

FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 4344 Donald Douglas Drive, Long Beach, California 90808; telephone (213) 514-6319.

**SUPPLEMENTARY INFORMATION:** A proposal to amend Part 39 of the Federal Aviation Regulations to amend Airworthiness Directive (AD) 85-11-02, Amendment 39-5068 (50 FR 20896; May 21, 1985), to require inspection of the elevator boost cylinder rod end nuts on certain McDonnell Douglas DC-9 and C-9 (Military) series airplanes, was published in the *Federal Register* on February 12, 1986 (51 FR 5204). The comment period for the proposal closed April 6, 1986.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the two comments received.

The first commenter queried as to why airplanes, fuselage numbers 1196 through 1242, would be subject to the initial inspection, since McDonnell Douglas has inspected those airplanes prior to delivery. The FAA has determined that there is no documentation which indicates that those serial-numbered fuselages have been inspected or checked and found in compliance to the McDonnell Douglas DC-9 Service Bulletin (S/B) 27-262, dated November 27, 1985, or other approved documentations.

The second commenter suggested that the initial compliance period for the recently added airplanes be 2,500 flight hours or 12 months since last inspection (delivery), or 300 flight hours after the effective date of the proposed amendment, whichever is later. The effect of this suggestion would be to permit newly delivered airplanes to accumulate 2,500 flight hours before inspection. In light of the lack of documentation to prove that these airplanes were inspected prior to delivery, this extension would not be appropriate.

It is estimated that 1,125 airplanes of U.S. registry will be affected by this AD, that it will take approximately 7 manhours per airplane to accomplish the required actions, and that the average labor cost will be \$40 per manhour. The cost of the new part is \$195. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be \$534,375.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities because few, if any, DC-9 airplanes are operated by small entities. A final evaluation has been prepared for this regulation and has been placed in the docket.

#### List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

#### Adoption of the Amendment

#### PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations as follows:

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

#### § 39.13 [Amended]

2. By amending AD 85-11-02, Amendment 39-5068 (50 FR 20896; May 21, 1985), as follows:

A. Revise applicability statement to read:

"McDonnell Douglas: Applies to McDonnell Douglas DC-9-10, -20, -30, -40, -50, -80, and C-9 (Military) series airplanes (Fuselage Numbers 1 through 1242), certificated in any category."

B. Add paragraph H. to read as follows:

"H. Modification of elevator hydraulic boost cylinder attach rod ends in accordance with the Accomplishment Instructions of McDonnell Douglas DC-9 Service Bulletin 27-262, dated November 27, 1985, or later revisions approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region, constitutes terminating action for the repetitive inspection requirements of this AD."

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1-L65 (54-60). These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office,

4344 Donald Douglas Drive, Long Beach, California.

This Amendment becomes effective August 21, 1986.

Issued in Seattle, Washington, on July 9, 1986.

Wayne J. Barlow,

Director, Northwest Mountain Region.

[FR Doc. 86-16070 Filed 7-16-86; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 200 and 240

[Release Nos. 33-6653; 34-23421; IC-15199; File Nos. S7-34-85, S7-35-85, S7-01-86]

#### Amendments to Tender Offer Rules: All-Holders and Best-Price

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rules.

**SUMMARY:** The Securities and Exchange Commission ("Commission") today announced the adoption of amendments to its issuer and third-party tender offer rules. The amendments provide that a bidder's or issuer's tender offer must be open to all holders of the class of securities subject to the tender offer and that any security holder must be paid the highest consideration paid to any other security holder during the tender offer. In addition, the Commission is amending existing rules concerning minimum offering periods and withdrawal rights. With respect to minimum offering periods, a tender offer would be required to remain open for ten business days upon the announcement of an increase or decrease in (i) the percentage of securities being sought or (ii) the consideration offered by the offeror. With respect to withdrawal rights, the amendments provide that withdrawal rights extend throughout the offering period and that the extension of withdrawal rights upon commencement of a competing bid is eliminated.

**EFFECTIVE DATES:** The all-holders requirement of new Rule 14d-10(a)(1) and amended Rule 13e-4(f)(8)(i), (i.e. 240.14d-10(a)(1) and 240.13e-4(f)(8)(i)), and amended Rules 30-1 and 30-3, (i.e. 200.30-1 and 200.30-3) are effective July 17, 1986. The other provisions of new Rule 14d-10 and amended Rules 13e-4, 14d-7, and 14e-1(b), (i.e. 240.14d-10, 240.13e-4, 240.14d-7, and 240.14e-1(b)), are effective on August 18, 1986, except that a tender offer commenced after that date in

competition with an offer that commenced prior to that date would be permitted to rely on the rules in effect prior to such date.

**FOR FURTHER INFORMATION CONTACT:** For information regarding Rules 14d-7, 14d-10 and 14e-1(b), contact Joseph G. Connolly, Jr. or Gregory E. Struxness, (202) 272-3097, Office of Tender Offers, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. For information regarding Rule 13e-4, contact Nancy J. Burke, (202) 272-2848, or Deren E. Manasevit, (202) 272-7494, Office of Legal Policy and Trading Practices, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is amending Rule 13e-4<sup>1</sup> and Regulations 14D<sup>2</sup> and 14E<sup>3</sup> pertaining to tender offers.

### I. Executive Summary

In July 1985, the Commission proposed a new rule to require a bidder making a tender offer under section 14(d) of the Securities Exchange Act of 1934 ("Exchange Act"):<sup>4</sup> (1) To extend the offer to all security holders who own shares of the class of securities subject to the offer ("all-holders requirement"); and (2) to pay every tendering security holder the highest consideration offered to any other security holder at any time during the tender offer ("best-price provision").<sup>5</sup> At that same time, the Commission proposed corresponding amendments to Rule 13e-4 which made the all-holders requirement and best-price provision applicable to issuer tender offers.<sup>6</sup>

The Commission also proposed to require that both third-party and issuer tender offers remain open for at least ten business days from the announcement of an increase in the amount of securities being sought by the offeror. The Commission proposed that such amended offers remain open for the same period of time currently required for increases in the

consideration offered or the dealer's soliciting fee in order to allow time for security holders to consider the offer as amended.

The July 1985 releases generated 76 comment letters from 68 commentators.<sup>7</sup> Commentators were about equally divided in their position on the all-holders requirement for third-party tender offers, while a substantial majority of commentators opposed adoption of the all-holders requirement for issuer tender offers. With respect to the July 1985 best-price proposal, a substantial majority of commentators supported adoption of the best-price proposal for third-party tender offers while commentators were about equally divided on the best-price provision for issuer tender offers. The majority of those commentators who opposed the all-holders requirement and best-price provision for issuer and third-party tender offers did so based upon their belief that the Commission lacked authority to promulgate the proposals. Commentators who supported the proposals did so for a variety of policy reasons, including the need to protect security holders from discriminatory tender offers.

With respect to the best-price provision, three commentators suggested revising the best-price proposal to require that all security holders to whom a tender offer is made must be paid the highest consideration paid, rather than offered, to any other security holder. This would permit a bidder to reduce the consideration offered without having to terminate the initial offer and commence a new offer, as has previously been required. The Commission agreed with the suggested reformulation of the best-price provision and in January 1986 proposed, *inter alia*, a revised best-price provision.<sup>8</sup>

The revised best-price proposal also necessitated the proposal of amendments to extend withdrawal rights and to require the offering period to remain open for ten business days upon an increase or decrease in the amount of securities sought or consideration offered.

Specifically, the Commission proposed to amend Rules 13e-4(f)(1)(ii)<sup>9</sup>

and 14e-1(b)<sup>10</sup> to provide that a tender offer must remain open for ten business days upon the announcement of an increase or decrease in the percentage of securities being sought or in the consideration offered by the offeror. The Commission proposed two alternatives to extend withdrawal rights. Under the first alternative, additional withdrawal rights would attach for ten business days upon the announcement of a decrease in the percentage of securities being sought or consideration offered. The second alternative provided that withdrawal rights would extend throughout the offer, and that the current requirement to extend withdrawal rights upon the commencement of a competing bid would be eliminated.

Thirteen comment letters were received in response to the Commission's release proposing the reformulated best-price rule.<sup>11</sup> Commentators generally supported the proposal revising the best-price provision from *offered* to *paid*. Further, the commentators who addressed the proposal to require that the offering period remain open for ten business days upon an increase or decrease in the consideration offered or percentage of securities sought generally supported such an amendment. With respect to the two proposals regarding withdrawal rights, commentators generally favored the proposal to extend withdrawal rights throughout the offering period over the proposal to require additional withdrawal rights for ten business days upon the announcement of a decrease in the percentage of securities sought or consideration offered.

The Commission continues to believe that it has the requisite rulemaking authority to adopt the all-holders requirement and best-price provision and, accordingly, is adopting those amendments substantially as proposed. In addition, the Commission is adopting, substantially as proposed, the amendments to Rules 13e-4(f)(1)(ii) and 14e-1(b) regarding the extension of the offering period for changes in the consideration offered or the amount of securities sought. Finally, the Commission is adopting the amendments to Rules 13e-4(f)(2)<sup>12</sup> and

<sup>1</sup> 17 CFR 240.13e-4.

<sup>2</sup> 17 CFR 240.14-1-14d-10.

<sup>3</sup> 17 CFR 240.14e-1-14e-3.

<sup>4</sup> 15 U.S.C. 78n(d).

<sup>5</sup> Release No. 33-6595 (July 1, 1985) [50 FR 27976].

<sup>6</sup> Release No. 33-6596 (July 1, 1985) [50 FR 28210].

This release also included proposed amendments to the applicable time periods for issuer tender offers in order to bring the provisions governing the conduct of issuer tender offers into conformity with third-party tender offers, to eliminate the advantages afforded defensive issuer tender offers, and to alleviate the confusion that may arise from disparate time periods. On January 9, 1986, the Commission adopted these amendments. See Release No. 33-6618 (January 14, 1986) [51 FR 3031].

<sup>7</sup> The letters of comment, as well as a copy of the summary of the comment letters prepared by the staff, are available for public inspection and copying at the Commission's Public Reference Room. (See File Nos. S7-34-85, S7-35-85.)

<sup>8</sup> Release No. 33-6619 (January 14, 1986) [51 FR 3186].

<sup>9</sup> 17 CFR 240.13e-4(f)(1)(ii).

<sup>10</sup> 17 CFR 240.14e-1(b).

<sup>11</sup> The letters of comment, as well as a copy of the summary of the comment letters prepared by the staff, are available for public inspection and copying at the Commission's Public Reference Room. (See File No. S7-01-86.)

<sup>12</sup> 17 CFR 240.13e-4(f)(2).

14d-7<sup>13</sup> to provide that withdrawal rights extend until the expiration of the offering period. These amendments also eliminate the extension of withdrawal rights upon the commencement of a competing bid.

## II. Authority

The Commission proposed the all-holders and best-price requirements for issuer and third-party tender offers pursuant to statutory authority vested in it by, *inter alia*, Sections 3(b), 13(e), 14(d), 14(e) and 23(a)<sup>14</sup> of the Exchange Act.<sup>15</sup> Section 23(a) authorizes the Commission to adopt such rules and regulations "as may be necessary or appropriate to implement the provisions of [the Exchange Act]." So long as the rule promulgated pursuant to such general rulemaking authority is "reasonably related to the purposes of the enabling legislation it will be sustained."<sup>16</sup> Sections 13(e), 14(d) and 14(e), added to the Exchange Act as part of the Williams Act amendments (Sections 13 (d)<sup>17</sup> and (e), and 14 (d), (e) and (f)<sup>18</sup> of the Exchange Act), were designed: (1) to promote investor protection by requiring full and fair disclosure in connection with cash tender offers, and (2) to eliminate discriminatory treatment among security holders who may desire to tender their shares.<sup>19</sup> These purposes are implemented through disclosure requirements, substantive provisions and antifraud protections. As discussed below, the all-holders and best-price requirements further the purposes of the Williams Act by assuring fair and equal treatment of all holders of the class of securities that is the subject of a tender offer and are an appropriate exercise of

the Commission's general rulemaking authority.

The all-holders and best-price rules are "necessary or appropriate" to implement the Williams Act. They expressly preclude bidders from discriminating among holders of the class of securities that is the subject of the offer, either by exclusion from the offer or by payment of different consideration. Without the all-holders and best-price requirements, the investor protection purposes of the Williams Act would not be fully achieved because tender offers could be extended to some security holders but not to others. Such discriminatory tender offers could result in the abuses inherent in "Saturday Night Specials," "First-Come First Served" offers and unconventional tender offers since security holders who are excluded from the offer may be pressured to sell to those in the included class in order to participate, at all, in the premium offered. These excluded security holders would not receive the information required by the Williams Act, would have their shares taken up on a first-come first-served basis and would have no withdrawal rights. There is nothing in the Williams Act or its legislative history to suggest that Congress intended to permit such selective protection of target company security holders.

Consistent with the disclosure objectives of the Williams Act, section 14(d) is "designed to make the relevant facts known so that shareholders have a fair opportunity to make their [investment] decision" to tender, sell or hold their securities.<sup>20</sup> Specifically, section 14(d)(1) requires bidders at the time a tender offer is made to provide investors, as well as the Commission, with information concerning, among other things, the terms of the offer and the bidder's plans or proposals with respect to the target company. In addition, section 14(d)(1) specifically grants to the Commission the authority to prescribe other disclosure requirements for bidders "as [may be] necessary or appropriate in the public interest or for the protection of investors." Congress also provided the Commission with this same broad grant of rulemaking authority in section 14(d)(4) which authorizes the Commission to specify "as necessary or appropriate in the public interest or the protection of investors" the information to be included in any recommendation by the management or others in favor of or in opposition to a tender offer.

Consistent with that intent, the Commission has used its rulemaking authority to promulgate regulations designed to ensure that security holders have adequate information about a tender offer. For example, Rule 14d-2<sup>21</sup> provides that a tender offer will commence upon publication or public announcement of the tender offer. That rule does not contemplate that notification of the tender offer will be made to only certain security holders, but rather operates on the assumption that all holders will be adequately informed about the tender offer. Similarly, Rule 14d-4<sup>22</sup> provides for dissemination of tender offer materials to all security holders.

The all-holders requirement complements these rules and serves as a means of effecting the purposes of the Williams Act. The all-holders requirement would realize the disclosure purposes of the Williams Act<sup>23</sup> by ensuring that all members of the class subject to the tender offer receive information necessary to make an informed decision regarding the merits of the tender offer. If tender offer disclosure is given to all holders, but some are barred from participating in the offer, the Williams Act disclosure objectives would be ineffective.

Further, the specific language of the Williams Act contemplates tender offers made for a "class" of equity security.<sup>24</sup> That language reflects Congress' understanding that all security holders were to have the opportunity to participate in a tender offer for a target's securities. In addition to section 14(d)(1)'s references to tender offers for "any class of any equity security," section 14(d)(6), which governs proration of securities tendered, discusses tender offers "for less than all the outstanding equity securities of a class." By using the term "class" of equity security,<sup>25</sup> it can be inferred that Congress intended that, when a tender offer is made, it will be made to all holders of the outstanding securities of such class.

The substantive provisions of the Williams Act also support the Commission's rulemaking authority to

<sup>21</sup> 17 CFR 240.14d-2.

<sup>22</sup> 17 CFR 240.14d-4.

<sup>23</sup> See, e.g., S. Rep. No. 550, *supra* at 3 ("The bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision.")

<sup>24</sup> See, e.g., section 14(d)(1) which refers to tender offers made for "any class of any equity security."

<sup>25</sup> Pursuant to the authority vested in it by sections 3(b) and 23(a) to define terms, the Commission, by promulgating the all-holders provision, is defining the term "class" of equity security.

<sup>13</sup> 17 CFR 240.14d-7.

<sup>14</sup> 15 U.S.C. 78c(b), 78m(e), 78n(d), 78n(e) and 78w(a).

<sup>15</sup> The Commission also proposed and is adopting these amendments under Section 23(c) of the Investment Company Act of 1940, 15 U.S.C. 80a-23(c), and Sections 9(a)(6) and 10(b) of the Exchange Act, 15 U.S.C. 78i(a)(6) and 78j(b).

<sup>16</sup> *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

<sup>17</sup> 15 U.S.C. 78m(d).

<sup>18</sup> 15 U.S.C. 78n(f).

<sup>19</sup> *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids*, Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 17 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) (hereinafter *Senate Hearings*); *Takeover Bids*, Hearings on H.R. 14475, S. 510 Before The Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 2d Sess. 11 (1968) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) (hereinafter *House Hearings*); S. Rep. No. 550, 90th Cong., 1st Sess. 10 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968).

<sup>20</sup> *Id.*

require that all security holders subject to a tender offer be treated alike. For example, in promulgating both the pro rata and equal price provisions of sections 14(d)(6) and (d)(7), Congress intended, *inter alia*, to assure fair treatment among security holders who may desire to tender their shares. The pro rata provisions of section 14(d)(6) were promulgated in order to give all security holders an equal opportunity to participate in a tender offer for less than all the outstanding shares of the target.<sup>26</sup> Specifically, that section provides that where a greater number of securities are deposited than the offeror is bound or willing to take up, the securities deposited must be taken up pro rata according to the number of securities deposited by each person. Although section 14(d)(6) recognizes that a tender offeror may accept less than all the securities of a particular class, that section does not authorize tender offers to be made to less than all security holders of the particular class of securities sought.

Similarly, section 14(d)(7) assures equality of treatment among all security holders who tender their shares by requiring that any increase in consideration offered to security holders be paid to all security holders whose shares are taken up during the offer. One of Congress' purposes in promulgating the provisions was "to assure equality of treatment among all shareholders who tender their shares."<sup>27</sup> These substantive provisions assume that offers will be made to all security holders and not just to a select few, and that offers will not be made to security holders at varying prices. Without the all-holders requirement and best-price provision, the specific protections provided by sections 14(d)(6) and (d)(7) would be vitiated because an offeror could simply address its offer either to a privileged group of security holders who hold the desired number of shares or to all security holders but for different considerations. The all-holders requirement and best-price provision both are consistent with Congressional intent and complement the pro rata and equal price protections of the Williams Act.

That the substantive provisions of the Williams Act are intended to assure equal treatment of tendering security holders does not detract from the fact that the Williams Act is designed to protect all security holders regardless of whether they tender their shares. Courts and commentators alike have stated

that "nontendering shareholders are within the class for whose protection the Williams Act was specifically designed."<sup>28</sup> The all-holders and best-price amendments implement the purpose of the Williams Act to protect all tendering and non-tendering security holders.

Thus, under sections 14(d) and 23(a) of the Exchange Act, the Commission has the requisite authority to promulgate the all-holders requirement and best-price provision for third-party tender offers. Section 13(e) of the Exchange Act provides additional authority for the all-holders and best-price requirements in connection with issuer tender offers.<sup>29</sup>

When it adopted section 13(e), Congress determined that, notwithstanding that share repurchases by an issuer were regulated by state corporation law, there was a need for federal regulation. Those who argue that adoption of the all-holders rule would preempt state corporation law fail to recognize that Congress made that decision when it enacted section 13(e). Regulation of issuer tender offers in the same manner as third-party tender offers is entirely consistent with Congressional intent.

In addition, many commentators have asserted that the Commission's authority under this provision is limited to regulating disclosure. It is clear, however, that in adopting the Williams Act, Congress granted to the Commission broad rulemaking authority in section 13(e) to determine the most appropriate regulatory scheme for issuer tender offers, and that the exercise of this authority could include adoption of substantive regulations.<sup>30</sup> For example, the Commission stated during Congressional consideration that the rulemaking authority in section 13(e) could be used to apply the substantive provisions of section 14(d) to issuer tender offers: "If the Commission is given rulemaking power with respect to issuers' purchases as provided in the bill, it could, and presumably would, provide separately for tender offers by

issuers following provisions of [Section 14(d)] to the extent appropriate."<sup>31</sup>

In conformity with this mandate, the Commission adopted Rule 13e-4 to regulate issuer tender offers. Rule 13e-4 extends to issuer tender offers many of the protections in the Williams Act pertaining to third party offers, including disclosure (Rule 13e-4(d)), withdrawal (Rule 13e-4(f)(2)), proration (Rule 13e-4(f)(3)), and equal price (Rule 13e-4(f)(4)). Thus, it is entirely appropriate that the all-holders requirement and best-price provision apply equally to issuers and third-parties.

While section 14(d) is only applicable to third-party tender offers, Congress nevertheless intended that the Williams Act's statutory purpose of investor protection was to be accomplished in a neutral manner. In implementing this policy of neutrality, the Commission has avoided favoring either management or the takeover bidder. There is no reason to provide different treatment for issuers with respect to the all-holders and best-price amendments. A tender offer, whether made by a bidder that is a third party or an issuer, puts the same pressure on target company security holders. Security holders have no less need in an issuer tender offer for the protections provided by the disclosure requirements and the substantive protections of proration and withdrawal. Similarly, Congress' intent to ensure equal treatment of holders of the same class of securities is equally applicable. Consistent with that policy, the all-holders requirement and best-price provision must be applied equally to issuer and third-party tender offers to avoid tipping the balance in favor of either party.<sup>32</sup>

Further, sections 13(e) and 23(a) of the Exchange Act provide ample statutory authority for the Commission to promulgate the all-holders requirement and best-price provision for issuer tender offers. Indeed, the Commission believes that ensuring that the fundamental policy of neutrality in the Williams Act is implemented through an equivalent all-holders requirement and best-price provision for issuer tender offers is the kind of use for which the general rulemaking authority in section 23(a) is appropriate.

<sup>26</sup> *Hundahl v. United Benefit Life Insurance Co.*, 465 F. Supp. 1349, 1368 (N.D. Tex. 1979); see also *Plaine v. McCabe*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 92,749 (9th Cir. 1986); *Wellman v. Dickinson*, 475 F. Supp. 783, 817 (S.D. N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 469 U.S. 1069 (1983); *In re Com Oil/Tesoro Petroleum Corp. Sec. Litig.*, 467 F. Supp. 227, 241-43 (W.D. Tex. 1979); A. Bromberg, *Securities Law: Fraud* § 6.3 (1974).

<sup>29</sup> Section 13(e)(1) authorizes the Commission "(A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices . . . ."

<sup>30</sup> See *Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2458, 2463 n.8 (1985).

<sup>31</sup> Senate Hearings, at 202 (Supplemental Memorandum of the Securities and Exchange Commission with Respect to Certain Comments on S. 510). Others at the Senate Hearings also noted that the substantive provisions in Section 14(d) "should be equally applicable to issuers' offers." *Id.* at 248 (statement by Milton Cohen).

<sup>32</sup> See, e.g., S. Rep. No. 550, *supra*, at 3; H.R. Rep. No. 1711, *supra*, at 4.

<sup>26</sup> S. Rep. No. 550, *supra*, at 10; H.R. Rep. No. 1711, *supra*, at 11.

<sup>27</sup> *Id.*

The Commission believes it has ample authority under, *inter alia*, sections 3(b), 13(e), 14(d) and 23(a) of the Exchange Act to adopt amendments to Rule 13e-4 and new Rule 14d-10. While not essential to the adoption of the Rules, section 14(e) of the Exchange Act provides additional authority to adopt these rules. As illustrated by the potential of such exclusionary offers to give rise, particularly in the case of partial bids, to the types of abuses presented by unconventional tender offers, the Commission believes that these rules are "means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative" and to effect the disclosure purposes of the Williams Act, as do the requirements of Rule 14e-1.<sup>33</sup>

### III. Discussion

#### A. The All-Holders Requirement

New Rule 14d-10 and amended Rule 13e-4(f)<sup>34</sup> make explicit the Commission's position that the Williams Act requires that third-party as well as issuer tender offers be open to all holders of the class of securities sought. The all-holders requirement does not prohibit tender offers for fewer than all outstanding securities of a class, but provides that all security holders must be able to accept the tender offer if they so choose.<sup>35</sup>

#### 1. State Statutes

In the proposing release,<sup>36</sup> the Commission discussed state takeover statutes and the effect of the Supreme Court's decision in *Edgar v. MITE Corp.* on the ability of a state to regulate a nationwide tender offer.<sup>37</sup> The Commission also stated its view that, to the extent post-*MITE* takeover statutes unlawfully burden interstate commerce or conflict with Federal law, they are invalid. The Commission also sought comment on the impact of the all-holders requirement on otherwise valid state takeover statutes and the actions

<sup>33</sup> See *Schreiber v. Burlington Northern, Inc.*, supra, 105 S. Ct. at 2464 (1985) [Section 14(e) "gives the Securities and Exchange Commission latitude to regulate nondeceptive activities as a 'reasonably designed' means of preventing manipulative acts, without suggesting any change in the meaning of the term 'manipulation' itself."].

<sup>34</sup> 17 CFR 240.13e-4(f).

<sup>35</sup> In this regard it should be noted that "security holder" means both record holders and beneficial owners of the class of securities subject to the offer. Accordingly, a tender offer directed only to holders of record would not comply with the all-holders requirement.

<sup>36</sup> Release No. 33-6595, supra.

<sup>37</sup> In *Edgar v. MITE Corp.*, 457 U.S. 624 (1984), the Supreme Court held that the Illinois Business Takeover Act was an impermissible burden upon interstate commerce in violation of the Commerce Clause.

that the Commission could take, consistent with the purposes of the Williams Act, to ameliorate such effects.

In response, some commentators stated that the Commission should not put an offeror in the position of being forced by federal law either to abandon its offer completely because state law would prohibit the offer from being made to residents of a particular state or to violate the law of that particular jurisdiction. A few of these commentators opined that the Commission should provide a state law exception from the all-holders requirement.<sup>38</sup>

The Commission recognizes that, as proposed, the all-holders requirement could have raised constitutional issues with respect to state statutes that are otherwise constitutionally valid under the *MITE* analysis. In adopting the rule, the Commission has sought to minimize the impact of the all-holders rule on otherwise constitutionally valid state statutes.

Rules 14d-10(b)(2) and 13e-4(f)(9)(ii),<sup>39</sup> as adopted, provide that, notwithstanding the all-holders requirement, a bidder or issuer will not be prohibited from excluding security holders in a particular state from a tender offer if the bidder or issuer is prohibited from making the offer in the state by administrative or judicial action taken pursuant to a statute enacted by that state.

A bidder or issuer, of course, would not have to comply with a constitutionally invalid state statute. Where the statute is constitutional, the bidder or issuer will not have to proceed with its offer in that state if it has attempted in good faith to comply with the statute but has been barred from making the offer in the state by administrative or judicial action<sup>40</sup> (This procedure is consistent with current practice). If an offeror fails to attempt in good faith to comply with an unconstitutional state antitakeover statute, the offeror will violate the rule if he proceeds with the tender offer.

In adopting the all-holders requirement the Commission does not intend to cause the invalidation of otherwise constitutional state statutes by preempting such statutes. Nor does the Commission intend to interfere with

<sup>38</sup> In contrast, however, one commentator stated that the all-holders requirement would not alter present practice significantly in that offerors interested in achieving success by making an offer in a particular state which has a statute that poses potential conflicts with federal law must seek to enjoin enforcement of that law or risk violating it.

<sup>39</sup> 17 CFR 240.14d-10(b)(2) and 13e-4(f)(9)(ii).

<sup>40</sup> In connection with qualifying securities in certain states, see discussion *infra* at § III.B.3.

the later adoption of state statutes that, but for conflicting with the all-holders requirement, would be constitutional. Where, however, judicial authority indicates that a state statute is unconstitutional, the bidder could proceed with its offer in the state and have no need for the exception.<sup>41</sup>

#### 2. Dissemination of Tender Offers

While a tender offer subject to Sections 13(e) and 14(d) of the Williams Act must be held open to all holders of the subject class of securities, including foreign persons, Rules 14d-10(b)(1) and 13e-4(f)(9)(i)<sup>42</sup> make clear that the all-holders requirement does not affect the required dissemination of tender offers. Under Rules 13e-4(e)<sup>43</sup> and 14d-4,<sup>44</sup> which govern dissemination of tender offers, adequate publication of an offer may include publication in a newspaper of national circulation. The Commission has not interpreted these provisions as requiring dissemination of tender offer materials outside of the United States, and the adoption of the all-holders requirement is not intended to impose any additional requirements in this regard.

#### 3. Foreign Offers

As proposed, the amendments to Rule 13e-4(f) and new Rule 14d-10 each included a provision which specified that the all-holders requirement would not affect a tender offer in which the bidder was not a citizen or resident of the United States and did not use the mails or any means or instrumentalities of interstate commerce or any facility of a national securities exchange. The Commission's intent in including these provisions was to make it clear that the all-holders requirement was not intended to cause a tender offer which, for lack of use of jurisdictional means, would not otherwise be subject to the requirements of section 13(e) or 14(d) of the Exchange Act, to become subject to such requirements. As a result of the decision in *The Plessey Company plc v.*

<sup>41</sup> In this regard, the Commission notes that in addition to the "first-generation" state statutes invalidated by *MITE*, several "second-generation" statutes have either been held unconstitutional or are of questionable validity as a result of judicial decisions with respect to similar statutes in other states. See, e.g., *Fleet Aerospace Corp. v. Holderman*, No. 86-3533 (6th Cir. June 25, 1986) [Ohio]; *Dynamics Corp. of America v. CTS Corp.*, No. 861-601 (7th Cir. May 28 1986, amended June 7, 1986) [Indiana]; *Terry v. Yamashita*, Civ. No. 84-1436 (D. Hawaii June 13, 1986) [Hawaii]; *APL Limited Partnership v. Van Dusen, Inc.*, 822 F. Supp. 1216 (D. Minn. 1985) [Minnesota]; *Icahn v. Blunt*, 612 F. Supp. 1400 (W.D. Mo. 1985) [Missouri].

<sup>42</sup> 17 CFR 240.14d-10(b)(1) and 13e-4(f)(9)(i).

<sup>43</sup> 17 CFR 240.13e-4(e).

<sup>44</sup> 17 CFR 240.14d-4.

The General Electric Company *plc.*<sup>45</sup> a decision with which the Commission concurs, the Commission believes the law is clear with respect to the application of section 14(d) of the Exchange Act to tender offers by bidders who are not citizens or residents of the United States and who do not employ the jurisdictional means of the United States. Accordingly, the Commission reiterates its position that the all-holders requirement is not intended to affect tender offers not otherwise subject to the Williams Act and has deleted, as no longer necessary, the specific proposed provisions from the rules.

### B. Best-Price Provision

#### 1. Best-Price Paid

In Release No. 33-6619, the Commission proposed to revise the best-price provision in proposed Rules 13e-4(f)(8)(ii) and 14d-10(a)(2)<sup>46</sup> to provide that "[t]he consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder. . . ." Under this proposal, both issuer and third-party bidders could reduce the consideration offered to security holders during the tender offer.<sup>47</sup> The highest price paid to any tendering security holder, however, would need to be paid to any other tendering security holder. Commentators generally endorsed the best-price provision, as revised, and, accordingly, the Commission is adopting it substantially as proposed.

#### 2. Alternative Types of Consideration

As proposed in Release No. 33-6619, where more than one type of consideration is offered, the types of consideration offered need not be substantially equivalent in value.<sup>48</sup>

<sup>45</sup> [Current] Fed. Sec. L. Rep. (CCH) ¶92486 (D. Del. Jan. 16, 1986). The Court noted that: (1) the offering circular stated that "[t]he offer is not being made directly or indirectly in, or by use of the mails or by any means or instrumentality of inter-state or foreign commerce or of any facilities of a national securities exchange of the U.S.A."; (2) to accept the offer, all individuals were required to certify that they either were not U.S. persons or that they satisfied certain special conditions; and (3) no Form of Acceptance received in an envelope postmarked in, or which otherwise appeared to have been sent from, the U.S.A. would be treated as valid.

<sup>46</sup> 17 CFR 240.13e-4(f)(8)(ii) and 14d-10(a)(2).

<sup>47</sup> See amendments to Rules 13e-4(f)(1) and 14e-1(b) (minimum offering period) *infra* at § III.D.

<sup>48</sup> In Release Nos. 33-6595 and 6596, the Commission had proposed that alternative types of consideration would be allowed so long as the various types of consideration were substantially equivalent, and all security holders had the same choice among the types of consideration offered. In light of several commentators' remarks that it is unnecessary to require alternative forms of consideration to be substantially equivalent in value, provided security holders have the same

Security holders, however, must be afforded the right to elect among all types of consideration offered.

Two commentators suggested that the Commission make clear that the requirement that each alternative form of consideration must be offered to each security holder is not intended to prohibit a bidder or issuer from imposing limitations on the amount of each type of consideration that will be available for payment, if such limitations are disclosed and if a proration mechanism is employed in the case of oversubscription. For example, commentators suggested that when alternative forms of consideration, such as cash and securities, are offered to all security holders, the bidder or issuer should be permitted to establish a limit on the amount of cash available for payment and, if the majority of security holders elect to receive cash for their tendered shares, the bidder or issuer should be permitted to pay cash to security holders on a pro rata basis.

The Commission agrees with these commentators. The imposition of a requirement that bidders and issuers who choose to offer alternative types of consideration must plan for a potential over-allotment of each type of consideration by arranging to have, on hand, 100% of each type of consideration is unnecessary for the protection of investors. Where the limitations on the availability of each type of consideration and the proration protections afforded in the event of oversubscription are fully disclosed at the commencement of the offer, security holders will be adequately protected by the substantive protections mandated by the Williams Act.<sup>49</sup>

#### 3. Blue Sky Laws

In Release No. 33-6619, the Commission stated that, although each alternative type of consideration generally must be offered to each

choice among the forms of consideration offered, the Commission revised the best-price provision accordingly.

<sup>49</sup> The disclosure with respect to the proration mechanism should specify the limitations on the availability of each type of consideration as well as the type and amount of consideration to be paid to security holders in the event of an oversubscription. The Commission will not object if an offeror affords security holders an opportunity to elect to receive only one type of consideration in lieu of proration or to have "all or none" of their shares accepted for payment. The imposition of limitations on the availability of consideration or changes in the proration mechanism after commencement of the offer, in the Commission's view, would be substantially equivalent to an increase or decrease in the consideration offered and, accordingly, would require that the offer remain open for a minimum period of ten business days following such a change in the terms of the offer.

security holder, it will not object if an offeror offers cash or other qualified securities in a state where Blue Sky law issues are involved.<sup>50</sup> A few commentators addressed this issue and suggested that the Commission incorporate such an exception into the rules.

The Commission agrees that it is appropriate to clarify the application of these provisions in situations where the offer and sale of securities in a tender offer is prohibited under a state's Blue Sky laws. Accordingly, Rules 13e-4(f)(11) and 14d-10(d)<sup>51</sup> specify that where the offer and sale of securities constituting consideration offered in a tender offer is prohibited by the appropriate authority of a state after a good faith effort by the bidder or issuer to register or qualify the offer and sale of such securities in such state, the bidder or issuer may offer an alternative form of consideration to security holders in that state. The offeror is not, however, required to do so and instead may elect to exclude security holders in that state from the offer. To meet the good faith requirement, an offeror must only make the required filing and pay the required fee; the offeror need not modify the terms of the consideration or the offer.

For example, an offeror offers only securities in exchange for the securities of the target company. After a good faith effort to qualify the offered securities in State X, the offeror is nonetheless barred from offering the securities in that state. The offeror may then, under Rules 13e-4(f)(11) and 14d-10(d), offer an alternative form of consideration, such as cash, to residents of State X. The offeror may determine, in its discretion, the value of the alternative form of consideration.

To ensure that a bidder or issuer that offers an alternative form of consideration to certain security holders is not unfairly disadvantaged through the application of certain provisions of the all-holders and best-price rules, the Commission has adopted Rules 13e-4(f)(11)(ii) and 14d-10(d)(2).<sup>52</sup> These rules specify that the requirements imposed by Rules 13e-4(f)(10) and 14d-10(c)<sup>53</sup> (*i.e.*, to afford each security holder the right to elect among each of the types of consideration offered and to pay each security holder the highest consideration of each type paid to any other security holder electing that type

<sup>50</sup> Release No. 33-6619, *supra*, at n.10.

<sup>51</sup> 17 CFR 240.13e-4(f)(11) and 14d-10(d). In connection with state takeover statutes, see discussion *supra* at § III.A.1.

<sup>52</sup> 17 CFR 240.13e-4(f)(11)(ii) and 14d-10(d)(2).

<sup>53</sup> 17 CFR 240.13e-4(f)(10) and 14d-10(c).

of consideration) do not apply in situations where the bidder or issuer offers an alternative form of consideration to certain security holders in accordance with the rule. Thus, under the above example, if the offeror offers \$10.00 in cash to holders residing in State X, the offeror will not be required under Rules 13e-4(f)(11)(ii) and 14d-10(d)(2)<sup>54</sup> to offer cash to security holders in any other state.

Similarly, Rules 13e-4(f)(10) and 14d-10(c) will not operate to require a bidder who chooses to offer an alternative form of consideration to security holders in State X to offer an alternative form of consideration that is equal to the highest consideration paid to any other security holder during the tender offer. The offeror may determine, in its discretion, the value of the alternative form of consideration.<sup>55</sup>

In this connection, a few commentators suggested that the Commission also should provide for exceptions from the requirement that all alternative forms of consideration be offered when: (1) A foreign bidder makes an exchange offer to non-resident non-United States security holders but wishes to offer only cash to United States security holders; and (2) a United States bidder makes an exchange offer to United States security holders but wishes to offer only cash to non-resident foreign security holders. In both situations, the bidder wants to avoid registering the offered securities in two countries. In view of the very limited number of such offers, the Commission does not believe a specific exemption is necessary or appropriate. The Commission, however, will consider an application for exemptive relief under Rules 13e-4(g)(7) or 14d-10(e)<sup>56</sup> in such situations.<sup>57</sup>

### C. Exemptions

#### 1. General Exemptive Authority

Paragraph (e) of rule 14d-10 and redesignated paragraph (g)(7) of Rule 13e-4<sup>58</sup> permit the Commission to grant relief from the all-holders requirement and best-price provision on a case-by-case basis. These paragraphs provide that the Commission, upon written request or its own motion, may determine that the all-holders

requirement or best-price provision, either conditionally or unconditionally, need not apply to a particular transaction.

#### 2. Specific Exemptions from Rule 13e-4

Rule 13e-4(g) codifies those few special and recurring circumstances where relief from the all-holders requirement for issuer repurchases through tender offers is warranted. The Commission has adopted an amendment to paragraph (g)(5) of Rule 13e-4,<sup>59</sup> providing that issuers are permitted to make odd-lot offers without complying with the general all-holders provision of Rule 13e-4(f)(8)(i). An odd-lot tender offer contemplates that the issuer will make a tender offer only to security holders who own an aggregate of not more than a specified number of shares that is less than one hundred. Generally, the purpose of an odd-lot offer is to reduce the high costs to the issuer of servicing large numbers of small security holder accounts, and to enable those security holders to dispose of their shares without incurring the brokerage fees that normally attend odd-lot transactions. Because odd-lot offers present "minimal potential for fraud and manipulation,"<sup>60</sup> the Commission is adopting that exception as proposed.<sup>61</sup>

The Commission, however, cautions issuers contemplating an odd-lot offer that the all-holders and best-price provisions would apply within the context of an odd-lot offer. Specifically, an issuer making an odd-lot offer would continue to be required to extend the offer to all security holders holding the specified number, or fewer, shares. Paragraph (g)(5) has been amended to provide that an odd-lot offer must comply with the all-holders requirement of paragraph (f)(8) of Rule 13e-4, except that, as currently permitted, an issuer could exclude participants in an issuer's plan as that term is defined in Rule 10b-6(c)(4).<sup>62</sup>

Similarly, the best-price provision would apply to require the issuer to pay to all security holders who tender pursuant to the odd-lot offer the highest consideration paid to any other security holder during the odd-lot offer. However, in the special context of issuer odd-lot offers, the Commission believes that an exception is appropriate to allow an issuer to use a formula to determine the amount that will be paid to a

particular security holder, provided that formula is based on the market price for the security and is applied uniformly.<sup>63</sup> Accordingly, paragraph (g)(5) has been amended to provide that an issuer odd-lot offer must comply with the best-price requirement of paragraph (f)(8)(ii) or the issuer must pay an amount of consideration based on a uniformly applied formula that, in turn, is based on the market price for the security.

In Release No. 33-6596, the Commission indicated that it may be appropriate to except modified "dutch auction" issuer tender offers from application of the best-price provision.<sup>64</sup> The revised best-price provision would require that all security holders whose securities are accepted in a modified dutch auction issuer tender offer be paid the highest consideration paid to any other security holder whose securities are accepted. Accordingly, there would no longer be any need to except these transactions from the operation of the best-price provision.

The Commission proposed to except, under Rule 13e-4, issuer rescission offers from the all-holders and best-price provisions. Under that exception, issuers would be permitted to offer to repurchase securities only from certain security holders whose securities may have been issued in violation of state law or the registration provisions of the Securities Act of 1933 ("Securities Act"). The offer to purchase may be made at varying prices equal to the price paid by each such security holder plus legal interest. In most cases, issuers would not make rescission offers if they were required to extend the offer to all holders of the class of securities that is the subject of the rescission offer, or if they were required to pay to every

<sup>54</sup> See, e.g., Letter regarding Great American Industries, Inc. [letter dated April 6, 1983].

<sup>55</sup> Under current staff interpretation, issuers have been permitted to make modified "dutch auction" issuer tender offers, although pure issuer "dutch auction" tender offers currently are not permitted under Rule 13e-4. In a pure dutch auction cash tender offer, the bidder invites security holders to tender securities to it at a price to be specified by the tendering security holder, rather than at a price specified by the bidder. Securities are accepted, beginning with those for which the lowest price has been specified, until the bidder has purchased the desired number of securities. Modified issuer dutch auction tender offers have been permitted under Rule 13e-4 subject to several conditions: (i) Disclosure in the tender offer materials of the minimum and maximum consideration to be paid; (ii) pro rata acceptance throughout the offer with all securities purchased participating equally in prorationing; (iii) withdrawal rights throughout the offer; (iv) prompt announcement of the purchase price, if determined prior to the expiration of the offer; and (v) purchase of all accepted securities at the highest price paid to any security holder under the offer. The staff has not addressed defensive modified issuer dutch auction tender offers.

<sup>54</sup> 17 CFR 240.13e-4(f)(11)(ii) and 14d-10(d)(2).

<sup>55</sup> Rule 13d-4(f)(8)(ii) and 14d-10(a)(2) would require the alternative form of consideration to be paid to all security holders in State X.

<sup>56</sup> 17 CFR 240.13e-4(g)(7) or 14d-10(e).

<sup>57</sup> See discussion *infra* at section III.C.1.

<sup>58</sup> The reference in 17 CFR 200.30-3(a)(35), delegating exemptive authority to the Director of the Division of Market Regulation pursuant to Rule 13e-4, has been revised to refer to paragraph (g)(7).

<sup>59</sup> 17 CFR 240.13e-4(g)(5).

<sup>60</sup> Release No. 34-19988 [July 21, 1983] [48 FR 34251].

<sup>61</sup> No corresponding exceptions have been adopted for third-party tender offers as the corporate interest in reducing servicing costs is not present.

<sup>62</sup> 17 CFR 240.10b-6(c)(4).

security holder the highest consideration paid to any other security holder pursuant to the rescission offer. Accordingly, the Commission is adopting that exception under Rule 13e-4(g)(6)<sup>65</sup> as proposed.

One commentator suggested that the Commission expand the rescission offer exception for issuer tender offers to offers not registered under the Securities Act. Typically, rescission offers are made because there may have been violations of section 5 of the Securities Act,<sup>66</sup> and in an attempt to remedy these violations a Securities Act filing is undertaken.<sup>67</sup> The Commission has determined not to expand the rescission offer exception. An issuer seeking to make an unregistered rescission offer may request an exemption from the provisions of the all-holders and best-price rule pursuant to redesignated paragraph (g)(7) of Rule 13e-4.<sup>68</sup>

#### D. Minimum Offering Period

Rules 14e-1(b) and 13e-4(f)(1)(ii) currently provide that a tender offer must remain open for ten business days upon an increase in the offered consideration or the dealer's soliciting fee.<sup>69</sup> In Release Nos. 33-6595 and 6596, the Commission proposed to add, as an additional trigger for the ten business day period, an increase in the amount of securities sought pursuant to a tender offer.

In Release No. 33-6619, the Commission proposed to further revise Rules 14e-1(b) and 13e-4(f)(1)(ii) to provide that a decrease in consideration offered or amount of securities sought would also trigger the ten business day extension. These proposed amendments were intended to ensure that security holders receive information pertaining to the amended offer and have additional time to analyze that offer and withdraw tendered shares.

<sup>65</sup> 17 CFR 240.13e-4(g)(6).

<sup>66</sup> 15 U.S.C. 77e.

<sup>67</sup> It should be noted, however, that the making of a rescission offer does not eliminate the prior securities law violation. In addition, neither the acceptance nor the rejection of such an offer necessarily extinguishes the security holders' rights to sue for the violation.

<sup>68</sup> The Commission may also use its exemptive authority under Rule 13e-4 to allow issuers to exclude officers and directors from the general all-holders requirement in those instances where the exclusion is not contrary to the purposes of the all-holders provision.

<sup>69</sup> In this regard, the Commission notes that in a recent tender offer the bidder publicly announced that it was prepared to increase the consideration offered if a specified number of shares were tendered prior to the expiration of the offer. In the Commission's view, such a public announcement constitutes an increase in the consideration offered, requiring the filing of an amendment to the Schedule 14D-1 and the extension of the offering period for ten business days.

In addition, the Commission proposed to revise the language in Rules 14e-1(b) and 13e-4(f)(1)(ii) from "amount of securities sought" to "percentage of securities sought." This proposed revision recognized those circumstances where an increase in the number of shares sought does not increase the percentage of shares ultimately sought. This situation may occur in a partial tender offer where a bidder, in the face of an issuance of securities by the issuer, continues to offer for the same desired percentage of outstanding securities even though the total number of securities sought increases.<sup>70</sup>

The ten business day time period will only be triggered as a result of changes in the offer effected by the bidder. Thus, if the target company increases the number of shares outstanding and the bidder does nothing, the ten business day time period will not be triggered despite the fact that the percentage of securities sought by the bidder has decreased. Only if the bidder's own actions cause a decrease or increase in the consideration offered or percentage of securities sought will the ten business day time period be triggered.

The majority of commentators who addressed these proposed amendments supported them, and, accordingly, the Commission is adopting them substantially as proposed. Other commentators suggested that the Commission clarify whether *de minimis* purchases of securities in addition to the amount initially sought would trigger the additional time period. The Commission agrees that such a clarification is necessary and has amended Rules 13e-4(f)(1)(ii) and 14e-1(b) to provide that if at the expiration of the offer, the offeror

<sup>70</sup> The minimum period during which an offer must remain open following material changes in the terms of the offer or information concerning the offer, other than a change in price or percentage of securities sought, will depend on the facts and circumstances, including the relative materiality of the terms or information. As a general rule, the Commission is of the view that, to allow dissemination to shareholders "in a manner reasonably designed to inform [them] of such change" (17 CFR 240.14d-4(c)), the offer should remain open for a minimum of five business days from the date that the material change is first published, sent or given to security holders. If material changes are made with respect to information that approaches the significance of price and share levels, a minimum period of ten business days may be required to allow for adequate dissemination and investor response. Moreover, the five business day period may not be sufficient where revised or additional materials are required because disclosure disseminated to security holders is found to be materially deficient. Similarly, a particular form of dissemination may be required. For example, amended disclosure material designed to correct materially deficient material previously delivered to security holders would have to be delivered rather than disseminated by publication.

accepts for payment an additional amount of securities that is less than two percent of the class of securities that is the subject of the tender offer<sup>71</sup> the tender offer will not be required to remain open for an additional time period. For example, under Rule 13e-4(f)(1)(ii) and 14e-1(b), if an offer were made for 51% of the class and 52.9% were tendered in response to that offer, the offeror could purchase the entire amount tendered without triggering the requirement to extend the offering period for ten business days. Conversely, the exercise of a reservation of a right to acquire an additional amount of securities tendered that is greater than two percent of the amount outstanding will trigger the requirement.

#### E. Withdrawal Rights

In Release No. 33-6619, the Commission proposed amending Rules 13e-4(f)(2) and 14d-7 in one of two alternate ways. The first alternative would provide for additional withdrawal rights for ten business days from the date that notice of a decrease in the consideration offered or percentage of securities sought is first communicated to security holders.<sup>72</sup> This proposal was intended to ensure that security holders who tendered prior to the decrease have the ability to reconsider their tender in light of the disclosure.

The Commission also proposed, as a second alternative, a broader approach to withdrawal rights. In light of the existing offering period framework, the Commission, as an alternative proposal, sought comment on a rule amendment that would extend withdrawal rights until the expiration of the tender offer. This proposal would protect security holders through a system that provides for prorationing and withdrawal throughout the offering period.<sup>73</sup> In this connection, the Commission pointed out that if the proposal to extend withdrawal rights throughout the offer is adopted no additional withdrawal rights

<sup>71</sup> The standard of less than two percent is consistent with the exemptions provided by sections 13(d)(6) and 14(d)(8) of the Exchange Act, 15 U.S.C. 78m(d)(6) and 78n(d)(8). For purposes of Rules 13e-4(f)(1)(ii) and 14e-1(b), the percentage of a class of securities will be calculated in accordance with Section 14(d)(3) of the Exchange Act.

<sup>72</sup> See 17 CFR 240.13e-4(e) and 240.14d-4(c).

<sup>73</sup> The Commission has previously expressed a view that there should be coextensive withdrawal periods. See, e.g., Statement of John S.R. Shad, Chairman of the Securities and Exchange Commission, before the House Subcommittee on Telecommunications, Consumer Protection, and Finance, March 28, 1984.

will attach in the event of the commencement of a competing offer.<sup>74</sup>

Commentators generally favored the proposal to extend withdrawal rights throughout the offer over the proposal to require additional withdrawal rights for ten business days from the date that notice of a decrease in consideration or percentage of securities sought is announced. Commentators were opposed, however, to linking withdrawal rights throughout the offering period with abolishing the extension of additional withdrawal rights upon commencement of a competing third party offer. The Commission, however, believes that given the significant extension of withdrawal rights there is no need to continue to require the additional withdrawal rights upon commencement of a competing bid.

The amendments also have the advantage of significantly simplifying the process. As a result of these amendments, security holders will have only one date to be concerned with—the expiration date. Proration and withdrawal rights will exist throughout the offer. A bidder will be the master of its own bid; timing will not be altered by actions of a competing bidder. This should reduce the potential for gamesmanship in commencing competing bids. Accordingly, the Commission is adopting, as proposed, the alternative requiring withdrawal rights to extend throughout the offer. By requiring withdrawal rights to extend throughout the offer, there is no longer a need to require under paragraph (f)(7) of Rule 13e-4 that the computation of withdrawal rights be done on a concurrent as opposed to a consecutive basis. Accordingly, paragraph (f)(7) of Rule 13e-4 has been amended to delete any references to withdrawal rights.

#### V. Final Regulatory Flexibility Analysis

This final regulatory flexibility analysis, which relates to Rule 13e-4 and Regulations 14D and E, has been prepared in accordance with 5 U.S.C. 604. The corresponding Initial Regulatory Flexibility Analyses are contained in the proposing releases.<sup>75</sup>

<sup>74</sup> See Report of Recommendations of Advisory Committee on Tender Offers at 28-29 (July 8, 1983). The Advisory Committee's recommendation to eliminate the extension of withdrawal rights upon commencement of a competing bid was premised on the idea "that each bidder should control its own bid" and that the other recommendations concerning withdrawal periods "provide[] shareholders protections comparable to those under the current system." *Id.* at 29.

<sup>75</sup> Release No. 33-6595 (July 1, 1985) [50 FR 27976]; Release No. 33-6596 (July 1, 1985) [50 FR 28210].

#### The Need for and Objectives of the All-Holders and Best-Price Requirements

The Commission has recognized a need to provide clarity and certainty in the regulatory scheme applicable to tender offers with respect to equal treatment of security holders. The all-holders and best-price provisions are necessary to achieve the investor protection purposes of the Exchange Act. Without these provisions, discriminatory tender offers could be effected by extending the offers to some security holders but not others or by making offers to security holders at varying prices. The objective of the all-holders requirement and best-price provision is to make explicit the requirement that issuers and bidders alike must extend their tender offers to all holders of the class of securities being sought in the tender offer and must pay every tendering security holder the highest consideration paid to any other security holder.

The best-price provision also necessitates that the Commission adopt amendments to Rules 13e-4 and 14d-7 regarding withdrawal rights and to Rules 13e-4 and 14e-1(b) that would require the offering period to remain open for ten business days upon announcement of an increase or decrease in the percentage of securities being sought or consideration offered by the offeror. In addition, the amendments to Rule 14e-1(b) would implement, *inter alia*, a recommendation of the Advisory Committee on Tender Offers.<sup>76</sup>

#### Issues Raised by Public Comment

No commentators commented on the Initial Regulatory Flexibility Analyses contained in the proposing releases.

#### Significant Alternatives

Very few, if any, small issuers would be affected by Rule 14d-10 and the amendments to Rule 14d-7. Accordingly, the Commission does not believe that other alternatives, including use of a performance rather than a design standard, or exempting small entities from all or part of the all-holders requirement and best-price provision would accomplish the Commission's statutory mandate to protect investors.

With respect to the amendments to Rules 13e-4 and 14e-1(b), an alternative would be to impose fewer requirements on tender offers by small issuers, such as exempting from the rule affected small entities or limiting the rules' applicability to those tender offers that

<sup>76</sup> See Report of Recommendations of the Advisory Committee on Tender Offers, *supra*, Recommendation 18.

meet certain standards, such as tender offers for the securities of issuers subject to section 15(d) of the Exchange Act<sup>77</sup> or tender offers made to residents of no more than one state. The Commission does not believe that such alternative proposals would be consistent with the Commission's statutory mandate of investor protection. Similarly, the Commission does not consider the use of performance rather than design standards to be a significant alternative because a performance standard would be inconsistent with the Commission's statutory mandate.

#### VI. Statutory Basis and Text of Amendments

The Commission hereby proposes to amend Rule 13e-4 and Regulations 14D and 14E pursuant to sections 3(b), 9(a)(6), 10(b), 13(e), 14(d), 14(e) and 23(a) of the Exchange Act, Section 23(c) of the Investment Company Act of 1940 and the Delegation of Functions Act, 15 U.S.C 78d-1.<sup>78</sup>

#### List of Subjects in 17 CFR Parts 200 and 240

Reporting and recordkeeping requirements, Securities, Tender Offers, Issuers, Administrative practice and procedures, Freedom of information, Privacy.

#### VII. Text of Amendments

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows:

#### PART 200—ORGANIZATION: CONDUCT AND ETHICS: INFORMATION AND REQUESTS

1. The authority citation for Part 200 continues to read in part:

Authority: Secs. 19, 23, 48 Stat. 85, 901, as amended, sec. 20, 49 Stat. 833, sec. 319, 53 Stat. 1173, secs. 38, 211, 54 Stat. 841, 855; 15 U.S.C 77s, 78w, 79f, 77sss, 80a-37, 80b-11 \* \* \*

2. By adding paragraph (f)(12) to § 200.30-1 to read as follows:

#### § 200.30-1 Delegation of authority to Director of Division of Corporation Finance.

(f) \* \* \*  
(12) To grant exemptions from Rule 14d-10 (Section 240.14d-10 of this Chapter) pursuant to Rule 14d-10(e) (Section 240.14d-10(e) of this Chapter).  
\* \* \* \* \*

<sup>77</sup> 15 U.S.C. 780(d).

<sup>78</sup> 15 U.S.C. 79c(b), 78i(a)(6), 78j(b), 78m(e), 78n(d), 78n(e), 78w(a) and 15 U.S.C. 80a-23(c).

3. By revising paragraph (a)(35) of § 200.30-3 to read as follows:

§ 200.30-3 Delegation of Authority to the Director of the Division of Market Regulation.

(a) \*\*\* (35) To grant exemptions from Rule 13e-4 (Section 240.13e-4 of this chapter) pursuant to Rule 13e-4(g)(7) (Section 240.13e-4(g)(7) of this chapter).

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

4. The authority citation for Part 240 is amended by adding the following citations: (Citations before \*\*\* indicate general rulemaking authority).

Authority: Sec. 23, 48 Stat. 901, as amended; 15 U.S.C 78w. \*\*\* §§ 240.13e-4, 14d-7, 14d-10 and 14e-1 also issued under secs. 3(b), 9(a)(6), 10(b), 13(e), 14(d) and 14(e), 15 U.S.C. 78c(b), 78i(a)(6), 78j(b), 78m(e), 78n(d) and 78n(e) and sec. 23(c) of the Investment Company Act of 1940, 15 U.S.C 80a-23(c).

5. By revising paragraph (f)(1)(ii) of §240.13e-4 to read as follows:

§ 240.13e-4 Tender offers by issuers.

(f) \*\*\* (1) \*\*\* (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.

5. By revising paragraph (f)(2)(i), removing paragraph (f)(2)(ii) and redesignating paragraph (f)(2)(iii) as (f)(2)(ii) of § 240.13e-4 to read as follows:

§ 240.13e-4 Tender offers by issuers.

(f) \*\*\* (2) \*\*\*

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

6. By revising paragraphs (f)(7) and (g)(5), redesignating paragraph (g)(6) as (g)(7), and adding new paragraphs (f)(8), (f)(9), (f)(10), (f)(11) and (g)(6), of § 240.13e-4 to read as follows:

§ 240.13e-4 Tender offers by issuers.

(f) \*\*\* (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 pursuant to the tender offer is the highest consideration paid to any other security holder during such 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.

(g) \*\*\* (5) Offers to purchase from security holders who own as of a specified date prior to the announcement of the offer

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 as of the specified date, except that an issuer can elect to exclude participants in an issuer's plan as that term is defined in Rule 10b-6(c)(4) under the Act [§ 240.10b-6(c)(4)], 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; or

7. By revising paragraph (a), removing paragraphs (b) and (c) and redesignating paragraph (d) as (b) of § 240.14d-7 to read as follows:

§ 240.14d-7 Additional withdrawal rights.

(a) Rights. In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the period such offer request or invitation remains open.

8. By adding a new § 240.14d-10 to read as follows:

§ 240.14d-10 Equal treatment of security holders.

(a) No bidder shall make a tender offer unless:

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

(2) The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer.

(b) Paragraph (a)(1) of this section shall not:

(1) Affect dissemination under Rule 14d-4 (§ 240.14d-4); or

(2) Prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good

faith effort by the bidder to comply with such statute.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:

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

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

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

(1) The bidder may offer security holders in such state an alternative form of consideration; and

(2) Paragraph (c) of this section shall not operate to require the bidder to offer or pay the alternative form of consideration to security holders in any other state.

(e) This section shall not apply to any tender offer with respect to which the Commission, upon written request or upon its own motion, either unconditionally or on specified terms and conditions, determines that compliance with this section is not necessary or appropriate in the public interest or for the protection of investors.

9. By revising paragraph (b) of § 240.14e-1 to read as follows:

**240.14e-1 Unlawful tender offer practices.**

(b) Increase or decrease the percentage of the class of securities being sought or the consideration offered or the dealer's soliciting fee to be given in a tender offer unless such tender remains open for at least ten business days from the date that notice of such increase or decrease is first published or sent or given to security holders.

*Provided, however,* That, for purposes of this paragraph, the acceptance for payment by the bidder 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.

By the Commission, Commissioners Peters and Fleischman dissenting in part. The separate written views of any individual Commissioner will be published forthwith in

Release Nos. 33-6653 A, 34-23421 A and IC-15199 A.

Jonathan G. Katz,

Secretary.

July 11, 1986.

[FR Doc. 86-16144 Filed 7-16-86; 8:45 am]

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

**21 CFR Part 5**

**Delegations of Authority and Organization; Center for Devices and Radiological Health**

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the regulations for delegations of authority by adding a new delegation to the Director and Deputy Director of the Center for Devices and Radiological Health from the Commissioner of Food and Drugs. The authority being added relates to registration and testing of cardiac pacemaker devices and pacemaker leads.

**EFFECTIVE DATE:** July 17, 1986.

**FOR FURTHER INFORMATION CONTACT:** Marjorie J. Shandruk, Office of Management and Operations (HFA-340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4976.

**SUPPLEMENTARY INFORMATION:** FDA is amending the regulations under Part 5 to delegate to the Director and Deputy Director, Center for Devices and Radiological Health, the authorities to perform the functions that have been delegated to the Commissioner of Food and Drugs under section 1862(h)(1), (2)(A), and (3) of the Social Security Act (42 U.S.C. 1395y(h)(1), (2)(A), and (3)), as amended.

Further redelegation of the authority delegated is not authorized. Authority delegated to a position by title may be exercised by a person officially designated to serve in such position in an acting capacity or on a temporary basis.

**List of Subjects in 21 CFR Part 5**

Authority delegations (Government agencies), Organization and functions (Government agencies).

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner

of Food and Drugs, Part 5 is amended as follows:

**PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION**

1. The authority citation for 21 CFR Part 5 continues to read as follows:

**Authority:** 5 U.S.C. 504, 552; 7 U.S.C. 2217; 15 U.S.C. 638, 1451 et seq.; 21 U.S.C. 41 et seq., 61-63, 141 et seq., 301-392, 467f(b), 679(b), 801 et seq., 823(f), 1031 et seq., 35 U.S.C. 156; 42 U.S.C. 219, 241, 242(a), 242a, 242l, 242o, 243, 262, 263, 263b through 263m, 264, 265, 300u et seq., 1395y and 1395y note, 3246b(b)(3), 4831(a), 10007, and 10008; Federal Caustic Poison Act (44 Stat. 1406); Comprehensive Drug Abuse Prevention and Control Act of 1970 (84 Stat. 1241); Federal Advisory Committee Act (Pub. L. 92-463); E.O. 11490, 11921.

2. Subpart B is amended by adding new § 5.28 to read as follows:

**§ 5.28 Cardiac pacemaker devices and pacemaker leads.**

The Director and Deputy Director, Center for Devices and Radiological Health (CDRH), are authorized to perform all the functions of the Commissioner of Food and Drugs with regard to a registry of all cardiac pacemaker devices and pacemaker leads for which payment was made under the Social Security Act (42 U.S.C. 1395y(h)(1), (2)(A), and (3)), as amended.

Dated: July 10, 1986

James W. Swanson,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 86-16064 Filed 7-16-86; 8:45 am]

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**DEPARTMENT OF THE INTERIOR**

**Office of Surface Mining Reclamation and Enforcement**

**30 CFR Part 935**

**Approval of Permanent Amendments for the State of Ohio Under the Surface Mining Control and Reclamation Act of 1977**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

**ACTION:** Final rule.

**SUMMARY:** OSMRE is announcing the approval of certain amendments to the Ohio permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

By letter dated October 26, 1985, the Ohio Department of Natural Resources