

## SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230, 231, 232, 239, 240, 241, and 249

[Release Nos. 33-8957; 34-58597; File No. S7-10-08]

RIN 3235-AK10

### Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule and interpretation.

**SUMMARY:** Almost nine years after the adoption of the original cross-border exemptions in 1999, the Commission is adopting changes to expand and enhance the utility of these exemptions for business combination transactions and rights offerings and to encourage offerors and issuers to permit U.S. security holders to participate in these transactions on the same terms as other target security holders. Many of the rule changes we are adopting today codify existing interpretive positions and exemptive orders in the cross-border area. We also are setting forth interpretive guidance on several topics. In two instances, we have extended the rule changes adopted here to apply to acquisitions of U.S. companies as well, because we believe the rationale for the changes in those instances applies equally to acquisitions of domestic and foreign companies. We also are adopting changes to allow certain foreign institutions to file on Schedule 13G to the same extent as would be permitted for their U.S. counterparts, where specified conditions are satisfied. We also are adopting a conforming change to Rule 16a-1(a)(1) to include the foreign institutions eligible to file on Schedule 13G.

**DATES:** The final rule is effective December 8, 2008, except that the amendments to part 231 and 241 are effective October 9, 2008.

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

**SUPPLEMENTARY INFORMATION:** We are amending Rules 162,<sup>1</sup> 800<sup>2</sup> and 802<sup>3</sup> under the Securities Act of 1933<sup>4</sup> and Rule 101<sup>5</sup> of Regulation S-T.<sup>6</sup> We also are amending Rules 13d-1,<sup>7</sup> 13e-3,<sup>8</sup> 13e-4,<sup>9</sup> 14d-1,<sup>10</sup> 14d-11,<sup>11</sup> 14e-5,<sup>12</sup> and 16a-1<sup>13</sup> under the Securities Exchange Act of 1934.<sup>14</sup> We also are making changes to Form S-4,<sup>15</sup> Form F-4,<sup>16</sup> Form F-X,<sup>17</sup> Form CB,<sup>18</sup> Schedule 13G<sup>19</sup> and Schedule TO.<sup>20</sup>

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<sup>1</sup> 17 CFR 230.162.

<sup>2</sup> 17 CFR 230.800.

<sup>3</sup> 17 CFR 230.802.

<sup>4</sup> 15 U.S.C. 77a *et seq.*

<sup>5</sup> 17 CFR 232.101.

<sup>6</sup> 17 CFR 232.10 *et seq.*

<sup>7</sup> 17 CFR 240.13d-1.

<sup>8</sup> 17 CFR 240.13e-3.

<sup>9</sup> 17 CFR 240.13e-4.

<sup>10</sup> 17 CFR 240.14d-1.

<sup>11</sup> 17 CFR 240.14d-11.

<sup>12</sup> 17 CFR 240.14e-5.

<sup>13</sup> 17 CFR 240.16a-1.

<sup>14</sup> 15 U.S.C. 78a *et seq.*

<sup>15</sup> 17 CFR 239.25.

<sup>16</sup> 17 CFR 239.34.

<sup>17</sup> 17 CFR 239.42.

<sup>18</sup> 17 CFR 239.800 and 17 CFR 249.480.

<sup>19</sup> 17 CFR 240.13d-102.

<sup>20</sup> 17 CFR 240.14d-100.

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### I. Background and Summary

#### A. General Overview of the Cross-Border Exemptions

The existing cross-border exemptions,<sup>21</sup> as adopted in 1999, are structured as a two-tier system based broadly on the level of U.S. interest in a transaction, measured by the percentage of target securities of a foreign private issuer<sup>22</sup> beneficially owned by U.S. holders.<sup>23</sup> The purpose of the exemptions is to address conflicts

<sup>21</sup> Generally, the rule citations to the cross-border exemptions throughout this release refer to the exemptions that were adopted in 1999. When applicable, we specify that a citation is to a "new" or "amended" rule.

<sup>22</sup> "Foreign private issuer" is defined in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)].

<sup>23</sup> "U.S. holder" is defined in the cross-border exemptions as any security holder resident in the United States. See Securities Act Rule 800(h) [17 CFR 230.800(h)]; Instruction 2 to Exchange Act Rules 13e-4(h)(8) and (i) [17 CFR 240.13e-4(h)(8) and 240.13e-4(i)] and 14d-1(c) and (d) [17 CFR 240.14d-1(c) and 240.14d-1(d)].

between U.S. and foreign regulation, thereby facilitating the inclusion of U.S. investors in cross-border transactions. While today's amendments will expand the scope of some of the exemptions, we retain this basic two-tier structure and the threshold U.S. ownership percentages. However, we are revising the manner in which eligibility to rely on the revised exemptions is determined.

Where U.S. holders own no more than 10 percent of the subject securities, a qualifying cross-border transaction will be exempt from most U.S. tender offer rules<sup>24</sup> pursuant to Tier I and from the registration requirements of Section 5 of the Securities Act of 1933<sup>25</sup> pursuant to Securities Act Rules 801<sup>26</sup> and 802. Tier I provides a broad exemption from the filing, dissemination and procedural requirements of the U.S. tender offer rules and the heightened disclosure requirements applicable to going private transactions as defined in Rule 13e-3.<sup>27</sup> An issuer that is the subject of a tender offer also is exempt from the obligation to express a position, and provide reasons for its position, about the tender offer to its own security holders under Tier I.<sup>28</sup> At the same level of U.S. ownership, Rules 801 and 802 also provide relief from the registration requirements of Securities Act Section 5 for securities issued in rights offerings and business combination transactions.

Where an issuer or acquirer relies on Rules 801 or 802 or the Tier I exemptions, it must furnish a Form CB to the Commission.<sup>29</sup> Form CB is a cover sheet to which the issuer or acquirer attaches an English translation of the disclosure document used in the foreign home jurisdiction and disseminated to U.S. target security holders.<sup>30</sup> The due date for furnishing Form CB to the Commission is the next business day after the disclosure document used in the foreign home jurisdiction is published or otherwise disseminated in

accordance with home country rules.<sup>31</sup> The materials submitted under cover of Form CB are not deemed filed with the Commission, and the filer is not subject to the liability provisions of Section 18 of the Exchange Act.<sup>32</sup>

In adopting the cross-border exemptions, we did not intend to create new filing obligations for issuers and acquirors where none existed previously. For that reason, a bidder relying on the Tier I exemption must submit a Form CB only if the tender offer would have been subject to Rules 13e-3 or 13e-4 or Regulation 14D,<sup>33</sup> but for the Tier I exemption. No filing requirement exists for a tender offer subject only to Exchange Act Section 14(e)<sup>34</sup> and Regulation 14E;<sup>35</sup> accordingly, furnishing a Form CB is not necessary.<sup>36</sup>

Tier II provides targeted relief from some U.S. tender offer rules for issuers and third-party bidders where U.S. security holders own more than 10 percent, but no more than 40 percent, of the target class. The Tier II exemptions encompass narrowly-tailored relief from certain U.S. tender offer rules, such as the prompt payment, extension and notice of extension requirements in Regulation 14E. While they do address certain areas of common regulatory conflict, the Tier II exemptions do not provide relief from the registration requirements of Securities Act Section 5, nor do they include an exemption from the additional disclosure requirements applicable to going private transactions by issuers or affiliates.

The scope of the Tier I and Tier II cross-border exemptions and the exemptions from the Securities Act registration requirements provided in Rules 801 and 802 are based broadly on

the level of U.S. interest in a given transaction, as measured by the percentage of shares beneficially owned by U.S. holders. In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.<sup>37</sup> We retain these basic equal treatment principles in our rule revisions.

### B. Background of Rule Revisions Adopted

On May 6, 2008, we proposed revisions to the rules governing certain cross-border business combination transactions, as well as revisions to the beneficial ownership reporting rules for certain foreign institutions.<sup>38</sup> These revisions were intended to expand and enhance the utility of the exemptions available for cross-border business combination transactions.<sup>39</sup> Many of the changes we proposed would codify existing interpretive positions and exemptive orders, and were intended to encourage offerors and issuers in cross-border business combinations to permit U.S. security holders to participate in these transactions in the same manner as other holders. Additionally, we provided guidance regarding several interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations. We also addressed the applicability of the U.S. all-holders provisions to foreign target security holders in tender offers for domestic issuers. In several instances, we requested comment about whether

<sup>37</sup> Securities Act Rules 801(a)(3) and 802(a)(2) [17 CFR 230.801(a)(3) and 230.802(a)(2)]; Exchange Act Rules 13e-4(h)(8)(ii) and (i)(2)(ii) [17 CFR 240.13e-4(h)(8)(ii) and 240.13e-4(i)(2)(ii)]; and 14d-1(c)(2) and (d)(2)(ii) [17 CFR 240.14d-1(c)(2) and 240.14d-1(d)(2)(ii)].

<sup>38</sup> See *Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, Release No. 33-8917, 34-57781 (May 6, 2008) (the "Proposing Release").

<sup>39</sup> "Business combination" is defined in Securities Act Rule 800(a) as any "statutory amalgamation, merger, arrangement or reorganization requiring the vote of security holders of one or more participating companies. It also includes a statutory short form merger that does not require a vote of security holders." In this release, we use the term more broadly to include those kinds of transactions, as well as tender and exchange offers. See Securities Act Rule 165(f)(1) [17 CFR 230.165(f)(1)] (defining the term more broadly, to include the types of transactions listed in Rule 145(a) [17 CFR 230.145(a)], as well as exchange offers). A "cross-border" business combination, as that term is used throughout this release, refers to a business combination in which the target company (or the issuer in a rights offering) is a foreign private issuer, as defined in Exchange Act Rule 3b-4(c).

<sup>24</sup> The U.S. anti-fraud and anti-manipulation rules and civil liability provisions continue to apply to these transactions. See *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release No. 33-7759, 34-42054 (October 22, 1999) [64 FR 61382] (the "1999 Cross-Border Adopting Release"), Section I.A.

<sup>25</sup> 15 U.S.C. 77e.

<sup>26</sup> 17 CFR 230.801.

<sup>27</sup> Exchange Act Rules 13e-3(g)(6) [17 CFR 240.13e-3(g)(6)], 13e-4(h)(8), and 14d-1(c).

<sup>28</sup> Exchange Act Rule 14e-2(d) [17 CFR 240.14e-2(d)].

<sup>29</sup> Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) [17 CFR 230.801(a)(4)(i) and 230.802(a)(3)(i)], and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii) [17 CFR 240.13e-4(h)(8)(iii) and 240.14d-1(c)(3)(iii)].

<sup>30</sup> Item 1 of Form CB.

<sup>31</sup> Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii). If the bidder is a foreign company, it must also file a Form F-X with the Commission appointing an agent for service of process in the United States. See Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii).

<sup>32</sup> 15 U.S.C. 78r. See also, 1999 Cross-Border Adopting Release, Section II.A.2. An acquirer or other person submitting Form CB is subject to U.S. anti-fraud provisions. See footnote 24 above.

<sup>33</sup> Exchange Act Rules 14d-1 through 14d-11 [17 CFR 240.14d-1 through 17 CFR 240.14d-11].

<sup>34</sup> 15 U.S.C. 78n(e).

<sup>35</sup> 17 CFR 240.14e-1 through 17 CFR 240.14e-8.

<sup>36</sup> See 1999 Cross-Border Adopting Release, Section II.A.2. Regulation 14E applies to all tender offers, including those not subject to Section 13(e) or 14(d) of the Exchange Act. These include tender offers for non-equity securities and securities that are not registered under Section 12 of the Exchange Act [15 U.S.C. 78j], as well as partial offers for less than all of the subject class, where the bidder will not own more than five percent of the subject class of equity securities after the tender offer (based on purchases in the tender offer and ownership in the target before the offer commences).

various rule changes we proposed should apply to tender offers for U.S. companies.<sup>40</sup>

In response to our request for comment on the Proposing Release, we received comments from a variety of groups and constituencies, most of whom expressed their support for our proposed modifications to the current rules. While commenters generally supported our proposed changes, some advocated further modifications to our rules.<sup>41</sup> After considering the comments, we are adopting amendments to the cross-border exemptions and beneficial ownership rules substantially as proposed, but with modifications discussed more fully in this release. We also are adopting two changes to rules applicable to all tender offers, including those for U.S. target companies, where we believe the rule modifications initially proposed in the cross-border context will be useful and in the public interest if applied to all tender offers.<sup>42</sup>

### 1. Reasons for the Amendments

As discussed in the Proposing Release, before the cross-border exemptions were adopted in 1999,<sup>43</sup> cross-border business combination transactions or rights offerings often excluded U.S. holders of a foreign issuer or foreign target company because of actual or perceived conflicts between U.S. and foreign law. Exclusion of U.S. investors deprived them of some or all of the benefits of such cross-border transactions. The cross-border exemptions adopted in 1999 represented an effort to facilitate the inclusion of U.S. security holders in foreign transactions in a manner consistent with our investor protection mandate.

While we believe the exemptions were successful in addressing many areas of conflict between U.S. and foreign law, we recognize that in some

instances the exemptions are not operating as optimally as intended, or do not address recurring conflicts of law and practice not anticipated when we adopted them. The revisions we adopt today address frequently arising issues and unintended consequences that have detracted from the usefulness of the existing cross-border exemptions. The revisions represent an expansion and refinement of the current exemptions. We believe they will encourage more offers to be extended into the United States.

The amendments we are adopting represent another step in the Commission's efforts to revise its rules relating to transactions involving foreign private issuers.<sup>44</sup> These changes are intended to address the realities of the modern securities markets and, in particular, the increasing globalization of those markets. Increasingly, U.S. persons seek to diversify their investments by purchasing securities of foreign companies. Their ability to do so, including through direct purchases on foreign exchanges, has been facilitated greatly by the Internet. While the increasing globalization of the securities markets has proved beneficial to U.S. investors and companies, as well as non-U.S. investors and foreign

private issuers, it also has increased the potential for regulatory conflicts in the context of cross-border business combination transactions. Whether foreign private issuers list their securities on a U.S. exchange or U.S. investors access overseas trading markets to purchase their securities, cross-border business combination transactions frequently present conflicts between U.S. and foreign regulatory systems.

The revisions we are adopting today are intended to address the most frequent areas of conflict or inconsistency with foreign regulations and practice that acquirors encounter in cross-border business combination transactions. We believe the revisions appropriately balance the need to protect U.S. investors through the application of protections afforded by U.S. law, while facilitating transactions that may benefit all security holders, including those in the United States. The expanded availability of the cross-border exemptions will serve the public interest by encouraging bidders to include U.S. holders in cross-border business combination transactions from which they otherwise might be excluded, thereby extending the benefits of those transactions to U.S. investors.<sup>45</sup> We recognize that these revisions will not eliminate all conflicts in law or practice presented by cross-border business combination transactions. The staff will continue to address those issues not covered by these revisions on a case-by-case basis, as is currently the practice.<sup>46</sup>

### 2. Summary of the Amendments

The rule amendments we are adopting address practical problems that have limited the ability of bidders to rely on the exemptions. We believe they also will alleviate some of the burdens on

<sup>40</sup> Additionally, in several instances in the Proposing Release, we solicited comment regarding whether various proposed changes should be extended to the Multijurisdictional Disclosure System ("MJDS") with Canada. We are not adopting any changes to MJDS at this time.

<sup>41</sup> The public comments we received are available for inspection in our Public Reference Room at 100 F Street, NE, Washington, DC 20549 in File No. S7-10-08, or may be viewed at <http://www.sec.gov/rules/proposed/s71008.shtml>.

<sup>42</sup> The rule changes that will apply to all tender offers, including those for domestic target companies: (1) Eliminate the maximum time limit on the length of the subsequent offering period and (2) provide the ability to commence an exchange offer upon the filing of a registration statement and before its effectiveness in exchange offers not subject to Rule 13e-4 or Regulation 14D. See amended Exchange Act Rule 14d-11 and amended Securities Act Rule 162.

<sup>43</sup> See 1999 Cross-Border Adopting Release.

<sup>44</sup> The Commission has undertaken several recent rulemaking initiatives that impact foreign private issuer reporting and registration requirements. For example, we recently revised our rules to make the U.S. capital markets more attractive to foreign private issuers by allowing the use of financial statements prepared in accordance with International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board ("IASB"), without a reconciliation to U.S. GAAP. See *Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP*, Release No. 33-8879 (December 21, 2007) [73 FR 986]. In addition, we amended the deregistration rules for exiting the U.S. regulatory system when the level of U.S. interest in a foreign private issuer's securities has decreased, such that continued registration is no longer justified. See *Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934*, Release No. 34-55540 (March 27, 2007) [72 FR 16934]. On August 27, 2008, we adopted changes to the manner of determining the availability of the Rule 12g3-2(b) exemption from Exchange Act registration. See *Exemption From Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers*, Release No. 34-58465 (September 5, 2008) [73 FR 52752]. Further, on August 27, 2008, we also adopted rule revisions applicable to foreign issuers, intended to improve the accessibility of the U.S. public capital markets and enhance the information available to investors. These revisions were proposed in *Foreign Issuer Reporting Enhancements*, Release No. 33-8900 (February 29, 2008) [73 FR 13404]. See also, *SEC Votes to Modernize Disclosure Requirements to Help U.S. Investors in Foreign Companies* (August 27, 2008) (announcing the adoption of three sets of rule amendments).

<sup>45</sup> In discussing the changes we are adopting, the focus of the discussion is on acquirors in business combination transactions because the rules changes primarily impact that constituency. However, some of those changes, such as those to the eligibility test for the cross-border exemptions, also affect comparable provisions in the rights offering exemption in Securities Act Rule 801. We discuss the specific changes relating to the rights offering exemption in greater detail in Section II.A.3. below.

<sup>46</sup> As discussed in the Proposing Release, the staff often provides exemptive or no-action relief by letter in the context of individual cross-border transactions. Pursuant to Rules 30-1 and 30-3 of the SEC's Rules of General Organization [17 CFR 200.30-1 and 200.30-3], we have delegated to the staff the authority to exempt individual bidders and issuers from the application of our rules. No-action and exemptive letters issued by the staff in connection with cross-border transactions may be found on our Web site at <http://www.sec.gov/divisions/corpfin/cf-noaction.shtml> and <http://www.sec.gov/divisions/marketreg/mr-noaction.shtml#rule14e5>.

bidders who must comply with two or more regulatory systems in the context of cross-border transactions. Highlights of the amendments, which are adopted as proposed except where otherwise specified, include:

- Modifications to the manner in which the look-through analysis must be conducted under our current rules, to alleviate timing concerns associated with that calculation, including:
  - Changes to the reference date for the calculation of U.S. beneficial ownership to allow calculation as of any date no more than 60 days before and no more than 30 days after the public announcement of the transaction;<sup>47</sup> and
  - No longer requiring that individual holders of more than 10 percent of the subject securities be excluded from the calculation of U.S. ownership;<sup>48</sup>
  - An alternate test for determining eligibility to rely on the cross-border exemptions, based in part on a comparison of average daily trading volume of the subject securities in the United States and worldwide. This alternate test will be available for all non-negotiated transactions and those for which the look-through analysis mandated by our rules may not be conducted;<sup>49</sup>
  - Expanded relief under Tier I for affiliated transactions subject to Rule 13e-3 for transaction structures not covered under our current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash;
  - Extension of relief afforded by the Tier II provisions to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act;
  - Expansion of relief afforded under Tier II to eliminate recurrent conflicts between U.S. and foreign law and practice in several areas, including:

- Allowing multiple foreign offers in conjunction with a concurrent U.S. offer;
- Permitting bidders to include foreign holders of ADRs in the U.S. offer and, under specified conditions, U.S. holders in the foreign offer(s);
- Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;
- Allowing subsequent offering periods in both cross-border and domestic offers to extend beyond 20 U.S. business days;<sup>50</sup>
- Allowing securities tendered during the subsequent offering period to be purchased within 20 business days from the date of tender, rather than 14 business days as originally proposed;
- Allowing bidders to pay interest on securities tendered during a subsequent offering period, where required under foreign law;
- Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods for certain kinds of tender offers;<sup>51</sup>
- Permitting bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date;<sup>52</sup>
- Codification of three class exemptive letters with respect to the application of Rule 14e-5 for Tier II tender offers;
- Expansion of the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act, including offers for domestic target companies;<sup>53</sup>
- Modification of the cover pages of specified tender offer schedules and registration statements to identify any cross-border exemptions relied upon in conducting the relevant transactions;
- Requiring electronic filing of all Forms CB and Forms F-X, filed in connection with Form CB; and
- Permitting foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, subject to certain conditions, and expanding the definition of beneficial ownership in

Exchange Act Rule 16a-1(a)(1) to include those foreign institutions.<sup>54</sup>

In addition to these rule amendments, we also are reiterating the interpretive guidance we provided in the Proposing Release, with some modifications. We are providing guidance on the following issues:

- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;
- The application of the all-holders provisions of our tender offer rules to foreign target security holders in transactions subject to U.S. equal treatment provisions;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The availability of the vendor placement procedure for exchange offers.

As discussed in further detail below, the revised rules we adopt today differ in some respects from what we proposed. For example, the alternate eligibility test is a combination of the existing look-through analysis and components of the existing test for non-negotiated transactions. For the revised look-through analysis, we are providing a longer date range than proposed, during which acquirors and issuers can calculate U.S. ownership. Where the acquiror or issuer is not able to accomplish the look-through analysis as of the date in 60 days before and 30 days after public announcement, we provide an extended period to accommodate those situations.

The changes we proposed to the eligibility test would have applied only to business combination transactions; however, those we adopt are applicable to rights offerings also. Another difference between the rule changes we proposed and those we adopt is that two changes are applicable to all business combinations, including those in which the target is a U.S. company. Under our revised rules, bidders conducting tender offers for either U.S. or foreign target companies may extend the subsequent offering period beyond the current 20-business day limit. In addition, offerors in exchange offers for both domestic and foreign targets may commence those offers before the effective date of the registration statement, even where the exchange offer is not subject to specified U.S. tender offer rules.

The revisions adopted today will be effective for transactions that commence

<sup>47</sup> Acquirors in business combinations that are unable to accomplish the look-through analysis as of a date during that range may calculate U.S. ownership as of a date no more than 120 days before public announcement. For rights offerings, the amended rule would permit calculation as of a date within 60 days before or 30 days after the record date. See amended Securities Act Rule 800(h)(1). The proposal included the date range of 60 days before announcement of a business combination only, and did not permit calculation as of a date after announcement.

<sup>48</sup> This change was not proposed, but the Proposing Release solicited comment on it. After further consideration and review of commenters' responses, we believe this change is appropriate.

<sup>49</sup> Although we did not propose this specific change, we did solicit comment generally on possible changes to the eligibility criteria. See Proposing Release, Section II. For bidders relying on the alternate test because they are unable to conduct the look-through analysis, the ADTV calculation will include a primary trading market component.

<sup>50</sup> We proposed to allow this change only for cross-border tender offers.

<sup>51</sup> Separate pro ration pools would be permitted only for Tier II tender offers that use the "mix and match" offer structure. See Section II.C.4.d. below.

<sup>52</sup> In the Proposing Release, we set forth interpretive guidance regarding the ability to terminate an initial offering period or voluntary extension of that period before a scheduled expiration date. We solicited comment on whether we should codify the existing interpretive guidance. See Proposing Release, Section II.C.6. We are codifying this guidance in new Exchange Act Rules 13e-4(i)(1)(vii) and 14d-1(d)(2)(ix).

<sup>53</sup> We proposed to allow this change only for cross-border tender offers.

<sup>54</sup> The change to Rule 16a-1 [17 CFR 240.16a-1] was not proposed, but was requested by commenters. We believe this change is consistent with the regulatory history of aligning the scope of Rule 16a-1(a)(1) with Rule 13d-1(b)(1)(ii).

after the effective date of the revised rules. To the extent that the parties to transactions other than those that commence after the effective date wish to rely on these rule changes, requests for relief will be considered on a case-by-case basis. Transition issues and the effective date of the revised rules relating to beneficial ownership reporting are discussed in Section II.F.

## II. Discussion

### A. Revised Eligibility Test for the Revised Cross-Border Exemptions

We are adopting changes to the eligibility test for the cross-border exemptions that we believe will facilitate the use of the exemptions and reduce the burden of determining eligibility. For negotiated transactions, acquirors must continue to conduct the look-through analysis, as amended today to provide greater flexibility.<sup>55</sup> Where acquirors are unable to conduct this analysis, we are adopting an alternate test that incorporates elements from the current hostile presumption<sup>56</sup> for non-negotiated deals, including an element based on average daily trading volume of the subject securities (“ADTV”).<sup>57</sup>

The cross-border exemptions require acquirors to query record holders and other nominees to determine U.S. beneficial ownership. For example, acquirors need only “look through” nominees located in the United States, the subject company’s jurisdiction of incorporation and that of each participant in the business combination transaction, and the jurisdiction that is the primary trading market for the subject securities, if different from the jurisdiction of incorporation.<sup>58</sup> In addition, acquirors may assume that beneficial holders are residents of the jurisdiction in which the nominee queried has its principal place of business, if after reasonable inquiry the acquiror is unable to obtain information

from that nominee.<sup>59</sup> These limitations on the scope of the required look-through analysis assist the acquiror in accomplishing the required analysis. We are not changing these provisions in our revised rules.

Where acquirors cannot conduct the look-through analysis, however, we are providing an alternate test similar to the hostile presumption for non-negotiated transactions.<sup>60</sup> Because we recognize that acquirors who do not have the cooperation of the target company may have limited access to information from nominees, this alternate test will be available for all non-negotiated transactions.<sup>61</sup> In the discussion that follows, we provide guidance on the limited circumstances under which the alternate test will be available for negotiated transactions.

The existing cross-border exemptions and the revised exemptions we adopt today continue to be available only when the target company is a foreign private issuer as defined in our rules.<sup>62</sup> As is the case with the existing cross-border exemptions, the revised exemptions are available equally to both U.S. and foreign acquirors, where the company being acquired qualifies as a foreign private issuer.

Under the current rules and the revisions we adopt today, the percentage of the subject securities held beneficially by U.S. persons is an important element in determining eligibility to rely on the exemptions.<sup>63</sup> We continue to believe that U.S. beneficial ownership, as determined by the revised look-through calculation, should be a central element in determining eligibility to rely on the cross-border exemptions. Beneficial ownership is the characteristic of the target subject security holder base that is, in our view, most closely tied to U.S.

interest in the subject securities in the context of a business combination transaction or a rights offering.<sup>64</sup> In the case of business combination transactions, which affect all target security holders whether or not they choose to participate, we believe the percentage of the subject securities that is held by U.S. holders is the best measure of when U.S. rules should apply.<sup>65</sup> In addition, because the cross-border exemptions include exemptions from the registration requirements of Section 5 of the Securities Act that are available to both foreign and U.S. acquirors, the focus on the percentage of target securities held by U.S. holders corresponds with the percentage of securities that may be issued without registration by a U.S. acquiror to U.S. target holders. Because securities of U.S. acquirors are likely to have their primary trading market in the United States, it is appropriate to consider the magnitude of these issuances and the resulting flow back into the United States.

The revised rules do not change the threshold percentages of U.S. ownership for reliance on the cross-border exemptions; however, we are changing the manner in which these percentages are determined. To address concerns raised by commenters about the look-through tests for negotiated transactions, we have significantly revised the manner in which that analysis must be performed, including when and under what circumstances it is mandated.<sup>66</sup> Based on feedback from commenters, we also are eliminating the requirement to exclude large security holders of the target class in calculating the percentage of U.S. ownership.<sup>67</sup> Commenters

<sup>64</sup> As noted in the Proposing Release, our focus on U.S. beneficial ownership for business combinations and rights offerings differs from the approach we have taken recently for foreign private issuer deregistration and for purposes of the ability of a foreign private issuer to qualify for the exemption from registration under Exchange Act Rule 12g3-2(b) [17 CFR 240.12g3-2(b)]. See the discussion in the Proposing Release, Section I.A.2.

<sup>65</sup> As we stated in the Proposing Release, using an ADTV test may result in target companies with significant U.S. ownership qualifying for the Tier I and Securities Act Rules 801 and 802 exemptions. Where a bidder, including a U.S. company, is eligible to rely on the Tier I cross-border exemptions, it may issue securities without registration under Securities Act Rule 802. We are concerned that use of an ADTV test for eligibility to rely on the cross-border exemptions would allow bidders, including U.S. bidders, to issue significant amounts of bidder securities to U.S. holders, without the protections of Securities Act registration.

<sup>66</sup> See amended Securities Act Rule 800(h); Instructions 2 and 3 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instructions 2 and 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>67</sup> The existing cross-border exemptions require target securities held by holders who individually

<sup>55</sup> See new Securities Act Rules 800(h)(6) and (7); Instructions 2 and 3 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instructions 2 and 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>56</sup> When we refer to the “hostile presumption” in this release, we mean the existing test used to determine eligibility for the cross-border exemptions for non-negotiated transactions, *i.e.*, those not made pursuant to an agreement between the acquiror and the target company. See Securities Act Rule 802(c) [17 CFR 230.802(c)] and Instruction 3 to Exchange Act Rules 14d-1(c) and (d).

<sup>57</sup> As used in this release, “subject securities” means securities of a target company that are the subject of a tender offer or are sought to be acquired in another kind of business combination transaction.

<sup>58</sup> See amended Securities Act Rule 800(h)(3); Instruction 2.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.iii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>59</sup> See amended Securities Act Rule 800(h)(4); Instruction 2.iv. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.iv. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>60</sup> See new Securities Act Rule 800(h)(6); Instruction 3 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>61</sup> See new Securities Act Rule 800(h)(6) and Instruction 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>62</sup> See Exchange Act Rule 3b-4(c). For the Securities Act Rule 801 exemptions for rights offerings, the issuer must be a foreign private issuer as defined in that rule. For business combinations such as mergers of equals, where both parties to the transaction will be replaced by a successor entity which issues securities in the amalgamation, U.S. holders may hold no more than 10 percent of the subject class, as if measured immediately after the business combination. See Securities Act Rule 802(a) [17 CFR 230.802(a)].

<sup>63</sup> The threshold U.S. beneficial ownership percentages are 10 percent (for Tier I and Securities Act Rules 801 and 802) and 40 percent (for Tier II).

advised that this change would expand the availability of the exemptions because of the concentrated ownership structures of many foreign private issuers.<sup>68</sup> We believe the cumulative effect of the revisions will facilitate the look-through process by providing greater flexibility to acquirors, and also will allow them to know at an earlier stage in the planning process how U.S. target holders will be treated.

No aspect of the Proposing Release generated more commentary, and more criticism, than this focus on beneficial ownership and the manner in which it must be calculated under our rules.<sup>69</sup> Despite the revisions to the look-through analysis adopted today, we remain cognizant of the concerns expressed by commenters with respect to the feasibility of the test under certain circumstances.<sup>70</sup> While we believe the look-through analysis and its focus on beneficial ownership should remain the starting point for determining eligibility to rely on the revised exemptions for negotiated transactions, we also recognize that circumstances exist in which acquirors are unable to conduct the look-through analysis.<sup>71</sup> Therefore, we are adopting an alternate test for such circumstances based, in part, on a comparison of the average daily trading volume of the subject securities in the United States as compared to worldwide trading over a twelve-month period.<sup>72</sup> The trading volume percentages we established for the ADTV element of the alternate test are the same as those for the existing hostile presumption.<sup>73</sup> The ADTV element of the alternate test is supplemented by other factors, such as the acquiror's actual knowledge of the U.S. ownership percentage of the subject securities, based on reports filed

own more than 10 percent of the subject class to be excluded from both the numerator and the denominator in calculating total U.S. ownership. The exclusion requirement applies to both U.S. and non-U.S. large holders. See Section II.A.1.b. below.

<sup>68</sup> See, e.g., letter from Sullivan & Cromwell LLP ("S&C").

<sup>69</sup> 20 of the 22 comment letters we received addressed this issue, either directly or indirectly.

<sup>70</sup> These include concerns about cost, burden and confidentiality. See, e.g., letter from Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association ("ABA").

<sup>71</sup> As discussed above, we are not requiring acquirors in hostile transactions to conduct the look-through analysis under our amended rules. This is the same approach as under the existing exemptions. See Instruction 3 to Exchange Act Rules 14d-1(c) and (d).

<sup>72</sup> See new Securities Act Rules 800(h)(6) and (7); Instruction 3 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>73</sup> See Securities Act Rule 802(c) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and (d). The thresholds also mirror the maximum percentage limits for U.S. beneficial ownership.

by the target company and others, as well as information from third parties known to the acquiror.<sup>74</sup>

We believe the changes to the look-through test in the cross-border exemptions and the alternate test we adopt today appropriately balance commenters' concerns with our investor protection goals. In our view, these revisions will increase the availability of the cross-border exemptions, including the exemptions from the registration requirements of Section 5 of the Securities Act,<sup>75</sup> which we anticipate will promote the inclusion of U.S. target holders in more cross-border transactions. We will continue to monitor the application of the revised rules to assess whether additional changes are necessary and in the public interest to facilitate this goal.

## 1. Changes to the Look-through Analysis

### a. Timing of the Calculation

We are adopting, with some modifications, the proposed changes to the timing of and reference date for the calculation of U.S. ownership for determining eligibility to rely on the cross-border exemptions for business combinations.<sup>76</sup> Under existing rules, acquirors are required to calculate U.S. ownership as of a set date—the 30th day before the commencement of a tender offer or before the solicitation for a business combination other than a tender offer.<sup>77</sup> The revisions adopted change the reference date to the public announcement of the business combination transaction.<sup>78</sup> For these purposes, we consider "public announcement" to be any oral or written communication by the acquiror or any party acting on its behalf, which

<sup>74</sup> See new Securities Act Rules 800(h)(6) and (7); Instruction 3.ii. and 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.ii. and 3.iii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>75</sup> See Securities Act Rules 801 and 802.

<sup>76</sup> See amended Securities Act Rule 800(h); Instruction 1.i. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.i. to amended Exchange Act Rules 14d-1(c) and (d). As noted below, we did not propose but solicited comment on similar changes to the timing of the calculation for eligibility for Securities Act Rule 801 (exemption for rights offerings). Today we also are adopting changes to Rule 800(h) that will provide issuers with greater flexibility to use a date within a 60-day range before and a 30-day period after the record date for a rights offering. See amended Securities Act Rule 800(h) and the discussion below.

<sup>77</sup> See Securities Act Rule 800(h); Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.i. to Exchange Act Rules 14d-1(c) and (d).

<sup>78</sup> See amended Securities Act Rule 800(h)(1); Instruction 2 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2 to amended Exchange Act Rules 14d-1(c) and (d).

is reasonably designed to inform or has the effect of informing the public or security holders in general about the transaction.<sup>79</sup> Under our revised rules, an acquiror seeking to rely on the cross-border exemptions may calculate U.S. ownership as of any date no more than 60 days before and no more than 30 days after the public announcement of the cross-border transaction.

The revised rules will allow the calculation to be accomplished based on a range of dates before public announcement of a business combination transaction because we believe that this will allow the parties to a business combination to determine and inform the markets of the treatment of U.S. target security holders at an earlier stage in the planning process. In addition, this change allows the calculation of U.S. ownership to be made before the target security holder base is affected by the public announcement. Most commenters supported the use of announcement as the reference point for the calculation.<sup>80</sup> Commenters generally also favored the use of a 60-day date range before public announcement, although one party advocated a shorter 30-day range.<sup>81</sup>

We expanded the rule to permit the calculation as of a date no more than 30 days after announcement to address commenters' concerns about the confidentiality of the look-through analysis.<sup>82</sup> Where that analysis must be conducted before announcement, it may compromise the confidentiality of the transaction. By allowing a range of dates both before and after public announcement, the rule is designed to provide acquirors whose home country law permits them to wait to conduct the analysis until after public announcement with flexibility to maintain confidentiality to the greatest extent possible.<sup>83</sup> This change was advocated by several commenters.<sup>84</sup>

<sup>79</sup> See generally, Instruction 5 to Exchange Act Rules 13e-4(c) and 14d-2 [17 CFR 240.13e-4(c) and 240.14d-2] (defining public announcement for purposes of precommencement communications about issuer or third-party tender offers).

<sup>80</sup> See, e.g., The Forum for U.S. Securities Lawyers in London.

<sup>81</sup> See, e.g., letter from Linklaters LLP ("Linklaters"). Another commenter suggested that for rights offering, the reference date should be 30 days before the record date, or alternatively, before announcement. See letter from S&C.

<sup>82</sup> See letter from Shearman and Sterling LLP ("Shearman").

<sup>83</sup> In some foreign jurisdictions, the acquiror may need to conduct the look-through analysis before announcement because home country law may require detailed information about the transaction, including the treatment of U.S. holders, to be included in the announcement.

<sup>84</sup> Two commenters, Shearman and Davis Polk & Wardwell ("DPW"), advocated a range extending

This 90-day range should be used in most cases. We recognize, however, that the 90-day range may not be enough time in some foreign jurisdictions, depending on the procedures available for obtaining beneficial ownership information. Therefore, our revised rules specify that where the issuer or acquiror is unable to complete the look-through analysis as of this 90-day period, it may use a date within 120 days before public announcement.<sup>85</sup> We considered providing every acquiror and issuer with the flexibility to look through as of a date within the extended 120-day period before announcement. We believe, however, that there should be some limits on dates available to conduct the analysis, and this extended period is warranted only where necessary.<sup>86</sup> We believe that in most cases, this date range will be sufficient time to conduct the required look-through analysis. Where the acquiror or issuer cannot accomplish the look-through analysis within this time period, it may use the alternate test outlined below.

#### b. Exclusion of Large Target Security Holders

Our revised rules do not affect the percentages of target securities that may be beneficially owned by U.S. holders in order for a transaction to qualify for the exemption. The maximum U.S. ownership percentages remain at no more than 10 percent for reliance on Tier I and Rules 801 and 802 and no more than 40 percent for Tier II.<sup>87</sup> The look-through analysis by which these percentages are calculated has changed, however. Our revised rules will no longer require that individual holders of more than 10 percent of the subject securities be excluded from the

calculation of U.S. ownership.<sup>88</sup> We believe this change will significantly expand the number of cross-border business combinations eligible for the exemptions, while still providing appropriate investor protections.

Although we did not propose this change in the Proposing Release, we solicited comment on it, and many commenters advocated it.<sup>89</sup> Commenters noted that requiring the exclusion of large target holders generally has the effect of skewing upward the percentage of U.S. ownership of foreign private issuers, which in turn decreases the availability of the cross-border exemptions.<sup>90</sup> Although existing rules require the exclusion of both U.S. and foreign holders of greater than 10 percent of the subject securities, commenters suggested that the effect of this requirement disproportionately inflates U.S. holdings because holders of large blocks of foreign stock are more likely to be non-U.S. persons.<sup>91</sup> We note that although this may be the case generally, there could be specific fact patterns where this rule change would decrease the availability of the cross-border exemptions because of the particular characteristics of the subject security holder base.<sup>92</sup> We are persuaded by commenters, however, that we should not treat greater-than-10 percent holders as non-market participants for purposes of the U.S. ownership calculation required by our rules.<sup>93</sup> We also believe, based on the staff's own experiences with cross-border transactions since 1999 as well as feedback from the commenters, that eliminating this exclusion requirement will increase the availability of the cross-border exemptions without compromising our investor protection goals.

We are retaining the requirement in our existing rules that securities held by the acquiror be excluded from both the

numerator and denominator in calculating U.S. beneficial ownership.<sup>94</sup> We did not propose a change to this requirement of our existing rules. In assessing what securities should be considered for the calculation, it is appropriate to exclude those held by the acquiror because it will not be participating in the acquisition as a target holder. In addition, acquirors often purchase a minority stake in a target company as part of a series of transactions which, while they may occur in stages over time, are part of the same overall acquisition plan; eliminating the requirement to exclude securities held by the acquiror would not reflect the reality that these series of transactions are typically part of an integrated business combination transaction. One commenter noted that excluding securities held by the acquiror could have the effect of inflating the U.S. ownership figures for the remaining securities in the subject class.<sup>95</sup> As noted above, however, this will not always be the case; the requirement to exclude securities held by a U.S. acquiror might have the effect of reducing the total U.S. ownership percentages. In addition, the commenter acknowledged that excluding subject securities held by the acquiror does not present the same logistical issues as requiring an acquiror to exclude securities held by third parties, for which it might not have accurate and complete ownership information.<sup>96</sup>

Several commenters suggested that securities held by greater than 10 percent holders should continue to be excluded from the U.S. ownership calculation, where those large holders are otherwise affiliated with the target.<sup>97</sup> At this time, we are not adopting this recommendation because we believe it may be too cumbersome to require acquirors to determine affiliation. Even if we set objective standards by which affiliation could be determined for these purposes, we believe the approach toward large holders, whether exclusion as under our existing rules, or inclusion under our revised rules, should be consistent for all similarly-situated holders. For this reason, we are not adopting the suggestion of one commenter to exclude from the calculation of U.S. ownership subject securities held by certain U.S.

from the 60th day before through the 30th day after announcement. Another commenter, Simpson Thacher & Bartlett LLP ("STB"), suggested a range from the 60th day before through the 60th day after announcement.

<sup>85</sup> See amended Securities Act Rule 800(h)(1); Instruction 2.i. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.i. to amended Exchange Act Rules 14d-1(c) and (d). This expanded date range is not available for rights offerings. See Section II.A.3. below.

<sup>86</sup> In the Proposing Release, we expressed concern about a bidder or issuer intentionally choosing a date that presents less than a representative picture of the target security holder base. We noted that the cross-border exemptions are not available for any transaction or series of transactions that technically comply with our rules but are in fact part of a scheme to evade them. See Proposing Release, Section II.A.2.b.

<sup>87</sup> See Securities Act Rules 801(a)(2) and 802(a)(1) [17 CFR 230.801(a)(2) and 17 CFR 230.802(a)(1)] and Exchange Act Rules 13e-4(h)(8)(i) and (i)(1)(ii) and 14d-1(c)(1) and (d)(2)(ii) [17 CFR 240.13e-4(h)(8)(i), 240.13e-4(i)(1)(ii), and 240.14d-1(c)(1)].

<sup>88</sup> Under the current rules, all securities held by persons or entities that individually hold more than 10 percent of the subject class, whether U.S. or foreign, must be excluded from both the numerator (U.S. ownership) and denominator (worldwide ownership) when calculating U.S. ownership percentages. See Securities Act Rule 800(h)(2) [17 CFR 230.800(h)(2)]; Instruction 2.ii. to Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d). Under the amended rules, these securities will be included in both the numerator and denominator.

<sup>89</sup> See Proposing Release, Section II.A.2.a. See, e.g., letters from Committee on Mergers, Acquisitions and Corporate Control Contests, Association of the Bar of the City of New York ("ABCNY"), DPW, and Linklaters.

<sup>90</sup> See, e.g., letters from STB and S&C.

<sup>91</sup> See letter from STB.

<sup>92</sup> This could be the case where a foreign private issuer had a disproportionate number of large U.S. security holders of the subject class.

<sup>93</sup> See letter from DPW.

<sup>94</sup> See amended Securities Act Rule 800(h)(2) and Instruction 2.ii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>95</sup> See letter from ABA.

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., letters from Cleary Gottlieb Steen & Hamilton LLP ("Cleary") and DPW.

institutional holders.<sup>98</sup> While the commenter argued that such institutional holders should be excluded from the calculation because our focus should be on retail holders, if we exclude U.S. institutions in determining eligibility to rely on the cross-border exemptions, our rules will apply less frequently to the retail holders who may need them the most. In addition, sophisticated institutional holders benefit from the procedural and other protections of our rules under the Williams Act.<sup>99</sup>

c. Under what circumstances is the issuer or acquiror unable to conduct the look-through analysis to determine eligibility to rely on a cross-border exemption?

As discussed above, the look-through test—as revised today—will remain the primary means of determining eligibility to rely on the cross-border exemptions for negotiated transactions. We continue to believe that extraordinary events in the life of a corporation, such as tender or exchange offers or other kinds of business combination transactions, may pose unique opportunities and risks to security holders. In a tender or exchange offer, where the bidder may present its offer directly to target security holders even where the target company itself does not support the offer, the disclosure and procedural protections of our rules provide critical safeguards for U.S. investors. Unlike capital-raising transactions, the interests of all target security holders, including U.S. holders, are affected by business combinations, whether or not they are permitted to participate in them. Because U.S. beneficial ownership of target securities represents aggregate U.S. economic interest in the target company, we continue to believe that it is the proper standard for determining exemption status. Nevertheless, commenters have pointed out—and the staff's experience has informed us of—some problems that arise in requiring the look-through test. To address these concerns, today we adopt an alternate test, based in part on a comparison of average daily trading volume, which may be used to determine eligibility to rely on the cross-border exemptions. In limited situations, where an issuer or acquiror is unable to conduct the look-through

analysis mandated in our rules, it may use the alternate test described below.<sup>100</sup>

Whether an issuer or an acquiror is unable to conduct the look-through analysis required by our rules will depend on the facts and circumstances of the particular analysis. We emphasize, however, that the need to dedicate time and resources to the look-through analysis alone will not support a finding that a bidder is unable to conduct the analysis. Similarly, concerns about the completeness and accuracy of the information obtained from the analysis will not necessarily justify the use of the alternate test. In each instance, the bidder must make a good faith effort to conduct a reasonable inquiry into ascertaining the level of U.S. beneficial ownership. Where issuers and acquirors have questions about the availability of the alternate test, whether in the context of individual cross-border transactions or otherwise, consideration will be given to whether additional guidance is appropriate.

Although we are not providing an exhaustive list of the situations that would justify the use of the alternate test, we do recognize specific factual scenarios when the alternate test could be used. For example, in some foreign jurisdictions, security holder lists are generated only at fixed intervals during the year and are not otherwise available. In those circumstances, where the published information is as of a date outside the range specified in our revised rules,<sup>101</sup> the alternate test may be used unless the acquiror or issuer otherwise has access to more current information. We believe that U.S. ownership information as of a date outside of the expanded range we provide in our revised rules will be outdated and therefore will justify the use of the alternate eligibility test.

We also believe that an acquiror generally will be unable to conduct the

<sup>100</sup> Cf. Securities Act Rule 409 [17 CFR 230.409] and Exchange Act Rule 12b-21 [17 CFR 240.12b-21] (providing flexibility, under limited circumstances, for registrants when they are unable to provide information required by the Commission's rules).

<sup>101</sup> Under the amended Instructions to the exemptions, as discussed above, the acquiror must obtain information about U.S. beneficial holders as of a date no more than 60 days before and no more than 30 days after the public announcement of the business combination (as of the record date for a rights offering). Where the acquiror cannot obtain information within these time frames, it may use a date no more than 120 days before public announcement. If it cannot conduct the look-through as of date within this extended time frame, the acquiror or issuer is unable to conduct the look-through for purposes of our rules and may rely on the alternate test.

required look-through analysis in the manner prescribed by our revised rules when the subject securities are in bearer form.<sup>102</sup> In addition, in certain foreign jurisdictions, nominees may be prohibited by law from disclosing information about the beneficial owners on whose behalf they hold. Where this prohibition extends to the country of residence of the beneficial owners of the subject securities, we believe the alternate test for determining eligibility should be available. Even the issuer itself may be unable to conduct the required look-through analysis and thus may turn to the alternate test under our revised rules.<sup>103</sup> In addition, where a business combination transaction is non-negotiated (not conducted pursuant to an agreement between the target and the acquiror), the acquiror need not conduct the look-through analysis under our revised rules. This is consistent with the existing rules, premised on the concept that a third party will generally have decreased access to ownership information without the cooperation of the target.<sup>104</sup>

## 2. Elements of the Alternate Test

Under the revised eligibility test, most acquirors will be required to conduct the look-through analysis, as modified by the rule changes we adopt today and discussed above. Only where an acquiror is unable to conduct the required analysis because of specific circumstances may it turn to the other means of determining eligibility specified in the alternate test.<sup>105</sup> As noted above, acquirors in non-negotiated transactions may continue to rely on the alternate test, which is similar to and replaces the current "hostile presumption."

Under the alternate test, an acquiror may rely on the cross-border exemptions unless average daily trading volume in the United States exceeds the limits set forth in our rules, reports filed by the target company indicate levels of U.S. ownership inconsistent with the limits for the applicable exemption, or the acquiror knows or has reason to

<sup>102</sup> These are securities for which the issuer or other party does not keep a registry of ownership. The possession of the stock certificate is the only proof of ownership for bearer securities.

<sup>103</sup> See Instruction 3 to amended Exchange Act Rules 13e-4(h)(8) and (i). This is different from the approach in our current rules, where the hostile presumption based on factors other than the look-through analysis is not available to issuers or affiliated bidders.

<sup>104</sup> See the Proposing Release, Section II.A.3.a. and the 1999 Cross-Border Adopting Release, Section II.F.3.

<sup>105</sup> See new Securities Act Rule 800(h)(7); Instruction 3 to amended Exchange Act Rules 13e-4(h) and (i); and Instruction 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>98</sup> See letter from Allen & Overy, Ashurst LLP, Clifford Chance LLP, Freshfields Bruckhaus Deringer, Herbert Smith LLP, Linklaters LLP, and Norton Rose LLP. This letter advocates disregarding holdings by U.S. institutional investors, such as those qualifying as "QIBs" as defined in Rule 144A, even where such entities individually hold no more than 10 percent of the subject securities.

<sup>99</sup> Pub. L. No. 90-439, 82 Stat. 454 (1968).



know that U.S. ownership exceeds the limits for the applicable exemption. We discuss each element of this alternate test below.

#### a. Average Daily Trading Volume Test

The first prong of our alternate test is based on a comparison of ADTV of the subject securities in the United States, as compared to worldwide ADTV.<sup>106</sup> As revised, this element of the alternate test is satisfied where ADTV for the subject securities in the United States over a twelve-month period ending no more than 60 days before the announcement of the transaction is not more than 10 percent (40 percent for Tier II) of ADTV on a worldwide basis.<sup>107</sup> As noted above, the percentage trading volume figures remain unchanged from the comparable component of the existing test for non-negotiated transactions.<sup>108</sup> We considered decreasing these percentages for purposes of this ADTV element, because our analysis indicates that these trading volume levels do not correspond with the U.S. beneficial ownership levels that remain the focus of our revised eligibility test.<sup>109</sup> However, these ADTV figures are a feature of the comparable ADTV element of the existing hostile presumption, and we have retained the comparable limiting elements focused on U.S. beneficial ownership discussed below. For these reasons, and because the alternate test will be available only in limited circumstances outside the context of a non-negotiated transaction, we have not changed the percentages for the ADTV test.

The revised rules specify that where a transaction is not made pursuant to an agreement between the acquiror and the target company, the acquiror need not conduct the look-through analysis.<sup>110</sup> This is similar to the existing "hostile

presumption" for non-negotiated transactions. We made that presumption available in 1999 when the current exemptions were adopted because we recognized that where no such agreement exists, without the cooperation of the target company, the acquiror's ability to obtain information about brokers and other nominees may be limited.<sup>111</sup> We believe this continues to be the case today.

The revised rules provide acquirors with a range of dates by which they may do the comparison of U.S. and worldwide average daily trading volume. The comparison must be made over a twelve-month period ending no more than 60 days before the public announcement of the transaction.<sup>112</sup> The requirement to perform the comparison as of a twelve-month period minimizes the potential for manipulation of the trading volumes both inside and outside the United States. For the reasons discussed above, we believe that providing a range of dates as of which the comparison may be accomplished provides appropriate flexibility for acquirors. In the context of an objective measure such as ADTV, there should be no concerns about compromising confidentiality by doing this calculation before announcement. Therefore, for purposes of this prong of the alternate test, we are not permitting the acquiror to use a range of dates that extends beyond announcement, as we do for the look-through test discussed above.<sup>113</sup> Using public announcement instead of commencement as the reference point for the calculation will allow acquirors to determine and inform the market and target holders about the treatment of U.S. holders at an earlier stage in the process.

The revised rules also require that there be a "primary trading market" for the subject securities, as that term is defined in our rules,<sup>114</sup> in order for the acquiror in a negotiated transaction to rely on the alternate test as a result of being unable to conduct the look-through analysis.<sup>115</sup> "Primary trading

market" means that at least 55 percent of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdictions during a recent twelve-month period.<sup>116</sup> In addition, if the trading of the subject securities occurs in two foreign markets, the trading in at least one of the two must be larger than the trading in the United States for that class.<sup>117</sup> In our view, the existence of a primary trading market is important because it is designed to ensure that there is a primary foreign regulator with oversight over the transaction. Thus, where there is no primary trading market for the subject securities outside of the United States, an acquiror in a negotiated transaction may not rely on the alternate test. In response to our request for comments, several commenters supported the adoption of a "primary trading market" component if we adopted a test based in whole or in part on ADTV.<sup>118</sup>

One commenter stated that requiring average daily trading volume in the United States to be compared to trading in the primary trading market, as opposed to the worldwide trading market, would be too restrictive.<sup>119</sup> The revised rules require a comparison of U.S. ADTV to worldwide ADTV, thus maximizing the size of the denominator and potentially limiting the U.S. average daily trading volume numbers.<sup>120</sup>

#### b. Information Filed by the Issuer With the Commission or Home Country Regulators

The second prong of the alternate test is that the acquiror must consider information about U.S. ownership levels that appear in annual reports or other annual information filed by the issuer with the Commission or with the regulator in its home jurisdiction. It may be disqualified from relying on the cross-border exemption sought if those

trading market requirement does not apply to the use of the alternate test for non-negotiated transactions.

<sup>106</sup> Exchange Act Rule 12h-6(f)(5)(i) [17 CFR 240.12h-6(f)(5)(i)]. Elsewhere in the revised exemptions, we continue to use the term "primary trading market" more narrowly, to refer to the single, principal foreign trading market for the subject securities outside the United States. See footnote 58 in the Proposing Release.

<sup>107</sup> Exchange Act Rule 12h-6(f)(5)(ii) [17 CFR 240.12h-6(f)(5)(ii)].

<sup>108</sup> See letters from Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller, Slaughter and May, and Uria Menéndez, STB, and Sompoo Japan Insurance Inc.

<sup>109</sup> See letter from ABA.

<sup>120</sup> This is consistent with the manner in which the calculation is done for purposes of the deregistration rule. See Exchange Act Rule 12h-6(a)(4)(i) [17 CFR 240.12h-6(a)(4)(i)]. Worldwide average daily trading volume for these purposes would include U.S. average daily trading volume.

<sup>106</sup> The comparable prong of the existing hostile presumption test compares "aggregate trading volume of the subject securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market as reported to the NASD" to the worldwide aggregate trading volume. See, e.g., the existing Instruction 3 to Exchange Act Rules 14d-1(c) and (d). Although the revised instruction we adopt today refers to "average daily" instead of "aggregate" trading volume, and eliminates the references to the NASD (or its successor FINRA), we do not view these changes as substantive.

<sup>107</sup> See new Securities Act Rule 800(h)(7)(i); Instruction 3.i. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.i. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>108</sup> See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and (d).

<sup>109</sup> See Memorandum from the Office of Economic Analysis (June 5, 2008) (available in the comment file for the Proposing Release at <http://www.sec.gov/rules/proposed/s71008.shtml>).

<sup>110</sup> See new Securities Act Rule 800(h)(6) and Instruction 3 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>111</sup> See 1999 Cross-Border Adopting Release, Section II.F.3.

<sup>112</sup> See new Securities Act Rule 800(h)(7)(i); Instruction 3.i. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.i. to amended Exchange Act Rules 14d-1(c) and (d). We proposed to modify the instruction in our rules to mandate a calculation over a twelve-calendar-month period ending no later than 60 days before announcement. We did not receive comments specifically addressing this point.

<sup>113</sup> See Instruction 2 to amended Exchange Act Rules 14d-1(c) and (d).

<sup>114</sup> See Exchange Act Rule 12h-6(f)(5).

<sup>115</sup> We did not propose, but we solicited comment on, whether we should adopt a primary trading market requirement when using an ADTV measure. See Proposing Release, Section II.A.4. The primary

reports or other filings indicate levels of U.S. ownership that exceed applicable limits for that exemption.<sup>121</sup>

This element of the alternate test is virtually identical to the comparable element of the existing test for non-negotiated transactions.<sup>122</sup> The only change from the prior test for non-negotiated transactions is that the revised Instruction specifies that only annual reports or other annual information filed before the public announcement of the transaction must be taken into account by the acquiror. We believe it is appropriate to set a time limit on the information that the acquiror must consider, since the planning process of the transaction and the certainty of the exemption itself may be disrupted by a filing that is made late in the process.

The acquiror's eligibility to rely on a cross-border exemption should not be affected by filings after that time, because the public announcement may contain (and in some foreign jurisdictions, must contain) detailed information about the treatment of U.S. target holders. We do not believe that the acquiror should lose eligibility based on reports filed after announcement; conversely, the acquiror will not gain eligibility to rely on the exemptions based on reports filed after announcement indicating a reduction in the percentage of U.S. holders.

The annual report filed with the Commission by foreign private issuers subject to Exchange Act reporting requires disclosure of the percentage of the class held by U.S. persons.<sup>123</sup> Not all foreign private issuers file annual reports with the Commission, however.<sup>124</sup> For those who do not file with the Commission, reports filed in the home jurisdiction may or may not require disclosure of comparable information about U.S. ownership. However, the acquiror may have reason to know U.S. beneficial ownership figures for non-reporting issuers, which

also must be taken into account pursuant to the final element of the eligibility test.

#### c. Reason To Know

We refer to the final element in the new alternate test as the "reason to know" element. The existing hostile presumption test for non-negotiated transactions contains a similar element.<sup>125</sup> This prong of the alternate test provides that an applicable cross-border exemption is not available, even where all other elements of the alternate test are met, if the acquiror "knows or has reason to know" that U.S. beneficial ownership levels exceed the limits for the applicable exemption.<sup>126</sup>

We believe the reason to know element serves a critical function in protecting the interests of U.S. investors under the current hostile presumption. Each other element of the eligibility test has limitations which may translate into an inaccurate and incomplete picture of the subject security holder base. The reason to know element captures information that the acquiror may gain as a result of its own assessment of the target company and the feasibility of the transaction. The acquiror should not be permitted to ignore such information simply because it comes from sources other than those captured in the other elements of our alternate test. The staff has received numerous questions about what constitutes "reason to know" information about U.S. ownership levels that would preclude reliance on the exemptions under the current hostile presumption. To provide guidance on that issue, we proposed changes to this element of the current hostile presumption test to assist acquirors in determining what constitutes "reason to know."<sup>127</sup> The proposed changes, which we are adopting today, clarified that an offeror is deemed to have reason to know information about U.S. ownership of the subject class that appears in any filing with the Commission or any regulatory authority in the issuer's home country or (if different) the jurisdiction in which its primary trading market is located.<sup>128</sup> This change will capture not only filings by the issuer, but also filings by other

parties reporting beneficial ownership of the subject securities.<sup>129</sup>

While commenters supported our efforts to provide further specificity on "reason to know," many requested further guidance on this issue, consistent with staff experience that it is an area of concern for practitioners under the current hostile presumption.<sup>130</sup> Therefore, as adopted, the revised provision contains additional references to specific sources of information that will be attributed to the acquiror.<sup>131</sup> This includes information about U.S. ownership "available from the issuer or obtained or readily available from any other source that is reasonably reliable."<sup>132</sup> "Readily available" for these purposes means publicly available from sources reasonably accessible to the issuer or acquiror at no or limited cost. We do not intend this language to mean that an issuer or acquiror must take into account information publicly available from any source, no matter how obscure or costly to obtain. If the acquiror and the target enter into an agreement pursuant to which the acquiror has the right to obtain information from the target, including information about U.S. ownership, it will be deemed to know any such information known to the target. We believe such an agreement will almost always exist in the context of a negotiated transaction.

Other sources of information of which the acquiror will be deemed to have knowledge under the rule revisions adopted today include, but are not limited to, third-party information providers and other advisors engaged by the parties to the transaction that may have provided information about U.S. ownership. This change to the rule does not require that the parties engage such third parties in order to qualify for eligibility under this element.<sup>133</sup> The rule simply requires the acquiror to take into account information that is obtained from a third-party information provider, including information that is readily available from such providers.

<sup>121</sup> See amended Securities Act Rule 800(h)(7)(ii); Instruction 3.ii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.ii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>122</sup> See Securities Act Rule 802(c)(3) [17 CFR 230.802(c)(3)] and Instruction 3.iii. to Exchange Act Rules 14d-1(c) and (d).

<sup>123</sup> Item 7.A.2. of Form 20-F mandates that "[i]nformation shall be provided as to the portion of each class of securities held in [the United States] and the number of record holders in the [United States]." Many foreign private issuers filing Form 20-F provide information about U.S. record ownership only, which is not in and of itself the measure of U.S. ownership used to determine eligibility to rely on the cross-border exemptions.

<sup>124</sup> A foreign private issuer must file an annual report with the Commission only where the foreign private issuer has a class of securities registered under Section 12 of the Exchange Act.

<sup>125</sup> See Securities Act Rule 802(c)(4) [17 CFR 230.802(c)(4)] and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and (d).

<sup>126</sup> See new Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>127</sup> See proposed Securities Act Rule 802(c)(4) and proposed Instruction 3.iv. to Exchange Act Rules 14d-1(c) and (d).

<sup>128</sup> *Id.*

<sup>129</sup> Only "annual reports" or filings of "annual information" by the issuer are covered in the preceding element of the test. Reports that may be covered by the "reason to know" element of the revised test include beneficial ownership reports filed by third parties reporting ownership in the subject class.

<sup>130</sup> See, e.g., letter from DPW.

<sup>131</sup> See amended Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>132</sup> *Id.*

<sup>133</sup> One commenter requested that we clarify that we are not establishing such a requirement. See letter from Cravath, Swaine, & Moore LLP ("Cravath").

These examples cited in our revised rules are not intended to be exclusive; an acquiror may have reason to know information from other sources, depending on the particular facts and circumstances of the transaction.<sup>134</sup>

We are adopting as proposed the limiting language in this revised instruction that makes it clear that knowledge or reason to know acquired after public announcement will not disqualify the acquiror from relying on the cross-border exemptions.<sup>135</sup> For the reasons discussed in the preceding section, we believe it is appropriate to include a timing element here, so that the ability to rely on a cross-border exemption is not called into question by knowledge acquired after announcement. Commenters generally supported this change.<sup>136</sup>

### 3. Changes to Eligibility Test for Rights Offerings

The changes to the eligibility test we adopt today also will apply to the calculation of U.S. ownership for rights offerings. Issuers may now calculate U.S. ownership as of a date no more than 60 days before and 30 days after the record date for the rights offering.<sup>137</sup> Thus, issuers will have greater flexibility on the timing of the calculation of U.S. ownership within a range of dates; however, the reference point for the calculation will continue to be the record date for rights offerings, rather than the date of public announcement for business combinations. This is appropriate because the record date for a rights offering is more closely tied to the specific security holder base that may participate in the transaction.<sup>138</sup>

We solicited comment on, but did not propose changes to, the eligibility test for rights offerings because we did not believe that issuers faced the same problems with the look-through analysis as third-party acquirors did for business combination transactions.<sup>139</sup> However,

<sup>134</sup> The proposed rules note that the sources listed are not intended to be an exclusive list.

<sup>135</sup> We do this by inserting the language the words "before the public announcement" into the first sentence of this amended provision. See new Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d-1(c) and (d).

<sup>136</sup> See, e.g., letter from ABCNY.

<sup>137</sup> See amended Securities Act Rule 800(h).

<sup>138</sup> See amended Securities Act Rule 800(h)(1). The expanded date range of up to 120 days if the information is not available within the range otherwise specified is not available for rights offerings. This should not be needed, as it is within the issuer's power to set an appropriate record date.

<sup>139</sup> See Proposing Release, Section II.A. This may be because issuers generally have access to greater information about their own security holders, and

several commenters argued that we should also adopt similar changes to the rights offering exemption.<sup>140</sup> It is our understanding that many foreign private issuers continue to exclude U.S. holders from rights offerings available to all other security holders. To the extent that the revisions we adopt today make the exemption for rights offerings more readily available and facilitate the inclusion of U.S. holders, these changes may be useful in promoting our investor protection goals.

Therefore, we are adopting similar changes to the method of calculating U.S. ownership for purposes of the exemption for rights offerings as we adopt today for business combination transactions. This will allow issuers more time to conduct the U.S. ownership calculation at an earlier stage in the transaction planning process. In addition to the changes to the look-through analysis mandated under our revised rules, the alternate test for calculating U.S. ownership also will be available for issuers unable to conduct the look-through analysis.<sup>141</sup>

### B. Changes to the Tier I Exemptions

#### 1. Expanded Exemption From Exchange Act Rule 13e-3

We are adopting as proposed revised Exchange Act Rule 13e-3(g)(6) expands the scope of the exemption from Rule 13e-3 to cover a broader range of cross-border transactions than otherwise would be subject to that Rule. Existing Rule 13e-3(g)(6) exempts the parties engaged in an affiliated cross-border business combination transaction from the application of Rule 13e-3 where that transaction is structured as an issuer or third-party tender offer under the Tier I cross-border exemptions, or as a securities offering made pursuant to Securities Act Rule 802. Transactions such as cash mergers, compulsory acquisitions for cash, and schemes of arrangement not consummated under these rules could be subject to Rule 13e-3 even where they otherwise would have been eligible for the cross-border exemption from that rule, if structured under Tier I or Securities Act Rule 802.

We believe that the form of the transaction should not govern whether Rule 13e-3 applies to a cross-border

rights offerings may not be subject to the same time pressures as business combination transactions.

<sup>140</sup> See letters from Cravath and S&C.

<sup>141</sup> See new Securities Act Rule 800(h)(6) and (7). This is a change from our existing rules, where the hostile presumption based in part on the average daily trading volume comparison is available only for third-party, unaffiliated acquirors. See, e.g., existing Securities Act Rule 802(c), which applies only to persons other than the issuer of the subject securities and is being replaced by the alternate test.

transaction which otherwise would be eligible for the Tier I exemption from that rule; therefore, we proposed eliminating the limits on the kinds of cross-border transactions that could be covered under the exemption in Rule 13e-3(g)(6). We are adopting this change as proposed. In order to qualify for the expanded exemption from Rule 13e-3, a party must meet all of the conditions for reliance on Rule 802 or Tier I. These conditions such as the requirement that U.S. security holders be treated at least as favorably as foreign security holders, will continue to safeguard the interests of U.S. holders. In addition, a party relying on revised Rule 13e-3(g)(6) for affiliated transactions not conducted pursuant to Securities Act Rule 802 or Tier I must submit a Form CB to the same extent as would be required in a transaction conducted pursuant to those provisions. Because the party relying on the expanded cross-border exemption from Rule 13e-3 would have had an obligation to file a Schedule 13E-3, absent the expanded exemption, a Form CB (and Form F-X where the filer is foreign) will be required.<sup>142</sup>

In the Proposing Release, we solicited comment on how we should accomplish the proposed expansion of the exemption from Rule 13e-3. We asked whether we should revise the rule to list additional transaction structures that would be covered under the expanded exemption, or whether we should simply eliminate any limits on the types of transactions covered, as proposed. The four commenters who addressed this issue supported the change, including our approach of leaving open the kinds of cross-border transactions that may be covered under the expanded exemption, to provide maximum flexibility for the parties covered by Rule 13e-3.<sup>143</sup>

One commenter called for us to extend the exemption from Rule 13e-3 to tender offers conducted pursuant to Tier II, on the grounds that corporate law matters that underpin the enhanced investor protection provisions in Rule 13e-3 are best addressed by home country regulation.<sup>144</sup> We recognize that other jurisdictions may impose equally effective but different safeguards to address the conflict of interests that may exist in a transaction to which Rule 13e-3 applies. We note, however, that Rule 13e-3 is a disclosure provision and we do not believe its application is unduly burdensome, particularly where

<sup>142</sup> See Instruction to amended Exchange Act Rule 13e-3(g)(6).

<sup>143</sup> See letters from ABA, ABCNY, Cravath, and DPW.

<sup>144</sup> See letter from ABCNY.

U.S. investors make up more than 10 percent of a foreign target's security holder base.

Another commenter called for us to exempt from the application of Rule 13e-3 any transaction subject to a third-party fairness hearing and determination.<sup>145</sup> We decline to expand the exemption in this manner. As noted above, Rule 13e-3 is a disclosure provision and does not regulate the substantive fairness of the underlying transaction. Thus, the fact that an affiliated transaction in a foreign jurisdiction has been found to be fair by an independent tribunal or other third party will be a matter for disclosure under the rule, but in our view, should not affect its general application.

## 2. Technical Changes to Securities Act Rule 802

We are adopting as proposed the changes to Rule 802(a)(2) and (3) to substitute the word "offeror" for "issuer." This is a correction to the existing rule rather than a substantive change. We did not receive any comments on this technical correction.

### C. Changes to the Tier II Exemptions

We proposed a number of changes to Tier II in order to alleviate practical difficulties that often result in the need for companies to request specific exemptive or no-action relief.<sup>146</sup> Most commenters did not address the specific changes we proposed, but generally supported our proposed expansion of these exemptions.

#### 1. Tier II Relief for Tender Offers Not Subject to Rule 13e-4 or Regulation 14D

The Tier II exemptions represent targeted modifications to U.S. tender offer rules intended to accommodate differences between U.S. and foreign practice in the context of a cross-border tender offer. Because the Tier II exemptions are contained in Rule 13e-4 and Regulation 14D, the staff receives questions about whether a bidder may rely on these exemptions for a tender offer subject to the provisions of Regulation 14E only. The staff has taken

<sup>145</sup> See letter from the ABA.

<sup>146</sup> Where we refer in this release to "relief," we mean exemptive or no-action relief provided by letter in the context of an individual transaction, unless otherwise indicated. See footnote 46 above referring to the staff's delegated authority to provide exemptive relief from U.S. rules for specific cross-border transactions. Where we refer to "interpretive guidance," we mean oral positions taken by the staff or written interpretations promulgated by the Division of Corporation Finance in the Manual of Publicly Available Telephone Interpretations available on our Web site. We refer to "Commission guidance" or "Commission interpretive guidance" to mean positions expressed by the Commission in releases.

the position that the Tier II exemptions are available for tender offers that would otherwise qualify for those exemptions, but for the fact that the tender offer is not subject to Rule 13e-4 or Regulation 14D. The staff's position was based on the premise that it would be inconsistent for bidders in tender offers subject only to the more basic tender offer provisions in Regulation 14E not to be able to take advantage of the Tier II exemptions, which technically apply to tender offers that are subject to the more extensive regulatory protections in Rule 13e-4 and Regulation 14D. We proposed to change the language of the Tier II exemptions to specifically make it available to offers subject only to Regulation 14E. As we stated in the Proposing Release, we believe the Tier II exemptions should be available for such offers if the conditions in our rules are satisfied; therefore, we are adopting amendments to the rules as proposed to clarify that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D.<sup>147</sup>

Commenters supported the proposed amendments to codify this position.<sup>148</sup> Under the revised rules, the Tier II exemptions will be available to Regulation 14E-only offers only where the exemptions would have been available if those offers were subject to Rule 13e-4 or Regulation 14D. Thus, all of the existing conditions applicable to the Tier II exemptions will apply. Some of the Tier II exemptions may not be necessary for tender offers not subject to the requirements of Rule 13e-4 or Regulation 14D, because Regulation 14E may not have a corresponding regulatory requirement.<sup>149</sup>

#### 2. Tier II Relief for Concurrent U.S. and Non-U.S. Offers

##### a. Multiple Foreign Offers in Connection With a U.S. Offer

The existing Tier II cross-border exemptions permit a bidder to conduct two separate but concurrent tender offers: one made *only* to U.S. target security holders and another open *only* to foreign target holders. In some instances, a tender offer may be subject to more than one regulatory regime outside the United States, particularly where the target's country of

<sup>147</sup> See amended Exchange Act Rules 13e-4(i) and 14d-1(d).

<sup>148</sup> 148 See, e.g., letter from Cravath.

<sup>149</sup> For example, there is no requirement in Regulation 14E to make a tender offer available to all target security holders. Therefore, the accommodation from the all-holders provisions in Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) will not be necessary for an offer subject only to Regulation 14E.

incorporation is not the location of the primary trading market for the target securities. In the past, bidders have requested and have been granted relief to conduct more than one foreign offer outside of the United States pursuant to the Tier II exemptions.<sup>150</sup>

Because we believe the use of a multiple offer structure may be helpful in addressing procedural and technical conflicts between tender offer rules and practice, as well as procedural requirements between different jurisdictions, we see no reason to prohibit the use of more than one offer outside the United States in connection with the Tier II exemptions. Three commenters addressed this proposed change; all supported it.<sup>151</sup> For the reasons noted above, we are adopting the amendments as proposed to permit the use of more than one offer outside of the United States for tender offers conducted under Tier II.<sup>152</sup> We believe the resulting increased flexibility to resolve regulatory conflicts will promote our goal of facilitating the inclusion of U.S. investors in cross-border tender offers subject to multiple regulatory regimes outside of the United States.

As discussed in the Proposing Release, the amendments we adopt today with respect to the use of a multiple offer structure under Tier II are not intended to permit the use of separate proration pools where such a structure is used in the context of a partial cross-border tender offer.<sup>153</sup> Under the current as well as the revised rules, bidders who conduct separate foreign and U.S. offers to minimize the difficulties of complying with two different regulatory regimes applicable to the offer must pro rate tendered securities on an aggregate basis, where required under U.S. rules.<sup>154</sup>

<sup>150</sup> See, e.g., *Alcan, Inc.* (October 7, 2003) ("*Alcan*"); *Asia Satellite Telecommunications Holdings Limited* (May 25, 2007); *BCP Crystal Acquisition GmbH & Co* (February 3, 2004) and *Mittal Steel Company N.V.* (June 22, 2006) ("*Mittal*") (providing relief for purchases outside of a U.S. offer for a tender offer that included more than one offer conducted outside of the United States).

<sup>151</sup> Letters from ABA, Cravath, and S&C.

<sup>152</sup> Amended Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>153</sup> Two commenters addressed our request for comment on whether we should permit the use of two separate proration pools in cross-border tender offers under Tier II. Both supported the continued use of a single proration pool. See letters from Cleary and Cravath.

<sup>154</sup> See Exchange Act Section 14(d)(6) [15 U.S.C. 78n(d)(6)] and Exchange Act Rules 13e-4(f)(3) [17 CFR 240.13e-4(f)(3)] and 14d-8 [17 CFR 240.14d-8]. See also the discussion in Section II.C.2.c. of the Proposing Release.

b. U.S. Offer May Include Non-U.S. Holders of ADRs<sup>155</sup>

The existing Tier II exemptions specify that a U.S. offer conducted in connection with a concurrent foreign offer under Tier II may be open to U.S. persons only.<sup>156</sup> This limitation creates a problem because bidders frequently seek to include all holders of ADRs, not only U.S. holders, in the U.S. portion of a dual offer. Additionally, in many instances, the target's home country regulations do not apply, by their terms, to ADRs.<sup>157</sup> So, as a practical matter, most bidders in cross-border tender offers wish to include all holders of ADRs in the U.S. portion of a dual offer. Companies frequently seek individual relief from the staff to address these issues.<sup>158</sup> The staff often has granted relief to permit a U.S. offer in a dual offer structure to include all holders of ADRs, including foreign holders.<sup>159</sup> Commenters generally supported the proposal.<sup>160</sup> Today we are adopting as proposed rule revisions that will allow a bidder in a cross-border tender offer conducted under Tier II to make the U.S. offer available to all holders of ADRs, including non-U.S. holders, to accommodate this preferred offer structure.<sup>161</sup> These revisions will eliminate the need for companies to seek individual relief in such circumstances.

As we noted in the Proposing Release, bidders have not requested exemptive or no-action relief to permit the inclusion of foreign persons who hold shares directly in share form in the U.S. offer. Two commenters advocated that we allow the U.S. offer to be made to foreign holders of target shares as well as ADRs. We do not believe such a rule change is warranted at this time, given

<sup>155</sup> "ADRs" refer to American Depositary Receipts. As in the Proposing Release, we use this term synonymously with American Depositary Shares, or ADSs.

<sup>156</sup> Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>157</sup> See, e.g., *Portugal Telecom, SGPS, S.A.* (December 19, 2006) ("*Portugal Telecom*") (noting that the provisions of the Portuguese Securities Code and the rules and regulations of the Portuguese Comissão de Mercado de Valores Mobiliários did not apply to the offer for ADSs of the target company listed on the New York Stock Exchange).

<sup>158</sup> See *Harmony Gold Mining Company Limited* (November 19, 2004) ("*Harmony Gold 2004*"); *Discount Investment Corporation Ltd.* (June 14, 2004); *Alcan; Serono S.A.* (September 12, 2002) ("*Serono S.A.*"); and *Southern Cross* (March 5, 2002).

<sup>159</sup> See, e.g., *Royal Bank of Scotland plc* (July 23, 2007) ("*Royal Bank*"); *E.ON Aktiengesellschaft* (December 6, 2006) ("*E.ON*"); *Koninklijke Ahold N.V.* (September 10, 2002) ("*Koninklijke*").

<sup>160</sup> See, e.g., ABA.

<sup>161</sup> Amended Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

that this type of relief has not been requested frequently. If circumstances arise that weigh in favor of permitting foreign target holders to be included in the U.S. offer in a particular instance, requests for relief will be considered on a case-by-case basis. Therefore, we are not changing our rules to permit foreign holders who hold in direct share form to participate in the U.S. offer under Tier II.

We emphasize that, as discussed in the Proposing Release, this and other rule changes to the Tier II exemptions are not intended to enable a bidder to make an offer open only to ADR holders. This would be prohibited where the target securities are registered under Section 12 of the Exchange Act and the all-holders provisions of U.S. tender offer rules apply.<sup>162</sup>

#### c. U.S. Holders May Be Included in Foreign Offer

We are adopting as proposed revisions allowing a bidder to include U.S. target security holders in a foreign offer conducted under Tier II, under specified conditions. Under the revised rules, when a bidder conducts concurrent U.S. and foreign offers under Tier II, the foreign offer may be open to U.S. target security holders only where: (i) The laws of the foreign target company's home jurisdiction expressly prohibit the exclusion of any target security holders, including U.S. persons; and (ii) the offer materials distributed to U.S. persons fully and completely describe the risks to U.S. holders of participating in the non-U.S. offer.<sup>163</sup>

This rule change reflects the fact that takeover rules in some non-U.S. jurisdictions do not permit the exclusion of any target security holders from the foreign offer, even where the bidder makes a concurrent U.S. offer that is open to U.S. holders. Where such rules are present, relief has been granted on a case-by-case basis, in order to accommodate the requirements of the applicable foreign regulatory regime.<sup>164</sup> Such relief has been conditioned on the same conditions we now codify in the revised rule, which we believe strikes the appropriate balance between the need to respect a foreign regulatory requirement in a primarily foreign transaction and the need to provide adequate protections for U.S. investors by fully disclosing the risks of

<sup>162</sup> See Exchange Act Rules 13e-4(f) [17 CFR 240.13e-4(f)] and 14d-10 [17 CFR 240.14d-10].

<sup>163</sup> See amended Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>164</sup> See, e.g., *Gas Natural SDG, S.A.* (March 2, 2006) ("*Gas Natural*").

participating in a non-U.S. offer not subject to U.S. rules.<sup>165</sup>

Commenters generally supported the proposed changes to the Tier II exemptions, including this change. One commenter stated that permitting U.S. persons to be included in a foreign offer where mandated by foreign law and where U.S. investors have received appropriate disclosure concerning the risks of participating in the foreign offer strikes the appropriate investor protection balance.<sup>166</sup>

We note that the rule change permitting U.S. investors to participate in a non-U.S. offer conducted under the Tier II exemptions does not require them to do so. Under our revised rules, as was the case before today's amendments, any U.S. holder who prefers to tender into the U.S. offer in a multiple offer under Tier II is free to do so.

#### 3. Termination of Withdrawal Rights While Counting Tendered Securities

We are adopting as proposed the rule revisions permitting a bidder in a cross-border tender offer conducted under Tier II to suspend withdrawal rights during the counting of tendered securities and until those securities are accepted for payment.<sup>167</sup> Rule 13e-4(f)(2)(ii) and Section 14(d)(5) of the Exchange Act require bidders to provide "back-end" withdrawal rights if tendered securities have not been accepted for payment within a certain date after the commencement of a tender offer.<sup>168</sup> Acceptance of securities tendered terminates the back-end withdrawal rights mandated by Rule 13e-4 and the Exchange Act.<sup>169</sup>

The requirement to provide back-end withdrawal rights creates problems in cross-border tender offers not generally present in U.S. offers. Differences in the tender, acceptance and payment procedures between U.S. and foreign offers necessitate this relief. The manner

<sup>165</sup> See amended Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>166</sup> Letter from ABA.

<sup>167</sup> See new Exchange Act Rules 13e-4(f)(2)(v) and 14d-1(d)(2)(viii).

<sup>168</sup> For issuer tender offers subject to Rule 13e-4, tendering security holders must be able to withdraw tendered securities after the expiration of 40 business days from the commencement of the tender offer. Exchange Act Rule 13e-4(f)(2)(ii) [17 CFR 240.13e-4(f)(2)(ii)]. For third-party tender offers, Section 14(d)(5) of the Exchange Act states that withdrawal rights exist "at any time after sixty days from the date of [commencement] of the original tender offer \* \* \*."

<sup>169</sup> Exchange Act Rule 13e-4(f)(2)(ii) states that back-end withdrawal rights arise upon the 41st day after commencement of an offer "if [tendered securities are] not yet accepted for payment." We interpret the back-end withdrawal rights provisions in Section 14(d)(5) of the Exchange Act to terminate upon acceptance of tendered securities.

in which securities are tendered and centralized for counting in U.S. tender offers typically enable bidders to accept tendered securities almost immediately after the expiration of the initial offering period, thereby terminating back-end withdrawal rights. However, because of differences in the manner in which securities are tendered in many non-U.S. jurisdictions, the centralization and counting of tendered securities can take longer than in the United States.<sup>170</sup> This makes it more likely that back-end withdrawal rights will exist during the counting process in a cross-border tender offer, thereby complicating the counting and payment procedure.

As a result of these difficulties, bidders have sought relief from the application of the back-end withdrawal rights provided under our rules in connection with cross-border tender offers.<sup>171</sup> We have recognized that the mechanics of the tendering and counting regimes in other countries justifies different treatment under our rules,<sup>172</sup> and for the same reasons, we believe it is appropriate to provide an exemption in this area. Under the rule revisions we are adopting, back-end withdrawal rights may be suspended after the expiration of an offer while tendered securities are being counted in a cross-border tender offer conducted under Tier II, so long as:

- The bidder has provided an offer period (including withdrawal rights) of at least 20 U.S. business days;<sup>173</sup>
- At the time withdrawal rights are suspended, all offer conditions other than the minimum acceptance condition have been satisfied or waived;<sup>174</sup> and

<sup>170</sup> For a description of the counting and centralization process in several European jurisdictions, see *Business Objects S.A.* (December 5, 2007) and *Vodafone AirTouch PLC* (December 22, 1999).

<sup>171</sup> See, e.g., *Barclays PLC tender offer for ABN AMRO Holding N.V.* (August 7, 2007) (“*Barclays*”); *Endesa, S.A.* (July 3, 2007); and *Portugal Telecom*.

<sup>172</sup> See Exchange Act Rules 13e-4(i)(2)(iv) and 14d-1(d)(iv) [17 CFR 240.13e-4(i)(2)(iv) and 240.14d-1(d)(iv)]. As a result of the differences in process between the U.S. and various foreign jurisdictions, Tier II currently includes prompt payment relief to allow a bidder meeting the conditions of that exemption to pay for tendered securities in accordance with home country law or practice.

<sup>173</sup> New Exchange Act Rules 13e-4(f)(2)(v)(A) and 14d-1(d)(2)(viii)(A).

<sup>174</sup> For reasons discussed above, the bidder in a cross-border tender offer may not know at the expiration of the offer whether the minimum tender condition has been satisfied, and the amended rules recognize this issue. See new Exchange Act Rules 13e-4(f)(2)(v)(B) and 14d-1(d)(2)(viii)(B). However, because the tenders of securities must occur before the expiration, even where the counting process occurs after the end of the offer, we view a minimum tender condition as being satisfied at or before expiration, consistent with our view that all non-regulatory conditions must be satisfied or

- Back-end withdrawal rights are suspended only until tendered securities are counted and are reinstated immediately after that process, to the extent they are not terminated by the acceptance of tendered securities.<sup>175</sup>

Under the rules before today’s amendments, back-end withdrawal rights were suspended between the end of an initial offering period and the commencement of a subsequent offering period.<sup>176</sup> We believe the rule change we adopt today is necessary because not every tender offer includes a subsequent offering period. For example, subsequent offering periods are not permitted in issuer tender offers or in third-party offers for less than all of the securities of the target class.<sup>177</sup> A subsequent offering period in a third-party tender offer for all outstanding target securities is at the option of the bidder and is not required under U.S. rules. The rule change we adopt today also operates to suspend back-end withdrawal rights that may exist after the expiration of a subsequent offering period, to the extent the bidder meets the conditions outlined in our rules.

The rule changes we adopt today are not intended to eliminate back-end withdrawal rights where a regulatory condition remains outstanding after the expiration of the offer period. Where a lengthy regulatory review process survives the expiration of a tender offer, the back-end withdrawal rights provided under our rules provide an important safeguard for tendering security holders.

Commenters generally supported the proposed changes to Tier II, including this one. One commenter noted that this relief is helpful even where no subsequent offering period is provided, and agreed that the requirement that all offer conditions must be satisfied at the time withdrawal rights are suspended is in the best interests of security holders.<sup>178</sup> Otherwise, security holders could face a prolonged period during which they could not withdraw and would not have received payment for tendered securities.<sup>179</sup> One commenter

waived as of that date. See footnote 151 in the Proposing Release. Note that the only conditions that may survive the expiration of the initial offering period are regulatory approvals necessary to consummate the tender offer.

<sup>175</sup> New Exchange Act Rules 13e-4(f)(2)(v)(C) and 14d-1(d)(2)(viii)(C).

<sup>176</sup> Exchange Act Rule 14d-1(d)(2)(v) [17 CFR 240.14d-1(d)(2)(v)].

<sup>177</sup> Exchange Act Rule 14d-11(b) [17 CFR 240.14d-11(b)].

<sup>178</sup> Letter from ABA.

<sup>179</sup> These provisions allow tendering security holders to withdraw their tendered securities after a certain period of time. Certain regulatory approval processes, such as anti-trust approvals, may be

suggested that we also permit suspension of back-end withdrawal rights while a financing condition remains outstanding at the time withdrawal rights are suspended.<sup>180</sup> The commenter noted that the financing for an offer may be contingent on the satisfaction or waiver of the minimum acceptance condition. At this time, we are not extending the rule to permit the suspension of back-end withdrawal rights while an offer condition, other than a minimum acceptance condition, remains outstanding. As noted above, in our view, only conditions for regulatory approvals necessary to the consummation of the offer may survive its expiration.<sup>181</sup>

#### 4. Subsequent Offering Period Changes

##### a. Maximum Time Limit on Subsequent Offering Period Eliminated

Based on our experience with foreign rules permitting the use of a subsequent offering period, we revised our rules in 1999 to permit the use of this offer structure in domestic tender offers.<sup>182</sup> Current rules permit a third-party bidder in a tender offer for all of the subject class of securities to include a subsequent offering period during which securities may be tendered and purchased on a rolling or “as tendered” basis if certain conditions are met.<sup>183</sup> We adopted the subsequent offering period because we believe it benefits target security holders who may want to tender into an offer once the offer is unconditional and will be consummated; once an offer for all outstanding securities is certain to be consummated successfully because all offer conditions have been satisfied or waived, the opportunity to tender into

lengthy and back-end withdrawal rights may provide an important safeguard in such cases. See generally, *ProSiebenSat.1 Media AG* (January 30, 2007) (in granting no-action relief from the prompt payment requirements of Exchange Act Rule 14e-1(c) where a regulatory condition was expected to survive the expiration of a tender offer, the staff explicitly noted that tendering target holders would have withdrawal rights through the date of receipt of such regulatory approvals). Consideration will be given to requests for relief under those circumstances only where a compelling reason exists.

<sup>180</sup> Letter from STB.

<sup>181</sup> See footnote 174 above and footnote 151 in the Proposing Release.

<sup>182</sup> *Regulation of Takeovers and Security Holder Communications*, Release No. 33-7760 (October 22, 1999) [64 FR 61408] (“*Regulation M-A Adopting Release*”).

<sup>183</sup> Exchange Act Rule 14d-11 permits the use of a subsequent offering period in an offer for all securities of the class that is the subject of the tender offer. If the bidder is offering security holders a choice of different forms of consideration, there may be no ceiling on any form of consideration offered. Subsequent offering periods are not permitted for issuer tender offers.

a subsequent offering period and to be paid quickly allows remaining target security holders to be paid before a back-end merger or other second-step transaction.<sup>184</sup> The subsequent offering period also may facilitate a bidder's efforts to reach the thresholds necessary to effect a short-form or "squeeze-out" merger at the levels set by the laws of the relevant jurisdiction.<sup>185</sup>

In practice, however, U.S. rules on subsequent offering periods have been a source of conflict with foreign regulations in the context of cross-border tender offers. A conflict often arises because Rule 14d-11 imposes a maximum time limit of 20 U.S. business days on the length of subsequent offering period.<sup>186</sup> Subsequent offering periods of significantly longer duration are common under law or practice in many foreign jurisdictions.<sup>187</sup> To address the conflict, today we are eliminating the maximum time limit on the length of a subsequent offering period in both foreign and domestic tender offers.

As proposed, this rule change would have applied only to Tier II cross-border tender offers. We also solicited comment on whether we should eliminate the 20-business day time limit as to domestic offers. Because we believe the flexibility to conduct a longer subsequent offering period will

be beneficial to bidders and target security holders in U.S. offers as well, we are making this change to our tender offer rules generally.<sup>188</sup> We believe that as a practical matter, eliminating the limit on the time period for a subsequent offering period will benefit target security holders who choose not to tender into an initial offering period. The elimination of the 20-business day time limit will allow security holders more time to tender during the subsequent offering period. Tendering holders will be paid more quickly, thereby avoiding the lengthy process that may be associated with a squeeze-out process. We do not believe that the elimination of this limit will have any negative effects on security holders. Security holders tendering during a subsequent offering period will continue to be protected by the prompt payment provisions, as modified today in the case of Tier II offers, in the event that a subsequent offering is conducted over an extended period of time.<sup>189</sup>

Five commenters specifically supported our proposal to eliminate the time limit on the length of the subsequent offering period.<sup>190</sup> Three supported making corresponding changes to the rules applicable to domestic tender offers, as we are doing today.<sup>191</sup> One commenter advocated the elimination of the 20-business day limit on the length of the subsequent offering period but expressed support for retaining the minimum three-business day period in our current rules.<sup>192</sup> We did not propose to eliminate the requirement that the subsequent offering period be at least three business days long, and we are not doing so today.<sup>193</sup> We believe the minimum time period is necessary to give remaining target security holders a meaningful opportunity to exercise the right to tender during this period.

#### b. Prompt Payment of Securities Tendered During the Subsequent Offering Period

We are adopting a modification of the proposed changes to the payment process for securities tendered during the subsequent offering period in a Tier II cross-border tender offer.<sup>194</sup> U.S. rules

mandate that securities tendered during a subsequent offering period must be paid for as soon as they are tendered, on a "rolling" basis.<sup>195</sup> Our revised rules will allow a bidder in a cross-border tender offer conducted pursuant to the Tier II exemptions to "bundle" and pay for securities tendered in the subsequent offering period within 20 business days of the date of tender. For purposes of this rule provision only, a business day will be determined by reference to the relevant foreign jurisdiction; this will provide greater flexibility for bidders, because foreign and U.S. holidays may vary.<sup>196</sup>

The requirement to pay for securities tendered during the subsequent offering period on a rolling basis exists because security holders cannot withdraw securities tendered in that period. Therefore, because the tender offer is no longer subject to any conditions,<sup>197</sup> it is appropriate for tendering security holders to be paid immediately upon tender.

In a cross-border tender offer, foreign rules or practice often dictate payment practices during the subsequent offering period that conflict with U.S. rules. For example, foreign law may require securities tendered during the subsequent offering period to be paid for within a certain number of days after the expiration of the subsequent offering period<sup>198</sup> or may require "bundling" of securities and payment on specified periodic take-up dates.<sup>199</sup> In the past, bidders have been granted relief to accommodate conflicts between U.S. rules and non-U.S. law or practice with respect to payment practices during the subsequent offering period.<sup>200</sup>

This revised rule we adopt today is slightly modified from the proposal in

<sup>195</sup> See Exchange Act Rule 14d-11(e) [17 CFR 240.14d-11(e)].

<sup>196</sup> See amended Exchange Act Rule 14d-1(d)(2)(iv). By not defining business day in accordance with the U.S. calendar, we believe this rule modification will be more useful because U.S. and non-U.S. holidays will vary.

<sup>197</sup> A subsequent offering period may commence only when all offer conditions have been satisfied or waived. See Exchange Act Rule 14d-11(c) [17 CFR 240.14d-11(c)].

<sup>198</sup> This is the practice in the Netherlands and France, for example. See *Barclays* and *Aventis* (June 10, 2004).

<sup>199</sup> For example, under Canadian law, tendered securities must be taken up and paid for within ten calendar days of tender.

<sup>200</sup> See *Barclays* (relief granted to permit payment for securities tendered in the subsequent offering period within five Dutch trading days after the end of that period); *Rio Tinto* (shares tendered during a subsequent offering period may be taken up and paid for within ten calendar days of the date of tender, in accordance with Canadian law); and *Aventis* (relief granted to permit payment for securities tendered into a French offer to be made within 12-18 French trading days after the expiration of that period).

<sup>184</sup> See Regulation M-A Adopting Release, Section II.G.1.

<sup>185</sup> *Id.*

<sup>186</sup> Another source of conflict is the minimum extension periods set forth in Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2) [17 CFR 240.13e-4(e)(3) and 240.14d-4(d)(2)]. These rules require an offer to remain open from the date that material changes to the offer materials are disseminated to security holders, as follows: (i) five business days for a prospectus supplement containing a material change other than price or share levels; (ii) 10 business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change; (iii) 10 business days for a prospectus supplement included as part of a post-effective amendment; and (iv) 20 business days for a revised prospectus when the initial prospectus was materially deficient.

<sup>187</sup> See *RWE Aktiengesellschaft* (March 22, 2002) ("*RWE*") (noting that subsequent offering periods lasting significantly longer than 20 business days are the custom in Great Britain and are permitted under The City Code on Takeovers); *Serono S.A.* (noting that French law does not set a maximum for the number of days in a subsequent offering and requesting relief for a 30 trading day subsequent offering period, with immediate acceptance of tendered shares on an "as tendered" basis); *Rio Tinto plc* (July 24, 2007) ("*Rio Tinto*") (noting that Canadian law sets no maximum period for subsequent offering periods); *STATs ChipPAC Ltd.* (March 15, 2007) ("*STATs ChipPAC*") (relief for a subsequent offering period of up to four months from the commencement date); and *Harmony Gold 2004* (requesting relief for a subsequent offering of longer than 20 U.S. business days, as permitted under South African law and as is customary market practice in that jurisdiction).

<sup>188</sup> See amended Exchange Act Rule 14d-11.

<sup>189</sup> See Exchange Act Rule 14d-11(e) [17 CFR 240.14d-11(e)] and amended Exchange Act Rule 14d-1(d)(2)(iv).

<sup>190</sup> See letters from ABA, Cleary, Cravath, Linklaters, and S&C.

<sup>191</sup> See letters from ABA, Cleary, and Cravath.

<sup>192</sup> Letter from ABA and Exchange Act Rule 14d-11.

<sup>193</sup> Exchange Act Rule 14d-11.

<sup>194</sup> See amended Exchange Act Rule 14d-1(d)(2)(iv).

order to provide expanded flexibility to avoid conflicts between U.S. and non-U.S. law and practice and to address concerns raised by commenters that the proposal did not go far enough in this regard. We initially proposed to require payment for securities tendered during the subsequent offering period to be made within 14 business days, but solicited comment on whether a shorter or longer period would be appropriate.<sup>201</sup> As adopted, we are allowing bidders 20 business days to effect payment. The change to 20 business days was requested by one commenter.<sup>202</sup> We believe that allowing 20 business days to effect payment should be sufficient in most jurisdictions, and increasing the payment period to 20 business days, rather than 14 business days as proposed, will not be detrimental to investors.

Several other commenters expressed support for allowing bidders to pay for securities tendered during the subsequent offering period in accordance with the target's home country law or practice, rather than fixing a set payment date, as proposed.<sup>203</sup> We are not adopting this change. Because we are eliminating the maximum time period for the subsequent offering period, we believe that maintaining a time limit for payment is appropriate and in the best interests of U.S. investors. Without a time limit for payment, investors tendering securities in the subsequent offering period may face an indefinite waiting period for payment of their tendered securities. Maintaining a time limit is particularly important because target security holders who tender during the subsequent offering period do not have withdrawal rights.<sup>204</sup>

The rule change we adopt is intended to set a minimum standard for payment for securities tendered during a subsequent offering period. Where local law mandates and local practice permits payment on a more expedited basis, payment must be made more quickly than 20 business days from the date of tender to satisfy U.S. prompt payment requirements.<sup>205</sup>

Although, as noted in the previous section, we are eliminating the limits on the length of the subsequent offering period for domestic as well as cross-border tender offers, we are not

adopting corresponding changes to permitted payment practice during the subsequent offering period for domestic offers.<sup>206</sup> The changes in permitted payment practice for Tier II cross-border tender offers are necessitated by direct conflicts between U.S. and foreign law and practice; no such conflicts exist for U.S. offers. Moreover, because withdrawal rights are not provided during a subsequent offering period, we believe that in domestic offers where there is no impediment to doing so, it is appropriate to continue to require payment to be made on an as tendered basis.

#### c. Payment of Interest on Securities Tendered During the Subsequent Offering Period

We are adopting as proposed a rule change permitting bidders in Tier II cross-border tender offers to pay interest on securities tendered during a subsequent offering period, where required under foreign law.<sup>207</sup> In some foreign jurisdictions, bidders are legally obligated to pay interest on securities tendered during a subsequent offering period at a rate set by law.<sup>208</sup> Sometimes interest accrues from the actual date of tender; in other jurisdictions, interest accrues from a date certain unrelated to the date of tender.<sup>209</sup>

Without the rule change we adopt today, paying interest on securities tendered during a subsequent offering period would violate U.S. rules, which mandate that security holders who tender into a subsequent offering period must receive the same consideration as those that tender during the initial offering period.<sup>210</sup> Because of this prohibition, bidders have requested and received exemptive relief to address the direct conflict of law presented, where foreign law in the relevant jurisdiction requires the payment of interest on securities tendered but U.S. law prohibits it.<sup>211</sup> The rule changes we

adopt today codify this relief for Tier II tender offers.

We note that the rule change we adopt today applies only where the payment of interest is mandated by the law of the relevant foreign jurisdiction applicable to the offer. It is not intended to allow bidders to pay more in the subsequent offering period simply as an inducement to tendering.<sup>212</sup> We believe the general requirement that bidders make the same amount and form of consideration in the initial and subsequent offering periods serves an important function to eliminate any coercion of target security holders, and should be maintained unless it is inconsistent with an express requirement of applicable foreign law.

We have not limited the amount of interest that may be paid on securities tendered during the subsequent offering period. In our experience, the rate of interest set by foreign law generally results in a *de minimis* payment, but we have not conditioned the application of the revised exemption on the amount of the interest payment. Only one commenter responded to our question regarding whether we should limit the amount of interest that may be paid on securities tendered during the subsequent offering period. That commenter supported our approach of not setting a limit, on the grounds that interest payments would not have a coercive effect under the circumstances where they are permitted by our revised rules.<sup>213</sup>

Our rule change does not permit the payment of interest on securities tendered during the initial offering period. The only commenter who addressed this question indicated that we should permit interest payments on securities tendered during an initial offering period, where such interest payments are required under home country law.<sup>214</sup> However, this is not an area where relief is frequently requested, so we do not believe a rule change is appropriate at this time.<sup>215</sup>

<sup>206</sup> See Exchange Act Rule 14d-1(d)(2) [17 CFR 240.14d-1(d)(2)] and Section II.C.4.a. of this release.

<sup>207</sup> New Exchange Act Rule 14d-1(d)(2)(vi).

<sup>208</sup> Germany and Brazil are two such foreign jurisdictions. For example, in Brazil, bidders must pay interest at a statutory rate on securities "put" to the bidder after the termination of a successful voluntary offer. We consider such a put right to be a tender offer or to constitute the subsequent offering period in a voluntary offer. See the description of this feature of Brazilian law in *Embratel Participacoes S.A.* (December 6, 2006) ("*Embratel*") and *Telemar Participacoes S.A.* (October 9, 2007) ("*Telemar*"). See also, *Bayer AG* (September 26, 2006) ("*Bayer*") (describing a similar requirement under German law).

<sup>209</sup> *Id.*

<sup>210</sup> Exchange Act Rules 14d-10 and 14d-11(f) [17 CFR 240.14d-10 and 14d-11(f)].

<sup>211</sup> See, e.g., *Telemar*; *Embratel*; and *Blackstone Entities* (December 16, 2004).

<sup>212</sup> One commenter argued that voluntary interest payments should be permitted. See letter from ABA. However, we believe that the general purposes for which we permit the use of a subsequent offering period are not consistent with the payment of offer consideration different than that provided during the initial offering period, unless specifically required by home country law.

<sup>213</sup> See letter from ABA.

<sup>214</sup> See letter from Cravath.

<sup>215</sup> To our knowledge, the staff has never been asked to provide no-action or exemptive relief to permit the payment of interest on securities tendered during an initial offering period. This may be, as one commenter posited, because tendering security holders often have withdrawal rights during an initial offering period, so they may not be deemed to have sold their shares until those rights terminate at the end of the initial offering period. See letter from ABA.

<sup>201</sup> See Proposing Release, Section II.C.4.a.

<sup>202</sup> See letter from Linklaters.

<sup>203</sup> See letters from ABA, Shearman, and S&C.

<sup>204</sup> See note to Exchange Act Rule 14d-11.

<sup>205</sup> The language of amended Exchange Act Rule 14d-1(d)(2)(iv) states "[w]here payment may not be made on a more expedited basis under home jurisdiction law or practice \* \* \*."



Consideration will be given to requests for relief in connection with individual cross-border transactions, if local law requires the payment of interest on securities tendered during an initial offering period.

#### d. Mix and Match Offers and the Initial and Subsequent Offering Periods

We proposed changes to our rules, which we adopt as proposed, to facilitate so-called “mix and match” cross-border tender offers. We view these changes as necessary and appropriate to facilitate the prompt payment for securities tendered during these offer periods, and to permit the use of the mix and match offer structure generally. In a mix and match offer, bidders offer a set mix of cash and securities in exchange for each target security, but permit tendering holders to request a different proportion of cash or securities. These elections by tendering holders are satisfied to the extent that other tendering security holders make offsetting elections for the opposite proportion of cash and securities, subject to a maximum amount of cash or securities that the bidder is willing to issue.<sup>216</sup>

U.S. rules prohibit several features characteristic of mix and match offers. Under U.S. subsequent offering period rules, a bidder must offer the same form and amount of consideration to security holders who tender into both the initial and subsequent offering periods.<sup>217</sup> Further, a bidder may not impose a ceiling on any form of alternate consideration offered during the subsequent offering period.<sup>218</sup>

Because of the prompt payment and other requirements of U.S. rules and the requirements of foreign law or practice in cross-border offers, bidders in mix and match offers often request relief to use two different proration and offset pools in their offers: one for securities tendered during the initial offering period and another for those tendered in the subsequent offering period.<sup>219</sup> The rule revisions we adopt today expressly permit the use of separate offset “pools” for securities tendered during the initial and subsequent offering periods for cross-border tender offers conducted under Tier II.<sup>220</sup> This rule change is necessary because of the U.S.

prohibition on the payment of different consideration in the initial and subsequent offering periods.<sup>221</sup> New Rule 14d-1(d)(2)(viii) also eliminates the prohibition on a ceiling for the form of consideration in a mix and match cross-border offer under Tier II, where target security holders are able to elect to receive alternate forms of consideration in the offer. Applicable foreign rules generally require the bidder to promptly take up and pay for securities tendered during the initial offering period at the end of that period.<sup>222</sup> In a mix and match offer where the bidder allows tendering security holders to make offsetting elections of cash and bidder securities, the bidder must set the offset or proration “pool” at the end of the initial offering period for the securities tendered during that period, in order to begin the payment process for those securities. Similarly, the bidder must count and offset against each other all securities tendered during the subsequent offering period.

We solicited comment about whether these changes should be extended to tender offers for U.S. target companies. Two commenters argued that these changes should apply to all tender offers, including offers for domestic targets, on the grounds that an acquiror for a U.S. target can accomplish the same result by entering into a merger agreement that provides target security holders with the same elections.<sup>223</sup> We are not extending these rule changes to tender offers for domestic issuers at this time. U.S. law already permits acquirors to structure business combination transactions in a manner that achieves the same result as the mix and match tender offer structure through the use of the merger structure. We have not received requests for relief in this area in connection with tender offers for U.S. targets; therefore, at this time, we do not believe there is a compelling reason to change our rules to provide this accommodation for U.S. offers.

#### 5. Terminating Withdrawal Rights Immediately After Reducing or Waiving a Minimum Acceptance Condition

We are reaffirming the interpretive position we expressed in the Proposing Release, with some further modifications, with respect to a bidder’s ability in a cross-border tender offer conducted under Tier II to waive or reduce a minimum acceptance condition without providing withdrawal rights. Under U.S. tender offer rules,

bidders must ensure that a tender offer remains open and includes withdrawal rights for a prescribed period after a material change in the terms of the offer.<sup>224</sup> Generally, waiving or reducing the minimum acceptance condition is considered a material change in the terms of the offer that triggers this requirement. A statement in the initial offer materials advising target security holders that the minimum acceptance condition *may* be reduced or waived is not sufficient to avoid the obligation to inform target security holders of this development if it actually occurs. Such a statement also is not sufficient to avoid the obligation to extend the offering period where required to satisfy the minimum time periods set forth in our rules.<sup>225</sup>

The requirement to provide withdrawal rights after a reduction in, or waiver of, a minimum acceptance condition under U.S. rules conflicts with law or practice in certain foreign jurisdictions. The conflicts with U.K. law and practice were the primary basis for the adoption of our original interpretive position when the cross-border exemptions were adopted in 1999.<sup>226</sup> Since that time, we have encountered other foreign jurisdictions with conflicting law or practice regarding the need or the ability of a bidder to provide withdrawal rights after reducing or waiving a minimum acceptance condition in a tender offer.<sup>227</sup> Because of these conflicts, we believe the basic premise for our interpretive position of permitting flexibility for bidders in Tier II cross-border tender offers to waive or reduce a minimum tender condition without providing withdrawal rights remains valid. As noted in the Proposing Release, however, additional conditions

<sup>224</sup> Exchange Act Rules 13e-4(e)(3) and 14d-4(d). The Commission has expressed the position that the minimum extension periods set forth in those rules apply as general guidelines applicable to all tender offers, including those that are not subject to Rule 13e-4 or Regulation 14D. See footnote 186 above and the discussion in Regulation M—A Adopting Release, Section II.E.2. See also Exchange Act Rule 14e-1(b) [17 CFR 240.14e-1(b)], which states that a tender offer must remain open for a minimum of 10 business days after a change in the consideration offered, the amount of securities sought, or the dealer’s soliciting fee.

<sup>225</sup> A bidder must announce that it may reduce or waive the minimum condition at least five business days before it reduces or waives it. See footnote 186 and the 1999 Cross-Border Adopting Release, Section II.B.

<sup>226</sup> See 1998 Cross-Border Proposing Release, Section II.C.2.f.

<sup>227</sup> For example, Netherlands law and practice allows a bidder to reduce or waive a minimum acceptance condition at or after the end of the initial offering period without providing tendering holders with the ability to withdraw their securities after the reduction or waiver. See, e.g., *Barclays*.

<sup>216</sup> For a discussion of the mechanics of a mix and match cross-border tender offer, see, e.g., *Barclays and Alcan*.

<sup>217</sup> Exchange Act Rule 14d-11(f).

<sup>218</sup> Exchange Act Rule 14d-11(b).

<sup>219</sup> See *Barclays and SERENA Software Inc.* (April 13, 2004)(setting a cap on the number of bidder shares and cash that would be issued in a mix and match election, with elections for more cash or shares being offset against one another).

<sup>220</sup> New Exchange Act Rule 14d-1(d)(2)(viii).

<sup>221</sup> See Exchange Act Rule 14d-11(f).

<sup>222</sup> See, e.g., *Germany and the United Kingdom*.

<sup>223</sup> See letters from ABA and Cleary.

are necessary to assure that the guidance is used for the purposes for which it was originally granted.<sup>228</sup>

We will not object if a bidder in a cross-border tender offer satisfying the requirements of Tier II waives or reduces the minimum acceptance condition in the offer without providing withdrawal rights after the reduction or waiver (except where an extension is required under Exchange Act Rule 14e-1),<sup>229</sup> under the following conditions:

- The bidder must announce that it may waive or reduce the minimum acceptance condition at least five business days before the actual waiver or reduction;<sup>230</sup>

- The bidder must disseminate the announcement through a press release and other methods reasonably calculated to inform U.S. holders of the possibility of a waiver or reduction, which may include placing an advertisement in a newspaper of national circulation in the United States;<sup>231</sup>

- The press release must state the exact percentage to which the minimum acceptance condition may be reduced (or if it will be waived, rather than reduced). The bidder must announce its actual intentions regarding waiver or reduction as soon as required under home country rules;

- During the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided;

- The announcement must advise security holders to withdraw tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition;

- The procedure for waiving or reducing the minimum acceptance conditions must be described in the offering materials;

- The offer must remain open for at least five business days after the waiver or reduction of the minimum acceptance condition;

- All offer conditions are satisfied or waived when withdrawal rights are terminated;<sup>232</sup>

- The potential impact of the waiver or reduction of the minimum acceptance condition is fully discussed in the initial offering materials or any supplemental materials;<sup>233</sup> and

- The bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable foreign law, and in any case, may not reduce or waive the minimum acceptance condition below a majority<sup>234</sup> of the outstanding securities of the subject class.

With respect to the last bullet point above, we initially limited the guidance to apply only where the bidder would not waive or reduce the minimum acceptance condition below a simple majority.<sup>235</sup> We solicited comment on what should be considered a “majority” for these purposes. Consistent with the feedback from one commenter,<sup>236</sup> we have further modified the guidance to address foreign jurisdictions in which some percentage greater than a simple majority may be required to control the target company after the offer. As we modify the guidance today, it may not be relied upon unless the bidder undertakes not to waive below a simple majority, or the percentage threshold required to control the target company under applicable foreign law, if it is greater. We are aware of at least one foreign jurisdiction where a percentage greater than a simple majority is required to control the management and corporate governance of a target company.<sup>237</sup> As discussed in the Proposing Release, in addition to the potential need to provide alternate sets of pro forma financial statements under our existing disclosure rules,<sup>238</sup> we

Finance’s Manual of Publicly Available Telephone Interpretations (July 2001) at <http://www.sec.gov/interp/telephone/phonesupplement3.htm>.

<sup>233</sup> The staff has conditioned a bidder’s ability to waive or reduce the minimum acceptance condition without providing withdrawal rights on adequately describing the potential impact of that action in the initial offer materials or in a supplement. See, e.g., *Royal Bank*.

<sup>234</sup> We consider a “majority” for these purposes to be any number greater than 50 percent of the outstanding securities of the subject class.

<sup>235</sup> See Proposing Release, Section II.C.5.

<sup>236</sup> See letter from ABA.

<sup>237</sup> We have been advised that Germany is one such foreign jurisdiction. Under German law, 75 percent of a target’s security holders must approve a “domination agreement” between the target and the bidder in order for the bidder to effectively exercise control of the target company after a tender offer. Therefore, unless the bidder can obtain at least 75 percent of the target’s securities in the tender offer, it cannot be assured of the ability to fully integrate the target company. See, e.g., *Bayar* and *Blackstone*.

<sup>238</sup> See Item 5 of Forms S-4 and F-4 and Rule 11-02(b)(8) of Regulation S-X [17 CFR 210.11-

believe reducing the minimum acceptance condition significantly below the level at which it is initially set may fundamentally change the nature of the transaction and the relationship between the offeror and the target company going forward. In particular, where the minimum acceptance condition changes below a majority of the subject class or that greater percentage needed to control the target company, security holders should be afforded withdrawal rights after the change, as the nature of their investment decision may have changed fundamentally.<sup>239</sup>

Several commenters argued that placing a newspaper advertisement in a newspaper of national circulation in the United States is unnecessary in the Internet age and unduly burdensome.<sup>240</sup> While the use of a newspaper advertisement is not required under all circumstances, we believe in the tender offer context, newsprint media remain an important means of communicating with security holders, and in particular, “back office” personnel at many financial institutions. Although we continue to believe that in most instances today, a newspaper advertisement is an appropriate method of dissemination reasonably calculated to inform U.S. holders, we recognize that as practice changes, and Internet and other means of communication evolve, a newspaper advertisement may in the future become unnecessary.<sup>241</sup>

One of the commenters advocated eliminating the requirement to provide five days notice of a possible waiver or reduction.<sup>242</sup> We believe that advance notice of a possible waiver or reduction serves an important function in warning target security holders who may wish to withdraw their tendered securities immediately if their tender decision would be impacted by a change in the minimum acceptance condition. Therefore, we are retaining this condition. Another commenter advocated expanding the ability to waive or reduce a minimum acceptance condition without providing withdrawal rights to the waiver of a financing condition, arguing that this renders the successful completion of the offer more

02(b)(8). Rule 11-02(b)(8) mandates that where a transaction is structured in such a way that significantly different results may occur, additional pro forma presentation must be provided which give effect to the range of possible results.

<sup>239</sup> See Proposing Release, Section II.C.5.

<sup>240</sup> See letters from ABA and Cravath.

<sup>241</sup> Cf. *Commission Guidance on the Use of Company Web Sites*, Release No. 34-58288 (August 1, 2008).

<sup>242</sup> See letter from ABA.

<sup>228</sup> See Proposing Release, Section II.C.5.

<sup>229</sup> Our position on reduction or waiver was never intended to allow a bidder to terminate withdrawal rights required under a mandatory extension of the offer period, i.e., an extension required under Rule 14e-1. See 1999 Cross-Border Adopting Release, Section II.B. We maintain this limitation today in modifying the position.

<sup>230</sup> As noted above, a statement in the initial offering materials will not satisfy this condition.

<sup>231</sup> This announcement should be filed on EDGAR, as is generally the practice today.

<sup>232</sup> See Section II.A. Question 1 in the Third Supplement to the Division of Corporation

likely and therefore benefits holders.<sup>243</sup> While we do not disagree that some changes in the terms of an offer may be viewed beneficially by target holders, we continue to believe that the provisions of U.S. rules that require extension of an offer period when its terms materially change are appropriate in most instances and should be relaxed only where conflicts between U.S. and foreign law or practice so necessitate. In our experience, bidders have not sought relief to waive a financing condition without providing withdrawal rights in cross-border tender offers. In addition, we believe that in some circumstances, the waiver of a financing condition may present risks to target holders, including those who have already tendered into the offer, because a bidder may waive the financing condition, thinking that financing is secure, when this may not turn out to be the case.

We reiterate that the ability to rely on our position, as modified above, to terminate withdrawal rights immediately after waiving or reducing a minimum acceptance condition is limited to offers that otherwise satisfy the requirements of the Tier II cross-border exemptions.<sup>244</sup> In addition, it may be relied upon only where law or practice in the applicable foreign jurisdiction does not permit the bidder to provide withdrawal rights after the reduction or waiver, as required under U.S. law. We do not believe a bidder in a cross-border offer should be permitted to rely on this position where it is not needed under the requirements of foreign law or practice.

#### 6. Early Termination of an Initial Offering Period or a Voluntary Extension of an Initial Offering Period

Where the expiration date of a tender offer has been set by the bidder, whether in the original offer materials or in supplemental materials announcing an extension of the offer, changing that expiration date requires notice to target security holders before the initial offering period closes and withdrawal rights terminate.<sup>245</sup> This extension

requirement in U.S. rules conflicts with the law or practice in some foreign jurisdictions, which mandate that once all offer conditions have been satisfied or waived, the initial offering period and withdrawal rights must terminate so that the bidder may begin the payment process.<sup>246</sup> Generally in these foreign jurisdictions, a subsequent offering period provides a means by which remaining target holders may participate in the offer, so they are not disadvantaged by its early termination.<sup>247</sup>

Both before and after the adoption of the cross-border exemptions, bidders in cross-border tender offers frequently have sought additional relief from the staff to terminate the initial offering period before its scheduled expiration, thereby terminating withdrawal rights, upon the satisfaction of all offer conditions.<sup>248</sup> We solicited comment on whether we should codify existing staff no-action guidance that permits a bidder in a cross-border tender offer conducted under the Tier II exemptions to terminate the initial offering period (or a voluntary extension of that period) if all offer conditions are satisfied, subject to the conditions discussed below. We received two comment letters supporting such a codification, and no objecting comments.<sup>249</sup> As one commenter noted, codifying this position will facilitate cross-border tender offers because it would be consistent with law and practice in certain jurisdictions, and transaction participants would not be required to seek individual relief from the staff as is currently the case.<sup>250</sup> Therefore, we are amending Exchange Act Rules 13e-4 and 14d-1(d) to codify the guidelines set forth in existing staff guidance to permit early termination, subject to the conditions set forth below, which will be specified in the rules.

Under new Rule 14d-1(d)(2)(ix), bidders in cross-border tender offers conducted under Tier II may terminate an initial offering period, including a voluntary extension of that period, if at

the time the initial offering period and withdrawal rights end:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied;
- The bidder has adequately discussed the possibility and the impact of the early termination in the original offer materials;
- The bidder provides a subsequent offering period after the termination of the initial offering period;
- All offer conditions are satisfied as of the time when the initial offering period ends; and
- The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.<sup>251</sup>

We also are amending Rule 13e-4 to add a new provision, Rule 13e-4(i)(2)(vii), to allow issuers or affiliates in a Tier II issuer tender offer to early terminate the initial offering period, or voluntary extension of that period, under the same circumstances discussed above.

As discussed in the Proposing Release, the position we codify today does not permit early termination upon the waiver of an offer condition.<sup>252</sup> When a bidder waives an offer condition, the terms of the offer may be fundamentally altered, such that it may influence the investment decisions of both target holders who have tendered and those who have not yet tendered. Our rules mandate that a tender offer remain open for specified time periods after a material change in the terms of an offer, which would include the waiver of a material offer condition.<sup>253</sup> By contrast, when an offer condition is satisfied, we believe the change is less fundamental in nature, because target security holders know from the outset that the successful consummation of the offer is contingent on the occurrence or non-occurrence of the relevant event.<sup>254</sup> For this reason, a bidder may not take advantage of the rules adopted here upon the waiver of an offer condition;

<sup>243</sup> See letter from STB.

<sup>244</sup> See Proposing Release, Section II.C.5.

<sup>245</sup> As noted above in footnotes 186 and 224, Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2) establish minimum time periods during which an offer must remain open after notice of a material change in its terms is communicated to target holders. Although by their terms these periods apply only to early commencement exchange offers, we have stated that we view the time periods set forth in these rules as generally applicable to all tender offers, including those not subject to Rule 13e-4 or Regulation 14D. See Regulation M-A Adopting Release, Section II.E.2. See also, Exchange Act Rule 14e-1(b), which establishes comparable minimum time periods for certain kinds of material changes, such as an increase or decrease in the offer

consideration or the amount of securities sought in the offer, and a change in the soliciting dealer's fees.

<sup>246</sup> We are advised that some of these jurisdictions include the United Kingdom, South Africa, Singapore and China (Hong Kong). See, e.g., *RWE* (U.K. practice); *Harmony Gold Mining Ltd.* (March 10, 2005) ("Harmony Gold 2005") (South Africa); *STATs ChipPAC* (Singapore); and *Jilin Chemical Industrial Company Ltd.* (December 21, 2005) (Hong Kong Code).

<sup>247</sup> *Id.*

<sup>248</sup> See *AstraZeneca PLC* (May 23, 2006); *Harmony Gold 2005*; and *In the Matter of Central and South West Corp.* (September 27, 1995).

<sup>249</sup> See letters from ABA and Linklaters.

<sup>250</sup> Letter from Linklaters.

<sup>251</sup> A mandatory extension is one required because of a change in the offer consideration, the number of securities sought by the bidder in the tender offer, or in the dealer's soliciting fees. See footnotes 224 and 245 above. See also Exchange Act Rules 13e-4(e)(3), 14d-4(d)(2), and 14e-1(b).

<sup>252</sup> See Proposing Release, footnote 216.

<sup>253</sup> See Exchange Act Rules 13e-4(e)(3) and 14d-4(d)(2)(i) [17 CFR 240.14d-4(d)(2)(i)].

<sup>254</sup> In our experience, foreign rules in certain jurisdictions may limit the number of offer conditions a bidder may impose and may also restrict a bidder's ability to waive those conditions. Therefore, waivers of material offer conditions may occur less frequently in cross-border offers. See, e.g., *Gas Natural*.

the offer (including withdrawal rights) must be extended upon a waiver. To the extent that foreign law in a particular jurisdiction mandates that a bidder terminate an initial offering period and withdrawal rights upon the waiver of all or some offer conditions, requests for relief will be considered on a case-by-case basis.

#### 7. Exceptions From Rule 14e-5 for Tier II Cross-Border Tender Offers

We are adopting the proposed amendments to Exchange Act Rule 14e-5, with some minor clarification and one revision. The amendments to the application of Rule 14e-5 for Tier II tender offers that we adopt today seek to modernize and enhance the utility of the rule by codifying three class exemptive letters in the cross-border tender offer context.<sup>255</sup> In our view, the codification of Rule 14e-5 exemptive class letters will simplify the procedural requirements for foreign tender offers and further promote the extension of such offers to U.S. security holders, without compromising the investor protections of the rule.

Rule 14e-5 safeguards the interests of persons who sell their securities in response to a tender offer. The rule protects investors by prohibiting an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms.<sup>256</sup> The rule prohibits the disparate treatment of security holders, prohibits the avoidance of proration requirements, and guards against the dangers posed by a bidder's purchases outside an offer that may involve fraud, deception and manipulation.<sup>257</sup> Specifically, the rule prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer. The rule's prohibitions apply from the time of public announcement of the tender offer until the offer expires.

As amended, new Rules 14e-5(b)(11) and (b)(12) would codify class exemptive letters in three areas: purchases and arrangements to purchase securities of a foreign private issuer (1) pursuant to the non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers; (2)

by offerors and their affiliates outside of a tender offer; and (3) by financial advisor's affiliates outside of a tender offer.

We received seven comment letters that specifically address the proposed amendments to Rule 14e-5.<sup>258</sup> In general, commenters expressed support for the proposed codification of the three class letters. The majority of comments relate to Rule 14e-5(b)(12), the second of the two proposed rule amendments. Consequently, we are adopting proposed Rule 14e-5(b)(11) without modification. As discussed below, we are adopting proposed Rule 14e-5(b)(12), with one revision and minor clarification, in response to comments received and upon further analysis.

#### a. Purchases or Arrangements To Purchase Pursuant to a Foreign Tender Offer(s)

As previously noted, we are adopting proposed Rule 14e-5(b)(11) without modification. Commenters expressed general support for the proposal to permit purchases or arrangements to purchase pursuant to a foreign offer(s) during the Rule 14e-5 prohibited period if certain conditions are satisfied.<sup>259</sup> There were no comments opposing this proposed amendment to Rule 14e-5. The exception is conditioned on the existence of specified safeguards to help protect U.S. security holders.<sup>260</sup> The exception permits purchases in a foreign offer(s) made concurrently or substantially concurrently with a U.S. offer if each of the conditions of the exception are met.<sup>261</sup>

#### b. Purchases or Arrangements To Purchase by an Affiliate of the Financial Advisor and an Offeror and its Affiliates

We are adopting, with one revision, proposed Rule 14e-5(b)(12), which would permit purchases or arrangements to purchase outside of a Tier II tender offer by an affiliate of the financial advisor and an offeror and its affiliates if certain conditions are satisfied, including that the subject company must be a foreign private issuer, and the covered person must reasonably expect that the tender offer qualifies as Tier II. Four commenters expressed support for the proposal.<sup>262</sup> No commenters opposed codification of

the *Sulzer* and *Financial Advisors* class exemptive letters. Some commenters suggested revision or clarification, as discussed below.

We proposed to exclude risk arbitrage trading from the exception applicable to purchasing activity by an affiliate of a financial advisor. We received only one comment letter in response to the request for comment in the proposal to provide information concerning other activity in addition to risk arbitrage that should be excluded from the exception as well as definitions related to risk arbitrage activity. The commenter proposed that we delete proposed paragraph (b)(12)(ii), which would exclude risk arbitrage trading by an affiliate of a financial advisor from the relief afforded to other trading activities that meet the provisions of paragraph (b)(12)(i).<sup>263</sup> We have determined not to adopt an exclusion limited to one particular type of activity and, thus, we are removing paragraph (b)(12)(ii). The condition that purchases or arrangements to purchase cannot be made to facilitate the tender offer should continue to address abusive purchasing activity that the rule is designed to prevent. Any purchasing activity by an affiliate of a financial advisor, including risk arbitrage, made to facilitate the tender offer would not be eligible for the exception. Accordingly, the exception as adopted contains no risk arbitrage exclusion.

The exception is conditioned on the existence of specified safeguards to help protect U.S. security holders.<sup>264</sup> As adopted, Rule 14e-5(b)(12) excepts purchases or arrangements to purchase outside of a Tier II tender offer by an affiliate of the financial advisor and an offeror and its affiliates if the conditions in the adopted rule are met.<sup>265</sup>

One commenter requested clarification with respect to language contained in the proposing release concerning purchases by financial advisor affiliates outside of a tender offer.<sup>266</sup> Adopted Rule 14e-5(b)(12) is premised on the financial advisor's affiliate carrying out its normal business activity when purchasing outside a tender offer, and would not permit purchases or arrangements to purchase to be made to facilitate the tender offer. In order to comply with the adopted exception, the financial advisor's purchasing activities must be "consistent with the [f]inancial [a]dvisor's [a]ffiliates' normal and usual business practices, and \* \* \* not

<sup>255</sup> See *Mittal; Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc* (March 2, 2007) ("*Sulzer*"); and *Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors* (April 4, 2007) ("*Financial Advisors*").

<sup>256</sup> 1999 Cross-Border Adopting Release, Section II.C.1.

<sup>257</sup> Regulation M-A Adopting Release, Section II.G.5.

<sup>258</sup> See letters from ABA, ABCNY, Cleary, Cravath, DPW, Osler Hoskin Harcourt LLP ("*Osler*"), S&C.

<sup>259</sup> See, e.g., letters from Cleary, Cravath, and S&C.

<sup>260</sup> See Proposing Release, Section II.C.7.

<sup>261</sup> New Exchange Act Rule 14e-5(b)(11)(i) through (v).

<sup>262</sup> Letters from Cleary, Cravath, S&C, and Osler.

<sup>263</sup> Letter from Cleary.

<sup>264</sup> See Proposing Release, Section II.C.7.

<sup>265</sup> New Exchange Act Rule 14e-5(b)(12).

<sup>266</sup> Letter from Cleary.

conducted for the purpose of promoting or otherwise facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or maintaining or affecting the price of, the securities of the subject company.”<sup>267</sup> The commenter noted a statement in the Proposing Release that purchasing activity effected in reliance on the proposed exception be consistent with the affiliate’s prior levels of activity is more restrictive than previous relief granted to financial advisors. The contention is that we previously have focused on the *nature* of the activity, rather than the *level* of the activity.

We acknowledge that the barometer for what constitutes the level of *normal* business activity may fluctuate once there is an announcement of a tender offer. However, if the level of purchasing activity far exceeds the usual or expected level of purchasing activity following the announcement of a tender offer, this could certainly be a red flag of improper facilitation.

Four commenters opposed the condition in proposed Rule 14e-5(b)(12)(i)(G)(2) that financial advisors have an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act in order for such an affiliate to make purchases or arrangements to purchase outside of a tender offer in the Tier II context.<sup>268</sup> In general, the commenters stated that the requirement that an affiliate of a financial advisor seeking Rule 14e-5 protection be a U.S. registered broker or dealer provides disincentives to foreign acquirors to include U.S. investors in deals. Two commenters stated that the condition favors financial institutions with U.S. affiliates over international institutions.<sup>269</sup> One commenter stated that if the necessary information barriers are in place, there would be adequate protection to U.S. investors despite the absence of a U.S. broker or dealer affiliate.<sup>270</sup>

While we appreciate that the U.S. broker or dealer affiliate requirement for financial advisors may potentially lead to the exclusion of U.S. investors from certain transactions, we continue to believe this is a fundamental provision to safeguard the interests of U.S. investors. We believe that this requirement strikes the proper balance among the investor protection goals of Rule 14e-5 and the interest of U.S. investors in being included in tender offers.

We received a comment requesting clarification of Rule 14e-5(b)(12)(i)(C) that, “No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States.”<sup>271</sup> We note that, notwithstanding this condition, in certain circumstances covered persons may engage in such purchases or arrangements to purchase if relying on other existing exceptions from this condition or through attaining no-action relief or exemptive order from the Commission. For example, reliance on the adopted (b)(12) exception would not necessarily preclude reliance on an existing exception, such as the exception in Rule 14e-5(b)(7) for purchases pursuant to contractual obligations.

We received one comment relating to the condition in Rule 14e-5(b)(12)(i)(D) concerning the term “offering materials.” The term “offering materials” refers to definitive offer materials and not earlier announcements in relation to the tender offer.<sup>272</sup>

We received one comment concerning the condition in proposed Rule 14e-5(b)(12)(i)(F) that for purchases or arrangements to purchase by an offeror and its affiliates the following condition be satisfied: tender offer prices will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price.<sup>273</sup> The condition to increase the offer consideration to match any higher consideration paid outside the tender offer is satisfied if the laws of the relevant home jurisdiction or the terms of the tender offer provide for matching the higher consideration and the offeror complies with such provision.

Other commenters requested codification of additional Rule 14e-5 or Regulation M relief that was not proposed, including Rule 14e-5 relief for financial institutions.<sup>274</sup> Individual requests for relief will continue to be considered on a case-by-case basis for activity that does not fall within the exceptions adopted today or other existing exceptions.

In our view, today’s adoption codifying the three Rule 14e-5 exemptive class letters concerning cross-border tender offers will simplify the procedural requirements for foreign

tender offers and further promote the extension of such offers to U.S. security holders, without compromising the investor protections of the rule.

#### *D. Expanded Availability of Early Commencement*

We proposed rule changes expanding the ability of a bidder to commence an exchange offer before effectiveness of the registration statement filed to register the bidder’s securities.<sup>275</sup> Under existing rules, the ability to “early commence” an exchange offer is available only when an exchange offer is subject to Rule 13e-4 or Regulation 14D.<sup>276</sup> Specifically, we proposed to allow issuers and third-party bidders in cross-border exchange offers conducted under Tier II to commence the exchange offer immediately upon the filing of the registration statement filed to register the bidder’s securities, even if they were not subject to those rules.<sup>277</sup>

In the Proposing Release, we solicited comment on whether we should similarly expand the availability of early commencement to exchange offers for domestic companies. Three commenters supported our proposal to make early commencement available for Tier II exchange offers subject only to Regulation 14E.<sup>278</sup> All three also advocated making this change as to all exchange offers, including those conducted for U.S. target companies.<sup>279</sup> We agree that this option should be available in exchange offers for both domestic and foreign target companies. When we adopted rule revisions permitting early commencement for exchange offers subject to Rule 13e-4 or Regulation 14D, we did so to address a disparity in the regulatory process for cash tender offers and exchange offers. Extending the early commencement option to domestic and foreign exchange offers not subject to Rule 13e-4 or Regulation 14D will further our goal of reducing the regulatory disparity. Therefore, we are amending our rules to allow all exchange offers, including those for domestic target companies not subject to Rule 13e-4 or Regulation 14D,

<sup>275</sup> See proposed Securities Act Rule 162(a) and proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

<sup>276</sup> Securities Act Rule 162(a) [17 CFR 230.162(a)].

<sup>277</sup> See Proposing Release, Section II.D., proposed Securities Act Rule 162(a) and proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x). Because foreign law may provide that a tender offer for one class of securities will trigger an obligation to make a contemporaneous offer for a related class, this rule change could enhance the ability of such exchange offers to commence early, and therefore could enhance the speed with which such offers may be effected.

<sup>278</sup> See letters from ABA, Cleary, and STB.

<sup>279</sup> *Id.*

<sup>267</sup> Letter from Cleary (citing Condition 4 in the *Financial Advisor* letter).

<sup>268</sup> Letters from ABA, ABCNY, DPW, and S&C.

<sup>269</sup> See letters from ABA and S&C.

<sup>270</sup> Letter from ABCNY.

<sup>271</sup> Letter from Cleary.

<sup>272</sup> Letter from Cravath.

<sup>273</sup> *Id.*

<sup>274</sup> See, e.g., letter from S&C (stating that financial advisor’s affiliates should also be exempted from Regulation M since there are also several class letters for Regulation M that have provided exemptions but have not yet been codified). See also, letter from ABCNY.

to commence upon the filing of the registration statement registering the offer, under the conditions proposed.<sup>280</sup> Amended Securities Act Rule 162(a) will allow early commencement for a "Regulation 14E-only" exchange offer only under the following conditions:

- The bidder provides withdrawal rights to the same extent as would be required under Rule 13e-4 and Regulation 14D;<sup>281</sup> and
- If there is a material change in the information provided to target security holders, the bidder must disseminate revised materials as required under Exchange Act Rules 13e-4(e)(3) and 14d-4(d) and must hold the offer open with withdrawal rights for the minimum time periods specified in those rules.<sup>282</sup>

As is currently the case with exchange offers subject to Rules 13e-4 and Regulation 14D, early commencement will be available for "Regulation 14E-only" offers so long as no securities are purchased until the registration statement is declared effective. The requirement to provide withdrawal rights generally, including after information about a material change is published, sent or given to target security holders, is a critical safeguard where an exchange offer may commence before effectiveness of the underlying registration statement. Without the ability to withdraw tendered securities, the prohibition on purchasing tendered securities before the effectiveness of the underlying registration statement would be rendered ineffective because the tender decision would be irrevocable and security holders would be "locked in" to the offer. The minimum time periods after which an offer must remain open from the time that revised information is disseminated to security holders set forth in Exchange Act Rules 13e-4(e) and 14d-4(d) are important because they allow time for security holders to consider new information.<sup>283</sup>

Our revised rules require offerors to provide withdrawal rights in early commencement offers not subject to Exchange Act Rule 13e-4 or Regulation 14D, to the same extent as would be required if the offer were subject to those provisions.<sup>284</sup> We note that today we adopt a number of rule revisions that limit the need to provide withdrawal

rights for Tier II cross-border tender offers, under the circumstances outlined in our revised rules.<sup>285</sup> Offerors not subject to the provisions of Rule 13e-4 or Regulation 14D because, for example, the subject securities are not registered under Section 12 of the Exchange Act, will be able to rely on the revised exemptions available for Tier II cross-border tender offers, to the same extent they would be able to do so were the offer subject to Rule 13e-4 or Regulation 14D. Similarly, bidders may rely on the modified interpretive position we issue today concerning the ability to waive or reduce a minimum acceptance condition without providing withdrawal rights after the waiver or reduction occurs.<sup>286</sup> Some of the existing cross-border exemptions also limit the need to provide withdrawal rights in certain circumstances;<sup>287</sup> we do not believe that bidders in cross-border tender offers not subject to Rule 13e-4 or Regulation 14D should be precluded from relying on these exemptions when they use early commencement.

Concerns about the complex nature of the disclosure and accounting issues that may arise in business combination transactions and the need for adequate time for staff review caused us to reject automatic effectiveness of exchange offer registration statements when we initially made early commencement available in 1999.<sup>288</sup> When we adopted early commencement in 1999, we recognized that early commencement alone would not be helpful in reaching our stated goal of equalizing the regulatory treatment of cash versus stock tender offers if the staff review process significantly delayed the ability of the exchange offer to close.<sup>289</sup> For

<sup>285</sup> See new Exchange Act Rules 13e-4(i)(2)(vii) and 14d-1(d)(2)(ix) (allowing bidders to terminate an initial offering period immediately upon satisfaction of all offer conditions). See also new Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(vii) (permitting suspension of back-end withdrawal rights while securities are being counted).

<sup>286</sup> See Section II.C.5 above.

<sup>287</sup> See, e.g., Exchange Act Rule 14d-1(d)(2)(v) (providing that a bidder need not extend withdrawal rights after the close of the initial offering period and before the beginning of the subsequent offering period, notwithstanding the provisions of Section 14(d)(5) of the Exchange Act).

<sup>288</sup> See Regulation M-A Adopting Release, Section II.E. The proposing release for Regulation M-A solicited comment on whether automatic effectiveness would be appropriate. *Regulation of Takeovers and Security Holder Communications*, Release No. 33-7607 (November 3, 1998) [63 FR 67331].

<sup>289</sup> This is because of the requirement that securities tendered into an exchange offer that commences early may not be purchased before the registration statement registering the bidder's securities is declared effective. Therefore, although an exchange offer may commence upon the filing of the registration statement, the bidder cannot

close the offer and purchase tendered securities until the Commission, through its staff, pursuant to delegated authority, takes the affirmative step of declaring the registration statement effective. *Id.*

that reason, we committed to expediting the staff review process for exchange offers so that they can compete more effectively with cash offers. The rule changes we adopt today will significantly expand the universe of exchange offers that may commence early. This could result in an increased burden on the staff to complete the review process for such offers on an expedited basis. While the staff intends to continue to afford expedited treatment for these filings, the review process may be somewhat longer in cases involving novel or unusually complex issues, such as exchange offers where the bidder is registering its initial public offering.

Current rules do not permit early commencement for specific types of exchange offers. Early commencement is not available for roll-ups and going-private transactions subject to Exchange Act Rules 13e-4 or Regulation 14D, which are subject to heightened scrutiny under our rules.<sup>290</sup> We retain this limitation in our revised rule. Although our revised rules expand the types of exchange offers that may commence before the effectiveness of a registration statement, we do not extend early commencement to offers that are roll-ups or going-private transactions.<sup>291</sup>

Today we also amend Securities Act Rule 162(b) to make it clear that the prospectus delivery requirements, including the requirement to deliver revised prospectuses and prospectus supplements contained in that provision, also will extend to offers not subject to Rule 13e-4 or Regulation 14D.<sup>292</sup> Under our revised rules as discussed above, offers not subject to Rule 13e-4 or Regulation 14D, such as those where the subject securities are not registered under Section 12 of the Exchange Act, may now commence before the filing of a registration statement, but only under the same conditions as would offers subject to Exchange Act Rule 13e-4 or Regulation 14D. The prospectus delivery requirements set forth in Securities Act Rule 162(b) and the dissemination requirements set forth in Exchange Act Rules 13e-4(e) and 14d-4(b) are important safeguards that are designed to ensure that target security holders receive adequate information and adequate time to consider it before their

close the offer and purchase tendered securities until the Commission, through its staff, pursuant to delegated authority, takes the affirmative step of declaring the registration statement effective. *Id.*

<sup>290</sup> See Exchange Act Rules 13e-4(e)(2) and 14d-4(b) [17 CFR 240.13e-4(e)(2) and 240.14d-4(b)].

<sup>291</sup> See the Instruction to amended Securities Act Rule 162.

<sup>292</sup> See amended Securities Act Rule 162(b).

<sup>280</sup> See amended Securities Act Rule 162(a) and (b).

<sup>281</sup> This includes back-end withdrawal rights as well as withdrawal rights during an offer.

<sup>282</sup> In addition, see below for a discussion of prospectus delivery requirements.

<sup>283</sup> See discussion in footnotes 186, 225, and 245.

<sup>284</sup> The offer materials disseminated to security holders should provide information about withdrawal rights and include the dates before and after which security holders may withdraw securities tendered in the offer.

investment decision becomes final. Therefore, offers such as those for unregistered securities that may now commence early under our revised rules must provide those safeguards, including the prospectus delivery requirements in amended Securities Act Rule 162(b).

#### *E. Changes to Schedules and Forms*

##### 1. Form CB

An offeror or issuer relying on the Tier I cross-border exemption in connection with a cross-border business combination transaction or rights offer may be required to furnish to the Commission a Form CB, including an English translation of the offering materials. Under existing rules, only persons already filing reports with the Commission under Section 13(a) or 15(d) of the Exchange Act are required to submit Form CB electronically via the Commission's Electronic Data Gathering, Analysis and Retrieval (EDGAR) system.<sup>293</sup> If the person furnishing the Form CB is not an Exchange Act reporting entity, the Form CB may be submitted in paper; a non-reporting person may submit a Form CB electronically but is not required to do so.<sup>294</sup>

We proposed to amend Rule 101(a) of Regulation S-T to require that all Form CBs be submitted electronically. We also proposed to require the electronic filing of Form F-X for appointment of an agent in the United States for service of process when that Form is filed in connection with a Form CB.<sup>295</sup> One commenter supported the proposed changes, but voiced concern regarding the potential deterrent effect of mandating electronic filing of these forms.<sup>296</sup> This commenter expressed concern that requiring electronic submission of Form CB could present a significant hardship for some non-reporting entities that could tip the balance in favor of complete exclusion of U.S. target holders even where the Tier I cross-border exemption is available. The same commenter noted that the international perceptions of U.S. litigation risk could be compounded by the requirement to file a Form CB on EDGAR. Another commenter did not support the proposal due to the costs and practical issues

involved with timely filing of Forms CB and F-X electronically, which the commenter suggested might deter bidders from including U.S. target holders in business combinations.<sup>297</sup>

We understand that requiring electronic submission of these forms may result in additional costs and timing concerns for foreign companies that are not otherwise required to file Exchange Act reports electronically with the Commission.<sup>298</sup> While we understand the commenters' concerns, we do not believe that requiring the electronic submission of Form CB and the accompanying Form F-X will be a significant burden compared with other considerations that enter into the decision to include or exclude U.S. target holders, and that it will be a benefit to U.S. security holders to have electronic access to this information.<sup>299</sup> Additionally, the Form CB is furnished, not filed, and therefore not subject to the liabilities of Section 18 of the Exchange Act.<sup>300</sup> With regard to the concern about widespread availability on EDGAR, investors currently can see that a paper Form CB has been submitted when they view a company's filings on EDGAR, although they cannot view the actual document. They can request a copy of the submission from the public reference room. Therefore, we do not believe that requiring electronic submission of the forms will increase potential liability.

We also solicited comment on whether the cover page of Form CB should be modified so that the person submitting the form would be required to specify the level of U.S. ownership supporting reliance on the cross-border exemptions claimed. We are not adopting this change, based on commenters' concerns described in the next section.

<sup>297</sup> Letter from S&C.

<sup>298</sup> In order to file electronically, an offeror or issuer that is not already doing so will need to obtain filing codes required to file on EDGAR. An offeror or issuer that does not already have EDGAR filing codes, and to which the Commission has not previously assigned a user identification number, which we call a "Central Index Key (CIK)" code, will obtain the codes by filing electronically a Form ID at <https://www/filermanagement.edgarfiling.sec.gov> and submitting, in paper, by fax, within two business days before or after filing the Form ID, a notarized authenticating document. The authenticating document would need to be manually signed by the applicant over the applicant's typed signature, include the information contained in the Form ID, and confirm the authenticity of the Form ID.

<sup>299</sup> We note that in situations in which the electronic submission poses a significant burden, a hardship exemption is available. See Rules 201 and 202 of Regulation S-T [17 CFR 232.201 and 232.202].

<sup>300</sup> 15 U.S.C. 78r.

##### 2. Schedule TO, Form F-4 and Form S-4

As proposed, we are adopting changes to Schedule TO and Forms F-4 and S-4 to include boxes on the cover page of the forms that a filing person will be required to check to indicate reliance on one or more applicable cross-border exemptions. The only commenter that addressed this proposal supported it.<sup>301</sup> We believe the inclusion of this information on the cover page of a tender offer statement or registration statement, filed in connection with a cross-border transaction in which the filer is seeking to rely on an applicable cross-border exemption, will enable the staff to perform the review process more efficiently. The availability of this information will eliminate staff comments that may be based on misperceptions about which exemption the filer is seeking and which U.S. rules apply to the transaction, thereby reducing the time and cost involved for the filer in responding to staff comments. In addition, the availability of this information may expedite staff review, which ultimately will benefit both investors and offerors.

We also solicited comment on whether we should require filers to specify on the cover page of the schedule and forms the percentage of U.S. ownership permitting reliance on the cross-border exemption(s) claimed in connection with the transaction. This information would be available to the filer, because it must be calculated to determine eligibility to rely on the exemptions. Commenters did not support making such a change to the schedule and forms.<sup>302</sup> They expressed concerns that such a requirement might subject the filer to litigation risks, given the uncertainties associated with determining U.S. target ownership levels.<sup>303</sup> We are mindful of these concerns and do not believe this information is critical for investors at this time. Therefore, we are not adopting this requirement.

#### *F. Beneficial Ownership Reporting by Foreign Institutions*

The beneficial ownership reporting requirements in Sections 13(d)<sup>304</sup> and 13(g)<sup>305</sup> of the Exchange Act and corresponding regulations<sup>306</sup> provide investors and the issuer with information about accumulations of

<sup>301</sup> Letter from ABA.

<sup>302</sup> Letters from ABA and STB.

<sup>303</sup> *Id.*

<sup>304</sup> 15 U.S.C. 78m(d).

<sup>305</sup> 15 U.S.C. 78m(g).

<sup>306</sup> Regulation 13D Exchange Act Rule 13d-1 *et seq.* [17 CFR 240.13d-1 *et seq.*].

<sup>293</sup> See Rules 101(a)(1)(vi) and (vii) of Regulation S-T [17 CFR 230.101(a)(1)(vi) and 17 CFR 230.101(a)(1)(vii)].

<sup>294</sup> See Rules 101(b)(7) and (8)(i) of Regulation S-T [17 CFR 230.101(b)(7) and 17 CFR 230.101(b)(8)(i)].

<sup>295</sup> Form F-X must be filed by all foreign companies that furnish a Form CB to the Commission and in other circumstances.

<sup>296</sup> Letter from ABA.

securities that may have the potential to change or influence control of the issuer. The statutory and regulatory framework establishes a comprehensive reporting system for gathering and disseminating information about the ownership of equity securities.

As discussed in the Proposing Release, the beneficial ownership reporting provisions require, subject to exceptions, that any person who acquires more than five percent of a class of equity securities registered under Section 12 of the Exchange Act and other specified equity securities report the acquisition on Schedule 13D within ten days. Persons holding more than five percent of a class of such securities at the end of the calendar year, but not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. These Schedule 13G filers include persons exempt from the requirements of Section 13(d), as well as specified institutional investors holding securities in the ordinary course of business and not with a control purpose. As specified in Rule 13d-1(b)(1)(ii) before the changes adopted today, the types of institutional investors that may file on Schedule 13G under that rule include a broker or dealer registered under Section 15(a) of the Exchange Act,<sup>307</sup> a bank as defined in Section 3(a)(6) of the Exchange Act,<sup>308</sup> an insurance company as defined in Section 3(a)(9) of the Exchange Act,<sup>309</sup> an investment company registered under Section 8 of the Investment Company Act of 1940,<sup>310</sup> an investment adviser registered under Section 203 of the Investment Advisers Act of 1940,<sup>311</sup> an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act,<sup>312</sup> and related holding companies and groups.

Under the rules before today's amendment, the list of institutional investors in Rule 13d-1(b)(1)(ii) did not include non-domestic institutions generally, and was limited to institutions such as brokers, dealers, investment advisers and companies registered with the Commission, or regulated banks or insurance companies. Historically, foreign institutions that sought to use Schedule 13G as qualified institutions under Rule 13d-1(b)(1)(ii) needed to obtain an exemptive order from the Commission

or, under the current practice, a no-action position from the Division of Corporation Finance. Relief was based upon the requester's undertaking to grant the Commission or the staff access to information that would otherwise be disclosed in a Schedule 13D and the comparability of the foreign regulatory scheme applicable to the particular category of institutional investor.<sup>313</sup>

In the Proposing Release, we proposed to amend Rule 13d-1(b)(1)(ii) to include foreign institutions that are subject to a foreign regulatory scheme substantially comparable to the regime applicable to the U.S. institutions listed in subparagraphs (A)-(J) of the current rule. As proposed, to be eligible to file on Schedule 13G, the foreign institution would be required to determine, and certify on Schedule 13G, that it is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to its U.S. counterparts. In addition to the certification on Schedule 13G, the foreign institution would be required to undertake to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D.

The comment letters that addressed this proposal generally supported the amendment. One commenter requested that the Commission clarify that a foreign institution that previously had received a no-action letter regarding the ability to file on Schedule 13G qualifies as a substantially comparable regulated institution for purposes of the amended rule.<sup>314</sup> Another commenter requested clarification that if an institutional investor previously received no-action relief on the basis that a particular regulatory scheme was substantially comparable to the applicable regulatory scheme in the U.S., that the regulatory schemes will be deemed substantially comparable.<sup>315</sup> Several commenters suggested that we not adopt the

requirement that foreign institutional investors undertake to provide the Commission or staff with the information that would be required in a Schedule 13D upon request.<sup>316</sup>

We are adopting the rule revision substantially as proposed, although we are moving the text to Rule 13d-1(b)(1)(ii)(J) and moving the current provision for groups to new subsection (b)(1)(ii)(K).<sup>317</sup> We are also making a minor modification to the text of new Rule 13d-1(b)(1)(ii)(J) and the certification on Schedule 13G. The modification adds the word "substantially" before "comparable" in the rule text and certification, consistent with our discussion of the standard here and in the Proposing Release.<sup>318</sup>

We do not believe that the requested clarification and elimination of the undertaking are appropriate. Our proposal to extend the ability to file on Schedule 13G to foreign institutional investors was intended to codify the no-action relief granted to certain institutions. The no-action letters issued by the staff are dependent upon the facts presented in each request, including the institution's assessment and determination that the foreign law that governs the institution is substantially comparable to the law applicable to its U.S. institutional counterparts and that it undertake to provide the information otherwise required by Schedule 13D upon request. Specifically, the letters state:

[t]he foregoing no-action position taken under Rule 13d-1(b)(1)(ii) is based solely upon the facts described and the representations made in your letter. In particular, we note your representations regarding the comparability of the relevant foreign laws that govern [the requesting parties and subsidiaries] and the U.S. laws governing entities of the type listed in Rule 13d-1(b)(1)(ii). We also note your undertaking to furnish upon request the information that would be required by Schedule 13D.<sup>319</sup>

Therefore, an institution's continued reliance upon a no-action letter it received from the staff would be appropriate to the extent that the facts

<sup>313</sup> See, e.g., *Canada Pension Plan Investment Board* (May 5, 2006) (granting relief for the Canada Pension Plan (CPP) Investment Board to file on Schedule 13G where the Board represented that the Canadian Pension Plan was the functional equivalent of a U.S. private pension fund and the regulatory regime governing the CPP Investment Board was substantially similar to the regulations applicable to U.S. pension funds under the Employee Retirement Income Security Act of 1974) and *Citigroup Inc.* (May 27, 2004) (granting relief for certain qualifying subsidiaries of Citigroup organized under the laws of England and Wales; the subsidiaries conducted investment banking business, including market-making, through trading in their own accounts and for their customers and represented that they were subject to regulation in the United Kingdom that was comparable to U.S. regulations).

<sup>314</sup> Letter from Ontario Teachers' Pension Plan Board ("Teachers").

<sup>315</sup> Letter from Cleary.

<sup>316</sup> Letter from ABA, Cleary, and Teachers.

<sup>317</sup> We are revising the references in the group provision to include the new subsection (J). Additionally, we are revising the references in subsection (G) to include the new subsection (J).

<sup>318</sup> In the Proposing Release, we stated "we propose to amend Rule 13d-1(b)(1)(ii) to include foreign institutions that are *substantially comparable* to the U.S. institutions listed in subparagraphs (A)-(J) of the current rule." (emphasis added) The proposed rule text and certification inadvertently omitted the word "substantially."

<sup>319</sup> See, e.g., *Nataxis S.A., Banque Federale des Banques Populaires and Caisse Nationale des Caisses d'Epargne* (October 9, 2007).

<sup>307</sup> 15 U.S.C. 78o(b).

<sup>308</sup> 15 U.S.C. 78c(a)(6).

<sup>309</sup> 15 U.S.C. 78c(a)(9).

<sup>310</sup> 15 U.S.C. 80a-8.

<sup>311</sup> 15 U.S.C. 80b-3.

<sup>312</sup> Codified principally in 29 U.S.C. 1001-1461.



presented in the letter did not differ materially in the future. A foreign institutional investor relying upon a prior letter received from the staff would be responsible for assessing whether or not a subsequent filing of a Schedule 13G was in compliance with the applicable regulations and no-action letter. Nevertheless, when these institutions otherwise will be required to file an amendment to the Schedule 13G, they must provide the certification required under our revised rules in order to continue to file on that Schedule. We do not believe that the amendment, which we are adopting as proposed, changes the obligations of a foreign institutional investor that previously relied upon a no-action letter issued to it by the staff. We believe that this amendment reduces the burden upon investor by eliminating the need to submit a no-action request to the staff and providing more certainty to the investor as to the availability of Schedule 13G.

We also do not believe that the undertaking to furnish Schedule 13D information is contrary to the Section 13(d) and 13(g) reporting structure or inconsistent with the underlying policy, as asserted by two commenters.<sup>320</sup> We believe that permitting certain foreign institutions to file on Schedule 13G in the same manner as their domestic counterparts is a significant benefit to those foreign institutions, due to the relaxed filing requirements for filing under Rule 13d-1(b)(1)(ii) as compared to Rule 13d-1(a), or even as a passive investor under Rule 13d-1(c). Therefore, we are retaining the undertaking in the certification.

We also solicited comment regarding whether the use of Schedule 13G by foreign institutions relying on the rule should be limited to institutions from jurisdictions that have a bilateral enforcement memorandum with the SEC or institutions that are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation, cooperation, and the exchange of information. Only one commenter responded to this question, and stated that it would not object if such a limitation were imposed.<sup>321</sup> At this time, we are not so limiting the use of the new rule. We are concerned that such a requirement could unduly restrict foreign institutions' ability to rely on the new rule, and we believe that the certification requirement provides a sufficient safeguard against the abuse of the amended rule.

The extension of Schedule 13G filing eligibility pursuant to Rule 13d-1(b)(1)(ii) to foreign institutions will be available only to institutions that acquire and hold the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect, including any transaction subject to Rule 13d-3(b).<sup>322</sup> Similar to a domestic institution, a foreign institution will need to determine whether it is qualified to use the short-form Schedule 13G at the time it exceeds the beneficial ownership threshold. This initial determination as to form eligibility will require a foreign institution to determine, at the time it exceeds the beneficial ownership threshold, whether it is subject to a foreign regulatory scheme substantially comparable to the regulatory scheme applicable to the corresponding category of U.S. institutional investor.

If the foreign institution made such a determination, it would be eligible to file on Schedule 13G as a qualified institutional investor, as long as it could provide the certification required by Schedule 13G. If at any time before filing a Schedule 13G pursuant to new Rule 13d-1(b)(1)(ii)(J) the foreign institution determined that it was no longer able to rely on the provision, it would be required to file a Schedule 13D in accordance with the rules. Similarly, a foreign institution filing a Schedule 13G would be required to file a Schedule 13D (or a Schedule 13G if it met the requirement for filing as a passive investor) in the event that circumstances change and it determines that it is no longer eligible to rely on new Rule 13d-1(b)(1)(ii)(J). As is the case now, a foreign institution also may rely on the passive investor provision in Rule 13d-1(c) to the extent it meets the conditions to do so and file a Schedule 13G rather than a Schedule 13D.

In response to commenters' suggestions,<sup>323</sup> we also are adopting a corresponding change to Exchange Act Rule 16a-1(a)(1) to include the foreign institutions eligible to rely on Rule 13d-1(b)(1)(ii)(J).<sup>324</sup> While we did not propose this change, it is consistent

<sup>322</sup> See Exchange Act Rule 13d-1(b)(1)(i) [17 CFR 240.13d-1(b)(1)(i)].

<sup>323</sup> See letters from ABA and S&C.

<sup>324</sup> See new Exchange Act Rule 16a-1(a)(1)(x). Existing Rule 16a-1(a)(1)(x) and (xi) contain redundant provisions regarding groups. Today's rule amendment replaces the text of subsection (x) with a new provision for foreign institutions. Accordingly, we are revising the references in subsection (xi) to include subsections (i) through (x). We also are revising the reference in subsection (a)(1)(vii) to include new subsection (x).

with our past practice in this area. When we adopted changes to expand the list of qualified institutional investors under Rule 13d-1(b)(1)(ii) to state and local government employee benefit plans, savings associations, and church plans, we also adopted corresponding amendments to Rule 16a-1(a)(1) to include those institutions in the list of persons that are not deemed to be the beneficial owners of securities held for the benefit of third parties.<sup>325</sup>

Rule 16a-1(a) sets forth the definition of beneficial ownership for purposes of determining who is a more than 10 percent beneficial owner for purposes of Exchange Act Section 16. Rule 16a-1(a)(1) allows the institutions identified in the rule to exclude from beneficial ownership calculations the shares they hold for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, without the purpose or effect of changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect, including any transaction subject to Rule 13d-3(b). Therefore, these institutions typically will not be 10 percent owners subject to Section 16(a) reporting, Section 16(b) short-swing profit recovery and Section 16(c) restrictions on short sales; however, the public will still be provided with information about their holdings through the Schedule 13G that they file.

When adopting Rule 16a-1(a)(1), the Commission noted that the rule was modeled after Rule 13d-1(b)(1)(ii).<sup>326</sup> We note that this change also codifies a staff interpretive position stating that a foreign institution permitted to file on Schedule 13G rather than Schedule 13D pursuant to a no-action letter is not deemed, for purposes of Section 16, the beneficial owner of securities held for the benefit of third parties or in customer or fiduciary accounts.<sup>327</sup>

<sup>325</sup> See *Amendments to Beneficial Ownership Reporting Requirements*, Release 34-39538 (January 12, 1998).

<sup>326</sup> See *Ownership Reports and Trading By Officers, Directors and Principal Security Holders*, Release No. 34-28869 (February 8, 1991). In proposing that Rule 16a-1(a)(1) rely on the Section 13(d) definitions for determining who is a ten percent holder, we stated: "Congress, in applying Section 16 to ten percent holders, intended to reach those persons who could be presumed to have access to inside information because of their interest in the issuer's securities. Thus, in determining beneficial ownership for purposes of ascertaining who is a ten percent holder, the analysis properly should turn on the person's potential for control." See *Ownership Reports and Trading By Officers, Directors and Principal Stockholders*, Release No. 34-26333 (December 2, 1988).

<sup>327</sup> *CS Holding* (January 16, 1992).

<sup>320</sup> See letters from Teachers and ABA.

<sup>321</sup> Letter from ABA.

With respect to transitional matters, foreign institutions comparable to those listed in current Rule 13d-1(b) that are currently filing on Schedule 13G under a no-action letter from the staff may continue to do so, to the extent they continue to meet the conditions upon which the no-action relief was granted; however, as noted above, when these institutions otherwise would be required to file an amendment to the Schedule 13G, they must provide the certification required under our revised rules in order to continue to file on that Schedule. Foreign institutions that do not have no-action letters eligible to rely on the revised rule to file on Schedule 13G may do so, to the extent that the filing deadline for the Schedule 13D they would otherwise be required to file falls after the effective date of these revised rules.

### G. Interpretive Guidance

#### 1. Foreign Target Security Holders and U.S. All-Holders Requirements

Most of this release deals with cross-border business combination transactions where the target is a foreign private issuer. In this section, however, we address an issue involving the treatment of foreign target security holders in tender offers generally, including those for U.S. target companies. The issue of bidders' ability to exclude foreign target security holders is addressed here because it closely relates to the issue of the exclusion of U.S. target security holders in cross-border tender offers, which we discuss in the next section.<sup>328</sup> As we continue to encourage our fellow international securities and takeover regulators to minimize the ability of bidders to exclude U.S. holders from business combination transactions, we recognize the need to take similar steps with regard to the ability of bidders to exclude non-U.S. holders pursuant to our rules.

In the Proposing Release, we provided guidance on the ability of bidders in tender offers for U.S. target companies to exclude foreign target holders in tender offers subject to U.S. all-holders provisions.<sup>329</sup> As we stated previously, the all-holders provisions in Rules 13e-4(f) and 14d-10 apply equally to U.S. as well as non-U.S. target holders.<sup>330</sup>

<sup>328</sup> See Section II.G.2. below.

<sup>329</sup> See Exchange Act Rules 13e-4(f) and 14d-10. Some tender offers are not subject to U.S. all-holders requirements, such as offers subject only to Regulation 14E because the target securities are not registered under Section 12 of the Exchange Act.

<sup>330</sup> See All-Holders and Best-Price Adopting Release, Section III.A.2., which stated "While a tender offer subject to Sections 13(e) and 14(d) of the Williams Act must be held open to all holders

Tender offers subject to those requirements must be open to all target security holders, and all target holders must be treated equally.<sup>331</sup> The guidance expressed here and in the comparable section of the Proposing Release does not represent new thinking or a change in the Commission's interpretation of existing all-holders rules. Rather, it is simply an effort to remind bidders and others of the position expressed by the Commission when the all-holders rules were adopted in 1986:

- Tender offers subject to the provisions of Section 13(e) or 14(d) of the Exchange Act must be open to all target security holders, including foreign persons;<sup>332</sup> and

- Although foreign target holders may not be excluded from U.S. tender offers under these provisions, our rules do not require dissemination of offer materials outside the United States.<sup>333</sup>

Because this is not a new provision, and generally bidders have not expressed concerns about U.S. all-holders requirements and the ability to exclude foreign target holders, it is not apparent that rule revisions are needed at this time. We note that this may be a function of the jurisdictional predicate for the application of foreign rules to

of the subject class of securities, including foreign persons, Rules 14d-10(b)(1) and 13e-4(f)(9)(i) make clear that the all-holders requirement does not affect the required dissemination of tender offers. \* \* \* The Commission has not interpreted these provisions as requiring dissemination of tender offer materials outside of the United States, and the adoption of the all-holders requirement is not intended to impose any additional requirements in this regard." (emphasis added; footnotes omitted).

<sup>331</sup> The equal treatment provision of Rules 13e-4(f) and 14d-10 does not prohibit tender offers for less than all outstanding securities of a subject class, but it does require that all security holders be able to accept the tender offer if they choose.

<sup>332</sup> Pursuant to Exchange Act Rules 13e-4(f) and 14d-10, a bidder may not restrict the offer to target holders as of a particular record date only. See footnote 35 in All-Holders and Best Price Adopting Release. While as a practical matter, the bidder will look to beneficial holders as of a recent date in distributing the offer materials, the offer must be open to all target security holders, including those who purchase after the tender offer commences. See *In the Matter of Application of WHX Corp.*, Exchange Act Release No. 47980 (June 4, 2003), vacated on other grounds, *WHX Corp. v. SEC*, 362 F.3d 854 (D.C. Cir. 2004).

<sup>333</sup> See *Amendments to Tender Offer Rules: All-Holders and Best-Price*, Release No. 34-23421 (July 11, 1986) [51 FR 25873] ("All-Holders and Best-Price Adopting Release"), Section III.A.2. Based on the guidance provided here, a statement that a tender offer is not being made into a particular jurisdiction is permissible where it means that tender offer materials are not being distributed into that jurisdiction. As discussed here, however, it may not mean that tenders from foreign target holders resident there will not be accepted, where an offer is subject to U.S. all-holders requirements. Statements that tenders from target security holders in certain jurisdictions will not be accepted are impermissible, for the reasons discussed above.

tender offers for U.S. companies. Although U.S. tender offer rules are triggered by making a tender offer using U.S. jurisdictional means, foreign tender offer rules may apply under more limited circumstances, based on the target's country of incorporation or the location of a trading market for its securities.<sup>334</sup> Thus, particularly for cash tender offers, it is not clear that allowing foreign target holders to participate in a U.S. offer generally would present significant burdens or risks for bidders, where no offer materials are distributed outside the United States.

For these reasons, we are not adopting a *de minimis* or other exception to U.S. all-holders provisions at this time. In special circumstances, however, requests for relief will be considered on a case-by-case basis, particularly where a bidder can demonstrate unusual facts warranting an accommodation from the all-holders provisions of Rules 13e-4(f) and 14d-10. For example, relief has been granted in situations where restrictions exist on the levels of securities of a company that may be held by non-U.S. persons.<sup>335</sup> In an exchange offer where unusual facts require relaxation of U.S. all-holders principles, this may include allowing the bidder to provide a cash alternative to foreign target holders in a jurisdiction in which securities may not be issued.<sup>336</sup> However, we believe such relief will rarely be warranted. We generally believe it is in the interests of U.S. investors to enforce U.S. equal treatment principles for the benefit of non-U.S. target security holders, particularly in light of the fact that comparable foreign all-holders requirements often protect U.S. investors by preventing their exclusion from cross-border offers.

In the Proposing Release, we solicited comment on whether any amendments to the U.S. equal treatment provisions were necessary or advisable to allow certain target security holders to be excluded from the offer. Commenters' reactions were mixed.<sup>337</sup> For the reasons

<sup>334</sup> See letter from DPW.

<sup>335</sup> See *Hallwood Energy Partners, LP* (May 1, 1990) and *Freeport-McMoran Energy Partners Ltd.* (June 19, 1989).

<sup>336</sup> See *The Korea Fund* (July 1, 2005) (permitting cash alternative for security holders in Japan, where a redemption offer by a fund featured in-kind distribution of the fund's securities, which would require registration in Japan for each issuer of the underlying securities).

<sup>337</sup> Four of the commenters suggested allowing bidders in domestic tender offers to exclude foreign holders under various circumstances. See letters from ABA, ABCNY, Cleary, and Linklaters. Three commenters proposed a *de minimis* exception to the all-holders rules for both cash and non-cash offers. See letters from ABA, ABCNY, and DPW.

discussed above, at this time, we do not believe it is necessary to amend Rules 13e-4(f) and 14d-10 to permit exclusion of foreign target holders from U.S. tender offers. We will monitor this issue with respect to future tender offers to determine whether further Commission action is needed.

Further, as we noted in the Proposing Release, it is inappropriate for bidders to shift the burden of assuring compliance with the relevant jurisdiction's laws to target security holders by requiring them to certify that tendering their securities complies with local laws or that an exemption applies that allows such tenders without further action by the bidder to register or qualify its offer. Target security holders may not be in possession of relevant facts regarding the bidder's action and the provisions of local law in their home jurisdiction necessary to make such a determination.

## 2. Exclusion of U.S. Target Security Holders From Cross-Border Tender Offers

In the Proposing Release, we provided guidance on the circumstances in which bidders in cross-border tender offers may avoid triggering U.S. tender offer and registration rules.<sup>338</sup> The Commission previously issued interpretive guidance on this subject when the cross-border exemptions were adopted in 1999,<sup>339</sup> and addressed issues raised by the use of the Internet in 1998.<sup>340</sup> The guidance expressed here supplements the guidance previously issued in those releases. Several principles have guided the Commission when considering this issue. First, we seek to encourage bidders in cross-border business combination transactions to include U.S. holders<sup>341</sup> in those transactions. The amendments we adopt today expand the scope of the cross-border exemptions adopted in 1999. Therefore, we believe these amendments will further limit the circumstances under which bidders will exclude U.S. target holders because of conflicts between U.S. and foreign law or practice. In addition, we believe that when a bidder knowingly permits U.S.

holders to participate in a cross-border offer, it must do so in compliance with U.S. rules.

While we encourage bidders to extend cross-border offers to U.S. holders, we recognize that bidders will not always do so and may have legitimate reasons for excluding U.S. holders, particularly where the percentage of target securities they hold is small. Where the subject class of securities is registered under Section 12 of the Exchange Act, and particularly where the subject securities trade on a U.S. exchange, we believe bidders should make every effort to include U.S. holders on the same terms as all other target holders. Exclusionary offers<sup>342</sup> for securities of foreign private issuers that trade on a U.S. exchange will be viewed with skepticism where the participation of those U.S. holders is necessary to meet the minimum acceptance condition in the tender offer. When purportedly exclusionary offers are made under those circumstances, we will look closely to determine whether bidders are taking reasonable measures to keep the offer out of the United States.

Where a bidder makes an exclusionary offer, we believe it must take appropriate measures to avoid the application of U.S. jurisdictional means. We identified some precautionary measures bidders may take to avoid triggering U.S. rules in prior releases. The offer materials (and the Web site where they are posted, if any) should clearly state that it is not available to U.S. holders.<sup>343</sup> In addition, we noted that bidders in offshore tender and exchange offers can put in place measures to ensure that tenders are not accepted from, nor securities issued (in the case of an exchange offer) to, U.S. holders.<sup>344</sup> These may include, in responding to inquiries and processing letters of transmittal, obtaining adequate information to identify U.S. holders.<sup>345</sup> Bidders also could obtain representations from tendering holders, or persons tendering on others' behalf, that the investor(s) tendering the securities are not U.S. holders.<sup>346</sup> Similarly, in disseminating the cash or

securities consideration to tendering holders, special care should be taken to avoid mailing into the United States.<sup>347</sup> A legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself because, if the bidder wants to support a claim that the offer has no jurisdictional connection to the United States, it also will need to take special precautions to prevent sales to or tenders from U.S. target holders.<sup>348</sup>

In some foreign jurisdictions, local law may prohibit the exclusion of any target security holders in a tender offer for all outstanding securities of a subject class. Such foreign all-holders requirements, like similar U.S. rules, may not require that offer materials be disseminated into another jurisdiction; however, they generally provide that a bidder in a tender offer for all target securities may not reject tenders from security holders from any jurisdiction, including the United States, should those holders learn of and tender into the offer on their own initiative. Regulators in these jurisdictions may not permit contrary statements about the exclusion of U.S. target security holders in the offer materials. Where a foreign all-holders requirement does not permit a bidder to reject tenders from U.S. holders and does not permit statements that the offer may not be accepted by U.S. holders, it may not be possible for the bidder to take adequate precautionary measures to avoid U.S. jurisdictional means.<sup>349</sup>

We recognize that bidders may conduct offshore exclusionary offers that are not open to U.S. target holders. However, a bidder may implicate U.S. jurisdictional means if it fails to take adequate measures (whether by choice or because it is unable to do so under applicable foreign law) to prevent tenders by U.S. target holders while purporting to exclude them. Conversely, where tenders are made by nominees on behalf of U.S. holders, and those nominees or holders misrepresent their

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> See Proposing Release, Section II.G.3. We understand that in many foreign jurisdictions that have such all-holders rules, foreign regulators may grant exemptions to permit exclusion of U.S. and other foreign holders under certain circumstances, such as when U.S. holders make up only a small percentage of the total target security holder base. We are troubled when a bidder announces to the marketplace that it will exclude U.S. target holders before it receives the required approvals from foreign regulatory authorities to do so, and where the announcement itself causes U.S. holders to sell into the marketplace, thereby reducing their numbers to the point at which an exemption to allow exclusion of U.S. holders is acceptable to the foreign regulator.

<sup>338</sup> See Proposing Release, Section II.G.2.

<sup>339</sup> See 1999 Cross-Border Adopting Release, Section II.G.

<sup>340</sup> See *Statement of the Commission regarding use of Internet Web sites to offer securities, solicit securities transactions or advertise investment services offshore*, Release No. 33-7516 (March 23, 1998) [63 FR 14806] ("1998 Internet Release").

<sup>341</sup> As noted in footnote 23, the term "U.S. holder" is defined as "any security holder resident in the United States." See amended Securities Act Rule 800(h) (although we amended other aspects of this provision, the definition of U.S. holder remains unchanged from the definition in the existing rule).

<sup>342</sup> By "exclusionary offer," we mean a tender offer, including an exchange offer, that excludes U.S. holders of the subject class of securities for which the offer is made.

<sup>343</sup> See 1998 Internet Release, Section III.B.

<sup>344</sup> See 1999 Cross-Border Adopting Release, Section II.G.2. As noted in the Proposing Release, bidders should not avoid payments to U.S. target holders in business combinations other than tender offers, where the target company is being merged out of existence, because in these kinds of transactions, unlike in tender offers, all target securities will be acquired in a single transaction.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

status as U.S. persons in order to participate in exclusionary offers, the bidder will not be viewed as having targeted the United States.<sup>350</sup> However, this position is premised on the bidder having taken adequate measures reasonably intended to prevent sales to and tenders from U.S. holders.<sup>351</sup> Indicia that would put the bidder on notice that the tendering holder is a U.S. holder would include receipt of payment drawn on a U.S. bank, provision of a U.S. taxpayer identification number or statements by the tendering holder that notwithstanding a foreign address, the tendering holder is a U.S. investor. We have explicitly noted that if, after implementing measures intended to safeguard against tenders by U.S. persons, the bidder discovers it has purchased securities from U.S. holders, it should consider other measures that may avoid this lapse in the future.<sup>352</sup>

Where a bidder knowingly permits U.S. holders to tender into offers made offshore, whether directly or through foreign intermediaries, we believe it may be difficult to avoid the use of U.S. jurisdictional means. This is especially true where foreign all-holders principles preclude the bidder from preventing tenders from U.S. holders. Several commenters argue that we should expressly permit U.S. institutional holders to participate in offshore exclusionary offers, without triggering U.S. tender offer rules.<sup>353</sup> For exchange offers, they advocate that the provisions of Regulation S would allow such institutional holders to participate in offshore offers without the need for registration under Section 5 of the Securities Act. While this may be true with respect to the registration requirements of the Securities Act, we believe that business combinations are fundamentally different from capital-raising transactions outside the context of a business combination. In the latter case, the U.S. federal securities laws do not establish a right of any person to participate in a securities offering; the issuer sets the terms of its offer and determines who may participate, whether through a private placement or otherwise. U.S. tender offer rules, by contrast, establish an all-holders requirement for certain kinds of business combinations, whereby all target holders have a right to participate in an offer on the same terms as all other

holders.<sup>354</sup> We noted in a prior release that permitting U.S. institutional holders to participate in an offshore offer pursuant to a private placement or under Regulation S while excluding other U.S. holders is inconsistent with all-holders provisions in our tender offer rules.<sup>355</sup> In the face of these requirements, we view the ability of institutional holders to participate in an offshore offer very differently under the Williams Act than we do under the provisions that may apply to allow their participation in offshore securities offerings under Regulation S. We continue to believe this fundamental difference warrants different treatment with respect to offshore offers under the Williams Act.

With the expansion of the cross-border exemptions adopted today, we believe there will be fewer circumstances warranting exclusionary offers because it will be easier for bidders to balance the regulatory requirements of foreign and U.S. rules. We note that many bidders do not exclude U.S. target holders from cross-border business combinations, where those offers are eligible for the Tier I or Rule 802 exemptions. In addition, several commenters stated that there is no valid reason to prohibit participation by U.S. holders in cash tender offers, where there is no registration requirement.<sup>356</sup> We agree that the burden on bidders to include U.S. holders in cash cross-border tender offers is not significant and whatever litigation risk would be associated with inclusion is not greater than is present under Tier I and Rule 802.

### 3. Vendor Placements

In the Proposing Release, we included an interpretive section discussing existing staff no-action precedent involving the use of a vendor placement structure. A vendor placement in a cross-border exchange offer occurs when a bidder offers securities to foreign target holders in an offer, but establishes an arrangement whereby securities that would be issued to tendering U.S. target holders are sold offshore by third parties. The bidder (or the third party) remits the proceeds of the sale (minus expenses) to tendering U.S. target holders. In a vendor placement, U.S. holders are not excluded from participating in the offer, but they participate on terms different

from those afforded other target security holders.<sup>357</sup> Where permissible, the vendor placement procedure allows a bidder in a cross-border exchange offer to extend the offer into the United States without registering the issuance of the securities offered under Section 5 of the Securities Act.

We included a discussion of existing vendor placement no-action letters in the Proposing Release because the staff continues to receive frequent inquiries on the use of this mechanism for cross-border exchange offers.<sup>358</sup> When the existing cross-border exemptions were adopted in 1999, they codified the ability of bidders in exchange offers conducted under Tier I to offer cash to U.S. holders in lieu of cash and stock or stock only offered to foreign holders. This ability was conditioned on the bidder having a reasonable basis to believe that the cash offered is substantially equivalent in value to the non-cash consideration offered to foreign target holders.<sup>359</sup> When U.S. holders receive a cash alternative as permitted under the Tier I exemption, the process is different than in a vendor placement because the bidder issues a fixed amount of cash directly to U.S. holders. In a vendor placement, by contrast, the bidder technically issues securities, which are then sold abroad on behalf of U.S. persons, who receive the cash proceeds from that sale. The amount of the proceeds a U.S. person receives will depend on the market price of the securities sold.

Since 1999, Tier I has afforded a method by which bidders in cross-border exchange offers may issue cash to U.S. target holders. Therefore, the staff no longer intends to issue vendor placement no-action letters regarding the registration requirements of Section 5. Bidders should employ the vendor placement procedure only to the extent that such procedure does not result in an offer or sale of securities for which registration under Section 5 would be required.

<sup>357</sup> We are advised that some foreign regulators object to the use of the vendor placement procedure on equal treatment and other grounds. Where a vendor placement structure is used in a cross-border exchange offer, it should comply with the laws of the applicable foreign jurisdiction. We do not intend to imply by the discussion here or in the Proposing Release that the use of this structure is required under U.S. law.

<sup>358</sup> See Proposing Release, Section II.G.3.

<sup>359</sup> See Exchange Act Rules 13e-4(h)(8)(ii)(C) [17 CFR 240.13e-4(h)(8)(ii)(C)] and 14d-1(c)(2)(iii) [17 CFR 240.14d-1(c)(2)(iii)]. U.S. holders who receive cash pursuant to these rules may under specified circumstances request from the bidder an opinion of an independent expert stating that the consideration offered them is substantially equivalent to the non-cash consideration offered to foreign holders. See *id.*

<sup>350</sup> See generally, 1998 Internet Release, Section III.C. and Proposing Release, Section II.G.2.

<sup>351</sup> See *id.*

<sup>352</sup> *Id.*

<sup>353</sup> See, e.g., letter from ABA.

<sup>354</sup> We recognize that some tender offers, such as those where the target class of securities is not registered under Section 12, are not subject to the all-holders rule.

<sup>355</sup> See 1999 Cross-Border Adopting Release at footnote 91.

<sup>356</sup> See, e.g., letter from DPW.

The guidance we provide here, which reiterates the guidance set forth in the Proposing Release and previous relief,<sup>360</sup> is intended to provide clarity about the factors that bidders should consider when contemplating the use of the vendor placement procedure. It is not intended to expand the circumstances under which we believe this procedure should be available.<sup>361</sup> The factors include:

- The level of U.S. ownership in the target company;<sup>362</sup>
- The number of bidder securities to be issued in the business combination transaction as a whole as compared to the amount of bidder securities outstanding before the offer;
- The amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer;
- The liquidity and general trading market for the bidder's securities;
- The likelihood that the vendor placement can be effected within a very short period of time after the termination of the offer and the bidder's acceptance of shares tendered in the offer;
- The likelihood that the bidder plans to disclose material information around the time of the vendor placement sales; and
- The process used to effect the vendor placement sales.<sup>363</sup>

We believe the liquidity of the market for the bidder's securities is relevant to whether registration under Section 5 should be required. Unless the market for the bidder's securities to be sold through the vendor placement process is highly liquid and robust and the number of bidder securities to be issued for the benefit of U.S. target holders relatively small compared to the total number of bidder securities outstanding, a vendor placement arrangement in a

cross-border exchange offer would in our view be subject to Securities Act registration under Section 5.

In addition to the factors listed above, we believe it is relevant whether sales of a bidder's securities in the vendor placement process are accomplished within a few business days of the close of the offer and whether the bidder announces material information, such as earning results, forecasts or other financial or operating information, before the sales process is complete. In addition, whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder is relevant. These factors are important because they indicate whether the market price which U.S. investors will receive when the bidder's securities are sold on their behalf is representative. The factors also are designed to ensure that U.S. investors are not effectively making an investment decision with respect to a purchase of securities (which would require registration under the Securities Act), but rather, are making a decision to tender their target securities in exchange for an amount of cash that, although it is not for a fixed sum,<sup>364</sup> can be readily determined and estimated based on historic trading prices.

Bidders may continue to use the vendor placement procedure in accordance with the guidance set forth here. The vendor placement process, where appropriately used, avoids the need for registration of the bidder securities sold on behalf of U.S. holders under Section 5 of the Securities Act. Where the tender offer also is subject to the equal treatment provisions of U.S. tender offer rules,<sup>365</sup> bidders also must seek an exemption from those rules in order to offer U.S. security holders a different form of consideration than what is provided to foreign target holders. In offers subject to the equal treatment provisions of the U.S. tender offer rules, it is not permissible under those rules to exclude most U.S. target holders and include only the U.S. holders (such as large institutional investors) for whom an exemption from Section 5 of the Securities Act is available.<sup>366</sup> For the same reasons, issuing securities to some U.S. holders,

<sup>364</sup> Early vendor placement letters featured a fixed price guaranteed by the bidder. However, most letters, including all of the more recent ones, do not include a floor on the cash value to be received by U.S. holders. Rather, they receive whatever proceeds are generated from the sale of the bidder's securities in an overseas market.

<sup>365</sup> See Exchange Act Rules 13e-4(f)(8) [17 CFR 240.13e-4(f)(8)] and 14d-10 [17 CFR 240.14d-10].

<sup>366</sup> See Proposing Release, Section II.G.3 and footnote 91 in the 1999 Cross-Border Adopting Release.

such as U.S. institutions, while providing cash to all others pursuant to a vendor placement arrangement is inconsistent with the equal treatment requirements of U.S. tender offer rules.<sup>367</sup>

Most of the vendor placement no-action letters issued by the staff involved tender offers that were not subject to U.S. equal treatment provisions.<sup>368</sup> In the future, the staff will consider whether requests for relief from the equal treatment provisions of U.S. tender offer rules where a vendor placement procedure is used are appropriate and in the best interests of U.S. security holders.<sup>369</sup> We generally believe that cross-border tender offers eligible to be conducted under the Tier I exemption represent the appropriate circumstances under which bidders may provide cash to U.S. target holders while offering securities to foreign target holders.

### III. Paperwork Reduction Act

Some provisions of the rule amendments adopted today constitute a "collection of information" within the meaning of the Paperwork Reduction Act of 1995 (the "PRA").<sup>370</sup> We have submitted the revisions to the Office of Management and Budget ("OMB") for review in accordance with the PRA.<sup>371</sup>

The hours and costs associated with preparing and filing the disclosure, filing the forms and schedules and retaining records required by this regulation constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The titles for the collection of information are:

(1) "Form S-4" (OMB Control No. 3235-0065);

(2) "Form F-4" (OMB Control No. 3235-0325);

<sup>367</sup> See Proposing Release, Section II.G.3.

<sup>368</sup> See footnote 360 above. But see *TABCORP Holdings Ltd.* (August 20, 1999) ("*TABCORP*").

<sup>369</sup> One commenter requested clarification on the circumstances under which the Commission will grant relief from the equal treatment provisions of U.S. tender offer rules where a vendor placement procedure is used. See letter from Cleary. The staff no-action letters in this area provide some guidance on the limited circumstances under which the staff has done so in the past. See *TABCORP*. While each transaction presents unique facts and circumstances, in our view, such relief is not always appropriate, even where a vendor placement procedure otherwise could be used to avoid the registration requirements of Section 5 of the Securities Act.

<sup>370</sup> 44 U.S.C. 3501 *et seq.*

<sup>371</sup> 44 U.S.C. 3507(d); 5 CFR 1320.11.

<sup>360</sup> See, e.g., *Singapore Telecommunications Ltd.* (May 15, 2001); *Oldcastle, Inc.* (July 3, 1986); *Electrocomponents PLC* (September 23, 1982); *Equitable Life Mortgage and Realty Investors* (December 23, 1982); *Getty Oil (Canadian Operations) Ltd.* (May 19, 1983); and *Hudson Bay Mining and Smelting Co. Ltd.* (June 19, 1985).

<sup>361</sup> One commenter requested that we expand the availability of the vendor placement procedure by making this procedure available whenever the target securities that are the subject of the tender offer are not registered under Section 12 of the Exchange Act. See letter from Cravath. We believe the factors we articulate here, rather than the unregistered status of the target securities, are the appropriate measure of when the vendor placement procedure should be available.

<sup>362</sup> As we stated in the Proposing Release, offerors should be particularly cognizant of this factor. See Proposing Release, Section II.G.3.

<sup>363</sup> We assume that the sales will be effected pursuant to the procedure under Category 1 of Regulation S [17 CFR 230.903(b)(1)].

(3) "Form ID" (OMB Control No. 3235-0328);

(4) "Form CB" (OMB Control No. 3235-0518);

(5) "Form F-X" (OMB Control No. 3235-0379);

(6) "Schedule TO" (OMB Control No. 3235-0515);

(7) "Securities Ownership—Regulation 13D (Commission Rules 13d-1 through 13d-7 and Schedules 13D and 13G)" (OMB Control No. 3235-0145);

(8) "Form 3" (OMB Control No. 3235-0104); and

(9) "Form 4" (OMB Control No. 3235-0287).

#### A. Summary of the Amendments

##### 1. Amendments to the Tier I Exemption and Form CB

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

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

For purposes of the PRA, we estimate that the additional burden cost resulting from the amendment will be zero.

##### 2. Amendments to Form CB, Forms S-4 and F-4, and Schedule TO

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

We are adopting amendments to the cover page of Forms S-4 and F-4 and Schedule TO that will require the filer to check a box specifying the applicable cross-border exemption being relied upon in connection with the transaction. Domestic and foreign persons or entities filing these documents will be the respondents to the collection of information requirement. This change will not affect the substantive obligation to file the forms or schedule. This additional information will allow the staff to better process such filings and monitor the application of the cross-border exemptions. The amount of information required to be included in each Schedule TO and Forms S-4 and F-4

will change minimally with the addition of a check box. Accordingly, for purposes of the PRA, our estimate is that the amount of time necessary to prepare each schedule or form, and hence, the total amount of burden hours, will not change.

##### 3. Amendments to Schedule 13G

Exchange Act Schedule 13G is a short-form filing for persons to report ownership of more than five percent of a class of equity securities registered under Section 12 of the Exchange Act. Generally, the filer must certify that the securities have not been acquired and are not held for the purpose of, or with the effect of, changing or influencing the control of the issuer of the securities. For purposes of the PRA, we estimate that compliance with the Schedule 13G requirements under Regulation 13D requires 98,800 burden hours in aggregate each year, broken down into 24,700 hours (or 2.6 hours per respondent) of respondent personnel time and costs of \$29,640,000 (or \$3,120 per respondent) for the services of outside professionals.<sup>372</sup>

The amendment to Exchange Act Rule 13d-1 will expand the availability of Schedule 13G to foreign institutions governed by a regulatory system substantially comparable to the U.S. regulatory system for domestic institutions. The amendment will allow specified foreign institutions to report beneficial ownership of more than five percent of a subject class of securities on Schedule 13G instead of Schedule 13D. Foreign institutions of the type specified in amended Rule 13d-1(b) will be the likely respondents to the collection of information requirements. If the amendment was not adopted, these institutions either would have to file on Schedule 13D or would be required to seek no-action letters from the staff to permit them to file on Schedule 13G to the same extent as their domestic counterparts, so long as they satisfy certain conditions. Amending the rule will enable foreign institutions meeting the conditions in the rule to file the Schedule 13G without seeking a no-action letter. Therefore, the amended

<sup>372</sup> These figures assume 9,500 respondents file Schedule 13G with the Commission annually. We estimate that 25 percent of the burden of preparation is carried by the company internally and that 75 percent of the burden of preparation is carried by outside professionals retained by the issuer. These figures estimate an average cost of \$400 per hour for the services of outside professionals, based on our consultations with several registrants and law firms and other persons who regularly assist registrants in preparing and filing with the Commission.

rule may result in only a slight increase in the number of Schedule 13G filers.<sup>373</sup>

For purposes of the PRA, we estimate that the amendments to Schedule 13G will create an incremental burden of two hours per response, which we will add to the existing Schedule 13G burden resulting in a total burden of 117,800 hours.<sup>374</sup> We note that the burden associated with the amendments to Schedule 13G initially will be higher with an estimated burden of five hours. Over time, however, we believe that on average the burden will lessen and therefore estimate an incremental burden of two hours per response. Each additional filer will incur a burden of approximately .50 hours of respondent personnel time (25 percent of the total burden) and costs of \$600 for the services of outside professionals (75 percent of the total burden). In sum, we estimate that the amendments to Schedule 13G will increase the annual paperwork burden by approximately 1.50 hours of respondent personnel time<sup>375</sup> and a cost of approximately \$1,800 for the services of outside professionals.<sup>376</sup>

We previously have estimated that Schedule 13D has a total burden of approximately 14.5 hours per response to prepare and is filed by 3,000 respondents annually. For purposes of the PRA, we have estimated that compliance with the Schedule 13D requirements under Regulation 13D requires 43,500 burden hours in aggregate each year, broken down into 10,875 hours (or 3.6 hours per respondent) of respondent personnel time and costs of \$13,050,000 (or \$4,350 per respondent) for the services of outside professionals.

Based upon these estimates, a foreign institution currently filing a Schedule 13D that will be eligible to file a Schedule 13G pursuant to the amended rule will benefit from a cost reduction

<sup>373</sup> Based on the number of no-action requests in this area in recent years, we believe that approximately three filers per year will benefit from this proposed change and will avoid the time and expense of submitting a no-action request to the staff. In addition, foreign institutions currently filing on Schedule 13D who have not sought no-action relief to file on Schedule 13G will also benefit by becoming eligible to use the shorter Schedule 13G. See discussion above.

<sup>374</sup> We currently estimate the burden for preparing a Schedule 13G filing to be 10.4 hours, resulting in a total of 98,800 burden hours in aggregate each year. If each additional filer incurred an additional two hours, the resulting burden would be 117,800 total burden hours (10.4 hours + two hours) × 9500 respondents).

<sup>375</sup> Three additional filers × .50 hours of respondent personnel time = 1.50 aggregate burden hours.

<sup>376</sup> Three additional filers × \$600 = \$1,800.

of \$630 per respondent.<sup>377</sup> As noted above, however, for a number of years, the staff has provided no-action relief to foreign institutions seeking to file a Schedule 13G rather than a Schedule 13D. For those institutions that are already filing a Schedule 13G pursuant to no-action relief, the amended rules will likely only increase the cost associated with providing the required certification in Schedule 13G and will not significantly impact the cost of complying with the requirements of Regulation 13D.

For purposes of PRA, we estimate that the amendments to Exchange Act Rule 16a-1 will reduce the number of Form 3 filers by three respondents, which will reduce the incremental burden by .5 hours per filer, or 1.5 total hours.<sup>378</sup> The reduction in three respondents corresponds with the estimated increase in respondents for Schedule 13G relying on the new provision for foreign institutions. In addition, we estimate that the amendments will reduce the number of Form 4 filings by 3 filings, which will reduce the incremental burden by .5 hours per filing, or a total of 1.5 total hours.<sup>379</sup> For purposes of the PRA, we estimate that the burden cost resulting from the amendments will be zero.

#### IV. Cost-Benefit Analysis

We are adopting amendments to our rules that are expected to reduce the overall cost for issuers and acquirors engaged in cross-border business combination transactions. We also provide interpretive guidance regarding the application of certain rules. Under the rule amendments adopted today, much of the no-action and exemptive relief sought in the past will be available without the need for no-action or exemptive letters. As a result, issuers and acquirors will benefit from an increase in regulatory certainty about the U.S. rules governing cross-border business combination transactions and a substantial savings in the cost of preparing letters requesting relief. Decreasing the burden on acquirors of complying with U.S. rules governing business combination transactions is designed to encourage them to extend

<sup>377</sup> We calculate this figure in the following manner: \$4,350—(\$3,120 + \$600) = \$630. The total cost burden of Schedule 13G is estimated currently at an aggregate burden of \$29,640,000 or \$3,120 per respondent (\$29,640,000/9,500 respondents = \$3,120).

<sup>378</sup> We calculate this figure in the following manner: 14,500 hours/29,000 filers = .5 hours reporting burden per filer.

<sup>379</sup> We calculate this figure in the following manner: 112,500 hours/225,000 filings annually = .5 hours reporting burden per filing. Our estimates account for one Form 4 filing per year per filer.

more transactions to U.S. target holders; therefore, we believe the rule revisions are in the interests of U.S. investors, while continuing to provide appropriate protections. We did not receive any comments regarding the cost of preparing such letters and the amount of time spent working through concerns raised during the review of such letters.

In analyzing the costs and benefits of the revised rules, we compared estimated future cross-border transaction activity that will likely occur under the revised rules with what will likely occur in a benchmark case without the rules.

#### A. Changes to the Eligibility Test for Determining Eligibility To Rely on the Cross-Border Exemptions

##### 1. Amendments

##### a. Adoption of the Alternate Test and Revision To Test for Non-Negotiated Transactions

The changes we proposed to the test for determining eligibility to rely on the cross-border exemptions for business combination transactions were limited in nature and scope, as are the changes we are adopting today. The changes are intended to address specific problems acquirors have faced in determining whether they can rely on the cross-border exemptions. We are adopting many of the changes as proposed, but we also are adopting an alternate test for situations in which an acquiror is unable to conduct the look-through analysis in a negotiated transaction. The alternative test uses ADTV as one of three elements that must be satisfied. The alternate test we are adopting will replace the hostile presumption. We do not believe the amendments we are adopting will materially affect the cost of undertaking such transactions because an acquiror will continue to be required to conduct the look-through analysis in a negotiated transaction, as it is required to do today. The alternate test will aid acquirors that are unable to conduct the look-through analysis by permitting them to use readily available average daily trading volume numbers to determine eligibility.

We also proposed limited changes to the manner in which U.S. ownership may be calculated for cross-border tender offers accomplished on a non-negotiated or hostile basis. These changes are intended to clarify certain elements of the former “hostile presumption” test, which are now incorporated into the alternate test, that have created uncertainty for acquirors in the past. As discussed above, the alternate test uses public announcement as the reference date when determining

eligibility to use the exemptions. Finally, in this release and the amended rules, we provide some guidance on the "reason to know" element of the alternate test, which we hope will make the application of the test simpler and more certain for acquirors.

#### i. Benefits

The alternate test we are adopting is expected to reduce costs involved in certain cross-border transactions. As discussed above, a bidder will be able to take advantage of the alternate test in situations where it is unable to conduct the look-through analysis. This may allow an acquiror to avail itself of an exemption that it otherwise would not have been able to use due to its inability to conduct the look-through analysis.

The relative easing of the burden on potential acquirors is expected to translate to monetary benefits to U.S. investors. When an acquiror is unable to conduct the look-through inquiry but is able to satisfy the alternate test, U.S. investors who own securities of the target company may benefit from being included in the tender offer and being eligible to receive tender offer premiums.

#### ii. Costs

Although the new alternate test is not designed to increase the cost of enacting cross-border transactions, there may be economic costs that arise from the low correlation between ADTV and the level of U.S. beneficial ownership. There may be an economic cost to U.S. investors owning securities in a target company if these U.S. investors no longer receive the Williams Act protection based on the acquiror's reliance on the alternate test. We believe these costs are balanced by the benefit of facilitating U.S. participation in the offer as a result of the availability of the alternate test.

The staff conducted an empirical analysis on the relationship between U.S. beneficial ownership and ADTV and found their correlation to be low.<sup>380</sup> Based on the transactions considered, the analysis suggests that the level of trading activity of certain securities in the United States may not accurately reflect the level of U.S. beneficial ownership of those securities. In turn, we may have situations in which U.S. beneficial ownership of a security is

high but its trading activity is low, and vice versa.

#### b. Revised Calculation Date and Inclusion of More Than 10 Percent Holders

Acquirors will now be permitted to calculate the required U.S. beneficial ownership figure within a range of dates that is no more than 60 days before announcement of the transaction and no more than 30 days after the announcement. Before today's amendments, the calculation was required to be done as of the 30th day before commencement of a cross-border business combination transaction. The revision to allow a range of dates is expected to provide acquirors with additional flexibility in structuring transactions and availing themselves of the cross-border exemptions.

Additionally, under the amended rules, the calculation of U.S. beneficial ownership for the look-through analysis will include the securities held by security holders who own more than 10 percent of the target securities. Because we are changing the manner in which the ratio must be calculated, the amendment will result in a change in the transactions that will qualify for the exemption. In most cases, as noted above, this amendment will increase the availability of the exemptions. It is possible, however, that under the amended rules transactions that may have qualified for an exemption previously may no longer qualify. Specifically, the amendment eliminates any possibility of relying on the Tier I exemption in cases where there is at least one U.S. security holder who owns more than 10 percent of the target securities. A similar situation could arise in which transactions that previously would have qualified for the Tier II exemptions no longer qualify, if there were an unusually large proportion of large U.S. target security holders. Nevertheless, based on our experience and the comment letters received, we believe that the practical effect is to increase the number of transactions that will qualify for exemption.

#### i. Benefits

We anticipate that the enhanced flexibility to choose a date within a range may make it easier for acquirors to accomplish the required calculation as specified under our rules, thereby promoting use of the exemptions and the inclusion of U.S. holders while reducing the acquirors' burden of seeking no-action or exemptive letters in this area. Allowing the calculation of U.S. ownership to be conducted within

60 days before public announcement of the transaction will enable acquirors to perform the calculation as of a date when the target's security holder base may be unaffected (or less affected, if there are some changes in response to rumors in the market) by the announcement of the transaction, which is expected to provide a more accurate picture of the security holder base. This change also will allow acquirors more flexibility in planning cross-border business combination transactions, and therefore we expect bidders will be encouraged to engage in these transactions. Additionally, extending the range for calculation of U.S. ownership to no more than 30 days after public announcement is expected to benefit acquirors who, for confidentiality reasons, wish to announce a business combination transaction prior to conducting a calculation of U.S. ownership. It is unclear whether using public announcement as the reference point for the calculation will have the effect of increasing or reducing U.S. ownership in the target company.

To the extent that inclusion of large target security holders in the calculation of U.S. beneficial ownership will allow for a number of new foreign private issuers to qualify for exemption, the amended rules provide an economic benefit both to U.S. investors and potential acquirors. In particular, primary benefits will accrue to U.S. shareholders of target securities in which U.S. investors hold a relatively large fraction of the securities held by small security holders but a relatively small fraction of securities held by large security holders. In such cases, the securities may not have been eligible for exemption under the prior rules, but will now be eligible. Because all shares held by U.S. investors represent U.S. aggregate economic interest, this extension of the exemption is a benefit to U.S. investors because it may encourage bidders to include U.S. security holders in their offers that otherwise would not have done so.

Even cases where transactions that previously would have qualified for an exemption no longer qualify for it could offer an economic benefit to U.S. investors. The presence of a U.S. investor who is a large target security holder indicates that U.S. investors collectively own a significant portion of the securities. Therefore, it is in the potential bidder's interest to include them in the transaction despite the cost of complying with the Williams Act rules. In this case, U.S. investors will gain from additional disclosure of information from the bidder. This

<sup>380</sup> This analysis was based on U.S. beneficial ownership figures that were reported in no-action requests submitted to the staff. In those no-action requests, however, the calculation would have excluded large target security holders, consistent with the Commission's rules at the time. The memorandum outlining the analysis appears in the comment file for the Proposing Release, on our Web site at <http://www.sec.gov/comments/s7-10-08/s71008-8.pdf>.



expected benefit will dissipate, however, if the bidder chooses to exclude U.S. holders from the offer.

ii. Costs

The amendments also will impose additional costs, but these costs are expected to be borne mainly by potential bidders. As explained above, when large U.S. holders own a sufficiently large proportion of the target securities, the transaction may no longer qualify for the previously available exemption. For the reasons discussed above, we believe that where there are significant U.S. holdings, potential bidders are likely to continue to include U.S. shareholders in their transactions in order to gain control of the majority of securities. It is possible, however, that in some cases there would be a cost to U.S. investors, if the bidder excluded them from the transaction.

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

*B. Changes to the Tier I Exemption*

1. Expansion of the Tier I Exemption From Exchange Act Rule 13e-3

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

a. Benefits

The expansion of the Tier I exemption from Rule 13e-3 will likely result in fewer filings of Schedule 13E-3, thus reducing the costs for issuers and affiliates in cross-border transactions that would otherwise be subject to those rules. As we noted in the Proposing Release, under the rules before today's amendments, the burden of complying with Rule 13e-3 and Schedule 13E-3 may be greater for foreign filers than domestic filers.<sup>381</sup> Foreign filers may not have a counterpart to these rule provisions in their home jurisdiction and may not be subject to the same fiduciary duty standards that form the basis for this heightened disclosure system for affiliated transactions.

Before the amendment we are adopting today, some entities engaged in affiliated cross-border business combination transactions would have been subject to Rule 13e-3 unless they requested individual exemptive relief. These requests have routinely been granted. To the extent that these kinds of requests will no longer be necessary as a result of the rule revision we adopt today, the revision will result in reduced costs for these entities. Issuers and affiliates may have excluded U.S. holders from transactions where they would have been required to file a Schedule 13E-3. We have been told that entities may have avoided making an offer to U.S. holders to avoid application of these rules, although it is difficult to isolate the effect of this provision on the number of entities that chose not to include U.S. holders. During 2007, approximately 110 Schedules 13E-3 were filed, 10 of which were filed by foreign private issuers. During that same period, no requests for relief on this issue were granted. Therefore, we expect the overall effect would not be significant, although the number of transactions that may have been structured to avoid U.S. jurisdictional means would not be reflected by filings on Schedule 13E-3. We believe the rule amendment will result in a cost reduction because it will lower the costs and burdens associated with extending these kinds of transactions into the United States. This amendment will be in the interests of U.S. investors to the extent that the expanded exemption from Rule 13e-3 motivates an acquiror to include U.S. investors in the transaction. Because the exemption applies only where U.S. security holders make up no more than 10 percent of the subject security holder

<sup>381</sup> See discussion in the Proposing Release, Section V.B.1.a.

base, and because the heightened disclosure requirements of Schedule 13E-3 may be onerous for foreign filers, we believe this exemption may result in more cross-border transactions being extended to U.S. investors.

b. Costs

U.S. investors of foreign private issuer targets in cross-border business combination transactions that would have been subject to Rule 13e-3 but for our rule amendment will lose the benefits of the disclosure in Schedule 13E-3, to the extent that such disclosure is not required under applicable foreign law. This cost is mitigated by the fact that, without the exemption, U.S. holders may be excluded from the transaction.

We sought data regarding the number of Schedules 13E-3 filed with respect to the securities of foreign private issuers, the number of entities or persons that the proposed rule amendment would affect, and the increases or decreases in cost that are likely to result, so we could attempt to estimate the costs and benefits associated with any possible reduction of Schedule 13E-3 filings. We did not receive any data from commenters in response to our request. Based on the number of Schedules 13E-3 filed by foreign private issuers in 2007, we do not expect the overall impact to be significant, although the number of transactions that may have been structured to avoid U.S. jurisdictional means would not be reflected by filings on Schedule 13E-3.

2. Technical Change to Rule 802 of Regulation C

We are adopting technical changes to the language of Rule 802. These changes are not intended to substantively change the filing obligations under the current rule, and we do not believe they will have any impact on the way that rule currently functions, except to clarify how it may be used. Therefore, the change will minimally affect costs and benefits.

*C. Changes to the Tier II Cross-Border Exemptions*

The rule changes we adopt today represent an expansion of the cross-border exemptions available to tender offers that meet the conditions outlined in the rules. The Tier II exemptions previously applied to tender offers conducted by third parties, issuers or affiliates, where those tender offers are subject to Rule 13e-4 or Regulation 14D. Today's amendments will expand the relief provided in the Tier II exemptions to address areas of frequent conflict between U.S. and foreign law or practice

for which individual relief is frequently requested, and will clarify that the Tier II exemptions also may be used for cross-border tender offers subject only to Regulation 14E of the Exchange Act. We also are expanding Tier II relief for dual offers by allowing offerors to make more than one concurrent non-U.S. offer, and to allow certain U.S. offers to include non-U.S. persons and certain foreign offers to include U.S. persons. Additionally, we are adopting changes to Rule 14e-5 to codify recent exemptive relief for Tier II-eligible tender offers.

#### 1. Benefits

These changes to the Tier II cross-border exemptions will expand the relief provided for eligible cross-border tender offers.<sup>382</sup> The rule changes will reduce the need for bidders to seek individual no-action or exemptive relief from the staff. Since they represent areas in which relief is most frequently requested and granted for these kinds of transactions, the changes will reduce the associated costs and burdens of applying for relief. Where we already have reduced the associated costs and burdens of requesting and granting relief through Rule 14e-5 class exemptive letters, the codification of that relief in rule text benefits market participants by modernizing the rule and enhancing its utility by providing one readily-accessible location for exempted activities. Because the rule changes will make it easier to make purchases outside of a U.S. tender offer in a manner consistent with relief frequently granted in this area, we believe the changes also will have the effect of encouraging acquirors and bidders to extend cross-border tender offers to U.S. target holders on the same terms as all other target security holders.

To the extent that some of the relief codified in today's rule changes was not contemplated in the 1999 Cross-Border Adopting Release and came about only as a result of the staff's issuance of no-action and exemptive letters, we have analyzed the benefits and costs of the proposed revisions against the rules adopted in 1999 rather than against the perceived state of the rules as created by the issuance of no-action relief. When the Tier II exemption was adopted in 1999, by its terms it only applied to tender offers subject to Rule 13e-4 or Regulation 14D. We are expanding the Tier II exemption to apply equally to cross-border tender offers governed by Regulation 14E only. By expanding the

Tier II exemption to cover such offers, the changes we are adopting today will allow more acquirors to take advantage of the exemption and thus allow more U.S. investors to benefit from being included in the offer. Expanding the category of offers for which Tier II relief is granted also will allow more flexibility in structuring offers and encourage more acquirors to take advantage of the exemption. Similarly, the changes to the Tier II relief for dual offers and the changes to Rule 14e-5 are intended to address certain foreign regulatory conflicts that were not fully appreciated when the Tier II exemption was adopted in 1999. By revising our rules to address these conflicts, we expect to enhance the applicability of the Tier II exemptions and the exemptions to Rule 14e-5 and therefore encourage more acquirors to take advantage of the exemptions and include U.S. holders in cross-border transactions.

#### 2. Costs

As with transactions governed by Regulation 14D and Rule 13e-4, the cost of reducing the protections of the Williams Act may include reduced procedural and informational safeguards for U.S. investors; however, the exemptions have been designed to reduce such a possibility. We are not aware of any other cost that will be incurred by expanding Tier II relief to tender offers governed by Regulation 14E only. In addition, because these amendments will not change the filing obligations of acquirors, investors would not lose the benefits of any required disclosure. The amendments we are making to Tier II do not affect the registration requirements of Section 5 of the Securities Act, which are not covered by these exemptions.

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

#### D. Expanded Availability of Early Commencement

##### 1. Amendment to Securities Act Rule 162

The amendments we adopt today will expand the ability to commence an exchange offer before the registration statement filed with respect to the securities offered is declared effective by the Commission. Our previous rules permitted "early commencement" only where an exchange offer was subject to Rule 13e-4 or Regulation 14D. For tender offers conducted under Tier II, we proposed to extend the option to all exchange offers, so long as withdrawal rights and other protections were provided to the same extent as would be required under Rule 13e-4 or Regulation 14D. We solicited comment regarding whether the ability to early commence should be extended to domestic offers as well. Commenters supported the proposed extension of early commencement to all exchange offers conducted under Tier II. They also supported extending early commencement to domestic offers. As adopted, the rules will permit early commencement for both cross-border and domestic exchange offers.

##### a. Benefits

We believe the rule amendments will further harmonize the treatment of exchange offers and cash tender offers by eliminating the timing disparity between the commencement of cash tender offers and stock tender offers. Domestic and foreign bidders that may have used a cash tender offer for a transaction due to timing concerns may benefit from elimination of the timing disparity. The amendments will not impact the filing and disclosure obligations of the acquiror under the Securities Act, or the requirement to comply with the tender offer rules in Regulation 14E. Because foreign law may provide that a tender offer for one class of securities will trigger an obligation to make a contemporaneous offer for a related class, this rule change could enhance the ability of such exchange offers to commence early, and therefore may enhance the speed with which such offers may be effected. The amendment to Tier II also may allow combined offers to compete with cash bids.

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

<sup>382</sup> See the discussion above regarding the changes to the threshold eligibility determination relating to the calculation of U.S. ownership.

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

#### b. Costs

As discussed above, allowing an early commencement option for an exchange offer may result in additional informational costs in some circumstances. To the extent that an offeror commences early and disseminates offer materials upon the filing of the underlying registration statement, it may receive staff comments after dissemination. This may present increased costs for offerors who must recirculate in circumstances where they have elected to commence their offer early, before the staff comment process (where applicable) is complete.

#### E. Changes to Forms and Schedules

We are adopting changes to the manner in which several forms and schedules are filed. We are requiring that all Form CBs, and Form F-Xs filed in connection with a Form CB, be filed electronically. A Form F-X filed in connection with a Form CB must be filed electronically under the same circumstances.

In addition, we proposed to add a box to the cover page of Schedule TO and Forms S-4 and F-4 where the filing person would specify the applicable cross-border exemption or exemptions being relied upon to conduct the applicable transaction.<sup>383</sup> We are adopting the amendments to those forms as proposed. Under the revised rules, filers relying on the Tier II cross-border exemptions and filing a Schedule TO will be required to indicate which, if any, cross-border exemption they are relying on in conducting their tender offer.

Similarly, filers of Form S-4 or F-4 that are conducting a cross-border transaction under the Tier II exemptions will be required to specify the cross-border exemption claimed on the cover page of those forms. In some cases, they also may be filing a Schedule TO, where the exchange offer is subject to Rule 13e-4 or Regulation 14D. In some instances, such as where an exchange offer commences early, a Form S-4 or F-4 may be filed before Schedule TO. It would be helpful for the staff to have this information at the earliest possible time in the offering process; therefore, we are adopting the requirement for Forms S-4 and F-4 as well. The changes we are making to Schedule TO and

Forms S-4 and F-4 will have no impact on the obligation of an offeror to file those forms.

#### 1. Benefits

Requiring electronic filing of all Form CBs will benefit investors because these Forms will be more easily accessible. Form CBs currently submitted in paper form may be accessed through our public reference room. Electronic filing will make Form CB accessible to investors more easily and more quickly.

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

#### 2. Costs

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

We received two comments in response to the proposal to require e-filing of Form CB. One commenter argued against requiring electronic filing due to the "costs and practical issues."<sup>384</sup> Another commenter cautiously supported the proposed changes but expressed concern with the possible deterrent effects of such requirements, such as potential hardships and liability arising from widespread availability of the filings on EDGAR.<sup>385</sup> While we understand the commenters' concerns, we do not

believe that requiring the electronic submission of Form CB and the accompanying Form F-X will be a significant burden and therefore we are adopting the revisions as proposed. We note that in situations in which the electronic submission poses a significant burden, a hardship exemption is available. Additionally, the Form CB is furnished, not filed, and therefore not subject to Section 18 liability. With regard to the concern about widespread availability on EDGAR, investors can see that a Form CB has been filed when they view a company's filings on EDGAR, although they cannot view the actual document. They can request a copy of the submission from the public reference room. Therefore, we do not believe that requiring electronic submission of the forms should increase the potential liability issues. We do not expect these amendments to materially affect the cost burden of these forms.

#### F. Changes to the Beneficial Ownership Reporting Rules

We are amending the beneficial ownership rules to allow foreign institutions of the same type as the domestic institutions listed in Exchange Act Rule 13d-1(b)(1)(ii) to file on Schedule 13G instead of Schedule 13D. The revised rule will permit specified types of institutions to file on Schedule 13G, where those institutions have acquired securities in the ordinary course of their business and not with the purpose or effect of changing or influencing control of the issuer of the subject securities. In order to use Schedule 13G to the same extent as their U.S. counterparts, these foreign "qualified institutional" filers also will have to meet the conditions specified in the revised rule and Schedule 13G. The conditions set forth in the rule and the certification now included in Schedule 13G codify the conditions previously contained in the staff's no-action letters. One such condition is the requirement to certify that the regulatory scheme applicable to that type of institution in its home country is substantially comparable to the regulatory system applicable to its U.S. counterpart. Another such condition is an undertaking to provide to the Commission staff, upon request, the information that would have been required under Schedule 13D.

#### 1. Benefits

The staff commonly grants no-action requests from foreign institutions comparable to the types of institutions listed in Rule 13d-1(b)(1)(ii) to file on Schedule 13G if they meet the

<sup>383</sup> The cover page of Form CB already requires disclosure of this information. However, Form CB needs to be filed only for some cross-border transactions, and only for those conducted under Tier I or Securities Act Rules 801 or 802.

<sup>384</sup> Letter from S&C.

<sup>385</sup> Letter from ABA.

conditions outlined in the no-action letters. The release adopting amendments to the beneficial ownership rules in 1998 discussed the fact that in the past, foreign institutional investors requested exemptive and no-action letters.<sup>386</sup> The release also stated that foreign institutions that wanted to use Schedule 13G as a qualified institutional investor should continue to request no-action relief from the staff. Because the staff's issuance of no-action letters was contemplated at the time of the 1998 amendments to the beneficial ownership rules, we only consider the costs and benefits of the proposed rule relevant to the staff's current practice of issuing no-action letters. From this perspective, the rule change would eliminate the costs and burdens on foreign institutions of seeking such relief individually. For foreign institutions that would otherwise have been eligible to file on Schedule 13G as passive investors under the current rules, filing under Rule 13d-1(b) reduces the burden on those filers because the initial filing obligation is less onerous for qualified institutional filers. For example, qualified institutions filing under Rule 13d-1(b) are required to file a Schedule 13G within 45 days after the end of the calendar year in which they own over five percent of the subject class as of the last day of that year. By contrast, passive investors reporting on Schedule 13G pursuant to Rule 13d-1(c) must file their initial report within ten days of the acquisition of more than five percent of the class. Unlike qualified institutional filers, passive investors may not file on Schedule 13G when their ownership equals or exceeds 20 percent of the subject class. No such limit exists for qualified institutional filers.

## 2. Costs

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

cost in permitting these institutions to file on Schedule 13G. We sought comment on the usefulness to investors of requiring these foreign institutions to file on Schedule 13D; however, we did not receive any comments in response to our request. We believe that investors will be able to obtain useful information from Schedules 13G filed by foreign institutions that acquire securities in the ordinary course of business and not with the purpose or effect of influencing control of the issuer. We do not believe the reduction of the amount of information filed by these institutions will be detrimental to investors because such institutions will not have the purpose or effect of influencing control of the issuers in which they hold securities. Thus, some of the additional information that would be required by Schedule 13D would be inapplicable.

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

We also are adopting a corresponding change to Exchange Act Rule 16a-1(a)(1) to include the foreign institutions eligible to rely on Rule 13d-1(b)(1)(ii)(J) in response to two commenters who requested it;<sup>387</sup> such a change would be consistent with the agency's regulatory history of aligning the scope of these two rules. Rule 16a-1(a) includes the definition of beneficial ownership for purposes of determining who is a more than 10 percent beneficial owner for purposes of Exchange Act Section 16. Rule 16a-1(a)(1) allows the institutions identified in the rule to exclude from 10 percent ownership calculations the shares they hold for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business, without the purpose or effect of changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect, including any transaction subject to Rule 13d-3(b). Similar to the change to Rule 13d-1(b)(1)(ii)(J), the change we are adopting to Rule 16a-

1(a)(1) may have an information cost to U.S. investors because it will exempt certain foreign institutions from Section 16(a) reporting. We do not believe the reduction of the amount of information filed by these institutions will be detrimental to investors because investors will have access to the information provided by these institutions in Schedule 13G.

## V. Consideration of Impact on Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act<sup>388</sup> and Section 3(f) of the Exchange Act<sup>389</sup> require us, when engaged in rulemaking, to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. When adopting rules under the Exchange Act, Section 23(a)(2) of the Exchange Act<sup>390</sup> requires us to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The amendments generally are expected to enhance efficiency in conducting cross-border tender offers and business combination transactions by streamlining the application of U.S. and foreign rules that may apply to those transactions. We expect that they will promote capital formation by facilitating cross-border business combination transactions conducted under multiple, and possibly conflicting, regulatory systems. Some of the rule revisions, such as the changes that broaden the availability of early commencement for exchange offers and the applicability of the Tier II exemptions for tender offers not subject to Exchange Act Rule 13e-4 or Regulation 14D, may be viewed as enhancing competition between competing offers for the same target securities, because they will make these provisions available to different kinds of offers. Furthermore, the rule changes are expected to reduce the regulatory burden on entities engaging in cross-border business combination transactions generally, which may promote competition by encouraging additional entities to engage in these types of transactions.

<sup>388</sup> 15 U.S.C. 77b(b).

<sup>389</sup> 15 U.S.C. 78c(f).

<sup>390</sup> 15 U.S.C. 78w(a)(2).

<sup>386</sup> See *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538 (January 12, 1998) [63 FR 2854].

<sup>387</sup> See letters from ABA and S&C.

The changes to the test for determining eligibility to rely on the Tier I and Tier II cross-border exemptions and Securities Act Rule 802 under Regulation C are intended to facilitate the application of those exemptions. When the exemptions were adopted in 1999, we determined that the cross-border exemptions would serve to promote the inclusion of U.S. investors in transactions required to be conducted in accordance with a foreign regulatory system. The amendments we adopt today enhance the utility of the exemptions by addressing recurring conflicts between U.S. law and foreign law and practice.

The purpose of the amendment to Exchange Act Rule 13e-3(g)(6) is to expand the exemption from Rule 13e-3 for cross-border transactions meeting the conditions of Tier I. This amendment is expected to reduce regulatory compliance burdens for issuers and affiliates engaged in affiliated cross-border transactions that would otherwise be subject to Rule 13e-3. The ability to avoid the application of Rule 13e-3 for certain cross-border transactions is expected to benefit U.S. investors, because an issuer or affiliate may choose to exclude them if that is the only means to avoid the heightened disclosure burdens of Rule 13e-3. This amendment may increase efficiency for issuers and affiliates engaged in cross-border transactions because they will be able to use transaction structures that are common abroad but that were not permitted under the exemption before these amendments.

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

We do not anticipate that the changes to Rule 14e-5 will have a significant impact, if any, on the economy because they codify the current scope of activities exempted from that rule's prohibitions through existing class exemptive letters. We believe that the changes to Rule 14e-5 likely will not place any burden on competition, as the

rule changes apply equally to all market participants covered by the rule. We believe that the Rule 14e-5 class exemptive letters concerning Tier II cross-border transactions have promoted efficiency and capital formation by eliminating the time and cost burdens associated with individual grants of relief. We believe that the codification of those letters similarly will foster efficiency and cross-border capital formation.

The amendment to Securities Act Rule 162(a), expanding the ability of offerors to commence an exchange offer early where a tender offer is not subject to Regulation 14D or Rule 13e-4, is expected to further equalize the regulatory burden between cash tender offers and exchange offers, thereby promoting competition. Because foreign rules often contain a mandatory offer requirement, obligating an offeror to make a tender offer for a given class of securities, these rule changes likely will place mandatory offers for unregistered classes of securities on an equal footing with offers for registered equity securities. The ability of offerors to commence an exchange offer early is being extended to domestic offers as well. This change likely will equalize the regulatory burden between cash tender offers and exchange offers in the United States.

The changes to Schedule TO and Forms S-4 and F-4 will likely improve efficiency because disclosure of the exemptions being relied upon by the bidder will aid the staff in its review of these documents and likely eliminate staff comments based upon assumptions as to the exemption being relied upon by the bidder.

## VI. Final Regulatory Flexibility Act Analysis

This Final Regulatory Flexibility Act Analysis has been prepared in accordance with the Regulatory Flexibility Act.<sup>391</sup> It relates to revisions to the rules and forms that we are adopting today.<sup>392</sup> An Initial Regulatory Flexibility Act Analysis was prepared in accordance with the Regulatory Flexibility Act and included in the Proposing Release.

### A. Need for the Amendments

These amendments are necessary to facilitate the inclusion of U.S. target security holders in cross-border business combination transactions. The

rule changes are expected to result in further reductions in the cost and burdens associated with including U.S. target holders in those transactions. U.S. target holders previously excluded from such transactions will benefit by having additional transactions extended to them.

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

### B. Significant Issues Raised by Public Comments

An Initial Regulatory Flexibility Analysis was prepared in accordance with the Regulatory Flexibility Act in connection with the Proposing Release, and we solicited comments on any impact the proposed changes might have on small entities. We did not receive any public comments that responded directly to the IRFA or that dealt directly with the proposal's impact on small entities.

### C. Small Entities Subject to the Final Amendments

The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."<sup>393</sup> The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission.<sup>394</sup> A "small business" and "small organization," when used with reference to an issuer other than an investment company, generally means an issuer with total assets of \$5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 issuers that may be considered reporting small entities.<sup>395</sup>

<sup>391</sup> 5 U.S.C. 601.

<sup>392</sup> Based on an analysis of the language and legislative history of the Regulatory Flexibility Act, Congress does not appear to have intended the Act to apply to foreign issuers. Therefore, we are analyzing the impact on small U.S. entities only.

<sup>393</sup> 5 U.S.C. 601(6).

<sup>394</sup> Securities Act Rule 157 [17 CFR 230.157] and Exchange Act Rule 0-10 [17 CFR 240.0-10] contain the applicable definitions.

<sup>395</sup> The estimated number of reporting small entities is based on 2007 data, including the

The revised rules may affect each of the approximately 1,100 issuers that may be considered reporting small entities. The number of reporting or non-reporting small businesses that actually rely on the revised rules, or may otherwise be impacted by the rule revisions, will depend on many factors. Acquirors relying on the exemptions may or may not have reporting obligations under the Exchange Act before engaging in a cross-border business combination transaction. An acquiror's ability to rely on the exemptions is not determined by the acquiror's size or market capitalization; however, we believe that small businesses are not typically acquirors in cross-border transactions. We believe that the amendments likely will result in savings to entities (both small and large) that qualify for the exemptions.

#### *D. Reporting, Recordkeeping and Other Compliance Requirements*

The amended rules do not impose any new reporting, recordkeeping or other compliance requirements on small entities.

#### *E. Agency Action To Minimize Effect on Small Entities*

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the amendments adopted today, the Commission considered the following alternatives: (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (ii) the clarification, consolidation or simplification of compliance and reporting requirements under the rule for small entities; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage from the amendments, or any part thereof, for small entities. Our objective in adopting the amendments is to facilitate the inclusion of U.S. holders in cross-border business combinations. While we considered the above alternatives to accomplish our stated objective, we believe that different compliance or reporting requirements are not necessary because the amendments do not establish any new reporting, recordkeeping, or compliance requirements for small entities. Establishing a different standard for small business entities would impose a greater compliance burden on small

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

#### **VII. Statutory Basis and Text of Amendments**

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

#### **List of Subjects in 17 CFR Parts 230, 231, 232, 239, 240, 241, and 249**

Reporting and recordkeeping requirements, Securities.

#### **Text of Amendments**

■ For the reasons set out in the preamble, we are amending Title 17, Chapter II of the Code of Federal Regulations as follows:

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

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

**Authority:** 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a29, 80a-30, and 80a-37, unless otherwise noted.

\* \* \* \* \*

■ 2. Revise § 230.162 to read as follows:

#### **§ 230.162 Submission of tenders in registered exchange offers.**

(a) Notwithstanding section 5(a) of the Act (15 U.S.C. 77e(a)), an offeror may solicit tenders of securities in an exchange offer before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules, and either:

(1) The exchange offer is subject to § 240.13e-4 or §§ 240.14d-1 through 14d-11 of this chapter; or

(2) The offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of § 240.13e-4 or §§ 240.14d-1 through 14d-11 of this chapter; and if a material change occurs in the information published, sent or given to security holders, the offeror complies with the provisions of § 240.13e-4(e)(3) or § 240.14d-4(b) and (d) of this chapter in disseminating information about the material change to security holders, and including the minimum periods during which the offer must remain open (with withdrawal rights) after notice of the change is provided to security holders.

(b) Notwithstanding Section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2)), a prospectus that meets the requirements of Section 10(a) of the Act (15 U.S.C. 77j(a)) need not be delivered to security holders in an exchange offer that commences before the effectiveness of a registration statement in accordance with the provisions of § 230.162(a) of this section, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with § 240.13e-4(e)(2) or § 240.14d-4(b) of this chapter. This applies not only to exchange offers subject to those provisions, but also to exchange offers not subject to those provisions that meet the conditions in § 230.162(a)(2) of this section.

*Instruction to § 230.162 of this section:* Notwithstanding the provisions of § 230.162 of this section above, for going-private transactions (as defined by § 240.13e-3) and roll-up transactions (as described by Item 901 of Regulation S-K (§ 229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of Section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

■ 3. Amend § 230.800 by revising paragraph (h)(1) and (h)(2) and adding paragraphs (h)(6) and (h)(7) to read as follows:

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

\* \* \* \* \*

(h) \* \* \*

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

(2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculation other types of securities that are convertible or

exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by the acquiror in an exchange offer or business combination;

\* \* \* \* \*

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

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

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

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

(iii) The acquiror or issuer knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent of such securities. As an example, an acquiror or issuer is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if

different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The acquiror in a business combination is deemed to know information about U.S. ownership available from the issuer. The acquiror or issuer is deemed to know information obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

\* \* \* \* \*

■ 4. Amend § 230.802 by revising paragraphs (a)(2) and (a)(3) and removing paragraph (c).

The revisions read as follows:

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

\* \* \* \* \*

(a) \* \* \*

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

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

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

(iii) If the offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in

the United States in a manner reasonably calculated to inform U.S. holders of the offer.

\* \* \* \* \*

#### **PART 231—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES ACT OF 1933 AND GENERAL RULES AND REGULATIONS THEREUNDER**

■ 5. Part 231 is amended by adding Release No. 33-8957 and the release date of September 19, 2008, to the list of interpretative releases.

\* \* \* \* \*

#### **PART 232—REGULATION S—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS**

■ 6. The authority citation for part 232 continues to read, in part, as follows:

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

\* \* \* \* \*

■ 7. Amend § 232.101 by:

■ a. Revising paragraphs (a)(1)(vi) and (a)(1)(vii);

■ b. Removing and reserving paragraph (b)(7); and

■ c. Revising paragraph (b)(8).

The revisions read as follows:

**§ 232.101 Mandated electronic submissions and exceptions.**

(a) \* \* \*

(1) \* \* \*

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

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

\* \* \* \* \*

(b) \* \* \*

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

#### **PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933**

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

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

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

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

**FORM S-4**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

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

**FORM F-4**

**REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933**

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

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

**FORM F-X**

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

**GENERAL INSTRUCTIONS**

\* \* \* \* \*

II. \* \* \*  
B. \* \* \*

(2) \* \* \*

**Note:** Regulation S-T Rule 101(b)(8) only permits the filing of the Form F-X in paper if filed by a Canadian issuer when qualifying an offering statement pursuant to the provisions of Regulation A (§§ 230.251–230.263 of this chapter).

\* \* \* \* \*

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

■ 12. The authority citation for part 240 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

■ 13. Amend § 240.13d-1 by:

■ a. Revising paragraph (b)(1)(ii)(G) and (J);

■ b. Removing "and" from the end of paragraph (b)(1)(ii)(I);

■ c. Adding paragraph (b)(1)(ii)(K); and

■ d. Removing the authority citation following the section.

The revisions and addition reads as follows:

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

\* \* \* \* \*

(b)(1) \* \* \*  
(ii) \* \* \*

(G) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in § 240.13d-1(b)(1)(ii)(A) through (J), does not exceed one percent of the securities of the subject class;

\* \* \* \* \*

(J) A non-U.S. institution that is the functional equivalent of any of the institutions listed in § 240.13d-1(b)(1)(ii)(A) through (I), so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution; and

(K) A group, provided that all the members are persons specified in § 240.13d-1(b)(1)(ii)(A) through (J).

\* \* \* \* \*

■ 14. Amend § 240.13d-102 by:

■ a. Revising Instruction 12 to the Instruction for the Cover Page before the Notes;

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

■ c. In Item 3 revising paragraph (j) and adding paragraph (k); and

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

The revision and additions read as follows:

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

\* \* \* \* \*

*Instructions for Cover Page:*

\* \* \* \* \*

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

Category	Symbol
Broker Dealer .....	BD
Bank .....	BK
Insurance Company .....	IC
Investment Company .....	IV
Investment Adviser .....	IA
Employee Benefit Plan or Endowment Fund .....	EP
Parent Holding Company/Control Person .....	HC
Savings Association .....	SA
Church Plan .....	CP
Corporation .....	CO
Partnership .....	PN
Individual .....	IN
Non-U.S. Institution .....	FI
Other .....	OO

\* \* \* \* \*

*Item 3. \* \* \**

(j) [ ] A non-U.S. institution in accordance with § 240.13d-1(b)(1)(ii)(J);

(k) [ ] Group, in accordance with § 240.13d-1(b)(1)(ii)(K). If filing as a non-U.S. institution in accordance with § 240.13d-1(b)(1)(ii)(J), please specify the type of institution: \_\_\_\_\_

\* \* \* \* \*

*Item 10. Certification*

\* \* \* \* \*

(b) The following certification shall be included if the statement is filed pursuant to § 240.13d-1(b)(1)(ii)(J), or if the statement is filed pursuant to § 240.13d-1(b)(1)(ii)(K) and a member of the group is a non-U.S. institution eligible to file pursuant to § 240.13d-1(b)(1)(ii)(J):

By signing below I certify that, to the best of my knowledge and belief, the foreign regulatory scheme applicable to [insert particular category of institutional investor] is substantially comparable to the regulatory scheme



applicable to the functionally equivalent U.S. institution(s). I also undertake to furnish to the Commission staff, upon request, information that would otherwise be disclosed in a Schedule 13D.

\* \* \* \* \*

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

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

\* \* \* \* \*

(g) \* \* \*

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

Instruction to § 240.13e-3(g)(6): To the extent applicable, the acquiror must comply with the conditions set forth in § 230.802 of this chapter, and §§ 240.13e-4(h)(8) and 14d-1(c). If the acquiror publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the transaction, the acquiror must furnish an English translation of that informational document, including any amendments thereto, to the Commission under cover of Form CB (§ 239.800 of this chapter) by the first business day after publication or dissemination. If the acquiror is a foreign entity, it must also file a Form F-X (§ 239.42 of this chapter) with the Commission at the same time as the submission of the Form CB to appoint an agent for service in the United States.

■ 16. Amend § 240.13e-4 by:

- a. Revising paragraph (h)(8)(i);
- b. Revising the introductory text of paragraph (i);
- c. Revising paragraph (i)(1)(ii);
- d. Revising paragraph (i)(2)(ii);
- e. Adding paragraphs (i)(2)(v) and (vi);
- f. Revising paragraphs 2.i. and ii. to the Instructions to paragraph (h)(8) and (i);
- g. Redesignating Instructions 3 and 4 to paragraphs (h)(8) and (i) as Instructions 4 and 5 respectively;
- h. Adding a new Instruction 3 to paragraphs (h)(8) and (i); and
- i. Revising the newly redesignated Instructions 4 and 5 to paragraphs (h)(8) and (i).

The revisions and additions read as follows:

**§ 240.13e-4 Tender offers by issuers.**

(h) \* \* \*  
(8) \* \* \*

(i) Except in the case of an issuer tender offer that is commenced during the pendency of a tender offer made by a third party in reliance on § 240.14d-1(c), U.S. holders do not hold more than 10 percent of the subject class sought in the offer (as determined under Instructions 2 or 3 to paragraph (h)(8) and paragraph (i) of this section);

\* \* \* \* \*

(i) *Cross-border tender offers (Tier II).*

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

\* \* \* \* \*

(1) \* \* \*

(ii) Except in the case of an issuer tender offer commenced during the pendency of a tender offer made by a third party in reliance on § 240.14d-1(d), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined in accordance with Instructions 2 or 3 to paragraphs (h)(8) and (i) of this section).

(2) \* \* \*

(i) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of paragraph (f)(8) of this section, an issuer or affiliate conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into multiple offers: one offer made to U.S. holders, which also may include all holders of American Depositary Shares representing interests in the subject securities, and one or more offers made to non-U.S. holders. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the

same class of securities that is the subject of the tender offers. U.S. holders may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. holders from the foreign offer(s) and where the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer(s).

\* \* \* \* \*

(v) *Suspension of withdrawal rights during counting of tendered securities.*

The issuer or affiliate may suspend withdrawal rights required under paragraph (f)(2) of this section at the end of the offer and during the period that securities tendered into the offer are being counted, provided that:

- (A) The issuer or affiliate has provided an offer period, including withdrawal rights, for a period of at least 20 U.S. business days;
- (B) At the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the issuer or affiliate is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and
- (C) Withdrawal rights are suspended only during the counting process and are reinstated immediately thereafter, except to the extent that they are terminated through the acceptance of tendered securities.

(vi) *Early termination of an initial offering period.* An issuer or affiliate conducting an issuer tender offer may terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights terminate, the following conditions are met:

- (A) The initial offering period has been open for at least 20 U.S. business days;
- (B) The issuer or affiliate has adequately discussed the possibility of and the impact of the early termination in the original offer materials;
- (C) The issuer or affiliate provides a subsequent offering period after the termination of the initial offering period;
- (D) All offer conditions are satisfied as of the time when the initial offering period ends; and
- (E) The issuer or affiliate does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.

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

\* \* \* \* \*

2. \* \* \*

i. Calculate the U.S. ownership as of a date no more than 60 days before and no more than 30 days after the public announcement of the tender offer. If you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before announcement;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities;

\* \* \* \* \*

3. If you are unable to conduct the analysis of U.S. ownership set forth in Instruction 2 above, U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities (40 percent for Tier II) so long as there is a primary trading market outside the United States, as defined in § 240.12h-6(f)(5) of this chapter, unless:

i. Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the tender offer exceeds 10 percent (or 40 percent) of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

ii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent (or 40 percent) of the outstanding subject class of securities; or

iii. You know or have reason to know, before the public announcement of the offer, that the level of U.S. ownership of the subject securities exceeds 10 percent (or 40 percent) of such securities. As an example, you are deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the home jurisdiction and, if different, the non-U.S. jurisdiction in which the primary trading market for the subject class of

securities is located. You are also deemed to know information obtained or readily available from any other source that is reasonably reliable, including from persons you have retained to advise you about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

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

5. The exemptions provided by paragraphs (h)(8) and (i) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (h)(8) and (i) of this section but are part of a plan or scheme to evade the provisions of this section.

\* \* \* \* \*

- 17. Amend § 240.14d-1 by:
  - a. Revising paragraph (a);
  - b. Revising paragraph (c)(1);
  - c. Revising the introductory text of paragraph (d), paragraphs (d)(1)(ii), (d)(2)(ii) and (d)(2)(iv);
  - d. Adding paragraphs (d)(2)(vi), (d)(2)(vii), (d)(2)(viii), and (d)(2)(ix); and
  - e. Revising Instructions 2.i., 2.ii., 3. introductory text, 3.i., 3.ii., and 3.iii. to the Instructions to paragraphs (c) and (d).

The revisions and additions read as follows:

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

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

\* \* \* \* \*

(c) \* \* \*

(1) *U.S. ownership limitation.* Except in the case of a tender offer that is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e-4(h)(8), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instructions 2 or 3 to paragraphs (c) and (d) of this section).

\* \* \* \* \*

(d) *Tier II.* A person conducting a tender offer (including any exchange offer) that meets the conditions in

paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section. In addition, a person conducting a tender offer subject only to the requirements of section 14(e) of the Act (15 U.S.C. 78n(e)) and Regulation 14E thereunder (§§ 240.14e-1 through 240.14e-8) that meets the conditions in paragraph (d)(1) of the section also shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section, to the extent needed under the requirements of Regulation 14E, so long as the tender offer complies with all requirements of Regulation 14E other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

(1) \* \* \*

(i) Except in the case of a tender offer that is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or § 240.13e-4(i), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under Instructions 2 or 3 to paragraphs (c) and (d) of this section); and

(2) \* \* \*

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

\* \* \* \* \*

(iv) *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of § 240.14e-1(c). Where payment may not be made on a more expedited basis

under home jurisdiction law or practice, payment for securities tendered during any subsequent offering period within 20 business days of the date of tender will satisfy the prompt payment requirements of § 240.14d-11(e). For purposes of this paragraph (d), a business day is determined with reference to the target's home jurisdiction.

\* \* \* \* \*

(vi) *Payment of interest on securities tendered during subsequent offering period.* Notwithstanding the requirements of § 240.14d-11(f), the bidder may pay interest on securities tendered during a subsequent offering period, if required under applicable foreign law. Paying interest on securities tendered during a subsequent offering period in accordance with this section will not be deemed to violate § 240.14d-10(a)(2).

(vii) *Suspension of withdrawal rights during counting of tendered securities.* The bidder may suspend withdrawal rights required under section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) at the end of the offer and during the period that securities tendered into the offer are being counted, provided that:

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

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

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

(viii) *Mix and match elections and the subsequent offering period.*

Notwithstanding the requirements of § 240.14d-11(b), where the bidder offers target security holders a choice between different forms of consideration, it may establish a ceiling on one or more forms of consideration offered.

Notwithstanding the requirements of § 240.14d-11(f), a bidder that establishes a ceiling on one or more forms of consideration offered pursuant to this subsection may offset elections of tendering security holders against one another, subject to proration, so that elections are satisfied to the greatest extent possible and prorated to the extent that they cannot be satisfied in full. Such a bidder also may separately offset and prorate securities tendered

during the initial offering period and those tendered during any subsequent offering period, notwithstanding the requirements of § 240.14d-10(c).

(ix) *Early termination of an initial offering period.* A bidder may terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights terminate, the following conditions are met:

(A) The initial offering period has been open for at least 20 U.S. business days;

(B) The bidder has adequately discussed the possibility of and the impact of the early termination in the original offer materials;

(C) The bidder provides a subsequent offering period after the termination of the initial offering period;

(D) All offer conditions are satisfied as of the time when the initial offering period ends; and

(E) The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.

*Instructions to paragraphs (c) and (d):*

\* \* \* \* \*

2. \* \* \*

i. Calculate the U.S. ownership as of a date no more than 60 before and no more than 30 days after public announcement of the tender offer. If you are unable to calculate as of a date within these time frames, the calculation may be made as of the most recent practicable date before public announcement, but in no event earlier than 120 days before announcement;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by the bidder;

\* \* \* \* \*

3. In a tender offer by a bidder other than an affiliate of the issuer of the subject securities that is not made pursuant to an agreement with the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 10 percent (40 percent in the case of paragraph (d) of this section)

of such outstanding securities, unless paragraphs 3.i., ii., or iii. of the instructions to paragraphs (c) and (d) of this section indicate otherwise. In addition, where the bidder is unable to conduct the analysis of U.S. ownership set forth in Instruction 2 to paragraphs (c) and (d) of this section, the bidder may presume that the percentage of securities held by U.S. holders is less than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding securities so long as there is a primary trading market for the subject securities outside the U.S., as defined in § 240.12h-6(f)(5) of this chapter, unless:

i. Average daily trading volume of the subject securities in the United States for a recent twelve-month period ending on a date no more than 60 days before the public announcement of the offer exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of the average daily trading volume of that class of securities on a worldwide basis for the same period; or

ii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10 percent (40 percent in the case of paragraph (d) of this section) of the outstanding subject class of securities; or

iii. The bidder knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent (40 percent in the case of paragraph (d) of this section) of such securities. As an example, a bidder is deemed to know information about U.S. ownership of the subject class of securities that is publicly available and that appears in any filing with the Commission or any regulatory body in the issuer's jurisdiction of incorporation or (if different) the non-U.S. jurisdiction in which the primary trading market for the subject securities is located. The bidder is deemed to know information about U.S. ownership available from the issuer or obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. These examples are not intended to be exclusive.

\* \* \* \* \*

■ 18. Amend § 240.14d-11 by revising the introductory text to read as follows:

**§ 240.14d–11. Subsequent offering period.**

A bidder may elect to provide a subsequent offering period of at least three business days during which tenders will be accepted if:

\* \* \* \* \*

■ 19. Amend § 240.14d–100 by adding a statement regarding reliance on the cross-border exemptions and check boxes on the cover page immediately before the General Instructions to read as follows:

**§ 240.14d–100 Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.**

\* \* \* \* \*

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

[ ] Rule 13e–4(i) (Cross-Border Issuer Tender Offer)

[ ] Rule 14d–1(d) (Cross-Border Third-Party Tender Offer)

\* \* \* \* \*

■ 20. Amend § 240.14e–5 by:

■ a. Removing “and” at the end of paragraphs (b)(9)(v) and (c)(6);

■ b. Removing the period at the end of paragraphs (b)(10)(v) and (c)(7) and adding in its place “; and”; and

■ c. Adding paragraphs (b)(11), (b)(12), (c)(8), and (c)(9).

The additions read as follows:

**§ 240.14e–5. Prohibiting purchases outside of a tender offer.**

\* \* \* \* \*

(b) \* \* \*

(11) *Purchases or arrangements to purchase pursuant to a foreign tender offer(s).* Purchases or arrangements to purchase pursuant to a foreign offer(s) where the offeror seeks to acquire subject securities through a U.S. tender offer and a concurrent or substantially concurrent foreign offer(s), if the following conditions are satisfied:

(i) The U.S. and foreign tender offer(s) meet the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d–1(d);

(ii) The economic terms and consideration in the U.S. tender offer and foreign tender offer(s) are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer(s) to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;

(iii) The procedural terms of the U.S. tender offer are at least as favorable as the terms of the foreign tender offer(s);

(iv) The intention of the offeror to make purchases pursuant to the foreign

tender offer(s) is disclosed in the U.S. offering documents; and

(v) Purchases by the offeror in the foreign tender offer(s) are made solely pursuant to the foreign tender offer(s) and not pursuant to an open market transaction(s), a private transaction(s), or other transaction(s); and

(12) *Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates.*

(i) Purchases or arrangements to purchase by an affiliate of a financial advisor and an offeror and its affiliates that are permissible under and will be conducted in accordance with the applicable laws of the subject company’s home jurisdiction, if the following conditions are satisfied:

(A) The subject company is a foreign private issuer as defined in § 240.3b–4(c);

(B) The covered person reasonably expects that the tender offer meets the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d–1(d);

(C) No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States;

(D) The United States offering materials disclose prominently the possibility of, or the intention to make, purchases or arrangements to purchase subject securities or related securities outside of the tender offer, and if there will be public disclosure of purchases of subject or related securities, the manner in which information regarding such purchases will be disseminated;

(E) There is public disclosure in the United States, to the extent that such information is made public in the subject company’s home jurisdiction, of information regarding all purchases of subject securities and related securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires;

(F) Purchases or arrangements to purchase by an offeror and its affiliates must satisfy the following additional condition: the tender offer price will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price; and

(G) Purchases or arrangements to purchase by an affiliate of a financial advisor must satisfy the following additional conditions:

(1) The financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws

and regulations through the establishment of information barriers;

(2) The financial advisor has an affiliate that is registered as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a));

(3) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and

(4) The purchases or arrangements to purchase are not made to facilitate the tender offer.

(ii) Reserved.

(c) \* \* \*

(8) *Subject company* has the same meaning as in § 229.1000 of this chapter; and

(9) *Home jurisdiction* has the same meaning as in the Instructions to paragraphs (c) and (d) of § 240.14d–1.

\* \* \* \* \*

■ 21. Amend § 240.16a–1 by:

■ a. Revising paragraph (a)(1)(vii);

■ b. Removing “and” from the end of paragraph (a)(1)(ix); and

■ c. Revising paragraphs (a)(1)(x) and (xi).

The revisions read as follows:

**§ 240.16a–1 Definition of terms.**

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(vii) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in § 240.16a–1 (a)(1)(i) through (x), does not exceed one percent of the securities of the subject class;

\* \* \* \* \*

(x) A non-U.S. institution that is the functional equivalent of any of the institutions listed in paragraphs (a)(1)(i) through (ix) of this section, so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution and the non-U.S. institution is eligible to file a Schedule 13G pursuant to § 240.13d–1(b)(1)(ii)(f); and

(xi) A group, provided that all the members are persons specified in § 240.16a–1 (a)(1)(i) through (x).

\* \* \* \* \*

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

■ 22. Part 241 is amended by adding Release No. 34–58597 and the release date of September 19, 2008, to the list of interpretative releases.

**PART 239—FORMS PRESCRIBED  
UNDER THE SECURITIES ACT OF 1933**

**PART 249—FORMS, SECURITIES  
EXCHANGE ACT OF 1934**

■ 23. The authority citation for part 249 continues to read in part as follows:

**Authority:** 15 U.S.C. 78a *et seq.*, 7202, 7233, 7241, 7262, 7264, and 7265; and 18 U.S.C. 1350, unless otherwise noted.

\* \* \* \* \*

■ 24. Amend Form CB (referenced in § 239.800 and § 249.480) by:

■ a. Revising General Instruction II.A.(1); and

■ b. Revising General Instruction II.A.(4).

**Note:** The text of Form CB does not and this amendment will not appear in the Code of Federal Regulations.

**Form CB**

**TENDER OFFER/RIGHTS OFFERING  
NOTIFICATION FORM**

(AMENDMENT NO. \_\_\_\_\_)

\* \* \* \* \*

**GENERAL INSTRUCTIONS**

\* \* \* \* \*

**II. Instructions for Submitting Form**

A. (1) Regulation S–T Rule 101(a)(1)(vi) (17 CFR 232.101(a)(1)(vi)) requires a party to submit the Form CB in electronic format via the Commission’s Electronic Data Gathering and Retrieval system (EDGAR) in accordance with the EDGAR rules set forth in Regulation S–T (17 CFR Part 232). For assistance with technical

questions about EDGAR or to request an access code, call the EDGAR Filer Support Office at (202) 551–8900.

\* \* \* \* \*

(4) If filing the Form CB in paper in accordance with a hardship exemption, 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. You must bind, staple or otherwise compile each copy in one or more parts without stiff covers. You must make the binding on the side or stitching margin in a manner that leaves the reading matter legible.

\* \* \* \* \*

By the Commission.

Dated: September 19, 2008.

**J. Lynn Taylor,**

*Assistant Secretary.*

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