same treatment under the EAR as other
"software"; and for export licensing purposes
encryption software is treated under the EAR
in the same manner as a commodity included
in ECCN 5A002. License Exceptions for
commodities are not applicable.

**Note:** Encryption software controlled for EI
reasons under this entry remains subject to
the EAR even when made publicly available
in accordance with part 734 of the EAR, and
it is not eligible for the General Software
Note ("mass market" treatment under
License Exception TSU for mass market
software). After a one-time BXA review,
certain encryption software may be released
from EI controls and made eligible for the
General Software Note treatment as well as
other provisions of the EAR applicable to
software. Refer to § 742.15(b)(1) of the EAR,
and Supplement No. 6 to part 742.

License Exceptions

<table>
<thead>
<tr>
<th>CIV:</th>
<th>N/A</th>
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<tbody>
<tr>
<td>TSR:</td>
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</table>

List of Items Controlled

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<th>Unit:</th>
<th>$ value</th>
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<tbody>
<tr>
<td>Related Controls:</td>
<td>N/A</td>
</tr>
<tr>
<td>Related Definitions:</td>
<td>S5D002.a, S5B002 or S5D002</td>
</tr>
</tbody>
</table>

- a. "Software" specially designed or
  modified for the "development", "production"
or "use" of equipment or "software" controlled by 5A002, 5B002 or S5D002.
- b. "Software" specially designed or
  modified to support "technology" controlled by S5E002.
- c. Specific "software" as follows:
  - c.1. "Software" having the characteristics,
    or performing or simulating the functions
    of equipment controlled by 5A002 or S5B002;
  - c.2. "Software" to certify "software"
    controlled by S5D002.c.1;
  - c.3. "Software" designed or modified to
    protect against malicious computer
damage, e.g., viruses;

**Note:** S5D002 does not control:

- a. "Software required" for the "use"
of equipment excluded from control
under the Note to 5A002;
- b. "Software" providing any of the
  functions of equipment excluded from
control under the Note to 5A002.

S5E002 "Technology" According to the
General Technology Note for the
"Development", "Production" or Use of
Equipment Controlled by 5A002 or
S5B002 or "Software" Controlled by
S5D002

License Requirements

Reason for Control: NS, AT, EI
Control(s) Country Chart

NS applies to entire entry—NS Column 1
AT applies to entire entry—AT Column 1

EI controls applies only to encryption
technology transferred from the U.S.
Munitions List consistent with E.O.
13026 of November 15, 1996 (61 FR
58767) and pursuant to the Presidential
Memorandum of that date. Refer to §
742.15 of the EAR.

License Exceptions

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</tbody>
</table>
| Items: | The list of items controlled contained in the ECCN heading.

**Supplement No. 2 to Part 774—General Technology and Software Notes**

I. General Technology Note. * * * * * * *

II. General Software Note. License Exception TSU ("mass market" software) is available to all destinations, except Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria, for release of software that is generally available to the public by being:

- a. Sold from stock at retail selling points, without restriction, by means of:
  - 1. Over the counter transactions;
  - 2. Mail order transactions; or
  - 3. Telephone call transactions;

Note: License Exception TSU for mass market software does not apply to encryption software controlled for EI reasons under ECCN 5D002. Encryption software may become eligible after a one-time BXA review according to the provision of § 742.15(b)(1) of the EAR.

Dated: December 23, 1996.

Sue E. Eckert,
Assistant Secretary for Export
Administration. 

[FR Doc. 96–33030 Filed 12–26–96; 8:45 am]
BILLING CODE 3510–33–P

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**SECURITIES AND EXCHANGE COMMISSION**

17 CFR Part 240

[Release Nos. 33–7376; 34–38068; IC–
22413; File No. 57–12–96]

RIN 3235–AG78

Odd-Lot Tender Offers by Issuers

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission ("Commission") is adopting an amendment to Rule 13e–4 under the Securities Exchange Act of 1934 ("Exchange Act"). The amendment removes the rule’s requirement that an issuer cash tender offer made to odd-lot holders specify a record date of ownership for eligibility to tender into the offer. The amendment enables issuers to conduct continuous, periodic, or extended odd-lot offers for their equity securities. The Commission also is granting a class exemption from Rule 10b–13, and a temporary class exemption from Rule 10b–6, under the Exchange Act to permit issuers to conduct odd-lot offers, to "round-up" odd-lots on behalf of odd-lot holders, and to make purchases of their securities otherwise than pursuant to the odd-lot offer.

**EFFECTIVE DATE:** December 30, 1996.

**FOR FURTHER INFORMATION CONTACT:**
Lauren C. Mullen, Attorney, Office of
Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street,
N.W., Stop 5–1, Washington, DC 20549,
at (202) 942–0772.

**SUPPLEMENTARY INFORMATION:**

I. Executive Summary

The Commission is adopting an amendment to paragraph (h)(5) of Rule 13e–4 ("Rule 13e–4" or "Rule") under the Exchange Act, 1 and is granting a class exemption from Rule 10b–13, 2 and a temporary class exemption from Rule 10b–6, 3 under the Exchange Act in connection with issuers' odd-lot tender offers. The amendment, which was published for comment on April 25, 1996 ("Proposing Release"), 4 and the class exemptions permit issuers to conduct continuous, periodic, or extended odd-lot offers for their equity securities otherwise than pursuant to the odd-lot offer.


securities without seeking exemptions from Rules 10b-6, 10b-13, and 13e-4 from the Commission.

II. Discussion of the Amendment

Rule 13e-4 governs cash tender and exchange offers by issuers for their equity securities. Paragraph (h)(5) of Rule 13e-4 excepts issuers' odd-lot offers from the provisions of the Rule, other than the "all holders" and "best price" provisions of paragraphs (f)(8)(i) and (f)(8)(ii), respectively. 1 In an odd-lot offer, the offer to purchase is limited to securityholders who own fewer than 100 shares of the subject security.

Prior to this amendment, paragraph (h)(5) of Rule 13e-4 required an issuer making an odd-lot offer to set a record date prior to the offer's announcement for the purpose of determining a securityholder's eligibility to participate in the offer. As discussed in the Proposing Release, the record date requirement was imposed to prevent certain perceived abuses. The Commission's experience with odd-lot offers, and the two comments received in response to the Proposing Release, indicate that such abuses rarely, if ever, occur. Therefore, to reduce the regulatory burdens for issuers conducting odd-lot offers, and to eliminate the need for the Commission to grant exemptions from Rule 13e-4 on a case-by-case basis for extended odd-lot offers, the Commission proposed amending Rule 13e-4 to delete the record date requirement from paragraph (h)(5). The amendment was proposed to permit issuers to conduct odd-lot offers on a continuous, extended, or periodic basis, and also to enable odd-lot holders who obtain their holdings prior to or during the odd-lot offer to participate in the offer.

The Commission has determined to adopt the amendment to Rule 13e-4(h)(5) as proposed, with a minor modification. 2 In order to provide


Rule 13e-4(f)(8)(i) requires that the tender offer be open to all securityholders of the class of security subject to the tender offer. 17 CFR 240.13e-4(f)(8)(ii)). Rule 13e-4(f)(8)(ii) requires that consideration paid to any securityholder pursuant to an issuer tender offer be the highest consideration paid to any other security holder during such tender offer. 17 CFR 240.13e-4(f)(8)(ii).

1 One commenter suggested that the Commission exempt issuers that conduct odd-lot offers from the broker-dealer registration requirements under Section 15(a) of the Exchange Act. The Commission

notes that this commenter's concerns were specifically addressed by the staff in Letter regarding Shareholder Communications with, among other issuers, shareholders with less than 100 shares of stock. The Commission believes that Rule 13e-4 is designed to cover an offer for economically significant holdings of a small number of shares, and that the proposal to eliminate the record date requirement from Rule 13e-4 would not result in a significant increase in the number of such offers.

2 The Commission recognizes that the odd-lot exception is intended to allow issuers to reduce the number of small shareholdings where the costs to issuers of servicing small shareholders, and the costs to shareholders of selling small holdings, are disproportionate to the value of the security. Accordingly, the Commission will consider, on a case-by-case basis, issuer offers involving tenders of more than 99 shares from each holder, where such offers involve a number of securities that represent a de minimis proportion of the value of the issuer's outstanding securities. 3

III. Class Exemption From Rule 10b-13 and Temporary Class Exemption From Rule 10b-6

As discussed in the Proposing Release, odd-lot offers also raise issues under Rule 10b-13, which prohibits an issuer conducting a cash tender or exchange offer from purchasing the same security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the offer. Rule 10b-13 is designed, inter alia, to prevent larger shareholders from demanding greater or different consents for the tender of their shares than that which is paid pursuant to the tender offer. Larger shareholders are ineligible to participate in odd-lot offers because, by definition, an odd-lot offer is available only to shareholders owning 99 or fewer shares of the issuer's securities. Accordingly, the Commission believes that purchases of an issuer's securities otherwise than pursuant to an odd-lot offer do not raise the concerns that Rule 10b-13 is designed to address.

The Commission, therefore, hereby grants an exemption from Rule 10b-13 to permit any issuer or agent acting on behalf of an issuer in connection with an odd-lot offer to purchase or arrange to purchase the security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the odd-lot offer. Lender shareholders are ineligible to participate in odd-lot offers because, by definition, an odd-lot offer is available only to shareholders owning 99 or fewer shares of the issuer's securities. Accordingly, the Commission believes that purchases of an issuer's securities otherwise than pursuant to an odd-lot offer do not raise the concerns that Rule 10b-13 is designed to address.

The Commission, therefore, hereby grants an exemption from Rule 10b-13 to permit any issuer or agent acting on behalf of an issuer in connection with an odd-lot offer to purchase or arrange to purchase the security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the odd-lot offer. Lender shareholders are ineligible to participate in odd-lot offers because, by definition, an odd-lot offer is available only to shareholders owning 99 or fewer shares of the issuer's securities. Accordingly, the Commission believes that purchases of an issuer's securities otherwise than pursuant to an odd-lot offer do not raise the concerns that Rule 10b-13 is designed to address.
“round-up” their holdings to 100 shares. Also, the Commission today is adopting Regulation M under the Exchange Act, the Securities Act of 1933,13 and the Investment Company Act of 1940,14 and is rescinding Rule 10b–6 under the Exchange Act, among other rules.15 Rule 102 of Regulation M, which along with Rule 101 replaces Rule 10b–6, contains an exception that permits issuers to purchase odd-lots while engaged in a distribution of the same or related securities. This exception allows issuers to conduct odd-lot tender offers, including continuous, periodic, or extended odd-lot offers, during a distribution of the same or related securities. The exception also allows issuers to purchase securities on behalf of odd-lot holders who wish to “round-up” their holdings to a round lot (i.e., 100 shares).16 The exceptions for odd-lot transactions under Regulation M will accomplish the same relief intended by provisions of the Proposing Release.17 The exception for odd-lot transactions from Rule 102 of Regulation M, and a similar exception from Rule 101 for distribution participants and their affiliated purchasers, will be effective as of 60 days from publication of Regulation M in the Federal Register.

To accommodate odd-lot offers in the interim, the Commission hereby grants an exemption from Rule 10b–6 on a temporary basis to permit an issuer, or an agent acting on behalf of the issuer, to bid for or purchase odd-lots, or to effect transactions to allow odd-lot holders to “round-up” their holdings to 100 shares during an odd-lot offer conducted pursuant to Rule 13e–4(h)(5), during a distribution for the purposes of Rule 10b–6. This class exemption will terminate as of the effective date of Regulation M.

IV. Regulatory Flexibility Act Analysis

The Chairman of the Securities and Exchange Commission certified in connection with the Proposed Release that the proposed amendment to Rule 13e–4 and the proposed class exemptions from Rules 10b–6 and 10b–13, if adopted, would not have a significant impact on a substantial number of small entities. None of the comments addressed the certification.

V. Effects on Competition and Other Findings

Section 23(a)(2) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the anti-competitive effects of such rules, if any, and to balance any impact against regulatory benefits gained in terms of furthering the purposes of the Exchange Act. Furthermore, Section 2 of the Securities Act of 193319 and Section 3 of the Exchange Act,20 as amended by the recently enacted National Securities Markets Improvement Act of 1996 ("Markets Improvement Act"),21 provide that whenever the Commission is engaged in rulemaking, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission also shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The Commission has considered the amendment to Rule 13e–4 and the class exemption from Rule 10b–13 in light of the standards cited in Sections 3 and 23(a)(2) of the Exchange Act and believes that, for the reasons stated herein, the adoption of the amendment and the granting of the class exemption will promote efficiency for issuers conducting odd-lot offers, will have no adverse effect on capital formation, and will not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act.

The Commission finds, in accordance with the Administrative Procedure Act,22 that the adoption of the amendment to Rule 13e–4 and the class exemptions from Rules 10b–6 and 10b–13 relieve mandatory restrictions and are exemptive in nature. Accordingly, the foregoing action becomes effective immediately.

VI. Statutory Basis

Pursuant to Sections 3(b), 9(a)(6), 10(b), 13(e), 14(e), and 23(a) of the Exchange Act; 15 U.S.C. 78c(b), 78(a)(6), 78(b), 78m(e), 78n(e), and 78w(a); the Commission amends Rule 13e–4 in Chapter II of Title 17 of the Code of Federal Regulations by amending paragraph (h)(5) of § 240.13e–4.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendment

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

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

§ 240.13e–4 Tender offers by issuers.

(a) * * * * *

(h) * * *

(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 an issuer’s plan, as that term is defined in § 242.100 of Regulation M, 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; * * * *

Dated: December 20, 1996.

By the Commission.

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 96–33061 Filed 12–27–96; 8:45 am]