

THE SEC'S M&A RELEASE: FINAL CHANGES IN THE REGULATION OF TAKEOVERS AND SECURITY HOLDER COMMUNICATIONS

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The U.S. Securities and Exchange Commission (the "SEC") has adopted comprehensive revisions to the U.S. securities laws aimed at updating and simplifying the rules and regulations applicable to business combinations (including tender offers, mergers, acquisitions and similar extraordinary transactions) (the "Revisions").¹ The Revisions became effective on January 24, 2000 (the "Effective Date") and are applicable to transactions which commenced on or after the Effective Date. The Revisions also apply to transactions already in progress on the Effective Date, subject to certain exceptions and, in certain cases, at the option of the parties to the transaction. In a separate release, which is not discussed herein, the SEC has adopted significant changes to the regulatory scheme for cross-border tender offers, exchange offers and rights offerings.²

EXECUTIVE SUMMARY

In the M&A Release, the SEC has adopted the following significant changes to existing SEC rules and regulations under the U.S. Securities Act of 1933 (the "Securities Act") and the U.S. Securities Exchange Act of 1934 (the "Exchange Act") in connection with business combinations³:

- Eased the current restrictions on oral and written communications with security holders to provide investors and the marketplace with more deal-related information on a timely basis;

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1. SEC Release No. 33-7760; 34-42055; IC-24107 (October 22, 1999) (the "M&A Release").
 2. SEC Release No. 33-7759 (October 22, 1999) (the "Cross Border Adopting Release").
 3. At this time, the SEC has not adopted proposals from the Securities Act Reform Release (SEC Release No. 33-7606, 34-40632, IC-23519 (November 3, 1998)) (the "Aircraft Carrier Release") that are unrelated to business combinations. For a general discussion of the Aircraft Carrier Release, please refer to the memorandum of our firm entitled "SEC Launches 'Aircraft Carrier' Release: Proposed Major Changes in Regulation of Securities Offerings in the United States," dated November 25, 1998.

- Reduced the disparity in the regulatory treatment of stock and cash tender offers by permitting both issuer and third-party stock tender offers to commence upon the filing of a Securities Act registration statement;
- Simplified and integrated the various disclosure requirements for tender offers, going-private transactions, and other extraordinary transactions in a new series of items included in Regulation S-K, and referred to as “Regulation M-A”;
- Combined the existing schedules for issuer and third-party tender offers (Schedules 14D-1 and 13E-4) and tender offer “going-private” transactions (Schedule 13E-3) into one schedule available for all tender offers, entitled Schedule TO;
- Required a “plain English” summary term sheet in all cash tender offers, cash mergers and going-private transactions except when the transaction is already subject to the Securities Act plain English rules;
- Updated the financial statement requirements for business combination transactions;
- Permitted an optional subsequent offering period during which security holders can tender shares, without withdrawal rights, for a limited period not exceeding twenty days after completion of certain tender offers;
- Clarified Rule 13e-1 that requires issuers to report any intended repurchases of their securities after a third-party tender offer has commenced;
- Conformed the security holder list requirement in the tender offer rules with the comparable provision in the proxy rules so that the list will include non-objecting beneficial owners; and
- Clarified Rule 10b-13 that prohibits purchases by an offeror outside a tender offer, and redesignated it as Rule 14e-5.

The Revisions are the SEC’s response to the increased use of securities as consideration in business combinations, the increase in hostile transactions involving proxy or consent solicitations, and the advent of major technological advances in communications which have made frequent, timely and direct communication with security holders more likely than in the past.

**COMMUNICATIONS WITH SECURITY
HOLDERS AND THE MARKETPLACE**

One goal of the Revisions is to improve the current regulatory scheme by easing the restrictions the law currently imposes on communications by companies involved in business combinations. In the M&A Release, the SEC acknowledges that such companies typically have

economic and other business reasons, and under certain circumstances, may face legal duties, to disclose information at an early point in a contemplated transaction. The previous rules, however, restricted deal-related disclosure prior to the filing of a registration, proxy or tender offer statement. The Revisions permit free communications, either oral or written, for many transactions at a much earlier point in the process than the previous rules allowed. The liberalized rules not only take into account the business and legal needs of companies involved in business combination transactions, but will also, in the SEC's view, help to provide full and fair disclosure to all investors. However, this new communications scheme does not alter the current requirement that security holders receive a mandated disclosure document before they are asked to make a voting or investment decision.

Communications Under the Securities Act. The Revisions eliminate certain restrictions on communications with respect to a proposed business combination transaction before the registration statement relating to the transaction is filed. Prior to the Revisions, in the case of a business combination involving securities as consideration, Section 5(c) of the Securities Act prohibited offers for such securities unless a registration statement was on file (so-called "gun jumping").

Paragraph (a) of new Rule 165 provides a safe harbor exemption from such prohibition under Section 5(c) for private or public communications beginning with and including the first public announcement⁴ of a transaction until a registration statement has been filed.⁵ Given the goal of permitting widespread dissemination of deal-related information with respect to a business combination transaction, including forward-looking information, there are no content restrictions on exempted communications (other than applicable antifraud rules). All written communications during these periods, made in reliance on the rule, however, must be filed on or before the date of first use.⁶ In addition, all written communications must include a

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4. "Public announcement" has been defined in Rule 165 as any communication by a party to the transaction, or any person authorized to act on a party's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the transaction.
 5. Paragraph (b) of new Rule 165 is a corresponding provision exempting communications during the waiting period after a registration statement has been filed and during the post-effectiveness periods from Section 5(b)(1) of the Securities Act, subject to the filing of written communications as described in Rule 165(a). In addition, new Rule 166 provides that any non-public communications about a transaction before the first public announcement of such transaction will not be deemed to be offers for purposes of Section 5(c) of the Securities Act, so long as parties to the transaction take all reasonable steps within their control to prevent further distribution or publication until the first public announcement or the registration statement is filed (although any such communication pursuant to Rule 166 is not required to be filed).
 6. Written communications include all information disseminated otherwise than orally, including scripts used by parties to the transaction to communicate information to the public, other written material relating to the transaction that is shown to the investors (*e.g.*, slides), electronic

prominent legend advising investors to read the registration statement.⁷ Oral communications do not need to be reduced to writing or filed. In order to protect against a security holder's right to rescind if a communication is either filed late or there is an unintentional failure to file, Rule 165 states that an immaterial or unintentional failure to file or delay in filing will not result in a loss of the exemptions provided by the rule.⁸

Communications Under the Proxy Rules. Although substantially expanded in 1992 to permit certain security holder communications without the need to furnish a proxy statement prior to such communications, the proxy rules previously restricted pre-proxy statement solicitations by companies of their shareholders except in connection with (i) election contests under Rule 14a-11 under the Exchange Act or (ii) pursuant to Rule 14a-12 in response to solicitations or certain other publicized activities opposed by the company. As part of the Revisions, the narrow safe harbor previously provided in Rule 14a-12 has been expanded to permit solicitations before filing and delivery of a proxy statement without the requirement of a prior opposing solicitation or other activity.⁹ Other provisions of the expanded Rule 14a-12 safe harbor require that: (i) any written solicitation made pursuant to the rule be filed with the SEC when made; (ii) no form of proxy be furnished to security holders prior to delivery of a proxy statement; and (iii) a legend be included on all written communications advising security holders to read the proxy statement and informing them where to find participant information,

communications and other future applications of changing technology. Videos and CD-ROM's, for example, must be filed on EDGAR by means of a transcript. See Rule 304 of Regulation S-T.

7. Pursuant to the Revisions, in both friendly and contested transactions, oral and written communications made in reliance on such exemptions from Sections 5(b)(1) and 5(c) of the Securities Act remain offers for purposes of Section 12(a)(2) of the Securities Act and therefore remain subject to civil liability thereunder. In addition, while the SEC stated that it believes that Section 12(a)(2) liability will adequately protect investors while not chilling parties' willingness to make pre-filing communications, it noted that if a communication contains material information, such information should be filed and incorporated by reference into a registration statement, and as a result become subject to Section 11 liability under the Securities Act.
8. This protection will be available so long as a good faith and reasonable attempt to file the written communication is made and the communication is filed as soon as practicable after discovery of the failure to file. Factors to be considered in determining whether a delay in filing is immaterial or unintentional include the nature of the information, the length of the delay, and the surrounding circumstances, including whether a bona fide effort was made to file timely.
9. The antifraud provisions of Rule 14a-9 under the Exchange Act, however, still apply to all communications made pursuant to the expanded Rule 14a-12 safe harbor.

including a detailed list of the names, affiliations, and interests of participants in the solicitation.¹⁰

Significantly, as expanded by the Revisions, Rule 14a-12 is no longer limited to solicitations in the business combination context. As revised, companies can obtain their investors' views on other matters pursuant to the rule, such as corporate governance issues that may require a security holder vote, prior to mailing a proxy statement for a vote on such matters. Companies that choose to engage in such solicitations also will be subject to the requirements of Rule 14a-12 noted above when relying on the safe harbor.

In light of the policy of encouraging companies to make early public disclosure of deal-related information, the SEC had proposed to eliminate the availability of filing merger proxies on a confidential basis with the SEC except under limited circumstances. However, pursuant to the Revisions as adopted, where the parties to a merger or other business combination transaction limit their public communications to those specified in Rule 135¹¹ (i.e., if they elect not to avail themselves of the new communication flexibility provided by the Revisions), confidential treatment will continue to be available for proxy materials.

Communications Under the Tender Offer Rules. The Revisions eliminate the "five business day rule" previously applicable to third-party cash tender offers.¹² Previously, the five business day rule was thought to limit the period during which investors could make investment decisions about a pending tender or exchange offer on the basis of incomplete information. The SEC now believes that unrestricted pre-filing communications will result in greater information about business combinations being made available to security holders on a more timely basis. Under the Revisions, bidders in both stock and cash tender offers will be required to satisfy the following filing and dissemination requirements with respect to their communications beginning with and including the first public announcement of the transaction: (i) written communications relating to tender offer transactions must be filed on or prior to the date that the communication is made and (ii) such communications must contain a legend advising

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10. At the option of the solicitor, soliciting materials can still include the participant information in full, as previously required, instead of a legend to such effect.
 11. Rule 135 generally exempts from the definition of "offer" any notice that states no more than specific limited information. The Rule 135 limit on communications would apply to all parties to the transaction and anyone acting on their behalf in communicating with the public.
 12. This rule required a bidder, within five business days of disclosure of certain information about an offer, either to: (i) file a tender offer statement with the SEC and disseminate tender offer materials to security holders or (ii) withdraw the offer. Failure to take one of these steps within the five-business day period resulted in filing and disclosure violations under the tender offer rules. The five-business day rule did not apply to exchange offers for stock.

security holders to read the full tender offer or recommendation statement when it becomes available.

The Revisions also include new Rule 14e-8 which is intended to minimize the potential for dissemination of false offers into the marketplace in the absence of the former five business day rule. The new rule prohibits bidders from announcing an offer: (i) without an intent to commence the offer within a reasonable time and complete the offer; (ii) with the intent to manipulate the price of the bidder's or the target's securities; or (iii) without a reasonable belief that the person will have the means to purchase the securities sought.

The Revisions also amend the definition of "commencement" of a tender offer to mean the time when the bidder first publishes, sends otherwise or gives security holders the means to tender securities in the offer.¹³ Upon commencement of a tender offer, the bidder must file and disseminate the appropriate tender offer materials, and in addition to other requirements, keep the tender offer period open for at least the required 20 business day period.

The Revisions also amend the tender offer rules to permit a target company the same freedom to make pre-commencement communications as bidders without having such communications deemed to be "recommendations" or "solicitations" (and therefore without triggering the obligation to file a Schedule 14D-9) on the same date that it communicates with security holders with respect to the offer. A target making such a pre-commencement communication with respect to a tender offer is not required to file a formal recommendation statement until after the offer is finally commenced and a recommendation is made by the target. The target is required to file its communication with the SEC no later than the date of the communication, and to include a prominent legend advising security holders to read the target's solicitation/recommendation statement for important information when it is available and advising investors that they can obtain such recommendation and other filed documents for free at the SEC's website and explaining which documents are from the target. The requirement that a target company must respond to a tender offer by communicating a position on the offer no later than ten business days from the date the offer is disseminated remains unchanged.¹⁴

In light of the many different communications media available to bidders, the SEC concluded that targets need a reliable way to learn about proposed offers for their securities so they may have the opportunity to respond in a timely manner. Thus, the Revisions include a requirement that a bidder deliver to the target and any other bidder the first written

13. Generally, this will occur if the bidder provides security holders with a transmittal form to use to tender securities or if the bidder publishes an advertisement advising security holders how to tender in the offer or to contact the bidder for more information on how to tender securities in the offer.

14. We note that, at this time, the SEC has not adopted an expansion of the Private Securities Litigation Reform Act of 1995 to cover forward-looking statements made in connection with tender offers.

communication with respect to the transaction that is filed, or required to be filed, with the SEC (that is, on or prior to the date of the communication).

EARLY COMMENCEMENT OF
EXCHANGE OFFERS

In 1979, the SEC adopted a requirement that a registration statement be effective before commencing an exchange offer involving the securities to be registered. Cash tender offers, on the other hand, could commence upon filing of required information with the SEC and dissemination of this information to security holders. No prior review by the SEC of cash tender offer materials is required. In cases where the SEC staff elected to review a registration statement filed in connection with an exchange offer, the delay between filing and commencement could be substantial. In a competitive bidding situation, this delay could make a stock offer less attractive and less likely to be successful than a cash offer, even when the stock offer had a higher stated value than the competing cash offer.

To address this disparity, the Revisions allow exchange offers, including issuer exchange offers, to commence, at a bidder's option, upon the filing of the registration statement covering the offered securities rather than when the registration statement becomes effective. Under the Revisions, to commence an exchange offer, the bidder is required to: (i) file a registration statement relating to the securities offered, including a preliminary prospectus having all information necessary, including pricing information, to allow security holders to make an informed decision regarding the exchange offer¹⁵; (ii) disseminate the preliminary prospectus and related letter of transmittal to all security holders; and (iii) file a related tender offer statement with the SEC. However, the bidder is not permitted to purchase the securities tendered for exchange until the registration statement is declared effective.

Such "early commencement" of an exchange offer is limited to third party and issuer exchange offers. Going private and roll-up transactions involving exchange offers, which the SEC believes involve material disclosure issues, are still not permitted to commence until the related registration statement becomes effective.¹⁶

It should be noted that, even under the new tender offer rules, exchange offers remain disadvantaged from a timing perspective to some extent. Cash tender offers are permitted to be

15. Information may not be omitted under Rule 430 or Rule 430A under the Securities Act.

16. The SEC had solicited comment on whether expedited staff review of registration statements in connection with exchange offers, or possibly allowing such registration statements to be immediately effective upon filing with the SEC, would be necessary to harmonize the treatment of cash tender offers and exchange offers. While the SEC determined that automatic effectiveness would not be in the best interests of security holders, it stated in the M&A Release that it is committed to expediting staff review of exchange offers so that they may compete more effectively with cash tender offers.

completed after the minimum 20-business day tender period; purchases of securities in an exchange offer, however, still are not permitted to be made until the related registration statement becomes effective.

As part of the early commencement rule change, the Revisions specify minimum time periods for which an exchange offer is required to remain open following the dissemination of a prospectus supplement that contains any material changes (whether as a result of SEC staff review or otherwise). Exchange offers that commence early must remain open for at least: (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 number of shares sought, the dealer's soliciting fee, or other similarly significant changes; (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.¹⁷ Bidders of exchange offers that commence early are not required to deliver a final prospectus to security holders, but nevertheless remain obligated to file a final prospectus with the SEC.

INTEGRATION/STREAMLINING OF DISCLOSURE REQUIREMENTS

Regulation M-A and Schedule TO. Prior to the Revisions, there were different disclosure schedules for issuer tender offers, third party tender offers and going-private transactions. The Revisions attempt to decrease the burdens of regulatory compliance by integrating the disclosure requirements applicable to these transactions into one set of uniform regulations. These regulations also eliminate unnecessary differences among the various line-item disclosure requirements currently applicable to issuer and third party tender offers, tender offer recommendations and going private transactions. The new regulations are called "Regulation M-A" and are included as a new 1000 series of Regulation S-K. The Revisions also combine the current tender offer schedules for issuer and third-party tender offers on Schedule 13E-4 and Schedule 14D-1, and for tender offer "going private transactions" on Schedule 13E-3, into a single schedule called "Schedule TO."

Plain English Summary Term Sheet; Other Disclosure Changes. The Revisions include several other changes to the rules and regulations designed to streamline and improve disclosure in business combinations. Some of the more significant changes are discussed below:

- The Revisions provide for a "plain English" summary term sheet for all cash tender offer, cash merger and going-private transactions which would highlight the transaction's critical features and cross-reference more detailed discussions. The

17. For example, failing to comply with the going-private rules or filing a "shell" document solely to trigger commencement and staff review.

summary term sheet must begin on the first or second page of the disclosure document.¹⁸

- The Revisions modify Item 14 of Schedule 14A regarding financial statement requirements to: (i) clarify that financial statement and other information about the acquiror in a cash merger is needed only if material to voting security holders' evaluation of the transaction; (ii) where financial statements of the acquiror are required, require two (instead of three) years of data; and (iii) eliminate the need for financial information about the target in a cash merger (other than in going-private or roll-up transactions) when the acquiror's security holders are not voting on the transaction.
- The Revisions also modify the financial statement requirements for targets that are not reporting companies under the Exchange Act, when the acquiror's security holders are not voting on the transaction, as follows¹⁹: (i) if a non-reporting company is being acquired in a business combination transaction, then financial statements for the latest fiscal year prepared in conformity with generally accepted accounting principles ("GAAP") must be provided; (ii) if the non-reporting target's security holders were previously provided with GAAP financial statements for either or both of the two fiscal years before the latest fiscal year, then GAAP financial statements must be provided for those years as well; and (iii) if the non-reporting target is not significant to the acquiror above the 20% level in accordance with Regulation S-X, then no financial statements are required with respect to the target.

UPDATE OF TENDER OFFER RULES

Subsequent Offering Period. The Revisions permit the use of a subsequent offering period in a cash or stock tender offer, similar to that available in many United Kingdom tender offers, pursuant to new Rule 14d-11 under the Exchange Act. In such a subsequent offering period, security holders are allowed to tender their shares after the completion of a tender offer by a third-party bidder. This subsequent offering period would be at the bidder's option, and the new rule allows the bidder to determine the duration of the period, ranging from a minimum of three business days to a maximum of twenty business days.²⁰ The subsequent offering period

18. In the M&A Release, the SEC has included a complete list of what information a bidder should provide in the summary term sheet accompanying a cash tender offer or cash merger proxy statement.

19. These changes do not apply to the financial statements required in roll-up transactions.

20. Bidders also may opt for a relatively short subsequent offering period and later extend the period if necessary. Any extension of the subsequent offering period must be limited to an aggregate of no

may be disclosed in the bidder's initial offering materials, or in a subsequent amendment to the tender offer materials that is disseminated to security holders prior to the expiration of the initial offer period (generally five business days). This subsequent offering period is available only if: (i) the tender offer is for all outstanding shares; (ii) all conditions to the offer are deemed satisfied or waived by the bidder on or before the close of the initial offering period (with the shares tendered during such initial period having been purchased at the closing of such initial period); (iii) withdrawal rights are not permitted during the subsequent offering period; and (iv) the same consideration is paid in both the initial and subsequent offering periods.

Bidder's Financial Statements and Other Financial Information. Under the tender offer rules, a bidder's financial statements must be disclosed if such information is "material." The Revisions attempt to clarify such materiality standard by providing specific guidance in an instruction in new Schedule TO as to when a bidder's financial statements are not required. Under the Revisions, a bidder's financial statements are not considered material when: (i) only cash consideration is offered; (ii) the offer is not subject to any financing condition; and (iii) either: (a) the bidder is a public reporting company that files reports electronically on EDGAR or (b) the offer is for all outstanding securities of the target. When the financial statements of a bidder in a third-party tender offer are material, the Revisions require only two years of historical financial information (instead of the previously required three years). The Revisions also have revised and updated the type of financial information (other than financial statements) required to be included in third-party and issuer tender offers and going private transactions.²¹ Finally, the Revisions have expanded the "Source of Funds" item requirement in the tender offer and going private rules to require disclosure of the specific sources of financing, any conditions to the financing, and the bidder's ability to finance the offer if the primary source of financing falls through.

Pro Forma Financial Information in Two-Step Transactions. In transactions involving a cash tender offer followed by a back-end merger where securities are offered as consideration for shares of the target company, the Revisions require pro forma financial information regarding the combined entity (prepared in accordance with Article 11 of Regulation S-X) to be included in the first-step cash tender offer statement. The SEC believes this information is necessary for investors to evaluate the transaction as a whole and to determine whether to tender for cash in the front-end tender offer or retain their securities to receive the offered securities in the second step of the transaction. However, this requirement is limited to: (i) "negotiated transactions"

more than twenty business days when combined with the initial subsequent offering period and also must be made in accordance with Rule 14e-1(d), which governs certain timing matters.

21. Prior to the Revisions, information regarding book value per share and the pro forma balance sheet effect of the transaction (as of the most recent fiscal year end and the latest interim balance sheet period) may have been required. Pursuant to the new rules, the SEC reduced the required information to only the most recent balance sheet.

(i.e., where the management of the target is cooperating with the bidder)²²; and (ii) transactions which are significant to the bidder above the 20% level in accordance with Regulation S-X.

Update of Rule 13e-1. Rule 13e-1 previously prohibited an issuer whose securities were the subject of a third party tender offer from repurchasing securities until information about the issuer's acquisition was filed with the SEC and sent to security holders. Previously, under the rule, an issuer could disseminate the required information to its security holders as early as six months before making any repurchases, long before it became the target of a tender offer. The revised rule requires issuers to file this information only after a tender offer is made, in order to prevent an early filing by an issuer from frustrating the rule's aim of providing information about the pending tender offer to the issuer's security holders. However, the Revisions eliminate the requirement to deliver the information to security holders in an effort to eliminate the cost to issuers of mailing such information. In addition, the rule as revised excludes periodic repurchases in connection with employee benefit plans and other similar plans that are made in the ordinary course and not in response to a third-party offer.

Stockholder Lists. The Revisions amend Rule 14d-5 under the Exchange Act (relating to dissemination of certain tender offers by use of stockholder lists and security position listings) to more closely align it with the 1992 amendments to Rule 14a-7 (the parallel rule relating to proxy materials). Specifically, Rule 14d-5 has been amended to require target companies to include in their stockholder lists a reasonably current list of non-objecting beneficial owners, as well as record owners, if the target company has obtained or obtains a list of beneficial owners for its own use before the meeting or security holder action. Similarly, a company that elects to provide a bidder with a stockholder list instead of mailing the bidder's materials will need to disclose recent information regarding non-objecting beneficial owners, including names, addresses and security positions, that the target company has in its possession or subsequently obtains. The security holder list must be in the format requested by the bidder if it can be provided without undue burden or expense.

Rule 10b-13. The Revisions amend Rule 10b-13 under the Exchange Act (which prohibits a person making a cash or stock tender offer from purchasing a security that is the subject of the offer other than as part of the offer) and re-designate it as Rule 14e-5. The new rule 14e-5 simplifies the language but does not alter the basic terms of the old Rule 10b-13 as it was previously interpreted by the SEC. The restrictions of Rule 14e-5 commence upon "public announcement"²³ of a tender offer and ends when the offer expires. Rule 14e-5 does not apply to purchases or arrangements to purchase outside of a tender offer during a subsequent offering

22. However, the SEC encourages bidders to provide pro forma or other similar financial information that the bidder considers useful and meaningful to security holders, regardless of whether the transaction is negotiated or not.

23. See Footnote 4 for the definition of "public announcement."

period if the consideration is the same in form and amount. In addition to subject securities²⁴, Rule 14e-5 covers related securities, which are defined as securities that are immediately convertible into, exchangeable for, or exercisable for subject securities. Rule 14e-5 contains several types of excepted transactions, including certain purchases pursuant to contractual obligations, purchases during odd-lot offers, covering transactions, and certain purchases by an affiliate of the dealer manager.

EFFECTIVE DATE AND TRANSITION

The following provides a summary of certain exceptions to the applicability of the Revisions and an identification of cases where parties may “opt-in” to the applicability of the Revisions for transactions in progress on the Effective Date.

Communications. Persons who have filed a registration statement, proxy statement or tender offer statement before the Effective Date may rely on the new exemptions for communications on or after the Effective Date.

Confidential Treatment of Proxy Materials. If preliminary proxy material is filed confidentially before the Effective Date, the filer may choose to continue such confidential treatment until the proxy material is published, sent or given to security holders in definitive form. The preliminary proxy material will remain confidential as long as the parties to the transaction do not make any public communication that exceeds what would be permitted by the rules prior to the Effective Date. However, the filer must re-file the preliminary proxy material publicly if the parties to the transaction avail themselves of the new exceptions for communications before providing the definitive proxy statement.

Early Commencement. If a person has filed a registration statement for an exchange offer before the Effective Date, and such registration statement has not become effective as of the Effective Date, the filer may rely on the early commencement provisions upon and after the Effective Date.

Regulation M-A and Schedule TO. If a registration statement, tender offer statement or proxy/information statement is filed before the Effective Date, the disclosure requirements in effect prior to the Effective Date will continue to apply to such statements until the transaction is completed, and amendments thereto should continue to comply with such requirements and not Regulation M-A or the revised rules. While amendments to tender offers filed before the Effective Date should continue to be filed as amendments to Schedules 13D-1 or 13E-4, tender offers commenced on or after the Effective Date must be filed on Schedule TO.

24. “Subject securities” are defined in Item 1000 of Regulation M-A as “the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction.”

Subsequent Offering Period. If a tender offer statement is filed before the Effective Date, the bidder may choose to offer a subsequent offering period beginning on or after the Effective Date in accordance with the Revisions (and may announce such subsequent offering period prior to the Effective Date).

Revised Security Holder List for Tender Offers. A request for a security holder list on or after the Effective Date must comply with the Revisions whether or not the tender offer statement was filed before the Effective Date.

Rule 14e-5. All tender offers that are publicly announced before the Effective Date will continue to be regulated by Rule 10b-13 even after the Effective Date. Rule 14e-5 will only apply to tender offers publicly announced on or after the Effective Date.

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The M&A Release sets forth a number of highly technical changes. This Memorandum is intended to constitute only an overview of certain key aspects of the M&A Release that are likely to be of interest to our clients at large and does not purport to discuss all of the Revisions. We invite recipients of this Memorandum who are interested in discussing the M&A Release, or who have questions concerning any particular aspect of the M&A Release, to contact Bill Curbow (w_curbow@stblaw.com), Mario Ponce (m_ponce@stblaw.com), Robert Goldbaum (r_goldbaum@stblaw.com) or Christopher Lee (c_lee@stblaw.com) of our New York Office at (212) 455-2000.

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