender offers must remain open for a minimum of 20 business days, subject to mandatory extensions for changes in the terms of the offer.[68] Today's proposals do not provide relief from the duration and extension requirements. We are not aware of jurisdictions where the U.S. duration and extension periods conflict with those of the home jurisdiction. Some home jurisdiction regulations permit a shorter time period.[69] But in our experience, those home jurisdiction rules do not prohibit the bidder from keeping the offer open or extending the offer for a longer period of time.

Q15. Is there a need for relief from the minimum offering and extension period requirements of the U.S. tender offer provisions?

Under the U.S. tender offer rules, if a bidder determines to extend an offer beyond a scheduled expiration date it must publish a notice of the extension by the beginning of the next business day.[70] The proposed Tier II exemption would permit bidders to announce extensions of the offer in accordance with the practices of the home jurisdiction, rather than prior to the commencement of trading on the next business day as required by U.S. rules. We are aware of situations when the U.S. rules conflict with those of the home jurisdiction, such as when the tabulation process requires more time for the bidder to decide whether to extend an offer.[71]

e. *Prompt payment for or return of tendered securities.* After expiration of an offer, U.S. tender offer rules require an offeror to promptly pay for, or return, tendered securities.[72] This ''prompt'' payment standard is satisfied if payment is made in accordance with normal settlement periods. Under T+3 settlement requirements, that period is now three trading days in the United States.[73] In the United Kingdom, for example, once the bidder is allowed to purchase tendered securities, payment must be made within 14 calendar days.[74] We have granted relief from the prompt payment rule in many exemptive orders.[75] The Tier II exemption would make promptly payment relief available so long as the bidder pays for the securities in accordance with the home country's requirements.

f. *Reduction of minimum condition.* The U.S. rules require that at least five business days remain in an offer following the waiver of the minimum tender condition. This permits investors to learn of, and react to, this material change to the offer.[76] The concern is that certain security holders may want to withdraw if the bidder lowers the minimum condition, while others may want to tender into the offer.

In the United Kingdom, it is common for the bidder to reduce the minimum condition from 90 to 51 percent, once all other conditions to the offer are satisfied, and immediately purchase the tendered securities. Under the City Code, the offer then must remain open for 14 days (the ''Subsequent Offering Period''). During the Subsequent Offering Period, the offer is open for acceptances, but not withdrawals.[77] Bidders anticipate that during the Subsequent Offering Period, sufficient tenders will come in to satisfy the 90 percent minimum condition. The 90 percent minimum condition is important to achieve because that is the amount required to conduct a compulsory acquisition.

Purchasing securities immediately after the reduction or waiver of the minimum condition is inconsistent with the U.S. tender offer requirements. To address this conflict, we have permitted a bidder in a cross-border tender offer to reserve the right to reduce the 90 percent condition and announce this reservation by press release and advertisement in a U.S. newspaper of national circulation at least five business days before any reduction.[78] Since bidders must disclose that they are reserving the right to reduce the minimum condition five days before they reduce it, security holders have sufficient time to withdraw their securities. Those security holders wishing to tender into the offer once the minimum condition is lowered will be able to tender during the Subsequent Offering Period.[79] Bidders believe this relief is necessary because they will not know before the expiration date whether to reduce the minimum condition, since many holders do not tender until the last day of the offer. They would only reduce the minimum condition if the number of tenders on such date is close to the 90 percent level and they believe they will get to the 90 percent level during the Subsequent Offering Period.

We will not object if bidders meeting the requirements for the Tier II exemption reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer (unless an

[66] *See, e.g.,* Oldcastle, Inc., SEC No-Action Letter (July 3, 1986).

[67] Amendments to Tender Offer Rules—All-Holders and Best Price, Securities Act Release No. 6653 (July 11, 1986) [51 FR 25873].

[68] Rule 14e–1 (a) and (b), 17 CFR 240.14e–1 (a) and (b).

[69] For example, French regulations require that the offer be held open for 20 French business days, which may differ from U.S. business days. General Regulations of the Paris Bourse by the Conseil des Bourses de Valeurs, Article 5–2–10 (1996). U.K. regulations require that the offer be held open for 21 calendar days. City Code, Rule 31.1.

[70] Rule 14e–1(d), 17 CFR 240.14e–1(d).

[71] We have granted exemptive relief to Swedish offers where, due to market practice in the jurisdiction, it is impracticable to announce an extension for up to 10 days following the expiration of the offer. During that period, shareholders do not have withdrawal rights. *See* In re Pharmacia & Upjohn, Inc., Pharmacia Aktiebolag and the Upjohn Co., Exchange Act Release No. 36240A (Sept. 27, 1995); In the Matter of Incentive AB and Gambro AB, Exchange Act Release No. 36793 (Jan. 31, 1996).

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

[73] Rule 15c6–1(a), 17 CFR 240.15c6–1(a).

[74] City Code, Rule 31.8.

[75] *See, e.g.,* In the Matter of Texas Utilities and The Energy Group PLC, Exchange Act Release No. 39810 (March 27, 1998).

[76] Interpretive Release Relating to Tender Offer Rules, Exchange Act Release No. 24296 (Apr. 3, 1987), [52 FR 11458].

[77] *See* Section II.C.2.b for a discussion of the permissibility of terminating withdrawal rights during the Subsequent Offering Period.

[78] *See* In the Matter of Pacificorp and The Energy Group, Exchange Act Release No. 38776 (June 25, 1997).

[79] Since the U.S. rules do not contemplate a Subsequent Offering Period, this relief should not be appropriate in a domestic transaction.

extension is required by Rule 14e–1), if the following conditions are met:

- The bidder must announce that it may reduce the minimum condition five business days prior to the time that it reduces the condition. A statement at the commencement of the offer that the bidder may reduce the minimum condition is insufficient;
- The bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, which could include placing an advertisement in a newspaper of national circulation in the United States;
- The press release must state the exact percentage to which the acceptance condition may be reduced and state that a reduction is possible. The bidder must declare its actual intentions once it is required to do so under the regulations of the home jurisdiction;
- During this five-day period, security holders who have tendered their shares in the offer will have withdrawal rights;
- This announcement must contain language advising security holders to withdraw their tenders immediately if their willingness to tender into the offer would be affected by a reduction of the minimum acceptance condition;
- The procedure for reducing the minimum condition must be described in the offering document; and
- The bidder must hold the offer open for acceptances for at least five business days after the satisfaction of the minimum acceptance condition.

D. Other Rules Governing Tender Offers

1. Rule 10b–13

We are proposing to amend Rule 10b–13 under the Exchange Act to facilitate the inclusion of U.S. security holders in tender offers for foreign securities.[80] Rule 10b–13 prohibits a person who is making a tender 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 pursuant to the offer.[81] The rule's prohibitions apply from the time of public announcement of the offer until the time the bidder is required, pursuant to 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 shares outside the offer, while other security holders are limited to the offer's terms.[82] The rule applies to the bidder, whether the bidder is the issuer or a third party, the bidder's affiliates, and the offer's dealer manager.[83]

Many foreign jurisdictions do not expressly prohibit a bidder from purchasing or arranging to purchase the subject security outside the terms of the offer. A number of these jurisdictions, however, do require that the bidder provide consideration to tendering security holders that is equivalent to the higher of the offer price and the highest price paid to any person whose securities were purchased outside the terms of the offer.[84] This means that tendering security holders will receive the benefit of any higher prices paid for securities outside the offer. In contrast, Rule 10b–13 is premised in part on the view that because of the time value of money, persons whose shares are purchased before payment is made in the offer receive a consideration different from that received by tendering security holders, even if they receive the same per share price.[85] Nevertheless, the requirement that bidders pay in the offer the highest price paid for shares purchased outside the offer is similar to the requirement in Rules 14d–7 and 13e–4(f)(4) under the Exchange Act that the highest consideration paid to any security holder pursuant to a tender offer be paid to all security holders that tender into the offer.

A strict application of Rule 10b–13 in some cases could disadvantage U.S. security holders. For example, a bidder may decide to exclude U.S. security holders from the offer when Rule 10b–13 would (1) preclude purchases outside the offer; and (2) the participation of U.S. security holders is not necessary to the success of the offer. In that circumstance, flexible application of Rule 10b–13 is necessary and appropriate to encourage bidders for the securities of foreign private issuers to extend their offers to U.S. security holders. At the same time, any relief extended to foreign tender offers should be limited to circumstances that do not undermine the investor protection goals of Rule 10b–13.

We have some experience in balancing these objectives. We issued an exemption from Rule 10b–13 in 1991 for tender or exchange offers relying on the MJDS with Canada.[86] That exemption recognizes that Canadian procedures applicable to tender offers afford a large measure of the protections provided by Rule 10b–13.[87] Additionally, in the 1991 proposals, we sought comment on whether we should provide an exemption from Rule 10b–13 to bidders of foreign securities when certain conditions are satisfied. Although the 1991 proposals were not adopted, the Commission has granted a number of exemptions from Rule 10b–13 to accommodate cross-border tender offers. These exemptions were subject to provisions pertaining to recordkeeping and compliance with applicable tender offer laws or regulations, as well as the conditions suggested in the 1991 proposals that:

(1) The U.S. offering documents prominently disclose the possibility of any purchases or arrangements to purchase the subject security (or certain related securities), or the intent to make such purchases, otherwise than pursuant to the terms of the tender offer;

(2) The bidder discloses in the United States information regarding such purchases to the extent such disclosure is made pursuant to the home jurisdiction's rules governing tender offers; and

(3) Such purchases are made outside the United States.[88]

For tender or exchange offers that are substantially foreign in character, we preliminarily believe that allowing U.S. security holders to participate in these offers outweighs the benefits derived from applying Rule 10b–13 to such offers. Commenters on the 1991 proposals supported this view. They stated that relief from Rule 10b–13 is appropriate for tender offers that are essentially foreign in character, especially if any such exemption is consistent with the relevant laws, rules, and practices of the foreign jurisdiction

[80] The Commission recently commenced a comprehensive review of Rule 10b–13, including its application in the context of offers for U.S. issuers. In connection with this review, we recently proposed revising Rule 10b–13 and redesignating it as Rule 14e–5. Securities Act Release No. 7607 (November 3, 1998). If those proposals are adopted, any changes made to Rule 10b–13 to accommodate cross border transactions will be incorporated into Rule 14e–5.

[81] 17 CFR 240.10b–13.

[82] *See* International Tender and Exchange Offers, Securities Act Release No. 6897 (June 5, 1991) [56 FR 27582, 27597].

[83] *See, e.g.,* Offer for Smith New Court PLC (July 26, 1995).

[84] *See, e.g.,* City Code Rules 6.1 and 6.2; *see also* Ontario Securities Act §§ 97(1), 97(2), 97(3); Ontario Securites Commission Policy Statement 9.3.

[85] *See* Brief of the Securities and Exchange Commission, Amicus Curiae, *Texaco Inv. v. Pennzoil Inc.* (Tex. Sup. Ct. July 22, 1987).

[86] Order of Exemption from Provisions of Rules 10b–6 and 10b–13 Under the Securities Exchange Act of 1934 for Canadian Multijurisdictional Disclosure System, Securities Exchange Act Release No. 29355 (June 21, 1991).

[87] *Id.*

[88] *See, e.g.,* Incentive A.B. Offer for Gambro A.B. (February 1, 1996). Additionally, we have granted Rule 10b–13 exemptions to permit concurrent U.S. and offshore tender offers. *See, e.g.,* Pechiney Privatization (Dec. 6, 1995).

governing the offer.[89] Based on our experience in granting exemptions under Rule 10b–13 in the context of foreign tender offers, we believe that relief from Rule 10b–13 would be appropriate within the context of the two-tiered structure proposed in this release to accommodate cross-border offers.

We propose to amend Rule 10b–13 to include an exception for Tier I tender or exchange offers, subject to the conditions that:

(1) The U.S. offering documents disclose prominently the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases otherwise than pursuant to the terms of the tender or exchange offer;

(2) The bidder discloses information in the United States regarding such purchases in the United States in a manner comparable to disclosure made in the home jurisdiction; and

(3) The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.

This proposed limited exception under Rule 10b–13 for Tier I tender offers largely represents a codification of the conditions contained in the exemptions previously granted by the Commission. The exception, however, would be limited to offers where U.S. persons held of record 10 percent or less of the class of securities sought in the offer.

Unlike in the 1991 proposed exemption, we are not proposing to limit the exception to purchases that are made outside the United States. Under the new proposals, in Tier I offers bidders could purchase target securities, subject to the conditions noted above, in transactions in the United States that otherwise would be prohibited under Rule 10b–13.[90]

We are not proposing an exception to Rule 10b–13 for Tier II offers because of the greater U.S. interest in those offers. We believe that we should continue to review requests for relief from Rule 10b–13 for offers other than Tier I-eligible offers on a case-by-case basis.[91] In that context, we will consider factors such as proportional ownership of U.S. security holders of the target security in relation to the total number of shares outstanding and to the public float; whether the offer will be for ''any-and-all'' shares or will involve prorationing; whether the offered consideration will be cash or securities; whether the offer will be subject to a foreign jurisdiction's laws, rules, or principles governing the conduct of tender offers that provide protections comparable to Rule 10b–13; and whether the principal trading market for the target security is outside the United States. This approach would comport with the Commission's action in a recent cross-border offer involving a U.K. target company with substantial U.S. ownership.[92]

In our view, the proposed exception to Rule 10b–13 will simplify the procedural requirements for foreign tender or exchange offers and further promote the extension of such offers to U.S. security holders, without compromising the investor protections of Rule 10b–13.

Q16. We solicit comments on the proposed exemption for Tier I offers generally, and whether:

(1) As suggested in the 1991 proposal, relief from Rule 10b–13 should be granted only for purchases made outside the United States;

(2) The exception should be subject to an express requirement that either the governing tender offer statute or rules contain, or the offer itself provides for, a provision that if the price paid to security holders outside the offer is higher than the tender offer price, the higher price will be offered to all security holders;

(3) The exception should be limited to offers for all outstanding securities, on the basis that shares purchased outside a partial offer would not be subject to prorationing and therefore may be made on terms materially different from shares purchased in the offer;

(4) The exception should be limited to cash tender offers, on the basis that purchases outside an exchange offer would be made for a form of consideration that may be materially different from the offer's consideration; and

(5) The exception should be limited to offers for the securities of foreign private issuers with no more than 10% U.S. holders of record, or permit a higher percentage of U.S. record holders, *e.g.*, 20%, 30% or 40%. If the level of permissible U.S. ownership is increased, should the exception contain additional conditions, such as limiting its availability to all cash, any-and-all offers; requiring the offer to comply with foreign tender offer rules providing protections comparable to Rule 10b–13; and/or requiring that the principal market for the security be outside the United States?

We recently granted a limited class exemption under Rule 10b–13 to permit ''connected exempt market makers'' and ''connected exempt principal traders,'' as defined by the City Code, to continue their U.K. market making activities during a cross-border offer that is subject to the City Code.[93] Under the City Code, connected exempt market makers and connected exempt principal traders are market makers or principal traders that are affiliated with the bidder's advisors (Eligible Traders). Without Rule 10b–13 relief, Eligible Traders would be forced to withdraw from trading in U.K. target securities, with possible adverse consequences for the liquidity of those securities. This limited class exemption recognizes the information barrier and other requirements contained in the City Code that Eligible Traders must satisfy to be exempt from the City Code's ''acting in concert'' provisions.[94] To rely on this exemption, the Eligible Trader must comply with specified disclosure and recordkeeping requirements and is prohibited from making purchases in the United States, which are consistent with conditions contained in other Rule

[89] *See* comment letters and a summary of the comments in File No. S7–18–91 at our public reference room in Washington, D.C.

[90] Of course, broker-dealers that solicit tenders from U.S. persons would be required to register as broker-dealers under Section 15 of the Exchange Act, absent an available exemption.

[91] Rule 10b–13 exemption requests should be directed to the Office of Risk Management and Control in the Commission's Division of Market Regulation, at (202) 942–0772.

[92] *See* In the Matter of Trinity Acquisition PLC, Exchange Act Release No. 40246 (July 22, 1998). In that offer, U.S. record and beneficial ownership in the target's securities was estimated at 45.46%. Despite the high level of U.S. ownership, the Commission granted a Rule 10b–13 exemption based on the following factors: the transaction was governed by the City Code, which requires that the offer's consideration be increased to the level of any higher price that is paid for purchases of the target's securities outside the offer and does not permit the offer to be withdrawn, except in limited circumstances; the offer was an all cash, any-and-all offer, thus no risk of proration existed; and the principal trading market for the target securities clearly was the London Stock Exchange. Also, the time value of money must be considered in the Rule 10b–13 context because those shareholders paid outside the offer receive consideration sooner than those who tender. This transaction, however, did not involve a substantial difference in the time value of money for purchases outside the offer. Other Rule 10b–13 concerns were not an issue because of the above protections against such abuses in the City Code.

[93] *See Exemption under Rule 10b–13 for Certain Principal Trading and Market Making Activities,* dated June 29, 1998 (Eligible Trader Class Exemption). If the activities of Eligible Traders were in connection with a Tier I offer, where U.S. persons held of record 10 percent or less of the class of securities sought in the offer, the proposed Tier I exception to Rule 20b–13 also would be applicable. Prior to the issuance of the Eligible Trader Class Exemption, the Commission granted Rule 10b–13 relief to U.K. market markers or principal traders on a case-by-case basis. *See, e.g.,* SunGard Data Systems, Inc. Offer for Rolfe & Nolan PLC (March 4, 1998); Doncasters PLC Offer for Triplex Lloyd PLC (March 11, 1998).

[94] *See* City Code Rule 38; Panel Statement 1997/11 dated October 16, 1997.

10b–13 exemptions granted in the cross-border context.

We propose to codify this class exemption. The proposed Rule 10b–13 amendment for Eligible Traders would not be limited to offers where U.S. record ownership is 10 percent or less of the class of securities sought in the offer. It also applies to offers where U.S. record ownership exceeds 10 percent, but is not greater than 40 percent. The proposed amendment, however, would not provide relief under Rule 10b–13 to bidders or anyone acting on behalf of bidders (such as advisors and other nominees or brokers).

The proposed amendment for Eligible Traders is subject to the following conditions:

(1) The issuer of the target security is a ''foreign private issuer,'' as defined in Rule 3b–4(c) under the Exchange Act;

(2) The tender or exchange offer is subject to the City Code;

(3) The Eligible Trader is a ''connected exempt market maker'' or ''connected exempt principal trader,'' as those terms are used in the City Code;

(4) The Eligible Trader complies with the applicable provisions of the City Code; and

(5) The offering documents disclose the identity of the Eligible Trader and describe how U.S. security holders can obtain information regarding an Eligible Trader's market making or principal purchases to the extent such information is required to be made public under the City Code.

Q17. We solicit comments on the proposed exception for U.K. Eligible Traders, including whether this exception should be available during any offer for a U.K. target or limited, *e.g.*, to Tier I offers.

Q18. Is it necessary to include the condition requiring that U.S. holders be able to obtain information regarding Eligible Traders' purchases to the extent such information is required to be made public in the United Kingdom?

Q19. Additionally, we seek comments on whether it is appropriate to exclude from Rule 10b–13's application transactions by any market makers, including U.S. market makers, that are subject to restrictions similar to those imposed by the City Code. Should Rule 10b–13 incorporate the connected market maker concepts of the City Code and provide an exclusion where there is an information barrier between the dealer-manager and the affiliated market maker, and public disclosure is made during the offer of the total amount of shares purchased in market making transactions and of the highest price paid for those shares?

2. Regulation M

In December 1996, the Commission adopted Regulation M.[95] Regulation M imposes trading restrictions on issuers and broker-dealers participating in exchange offers or rights offerings that are ''distributions,'' generally from the day offering materials are disseminated until the end of the distribution.[96] At this time, we are not proposing an exemption to Regulation M for cross-border exchange offers, whether qualifying for the registration exemption under proposed Rule 802 or the proposed Tier I or Tier II exemptions from the U.S. tender offer provisions, or for cross-border rights offerings qualifying for the registration exemption under proposed Rule 801. We preliminarily believe we should evaluate the need for exemptions from Regulation M after we gain experience with the Regulation's operation in the context of those offerings. To date we have had very limited experience with the application of Regulation M to exchange offers for foreign equity securities or rights offerings involving foreign securities. The limited number of requests for relief in these contexts suggests that Regulation M may not be an impediment to these kinds of transactions and that exemptions from its provisions may be unnecessary.[97]

Q20. Are exemptions from various rules under Regulation M necessary to accommodate cross-border rights offerings or exchange offers conducted pursuant to proposed Rules 801 or 802? Commenters should provide reasons why such exemptions would be necessary and the scope of any conditions that should be imposed.

E. Exemption from the Securities Act for Exchange Offers, Business Combinations, and Rights Offerings

1. Summary

Today's proposals also provide exemptions from Securities Act registration requirements for securities issued to U.S. security holders of a foreign private issuer in exchange offers, business combinations, and rights offerings. These exemptions are being proposed as Rule 801 for rights offerings and Rule 802 for business combinations and exchange offers. The exemptions are available only if the target company (or the issuer in an issuer tender offer or rights offering) is a foreign private issuer and U.S. security holders hold of record no more than five percent of the subject securities. The exemptions proposed today differ from the 1991 proposals in that they no longer impose a dollar limitation on the amount of securities to be issued. In addition, there are no proposals to permit registration of such offerings based on home country disclosure.[98]

Since the issuance of the 1991 proposals, we have facilitated the inclusion of U.S. security holders in exchange offers, business combinations and rights offerings by reviewing registration statements concerning these transactions on an expedited basis and by permitting certain accommodations when necessary and prudent for the protection of U.S. security holders. Nevertheless, U.S. security holders continue to be excluded from these offerings.[99] An exemption from the registration requirements appears necessary to ensure that U.S. security holders can participate fully in these offers for foreign companies. An exemption is particularly necessary when the percentage of shares held in the United States is small.

Based on our experience in reviewing registered exchange offers, business combinations, and rights offerings involving foreign registrants, however, we have determined not to propose a home-country based registration system. The disclosure and accounting standards of foreign jurisdictions are not always consistent with the level of prospectus disclosure required in a registered offering under the Securities Act. Instead, we believe that any accommodation under the Securities Act should be limited to circumstances when the proportional U.S. interest in the transaction is insignificant, and U.S. participation is not essential to its success. In those situations, extending the transaction to U.S. security holders is unlikely to be an attempt to raise capital or develop a market for the offeror's securities in the United States.

[95] Anti-manipulation Rules Concerning Securities Offerings, Securities Exchange Act Release No. 38067 (January 3, 1997) [62 FR 520].

[96] The term ''distribution'' is defined in 17 CFR 242.100. Where the portion of an exchange offer or rights offering made in the United States does not constitute a ''distribution'' (*e.g.*, where it does not satisfy the ''magnitude of the offering'' or ''special selling efforts and selling methods'' prongs of the definition), it is not subject to Regulation M.

[97] For example, the trading restrictions in Rule 101 of Regulation M, which apply to underwriters and other broker-dealers, do not apply to actively traded securities, as defined in 17 CFR 242.100.

[98] The 1991 proposals provided a dual approach: (1) a registration exemption pursuant to Section 3(b) of the Securities Act for an issuer's securities offered with respect to the foreign target company's securities, provided that the aggregate dollar value of the securities offered in the United States did not exceed $5 million; and (2) registration on the basis of home jurisdiction disclosure documents, if U.S. residents held five percent or less of the foreign target company's securities before the offer commenced.

[99] *See* Notes 15, 24 and 25, *supra*.

Rather, U.S. investors would benefit by participating in what is otherwise an offshore transaction. Our preliminary view is that these exemptions would be appropriate and in the public interest, because they would promote including U.S. security holders in exchange offers, rights offerings and business combinations.

When the percentage of U.S. ownership is significant, registration of the exchange offer, business combination or rights offer under U.S. disclosure and accounting standards is both appropriate and, in virtually all instances, cost effective and feasible. When the percentage of U.S. ownership is not significant, it is appropriate to exempt these offers from the registration requirements, conditioned on satisfaction of minimal offeror and transactional requirements. Although companies conduct rights offerings to raise capital, full prospectus disclosure may be less necessary because the offerees should already be familiar with the issuer and the securities being offered. In any event, the fact that a company must offer the securities only to existing security holders on a pro rata basis and the requirement that the rights may not be transferred in the United States should ensure that the offering will not serve as a means to develop a U.S. market interest.

Q21. Comment is solicited as to whether these Securities Act exemptions are necessary and appropriate. Should the other proposals proceed without the proposed Securities Act exemptions?

The proposed exemptions are not available for any transaction or series of transactions that technically complies with the exemptions but is part of a plan or scheme to evade the registration provisions of the Securities Act.[100] For example, if the exchange offer or rights offering is a sham, the exemptions would not be available.

2. Eligibility Conditions

a. *Transactional eligibility requirements.* i. *Common requirements for exchange offers, business combinations and rights offerings.* (a) U.S. ownership limitation. Under today's proposals, exchange offers, business combinations, and rights offerings would be exempt from registration under the Securities Act, so long as U.S. security holders own of record five percent or less of the foreign company's securities that are the subject of the offer.[101] When U.S. security holders own five percent or less of the issuer, U.S. participation is generally not necessary for the success of the offer.

Q22. Comment is requested on whether five percent is the appropriate threshold. Would an exemption set at 10 percent or as low as one percent be appropriate and consistent with the protection of investors? Is the five percent threshold too low for small businesses whose offerings are small? Is it too high for large companies, whose offerings are correspondingly large?

Unlike the 1991 proposals, we have not based today's proposal on an absolute dollar limit. The $5 million threshold we proposed in 1991 reflected the maximum dollar offering that the Commission could exempt under Section 3(b) of the Securities Act. With the recent addition of general exemptive authority under Section 28 of the Securities Act, we have greater flexibility to base the exemptions on a higher dollar ceiling, the percentage of outstanding securities held in the United States, or other relevant factors.[102] A number of commenters on the 1991 proposals urged us to use any new authority to increase the permitted amount of securities offered under the proposal. They argued that $5 million was too low to make the proposed exemptions meaningful.

We are proposing not to limit the scope of the exemptions by a dollar amount because we believe limiting the exemptions to transactions with no more than five percent U.S. participation effectively eliminates the risk that the exemptions will be abused. Without a dollar limitation, however, the exemptions could result in a significant amount of securities entering the U.S. public markets and affecting a large number of investors without registration. The larger the target company, the greater the potential impact of such an offering on U.S. security holders. For these reasons, we are considering imposing a dollar limitation as well as the percentage limitation.

Q23. Should Rules 801 and 802 be limited by a dollar ceiling of $5, $10 or $20 million? Should an issuer be allowed to issue up to, for example, $5, $10 or $15 million regardless of the amount of U.S. holdings? Should the test be in the alternative, for example, $10 million or five percent U.S. holdings, whichever is higher? Or lower?

(b) Equal treatment. The terms and conditions of the offer must be the same for U.S. and foreign security holders, subject to certain exceptions similar to the Tier I exemption under the tender offer provisions.

(c) Transfer Restrictions. Proposed Rules 801 and 802 impose certain restrictions on the transferability of the securities that an acquiror may issue in exchange offers or business combinations or the equity securities that may be purchased pursuant to Rule 801 upon the exercise of the rights. We preliminarily believe that the securities that may be purchased upon the exercise of the rights should be restricted within the meaning of Rule 144.[103] This restriction will help ensure that foreign companies will not use rights offerings to create a market in the United States.

If the securities that are the subject of the transaction made pursuant to Rule 802 are ''restricted securities'' under Rule 144, then securities acquired in the transaction will be ''restricted securities.'' [104] Conversely, if the securities that are the subject of the transaction made pursuant to Rule 802 are unrestricted, then securities acquired in the transaction will be unrestricted. In the latter case, the securities would be freely tradable by non-affiliate security holders, so long as they are not participating in the offer under circumstances in which they could be deemed statutory underwriters. Particularly in the case of exchange offers, requiring unaffiliated U.S. security holders to accept restricted securities in exchange for their unrestricted securities, seems unjustified. The fact that no more than five percent of the subject company's securities may be held in the United States should minimize the potential that Rule 802 will be misused as a means to conduct distributions in the United States, and should eliminate the need to classify securities issued under Rule 802 as restricted securities.

Q24. We request comments on whether the potential for abuse, including an unregistered distribution of the acquiror's securities, should require that all securities issued under Rule 802 be deemed restricted securities

[100] *See* General Note 2 to proposed Rules 800, 801 and 802.

[101] A number of commenters on the 1991 proposals urged the Commission to adopt a higher percentage to broaden the offers that could be registered based on home country disclosure requirements. Under the current proposals, these offers would be conducted on an exempt, rather than a registered, basis. For that reason, we have determined not to propose a higher U.S. ownership threshold.

[102] *See* Note 27, *supra.*

[103] *See* General Note 9 to Proposed Rules 800–802.

[104] *See* General Note 9 to Proposed Rules 800–802.

for purposes of Rule 144 under the Securities Act.

Q25. Will making Rule 801 securities restricted impose monitoring and other procedural obligations that will deter reliance on the rule? For example, will the fact that the foreign issuer may have to establish a separate restricted American Depositary Receipt (''ADR'') facility and monitor withdrawals from that facility deter reliance on the exemption?

ii. *Additional requirements for rights offerings.* As with the 1991 proposals, Rule 801 as proposed today would be available only for rights offerings of equity securities made on a pro rata basis to existing security holders of the same class, including holders of ADRs evidencing those securities. Foreign companies generally make rights offerings only with respect to outstanding equity securities of the same class. We propose to limit Rule 801 to the offer of securities of the same class of securities as those held by the offerees, because the offerees already have made the decision to invest in that class.[105]

Proposed Rule 801 would be available only for all-cash transactions and would additionally require that the rights granted to U.S. security holders not be transferable except offshore in accordance with Regulation S.[106] The rights offering exemption being proposed today is not intended to permit foreign private issuers to extend offerings to new investors in the United States.

Q26. We request comments on whether this limitation on transferability is appropriate.

b. *Offeror eligibility requirements.* i. *Exchange offers/business combinations.* Like the 1991 proposals, Rule 802 as proposed does not contain any limitations based on the domicile or reporting status of the offeror. Any offeror can use proposed Rule 802 regardless of whether it is a U.S. company or a foreign private issuer and regardless of whether it is a reporting company. The target company, however, must be a foreign private issuer. Limiting the exemption to foreign private issuers would require a U.S. bidder for the securities of a foreign target to register the U.S. portion of an exchange offer. This would place a U.S. bidder, particularly a non-reporting U.S. company, at a competitive disadvantage to a foreign bidder for the same company.

Q27. Is it appropriate or necessary to allow U.S. companies, including reporting companies eligible to use the Form S–3 short form registration statement, to rely on the exemption? Should Rule 802 be available to a domestic company only when there is a competing bid for the target's securities?

We are considering adopting offeror eligibility requirements to address the concern that start-up companies would use Rule 802 to issue a significant amount of securities in the United States without complying with the registration requirements of the Securities Act.

Q28. Should an offeror seeking to rely on Rule 802 have to be a reporting company under Section 13(a) or 15(d) of the Exchange Act[107] at the time the exchange offer or business combination is first offered to U.S. security holders?

Q29. Should we impose a minimum reporting history, either as an Exchange Act reporting company or as a listed company on a recognized foreign securities exchange or market?

Q30. Should we require that either the target security, the security to be issued, or both, be listed on an established U.S. or foreign securities exchange and have a minimum public float such as $50 million, $100 million or $150 million? This may ensure U.S. security holders a degree of liquidity if they are unwilling to accept the consideration offered in the exchange offer or business combination and would prefer to sell the investment into the public markets.

ii. *Rights offerings.* Proposed Rule 801 requires that the offeror be a foreign private issuer. It does not impose any other issuer eligibility requirements. As originally proposed in 1991, Rule 801 contained additional offeror eligibility requirements, including that the offeror satisfy certain information and listing requirements.[108] The Commission intended those proposed offeror eligibility requirements, in part, to prevent start-up companies or insubstantial issuers from using the exemption to raise capital in the United States without complying with Securities Act registration requirements. The requirements also were intended to assure that information about the offeror would be publicly available to investors in the United States, including at a minimum, information the issuer makes public in its home country.

We believe that investor protection should be served by facilitating U.S. security holders' participation in a rights offering for securities of any foreign private issuer with which the investor is already familiar, without narrowing those offerings with additional offeror criteria. The anti-fraud and other civil liability provisions of the federal securities laws will apply and should provide protection with regard to the disclosure investors receive in such offerings.

Q31. We solicit comments on whether it is appropriate or necessary to retain any or all of the offeror eligibility requirements that the Commission originally proposed in 1991 in connection with Rule 801. If so, is it appropriate to provide for a size-of-issuer test as an alternative to requiring a three-year listing history on a designated foreign market for determining the eligibility of non-reporting issuers?

Q32. Should the alternative test be based on the offeror's public float, as previously proposed, or on its net assets, net worth, or on average daily trading volume?

Q33. Should the previously proposed minimum public float of $75 million be reduced, for instance, to $50 million, or be raised to $100 million or $150 million?

Q34. Is it appropriate or necessary to limit the exemption to reporting companies?

c. *Informational requirements.* Rules 801 and 802 would not mandate that specific information, including offering circulars, be sent to U.S. security holders. Instead, when any document, notice or other information is provided to offerers, copies (translated into English) must be provided to U.S. security holders. If, instead of delivering documents to offerees outside the United States, the offeror publishes information regarding the offering outside the United States, then the offeror may satisfy the information dissemination requirement by delivering written copies of the publication or advertisement (in English) to U.S. offerees. Because U.S. publication of the exempt offer creates the potential for stimulating a U.S. market interest in the offeree's

[105] Proposed Rule 800. As proposed, the term ''equity securities'' does not include convertible securities, warrants, rights, or options.

[106] 17 CFR 230.901 through 230.905.

[107] 15 U.S.C. 78m(a) and 79o(d).

[108] As proposed in 1991, Rule 801 would have been available to foreign private issuers filing reports with the Commission pursuant to Sections 13(a) or 15(d) of the Exchange Act which were current with respect to the filing obligations at the time of the offering. It also would have been available to foreign private issuers exempt from the requirements of Section 12(g) of the Exchange Act pursuant to Rule 12g3–2(b), if the offeror had a class of equity securities listed or quoted on at least one designated offshore securities market, was in compliance with the listing requirements applicable to those securities and, in addition, either (a) had maintained such listing or quotation continuously for 36 months immediately prior to the commencement date of the offering, or (b) had a public float in the listed securities of not less than $75 million. These same eligibility criteria applied to the proposed registration form.

securities, we are proposing to require actual delivery of the offering materials to U.S. holders in rights offerings. [109] Because it is a common practice in this country to publish exchange offers, however, we are requiring publication rather than actual delivery for transactions exempt under proposed Rule 802. Proposed Rules 801 and 802 both require that the offeror must provide the notice or offering document to U.S. security holders at the same time it provides the information to offshore offerees.

Q35. Should issuers relying on Rules 801 and 802 be required to prepare and physically deliver some form of prospectus or offering circular? In the absence of such a document, should the issuer be required to deliver its latest annual report containing audited financial statements?

To enable us to monitor the operation of the exemptions, Rules 801 and 802 as proposed also would require that an offeror submit a notification to the Commission on proposed new Form CB. The new form will include as an attachment a copy of any document, notice or other information mailed to U.S. offerees. A foreign company must contemporaneously file a Form F–X when it submits the Form CB.[110] The exemptions would also require that a legend be included in the offering document or notice stating that the offer is being conducted pursuant to home jurisdiction disclosure requirements, and that those requirements may differ from the U.S. disclosure requirements, including financial statement requirements.

Q36. Is this notification submission necessary, and, if so, should the notification, as proposed, attach a copy of any disclosure documents required to be filed or delivered pursuant to the home jurisdiction regulatory requirements?

Q37. Should bidders relying on the Tier I exemption for cash tender offers be required to include a legend on the offering materials similar to the legend proposed for rights offerings and exchange offers?

d. *Rule 802 Eligible Securities—Trust Indenture Act exemption.* We are not proposing any restrictions on the type of securities that an issuer could offer in reliance on proposed Rule 802.[111] Therefore, the rules proposed today will permit offerors to offer debt securities in an exchange offer or business combination for the subject company's equity or debt securities. The issuance of debt securities ordinarily requires qualification of an indenture under the Trust Indenture Act, unless the debt securities are exempt from the qualification requirements pursuant to Section 304 under that Act.[112]

Qualification of an indenture assures the debtholders of the services of an independent trustee having certain qualifications and lacking conflicts of interest. The Trust Indenture Act deems a qualified indenture to automatically include certain protective covenants.[113] These mandatory protective covenants give important rights to the debtholders. For example, debtholders have the right to sue individually for the payment of principal and interest.[114] Further, these provisions give certain powers to the trustee and prohibit certain actions by the trustee, including the preferential collection of certain claims owed to the trustee by the obligor in the event of default.[115] The rules under the Trust Indenture Act require the filing of a Form T–1, which is the statement of eligibility and qualification of the trustee, and the trust indenture itself.[116]

We are again proposing under Section 304(d) of the Trust Indenture Act [117] a new rule that would exempt any debt security issued pursuant to proposed Rule 802 under the Securities Act from having to comply with the provisions of the Trust Indenture Act. We believe that enforcing the statutory requirement that debt securities be issued pursuant to a qualified indenture under the Trust Indenture Act is unnecessary when 95 percent or more of the subject securities are outside the United States and many U.S. investors could lose the chance to participate in these offerings. Therefore, for the same reasons we believe it is appropriate to exempt exchange offers meeting the requirements of Rule 802 from the registration requirements of the Securities Act, we also believe that an exemption from the Trust Indenture Act is appropriate and consistent with investor protection.

The exchange of debt securities will not be integrated with any other offerings by the offeror. This means it would not affect the availability of the Trust Indenture Act exemption with regard to the issuance of other debt securities.

Q38. Is the proposed unconditional exemption from the requirements of the Trust Indenture Act for any debt security issued pursuant to Rule 802 necessary or appropriate in the public interest and consistent with investor protection and the purposes of that Act? Would it be more appropriate to exempt transactions from the procedural requirements of the Trust Indenture Act, such as filing the Form T–1, but still require that the debt securities be issued pursuant to an indenture containing some or all of the mandatory protective covenants discussed above? If so, which protective covenants should be preserved?

F. Effect of Reliance on Rule 801 or 802 on the Availability of Other Exemptions

The exemptions contemplated under proposed Rules 801 and 802 are non-exclusive.[118] An issuer making an offering in reliance on either of the proposed rules may claim any other available exemption under the Securities Act. Securities issued under Rule 801 or Rule 802 would not be integrated with any other exempt offerings by the issuer.[119] For example, security holders who are offered and sold securities in accordance with Rule 801 or Rule 802 would not be counted in the calculation of the number of purchasers in a subsequent Regulation D offering by the issuer.[120] Similarly, the amount of securities offered in the Rule 801 or Rule 802 transaction would not be included in the aggregate offering price of any subsequent Regulation D offerings by the offeror.[121] Also, information submitted to the Commission pursuant to the requirements of Rules 801 or Rule 802, or disseminated to investors under those rules would not constitute a ''general solicitation'' within the meaning of Regulation D or ''directed selling efforts'' within the meaning of Regulation S.

The proposed rules relate only to the application of Section 5 of the Securities

[109] See Proposed Rule 801(a)(4)(iii).

[110] Form F–X is used by certain non-U.S. companies to appoint an agent for service of process in the United States.

[111] This is similar to the 1991 proposals.

[112] 15 U.S.C. 77ddd.

[113] Section 318(c) of the Trust Indenture Act, 15 U.S.C. 77rrr(c). Every qualified indenture is deemed to automatically include Sections 310 through 318(a) of the Trust Indenture Act.

[114] Section 316(b) of the Trust Indenture Act, 15 U.S.C. 77ppp(b).

[115] Section 311 of the Trust Indenture Act, 15 U.S.C. 77kkk.

[116] 17 CFR 260.5a–1.

[117] 115 U.S.C. 77ddd(d). Section 304(d) gives the Commission by rule or order, the authority to exempt conditionally or unconditionally any indenture from one or more provisions of the Trust Indenture Act. The Commission may employ this exemptive authority ''if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended'' by the Trust Indenture Act.

[118] *See* General Note 5 to proposed Rules 800–802.

[119] *See* Preliminary Note 7 to Regulation D, 17 CFR 230.501 through 230.508.

[120] *See* Regulation D, 17 CFR 230.505 through 230.506.

[121] *See* Regulation D, 17 CFR 230.504 through 230.505.

Act. They have no effect on the anti-fraud or anti-manipulation provisions of the federal securities laws or provisions of state law relating to the offer and sale of securities.[122] However, the civil liability provisions that relate only to registered offerings, such as Section 11 of the Securities Act,[123] would not apply to these transactions because they would be exempt from registration.

In addition, offerings exempt under proposed Rules 801 or 802 would not trigger a continuous reporting obligation under Section 15(d) of the Exchange Act. Nor would reliance on Rules 801 or 802 disqualify the issuer from the existing Rule 12g3–2(b)[124] exemption for foreign private issuers from the registration and reporting requirements of Section 12(g) of the Exchange Act, unless the acquired company was a reporting company.

Q39. We request comment on whether a foreign private issuer should be precluded from relying on the Rule 12g3–2(b) exemption following an offering under Rule 801 or 802, given that the Rule 12g3–2(b) exemption is intended for issuers that do not access the U.S. capital markets in any significant fashion. Should the issuer become ineligible for the Rule 12g3–2(b) exemption if the Rule 801 or 802 offering exceeds $10 million or some other dollar threshold? Should the same ineligibility result if the foreign private issuer has more than 500 holders of record in the United States after the Rule 801 or 802 offering is completed?

G. Unavailability of Rules 801 and 802 and the Tender Offer Exemptions for Investment Companies

Proposed Rules 801 and 802 would not be available for securities issued by an investment company, whether foreign or domestic, that is registered or required to be registered under the Investment Company Act of 1940 (the ''Investment Company Act'').[125] We have excluded foreign investment companies from the proposed exemptions because the Investment Company Act prohibits foreign investment companies from publicly offering securities in the United States or to U.S. persons.[126] We excluded domestic investment companies because, unlike other issuers, an investment company that is registered or required to be registered under the Investment Company Act generally must register the securities that it offers or sells outside the United States.[127]

Q40. Should Rule 802 be available to a closed-end investment company that is registered under the Investment Company Act?

We believe this exclusion is appropriate for some foreign private issuers that meet the definition of ''investment company'' contained in Section 3(a) of the Investment Company Act but have not registered with the Commission under that Act. Both foreign and domestic issuers that are excepted from the definition of ''investment company'' under the Investment Company Act, however, would be permitted to use the exemptions, so long as reliance on the exemptions is consistent with their unregistered status under the Investment Company Act.[128] For example, a foreign private issuer that can offer its securities publicly in the United States in reliance on a rule, such as Rule 3a–6 under the Investment Company Act, or pursuant to an individual exemptive order under the Investment Company Act, may use Rule 801 to make a rights offering in the United States or Rule 802 to make an exchange offer or enter into a business combination in the United States.[129]

Similar to Rules 801 and 802, the Tier I and Tier II tender offer exemptions will not be available if the target company is an investment company registered or required to be registered under the Investment Company Act. The Commission has not received requests for relief in connection with a tender offer for a foreign investment company. To keep the proposed exemptions as narrow as possible to address conflicts between U.S. and foreign law, the tender offer exemptions would not extend to tender offers for foreign investment companies.

Q41. Should these exemptions be available when the target company is a foreign investment company?

H. Determination of U.S. Ownership

1. Definition of U.S. Holder

The term U.S. holder is based on shareholder residence. The term is important under both the Tier I and II exemptions. It is also important in determining the availability of the proposed Securities Act exemptions for cross-border rights offerings and exchange offers under Rules 801 and 802. Relief in each case is conditioned, at least in part, on the percentage of the target company's securities held by U.S. security holders not exceeding a specified threshold.[130] The calculation of the target company's U.S. security holders would be made at the commencement of the tender offer, rights offering or exchange offer. In the case of a business combination such as a merger where the securities are issued by the acquiring company, the calculation will be based on U.S. ownership of the company to be acquired at the commencement of the solicitation for the merger. In business combinations such as an amalgamation, where the securities are issued by a successor company to all participating companies, the calculation would be

[122] *See* General Notes 1, 3 and 4 to proposed Rules 800–802.

[123] 15 U.S.C. 77k.

[124] 17 CFR 240.12g3–2(b).

[125] 15 U.S.C. 80a–1 *et seq.* This is similar to the 1991 proposals.

[126] 15 U.S.C. 80a–7(d). Section 7(d) prohibits a foreign investment company from using U.S. jurisdictional means to offer its securities publicly, or to U.S. persons, unless the Commission issues an exemptive order permitting the company to register under the Investment Company Act. *Id.* A tender offer, exchange offer, business combination, or rights offering by a foreign investment company may constitute a public offering.

[127] *See* Offshore Offers and Sales, Securities Act Release No. 6779 (June 10, 1988) (53 FR 22661 (June 17, 1988)), at nn. 73–75 and accompanying text; Offshore Offers and Sales, Securities Act Release No. 6863 (April 24, 1990) (55 FR 18306 (May 2, 1990)), at nn. 151–53 and accompanying text. A closed-end investment company that is registered under the Investment Company Act, however, like other non-investment company issuers, may be able to issue securities abroad without registering those securities under the Securities Act. *See id.*

[128] Issuers relying on section 3(c)(1) or 3(c)(7) of the Investment Company Act (15 USC 80a–3(c)(1) and 15 U.S.C. 80a–3(c)(7)) for an exception from the definition of ''investment company'' may not offer securities publicly in the United States. Reliance on Rule 801 or 802 by these issuers thus would be inconsistent with their unregistered status under the Investment Company Act.

[129] Rule 3a–6, 17 CFR 270.3a–6, generally excepts foreign banks and insurance companies from the definition of ''investment company'' under the Investment Company Act. *See* Exception from the Definition of Investment Company for Foreign Banks and Foreign Insurance Companies, Investment Company Act Release No. 18381 (Oct. 29, 1991) [56 FR 56294] (adopting Rule 3a–6 and rescinding Rule 6c–9 under the Investment Company Act). The Rule permits these entities to sell their securities publicly in the United States without first registering as investment companies. Foreign banks and insurance companies relying on Rule 3a–6 to make a public offering of their securities in the United States, as well as certain of their holding companies and finance subsidiaries relying on Rules 3a–1 and 3a–5, respectively, generally are required by Rule 489 under the Securities Act to file a Form F–N with the Commission.

[130] In measuring the percentage of the class of securities held by U.S. holders, securities of that class underlying securities convertible into or exchangeable for securities of such class will be included in the calculation. *See* Rule 13d–3(d). Securities represented by ADRs, or other forms of depositary receipts, such as Global Depositary Receipts (''GDRs''), likewise, will be included. In calculating the percentage of outstanding securities of the class held in the United States, shares represented by ADRs will be included in both the numerator and the denominator, treating the ordinary shares held in the United States (represented by ADRs) and ordinary shares not represented by ADRs (wherever held) as a single class, as is currently the practice. American Depositary Receipts, Exchange Act Release No. 29226 (May 23, 1991) [56 FR 24420].

made as if measured immediately after completion of the business combination. In the latter situation, all participants in the business combination must be foreign private issuers.

The term U.S. holder was defined in the 1991 proposals as any person whose address appears on the records of the issuer of the subject securities, or of any voting trustee, depositary, share transfer agent, or any person acting in a similar capacity on behalf of the issuer of the subject securities, as being located in the United States.[131] The proposed definition of U.S. holder was derived from the definition of ''foreign private issuer'' under the Exchange Act.[132] The definition of U.S. holder does not turn on the residence of the beneficial owner of the securities, nor is there a requirement to identify beneficial owners in order to determine their residence.

Q42. Given the potential significance of U.S. beneficial ownership, we solicit comments on whether a beneficial holder test should be included if the bidder or issuer knows the percentage of U.S. beneficial owners or can access that information without unreasonable effort or expense. For example, should an issuer be required to determine the amount held by a foreign broker-dealer as nominee for U.S. accounts?

Several commenters asked us to clarify the definition of U.S. holder with respect to depositaries and ADR and other depositary receipt facilities. For securities registered in the name of a nominee of a depositary maintaining a book entry system, such as Cede & Co., nominee for The Depository Trust Company, the issuer or third party may rely on how the participants' names appear on the records of the depositary. This approach would be consistent with the determination of ''record holder'' under Section 12(g) of the Exchange Act.[133] An ADR, Global Depositary Receipt (''GDR'') or other depositary facility likewise will not be treated as the record holder of the ADRs.[134] Shares deposited in an ADR depositary will be presumed to be held solely by U.S. residents in determining the percentage of shares held by U.S. security holders. If the issuer receives information to the contrary from the depositary, it may rely on that information in calculating U.S. security holders.[135]

Q43. Should we treat all holders of ADRs as U.S. residents of the underlying foreign securities only when the ADR facility is unsponsored?

A number of commenters also expressed concern as to the treatment of bearer securities in determining U.S. ownership. Since a U.S. residence will not appear on the records of the issuer for the holder of bearer securities, these securities will not be treated as being held by U.S. residents, unless the offeror knows or has reason to know that these securities are held by U.S. residents.

2. Exclusion of Foreign Security Holders Holding More Than 10 Percent

We are concerned that foreign private issuers could have a significant majority of their shares held by controlling non-U.S. shareholders. As a result, U.S. holders could represent a significantly greater percentage of the company's non-affiliated public float. For example, a foreign company with an 80 percent non-U.S. shareholder could have up to 25 percent of its non-affiliated public float owned by U.S. holders and still qualify under Rules 801 and 802 if the calculation were based upon the total amount of securities outstanding. For that reason, shares held by non-U.S. holders of more that 10 percent of the class are not included in the calculation of the U.S. ownership percentage. The exclusion is limited to non-U.S. affiliates to prevent reliance on the exemptive rules when the company is controlled by a U.S. holder with, for example, 80 percent of the shares.

Q44. Would it be appropriate to exclude affiliated shares, whether held outside the United States or in the United States, from both elements of the calculation, thus focusing only on the percent of the company's total world-wide non-affiliated float held in the United States? Is 10 percent the appropriate level of ownership for excluding a holder's shares from the calculation? Should shares held by an acquiror or by the issuer's senior management also be excluded? Are foreign companies with significant U.S. ownership by affiliates as likely to exclude U.S. holders from participation in exchange and rights offerings?

3. Determination of Eligibility by Persons Other Than the Issuer

The principal disadvantage of using a U.S. ownership threshold as a condition for the applicability of the Exchange Act tender offer exemptions and the Securities Act registration exemptions for exchange offers and business combinations is that it will be difficult for third-party bidders to ascertain whether the exemption is available without information on the subject company's U.S. ownership.[136]

The 1991 proposals permitted a bidder seeking to acquire securities of a foreign subject company that is a reporting company or furnishes information to the Commission under Rule 12g3–2(b) to rely upon the disclosure contained in the target company's filings regarding the extent to which their securities are held by U.S. security holders. We proposed this approach based on other proposed rules that would have required foreign private issuers to disclose their U.S. ownership on an annual basis.[137] Further, as originally proposed, if a foreign subject company was not a reporting company under the Exchange Act and did not submit reports pursuant to Rule 12g3–2(b), an offeror or issuer could presume that the U.S. ownership did not exceed the ceiling amount, unless it had actual knowledge to the contrary. Those rules were never adopted and are not being reproposed today.

Under the current proposals, a third-party bidder in a hostile tender offer will be entitled to a presumption that the percentage threshold requirements of the Tier I, Tier II and Rule 802 exemptions are not exceeded unless:

(1) the aggregate trading volume of the subject class of securities on national securities exchanges in the United States, on the Nasdaq Stock Market or on the OTC market, as reported to the NASD, exceeds 10 percent in the case of Tier I offers, 40 percent in the case of Tier II offers, or 5 percent in the case of Rule 802, of the worldwide aggregate trading volume of that class of securities over the 12-calendar-month period prior to commencement of the offer;

[131] *See also* the Foreign Disclosure Proposing Release, *infra* Note 138, MJDS, *supra* Note 51, and Cross Border Rights Offer Release, *supra* Note 20, which used the same definition of U.S. holder.

[132] Rule 3b–4, 17 CFR 240.3b–4 (number of shareholders resident in the United States determined by looking to how a holder's address appears on the records of the issuer or depositary). *See also* Instruction A.2. to Schedule 14D–1F.

[133] *See, e.g.,* Techne Corp., SEC No-Action Letter (Sept. 20, 1988); CFAC REMIC Trust 1989–A, SEC No-Action Letter (Mar. 30, 1990). *See also* Rule 12g5–1, 17 CFR 240.12g5–1 (treating all accounts held by a particular broker-dealer, bank, or custodian as one record holder).

[134] *Cf.*, Rule 12g5–1(b), 17 CFR 240.12g5–1(b).

[135] Hostile bidders often will not be in a position to obtain residency information from a depositary transfer agent, or other persons acting on the issuer's behalf. We are proposing to provide third parties with certain presumptions based on trading volume to address this problem. *See* Section II.H.3. below.

[136] Exemptions for transactions like issuer tender offers or rights offerings do not pose this problem. An issuer can and must examine its own records and those of transfer agents and depositaries acting on its behalf to obtain the necessary information regarding U.S. ownership of its own securities.

[137] Proposed Amendment to Regulation S–K, Form 20–F, Proposed Form 40–F and Rule 12g3–2; Proposed New Forms for Furnishing Materials Pursuant to Rule 12g3–2(b), Securities Act Release No. 6898 (June 6, 1991) [56 FR 27612].

(2) the most recent annual report or other informational form filed or submitted by the issuer to securities regulators in its home jurisdiction or elsewhere (including with the Commission) indicates that U.S. holdings exceed the applicable threshold; or (3) the bidder knows or has reason to know from other sources that the level of U.S. ownership of the subject class exceeds the thresholds.[138] This presumption is not available in negotiated transactions, since the bidder in a negotiated transaction would be able to get this information from the target company.

As to whether the foreign subject company is a foreign private issuer, the bidder could rely on the exemptions if the issuer of the subject securities files reports with the Commission under the foreign integrated disclosure system [139] or has claimed an exemption from reporting under Exchange Act Rule 12g3–2(b), unless the bidder knows the foreign subject company is not a foreign private issuer.[140] Even if the above presumptions are not available, the bidder may nevertheless rely on the exemption if it can demonstrate that U.S. ownership is less than the relevant threshold.

Subsequent changes or movements in the number of shares held by U.S. security holders after the offer commences would be irrelevant to the availability of the exemptions proposed today. In addition, an issuer or a third-party bidder instituting a subsequent competing offer could use the same information as to U.S. holdings as the initial third-party bidder or issuer to calculate the percentage of securities held by U.S. security holders. An interim filing disclosing a disqualifying level of U.S. ownership in the United States would not disqualify the second offer.

Q45. Should the presumption be available in negotiated transactions? Should a bidder that has entered into a negotiated transaction with the issuer after a prior hostile bidder has commenced a tender offer be able to use the presumption?

[138] If U.S. ownership of more than 5 percent is reported in public filings with the Commissin, such as Schedule 13G, we would take the positio that the bidder has reason to know the level of U.S. ownership exceeds 5 percent.

[139] This includes Form 20–F and 6–K, which are available only to foreign private issuers. Conversely, if a foreign issuer is reporting on the Commission's forms for domestic issuers, the bidder would have reason to believe it is not a foreign private issuer.

[140] *See* General Instruction I.A.5 to Schedule 14D–1F, 17 CFR 240.14d–102.

III Cost-Benefit Analysis

U.S. residents holding stock in foreign private issuers are often excluded from tender offers [141] and rights offerings for the foreign private issuers' securities because of conflicts between U.S. and foreign regulation of these offers. As a result, U.S. security holders of foreign private issuers are unable to benefit from any premium offered in a tender offer [142] or are unable to purchase additional securities at a discount in a rights offering.

We know of numerous tender offers that have excluded U.S. security holders. For example, based on a random sample of 31 tender offers out of a total of 171 tender offer or merger proposals handled by the U.K. Takeover Panel (the entity that regulates tender offers in the U.K.) in 1997, when the U.S. ownership of the target was less than 15 percent (30 offers), bidders excluded U.S. security holders. When the U.S. ownership was significant, such as 38 percent (one offer), the bidder included U.S. security holders. Similarly, in rights offerings, foreign private issuers routinely issue cash in lieu of rights to U.S. security holders.[143]

The proposed rules and rule amendments would exempt from the tender offer and registration rules cross-border tender offers, exchange offers, rights offerings and business combinations when U.S. ownership of the foreign company is not significant (*i.e.*, 10 percent for tender offers (the ''Tier I exemption'') and five percent for exchange offers, rights offerings and business combinations). When the U.S. ownership in the foreign company exceeds 10 percent, but is not greater than 40 percent, the proposal also includes exemptions from certain of the Commission's tender offer rules (the ''Tier II exemption'').

The purpose of these exemptions is to facilitate including U.S. security holders of foreign companies in these types of transactions by removing regulatory barriers. The proposed rules and rule amendments are intended to reduce the registration requirements of cross-border transactions. We expect the exemptions to reduce the costs and burdens of extending these types of offers to U.S. security holders. U.S. security holders of foreign companies will benefit by being able to participate in these types of transactions.

Entities relying on the Tier I exemption would benefit from the proposed rules because they would not need to comply with the procedural and filing requirements of the tender offer rules. Specifically, an acquiror would not need to file Schedules 13E–4 or 14D–1. In lieu of these forms, an acquiror would submit to the Commission Form CB, which is significantly less burdensome.[144] Also, a non-U.S. acquiror would file a Form F–X contemporaneously with the Form CB.[145]

Similarly, entities relying on Rules 801 or 802 in connection with a rights offer or exchange offer would benefit from the proposed rules because they would not need to comply with the registration requirements of the federal securities laws. Specifically, an issuer would not need to file the registration forms, including Forms S–1, S–2, S–3, S–4, F–1, F–2, F–3 and F–4. Instead of these forms, an issuer would submit to the Commission Form CB and Form F–X (if the issuer is a non-U.S. entity), which, as discussed above, are significantly less burdensome.

Entities relying on the Tier I and Tier II exemptions would also benefit from the proposals because they would not need to comply with all of the procedural requirements of the Commission's tender offer rules.[146] For example, in the Tier I exemption, an acquiror would be exempt from all of the procedural requirements of the U.S. tender offer rules including those relating to the duration of the offer and withdrawal rights.

In the Tier II exemption, an acquiror would receive certain limited relief from the Commission's tender offer rules, including withdrawal rights. The Tier II exemption provides relief from the U.S. tender offer rules that are common impediments to extending offers to U.S. security holders. However, an acquiror relying on the Tier II exemption would have to comply with the remaining tender offer provisions. These provisions include, among others, the following: (1) Keeping the offer open 20

[141] The term ''tender offer'' includes both cash tender offers and exchange offers. The term ''exchange offer'' means a tender offer where securities are being issued as consideration.

[142] *See supra*, Note 24.

[143] Investors holding ADRs through Bank of New YOrk received cash in lieu of rights in 29 of the 37 rights offerings from 1994 to 1996. Investors holding ADRs through Morgan Guaranty Trust Company of New York also were frequently cashed out in rights offerings. In 1996, these investors received cash in lieu of rights in 23 of the 24 rights offers. In four of such cases, however, the proceeds were too small to distribute. Of the 23, six of the offers permitted qualified institutional buyers to participate in the rights offerings.

[144] *See* Section V., *infra*, for a description of the Form CB.

[145] Form F–X is used by certain non-U.S. entities to appoint an agent for service of process in the United States.

[146] We cannot quantify the cost savings that would result from not imposing the Commission's procedural requirements.

business days; (2) filing a Schedule 13E–4 or 14D–1, as applicable; (3) disseminating the offering documents; and (4) offering withdrawal rights until the offer goes wholly unconditional. Although complying with these additional requirements may impose additional costs to cross-border tender offers, compliance would still be less burdensome than satisfying all the U.S. tender offer requirements. Because each foreign country's laws are different, we do not know the extent to which these additional requirements may conflict with foreign law. Thus we are unable to estimate the incremental cost, if any, of complying with these requirements.

No specific data was provided in response to the Commission's original request in 1991 regarding the costs and benefits associated with the proposed amendments. We have information regarding several transactions that have excluded U.S. security holders. But since offerors do not file documents with the Commission when U.S. security holders are excluded, we do not have access to comprehensive data on the number of cross-border transactions that have excluded U.S. security holders. Further, if the transaction is a tender offer for securities that are not registered under Section 12 of the Exchange Act, and is subject only to Regulation 14E, there is no filing obligation. Therefore, we are unable to estimate the number of entities that will take advantage of the proposed exemptions. While we are unable to determine how many U.S. security holders will benefit from the proposed rules by being able to participate in cross-border tender, exchange and rights offerings, we believe that the proposed rules will benefit U.S. security holders by removing regulatory burdens to including U.S. security holders in these types of offers. To evaluate fully the benefits and costs associated with the proposed adoption of new Securities Act Rules 801 and 802, and Form CB, Trust Indenture Act Rule 4d–10, revisions to Securities Act Rule 144 and Form F–X, and revisions Exchange Act Rules 10b–13, 13e–4, 14d–1, 14e–1 and 14e–2, and Rule 30–1 of the Commission's Rules of Practice and Investigation, we request commenters to provide views and data as to the costs and benefits associated with these proposals. Specifically, we request data as to the number of entities who have excluded U.S. security holders due to conflicts between the U.S. and foreign regulation and how many entities would be eligible to take advantage of the exemptions. We ask that foreign regulators, foreign private issuers, their counsel and auditors provide views and data as to the costs and benefits associated with multijurisdictional tender offers under current law as compared to the costs and benefits under the proposed system.

Section 23(a) of the Exchange Act [147] requires us, in adopting rules under the Exchange Act, to consider the impact any rule would have on competition. We can not adopt any rule that would impose a burden on competition not necessary or appropriate in the public interest. Our preliminary view is that the proposed rules for cross-border rights offerings, exchange offers, and tender offers would not have any anticompetitive effects. In fact, we believe the proposed rules will facilitate a variety of cross border transactions, thereby enhancing the efficiency of global competition for capital. We seek information on the impact of increased competition for capital for domestic companies as a result of an increase in securities offered into the United States by foreign companies. Also, to what extent would the benefit to U.S. investors offset the cost of any such increased competition for capital? We 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 Exchange Act.

IV. Summary of Initial Regulatory Flexibility Analysis

We have prepared an Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with 5 U.S.C. 603 regarding the proposed rules. The IRFA notes that the proposed rules are intended primarily to facilitate tender and rights offerings for securities of foreign private issuers held by U.S. residents. The resulting reduction in the expense, time and effort of making such offerings will benefit U.S. security holders. These persons normally are excluded from such offerings. Entities that wish to extend these offers to U.S. security holders will also benefit. The IRFA discusses several alternatives to the proposed rules that we preliminary considered, including permitting registration of securities issued in rights offerings and exchange offers to be based on home country documents. However, as a preliminary matter, we believe that there is no less restrictive alternative to the proposed rule amendments that would serve the purpose of the tender offer and registration requirements of the federal securities laws. We did not identify alternatives to the proposed rules that are consistent with their objectives and our statutory authority. The proposed rules would not duplicate or conflict with any existing federal rule provisions.

The proposed rules are limited to tender offers and exchange offers for the securities of foreign private issuers. But both foreign and domestic bidders, whatever their size, are eligible to use these exemptions. Only foreign private issuers are eligible to use the exemption for rights offerings. Small entities could rely on the proposed tender and exchange offer exemptions on the same basis as larger entities, provided that they meet the conditions for relying on them.

We know of approximately 1,100 Exchange Act reporting companies, that are not investment companies, that currently satisfy the definition of ''small business'' under Rule 0–10. There are approximately 400 investment companies that satisfy the ''small business'' definition. We have no data to determine how many reporting or non-reporting small businesses may actually rely on the proposed rules, or may otherwise be impacted by the rule proposals. However, we believe that the proposed amendments will result in a substantial savings to entities (both small and large) that qualify for the exemptions. Qualifying entities will not have to comply with the tender offer and registration requirements of the U.S. securities laws.

The IRFA notes that the proposed amendments would eliminate certain existing reporting requirements for entities conducting an exempt tender or exchange offer. Specifically, an acquiror would not need to file Schedules 13E–4 or 14D–1. Further, in a rights or exchange offer, an acquiror would not need to register the securities being issued. In place of these filing obligations, an acquiror relying on the proposed exemptions would submit, rather than file, Form CB. Form CB is merely a cover sheet that incorporates the offering documents sent to security holders pursuant to the requirements of the country in which the issuer is incorporated. Also, a non-U.S. acquiror would file a Form F–X contemporaneously with the Form CB.[148] We believe Form CB and Form F–X are significantly less burdensome to prepare than the current reporting requirements for tender and exchange offers. In addition, we believe it takes a

[147] 15 U.S.C. 78w(a)(2).

[148] Form F–X is used by certain non-U.S. entities to appoint an agent for service of process in the United States.

lesser degree of professional skill, including that of securities lawyers and accountants, to prepare a Form CB and Form F–X than to prepare a Schedule 13E–4, 14D–1 or a registration statement. In some cases, the professional skills required would include the ability to translate from a foreign language into English. We estimate that Form CB and Form F–X would take substantially less time to prepare than Schedule 14D–1, Schedule 13E–4, or Forms S–1, S–2, S–3, S–4, F–1, F–2, F–3 and F–4.[149]

We encourage written comments on any aspect of the IRFA. We will consider any comments in preparing the Final Regulatory Flexibility Analysis if the proposed amendments are adopted. To obtain a copy of the IRFA, you may contact Laurie L. Green or Christina Chalk, in the Office of Mergers and Acquisitions, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549, at (202) 942–2920.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, we are also requesting information regarding the potential impact of the proposed rule on the economy on an annual basis. Commenters should provide empirical data to support their views.

V. Paperwork Reduction Act

Some provisions of the proposed rules and rule amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (the ''Act'') (44 U.S.C. 3501 *et seq.*). We have submitted our proposed revisions to the information collections required by these provisions to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(a) and 5 CFR 1320.11. The title for the collection of information is ''Form CB'' and revised ''Form F–X''.

The proposed rules and rule amendments would exempt from the tender offer and registration rules cross-border tender offers, exchange offers, rights offerings and business combinations when U.S. ownership of the foreign company is not significant. The purpose of these exemptions is to facilitate including U.S. security holders of foreign companies in these types of transactions. The proposed rules and rule amendments are intended to reduce the regulations applicable to some cross-border transactions and therefore, are expected to reduce the existing collection of information requirements. The proposed amendments would eliminate certain existing reporting requirements for entities, including small entities, conducting an exempt tender or exchange offer. Specifically, an acquiror would not need to comply with Schedules 13E–4 or 14D–1. Further, in an exchange or rights offer, an acquiror would not need to file a registration statement registering the securities being issued.

Proposed Rule 14d–1(c)(2)(i) requires bidders to disseminate any informational documents to U.S. holders in English. This may require some bidders to translate documents and thus imposes a burden.

Proposed Rules 801(c)(4)(i) and 802(c)(3)(i) under the Securities Act and Rules 13e–4(h)(8)(2)(i), 14d–1(c)(2)(i) and 14e–2(d)(1) require that an entity conducting an exempt tender or rights offer in connection with a cross-border transaction pursuant to the proposed exemptions file Form CB. The collection of information would be necessary so that we can determine whether the transaction meets the eligibility requirements of the proposed exemptive rules. We also have to collect information to ensure that information about the transaction would be publicly available. Security holders would thus have the opportunity to make informed investment decisions, particularly since the transactions relate to potential changes in control.

Form CB is a cover sheet that incorporates the offering documents sent to security holders pursuant to the requirements of the country in which the issuer is incorporated. Form CB also requires disclosure of the identity of the entity conducting the tender or rights offer. Form CB must be submitted to the Commission on the business day following the date the offering documents are sent to security holders in the home jurisdiction.

Proposed Form CB also requires that a non-U.S. entity must file a consent to service of process on Form F–X. Form F–X is used by certain non-U.S. entities to appoint an agent for service of process in the United States. The proposed revisions to Form F–X would add non-U.S. entities submitting a Form CB to the list of entities currently required to file Form F–X. This collection of information is necessary to provide investors with information concerning the U.S. person designated as agent for service of process.

For the tender and exchange offer exemptions, domestic and foreign entities wishing to engage in cross-border transactions will likely be the respondents to the collection of information requirement. Also, the company that is the target of the tender offer will be required to respond to the collection of information requirements. With respect to rights offerings, the likely respondents would be foreign private issuers conducting rights offerings. We have no data to help us determine how many entities may actually rely on the proposed exemptions, since relying on the exemptions is voluntary. We estimate that 824 Forms CB would be filed each year if the proposals were adopted.[150] We estimate that it would impose an estimated burden of 2 hours[151] for a total burden of 1648 hours. We estimate that half of the entities submitting Form CB would be foreign entities that would be required to file Forms F–X (412) each year if the proposals were adopted. Form F–X currently is estimated to impose an estimated burden of 2 hours for a total burden of 824 hours.

The Commission believes that Forms CB and F–X would be significantly less burdensome to prepare than the current reporting requirements for tender and exchange offers. As discussed above, it is estimated that Forms CB and F–X would impose an estimated burden of two hours per Form. This contrasts with Schedule 14D–1 which has an estimated burden of 354 hours per form, Schedule 13E–4 which has an estimated burden of burden of 232 hours per form, and Forms S–1, S–2, S–3, S–4, F–1, F–2, F–3 and F–4 which have an estimated burden of 1,239, 470, 397, 1,233, 1,868, 1,397, 166, and 1,308 hours per form, respectively.

A bidder or issuer must respond to the described information collections in order to rely on the proposed exemptions. The information will not be kept confidential. Unless a currently valid OMB control number is displayed, an agency may not sponsor, conduct or require response to an information collection.

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

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

[149] *See* Section V, *infra*.

[150] In 1997 there were 1,648 cross-border mergers and acquisitions. *See supra*, Note 23. We assume half those transactions would be eligible for the Tier I exemption and/or Rules 801 and 802 if extended to U.S. holders. Based on these assumptions, we estimate that Form CB will be filed 824 times.

[151] Since Form CB is substantially similar to Schedules 14D–1F and 13E–4F (the forms prescribed under the MJDS), the estimated burden hours is the same as the amount determined for those forms. This calculation does not include the potential time needed to translate the document into English.

(2) On the accuracy of the Commission's estimate of the burden of the proposed collection of information;

(3) On the quality, utility and clarity of the information to be collected; and

(4) whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

If you would like to submit comments on the collection of information requirements, please 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, DC 20503, with reference to File No. S7–29–98. The OMB must make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VI. 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 comments on the usefulness of the proposals to foreign private issuers, foreign private issuers who are reporting companies with the Commission, registrants and the marketplace at large. 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 comments on whether the proposals would promote efficiency, competition, and capital formation.

Please send three copies of your comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 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. S7–29–98; 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, NW, Washington, DC. We will post electronically submitted comments on our Internet Web site (http://www.sec.gov).

VII. Statutory Basis of Proposals

We are proposing these revisions pursuant to Sections 3(b), 7, 8, 10, 19 and 28 of the Securities Act, Sections 12, 13, 14, 23 and 36 of the Exchange Act, and Section 304 of the Trust Indenture Act.

List of Subjects

17 CFR Part 200

Authority delegations (Government agencies).

17 CFR Parts 230, 239, 240, 249, and 260

Reporting and recordkeeping requirements, Securities.

Text of Proposals

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

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

1. The authority citation for Part 200 continues to read in part as follows:

Authority: 15 U.S.C. 77s, 78d–1, 78d–2, 78w, 78*ll*(d), 78mm, 79t, 77sss, 80a–37, 80b–11, unless otherwise noted.

* * * * *

2. By amending § 200.30–1 by adding paragraph (e)(16) to read as follows:

§ 200.30–1 Delegation of authority to Director of Division of Corporation Finance.

* * * * *

(e) * * *

(16) To grant exemptions from:

(i) Tender offer provisions of Sections 13(e) and 14(d)(1) through 14(d)(7) of the Exchange Act (15 U.S.C. 78m(e) and 78n(d)(1) through 78n(d)(7)), Rule 13e–3 (§ 240.13e–3 of this chapter) and Rule 13e–4 (§ 240.13e–4 of this chapter), Regulation 14D (§§ 240.14d–1 through 240.14d–10 of this chapter) and Schedules 13E–3, 13E–4, 14D–1, 14D–9 (§§ 240.13e–100, 240.13e–101, 240.14d–100 and 240.14d–101 of this chapter) thereunder, pursuant to Sections 14(d)(5) and 14(d)(8)(C) of the Exchange Act (15 U.S.C. 78n(d)(5) and 78(d)(8)(C)), and Rule 14d–10(e) (§ 240.14d–10(e) of this chapter); and

(ii) The tender offer provisions of Rule 14e–1 and 14e–2 of Regulation 14E (§ 240.14e–1 and 240.14e–2 of this chapter) pursuant to Section 36(a) of the Exchange Act (15 U.S.C. 78mm(a)).

* * * * *

3. By amending § 200.30–3 to add paragraph (a)(65) to read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Market Regulation.

* * * * *

(a) * * *

(65) Pursuant to Section 36(a) of the Act, 15 U.S.C. 78mm(a), to grant exemptions from the tender offer provisions of Rule 14e–1 of Regulation 14E (§ 240.14e–1 of this chapter).

* * * * *

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

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

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77r, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–24, 80a–28, 80–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

5. By amending § 230.144 to add paragraphs (a)(3)(vi) and (vii) to read as follows:

§ 230.144 Persons deemed not to be engaged in a distribution and therefore not underwriters.

* * * * *

(a) * * *

(3) * * *

(vi) Securities acquired in a transaction made in compliance with § 230.801; or

(vii) Securities acquired in a transaction made in compliance with § 230.802 if the securities that are tendered or surrendered in the § 230.802 transaction are ''restricted securities'' within the meaning of this § 230.144(a)(3).

* * * * *

6. By adding §§ 230.800 through 230.802 and an undesignated center heading to read as follows:

Exemptions for Cross-Border Rights Offerings, Exchange Offerings, and Business Combinations

GENERAL NOTES TO §§ 230.800, 230.801 AND 230.802

1. Sections 230.801 and 230.802 relate only to the applicability of the Act (15 U.S.C. 77e) and not to the applicability of the anti-fraud, civil liability or other provisions of the federal securities laws.

2. The exemptions provided by § 230.801 and § 230.802 are not available for any securities transaction or series of transactions that technically complies with § 230.801 and § 230.802 but are part of a plan or scheme to evade the registration provisions of the Act. In those cases, the issuer must register the offer and sale of the securities.

3. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (15 U.S.C.

78a *et seq.*) and any other applicable provisions of the federal securities laws.

4. An issuer who relies on § 230.801 or an offeror who relies on § 230.802 must still comply with any applicable state laws relating to the offer and sale of securities.

5. Attempted compliance with § 230.801 or § 230.802 does not act as an exclusive election; an issuer making an offer or sale of securities in reliance on § 230.801 or § 230.802 may also rely on any other applicable exemption from the registration requirements of the Act.

6. Section 230.801 and § 230.802 provide exemptions only for the issuer of the securities and not for any affiliate of that issuer or for any other person for resales of the issuer's securities. These sections provide exemptions only for the transaction in which the issuer or other person offers or sells the securities, not for the securities themselves. Securities acquired in a § 230.801 or § 230.802 transaction may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. Section 230.801 does not apply to a rights offering by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*). Section 230.802 does not apply to exchange offers or business combinations by an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*).

8. Unregistered offers and sales made outside the United States will not affect contemporaneous offers and sales made in compliance with § 230.801 or § 230.802. A transaction that complies with § 230.801 or § 230.802 will not be integrated with offerings exempt under other provisions of the Act, even if both transactions occur at the same time.

9. Securities acquired in a rights offering under § 230.801 are ''restricted securities'' within the meaning of § 230.144(a)(3). If the securities that are the subject of the exchange offer or business combination are restricted securities, securities issued in a transaction under § 230.802 are also restricted securities.

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

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

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

Commencement. *Commencement* means the same as in § 240.14d–2(a) of this chapter.

Equity security. *Equity security* means the same as in § 240.3a11–1 of this chapter, but does not include:

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

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

(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.

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

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

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

Home jurisdiction. *Home jurisdiction* means both the jurisdiction of the issuer's incorporation, organization or chartering and the principal foreign market where the foreign private issuer's securities are listed or quoted.

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.

U.S. holder. *U.S. holder* means any person whose address appears on the records of the issuer of the subject securities, or any voting trustee, depositary, share transfer agent, or any person acting in a similar capacity as being located in the United States. Unless information provided by the depositary demonstrates otherwise, holders of American Depositary Receipts shall be counted as U.S. holders of the underlying securities for the purposes of this section.

§ 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), provided that 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 five percent of the outstanding class of securities that is the subject of the rights offering on the date the securities are first offered to U.S. holders. For purposes of calculating the percentage of outstanding securities held by U.S. holders, exclude from the total number of shares outstanding shares held by non-U.S. persons who hold more than 10 percent of the subject securities.

(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.

(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 provide that informational document to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination.

(ii) The issuer must disseminate by mail any informational document to U.S. holders, in English, that is published or provided to security holders in the issuer's home jurisdiction.

(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.

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

(b) **Legends.** The following legend is included on the cover page 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 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.** (i) U.S. holders of the foreign target company must hold no more than five percent of the securities that are the subject of the transaction as of the commencement of the exchange offer or solicitation for a business combination.

(ii) In the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders will hold no more than five percent of the class of securities of the successor registrant, as if measured immediately after completion of the business combination.

(iii) For purposes of calculating the percentage of outstanding securities held by U.S. holders, exclude from the total number of shares outstanding shares held by non-U.S. persons who hold more than 10 percent of the subject securities.

(2) **Equal treatment.** The issuer 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; provided:

(i) **Blue sky registration.** If a U.S. state or jurisdiction requires registration or qualification of the offer or sale of securities in connection with the exchange offer or business combination, and the issuer does not so register or qualify the offer and sale, the issuer may offer security holders in such state or jurisdiction a cash alternative. If the issuer does not include a cash-only alternative in any other jurisdiction, it need not extend the offer in any state or jurisdiction that requires registration or qualification.

(ii) **Disparate tax treatment.** If the issuer offers ''loan notes'' to offer sellers tax advantages not available in the United States and these notes are not listed on any organized securities market or registered under the Securities Act, the loan notes need not be offered to U.S. holders.

(3) **Informational documents.** (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the securities in connection with the exchange offer or business combination, the issuer must provide that informational document to the Commission on Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination.

(ii) The issuer must disseminate any informational document to U.S. holders, in English, on a comparable basis as provided to security holders in the issuer's home jurisdiction.

(iii) If the issuer disseminates solely 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.

(b) **Legends.** The following legend must be included on the cover page of any informational document the issuer 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 pursuant to the exchange offer, such as open market or privately negotiated purchases.

(c) For exchange offers conducted by third parties without the cooperation of 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 five percent or less of the outstanding subject securities, unless:

(1) The aggregate trading volume of the subject class on national securities exchanges in the United States, on the Nasdaq market or on the OTC market, as reported to the NASD, exceeds five percent of the worldwide aggregate trading volume of the subject securities over the 12-calendar-month period before commencement of the offer (or if commenced in response to a prior offer, over the 12-calendar-month period prior to the commencement of the initial offer);

(2) 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 indicates that U.S. holders hold more than five percent of the outstanding subject class of securities; or

(3) The offeror knows, or has reason to know, that U.S. ownership exceeds five percent of such securities.

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

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

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77sss, 78c, 78*l*, 78m, 78n, 78o(d), 78u–5, 78w(a), 78*ll*(d), 79e, 79f, 79g, 79j, 79*l*, 79m, 79n, 79q, 79t, 80a–8, 80a–24, 80a–29, 80a–30 and 80a–37, unless otherwise noted.

* * * * *

8. By amending Form F–X (referenced in § 239.42) General Instruction 1 to add paragraph (g) and to revise Item II.F(b) to read as follows:

[**Note:** Form F–X does not and this amendment will not appear in the Code of Federal Regulations.]

Form F–X

General Instructions

1. Form F–X shall be filed with the Commission:

* * * * *

(g) by any non-U.S. issuer providing Form CB to the Commission in connection with a tender offer, rights offering or business combination.

* * * * *

II. * * *

F. * * *

(b) the use of Form F–8, Form F–80 or Form CB stipulates and agrees to appoint a successor agent for service of process and file an amended Form F–X if the Filer discharges the Agent or the Agent is unwilling or unable to accept service on behalf of the Filer;

* * * * *

9. By adding § 239.800 and Form CB to read as follows:

§ 239.800 Form CB, report of sales of securities in connection with an exchange offer or a rights offering.

This Form shall be used to report sales of securities in connection with a rights offering in reliance upon § 230.801 of this chapter and to report sales of securities in connection with an exchange offer or business combination in reliance upon § 230.802 of this chapter.

[**Note:** Form CB does not appear in the Code of Federal Regulations. Form CB is attached as Appendix A.]

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

10. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d 78f, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*(d), 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

11. By amending § 240.10b–13 to redesignate paragraph (d) as paragraph (f) and to add new paragraphs (d) and (e) to read as follows:

§ 240.10b–13 Prohibiting other purchases during tender offer or exchange offer.

* * * * *

(d) The provisions of this section shall not apply to the purchase, or arrangement to purchase, of a security of the same class as that which is the subject of a cash tender offer or exchange offer (or of any other security which is immediately convertible into or exchangeable for such security) if the following conditions are satisfied:

(1) The cash tender offer or exchange offer is exempt under § 240.13e–4(h)(8) or § 240.14d–1(c);

(2) The offering documents furnished to U.S. holders prominently disclose the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases;

(3) The bidder discloses information in the United States about any such purchases in a manner comparable to the disclosure made in the home jurisdiction, as defined in § 240.13e–4(i)(3); and

(4) The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.

(e) The provisions of this section shall not apply to the purchase, or arrangement to purchase, of a security of the same class as that which is the subject of a cash tender offer or exchange offer (or of any other security which is immediately convertible into or exchangeable for such security) if the following conditions are satisfied:

(1) The issuer of the subject security is a foreign private issuer, as defined in § 240.3b–4(c);

(2) The offer is subject to the United Kingdom's City Code on Takeovers and Mergers;

(3) The purchase or arrangement to purchase is effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the United Kingdom's City Code on Takeovers and Mergers;

(4) The connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the United Kingdom's City Code on Takeovers and Mergers; and

(5) The offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and describe how U.S. security holders can obtain, upon request, information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom.

* * * * *

12. By amending § 240.13e–3 to add paragraph (g)(6) to read as follows:

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

* * * * *

(g) *Exceptions.* * * *

* * * * *

(6) Any tender offer or business combination made in compliance with § 230.802 of this chapter, § 240.13e–4(h) or § 240.14d–1(c).

13. By amending § 240.13e–4 to redesignate paragraph (h)(8) as (h)(9) and to add new paragraphs (h)(8) and (i) to read as follows:

§ 240.13e–4 Tender offers by issuers.

* * * * *

(h) * * *

(8) **Cross-border tender offers.** Any issuer tender offer (including any exchange offer) by a foreign private issuer, if 10 percent or less of the outstanding class of securities that is the subject of the tender offer are held of record by U.S. holders and the following additional conditions are satisfied. For purposes of calculating the percentage of outstanding securities held by U.S. holders, exclude from the total number of shares outstanding shares held by non-U.S. persons who hold more than 10 percent of the subject securities:

(i) The issuer must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the offer, however:

(A) **Registered exchange offers.** If the issuer offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and a cash-only alternative, the issuer must offer only the cash alternative to security holders in any state or jurisdiction that prohibits the offer and sale of the securities after the issuer has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction. If the issuer does not include a cash-only alternative in any other jurisdiction, the issuer need not extend the offer to security holders in those states or jurisdictions that prohibits the offer and sale of the securities.

(B) **Exempt exchange offers.** If the issuer offers securities exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and a cash-only alternative, the issuer must offer only the cash alternative to security holders in any state in which the statutes or regulations do not provide a corresponding exemption from registration or qualification. When a cash-only alternative is not offered to security holders in any other state or jurisdiction, the issuer need not extend the offer to security holders in those states or jurisdictions that require registration or qualification.

(C) **Disparate tax treatment.** If the issuer offers ''loan notes'' solely to offer sellers tax advantages not available in the United States and these notes are not listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders.

(ii) **Dissemination and filing.** (A) If the issuer publishes or otherwise disseminates an informational document, the issuer must provide that informational document to the Commission on Form CB (§ 249.480 of this chapter). Form CB must be provided to the Commission no later than the next business day after publication or dissemination.

(B) The issuer must disseminate any informational document to U.S. holders, in English, on a comparable basis as provided to security holders in the home jurisdiction.

(C) If the issuer disseminates solely 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.

(iii) For purposes of this paragraph (h)(8):

(A) The issuer must include securities underlying American Depositary Shares that are exchangeable or convertible for such securities in determining the amount of securities outstanding of the class that is the subject of the offer, as well as, the percentage of the subject class of securities held of record by U.S. holders.

(B) If an issuer submits Form CB (§ 249.480 of this chapter) during an ongoing tender or exchange offer for securities of the class subject to the offer, the issuer must calculate the percentage of the class held by U.S.

holders as of the same date used by the initial offeror.

(C) *Home jurisdiction* means both the jurisdiction of the issuer's incorporation, organization or chartering and the principal foreign market where the issuer's securities are listed or quoted.

(D) *U.S. holder* means any person whose address appears on the records of the issuer of the subject securities, or any voting trustee, depositary, share transfer agent, or any person acting in a similar capacity as being located in the United States. Unless information provided by the depositary demonstrates otherwise, holders of American Depositary Receipts shall be counted as U.S. holders of the underlying securities for the purposes of this section.

(iv) An investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) may not use this paragraph (h)(8).

* * * * *

(i) **Cross-border tender offers.** Any issuer tender offer that meets the conditions in paragraph (i)(1) of this section shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section:

(1) **Conditions.** (i) The issuer is a foreign private issuer as defined in § 240.3b-4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*);

(ii) U.S. security holders do not hold of record more than 40 percent of the class of securities sought in the offer. For purposes of calculating the percentage of outstanding securities held by U.S. holders, exclude from the total number of shares outstanding shares held by non-U.S. affiliates who hold more than 10 percent of the subject securities; and

(iii) The issuer complies with all applicable U.S. tender offer laws and regulations, other than those for which an exemption has been provided in paragraph (i)(2) of this section.

(2) **Exemptions.** (i) **Withdrawal rights.** Any issuer tender offer meeting the conditions of paragraph (i)(1) of this section is exempt from the provisions of paragraph (f)(2) of this section. Withdrawal rights may terminate before the expiration of the offer if the offer is for all shares and, if:

(A) All conditions to the offer have been satisfied or waived before the termination of withdrawal rights; except that, if it is impracticable to determine whether the minimum condition to the offer has been met at the expiration of the offer because of the home jurisdiction practice of tendering to multiple depositaries, the issuer may terminate withdrawal rights while determining whether the minimum condition has been satisfied. If the issuer determines that the minimum condition has not been satisfied and extends the offer instead of returning the tendered shares, withdrawal rights must be extended during that additional offering period;

(B) All minimum time periods required by this section and § 240.14e-1 through § 240.14e-7 (Regulation 14E) have been satisfied;

(C) The issuer extends withdrawal rights during all minimum time periods required by this section and § 240.14e-1 through § 240.14e-7 (Regulation 14E);

(D) When withdrawal rights terminate, the issuer immediately accepts and promptly pays for all securities previously tendered upon termination of withdrawal rights; and

(E) The issuer immediately accepts and promptly pays for all securities tendered after the termination of withdrawal rights.

(ii) **Equal treatment—loan notes.** If the issuer offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are not listed on any organized securities market nor registered under the Securities Act (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding paragraphs (f)(8) and (h)(9) of this section.

(iii) **Equal treatment—separate U.S. and foreign offers.** Notwithstanding the provisions of paragraphs (f)(8) and (h)(9) of this section, an issuer conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into two offers: one offer made only to U.S. holders and another offer made only to non-U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer.

(3) For purposes of this paragraph (i):

(i) The issuer must include securities underlying American Depositary Shares that are exchangeable or convertible for such securities in determining the amount of securities outstanding of the class that is the subject of the offer, as well as, the percentage of the subject class of securities held of record by U.S. holders.

(ii) If an issuer commences an issuer tender offer during an ongoing tender or exchange offer for securities of the same class subject to the offer, the issuer must calculate the percentage of the class held by U.S. holders as of the same date used by the initial offeror.

(iii) *Home jurisdiction* means both the jurisdiction of the issuer's incorporation, organization or chartering and the principal foreign market where the issuer's securities are listed or quoted.

(iv) *U.S. holder* means any person whose address appears on the records of the issuer of the subject securities, or any voting trustee, depositary, share transfer agent, or any person acting in a similar capacity as being located in the United States. Unless information provided by the depositary demonstrates otherwise, holders of American Depositary Receipts shall be counted as U.S. holders of the underlying securities for the purposes of this section.

14. By amending § 240.14d-1 to redesignate paragraphs (c), (d), (e), and (f) as paragraphs (e), (f), (g) and (h), and to add new paragraphs (c) and (d) and Notes thereto to read as follows:

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

* * * * *

(c) Any tender offer for the securities of a foreign private issuer as defined in § 240.3b-4 shall be exempt from the requirements of Sections 14(d)(1) through 14(d)(7) of the Act (15 U.S.C. 78n(d)(1) through 78n(d)(7)), Regulation 14D (§ 240.14d-1 through § 240.14d-10) and Schedules 14D–1 (§ 240.14d-100) and 14D–9 (§ 240.14d-101) thereunder, and § 240.14e-1 and § 240.14e-2 of Regulation 14E under the Act, if U.S. holders own of record 10 percent or less of the outstanding class of securities that is the subject of the tender offer and the following additional conditions are satisfied. For purposes of calculating the percentage of outstanding securities held by U.S. holders, exclude from the total number of shares outstanding shares held by non-U.S. persons who hold more than 10 percent of the subject securities.

(1) **Equal treatment.** The bidder must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer, however:

(i) **Registered exchange offers.** If the bidder offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and a cash-only alternative, the bidder must offer only the cash alternative to security holders in any state or jurisdiction that prohibits the sale of securities after the bidder has made a good faith effort to register or qualify the offer and sale of securities in

that state or jurisdiction. When a cash-only alternative is not offered to security holders in any other jurisdiction, the issuer need not extend the offer to security holders in those states or jurisdictions that prohibit the offer and sale of the securities.

(ii) **Exempt exchange offers.** If the bidder offers securities exempt from registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and a cash-only alternative, the bidder must offer only the cash alternative to security holders in any state or jurisdiction in which the statutes or regulations do not provide a corresponding exemption from registration or qualification. When a cash-only alternative is not offered to security holders in any other jurisdiction, the bidder need not extend the offer to security holders in those states or jurisdictions that require registration or qualification.

(iii) **Disparate tax treatment.** If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are not listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding § 240.14d-10.

(2) **Informational documents.** (i) The bidder shall disseminate any informational document to U.S. holders, in English, on a comparable basis as provided to security holders in the home jurisdiction.

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

(iii) In the case of tender offers for securities described in Section 14(d)(1) of the Act (15 U.S.C. 78n(d)(1)), the bidder shall furnish to the Commission on Form CB (§ 249.480 of this chapter) any informational document it publishes or otherwise disseminates to holders of the outstanding class of securities. The bidder shall provide the Form CB to the Commission no later than the next business day after publication or dissemination.

(3) **Investment companies.** The issuer of the securities that are the subject of the tender offer is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*).

(d) A person conducting a tender offer that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section:

(1) **Conditions.** (i) The subject company is a foreign private issuer as defined in § 2403b–4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*);

(ii) U.S. security holders do not hold of record more than 40 percent of the class of securities sought in the offer. For purposes of calculating the percentage of outstanding securities held by U.S. holders, exclude from the total number of shares outstanding shares held by non-U.S. persons who hold more than 10 percent of the subject securities; and

(iii) The bidder complies with all applicable U.S. tender offer laws and regulations, other than those pursuant to which an exemption has been provided for in paragraph (d)(2) of this section.

(2) **Exemptions—**(i) **Withdrawal rights.** Notwithstanding the provisions of Section 14(d)(5) of the Act (15 U.S. C 78n(d)(5)) and § 240.14d–7, a bidder in a tender offer meeting the conditions of paragraph (d)(1) of this section may terminate withdrawal rights before the expiration of the offer, if the offer is for all outstanding shares and:

(A) All conditions to the offer are satisfied or waived before withdrawal rights terminate; except that, if it is impracticable to determine whether the minimum condition to the offer has been met at the expiration of the offer due to the home jurisdiction practice of tendering to multiple depositaries, the bidder may terminate withdrawal rights while determining whether the minimum condition has been satisfied. If the bidder determines that the minimum condition is not satisfied and extends the offer instead of returning the tendered shares, withdrawal rights must be extended during such additional offering period;

(B) All minimum time periods required by § 240.14d–1 through

§ 240.14d–10 (Regulation 14D) and § 240.14e–1 through § 240.14e–7 (Regulation 14E) are satisfied;

(C) The bidder extends withdrawal rights during all minimum time periods required by Regulation 14D and Regulation 14E;

(D) All securities previously tendered are immediately accepted and promptly paid for upon termination of withdrawal rights; and

(E) All securities tendered after the termination of withdrawal rights are immediately accepted and promptly paid for.

(ii) **Equal treatment—loan notes.** If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are not listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding § 240.14d–10.

(iii) **Equal treatment—separate U.S. and foreign offers.** Notwithstanding the provisions of § 240.14d–10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into two offers: one offer made only to U.S. holders and another offer made only to non-U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers.

(iv) **Commencement**. A public announcement of a tender offer meeting the conditions of paragraph (d)(1) of this section will not trigger the commencement requirements under § 240.14d–2(b), if:

(A) The announcement is required by home jurisdiction law or practice;

(B) The announcement contains no information beyond the requirements of the home jurisdiction law or practice;

(C) The announcement, when disseminated in written form in the United States, contains a legend noting that the offer will not commence until the informational documents are mailed to shareholders, which mailing may not occur until permitted by the home jurisdiction; and

(D) The bidder mails the informational documents within 30 days after the announcement or makes a public announcement if it decides not to commence an offer.

Note to Paragraph (d)(2)(iv). If the tender offer meets these conditions, the tender offer will commence only upon mailing or publishing the offer. Further, the Schedule 14D–1 need not be filed with the Commission pursuant to § 240.14d–3 until the offer is mailed or published. In addition, making an announcement meeting these conditions would not constitute a solicitation or recommendation with respect to the offer within the meaning of § 240.14d–9.

(v) **Notice of extensions.** Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(d).

(vi) **Prompt payment.** Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e–1(c).

General Notes to paragraphs (c) and paragraphs (d):

1. If a bidder believes it requires exemptive relief beyond that provided for in Section

14d–1(d)(2), the bidder should submit a written application requesting relief along with an analysis of the basis for such relief. The bidder should submit the application to the Director of the Division of Corporation Finance.

2. The bidder should 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 target securities outstanding, as well as the number held of record by U.S. holders.

3. *Home jurisdiction* means both the jurisdiction of the target company's incorporation, organization or chartering and the principal foreign market where the target company's securities are listed or quoted.

4. *U.S. holder* means any person whose address appears on the records of the issuer of the subject securities, or any voting trustee, depositary, share transfer agent, or any person acting in a similar capacity as being located in the United States. Unless information provided by the depositary demonstrates otherwise, holders of American Depositary Receipts shall be counted as U.S. holders of the underlying securities for the purposes of §§ 240.14d–1(c) and (d).

5. For purposes of § 240.14d–1(c), with respect to a tender offer conducted without the cooperation of 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 such outstanding securities, unless:

(a) The aggregate trading volume of that class of securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market, as reported to the NASD, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the 12 calendar month period prior to commencement of the offer;

(b) 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 indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(c) The bidder knows or has reason to know that the level of U.S. ownership exceeds 10 percent of such securities.

6. For purposes of § 240.14d–1(d), with respect to a tender offer conducted without the cooperation of 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 40 percent or less of the outstanding securities, unless:

(a) The aggregate trading volume of that class of securities on all national securities exchanges in the United States and on the Nasdaq market exceeds 40 percent of the worldwide aggregate trading volume of that class of securities over the 12 calendar month period prior to commencement of the offer;

(b) The most recent annual report or annual information filed or submitted by the target company with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 40 percent of the outstanding subject class of securities; or

(c) The bidder knows, or has reason to know, that the level of U.S. ownership exceeds 40 percent of such securities.

7. If a bidder commences a tender offer during an ongoing tender or exchange offer for securities of the same class subject to its offer, the bidder should calculate the percentage of target securities held by U.S. holders as of the same date used by the initial bidder.

15. By amending § 240.14e–2 to add paragraph (d) to read as follows:

§ 240.14e–2 Position of subject company with respect to a tender offer.

* * * * *

(d) **Exemption for cross-border tender offers.** Any issuer of a class of securities that is the subject of a tender offer conducted in reliance upon and in conformity with § 240.14d–1(c), or any other person subject to § 240.14d–9, shall be exempt from §§ 240.14e–2 and 240.14d–9 if:

(1) The issuer, or any other person subject to § 240.14d–9, furnishes to the Commission on Form CB (§ 249.480 of this chapter) the entire informational document it publishes or otherwise disseminates to holders of the class of securities in connection with the tender offer no later than the next business day after publication or dissemination;

(2) The issuer, or any other person subject to § 240.14d–9, disseminates any informational document to U.S. holders, in English, on a comparable basis as provided to security holders in the issuer's home jurisdiction; and

(3) If the issuer, or any other person subject to § 240.14d–9, disseminates solely by publication in its home jurisdiction, such person shall publish the information in the United States in a manner reasonably calculated to inform U.S. security holders of the offer.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

16. The authority citation for Part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted;

* * * * *

17. By adding Subpart E, § 249.480 and Form CB to read as follows:

Subpart E—Forms for Statements Made in Connection with Exempt Tender Offers

§ 249.480 Form CB, tender offer statement in connection with a tender offer for a foreign private issuer.

This form shall be used to report an issuer tender offer conducted in compliance with § 240.13e–4(h)(8) of this chapter and a third-party tender offer conducted in compliance with § 240.14d–1(c) of this chapter. This report shall also be used by a target company pursuant to § 240.14e–2(d)(1) of this chapter.

[Note: Form CB does not appear in the Code of Federal Regulations. Form CB is attached as Appendix A.]

PART 260—GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

18. The authority citation for Part 260 continues to read as follows:

Authority: 15 U.S.C. 77eee, 77ggg, 77nnn, 77sss, 78*ll*(d), 80b–3, 80b–4, and 80b–11.

19. By adding § 260.4d–10 to read as follows:

§ 260.4d–10 Exemption for securities issued pursuant to § 230.802 of this chapter.

Any debt security, whether or not issued under an indenture, shall be exempt from the operation of the Act if made in compliance with § 230.802 of this chapter.

Dated: November 13, 1998.

By the Commission.

Jonathan G. Katz,

Secretary.

Appendix A

Note: Form CB does not appear in the Code of Federal Regulations.

FORM CB

OMB APPROVAL

OMB Number: xxxx–xxxx
Expires: Approval Pending
Estimated average burdens hours per response: 2.0

U.S. Securities and Exchange Commission

Washington, D.C. 20549

Form CB

TENDER OFFER/RIGHTS OFFERING NOTIFICATION FORM

(AMENDMENT NO. _____)

Please place an X in the box(es) to designate the appropriate rule provision(s) relied upon to file this Form:

Securities Act Rule 801 (Rights Offering) ☐
Securities Act Rule 802 (Exchange Offer) ☐
Exchange Act Rule 13e–4(h)(8) (Issuer Tender Offer) ☐
Exchange Act Rule 14d–1(c) (Third Party Tender Offer) ☐
Exchange Act Rule 14e–2(d)(1) (Target Response) ☐

_____
(Name of Subject Company)

_____
(Translation of Subject Company's Name into English (if applicable))

_____
(Jurisdiction of Subject Company's Incorporation or Organization)

_____

(Name of Person(s) Furnishing Form)

_____

(Title of Class of Securities)

_____

(CUSIP Number of Class of Securities (if applicable))

_____

(Name, Address (including zip code) and Telephone Number (including area code) of Person(s) Authorized to Receive Notices and Communications on Behalf of Subject Company)

_____

(Date Tender Offer/Rights Offering Commenced)

* 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 control number. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. This collection of information has been reviewed by OMB in accordance with the clearance requirements of 44 U.S.C. 3507.

General Instructions

I. Eligibility Requirements for Use of Form CB

A. Use this Form to furnish information pursuant to Rules 13e–4(h)(8), 14d–1(c) and 14e–2(d)(1) under the Securities Exchange Act of 1934 (''Exchange Act''), and Rules 801 and 802 under the Securities Act of 1933 (''Securities Act'').

Instructions

1. For the purposes of this Form, the term ''subject company'' means the issuer of the securities in a rights offering and the company whose securities are sought in a tender offer.

2. For the purposes of this Form, the term ''tender offer'' includes both cash and stock tender offers.

B. The information and documents furnished on this Form are not deemed ''filed'' with the Commission or otherwise subject to the liabilities of Section 18 of the Exchange Act.

II. Instructions for Submitting Form

A. You must furnish five copies of this Form and any amendment to the Form (see Part I, Item 1.(b)), including all exhibits and any other paper or document furnished as part of the Form, to the Commission at its principal office. Each copy shall be bound, stapled or otherwise compiled in one or more parts, without stiff covers. The binding shall be made on the side or stitching margin in such manner as to leave the reading matter legible.

B. The persons specified in Part IV must manually sign the original and at least one copy of this Form and any amendments. You must conform any unsigned copies.

C. You must furnish this Form to the Commission no later than the next business day after the disclosure documents submitted with this Form are published or otherwise disseminated in the subject company's home jurisdiction.

D. In addition to any internal numbering you may include, sequentially number the manually signed original of the Form and any amendments by handwritten, typed, printed or other legible form of notation from the first page of the document through the last page of the document and any exhibits or attachments thereto. Further, you must set forth the total number of pages contained in a numbered original on the first page of the document.

III. Special Instructions for Complying with Form CB

Under Sections 3(b), 7, 8, 10, 19 and 28 of the Securities Act of 1933, and Sections 12, 13, 14, 23 and 36 of the Exchange Act of 1934 and the rules and regulations adopted under those Sections, the Commission is authorized to solicit the information required to be supplied by this form by certain entities conducting a tender offer, rights offer or business combination for the securities of certain issuers.

Disclosure of the information specified in this form is mandatory. We will use the information for the primary purposes of ensuring that the offeror is entitled to use the Form and that investors have information about the transaction to enable them to make informed investment decisions. We will make this Form a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can utilize it for a variety of purposes. These purposes include referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statutes or provisions.

PART I—INFORMATION SENT TO SHAREHOLDERS

Item 1. *Home Jurisdiction Documents*

(a) You must attach to this Form the entire disclosure document or documents you have delivered to holders of securities in the home jurisdiction. The Form need not include any documents incorporated by reference into those disclosure document(s) and not distributed to holders of securities. If any part of the document or documents to be sent to U.S. shareholders is in a foreign language, include an English translation.

(b) Furnish any amendment to a home jurisdiction document or documents to the Commission under cover of this Form. Indicate on the cover page the number of the amendment.

Item 2. *Informational Legends*

You may need to include legends on the outside cover page of any offering document(s) used in the transaction. *See* Rules 801(d) and 802(d).

Note to Item 2. If you deliver the home jurisdiction document(s) through an electronic medium, the required legends must be presented in a manner reasonably calculated to draw attention to them.

PART II—INFORMATION NOT REQUIRED TO BE SENT TO SHAREHOLDERS

The exhibits specified below shall be furnished as part of the Form, but need not be sent to shareholders unless sent to shareholders in the home jurisdiction. Letter or number all exhibits for convenient reference.

(1) Furnish to the Commission any reports or information that, in accordance with the requirements of the home jurisdiction, must be made publicly available in connection with the transaction but need not be disseminated to shareholders.

(2) Furnish copies of any documents incorporated by reference into the home jurisdiction document(s).

(3) If any name is signed to this Form pursuant to a power of attorney, furnish manually signed copies of the power of attorney.

PART III—CONSENT TO SERVICE OF PROCESS

(1) When this Form is furnished to the Commission, the person furnishing this Form (if a non-U.S. person) shall also file with the Commission a written irrevocable consent and power of attorney on Form F–X.

(2) Promptly communicate any change in the name or address of an agent for service to the Commission by amendment of the Form F–X.

PART IV—SIGNATURES

(1) Each person (or its authorized representative) on whose behalf the Form is submitted must sign the Form. If a person's authorized representative signs, and the authorized representative is someone other than an executive officer or general partner), provide evidence of the representative's authority with the Form.

(2) Type or print the name and any title of each person who signs the Form beneath his or her signature.

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

(Signature) _____

(Name and Title) _____

(Date) _____

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