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(i) If such tender offer was made for any or all securities of a class of the issuer;

(A) Such tender offer fully disclosed such person's intention to engage in a Rule 13e-3 transaction, the form and effect of such transaction and, to the extent known, the proposed terms thereof; and

(B) Such Rule 13e-3 transaction is substantially similar to that described in such tender offer; or

(ii) If such tender offer was made for less than all the securities of a class of the issuer:

(A) Such tender offer fully disclosed a plan of merger, a plan of liquidation or a similar binding agreement between such person and the issuer with respect to a Rule 13e-3 transaction; and

(B) Such Rule 13e-3 transaction occurs pursuant to the plan of merger, plan of liquidation or similar binding agreement disclosed in the bidder's tender offer.

(2) Any Rule 13e-3 transaction in which the security holders are offered or receive only an equity security *Provided*, That:

(i) Such equity security has substantially the same rights as the equity security which is the subject of the Rule 13e-3 transaction including, but not limited to, voting, dividends, redemption and liquidation rights except that this requirement shall be deemed to be satisfied if unaffiliated security holders are offered common stock;

(ii) Such equity security is registered pursuant to section 12 of the Act or reports are required to be filed by the issuer thereof pursuant to section 15(d) of the Act; and

(iii) If the security which is the subject of the Rule 13e-3 transaction was either listed on a national securities exchange or authorized to be quoted in an interdealer quotation system of a registered national securities association, such equity security is either listed on a national securities exchange or authorized to be quoted in an interdealer quotation system of a registered national securities association.

(3) [Reserved]

(4) Redemptions, calls or similar purchases of an equity security by an issuer pursuant to specific provisions set forth in the instrument(s) creating

or governing that class of equity securities; or

(5) Any solicitation by an issuer with respect to a plan of reorganization under Chapter XI of the Bankruptcy Act, as amended, if made after the entry of an order approving such plan pursuant to section 1125(b) of that Act and after, or concurrently with, the transmittal of information concerning such plan as required by section 1125(b) of that Act.

(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.

[44 FR 46741, Aug. 8, 1979, as amended at 47 FR 11466, Mar. 16, 1982; 48 FR 19877, May 3, 1983; 48 FR 34253, July 28, 1983; 51 FR 42059, Nov. 20, 1986; 61 FR 24656, May 15, 1996; 64 FR 61403, 64 FR 61452, Nov. 10, 1999; 73 FR 17813, Apr. 1, 2008; 73 FR 58323, Oct. 6, 2008; 73 FR 60090, Oct. 9, 2008]

§ 240.13e-4 Tender offers by issuers.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section and in Schedule TO (§ 240.14d-100) shall have the same meaning as in the Act or elsewhere in the General Rules and Regulations thereunder. In addition, the following definitions shall apply:

(1) The term *issuer* means any issuer which has a class of equity security registered pursuant to section 12 of the

Act, or which is required to file periodic reports pursuant to section 15(d) of the Act, or which is a closed-end investment company registered under the Investment Company Act of 1940.

(2) The term *issuer tender offer* refers to a tender offer for, or a request or invitation for tenders of, any class of equity security, made by the issuer of such class of equity security or by an affiliate of such issuer.

(3) As used in this section and in Schedule TO (§240.14d-100), the term *business day* means any day, other than Saturday, Sunday, or a Federal holiday, and shall consist of the time period from 12:01 a.m. through 12:00 midnight Eastern Time. In computing any time period under this Rule or Schedule TO, the date of the event that begins the running of such time period shall be included *except that* if such event occurs on other than a business day such period shall begin to run on and shall include the first business day thereafter.

(4) The term *commencement* means 12:01 a.m. on the date that the issuer or affiliate has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

(5) The term *termination* means the date after which securities may not be tendered pursuant to an issuer tender offer.

(6) The term *security holders* means holders of record and beneficial owners of securities of the class of equity security which is the subject of an issuer tender offer.

(7) The term *security position listing* means, with respect to the securities of any issuer held by a registered clearing agency in the name of the clearing agency or its nominee, a list of those participants in the clearing agency on whose behalf the clearing agency holds the issuer's securities and of the participants' respective positions in such securities as of a specified date.

(b) *Filing, disclosure and dissemination.* As soon as practicable on the date of commencement of the issuer tender offer, the issuer or affiliate making the issuer tender offer must comply with:

(1) The filing requirements of paragraph (c)(2) of this section;

(2) The disclosure requirements of paragraph (d)(1) of this section; and

(3) The dissemination requirements of paragraph (e) of this section.

(c) *Material required to be filed.* The issuer or affiliate making the issuer tender offer must file with the Commission:

(1) All written communications made by the issuer or affiliate relating to the issuer tender offer, from and including the first public announcement, as soon as practicable on the date of the communication;

(2) A Schedule TO (§240.14d-100), including all exhibits;

(3) An amendment to Schedule TO (§240.14d-100) reporting promptly any material changes in the information set forth in the schedule previously filed; and

(4) A final amendment to Schedule TO (§240.14d-100) reporting promptly the results of the issuer tender offer.

Instructions to §240.13e-4(c):

1. Pre-commencement communications must be filed under cover of Schedule TO (§240.14d-100) and the box on the cover page of the schedule must be marked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under §230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it is available because it contains important information. The legend also must advise investors that they can get the tender offer statement and other filed documents for free at the Commission's web site and explain which documents are free from the issuer.

4. See §§230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

5. "Public announcement" is any oral or written communication by the issuer, affiliate or any person authorized to act on their behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the issuer tender offer.

(d) *Disclosure of tender offer information to security holders.* (1) The issuer or affiliate making the issuer tender offer must disclose, in a manner prescribed

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by paragraph (e)(1) of this section, the following:

(i) The information required by Item 1 of Schedule TO (§240.14d-100) (summary term sheet); and

(ii) The information required by the remaining items of Schedule TO for issuer tender offers, except for Item 12 (exhibits), or a fair and adequate summary of the information.

(2) If there are any material changes in the information previously disclosed to security holders, the issuer or affiliate must disclose the changes promptly to security holders in a manner specified in paragraph (e)(3) of this section.

(3) If the issuer or affiliate disseminates the issuer tender offer by means of summary publication as described in paragraph (e)(1)(iii) of this section, the summary advertisement must not include a transmittal letter that would permit security holders to tender securities sought in the offer and must disclose at least the following information:

(i) The identity of the issuer or affiliate making the issuer tender offer;

(ii) The information required by §229.1004(a)(1) and §229.1006(a) of this chapter;

(iii) Instructions on how security holders can obtain promptly a copy of the statement required by paragraph (d)(1) of this section, at the issuer or affiliate's expense; and

(iv) A statement that the information contained in the statement required by paragraph (d)(1) of this section is incorporated by reference.

(e) *Dissemination of tender offers to security holders.* An issuer tender offer will be deemed to be published, sent or given to security holders if the issuer or affiliate making the issuer tender offer complies fully with one or more of the methods described in this section.

(1) For issuer tender offers in which the consideration offered consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77c):

(i) Dissemination of cash issuer tender offers by long-form publication: By making adequate publication of the information required by paragraph (d)(1) of this section in a newspaper or news-

papers, on the date of commencement of the issuer tender offer.

(ii) Dissemination of any issuer tender offer by use of stockholder and other lists:

(A) By mailing or otherwise furnishing promptly a statement containing the information required by paragraph (d)(1) of this section to each security holder whose name appears on the most recent stockholder list of the issuer;

(B) By contacting each participant on the most recent security position listing of any clearing agency within the possession or access of the issuer or affiliate making the issuer tender offer, and making inquiry of each participant as to the approximate number of beneficial owners of the securities sought in the offer that are held by the participant;

(C) By furnishing to each participant a sufficient number of copies of the statement required by paragraph (d)(1) of this section for transmittal to the beneficial owners; and

(D) By agreeing to reimburse each participant promptly for its reasonable expenses incurred in forwarding the statement to beneficial owners.

(iii) Dissemination of certain cash issuer tender offers by summary publication:

(A) If the issuer tender offer is not subject to §240.13e-3, by making adequate publication of a summary advertisement containing the information required by paragraph (d)(3) of this section in a newspaper or newspapers, on the date of commencement of the issuer tender offer; and

(B) By mailing or otherwise furnishing promptly the statement required by paragraph (d)(1) of this section and a transmittal letter to any security holder who requests a copy of the statement or transmittal letter.

Instruction to paragraph (e)(1): For purposes of paragraphs (e)(1)(i) and (e)(1)(iii) of this section, adequate publication of the issuer tender offer may require publication in a newspaper with a national circulation, a newspaper with metropolitan or regional circulation, or a combination of the two, depending upon the facts and circumstances involved.

(2) For tender offers in which the consideration consists solely or partially of securities registered under the Securities Act of 1933, a registration statement containing all of the required information, including pricing information, has been filed and a preliminary prospectus or a prospectus that meets the requirements of Section 10(a) of the Securities Act (15 U.S.C. 77j(a)), including a letter of transmittal, is delivered to security holders. However, 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.

Instructions to paragraph (e)(2):

1. If the prospectus is being delivered by mail, mailing on the date of commencement is sufficient.
2. A preliminary prospectus used under this section may not omit information under § 230.430 or § 230.430A of this chapter.
3. If a preliminary prospectus is used under this section and the issuer must disseminate material changes, the tender offer must remain open for the period specified in paragraph (e)(3) of this section.
4. If a preliminary prospectus is used under this section, tenders may be requested in accordance with § 230.162(a) of this chapter.

(3) If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate must disseminate promptly disclosure of the change in a manner reasonably calculated to inform security holders of the change. In a registered securities offering where the issuer or affiliate disseminates the preliminary prospectus as permitted by paragraph (e)(2) of this section, the offer must remain open from the date that material changes to the tender 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) Ten business days for a prospectus supplement containing a change in price, the amount of securi-

ties sought, the dealer's soliciting fee, or other similarly significant change;

(iii) Ten business days for a prospectus supplement included as part of a post-effective amendment; and

(iv) Twenty business days for a revised prospectus when the initial prospectus was materially deficient.

(f) *Manner of making tender offer.* (1) The issuer tender offer, unless withdrawn, shall remain open until the expiration of:

(i) At least twenty business days from its commencement; and

(ii) At least ten business days from the date that notice of an increase or decrease in the percentage of the class of securities being sought or the consideration offered or the dealer's soliciting fee to be given is first published, sent or given to security holders.

Provided, however, That, for purposes of this paragraph, the acceptance for payment by the issuer or affiliate of an additional amount of securities not to exceed two percent of the class of securities that is the subject of the tender offer shall not be deemed to be an increase. For purposes of this paragraph, the percentage of a class of securities shall be calculated in accordance with section 14(d)(3) of the Act.

(2) The issuer or affiliate making the issuer tender offer shall permit securities tendered pursuant to the issuer tender offer to be withdrawn:

(i) At any time during the period such issuer tender offer remains open; and

(ii) If not yet accepted for payment, after the expiration of forty business days from the commencement of the issuer tender offer.

(3) If the issuer or affiliate makes a tender offer for less than all of the outstanding equity securities of a class, and if a greater number of securities is tendered pursuant thereto than the issuer or affiliate is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities tendered by each security holder during the period such offer remains open; *Provided, however,* That this provision shall not prohibit the issuer or affiliate making the issuer tender offer from:

(i) Accepting all securities tendered by persons who own, beneficially or of record, an aggregate of not more than a specified number which is less than one hundred shares of such security and who tender all their securities, before prorating securities tendered by others; or

(ii) Accepting by lot securities tendered by security holders who tender all securities held by them and who, when tendering their securities, elect to have either all or none or at least a minimum amount or none accepted, if the issuer or affiliate first accepts all securities tendered by security holders who do not so elect;

(4) In the event the issuer or affiliate making the issuer tender increases the consideration offered after the issuer tender offer has commenced, such issuer or affiliate shall pay such increased consideration to all security holders whose tendered securities are accepted for payment by such issuer or affiliate.

(5) The issuer or affiliate making the tender offer shall either pay the consideration offered, or return the tendered securities, promptly after the termination or withdrawal of the tender offer.

(6) Until the expiration of at least ten business days after the date of termination of the issuer tender offer, neither the issuer nor any affiliate shall make any purchases, otherwise than pursuant to the tender offer, of:

(i) Any security which is the subject of the issuer tender offer, or any security of the same class and series, or any right to purchase any such securities; and

(ii) In the case of an issuer tender offer which is an exchange offer, any security being offered pursuant to such exchange offer, or any security of the same class and series, or any right to purchase any such security.

(7) The time periods for the minimum offering periods pursuant to this section shall be computed on a concurrent as opposed to a consecutive basis.

(8) No issuer or affiliate shall make a tender offer unless:

(i) The tender offer is open to all security holders of the class of securities subject to the tender offer; and

(ii) The consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.

(9) Paragraph (f)(8)(i) of this section shall not:

(i) Affect dissemination under paragraph (e) of this section; or

(ii) Prohibit an issuer or affiliate from making a tender offer excluding all security holders in a state where the issuer or affiliate is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the issuer or affiliate to comply with such statute.

(10) Paragraph (f)(8)(ii) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:

(i) Security holders are afforded equal right to elect among each of the types of consideration offered; and

(ii) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(11) If the offer and sale of securities constituting consideration offered in an issuer tender offer is prohibited by the appropriate authority of a state after a good faith effort by the issuer or affiliate to register or qualify the offer and sale of such securities in such state:

(i) The issuer or affiliate may offer security holders in such state an alternative form of consideration; and

(ii) Paragraph (f)(10) of this section shall not operate to require the issuer or affiliate to offer or pay the alternative form of consideration to security holders in any other state.

(12)(i) Paragraph (f)(8)(ii) of this section shall not prohibit the negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement, or payments made or to be made or benefits granted or to be granted according to such an arrangement, with respect to any security holder of the issuer, where the amount payable under the arrangement:

(A) Is being paid or granted as compensation for past services performed,

future services to be performed, or future services to be refrained from performing, by the security holder (and matters incidental thereto); and

(B) Is not calculated based on the number of securities tendered or to be tendered in the tender offer by the security holder.

(ii) The provisions of paragraph (f)(12)(i) of this section shall be satisfied and, therefore, pursuant to this non-exclusive safe harbor, the negotiation, execution or amendment of an arrangement and any payments made or to be made or benefits granted or to be granted according to that arrangement shall not be prohibited by paragraph (f)(8)(ii) of this section, if the arrangement is approved as an employment compensation, severance or other employee benefit arrangement solely by independent directors as follows:

(A) The compensation committee or a committee of the board of directors that performs functions similar to a compensation committee of the issuer approves the arrangement, regardless of whether the issuer is a party to the arrangement, or, if an affiliate is a party to the arrangement, the compensation committee or a committee of the board of directors that performs functions similar to a compensation committee of the affiliate approves the arrangement; or

(B) If the issuer's or affiliate's board of directors, as applicable, does not have a compensation committee or a committee of the board of directors that performs functions similar to a compensation committee or if none of the members of the issuer's or affiliate's compensation committee or committee that performs functions similar to a compensation committee is independent, a special committee of the board of directors formed to consider and approve the arrangement approves the arrangement; or

(C) If the issuer or affiliate, as applicable, is a foreign private issuer, any or all members of the board of directors or any committee of the board of directors authorized to approve employment compensation, severance or other employee benefit arrangements under the laws or regulations of the home country approves the arrangement.

Instructions to paragraph (f)(12)(ii): For purposes of determining whether the members of the committee approving an arrangement in accordance with the provisions of paragraph (f)(12)(ii) of this section are independent, the following provisions shall apply:

1. If the issuer or affiliate, as applicable, is a listed issuer (as defined in § 240.10A-3 of this chapter) whose securities are listed either on a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a)) or in an inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)) that has independence requirements for compensation committee members that have been approved by the Commission (as those requirements may be modified or supplemented), apply the issuer's or affiliate's definition of independence that it uses for determining that the members of the compensation committee are independent in compliance with the listing standards applicable to compensation committee members of the listed issuer.

2. If the issuer or affiliate, as applicable, is not a listed issuer (as defined in § 240.10A-3 of this chapter), apply the independence requirements for compensation committee members of a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a)) or an inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o-3(a)) that have been approved by the Commission (as those requirements may be modified or supplemented). Whatever definition the issuer or affiliate, as applicable, chooses, it must apply that definition consistently to all members of the committee approving the arrangement.

3. Notwithstanding Instructions 1 and 2 to paragraph (f)(12)(ii), if the issuer or affiliate, as applicable, is a closed-end investment company registered under the Investment Company Act of 1940, a director is considered to be independent if the director is not, other than in his or her capacity as a member of the board of directors or any board committee, an "interested person" of the investment company, as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)).

4. If the issuer or affiliate, as applicable, is a foreign private issuer, apply either the independence standards set forth in Instructions 1 and 2 to paragraph (f)(12)(ii) or the independence requirements of the laws, regulations, codes or standards of the home country of the issuer or affiliate, as applicable, for members of the board of directors or the committee of the board of directors approving the arrangement.

5. A determination by the issuer's or affiliate's board of directors, as applicable, that the members of the board of directors or the committee of the board of directors, as applicable, approving an arrangement in accordance with the provisions of paragraph (f)(12)(ii) are independent in accordance with the provisions of this instruction to paragraph (f)(12)(ii) shall satisfy the independence requirements of paragraph (f)(12)(ii).

Instruction to paragraph (f)(12): The fact that the provisions of paragraph (f)(12) of this section extend only to employment compensation, severance and other employee benefit arrangements and not to other arrangements, such as commercial arrangements, does not raise any inference that a payment under any such other arrangement constitutes consideration paid for securities in a tender offer.

(13) *Electronic filings.* If the issuer or affiliate is an electronic filer, the minimum offering periods set forth in paragraph (f)(1) of this section shall be tolled for any period during which it fails to file in electronic format, absent a hardship exemption (§§ 232.201 and 232.202 of this chapter), the Schedule TO (§240.14d-100), the tender offer material specified in Item 1016(a)(1) of Regulation M-A (§229.1016(a)(1) of this chapter), and any amendments thereto. If such documents were filed in paper pursuant to a hardship exemption (*see* §232.201 and §232.202 of this chapter), the minimum offering periods shall be tolled for any period during which a required confirming electronic copy of such Schedule and tender offer material is delinquent.

(g) The requirements of section 13(e)(1) of the Act and Rule 13e-4 and Schedule TO (§240.14d-100) thereunder shall be deemed satisfied with respect to any issuer tender offer, including any exchange offer, where the issuer is incorporated or organized under the laws of Canada or any Canadian province or territory, is a foreign private issuer, and is not an investment company registered or required to be registered under the Investment Company Act of 1940, if less than 40 percent of the class of securities that is the subject of the tender offer is held by U. S. holders, and the tender offer is subject to, and the issuer complies with, the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the offer (unless the issuer has received an exemption(s)

from, and the issuer tender offer does not comply with, requirements that otherwise would be prescribed by this section), *provided that*:

(1) Where the consideration for an issuer tender offer subject to this paragraph consists solely of cash, the entire disclosure document or documents required to be furnished to holders of the class of securities to be acquired shall be filed with the Commission on Schedule 13E-4F (§240.13e-102) and disseminated to shareholders residing in the United States in accordance with such Canadian laws, regulations and policies; or

(2) Where the consideration for an issuer tender offer subject to this paragraph includes securities to be issued pursuant to the offer, any registration statement and/or prospectus relating thereto shall be filed with the Commission along with the Schedule 13E-4F referred to in paragraph (g)(1) of this section, and shall be disseminated, together with the home jurisdiction document(s) accompanying such Schedule, to shareholders of the issuer residing in the United States in accordance with such Canadian laws, regulations and policies.

NOTE: Notwithstanding the grant of an exemption from one or more of the applicable Canadian regulatory provisions imposing requirements that otherwise would be prescribed by this section, the issuer tender offer will be eligible to proceed in accordance with the requirements of this section if the Commission by order determines that the applicable Canadian regulatory provisions are adequate to protect the interest of investors.

(h) This section shall not apply to:

(1) Calls or redemptions of any security in accordance with the terms and conditions of its governing instruments;

(2) Offers to purchase securities evidenced by a scrip certificate, order form or similar document which represents a fractional interest in a share of stock or similar security;

(3) Offers to purchase securities pursuant to a statutory procedure for the purchase of dissenting security holders' securities;

(4) Any tender offer which is subject to section 14(d) of the Act;

(5) Offers to purchase from security holders who own an aggregate of not

more than a specified number of shares that is less than one hundred: *Provided, however, That:*

(i) The offer complies with paragraph (f)(8)(i) of this section with respect to security holders who own a number of shares equal to or less than the specified number of shares, except that an issuer can elect to exclude participants in a plan as that term is defined in § 242.100 of this chapter, or to exclude security holders who do not own their shares as of a specified date determined by the issuer; and

(ii) The offer complies with paragraph (f)(8)(ii) of this section or the consideration paid pursuant to the offer is determined on the basis of a uniformly applied formula based on the market price of the subject security;

(6) An issuer tender offer made solely to effect a rescission offer: *Provided, however, That* the offer is registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and the consideration is equal to the price paid by each security holder, plus legal interest if the issuer elects to or is required to pay legal interest;

(7) Offers by closed-end management investment companies to repurchase equity securities pursuant to § 270.23c-3 of this chapter;

(8) *Cross-border tender offers (Tier 1)*. Any issuer tender offer (including any exchange offer) where the issuer is a foreign private issuer as defined in § 240.3b-4 if the following conditions are satisfied.

(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);

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

(A) *Registered exchange offers*. If the issuer or affiliate offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.), the issuer or affiliate need not extend the offer to se-

curity holders in those states or jurisdictions that prohibit the offer or sale of the securities after the issuer or affiliate has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the issuer or affiliate must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(B) *Exempt exchange offers*. If the issuer or affiliate offers securities exempt from registration under § 230.802 of this chapter, the issuer or affiliate need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer or affiliate must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(C) *Cash only consideration*. The issuer or affiliate may offer U.S. holders cash only consideration for the tender of the subject securities, notwithstanding the fact that the issuer or affiliate is offering security holders outside the United States a consideration that consists in whole or in part of securities of the issuer or affiliate, if the issuer or affiliate has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders, and either of the following conditions are satisfied:

(1) The offered security is a “margin security” within the meaning of Regulation T (12 CFR 220.2) and the issuer or affiliate undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

(2) If the offered security is not a “margin security” within the meaning of Regulation T (12 CFR 220.2), the issuer or affiliate undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that

the cash consideration offered to U.S. holders is substantially equivalent to the value of the consideration offered security holders outside the United States.

(D) *Disparate tax treatment.* If the issuer or affiliate offers “loan notes” solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a et seq.), the loan notes need not be offered to U.S. holders.

(iii) *Informational documents.* (A) If the issuer or affiliate publishes or otherwise disseminates an informational document to the holders of the securities in connection with the issuer tender offer (including any exchange offer), the issuer or affiliate must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§ 249.480 of this chapter) by the first business day after publication or dissemination. If the issuer or affiliate is a foreign company, it must also file a Form F-X (§ 239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

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

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

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

(9) Any other transaction or transactions, if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally, or on specified terms and conditions, as not

constituting a fraudulent, deceptive or manipulative act or practice comprehended within the purpose 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) *Conditions.* (i) The issuer is a foreign private issuer as defined in § 240.3b-4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), other than a registered closed-end investment company; and

(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) *Exemptions.* The issuer tender offer shall comply with all requirements of this section other than the following:

(i) *Equal treatment—loan notes.* If the issuer or affiliate offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act (15 U.S.C. 77a et seq.), the loan notes need

not be offered to U.S. holders, notwithstanding paragraph (f)(8) and (h)(9) of this section.

(ii) *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).

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

(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).

(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:

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

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

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;

iii. Use the method of calculating record ownership in § 240.12g3-2(a), 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, your jurisdiction of incorporation, and the jurisdiction that is the primary trading market for the subject securities, if different than your jurisdiction of incorporation;

iv. 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 definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

v. Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

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.

(j)(1) It shall be a fraudulent, deceptive or manipulative act or practice, in connection with an issuer tender offer, for an issuer or an affiliate of such issuer, in connection with an issuer tender offer:

(i) To employ any device, scheme or artifice to defraud any person;

(ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(iii) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(2) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with any issuer tender offer, it shall be unlawful for an issuer or an affiliate of such issuer to make an issuer tender offer unless:

(i) Such issuer or affiliate complies with the requirements of paragraphs (b), (c), (d), (e) and (f) of this section; and

(ii) The issuer tender offer is not in violation of paragraph (j)(1) of this section.

[44 FR 49410, Aug. 22, 1979]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 240.13e-4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.