

## Securities and Exchange Commission

## § 230.800

(2) Resales of securities issued pursuant to this section must be in compliance with the registration requirements of the Act or an exemption from those requirements.

(3) Ninety days after the issuer becomes subject to the reporting requirements of section 13 or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)), securities issued under this section may be resold by persons who are not affiliates (as defined in §230.144) in reliance on §230.144, without compliance with paragraphs (c) and (d) of §230.144, and by affiliates without compliance with paragraph (d) of §230.144.

[64 FR 11101, Mar. 8, 1999, as amended at 64 FR 61498, Nov. 12, 1999; 72 FR 71571, Dec. 17, 2007; 73 FR 1009, Jan. 4, 2008]

### §§ 230.702(T)–230.703(T) [Reserved]

#### EXEMPTIONS FOR CROSS-BORDER RIGHTS OFFERINGS, EXCHANGE OFFERS AND BUSINESS COMBINATIONS

SOURCE: Sections 230.800 through 230.802 appear at 64 FR 61400, Nov. 10, 1999, unless otherwise noted.

#### GENERAL NOTES TO §§ 230.800, 230.801 AND 230.802

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

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

3. An issuer who relies on §230.801 or an offeror who relies on §230.802 must still comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) and any other applicable provisions of the federal securities laws.

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

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

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

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

8. Securities acquired in a rights offering under §230.801 are "restricted securities" within the meaning of §230.144(a)(3) to the same extent and proportion that the securities held by the security holder as of the record date for the rights offering were restricted securities. Likewise, securities acquired in an exchange offer or business combination subject to §230.802 are "restricted securities" within the meaning of §230.144(a)(3) to the same extent and proportion that the securities tendered or exchanged by the security holder in that transaction were restricted securities.

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

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

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

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

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

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

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

(3) Any such warrant or right; or

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

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

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

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

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

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

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

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

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

(1) Calculate the percentage of outstanding securities held by U.S. holders

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

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

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

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

(5) Count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or information

that is otherwise provided to you indicates that the securities are held by U.S. residents.

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

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

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

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

(iii) The acquiror or issuer knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10 percent of such securities. As an example, an acquiror or issuer is deemed to know information about U.S. owner-

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

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

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

**§ 230.801 Exemption in connection with a rights offering.**

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

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

(2) *Limitation on U.S. ownership.* U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering (as determined under the definition of "U.S. holder" in § 230.800(h)).

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

(4) *Informational documents.* (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the securities in connection with the rights offering, the issuer