

[8010-01]

SECURITIES AND EXCHANGE
COMMISSION

[17 CFR Part 240]

[Release No. 34-14234; File No. S7-731]

REGULATION OF ISSUER TENDER
OFFERSProposed Rule Under the Securities
Exchange Act of 1934AGENCY: Securities and Exchange
Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission proposes for comment a new rule and related schedule regulating issuer tender and exchange offers. If adopted, the proposed rule and schedule would impose substantive and disclosure requirements with respect to tender and exchange offers by issuers for their securities. By providing substantive regulation of issuer tender offers, the Commission seeks to prevent fraudulent, deceptive or manipulative acts or practices which may occur in the absence of such regulation.

DATE: Comments should be submitted
on or before February 24, 1978.ADDRESS: Send comments to George
A. Fitzsimmons, Secretary, Securities and
Exchange Commission, Room 892, 500
North Capitol St., Washington, D.C.
20549.Persons wishing to submit written
views, data and arguments should file
three copies of their comments.All submissions should refer to File No.
S7-731 and will be available for public
inspection at the Commission's Public
Reference Room, Room 6101, 1100 L
Street NW., Washington, D.C.FOR FURTHER INFORMATION CON-
TACT:Mary Sebek, Office of Market Struc-
ture and Trading Practices, Division
of Market Regulation, Securities and
Exchange Commission, 500 North
Capitol Street, Washington, D.C.
20549, 202-755-8748.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission today proposed for comment new Rule 13e-4 and related Schedule 13E-4 pursuant to Sections 3(b), 10(b), 13(e), 14(e) and 23(a) of the Securities Exchange Act of 1934 (the "Act") (15 U.S.C. 78a et seq., as amended by Pub. L. No. 94-29, 89 Stat. 97 (June 4, 1975)) to regulate certain issuer tender and exchange offers. If adopted, these proposals would require that, in connection with tender and exchange offers for their own equity securities, all issuers with a class of equity securities registered pursuant to Section 12 of the Act or required to file periodic reports pursuant to Section 15(d) of the Act and closed-end investment companies registered under the Investment Company Act of 1940 comply with substantive and disclosure rules

See footnotes at end of article.

which, in part, follow those currently required only in connection with tender and exchange offers by persons other than issuers.

The Commission also wishes to call attention to the recent publication for comment of Proposed Rule 13e-3 (17 CFR 240.13e-3) and Proposed Schedule 13E-3 (17 CFR 240.13e-100) which, if adopted, would regulate going private transactions. See Securities Exchange Act Release No. 14185 (Nov. 17, 1977) 42 FR 60900. If Rules 13e-3 and 13e-4 are adopted, an issuer tender offer which is a "Rule 13e-3 transaction," as defined in paragraph (a) (4) of Proposed Rule 13e-3 (17 CFR 240.13e-3(a) (4)), would have to be effected in compliance with both rules. Since a Rule 13e-3 transaction involving a tender offer may require a different regulatory approach than an issuer tender offer which is not part of a series of transactions causing an issuer to go private, alternative regulatory approaches which the Commission may adopt for going private issuer tender offers are noted in this release and comment is specifically invited on the appropriateness of each such alternative approach.

Proposed Rule 13e-4 and Schedule 13E-4 are based on the Commission's Public Fact-Finding Investigation in the Matter of Beneficial Ownership, Takeovers and Acquisitions by Foreign and Domestic Persons,¹ Congressional hearings,² judicial decisions and the Commission's experience with the existing regulatory framework (including its proposed third party tender offer rules).³ The proposals are not applicable to presently pending tender offers by issuers and, if adopted, would not apply to issuer tender offers announced prior to the effective date.

I. BACKGROUND

The Williams Act Amendments⁴ to the Act provided for federal regulation of tender offers, subject to certain specified exceptions. The 1968 takeover legislation was aimed specifically at tender offers which involved a potential shift of control.⁵ Accordingly, the initial version of S. 510 excluded acquisitions through tender offers by issuers for their own securities.⁶

During hearings on the legislation which eventually became the Williams Act, it was suggested that the basic pattern of Section 2 of the pending bill (which eventually became Section 14(d) of the Act) should be equally applicable to tender offers by issuers.⁷ In response, the Commission emphasized that disclosure in issuer tender offers differs from that which should be made by a third party during a contest for corporate control,⁸ but stated that "[i]f 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 the provisions of (Section 14(d)) to the extent appropriate."⁹ As adopted, the Williams Act added Section 14(d) (8) (B) to the Act which speci-

ficably exempts "any offer for, or request or invitation for tenders of, any security * * * by the issuer of such security * * *" from the provisions of Section 14(d) of the Act.

In addition to the regulation of certain tender offers by persons other than the issuer, the Williams Act also amended Section 13 of the Act by adding paragraph 13(e) (1) which makes it unlawful for an issuer with a class of equity securities registered pursuant to Section 12, or a closed-end investment company registered under the Investment Company Act of 1940, to purchase its equity securities in contravention of rules adopted by the Commission "to define acts and practices which are fraudulent, deceptive or manipulative" and "to prescribe means reasonably designed to prevent such acts and practices."¹⁰ The Williams Act also added Section 13(e) (2) of the Act which attributes purchases by a control person to the issuer.¹¹

To date, with the exception of Rule 10b-13 (17 CFR 240.10b-13),¹² which prohibits any person who makes a tender or exchange offer for any equity security from purchasing, during the tender offer, such security otherwise than pursuant to such offer, and Rule 10b-4 (17 CFR 240.10b-4),¹³ which prohibits short tendering during any tender offer, the only regulation of issuer tender offers has been pursuant to the antifraud provisions of Section 10(b) (and Rule 10b-5 (17 CFR 240.10b-5) thereunder) and Section 14(e) under the Act.¹⁴

To a limited extent, the Commission's staff has indirectly regulated certain issuer tender and exchange offers which are exempt from the Williams Act. If an issuer is deemed to be engaged in a "distribution," for purposes of Rule 10b-6 (17 CFR 240.10b-6), of the securities for which the tender offer is being made, an application for an exemption from Rule 10b-6 must be made, pursuant to paragraph (f) of the Rule, prior to the tender offer purchases. If granted, the exemption customarily permits the purchases to be effected only pursuant to specified terms and conditions of a Rule 10b-6 exemption which, in the case of a tender or exchange offer, generally follow the requirements of Sections 14(d) (5)-(7) of the Act.

II. THE NEED FOR RULEMAKING

The Commission believes that this indirect regulation of some issuer tender offers, while consistent with the need to protect investors and the public interest, should be replaced by a more direct and comprehensive method of regulation. By providing substantive regulation of issuer tender offers, the Commission seeks to prevent fraudulent, deceptive or manipulative acts or practices which may occur in the absence of such regulation.

Rule 13e-4 is being proposed pursuant to Sections 3(b), 10(b), 13(e), 14(e) and 23(a) of the Act. Accordingly, the proposals set forth herein will apply not only to all tender offers by issuers with a class of equity securities registered

pursuant to Section 12 of the Act and all closed-end investment companies registered under the Investment Company Act of 1940, but also to tender offers by issuers required to file periodic reports pursuant to Section 15(d) of the Act. The proposals will apply irrespective of whether, for purposes of Rule 10b-6, a distribution of the subject security exists. The Commission believes that, if adopted, the proposals will afford issuers a degree of certainty in planning tender offers for their own securities and will provide securityholders with substantive protections and disclosure more closely paralleling that afforded securityholders in tender offers subject to the Williams Act.

III. SUMMARY OF PROPOSED RULE 13E-4

1. PERIOD OF THE TENDER OFFER

Paragraph (b) (3) of Proposed Rule 13e-4 would require that an issuer tender offer remain open for at least fifteen business days after the time definitive copies of the offer are first published, sent or given to securityholders.¹⁵ There is presently no minimum time period for third party tender offers although the seven day withdrawal period required by Section 14(d) (5) of the Act has had the effect of establishing a seven day minimum tender offer period. The Commission believes that a minimum requirement is necessary to insure that all securityholders are given a reasonable opportunity to consider the terms of and participate in the tender offer.

2. SUBJECTS OF THE OFFER

Paragraph (b) (4) of Proposed Rule 13e-4 would require that any tender offer by an issuer for its securities be made to all holders of the class of subject security,¹⁶ with one exception. The exception would involve so-called "odd lot" tender offers by issuers.

The stated corporate justification for odd lot tender offers is normally the high cost of servicing holders of a small number of securities¹⁷ relative to the value of those securities.¹⁸ In the case of low-priced securities, the annual cost of servicing a securityholder actually may equal or exceed the total market value of the issuer's securities held by an odd lot securityholder.

Odd lot tender offers can be beneficial to both the issuer and its remaining securityholders¹⁹ and to the odd lot holders who are generally given the opportunity to dispose of their securities with little or no transaction costs.

For the foregoing reasons, Proposed Rule 13e-4 would provide special treatment for tender offers by an issuer to owners of less than one hundred shares of that issuer's securities.²⁰ Thus, the proviso to paragraph (b) (4) of Proposed Rule 13e-4 would permit a tender offer to be made by an issuer to persons who own, of record or beneficially, an aggregate of less than one hundred shares.²¹ Clause (B) of the proviso to paragraph (b) (6) would exclude odd lot tender offers from the Rule's requirement of pro-

rata acceptance by permitting the issuers to accept, in full, securities tendered by odd lot holders who tender all their securities. Finally, the proviso to paragraph (b) (7) would permit the price offered in an odd lot offer to be expressed in terms of a formula rather than a fixed price.

The treatment in Proposed Rule 13e-4 of odd lot tender offers may be inappropriate in a tender offer which is a "Rule 13e-3 transaction," particularly in view of the requirement in Proposed Rule 13e-3 that the transaction be fair. The Commission requests comment on whether the terms of a tender offer which would be "Rule 13e-3 transaction," should either afford odd lot holders of subject securities different treatment than round lot holders of subject securities or require the same treatment.

3. WITHDRAWAL RIGHTS

Paragraph (b) (5) of Proposed Rule 13e-4 would provide that securities deposited pursuant to the tender offer may be withdrawn at any time until the expiration of at least ten business days after the time the offer is first published, sent or given to securityholders²² and, if the tendered securities have not been accepted for payment, at any time during the seven business days following the date a Schedule 14D-1 (17 CFR 240.14d-100) is filed with the Commission relating to a competing tender offer by a subsequent bidder. In addition, securityholders may withdraw their securities at any time after forty business days from the date of the original offer if the tendered securities have not been accepted for payment. By assuring securityholders who tender their shares immediately after the offer commences a short period within which to reconsider, paragraph (b) (5) of Proposed Rule 13e-4 would protect securityholders from being pressured into accepting the tender offer prior to the time all relevant facts concerning the offer are fully disclosed and disseminated. The right of withdrawal after forty business days, if the tendered securities have not been accepted for payment, assures that a securityholder will not have his securities "locked in" for an unreasonable amount of time.²³ In the interim, the issuer is provided with a degree of certainty respecting the success of the offer and can extend, terminate, or revise the offer accordingly.

The additional withdrawal rights for seven business days after a Schedule 14D-1 relating to a competing offer by a subsequent purchaser as filed with the Commission is designed to permit a securityholder the opportunity to respond to a more favorable offer.²⁴

4. PRO RATA ACCEPTANCE

Paragraph (b) (6) of Proposed Rule 13e-4 would provide for pro rata acceptance where a greater number of securities are deposited within ten business days from the commencement of the offer than the issuer will accept. This provision is based on Section 14(a) (6) of the Act, which was designed to "allow all

shareholders a fair opportunity to participate in the offer."²⁵ Paragraph (b) (6) of Proposed Rule 13e-4 would not impose restrictions on the method of accepting tendered securities after ten business days from the commencement of the offer unless the consideration is increased.

Clause (A) of the proviso to paragraph (b) (6) of Proposed Rule 13e-4 would permit the issuer to select a longer period of time, including the entire length of the tender offer, during which pro rata acceptance of tendered securities would occur. Thus, an issuer could stipulate that all securities tendered during the period of the tender offer would be accepted on a pro rata basis regardless of when such securities were tendered.²⁶

Finally an exception to the pro rata acceptance provision would be permitted by clause (B) of the proviso to paragraph (b) (6) of Proposed Rule 13e-4, which would permit an issuer to accept, in full, securities tendered by holders of less than a specified number of such securities, not to exceed an odd lot, who tender all their securities before accepting securities tendered by others on a pro rata basis.²⁷

Clause (C) of the proviso to paragraph (b) (6) of Proposed Rule 13e-4 would permit an issuer to give security holders the opportunity to designate that their tendered securities be accepted on an "all or none" or "part or none" basis rather than pro rata.²⁸

5. CONSIDERATION

Paragraph (b) (7) of Proposed Rule 13e-4 would require that the same consideration be offered to all security holders²⁹ and that any increase in consideration subsequently offered be paid for all securities previously tendered. Section 14(d) (7) of the Act presently requires that a person who makes a tender offer for equity securities and, prior to the expiration thereof, increases the consideration to be paid for such securities, must pay the increased consideration to all holders who have previously tendered their securities pursuant to the offer, without regard to whether such securities had been accepted before the increase in consideration was announced. This provision was designed "to assure fair treatment of those persons who tender their shares at the beginning of the tender period, and to assure equality of treatment among all shareholders who tender their shares."³⁰ The Commission believes that the principle of fair treatment embodied in Section 14(d) (7) of the Act should be equally applicable to tender offers by issuers.

6. ABSTENTION FROM OTHER PURCHASES OF THE SUBJECT SECURITY UNTIL TEN BUSINESS DAYS AFTER THE OFFER EXPIRES

Paragraph (b) (8) of Proposed Rule 13e-4 would prohibit purchases of the subject security by the issuer until at least ten business days after the offer terminates. This provision is intended to supplement and expand the protection afforded by Rule 10b-13.³¹ The Com-

See footnotes at end of article.

mission believes that a period of ten business days after a tender offer is sufficient to permit the impact of the offer on the market to subside before subsequent purchases are made. With respect to a tender offer by an issuer which is deemed to be a "Rule 13e-3 transaction" within the contemplation of Proposed Rule 13e-3(a)(4) (see pages 2-3 supra), the Commission wishes commentators to specifically address the question of whether, with respect to post-tender offer purchases, the approach of paragraph (b)(8) of Proposed Rule 13e-4 or a modification of the approach of Proposed Rule 14d-6,³² which would leave only the best price provision applicable to a bidder's post-tender offer purchases, is more appropriate for going private tender offers.

7. COVERAGE OF THE PROPOSED RULE

(a) *Control persons.* Section 13(e)(2) of the Act states that "[f]or the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer." The Commission believes that purchases by a person in a control relationship with an issuer should not be exempted from substantive tender offer regulation since a tender offer by such a person raises the same potential for fraud, deception, or manipulation as an offer by the issuer itself. As was noted by former Chairman Cohen:

We have found that purchases by a parent or a subsidiary of the issuer, or anyone else in a control relationship with the issuer, * * * give rise to similar problems (as purchases by the issuer) * * *.³³

However, purchases by affiliates or persons in a control relationship with an issuer are presently subject to regulation under the Williams Act.³⁴ Nevertheless, because of the language of Section 13(e)(2) of the Act,³⁵ the Commission requests that commentators address the issue of whether tender offers by control persons should be exempted from some or all of the provisions of Proposed Rule 13e-4.

(b) *Special Bids.* The Commission has stated that "a 'special bid' to purchase equity securities through the facilities of a national securities exchange * * * would constitute a 'tender offer' or 'request or invitation for tenders' within the meaning of Sections 14(d) and (e) of the Act."³⁶ The practical effect of this position has been to greatly reduce the prospects of using the special bid technique since it is virtually impossible for a bidder to comply with the withdrawal and proration provisions of Section 14(d).³⁷

Since the Commission believes that the notice, withdrawal, proration and other substantive provisions of Proposed Rule 13e-4 are essential for the fair and equal treatment of all securityholders, any benefit an issuer may derive from the use of a special bid³⁸ is of secondary importance. In order to acquire its own securities, an issuer can still utilize open market or privately negotiated transactions,³⁹ or, of course, a tender offer.

See footnotes at end of article.

8. EXEMPTIVE AUTHORITY

Paragraph (c) of Proposed Rule 13e-4 would exempt from its provisions calls or redemptions of a security in accordance with the terms of its governing instrument, offers to purchase fractional interests in a security and offers to purchase a security in connection with the statutory rights of dissenting securityholders. In addition, paragraph (c)(4) of Proposed Rule 13e-4 would authorize the Commission, upon written request or its own motion, to exempt any transaction, either unconditionally or on specified terms and conditions, as not constituting a fraudulent, deceptive or manipulative act or practice comprehended within the purpose of the Rule.

IV. SUMMARY OF PROPOSED SCHEDULE 13E-4

Section 13(e)(1) of the Act specifically addresses the need for disclosure in issuer repurchases (including tender offers) by stating that:

Such rules (adopted by the Commission under Section 13(e)(1)) may require an issuer to provide (shareholders with information) relating to the reasons for such purchases, the source of funds, the number of shares to be purchased, the price to be paid for such securities, (and) the method of purchase * * *.

This is not to suggest, however, that the disclosure required by an issuer tender offer rule should exactly parallel third party tender offer disclosure. This was recognized both by commentators⁴⁰ and the Commission⁴¹ during the 1967 hearings on the takeover bill. Accordingly, the information which would be required by Proposed Schedule 13E-4 is somewhat different from that required for third party tender offers by Schedule 14D-1.⁴² The terms "bidder" and "subject company" contained in Schedule 14D-1 are not used in Schedule 13E-4; instead the term "issuer" is used throughout. In addition, Item 2 of Schedule 14D-1, relating to the identity of the bidder (if other than the issuer), and Item 3 of Schedule 14D-1, concerning past relationships, transactions or negotiations between the bidder and the issuer, are not included in Proposed Schedule 13E-4 because of the absence of a third party bidder. Information comparable to that required by Item 9 of Schedule 14D-1 ("Financial Statements of Certain Bidders") would not be required by Proposed Schedule 13E-4. Because Proposed Rule 13e-4 (unlike Section 14(d)) is intended to apply to issuers required to file periodic reports pursuant to Section 15(d) of the Act, Item 3 of Proposed Schedule 13E-4 ("Purpose of the Tender Offer and Plans or Proposals of the Issuer") contains paragraph (h) (relating to the suspension of the obligation to file periodic reports under Section 15(d) of the Act). Finally, commentators are requested to consider whether Instruction 2 to Item 4 of Proposed Schedule 13E-4 ("Interests in Securities of the Issuer"), which is intended to facilitate efforts to preserve the confidentiality of the tender offer in

order to avoid possible misuse of inside information, would adequately achieve that purpose.⁴³

V. ADDITIONAL INQUIRIES

A. DISSEMINATION OF TENDER OFFER MATERIAL TO BENEFICIAL OWNERS

Paragraph (b)(2) of Proposed Rule 13e-4 would require that a statement containing the information required by Proposed Schedule 13E-4 (or a fair and adequate summary thereof) be published, sent or given to all holders of the subject securities. If the issuer sends such a statement (or summary thereof) to record holders, it must also make a reasonable effort to send such statement (or summary) to all beneficial holders of the subject securities. An issuer shall be deemed to have made a reasonable effort to send the information to beneficial holders if it follows Instruction (1)(B) of Proposed Schedule 13E-4 which is similar to Rule 14b-1 under the Act (17 CFR 240.14b-1) relating to the procedures for the dissemination of proxies and annual reports.

B. INCORPORATION BY REFERENCE

The Commission is soliciting comment on the appropriateness of utilizing some or all of the existing statutory tender offer provisions and existing (or proposed) Commission rules which apply to third party offers, through incorporation by reference, in connection with issuer tender offer regulation. Thus, for example, Rule 13e-4 could provide that the disclosure requirements of paragraph (b)(1) of the Proposed Rule would be satisfied if the issuer files a Schedule 14D-1 (modified, where appropriate, to reflect disclosure deemed appropriate for issuers only) rather than a separate Schedule 13E-4.

C. THE NEED FOR A RECOMMENDATION STATEMENT

Although it does not appear likely that a recommendation statement would generally be utilized in connection with a tender offer by an issuer for its own securities, situations may exist where officers, directors or securityholders of an issuer determine to recommend against the terms and conditions of an issuer tender offer. Commentators are asked to submit their views on the need for, and content of, a recommendation statement which would be utilized in connection with an issuer tender offer subject to Rule 13e-4.⁴⁴

D. RESTRICTIONS ON THE DURATION OF AN OFFER

There is presently no restriction on the length of time a tender offer (whether by an issuer or a third party) may remain outstanding. The Commission requests comments on whether and, if so, to what extent, it would be appropriate to limit the duration of a tender offer by an issuer for its own securities.

E. CERTAIN ADDITIONAL WITHDRAWAL RIGHTS

Notwithstanding the provisions of paragraph (b)(6) of Proposed Rule 13e-4,

which permit a tendering securityholder to withdraw his securities after the expiration of forty business days from the commencement of the tender offer if such securities have not been accepted for payment by the issuer, a tendering securityholder may nonetheless be deprived of access to his securities for an extended period of time. Accordingly, the Commission requests comment on whether the proposed Rule's forty business day withdrawal period should be shortened and whether the ten business day unconditional withdrawal period in the proposed Rule should be lengthened.

EFFECTS ON COMPETITION

The Commission is not aware of any burden on competition imposed by Proposed Rule 13e-4 and Schedule 13E-4 that would not be necessary or appropriate in furtherance of the purposes of the Act; however, comments on the impact of Proposed Rule 13e-4 and Proposed Schedule 13E-4 on competition in light of the purposes of the Act are specifically requested.⁴⁶

REQUEST FOR COMMENT

Accordingly, it is proposed to amend Title 17 of the Code of Federal Regulations, Chapter II, by adding § 240.13e-4 and § 240.13e-101 pursuant to the authority under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq., as amended by Pub. L. No. 94-29, 89 Stat. 97 (June 4, 1975)). Rule 13e-4 and Schedule 13E-4 are proposed pursuant to Sections 3(b), 10(b), 13(e), 14(e) and 23(a) of the Act (15 U.S.C. 78c(b), j(b), m(e), n(e) and w(a)).

§ 240.13e-4 Tender offers by issuers.

(a) It shall be a fraudulent, deceptive or manipulative act or practice for an issuer which has a class of equity securities registered pursuant to Section 12 of the Act or which is required to file periodic reports pursuant to Section 15 (d) of the Act or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase, directly or indirectly, any of its equity securities in a tender or exchange offer:

(1) As to which adequate disclosure of the terms of the offer, its purpose and other material information relevant to the offer has not been made;

(2) Which unreasonably discriminates among holders of securities which are the subject of the offer;

(3) Which is of unduly short duration or unduly restricts the right of persons tendering in response to the offer to withdraw their tendered securities;

(4) As to which the issuer unduly delays either the payment for securities tendered and accepted or the return of securities not accepted; or

(5) Which is employed by an issuer, directly or indirectly, for the purpose of creating or sustaining false or misleading market prices for the securities which are the subject of the offer.

(b) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in con-

nection with tender offers subject to the provisions of paragraph (a) of this section, it shall be unlawful for an issuer which has a class of equity securities registered pursuant to Section 12 of the Act or which is required to file periodic reports pursuant to Section 15(d) of the Act or which is a closed-end investment company registered under the Investment Company Act of 1940, directly or indirectly, to make a tender offer for any class of its equity securities unless simultaneously with or prior to the time the tender offer is first published, sent or given to securityholders:

(1) The issuer files ten copies of an Issuer Tender Offer Statement on Schedule 13E-4 (§ 240.13e-100) including all exhibits, with the Commission.

(2) A statement containing the information required by paragraph (b) (1) of this section, or a fair and adequate summary thereof, is published, sent or given to all holders of the subject securities, and, if the issuer sends such a statement or summary to all record holders, it makes a reasonable effort to send the statement or summary to all beneficial holders of its subject securities. For purposes of this section, an issuer which follows the procedures specified in Instruction (1) (B) of Schedule 13E-4 shall be deemed to have made a reasonable effort to send the statement or summary.

(3) The tender offer shall remain open until the expiration of at least fifteen business days from the time definitive copies of the offer are first published, sent or given to securityholders.

(4) The tender offer shall be made to all securityholders of the class of security subject thereto: *Provided, however*, That this provision shall not prohibit a tender offer which is limited to persons who own, of record or beneficially, an aggregate of less than one hundred shares of such security.

(5) Securities tendered pursuant to the tender offer may be withdrawn at any time until the expiration of ten business days after the time definitive copies of the offer or request or invitation are first published, sent or given to securityholders, and, if not accepted for payment by the issuer, at any time during the seven business days following the date a Schedule 14D-1 (§ 240.14d-100) is filed with the Commission relating to a competing tender offer by a subsequent bidder, and at any time after forty business days from the date of the original tender offer or request or invitation.

(6) If the number of securities tendered within ten business days after commencement of the tender offer exceeds the number of securities that will be accepted, all securities tendered will be accepted as nearly as possible on a pro rata basis (disregarding fractions) according to the number of securities tendered by each securityholder. The provisions of this section shall also apply to securities deposited within ten business days after notice of an increase in the consideration offered to securityholders, as described in paragraph (b) (7), of this section, is first published,

sent or given to securityholders; *Provided, however*, That this provision shall not prohibit the issuer from (i) accepting all securities tendered during the term of the offer on a pro rata basis; or (ii) accepting all securities tendered by holders of less than one hundred shares of such security who tender all their securities, before prorating securities tendered by others; or (iii) permitting securityholders who tender all securities held by them and who desire to have either all or none, or at least a minimum number or none, of their tendered securities accepted, to so designate when tendering their securities.

(7) The issuer offers the same consideration to all securityholders; and if, after the tender offer is published, sent or given, the consideration offered is increased, the issuer pays such increased consideration to all holders of such securities who previously have tendered their securities: *Provided, however*, That in connection with a tender offer made only to holders of less than one hundred shares of such security the terms of the offer may provide for the same formula for determining the consideration offered to all holders of less than one hundred shares.

(8) No purchases of such securities (otherwise than pursuant to the offer) are made by the issuer until at least ten business days after the termination of the offer.

(9) The issuer either pays the offered consideration or returns the securities deposited by or on behalf of securityholders within a reasonable time after the termination of the tender offer.

(c) This rule shall not prohibit:

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

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

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

(4) Any other transaction or transactions if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally, or on specified conditions, as not constituting a manipulative or deceptive device or contrivance or a fraudulent, deceptive or manipulative act or practice comprehended within the purpose of this section.

INSTRUCTION

(1) The tender offer shall be deemed "published, sent or given to securityholders" for purposes of this section if the issuer complies fully with one of the following:

(A) *Long-form publication.* Publishing the formal offer containing the information required by paragraph (b) (1) of this section in a newspaper which, depending on the facts and circumstances involved, may require publication in a newspaper with a national circulation or may only require publication in a newspaper with metropolitan or regional circulation;

⁴⁶ See footnotes at end of article.

(B) *Use of stockholder and other lists.* Mailing the formal offer containing the information required by paragraph (b)(1) of this section to all persons named on the issuer's most recent list of securityholders, furnishing the number of copies of the formal offer requested by brokers, banks and similar persons whose names appear or whose nominees appear on the list of securityholders or who are listed as participants on the most recent security position listing of any clearing agency which acts as a depository requesting such persons to forward such formal offer to the beneficial owners of such securities in a timely manner and undertaking to pay the reasonable expenses of such persons in forwarding such information; or

(C) *Summary publication.* Publishing a summary advertisement of such tender offer in a newspaper which, depending on the facts and circumstances involved, may require publication in a newspaper with a national circulation or may only require publication in a newspaper with metropolitan or regional circulation. The summary advertisement shall include at least:

- (1) The identity of the issuer;
- (2) The amount and class of securities being sought and the price being offered;
- (3) The scheduled expiration date of the tender offer and whether it may be extended;
- (4) The general purpose of the tender offer;
- (5) Appropriate instructions for record holders and beneficial owners of securities of the class being sought regarding how to obtain promptly, at the expense of the issuer, the information required by paragraph (b)(1) of this section; and

(6) A statement that the information required by paragraph (b)(1) of this section is incorporated by reference into the summary advertisement of the tender offer.

INSTRUCTION

(2) Material changes to the information first published, sent or given to securityholders pursuant to this section shall be promptly disseminated by the issuer in the manner in which the formal offer was first published, sent or given to securityholders.

§ 240.13c-101 Schedule 13E-4. Tender Offer Statement Pursuant to Section 13(c)(1) of the Securities Exchange Act of 1934.

(Amendment No. ----)

(Name of issuer)

(Title of class of securities)

(CUSIP number of class of securities)

(Name, address and telephone number of person authorized to receive notices and communications on behalf of the issuer)

NOTE.—Ten copies of this statement, including all exhibits, should be filed with the Commission.

INSTRUCTIONS

A. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or

See footnotes at end of article.

sub-item of the statement unless it would render such answer incomplete, unclear or confusing. Matter incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required.

C. If the statement is filed by a partnership, limited partnership, syndicate or other group, the information called for by Items 2-7, inclusive, shall be given with respect to (i) each partner of such partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such partner or member. If the issuer is a corporation or if the statement is filed by a corporation the information called for by Items 2-7 shall be given with respect to (a) each executive officer and director of such corporation; and (b) each person controlling such corporation; and (c) each executive officer and director of any corporation ultimately in control of such corporation. Executive officer shall mean the president, secretary, treasurer and vice president in charge of a principal business function (such as sales, administration or finance) and any other person who performs similar policy making functions for the corporation. It is assumed that a response to an item in the statement is made with respect to the issuer referred to in this Instruction unless there is a specific indication to the contrary.

D. Upon termination of the tender offer, the issuer shall promptly file a final amendment to Schedule 13E-4 disclosing all material changes in the items of that Schedule and stating that the tender offer has terminated, the date of such termination and the results of such tender offer.

Item 1.—Security and issuer. (a) State the name of the issuer and the address of its principal executive office;

(b) State the exact title and the number of shares outstanding of the class of securities being sought; the exact amount of such securities being sought and the consideration being offered therefore; whether any such securities are to be purchased from an officer, director or control person of the issuer or any affiliate of the issuer, and the details of each such transaction; and

(c) Identify the principal market in which such securities are being traded and state the high and low sales prices for such securities as reported in the consolidated transaction reporting system or such principal exchange (or, in the absence thereof, the range of high and low bid quotations) for each quarterly period during the past two years.

Item 2.—Source and amount of funds or other consideration. (a) State the source and total amount of funds or other consideration for the purchase of the maximum number of securities for which the tender offer is being made.

(b) If all or any part of such funds or other consideration is or is expected to be, directly or indirectly, borrowed for the purpose of the tender offer:

(1) Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and other material terms or conditions relative to such loan agreement; and

(2) Briefly describe any plans or arrangements to finance or repay such borrowings, or if no such plans or arrangements have been made, make a statement to that effect;

(c) If the source of all or any part of the funds to be used in the tender offer is a loan made in the ordinary course of business by a

bank as defined by Section 3(a)(6) of the Act, the issuer filing the Schedule 13E-4 may request, in accordance with the provisions of Rule 24b-2 (17 CFR 240.24b-2) under the Act, that the name of such bank not be made available to the public.

Item 3.—Purpose of the tender offer and plans or proposals of the issuer. State the purpose or purposes of the tender offer, whether the securities are to be retired, held in the treasury of the issuer, or otherwise disposed of, indicating such disposition, and any plans or proposals which relate to or would result in:

(a) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer or any of its subsidiaries;

(b) A sale or transfer of a material amount of assets of the issuer or any of its subsidiaries;

(c) Any change in the present board of directors or management of the issuer including, but not limited to, any plans or proposals to change the number or the term of directors or to fill any existing vacancies on the board;

(d) Any material change in the present capitalization or dividend policy of the issuer;

(e) Any other material change in the issuer's corporate structure or business, including, if the issuer is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by Section 13 of the Investment Company Act of 1940;

(f) Causing a class of equity securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter-dealer quotation system of a registered national securities association; or

(g) A class of equity securities of the issuer becoming eligible for termination of registration pursuant to Section 12(g)(4) of the Act.

(h) The suspension of the issuer's obligation to file reports pursuant to Section 15(d) of the Act.

Item 4.—Interest in securities of the issuer. Describe any transaction in the class of subject securities that was effected during the past 40 business days by any person referred to in Instruction C and by each associate or subsidiary of such person, including any executive officer or director of any such subsidiary.

INSTRUCTIONS

1. The description of a transaction required by this Item shall include, but not necessarily be limited to: (1) The identity of the person covered by this Item who effected the transaction; (2) the date of the transaction; (3) the amount of securities involved; (4) the price paid for each such security; and (5) where and how the transaction was effected.

2. If the information required by this Item is available to the issuer at the time this statement is initially filed with the Commission pursuant to Rule 13e-4 (§ 240.13e-4(b)), such information should be included in such initial filing. However, if such information is not available to the issuer at the time of such initial filing, it should be filed with the Commission promptly but in no event later than two business days after the date of such filing and, if material, should be disclosed to securityholders of the issuer in a manner similar to that in which the tender offer was first published, sent or given to such securityholders.

Item 5.—Contracts, Arrangements, Understandings or Relationships With Respect to the Issuer's Securities. Describe any contract,

arrangement, understanding or relationship (whether or not legally enforceable) between the issuer (including those persons enumerated in Instruction C to this schedule) and any person with respect to any securities of the issuer (including, but not limited to, any contract, arrangement, understanding or relationship concerning the transfer or the voting of any of such securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss, or the giving or withholding of proxies) naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into and giving the material provisions thereof. Include such information for any of such securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person the power to direct the voting or disposition of such securities, except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

Item 6.—Persons retained, employed or to be compensated. Identify all persons and classes of persons employed, retained or to be compensated by the issuer, or by any person on behalf of the issuer, to make solicitations or recommendations in connection with the tender offer and describe briefly the terms of such employment, retainer or arrangement for compensation.

Item 7.—Additional information. If material to a decision by a securityholder whether to sell, tender or hold securities being sought in the tender offer, furnish information including, but not limited to, the following:

(a) Any present or proposed contracts, arrangements, understandings or relationships between the issuer and its executive officers, directors and affiliates (other than any contract, arrangement or understanding required to be disclosed pursuant to Item 5 of this schedule);

(b) Any applicable regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer;

(c) The applicability of anti-trust laws; and

(d) The applicability of the margin requirements of Section 7 of the Act and the regulations promulgated thereunder;

(e) Any material pending legal proceedings relating to the tender or exchange offer, including the name and location of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto and a brief summary of the proceedings;

INSTRUCTION

In connection with this sub-item, a copy of any document relating to a major development (such as pleadings, an answer, complaint, temporary restraining order, injunction, opinion, judgment or order) in a material pending legal proceeding should be promptly furnished to the Commission on a supplemental basis.

(f) Such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

Item 8.—Material to be filed as exhibits. Furnish a copy of:

(a) Tender offer material which is published, sent or given to securityholders by or on behalf of the issuer in connection with the tender offer;

(b) Any loan agreement referred to in Item 2 of this schedule; *Provided, however, That the identity of any bank which is a*

See footnotes at end of article.

party to a loan agreement need not be disclosed if the person filing the Schedule 13E-4 has requested, in compliance with the provisions of Rule 24b-2 under the Act, that the identity of such bank not be made available to the public;

(c) Any document setting forth the terms of any contracts, arrangements, understandings or relationships referred to in Items 5 or 7(a) of this schedule;

(d) Any written opinion prepared by legal counsel at the issuer's request and communicated to the issuer pertaining to the tax consequences of the tender offer;

(e) In an exchange offer where securities of the issuer have been or are to be registered under the Securities Act of 1933, the prospectus containing the information required to be included therein by Rule 434b (§ 230-434b) of that Act;

(f) If any oral solicitation of securityholders is to be made by or on behalf of the issuer, any written instruction, form or other material which is furnished to the persons making the actual oral solicitation for their use, directly or indirectly, in connection with the tender offer.

SIGNATURE

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

(Date)

(Signature)

(Name and title)

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

(Secs. 3(b), 10(b), 13(e), 14(e), 23(a), 48 Stat. 882, 894, 891, 895, 901, sec. 8, 49 Stat. 1379, sec. 5, 78 Stat. 569, 570, secs. 2, 3, 82 Stat. 454, 455, secs. 1, 2, 3-5, 84 Stat. 1497, secs. 3, 18, 89 Stat. 97, 155, (15 U.S.C. 78c(b), 78j(b), 78m(e), 78n(e), 78w(a).)

The Commission hereby proposes for comment proposed Rule 13e-4 and Schedule 13E-4 pursuant to Sections 3 (b), 10(b), 13(e), 14(e) and 23(a) of the Act.

As indicated above, interested persons are invited to submit written presentation of views, data and arguments concerning proposed Rule 13e-4 and Schedule 13E-4. As an aid to persons interested in submitting comments, particular items as to which the Commission has specifically requested the submission of comments are set forth below. Each item is described below in a cursory manner; for a complete discussion, interested persons should refer to the text of this release.

1. Whether tender offers by control persons of an issuer should be exempted from some or all of the provisions of Proposed Rule 13e-4;

2. Whether the requirement in paragraph (b)(4) of Proposed Rule 13e-4 that the tender offer be extended to all holders of the class of subject securities

creates a conflict in those instances in which a tender offer cannot be made in certain jurisdictions;

3. Whether tender offer material should be disseminated to beneficial holders of subject securities;

4. Whether regulation of issuer tender offers should be accomplished by incorporating by reference existing statutory tender offer provisions and existing (and proposed) tender offer rules;

5. Whether there is a need for a recommendation statement in connection with issuer tender offers and, if so, the content of such a statement;

6. Whether it is necessary to limit the duration of an issuer tender offer;

7. Whether withdrawal rights (in addition to those contemplated by paragraph (b)(5) of Proposed Rule 13e-4) should be afforded tendering securityholders;

8. Whether an issuer and its round lot securityholders derive financial benefits from a tender offer made to odd lot securityholders, and if so, whether such benefits are justified in light of the purposes of Proposed Rule 13e-4.

9. Whether it is appropriate to permit an odd lot issuer tender offer to be made to fewer than all owners of odd lots.

10. Whether it is appropriate to require that odd lot tender offers by issuers be extended to beneficial as well as record owners.

11. Whether Instruction 2 of Item 4 of Proposed Schedule 13E-4 ("Interest in Securities of the Issuer"), which is intended to facilitate efforts to preserve the confidentiality of the tender offer, would adequately achieve that purpose.

12. Whether the term of a tender offer which would be a "Rule 13e-3 transaction" should afford odd lot holders of subject securities different treatment than holders of one hundred shares or more of subject securities, in view of the requirement in Proposed Rule 13e-3(b), for transactions by issuers with a class of equity securities registered pursuant to Section 12 of the Act, that the transaction be fair.

13. Whether permitting acceptance of tendered securities on a formula basis from odd lot securityholders could satisfy the element of fairness of Proposed Rule 13e-3.

14. Whether, with respect to post-tender offer purchases, the approach of paragraph (b)(8) of Proposed Rule 13e-4, or one which requires that any post-tender offer purchases for 40 business days by the issuer be effected at the highest price paid during the offer, is appropriate for going private tender offers.

15. Whether an issuer tender offer which is a "Rule 13e-3 transaction" should be subject to both Proposed Rules 13e-3 and 13e-4 or subject only to the terms of Proposed Rule 13e-3, if adopted.

By the Commission.

GEORGE A. FITZSIMMONS,
Secretary.

DECEMBER 7, 1977.

FOOTNOTES

¹ Securities Act Release Nos. 5529 (Sept. 9, 1974) 39 FR 33835, and 5538 (Nov. 5, 1974) 39 FR 41223.

² See, e.g., Hearings Before the Senate Committee on Banking, Housing and Urban Affairs on Corporate Takeovers, 94th Cong., 2d Sess. (1976).

³ Securities Exchange Act Release No. 12676 (Aug. 2, 1976) 41 FR 33004 ("Release No. 34-12676"). The proposed tender offer rules are still under active consideration by the Commission and its staff. To the extent that the provisions of Proposed Rule 13e-4 differ from the Commission's 1976 tender offer proposals, such differences reflect a recognition that the appropriate form of regulation for third party tender offers may differ from the regulation of issuer tender offers.

⁴ Pub. L. 90-439; 82 Stat. 454 (July 28, 1968).

⁵ Hearings on S. 510 Before the Subcomm. on Securities of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. at 115-116 (1967) ("Senate Hearings").

⁶ The bill's approach of regulating tender offers under Section 14 of the Act and addressing securities acquisitions, as distinguished from tender offers, in Section 13 of the Act, reflected the Commission's earlier comments on S. 2731, Senator Williams' original tender offer legislative proposal, which he introduced on October 22, 1965. 111 Cong. Rec. 28528 (1965). The Commission had commented that "the protections in the bill for shareholders regarding issuer acquisitions) appear to be an appropriate counterpart to the protections preventing deceptive or unfair practices in attempts by others to take over from existing management." Memorandum of the Securities and Exchange Commission to the Committee on Banking and Currency, U.S. Senate, on S. 2731, 89th Cong., 112 Cong. Rec. 19003, 19005 (1966).

⁷ "[I]t would seem that tender offers by issuers involve many of the same problems as tender offers by other persons, and it is not apparent why these are made an exception to (Section 13(e)). While the details of disclosure would differ from those applicable to non-issuer tender offers, the basic pattern of (Section 14(d))—advance filing, prescribed contents of soliciting letter, right of withdrawal, pro rata instead of first-come first served basis of selection, giving early depositors the benefit of later increases in price—should be equally applicable to issuers' offers." Letter dated March 24, 1967 to Senator Harrison A. Williams, Jr. from Milton Cohen, Esq.; Senate Hearings at 248.

⁸ "[I]t must be recognized that the disclosures which should be made by an issuer making a tender offer for its own shares are entirely different than those which should be made by a third party. For example, an issuer making such a tender offer probably should disclose substantially more information with respect to its own business and prospects than can reasonably be expected of a third party." "Supplemental Memorandum of the Securities and Exchange Commission with Respect to Certain Comments on S. 510"; Senate Hearings at 202.

⁹ Id. (emphasis supplied).

¹⁰ Section 13(e)(1) further states that: "Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material

to a determination whether such security should be sold."

¹¹ Section 13(e)(2) was amended in 1970 to give the Commission rulemaking authority to treat certain purchases as not being made on behalf of an issuer. Pub. L. 91-567, 84 Stat. 1497 (Dec. 22, 1970).

¹² Rule 10b-13 was proposed in 1968, see Securities Exchange Act Release No. 8391 (Aug. 30, 1968) 33 FR 13036; republished in 1969, see Securities Exchange Act Release No. 8595 (May 5, 1969) 34 FR 7547; and adopted in 1969, see Securities Exchange Act Release No. 8712 (Oct. 8, 1969) 34 FR 15836.

¹³ Rule 10b-4 was proposed and adopted in 1968, see Securities Exchange Act Release Nos. 8224 (Jan. 3, 1968) 33 FR 573, and 8321 (May 28, 1968) 33 FR 8269. Amendments to Rule 10b-4 were recently published for comment by the Commission, see Securities Exchange Act Release No. 14157 (Nov. 8, 1977) 42 FR 59280.

¹⁴ Tender offers by issuers are subject to Section 14(e). See *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 595-96 (Feb. 19, 1974) (5th Cir.), cert. denied, 419 U.S. 873 (1974). See also *Henry Heide, Inc.*, (1972-1973 Transfer Binder) CCH Fed. Sec. L. Rep. ¶ 78,838, at 81,836 (May 1, 1972); *Heine v. The Signal Companies, Inc.*, CCH Fed. Sec. L. Rep. ¶ 95,898, at 91,316 (dictum) (S.D.N.Y.) (Mar. 4, 1977).

¹⁵ See Proposed Rule 14e-2(a); Release No. 12676.

¹⁶ Issuers may be prohibited from extending to, or requesting offers from, residents of a particular state because of the inability to secure necessary regulatory approval (e.g., some states require that there be a prior finding that an offer is fair). The Commission solicits comment on the apparent conflict created if an offer cannot be made in certain jurisdictions and the requirement, in paragraph (b)(4) of Proposed Rule 13e-4, that an issuer tender offer be extended to all securityholders of the class of subject securities. Commentators are requested to provide examples of instances in which tender or exchange offers have been prevented from being extended to residents of certain States.

¹⁷ The Commission's Street Name Study discussed issuer-shareholder communications such as proxy material, quarterly reports and routine communications. Regarding the costs of one type of communication, the Commission found that, among 71 issuers sending proxy materials directly to recordholders, the annual cost of mailing such materials ranged from \$.34 to \$1 per registered holder. The cost per holder of sending proxy materials through intermediaries (e.g., banks and brokers) to such holders ranged from \$1.36 to \$2.37. See Final Report of the Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities" 24, 25 (Committee Print 1976).

In a 1971 study of 76 companies listed on the New York Stock Exchange, 3 companies reported total annual stockholder servicing costs of less than \$1 per shareholder; 20 companies reported such costs to be between \$1 and \$1.99; 31 companies reported such costs to be between \$2 and \$4.99; 9 companies reported such costs to be between \$5 and \$9.99; and 13 companies reported such costs to be \$10 or more. Young and Marshall, Controlling Shareholder Servicing Costs, 49 Harv. Bus. Rev. 71, 74 (1971) ("Young and Marshall").

¹⁸ Young and Marshall at 75. The authors concluded that shareholder servicing costs vary almost linearly with the number of shareholders.

¹⁹ The Commission specifically solicits comments regarding the extent to which an issuer and its remaining securityholders de-

rive financial benefits from a tender offer made to the issuer's odd lot securityholders, and whether such benefits are justified in light of the purposes of Proposed Rule 13e-4.

²⁰ Odd lot tender offers to owners of a specified number of shares less than one hundred shares are not uncommon, e.g., a tender offer to all owners of fifty shares or less. The Commission specifically solicits comments on whether such a limited offer, discriminating among odd lot owners, is appropriate.

²¹ Odd lot tender offers are sometimes limited to record holders. Accordingly, persons beneficially owning in the aggregate less than 100 shares, but holding such shares through brokers in "street" name or otherwise than of record, have not been eligible to participate in such odd lot tender offers. Comment is specifically solicited on whether such offers should be required to be extended to beneficial, as well as record, owners.

²² Proposed Rule 14d-5, if adopted, would extend to ten business days the present seven day withdrawal period of Section 14(d)(5). See Release No. 34-12676. The seven day withdrawal period was designed to give shareholders who tender at the beginning of an offer "a short period within which to reconsider." See S. Rep. No. 550, 90th Cong., 1st Sess. at 10 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess. at 10 (1968).

²³ Proposed Rule 13e-4 utilizes the term "business days." The forty business day period in paragraph (b)(5) of the proposed Rule approximates the sixty day period in Section 14(d)(5). The sixty day withdrawal period in Section 14(d)(5) was intended to prevent "tendered securities from being tied up indefinitely awaiting a decision by the person making the offer as to whether or not he will purchase them." See S. Rep. No. 550, 90th Cong., 1st Sess. at 3-4 (1967). During the 1967 hearings on the takeover bill, then Chairman Manuel F. Cohen commented that " * * * I see no reason why those shareholders who have tendered during the initial period must be left in a state of uncertainty while the offeror endeavors to attract more shares." Senate Hearings at 198. The Commission recognizes, however, that a tendering securityholder may nonetheless be deprived of access to his securities for an extended period of time and accordingly is inviting comment on the need for additional rulemaking to address this situation. See *infra* at 33-34.

²⁴ See paragraph (b) of Proposed Rule 14d-5; Release No. 12676.

²⁵ See Senate Hearings at 21 (1967); H. Rep. No. 1711, 90th Cong., 2d Sess. at 11 (1968).

²⁶ See Proposed Rule 14d-8; Release No. 34-12676. The Commission had originally recommended, and the Williams bill, as originally drafted, would have provided, that the pro rata acceptance requirement apply throughout the life of the tender offer. S. Rep. No. 550, 90th Cong., 1st Sess. at 4 (1967). In recommending that pro rata acceptance not be required for more than the first ten days of the offer, the New York Stock Exchange argued:

"While we do not believe the full period pro rata approach should be prohibited, we do not think it should be required by law as the only permissible method."

Senate Hearings at 77. The Senate Subcommittee followed this suggestion and modified the original bill to require pro rata acceptance only for those securities tendered during the first ten days of an offer. See S. Rep. No. 550, 90th Cong., 1st Sess. at 4 (1967); see also Section 14(d)(6).

²⁷ The exception from the requirement of pro rata acceptance for odd lots is intended to avoid the otherwise self-defeating result of a reduction in the size of odd lot holdings rather than a reduction in the number of such holdings.

³⁵ Either alternative might be desired by an issuer to assure tendering securityholders that any adverse tax consequences which may result from acceptance of less than a specified number of their tendered securities would be avoided.

³⁶ In recognition of the manner in which certain odd lot offers are made (e.g., at the market price prevailing when the securities are received by the issuer), the proviso to paragraph (b)(7) of Proposed Rule 13e-4 would permit an issuer to offer the same formula for payment to all holders of less than one hundred shares of its equity securities even though this may result in different consideration being paid to tendering securityholders. If the tender offer is deemed to be a "Rule 13e-3 transaction" (see pages 2-3 supra), permitting acceptance of tendered securities on a formula basis from odd lot securityholders may not satisfy the element of fairness required by Proposed Rule 13e-3. Comment is requested on whether the proviso to paragraph (b)(7) of Proposed Rule 13e-4 should apply to tender offers which would be "Rule 13e-3 transactions."

³⁷ S. Rep. No. 550, 90th Cong., 1st Sess. at 10 (1967).

³⁸ Rule 10b-13 prohibits any person making a tender or exchange offer for any equity security, including an issuer, from purchasing, or arranging to purchase, any such security (or any other security immediately convertible into or exchangeable for such security) otherwise than pursuant to such offer from the time the offer is publicly announced or otherwise made known to securityholders until the expiration of the offer.

³⁹ Proposed Rule 14d-6 (see Release No. 34-12676) would integrate with the tender offer, for the purpose of Section 14(d), any purchase made by a bidder within forty business days after the tender offer terminates. Comments received on Proposed Rule 14d-6 indicated that practical and legal difficulties were presented by a proposal which attempted to apply pro rata and withdrawal requirements to purchases by a bidder following the termination of its tender offer. In response to such comments, the staff is considering modifying Proposed Rule 14d-6

in the manner discussed in the text.

⁴⁰ Senate Hearings at 27-28.

⁴¹ See S. Rep. No. 1125, 91st Cong., 2d Sess. at 4-5 (1970). The exemption from Section 14(d) provided by paragraph (8)(B) thereof for tender offers by an issuer has not been extended to tender offers by control persons or affiliates of an issuer (other than a 100%-owned subsidiary of an issuer).

⁴² The first sentence of Section 13(e)(2), which was added to the Act in 1970, has the effect of bringing purchases by control persons within the coverage of the section. The second sentence, however, gives the Commission rulemaking authority, including the authority to adopt "exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase (by a control person) should be deemed to be a purchase by the issuer * * *." See note 11 supra.

⁴³ See Securities Exchange Act Release No. 8392 (Aug. 30, 1968) 33 FR 14109. The Commission further stated that "[a]ny such bid, therefore, can be lawfully made only in accordance with the provisions of those sections, including paragraph (5), withdrawal provisions, and paragraph (6), pro rata provisions, of Section 14(d), and the rules and regulations thereunder." Id.

⁴⁴ Pursuant to New York Stock Exchange Rule 391 and American Stock Exchange Rule 560, a purchaser, after receiving exchange approval, must announce a special bid on the tape, specifying the number of shares desired and a fixed bid price. The specified price cannot be less than the higher of the current bid or the last sale, and generally is substantially higher, although the price cannot be higher than the current asked price, unless specifically permitted by the applicable exchange. All orders are executed at the bid price until the bid is satisfied or withdrawn. The withdrawal of a special bid requires the approval of the exchange, and, unless otherwise specifically exempted, must remain open for a minimum period of fifteen minutes. The special bid procedure is premised upon a determination that the regular auction market for the subject security cannot efficiently satisfy the order.

⁴⁵ A special bid is generally less expensive and quicker, and may require less of a pre-

mium over the market price, than a traditional tender offer.

⁴⁶ See Securities Exchange Act Release Nos. 8930 (July 13, 1970) 35 FR 11410, and 10539 (Dec. 6, 1973) 38 FR 34341 in which the Commission published for comment, and republished a revised version of, Proposed Rule 13e-2 under the Act which, if adopted, would regulate an issuer's purchases of its own securities. The Commission remains concerned that an issuer's purchases of its own securities may be effected for manipulative purposes. See "Securities and Exchange Commission v. Chromalloy American Corp., et al.," Litigation Release No. 7850 (Mar. 30, 1977). See also "Securities and Exchange Commission v. Georgia-Pacific Corp.," CCH Fed. Sec. L. Rep. ¶ 91,692 (S.D.N.Y.) (May 23, 1966).

⁴⁷ "[T]he details of disclosure [for issuer tender offers] would differ from those applicable to non-issuer tender offers * * *." Senate Hearings at 115-116 (1967).

⁴⁸ [I]t must be recognized that the disclosures which should be made by an issuer making a tender offer for its own shares are entirely different than those which should be made by a third party." Senate Hearings at 202 (1967).

⁴⁹ See Securities Exchange Act Release No. 13787 (July 28, 1977) 42 FR 38341.

⁵⁰ The class of persons covered by Item 4 of Proposed Schedule 13E-4 is substantially similar to that covered by Item 6 of Schedule 14D-1 ("Interest in securities of the Subject Company"). However, commentators are requested to consider the breadth of the coverage since an issuer tender offer may not require disclosure co-extensive with that required for third party offers.

⁵¹ In connection with third party offers, proposed amendments to Rule 14d-4 under the Act, if adopted, would require the filing with the Commission, under certain circumstances, of a proposed Schedule 14D-4 Recommendation Statement. See Release No. 34-12676.

⁵² In responding, commentators should consider the effects on competition that may result from different disclosure and substantive requirements for issuers and third parties in a contested tender offer.

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