

SECURITIES AND EXCHANGE
COMMISSION

17 CFR Parts 230 and 240

[Releases Nos. 33-6158 and 34-16384,
IC-10958]

Tender Offers

AGENCY: Securities and Exchange
Commission.

ACTION: Final rules.

SUMMARY: The Commission announces the adoption of new rules and a related schedule pertaining to tender offers. These provisions implement existing statutory requirements by providing specific filing, delivery and disclosure requirements, optional dissemination provisions and additional substantive regulatory protections with respect to certain tender offers. In addition, certain antifraud rules applicable to any tender offer have been adopted. These actions are necessary and appropriate in the public interest and for the protection of investors because of the increased occurrence of tender offers; their impact on securities markets and on corporate control; the dynamic nature of these transactions and the need to ensure a balance between the interests of the person making a tender offer and the management of the company whose securities are being sought while providing disclosure and substantive protections to shareholders making investment decisions.

EFFECTIVE DATE: January 7, 1980.

FOR FURTHER INFORMATION CONTACT: John Huber or John Granda (202-272-2589), Office of Disclosure Policy, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission today announced the adoption of amendments to Regulation 14D, Rule 434b and Schedule 13D as well as the adoption of Regulation 14E pursuant to sections of the Federal securities laws including sections 2, 17 and 19 of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. 77a et seq., as amended by Pub. L. No. 94-29 (June 24, 1975)] and sections 3(b), 10(b), 13(d), 14(d), 14(e) and 23(a) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. 78a et seq. as amended by Pub. L. No. 94-29 (June 24, 1975)] with respect to tender offers. These actions implement the present statutory requirements by providing specific filing and disclosure requirements, optional dissemination

provisions, and additional substantive protections with respect to tender offers subject to section 14(d) of the Exchange Act. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with tender offers, there are also provisions relating to the length of the tender offer and extension thereof, payment of the consideration offered, and disclosure of the subject company's position with respect to the tender offer.

The new and amended provisions are not applicable to any tender offer which has been published, sent or given to security holders prior to their effectiveness.

The Commission is also withdrawing proposed Rules 14d-8 and 14e-2 published for comment in Release No. 34-15548 (February 5, 1979) [44 FR 9956] and concurrently publishing for comment proposals in lieu thereof which, if adopted, would be applicable to any tender offer.¹ These proposals include: a definition of the term "tender offer"; certain antifraud provisions concerning trading by certain persons on the basis of material, non-public information relating to a tender offer; provisions requiring equal treatment of security holders in the context of tender offers; and a prohibition of certain purchases not made by means of a tender offer.

The rules adopted in this release are based primarily on the proposals published for comment by the Commission in February 1979 (the "February proposals" or the "former proposals"),² the 105 letters of comment received in response thereto,³ and the Commission's experience. A discussion of the statutory background and development of the February proposals is included in the release which published the proposals for comment (the "February release").⁴

For the convenience of interested persons, a table setting forth the relationship of the rules and schedules published herein to the February proposals is being furnished. The table

consists of three columns: (1) the adopted rule and schedule; (2) the title of the adopted rules and schedule; and (3) the corresponding proposal. The table is as follows:

Adopted rule or schedule	Title	Proposal
14d-1.....	Scope of and Definitions Applicable to Regulations 14D and 14E.	14d-1.
14d-2.....	Date of commencement of a tender offer.	14d-6.
14d-3.....	Filing and transmittal of tender offer statement.	14d-2.
14d-4.....	Dissemination of certain tender offers.	14d-4.
14d-5.....	Dissemination of certain tender offers by the use of stockholder lists and security position listings.	14d-5.
14d-6.....	Disclosure requirements with respect to tender offers.	14d-3.
14d-7.....	Additional withdrawal rights.	14d-7.
14d-8.....	Exemption from statutory pro rata requirement.	14d-9.
14d-9.....	Solicitation/ recommendation statements with respect to certain tender offers.	14d-10.
14D-9.....	Solicitation/ Recommendation Statement.	14D-10.
14e-1.....	Unlawful tender offer practices.	14e-1.
14e-2.....	Position of subject company with respect to a tender offer.	Special Inquiry A.

I. Overview of Application and
Operation of Rules and Schedule

The rules are grouped into two regulations. The application of Regulations 14D and 14E depends on whether or not the tender offer is subject to section 14(d)(1) of the Exchange Act. If the tender offer is subject to section 14(d)(1), both regulations apply. If the tender offer is not subject to that subsection, only Regulation 14E is applicable. The following discussion relates only to a tender offer in which both Regulations are applicable.

The rules regulating the person making the tender offer (the "bidder") may be divided into four categories: filing requirements; dissemination provisions; disclosure requirements; and substantive provisions. Before discussing these categories, it should be noted that the operation of these rules is triggered by the date of commencement of the tender offer, which is defined by Rule 14d-2 as essentially equivalent to the date the tender offer is first published or sent or given to security holders.

¹ See Release No. 33-6159 (November 29, 1979), published elsewhere in this issue.

² No. 34-15548 (February 5, 1979) [44 FR 9956].

³ Letters were received from the following categories of commentators: corporations (63); law firms and associations (11); trade organizations and associations (10); state administrative agencies (7); securities industry (6); academicians (1); and other interested persons (7). Copies of these letters are available for public inspection and copying at the Commission's Public Reference Room (File No. S7-770). For the convenience of the public, a copy of the summary of these comment letters, which was prepared by the staff of the Commission, has been placed in File No. S7-770 and is also available for public inspection and copying.

⁴ Securities Exchange Act Release No. 34-15548 (February 5, 1979) [44 FR 9956].

The filing of Schedule 14D-1 with the Commission is governed by Rule 14d-3. In addition, a bidder is required to make hand delivery of the initial filing and any amendments to the company whose securities are being sought (the "subject company"), and under certain conditions to give telephonic notice of certain information and to mail copies to national securities exchanges and to the NASD. A competing bidder is also required to hand deliver the initial filing to any previous bidder whose tender offer for the same class of securities has not yet expired.

Rule 14d-4 establishes three alternative methods of disseminating a cash tender offer to security holders: long-form publication; summary publication; and the use of shareholder lists and security position listings ("stockholder lists"). The dissemination process includes both the initial and subsequent soliciting materials published or sent or given to security holders during the tender offer. While tender offers may be disseminated by methods other than those specified in Rule 14d-4, summary publication and the use of stockholder lists and security position listings pursuant to Rule 14d-5 must comply with Rules 14d-4(a)(2) and (a)(3), respectively. The dissemination of an exchange tender offer is governed by the provisions of the Securities Act if the transaction is subject to the registration requirements of that Act.

Rule 14d-5 allows a bidder to disseminate its tender offer materials in a manner substantially similar to that permitted under present Rule 14a-7 [17 CFR 240.14d-7], which relates to proxy contests. The tender offer materials would be disseminated to security holders pursuant to the stockholder lists. The subject company would determine whether to retain the stockholder lists, in which case the subject company would distribute the bidder's tender offer materials, or to furnish the stockholder lists to the bidder, in which case the bidder would distribute them.

While the dissemination provisions of Rule 14d-4 apply only to tender offers in which the consideration consists solely of cash and/or securities exempt from registration under Section 3 of the Securities Act and are not mandatory, the disclosure requirements of Rule 14d-6 apply to any tender offer subject to section 14(d). The specific disclosure requirements generally depend on whether the tender offer is published or sent or given to security holders by means of summary publication pursuant to Rule 14d-4(a)(2) or the use of stockholder lists and security position listings pursuant to Rule 14d-5. The

summary advertisement which is required to be published in connection with either of these means of dissemination must contain the disclosure called for by Rule 14d-6(e)(2). Tender offers which are disseminated other than by such means, such as cash tender offers which are published by means of long-form publication, registered exchange offers or unconventional tender offers, are subject to the disclosure requirements prescribed by Rule 14d-6(e)(1).

With respect to a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act, Rules 14d-4, 14d-5 and 14d-6 are designed to operate in concert. This interrelationship may be demonstrated by the following brief description of the chronological operation of a cash tender offer by the use of stockholder lists: (1) the bidder requests the use of the stockholder lists pursuant to Rule 14d-5(a); (2) on or prior to the date of the request the bidder makes adequate publication of either a summary advertisement or long-form publication commencing the tender offer under Rule 14d-2; (3) the subject company makes its election either to disseminate the tender offer materials or to furnish the stockholder lists; (4) if the subject company conducts the dissemination, Rule 14d-5(b) governs the subject company's conduct and Rule 14d-5(f)(3) applies to the bidder; (5) if the subject company furnishes the stockholder lists to the bidder, Rule 14d-5(c) applies to the subject company and Rule 14d-5(f)(4) prescribes the method by which the bidder disseminates its tender offer materials; (6) under either option, the bidder's tender offer materials must include the disclosure required by Rule 14d-6(e)(1); and (7) a similar sequence will be followed with respect to material changes in the bidder's tender offer materials.

Substantive provisions concerning tender offers subject to section 14(d) of the Exchange Act are set forth in Rules 14e-1, 14d-7 and 14d-8. Rule 14e-1 regulates the minimum length of a tender offer. Any tender offer (other than certain issuer tender offers) is required to remain open for a minimum of twenty business days from the date of commencement and for ten business days from the date of any notice of increase in the offered consideration or the dealer's soliciting fee. These time periods are designed to operate concurrently. Thus, if a tender offer commences on business day 1 and the bidder increases the consideration on business day 8, the ten business day

period will expire during the minimum twenty business day period.

Rules 14d-7 and 14d-8 relate to the terms under which the tender offer may be conducted. The additional withdrawal rights provided by Rule 14d-7 operate independently of the time period requirements of proposed Rule 14e-1. Under Rule 14d-7, an initial withdrawal period of 15 business days is provided and, if a competing offer is made, an additional ten business day withdrawal period is required under certain conditions. As with the time periods of Rule 14e-1, the additional withdrawal right time periods are computed concurrently, rather than consecutively. Rule 14d-8 enables a bidder, if it wishes, to vary either or both of the pro rata acceptance provisions of section 14(d)(6) on the condition that (1) the minimum ten day periods under the statute are provided; and (2) the bidder's tender offer materials disseminated on the date of commencement of the offer disclose the different pro rata time periods.

Rule 14e-1(c) requires payment for or the return of the deposited securities to security holders promptly after the termination or withdrawal of the tender offer.

The subject company is regulated by three rules. If a bidder has determined to use the subject company's stockholder list, the subject company must comply with Rule 14d-5. Rule 14e-2 requires the subject company to disclose to security holders its position with respect to the tender offer and the reasons therefor within ten business days of the date the tender offer is first published or sent or given to security holders. This communication is, under Rule 14d-9(f), a solicitation/recommendation requiring compliance with Rule 14d-9. Thus, the statement furnished under Rule 14e-2 or any other solicitation or recommendation to security holders with respect to the tender offer would under Rule 14d-9 require the filing of Schedule 14D-9 with the Commission and transmittal thereof to certain designated persons as soon as practicable on the date the solicitation/recommendation is first published or sent or given to security holders. The disclosure in the solicitation-recommendation disseminated to security holders by the subject company would be required to contain certain information, based on the provisions of Schedule 14D-9. Material changes to that Schedule would be filed, delivered and disseminated in a similar manner.

Rule 14d-9 also covers solicitations/recommendations of certain specified persons. Generally, persons who are related to the subject company or the

bidder because of employment, membership on the board of directors, or shareholder or affiliate status are included in the persons required to comply with the rule. To avoid unnecessary regulation, Rule 14d-9 does not include every solicitation/recommendation made with respect to a tender offer subject to section 14(d). It should be noted, however, that communications not covered by Rule 14d-9, as well as those regulated by the rule, are subject to section 14(e) of the Act.

II. Synopsis of Rules and Schedule ⁵

A. Rule 14d-1: Scope of and Definitions Applicable to Regulations 14D and 14E

A new paragraph (a) has been added to Rule 14d-1 to clarify the scope of Regulations 14D and 14E. Section 14(d)(1) of the Exchange Act imposes certain requirements upon a bidder who makes a tender offer for a class of equity securities ⁶ described in that section if upon consummation of such tender offer the bidder would be the beneficial owner of more than five percent of such class. Rule 14d-1(a) limits the application of Regulation 14D to tender offers which are subject to section 14(d)(1). Thus, tender offers by persons for securities of which they are the issuer are not subject to Regulation 14D. However, the rule specifically notes that tender offers by affiliates of such issuers are subject to Regulation 14D. Regulation 14E applies to any tender offer without regard to whether the class of securities being sought is described in section 14(d)(1) or whether the person making the tender offer will upon consummation thereof be the beneficial owner of more than five percent of such class.⁷ Therefore, issuer

⁵This synopsis is included in order to assist all interested persons in their understanding of and compliance with the provisions of the rules and schedule which are published herein. However, attention is directed to the text of the rules and schedule for a more complete understanding.

⁶The classes are: any class of equity securities registered pursuant to section 12 of the Exchange Act; any class of equity securities which would have been required to be registered pursuant to section 12 except for the exemption provided in section 12(g)(2)(G) of the Exchange Act; and any class of equity securities issued by a closed-end investment company registered under the Investment Company Act of 1940.

⁷Section 14(e) applies to any tender offer, not only those subject to section 14(d)(1). This position is supported by the language of Section 14(e), a comparison with the other provisions of the Williams Act, the legislative history of the Williams Act, administrative interpretation, legal commentary, and case law; see Release No. 34-16385 (November 29, 1979), footnote 15. The structure of sections 14(d) and 14(e) of the Williams Act reflects a Congressional determination to limit the filing mechanisms and attendant requirements of section 14(d) to tender offers for securities

tender offers are subject to Regulation 14E unless a specific rule thereunder provides otherwise. However, Regulation 14E does not apply to any tender offer for "exempted securities" as that term is defined in section 3(a)(12) of the Exchange Act.⁸

Rule 14d-1(b) establishes a definitional framework in order to clarify terms frequently used in Regulations 14D and 14E and to provide guidance concerning the operation of certain terms. Terms defined in the Exchange Act and in Rule 12b-2 [17 CFR 240.12b-2] promulgated thereunder have the same meaning in the Regulations unless the context otherwise requires. In addition, eight specific terms are defined.⁹

While certain technical revisions have been made in response to specific comments, the definitions are for the most part the same as those proposed for comment. The term "beneficial owner" has, however, been revised by bifurcating the meaning of the term depending on the context in which it is employed. For purposes of filing a

described in section 14(d)(1) of the Exchange Act, but not to limit the antifraud provisions of section 14(e). Having so limited the requirements of section 14(d) and the related costs of compliance, there is no valid reason not to follow the Congressional mandate to protect investors against fraud, deceit and manipulation where, from among the various methods of acquiring securities of a company, the tender offer method is utilized.

⁸Commissioner Karmel believes that the rules adopted by the Commission here pursuant to section 14(e) of the Exchange Act should be subject to clearly defined jurisdictional limits. She believes they should be subject to those limits which apply to the rules adopted pursuant to section 14(d) of that Act, unless some other appropriate limits can be devised. For example, the rules adopted here do not apply to exempted securities. In the view of Commissioner Karmel, Rules 14e-1 and 14e-2 impose regulatory requirements, including some affirmative obligations, essentially in order to prevent violations of section 14(d), rather than to prohibit fraudulent conduct in general. She believes that the rules adopted here today are so broad as to apply on their face to the securities of any corporation, without regard to whether such federal regulation is appropriate. The Commissioner notes that section 14(e) is not limited by its language to matters subject to federal jurisdiction, that is, acts or practices committed through the use of the mails or the facilities of interstate commerce. However, such an essential jurisdictional predicate for federal rulemaking has been read into that section.

Commissioner Karmel believes that Rules 14e-1 and 14e-2, adopted here pursuant to section 14(e), and lacking any other limits, should likewise reflect the jurisdictional limits of section 14(d), and apply only to tender offers for securities of certain investment or insurance companies or companies with securities registered pursuant to section 12 of the Act. The exercise of the Commission's jurisdiction as fully as has been done here is, in her judgment, doubtful. In cases where the Commission's exercise of jurisdiction is questionable, Commissioner Karmel believes that restraint should be exercised.

⁹The defined terms are: "bidder," "subject company," "security holders," "beneficial owner," "tender offer material," "executive officer," "business day," and "security position listing."

Schedule 14D-1 or a Schedule 14D-9 as well as stating the number of shares beneficially owned in response to Item 6 of Schedule 14D-1, the term "beneficial owner" has the same meaning as that set forth in Rule 13d-3 [17 CFR 240.13d-3]. Thus, both voting power and investment power with respect to a specified security, or the right to acquire either of those powers, are relevant. However, for other purposes, which relate principally to dissemination of the tender offer, only investment power is operative. This distinction recognizes that in the context of a tender offer only the persons with investment power are being asked to make an investment decision and therefore would benefit from the receipt of tender offer materials.

The definition of "business day" has also been revised in two respects. First, the reference to the time period from 12:01 a.m. through 12:00 midnight has been clarified by specifying that the Eastern time zone is applicable. Second, the application of the definition to the computation of time periods which do not begin on the date of commencement has been clarified. The commentators correctly noted that the standard proposed for comment, which was based on the date of commencement, does not address the computation of time periods which become operative during the tender offer, such as the requirement imposed by Rule 14e-1(b) that a tender offer must remain open for ten business days following notice of a price increase. Accordingly, in computing any time period under section 14(d)(5) or 14(d)(6) of the Act or under Regulation 14D or 14E, the date of the event which begins the running of the time period is included unless the event occurs on a non-business day, in which case the period begins to run on and includes the first business day thereafter. Thus, if a tender offer commences under Rule 14d-2(b) on a non-business day, the Williams Act and the rules thereunder would apply on that date but the statutory and regulatory time periods would begin to run on and would include the first business day after the tender offer is commenced.

Rule 14d-2: Date of Commencement of a Tender Offer

In view of the importance of the concept of "commencement" of a tender offer to the operation of the Williams Act as well as the need to provide content and clarity to the term, the Commission has determined to adopt Rule 14d-2, which follows closely proposed Rule 14d-6. The provisions of Rule 14d-2(a) (1) through (3) are related to the methods by which tender offer

materials may be disseminated under Rule 14d-4. Hence, a tender offer using long-form publication commences on the date of the newspaper publication. A tender offer disseminated by means of summary publication commences on the date the summary advertisement appears in the newspapers. If stockholder lists and security position listings are used pursuant to Rule 14d-5 to disseminate the tender offer, the bidder is also required to make either long-form or summary publication of the tender offer on or prior to the date of the bidder's request pursuant to Rule 14d-5(a). Publication of the long-form publication or the summary advertisement commences the tender offer under Rule 14d-2(a)(3). Tender offers in which the consideration offered consists of securities registered pursuant to the Securities Act commence when the bidder's registration statement becomes effective thereunder. A tender offer which is not disseminated by any of these means commences on the date it is first published or sent or given.

Rule 14d-2(a) has been revised to clarify that a tender offer which is disseminated by a combination of methods commences on the date that the first method is used. It has also been revised to specify that the tender offer commences on 12:01 a.m. on that date. Accordingly, the date of commencement will be included as a full day in computing any applicable time periods.

As discussed more fully in the February release, Rule 14d-2(b) is intended to prevent public announcements by a bidder of the material terms of its tender offer in advance of the offer's formal commencement. The Commission believes that this practice is detrimental to the interests of investors and results in many of the abuses the Williams Act was enacted to prevent. Such pre-commencement public announcements cause security holders to make investment decisions with respect to a tender offer on the basis of incomplete information¹⁰ and trigger market activity normally attendant to a tender offer, such as arbitrage activity. Since they constitute the practical commencement of a tender offer, such pre-

¹⁰ As stated in the Senate and House Reports accompanying the Williams Act: "Without knowledge of who the bidder is and what he plans to do, the shareholder cannot reach an informed decision. He is forced to take a chance. For no matter what he does, he does it without adequate information to enable him to decide rationally what is the best possible course of action. This is precisely the kind of dilemma which our security laws are designed to prevent." S. Rep. No. 550, 90th Cong., 1st Sess. 2 (1967) ("1967 Senate Report"); H.R. Rep. No. 1711, 90th Cong., 2nd Sess. 3 (1968) ("1968 House Report").

commencement public announcements cause the contest for control of the subject company to occur prior to the application of the Williams Act and therefore deny security holders the protections which that Act was intended by Congress to provide.¹¹

Under Rule 14d-2(b) a bidder's public announcement through a press release, newspaper advertisement or public statement of certain material terms of a cash tender offer causes the bidder's tender offer to commence under section 14(d) of the Exchange Act. In order to provide certainty to bidders, the information which will trigger Rule 14d-2(b) is set forth in Rule 14d-2(c). Generally, this information relates to: the identity of the bidder and the subject company; a statement of the class and amount of securities being sought; and disclosure of the price or range of prices being offered therefor. Safe harbor provisions for public announcements which will not trigger the operation of Rule 14d-2(b) are set forth in Rules 14d-2(d) and (e).

Rule 14d-2(b) contains an exception clause which is designed to prevent the imposition of undue burdens on a bidder and to assure the availability of security holders' rights under sections 14(d)(5) and 14(d)(6) and the rules promulgated thereunder. Under the exception clause, the tender offer would not be deemed to commence on the date of the public announcement if within five business days thereafter the bidder either: (1) issues a subsequent public announcement stating that the bidder has determined not to continue with the offer; or (2) complies with the filing requirements of Rule 14d-3(a) and disseminates the disclosure required by Rule 14d-6(a) to security holders pursuant to Rule 14d-4 or otherwise.¹² An empirical study of 153 cash tender offers during the period from 1974 through 1978 which was conducted by the Commission's Directorate of Economic and Policy Research¹³ has confirmed the feasibility of meeting these requirements within a period of five business days.

If the bidder makes the subsequent announcement contemplated by the first option, the initial announcement will not be deemed to commence an offer. If the bidder complies with the filing,

disclosure and dissemination requirements of the second option, the tender offer will commence on the date of such compliance, rather than the date of the earlier public announcement, except that section 14(d)(7) will apply from the date of such earlier public announcement. If the bidder exercises neither option, the tender offer commences on the date of the initial announcement, resulting, however, in filing and disclosure violations. As a result, it is not anticipated that a bidder making such a public announcement will select the "do nothing" alternative.

Some commentators noted that there is a direct conflict between rule 14d-2(b) and state anti-takeover statutes¹⁴ with the effect that such statutes are preempted. These statutes typically require a publication of or a public filing which includes the material terms of the tender offer prior to the time the offer may be commenced. These requirements of the state statutes will trigger the commencement¹⁵ of the tender offer under Rule 14d-2(b) despite the fact that the state statutes do not permit the offer to commence until the conclusion of any applicable waiting period and hearing process. Moreover, by deeming commencement to occur on the date of the publication or filing required by these statutes, the minimum periods, best price, and withdrawal and pro rata rights provided under these statutes could not function since they are usually predicated on the effective date of the tender offer which cannot occur until after the conclusion of the waiting period and hearing process.

Thus, the conflict between Rule 14d-2(b) and such state statutes is so direct

¹⁴ There are currently over 35 state anti-takeover statutes. However, in 1968, when the Williams Act was enacted, only Virginia had a takeover statute, and that statute had not been enforced. (Virginia's statute, Va. Code § 13.1-528, became effective on March 5, 1968, (Va. Act 1968, c. 119) (amendments to the Virginia statute became effective on July 1, 1979); the Williams Act was enacted several months later, on July 29, 1968. When Congress enacted the Williams Act amendments in 1970, Pub. L. No. 91-567, 84 Stat. 1497, Ohio and Nevada had passed takeover laws, but only the Ohio law had been enforced, and that occurred in the same month the amendments were enacted. Nev. Rev. Stat. § 79.376-78.3778 (1973), 2 CCH Blue Sky L. Rep. ¶11,151-31,169; Ohio Rev. Code Ann. § 1707.04.1 (Page 1977 Supp.), 2 CCH Blue Sky L. Rep. ¶38,104-1. There is no evidence in the legislative history that Congress was aware of these laws.

¹⁵ Subject to the exception clause in Rule 14d-2(b) noted previously, a bidder must file and transmit its Schedule 14D-1 on the date of commencement as well as publish or send or give the information required by Rule 14d-6 to security holders. Thus, by requiring compliance with Regulation 14D at the time such information is first made available to the public, the rule ensures that security holders will have adequate information when they are confronted with the need to make investment decisions with respect to a tender offer.

¹¹ See Brief for SEC as Amicus Curiae, *Leroy v. Great Western United Corp.*, 99 S. Ct. 2710 (1979).

¹² It should be noted that the exception applies only to section 14(d). Thus, a public announcement of the information set forth in Rule 14d-2(c) would trigger the application of Rule 10b-13[17 CFR 240.10b-13]. Bidders are also reminded of the possible applicability of section 14(e) to such purchases.

¹³ This study has been included in File No. S7-770 and is available for public inspection and copying.

and substantial as to make it impossible to comply with both sets of requirements as they presently exist. While recognizing its long and beneficial partnership with the states in the regulation of securities transactions, the Commission nevertheless believes that the state takeover statutes presently in effect frustrate the operation and purposes of the Williams Act¹⁶ and that, based upon the abuses in current tender offer practice discussed above, Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act.

Concern was also expressed by the commentators regarding the potential for a conflict between Rule 14d-2(b) and statutes requiring regulatory approval to be obtained in connection with certain transactions, such as tender offers involving a subject company engaged in a regulated business. This may occur where the application for such approval is public and includes the information specified in Rule 14d-2(c). The commentators noted that without a provision for the extension of the five day period provided in Rule 14d-2(b), the bidder may have to abandon the tender offer because it cannot comply with conflicting legal requirements.

The Commission's examination of this issue reveals that such conflicts are unlikely at the Federal level. The Federal¹⁷ statutes which are commonly applicable in this context focus on the acquisition of either control or a specified percentage of securities. Thus, if appears that a tender offer which is appropriately conditioned upon obtaining the necessary regulatory approval may be published or sent or given in compliance with Rule 14d-2(b) without conflicting with such statutes. Bidders are, however, reminded of the importance of providing appropriate disclosure with respect to regulatory requirements which must be complied with or regulatory approval which must be obtained in connection with the tender offer.¹⁸

¹⁶ See brief for SEC as Amicus Curiae *Leroy v. Great Western United Corp.*, U.S. 99 S. Ct. 2710 (1979).

¹⁷ See the Banking Holding Company Act, 12 U.S.C.A. § 1842 (West Supp. 1979); the Federal Aviation Act, 49 U.S.C.A. § 1378 (West Supp. 1979); the Federal Communications Act, 47 U.S.C.A. § 310 (West Supp. 1979); the Interstate Commerce Act, 49 U.S.C.A. § 11343 (West Supp. 1979).

¹⁸ See Item 10(b) of Schedule 14D-1. See also *Ronson v. Liquifin AG*, 370 F. Supp. 597 (D.N.J.), *aff'd*, 497 F.2d 394 (3rd Cir.), *cert. denied*, 419 U.S. 870 (1974); *Commonwealth Oil Refining Co. v. Tesoro Petroleum Corp.*, 394 F. Supp. 287 (S.D.N.Y. 1975); *Texasgulf, Inc., v. Canada Development Corp.*, 366 F. Supp. 374 (S.D. Tex. 1973).

Rule 14d-3: Filing and Transmission of Tender Offer Statement

Rule 14d-3(a) requires the bidder to file a Schedule 14D-1 with the Commission as soon as practicable on the commencement date. This Rule also requires the bidder to hand deliver a copy of the Schedule to the subject company and to any previous bidder which has filed a Schedule 14D-1 with respect to a tender offer for the same class of securities which has not yet terminated. The Commission has determined, however, not to require the bidder to hand deliver a copy of the schedule to securities exchanges or to the National Association of Securities Dealers (the "NASD") as proposed for comment. Instead, each national securities exchange where the class of the subject company's securities being sought in the tender offer is registered and listed for trading and, if the class of securities being sought in the tender offer is quoted in NASDAQ, the NASD, will receive telephonic notice of certain information and a copy of the schedule through the mail. This revision will reduce the compliance burden noted by the commentators while at the same time providing timely notice of the tender offer to securities exchanges and the NASD.

The requirements for filing amendments disclosing material changes to the bidder's Schedule 14d-1 and additional tender offer materials as exhibits to the Schedule, formerly set forth in paragraphs (b) and (c) of proposed Rule 14d-2, have been revised and combined into a single paragraph (b) of Rule 14d-3. Rule 14d-3(b) requires material changes in the information set forth in the bidder's Schedule 14D-1 to be filed as an amendment. In addition, such amendments must be hand delivered to the subject company and sent to any exchange and/or the NASD as required by Rule 14d-3(a). Any additional tender offer, without regard to whether it includes disclosure of a material change in the information previously disseminated to security holders, is required to be filed as an exhibit to the bidder's Schedule 14D-1 and transmitted in the same manner as amendments disclosing material changes.

Rule 14d-3(b) requires additional tender offer material and amendments to the Schedule 14D-1 disclosing a material change to be filed and sent promptly but not later than the date such material or such change is first published or sent or given to security holders. Rule 14d-3(c) creates a limited exception to this requirement by providing that additional tender offer

material or an amendment to Schedule 14D-1 which only discloses the number of shares deposited to a certain date and/or announces the extension of the tender offer may be filed and sent promptly after the date such material is first published or sent or given to security holders.

A few commentators advocated the extension of the standard in paragraph (c) to the filing and transmission of all additional tender offer material and amendments to Schedule 14D-1 because of the logistical difficulties which would occasionally arise in meeting the same day standard. The Commission notes, however, that section 14(d)(1) of the Exchange Act specifically provides that additional tender offer materials shall be filed and sent not later than the date the material is first published or sent or given to security holders. Moreover, since 1968 former Rule 14d-1(d) has required the filing of additional tender offer material not later than the time such material is first published or sent or given to security holders. While the Commission believes that the limited exception provided by Rule 14d-3(c) is consistent with the statutory framework of the Williams Act and will facilitate prompt dissemination of such limited disclosure, it does not presently believe that further expansion of the exception is warranted.

Rule 14d-4: Dissemination of Certain Tender Offers

As discussed more fully in the February release,¹⁹ the disclosure process envisioned by the Williams Act is not limited to the items of information which must be disclosed. It also includes the dissemination of material information to shareholders so that security holders have the opportunity to receive, consider and evaluate the disclosure required by Rule 14d-6.

Tender offers in which the consideration consists of securities registered under the Securities Act are disseminated pursuant to that Act. The former tender offer rules, however, did not provide specific guidance as to what constitutes adequate dissemination of a tender offer in which the consideration consists of cash and/or securities exempt from registration under section 3 of the Securities Act. Rule 14d-4 provides such guidance and encourages the prompt and widespread dissemination of such tender offers by establishing standards whereby information disseminated in compliance with its provisions would be deemed "published or sent or given to security holders" for purposes of section 14(d)(1)

¹⁹ 44 FR 9965-66.

of the Exchange Act. This is accomplished by providing three alternative definitions of what constitutes dissemination: long-form publication; summary publication and use of stockholder lists and security position listings. A bidder is able to use more than one method so long as there is full compliance with each method used. Moreover, Rule 14d-4 is not mandatory and a tender offer in which the consideration consists of cash and/or securities exempt from registration under Section 3 of the Securities Act may be disseminated by other methods. It should be noted, however, that a proviso has been added to paragraph (a) to make clear that any bidder who uses summary publication or stockholder lists and security position listings pursuant to Rule 14d-5 must comply fully with paragraphs (a)(2) and (a)(3), respectively.

Long-form publication under Rule 14d-(a)(1) is substantially equivalent to the current practice. It requires adequate publication of the tender offer in a newspaper or newspapers.²⁰

Summary publication under Rule 14d-4(a)(2) requires the adequate publication of a summary advertisement of the tender offer in a newspaper or newspapers.²¹ Additionally, this method requires a bidder to mail or otherwise furnish with reasonable promptness its tender offer materials²² to any security holder upon request. In order to comply with this provision, a bidder must have sufficient copies of the tender offer materials available for distribution when the summary advertisement appears. The Commission believes that this method will facilitate rapid communication of a tender offer to security holders and will ensure dissemination of tender offer materials while at the same time decreasing the scheduling problems and escalating costs associated with making long-form publication of tender offers.

Rule 14d-4(a)(3) relates to the use of stockholder lists and security position listings. As proposed for comment, this provision would have required publication of a summary advertisement of the tender offer at the approximate time of the commencement of the mailing and transmittal of the tender offer materials pursuant to proposed Rule 14d-5 as well as specifying certain other requirements which depended on

²⁰ The disclosure requirements for long-form publication are set forth in Rule 14d-6(a)(1), discussed below.

²¹ The limited disclosure requirements for a summary advertisement are set forth in Rule 14d-6(a)(2)(i), discussed below.

²² The disclosure required by such tender offer materials is set forth in Rule 14d-6(a)(2)(ii), discussed below.

the subject company's election pursuant to proposed Rule 14d-5. Rule 14d-4(a)(3) has been revised in several respects. First, in response to the request by commentators for greater flexibility in the use of this method, either long-form or summary publication may be used with stockholder lists and security position listings. Second, such publication is required on or prior to the date of the request to the subject company, rather than on the date of mailing and transmittal of tender offer materials. This revision is intended to decrease the possibility of leaks between the time of the bidder's request and publication that existed under the proposal. It also allows the bidder to control the time of publication and is thus responsive to the commentator's concern regarding the difficulty of obtaining adequate newspaper space on short notice since the bidder would not have known when the subject company would issue the notice that the mailing had commenced. Third, the specific obligations of the bidder regarding the use of stockholder lists and security position listings have been moved to Rule 14d-5.

The specification of what constitutes adequate publication, formerly contained in paragraph (a) of proposed Rule 14d-4, has been made into a separate paragraph (b). In addition, a proviso has been added which deems publication in all editions of a daily newspaper with a national circulation to constitute adequate publication.

Pursuant to Rule 14d-4(c), material changes in the information published or sent or given to security holders must be disseminated in a manner reasonably designed to inform security holders. This change reflects the simplification sought by the commentators with respect to the requirement proposed for comment that material changes be disseminated by the same method used to disseminate the initial tender offer materials. In order to prevent abuse of the use of stockholder lists and security position listings, however, a bidder who has elected pursuant to Rule 14d-5(f)(1), discussed below, to require the subject company to disseminate amendments disclosing material changes pursuant to Rule 14d-5 must disseminate such changes pursuant to such lists and listings. The bidder is nevertheless free to disseminate material changes by other means as well.

Rule 14d-5: Dissemination of Certain Tender Offers by the Use of Stockholder Lists and Security Position Listings

Rule 14d-5 gives bidders a Federal right to have their tender offer materials disseminated by means of the

stockholder lists of the subject company and security position listings of clearing agencies. As described more fully below, the subject company is able to elect whether to retain the stockholder lists, in which case the subject company will mail and transmit the bidder's tender offer materials, or to furnish the stockholder lists to the bidder, in which case the bidder will mail and transmit the tender offer materials. The option feature of Rule 14d-5 is patterned after Rule 14a-7 [17 CFR 240.14a-7]. In light of this option and case law under Rule 14a-7,²³ the Commission believes that Rule 14d-5 does not conflict with state law provisions controlling the right of shareholders to be furnished direct access to the stockholder list. Moreover, the rights created by Rule 14d-5 are intended to be in addition to any rights the bidder may have to stockholder lists under state law.

The Commission has carefully considered the comments questioning its authority to adopt the rule. It continues to believe that the extensive discussion of its rulemaking authority in the February release adequately demonstrates that the rule is within the Commission's authority.

In order to assure the timely receipt of tender offer materials by security holders pursuant to the rule, the rule specifies the time periods for compliance as well as the principal obligations of both the bidder and the subject company. Generally speaking, four of the seven paragraphs in the rule pertain to the subject company and three pertain to the bidder.

The principal paragraph relating to the requirements imposed on the subject company is Rule 14d-5(a). This provision is triggered by the subject company's receipt of a written request from a bidder for the use of stockholder lists and security position listings.²⁴ Upon receipt, the subject company is required to notify promptly certain persons, including transfer agents, of the receipt of the request and to ascertain promptly whether the current stockholder list was prepared as of a date earlier than ten business days before the date of the bidder's request. If

²³ See *Wood, Walker & Co. v. Evans*, 300 F. Supp. 171 (D. Colo. 1969), *aff'd*, 461 F.2d 852 (10th Cir. 1972), in which the district court addressed the compatibility of the Colorado shareholder inspection statute in effect at the time, Colo. Rev. Stat. § 3-15-17, with Rule 14a-7, and held that the two provisions were not mutually exclusive, that utilization of some of the federal procedures did not constitute a binding election, and that the Federal rule did not preempt the state statute.

²⁴ The subject company would not be required to comply with the proposal if the written request failed to meet the requirements of paragraph (e) of the proposal, discussed below.

the list was prepared prior to the ten business day period, the subject company is required to prepare a stockholder list as of the most recent practicable date which shall not be earlier than ten business days before the day the bidder's request was received. While Rule 14d-5(a) provides the subject company with an election either to furnish the lists to the bidder or to conduct the mailing/transmittal of the bidder's tender offer materials, this provision also requires the subject company to deliver oral notification of its election, which would be confirmed in writing, to the bidder no later than the second business day after the date the bidder's request is received. If the subject company elects to conduct the mailing/transmittal, the subject company's notification would include the approximate direct cost incidental to the mailing of the bidder's tender offer materials computed in accordance with Rule 14d-5(g)(2). This will apprise the bidder of the amount it will have to advance to the subject company at the time its materials are delivered in the event the subject company elects to conduct the mailing/transmittal on behalf of the bidder.

If the subject company elects to conduct the mailing and transmittal of the bidder's tender offer materials, Rule 14d-5(b) is applicable and requires the subject company to contact each participant named on the security position listings of clearing agencies and to ascertain the approximate number of beneficial owners of the securities held by such participant. No later than three business days after delivery of the bidder's tender offer materials, the subject company would be required to begin to mail a copy of such materials to each record holder named on the stockholder list and to begin to transmit the appropriate number of sets of such materials to the participants on the security position listings for subsequent delivery to beneficial owners of the securities sought by the tender offer. This clarifies an ambiguity in the proposal noted by the commentators as to whether it was intended that the mailing and transmittal be completed within the period specified. It is also responsive to the comments which indicated that the mailing and transmittal could not be completed in that amount of time. In order to prevent the use of dilatory tactics by or on behalf of the subject company, this revision has been accompanied by a requirement that the subject company use its best efforts to complete the mailing and transmittal in a timely manner. Moreover, the provision makes

clear that the subject company cannot complete the mailing and transmittal of the bidder's tender offer materials in a substantially greater period of time than it would complete a mailing and transmittal of its own materials relating to the tender offer. It should be noted that the "substantially greater" standard is intended to take into account differences in the time needed to mail and transmit the materials arising solely as a result of the physical characteristics of the materials.

Rule 14d-5(b)(5) provides an updating procedure with respect to the stockholder list under which persons, who become record holders after the date of the stockholder list, are furnished copies of the bidder's tender offer materials. Under Rule 14d-5(b)(6) a similar mailing/transmittal procedure would be followed with respect to amendments disclosing material changes to the bidder's tender offer materials. It should be noted, however, that the subject company's obligation to mail and to transmit such amendments pursuant to Rule 14d-5(b)(6) is qualified by the bidder's election under new paragraph (f)(1). Thus, the obligation will arise only where the bidder has made an irrevocable election to require the subject company to disseminate amendments disclosing material changes.

If the subject company elects to furnish the stockholder list and security position listings to the bidder, Rule 14d-5(c) is applicable and requires the subject company to furnish such list and listings no later than the third business day after the date of the bidder's request. As with the revision to paragraph (b)(6), Rule 14d-5(c)(2) has been revised to require the subject company to update the stockholder list only if the bidder has elected pursuant to paragraph (f)(1) to require the subject company to disseminate amendments disclosing material changes to the tender offer materials.

While the name and address of record holders would be furnished to the bidder, the amount of securities held by such persons would not be disclosed. The commentators disagreed on whether the amount of securities owned of record by each security holder should be shown on the stockholder list. The Commission has determined not to require that disclosure because the purpose of the rule is to facilitate dissemination of the tender offer in the interest of all security holders; not to facilitate the tender offer by permitting the bidder to selectively mail only to large holders. This approach also serves

to protect the interest of holders in the confidentiality of their holdings.

Rule 14d-5(d) is designed to clarify the application of other provisions of the Federal securities laws to a subject company under the mailing/transmittal procedure. Sub-paragraphs (1) and (2) have been added in response to the views of the commentators and are self-explanatory. Sub-paragraphs (3) and (4), which are also self-explanatory, have been revised to negate the possible inference that the subject company or its affiliates or agents would be underwriters under section 2(11) of the Securities Act or liable under any provision of the Federal securities laws for the disclosure in the bidder's tender offer materials based solely upon the failure to comply in all respects with Rule 14d-5.

The Commission has determined not to adopt proposed Rule 14d-5(e). That proposal would have prevented the subject company from conducting a shareholder communication relating to the bidder's tender offer, other than a stop-look-and-listen letter, until it had completed certain obligations under the rule. As noted by the commentators, the proposal involved potential abuse by a bidder seeking a tactical advantage. Moreover, the provision is no longer necessary since the revisions to Rule 14d-4 discussed above will require the tender offer to commence on or prior to the date of the bidder's request for the stockholder lists and security position listings.

While Rule 14d-5(e) sets forth the information which a bidder must include in its written request in order to initiate the operation of Rule 14d-5(a), Rule 14d-5(f) would impose certain requirements on the bidder. Rule 14d-5(f)(1) requires the bidder to make a timely election whether to require the subject company to disseminate amendments disclosing material changes to the tender offer materials. In view of the additional burden which the mailing and transmission of such amendments may impose on the subject company, the Commission believes such information should be available to the subject company prior to making its election. Paragraph (f)(2) of Rule 14d-5 requires the bidder to comply with the dissemination requirements of Rule 14d-4(a)(3). If the subject company elects to conduct the mailing/transmittal of the bidder's tender offer materials, Rule 14d-5(f)(3) would require the bidder to deliver its tender offer materials, including amendments, to the subject company and to mail or otherwise to furnish the tender offer materials to any requesting security holder. Another

provision requires the bidder to advance to the subject company an amount equal to the approximate cost of conducting the mailings to security holders computed in accordance with paragraph (g)(2) of Rule 14d-5. This provision alleviates the commentators' concern that the subject company will be required to absorb the expense of compliance with the rule in cases where the bidder is financially irresponsible. If the subject company elects to furnish the lists to the bidder, Rule 14d-5(f)(4) would require the bidder to use such lists exclusively in the dissemination of tender offer materials to security holders; to return the lists to the subject company promptly after the termination of the bidder's tender offer; to accept, handle and return all lists on a confidential basis; not to retain any list or any information derived from such list after the termination of the tender offer; to mail all the tender offer materials, including amendments, to each person on the stockholder list and updates thereto; to follow a procedure under which all tender offer materials would be transmitted to each participant named on a security position listing for subsequent delivery to the beneficial owners of the securities. Regardless of the subject company's election, the bidder is required to reimburse promptly the subject company for the direct costs of complying with the rule computed in accordance with paragraph (g)(2) incurred by the subject company and its agents in complying with the requirements of the rule which are in excess of the amounts advanced by the bidder under paragraph (f)(3)(iii).

Rule 14d-5(g) adds greater specificity to the obligations imposed on the bidder by paragraph (f). Paragraph (g)(1) specifies the minimum number of sets of tender offer materials which the bidder must deliver and requires envelopes or other containers to be provided therewith. It also provides that delivery of the tender offer materials shall be deemed not to have been made unless the bidder has advanced the approximate cost of conducting the mailing at the time of delivery. Thus, the subject company would not be obligated to mail and transmit the tender offer materials pursuant to Rule 14d-5(b) unless such payment is received with the materials. Paragraph (g)(2) specifies the procedure for calculating the cost of mailing tender offer materials and amendments thereto. It should also be noted that this provision imposes an obligation on the subject company to provide an appropriate accounting to the bidder with its final billing.

Rule 14d-6: Disclosure Requirements With Respect To Tender Offers

Rule 14d-6 establishes specific disclosure requirements for any tender offer which is subject to section 14(d)(1) of the Exchange Act. While the rule substantially follows proposed Rule 14d-3, its structure has been revised. The disclosure requirements continue to depend on the method by which the tender offer is disseminated to security holders but the distinction between the requirements which are applicable to tender offer materials disseminated on the date of commencement and to additional tender offer materials disseminated after the date of commencement has been clarified.

Rule 14d-6(a) provides the disclosure requirements which are applicable to tender offer materials published or sent or given to security holders on the date of commencement. When a bidder uses a method under Rule 14d-4 to disseminate a tender offer on the date of commencement, either sub-paragraphs (a)(1), (a)(2) or (a)(3) of Rule 14d-6 will determine what information specified in paragraph (e) will be required to be disclosed. Exchange tender offers in which the consideration consists of securities registered under the Securities Act or any other tender offer which is disseminated on the date of commencement other than by means of Rule 14d-4 are governed by the disclosure requirements of Rule 14d-6(a)(4).

Rules 14d-6 (a) and (b) specify the information required in additional tender offer materials that are published or sent or given to security holders subsequent to the date of commencement. While based on proposed Rule 14d-3(c)(2), Rule 14d-6(b) has been revised to permit summary advertisements to be used after the date of commencement of the tender offer and to reduce the number of items of information required to be included. Rule 14d-6(c), which is based on proposed Rule 14d-3(c)(1), has been revised in two respects. First, it allows a bidder greater flexibility to omit information from certain tender offer materials disseminated subsequent to the date of commencement if such information has been previously furnished by the bidder in connection with the tender offer. Second, it makes clear that tender offer materials furnished by the bidder upon the request of any security holder or transmitted to security holders pursuant to stockholder lists and security position listings requested under Rule 14d-5 must include all of the information required by Rule 14d-6(e)(1). These revisions are

designed to reduce the compliance burden noted by the commentators while assuring the adequacy of the information furnished to security holders.

Rule 14d-6(d) establishes an express obligation to disclose promptly material changes in the information published or sent or given to security holders. This obligation comports with current practice and avoids any possible ambiguity, thus ensuring full disclosure of material information during the course of the tender offer.

Rule 14d-6(e) specifies the items of information to be included pursuant to Rules 14d-6 (a) and (b). Rule 14d-6(e)(1) is applicable to tender offers which are published or sent or given to security holders other than by means of a summary advertisement. Although it closely follows proposed Rule 14d-6(b)(1), revisions have been made with respect to disclosure of the expiration of the tender offer, pro rata periods, and Item 2 of Schedule 14D-1. The commentators noted that it may not be possible or appropriate at the commencement of a tender offer to disclose upon what terms or conditions the offer will be extended, as required by proposed Rule 14d-3(b)(1)(v). The Commission has therefore followed the recommendation of the commentators by requiring disclosure of the procedures for extension. The commentators also pointed out that a bidder cannot know in advance the dates of the period during which securities will be taken up pro rata pursuant to section 14(d)(6) of the Exchange Act in the case of an increase in consideration. Accordingly, Rule 14d-6(e)(1)(vi) has been revised to require the expiration date to be stated only for the pro rata period which begins on the date of commencement. In order to reduce the expense of publication, disclosure will not be required of the residence or business address and five-year employment history of natural persons other than the bidder described in response to Item 2 of Schedule 14D-1.

Rule 14d-6(e)(2) specifies the limited disclosure to be made in a summary advertisement published, sent or given on the date of commencement pursuant to Rule 14d-6(a) (2) or (3). The inclusion of any additional information in a summary advertisement published, sent or given on the date of commencement will make this provision unavailable to the bidder and result in the necessity for publication of the information required by Rule 14d-6(e)(1). A few commentators urged the expansion of the provision to permit the inclusion of additional information. The Commission

is concerned that the expansion of summary advertisements beyond their present limits would erode its intended benefits, viz., rapid notification of the existence of the tender offer and reduction of the scheduling problems and escalating costs associated with making long-form publication of a tender offer. It should also be noted that summary advertisements are only a part of the method of summary publication. Bidders are also required by Rule 14d-4(a)(2)(ii) to furnish tender offer materials containing the information required by Rule 14d-6(e)(1) to any security holder who requests such materials pursuant to the summary advertisement. Security holders are notified of this opportunity in the summary advertisement which is required to include appropriate instructions as to how security holders may obtain promptly, at the bidder's expense, the bidder's tender offer materials. Moreover, the explanatory note to proposed Rule 14d-3(b)(2) has been made into a separate subparagraph of Rule 14d-6(e) which prevents the inclusion of a transmittal letter (whereby securities of the subject company being sought in the tender offer may be transmitted to the bidder or its depository) in the summary advertisement. This is intended to encourage security holders to request the bidder's tender offer materials in making their investment decision with respect to the tender offer.

Several commentators were opposed to the requirement in proposed Rule 14d-3(b)(2)(ii) that the bidder include a brief description of the purpose of the tender offer in its summary advertisement. It was submitted that bidders would be reluctant to summarize the purpose of the tender offer, thereby resulting in a lengthy advertisement containing all of the information required by Item 5 of Schedule 14D-1. As noted previously, extended discussions of this sort are inconsistent with the intended purpose of summary advertisements. The Commission has therefore narrowed the scope of the requirement by requiring disclosure only in those cases where the purpose or one of the purposes is to acquire or influence control and where the tender offer is for less than all securities of the class. The Commission believes that in the context of a summary advertisement the critical item of information with respect to the bidder's purpose in making the tender offer is whether he is seeking to obtain or influence control. Since this purpose is implicit in tender offers for all of the outstanding securities, disclosure of a

control purpose is not being required in a summary advertisement with respect to such offers.

Rule 14d-7: Additional Withdrawal Rights

Rule 14d-7 is being adopted substantially as proposed for comment. The rule is intended to enhance the effectiveness of withdrawal by providing withdrawal rights to security holders in addition to those provided by section 14(d)(5) of the Exchange Act. These additional withdrawal rights are set forth in Rule 14d-7(a) which is intended to interrelate with Rule 14e-1(a).²⁵

Rule 14d-7(a)(1) extends the statutory seven-day withdrawal right to fifteen business days from the date the tender offer commences. This affords security holders a longer period to reconsider their decision to deposit their shares. It also gives bidders a reasonable time prior to the expiration of the offer to ascertain the number of shares deposited and to determine whether to accept such securities for payment or to change the terms of the offer, such as extending the expiration date.

Certain commentators questioned the Commission's authority to extend the withdrawal period beyond that provided in section 14(d)(5). The Commission notes, however, that section 14(d)(5) expressly grants the authority to vary the statutory periods "as necessary or appropriate in the public interest or for the protection of investors." In the Commission's view, the specific withdrawal rights contemplated by the rule serve the public interest and the protection of investors by providing effective means of withdrawal within the context of the minimum period for tender offers in Rule 14e-1(a).

Rule 14d-7(a)(2) establishes a conditional withdrawal right in competing tender offer situations under which shares can be withdrawn on the date and for ten business days following the commencement date of a competing tender offer by another bidder. It should be noted, however, that commencement for the purpose of this provision is determined solely under Rule 14d-2(a). Thus, a public announcement which is deemed to commence a tender offer under Rule 14d-2(b) would not trigger additional withdrawal rights under Rule 14d-7(a)(2). As proposed for comment, this provision would also have been triggered by a competing tender offer by the subject company. This requirement was deleted because of its potential for

abuse. As noted by the commentators, a subject company could obtain an advantage through the extension of the withdrawal period by making a tender offer for a de minimus amount of the securities being sought by the bidder.

Rule 14d-7(b) provides that the withdrawal rights under subparagraphs (a)(1) and (a)(2) of the rule are to be computed on a concurrent rather than a consecutive basis. The following is an example of the concurrent computation of time periods for withdrawal rights pursuant to this section. Bidder X commences a tender offer on Business Day 1 and another bidder, Y, commences a tender offer for securities of the same class of securities on Business Day 7. For X's tender offer, the withdrawal rights under Rule 14d-7(a)(1) of from Business Day 8 through Business Day 15 would be included in the computation of withdrawal rights under Rule 14d-7(a)(2). Thus, withdrawal rights in X's tender offer would begin on Business Day 1 and terminate at the end of Business Day 17.

Rule 14d-7(d) addresses the question of how security holders can properly effect withdrawal of deposited securities. The commentators noted that the limited requirements in the proposal for effecting withdrawal, although reasonable in terms of serving as timely notice of withdrawal, would have unduly hampered the bidder's ability to protect itself against fraud in physically releasing the withdrawn securities. The provision has therefore been revised to specify the requirements for timely notice of withdrawal but to permit the bidder to impose reasonable requirements as conditions precedent to the physical release of withdrawn securities.

Proposed Rule 14d-8: Purchases After Termination of Certain Tender Offers

As a means designed to prevent circumvention of the so-called "best price rule" embodied in section 14(d)(7) of the Exchange Act, proposed Rule 14d-8 would have integrated, for the purpose of that subsection, certain purchases of subject company securities made by a bidder or its affiliates within forty business days after the termination of the bidder's tender offer. In view of the substantial problems raised by the commentators with respect to both the approach taken in the proposed rule and its operation and impact,²⁶ the Commission has determined not to adopt it. Nevertheless, the Commission continues to believe there is a need to prevent bidders from taking advantage

²⁵ As discussed below, Rule 14e-1(a) establishes a minimum period of twenty business days for any tender offer.

²⁶ See pages 111 to 131 of the summary of comments.

of unsettled market conditions following the termination of a tender offer. It is therefore concurrently publishing for comment proposed Rule 14e-5, described more fully in a companion release, which would prevent purchases of securities sought by the bidder in a tender offer for a period of ten business days following termination of the tender offer.

Rule 14d-8: Exemption From Statutory Pro Rata Requirement

Rule 14d-8 is identical to proposed Rule 14d-9. The rule establishes an exemption from section 14(d)(6) pursuant to Section 14(d)(8)(C) of the Exchange Act for a tender offer for less than all the outstanding equity securities of a class in which the bidder provides pro rata periods in excess of those required by section 14(d)(6). Thus, a bidder is allowed to use any proration period of more than ten days with respect to either the period after commencement or after notice of an increase in the consideration offered or both. The availability of the exemption is conditioned on disclosure of the different pro rata periods in the tender offer materials disseminated by the bidder on the date of commencement of the tender offer. In order to avail itself of this provision, a bidder would be required to notify security holders at the earliest possible time, i.e. the date of commencement, that pro rata time periods in addition to those required by statute will be provided in the tender offer. If no provision is made in the tender offer materials disseminated to security holders on the commencement date, the time requirements of section 14(d)(6) would apply and the bidder would be unable to vary the proration periods during the course of the tender offer. Disclosure at the commencement of a tender offer is intended to avoid confusion and uncertainty among security holders confronted with a tender offer for their shares.

Rule 14d-8 is voluntary and operates in a manner similar to that under section 14(d)(6). The Commission believes that the rule will resolve any doubt among practitioners that a bidder can extend either or both of the pro rata acceptance provisions beyond the ten-day periods without being in violation of section 14(d)(6). Moreover, the rule decreases the likelihood of hasty decision-making by investors and increases the opportunity for equal participation by all security holders in tender offers for less than all securities of a class.

Rule 14d-9: Solicitation/ Recommendation Statements With Respect to Certain Tender Offers

Rule 14d-9 is applicable to any solicitation or recommendation with respect to a tender offer by a person described in Rule 14d-9(d). Rule 14d-9(a) requires the filing of Schedule 14D-9 with the Commission and transmittal of copies to certain persons as soon as practicable on the date the solicitation or recommendation is first published or sent or given to security holders. The procedures applicable to transmittal by the subject company of copies of its Schedule 14D-9 to national securities exchanges and to the NASD have been revised to parallel the changes to Rule 14d-3(a). Thus, in lieu of the hand delivery requirement proposed for comment, the subject company is required to give telephonic notice of certain information in the schedule and to mail a copy of the schedule to each national securities exchange where the security is registered and listed for trading and, if the class of securities is authorized for quotation in the NASDAQ interdealer quotation system, to the NASD.

Under Rule 14d-9(b), material changes in the information contained in the Schedule 14D-9 are required to be filed with the Commission and transmitted to the same persons who received the initial filing under Rules 14d-9 (a)(2) and (a)(3). Such amendments must be filed and transmitted promptly but not later than the date the material change is first published or sent or given to security holders. The proposal required material changes to be disseminated to security holders, thus implicitly requiring disclosure of such changes to be made. Rule 14d-9(b) has been revised to make explicit both the obligation to disclose and to disseminate such changes. It has also been revised to specify that such disclosure and dissemination must be made promptly after the change has occurred.

Rule 14d-9(c) establishes minimum informational requirements for any solicitation or recommendation that is communicated to security holders.²⁷ In order to reduce the compliance burden, information furnished to security holders will not have to include the information required by Item 5 of Schedule 14D-9 with respect to persons making solicitations or recommendations on behalf of the person filing the Schedule 14D-9.

²⁷ In addition to the specific disclosure requirements of Rule 14d-10(c), solicitations/ recommendations are also subject to section 14(e) of the Exchange Act.

Rule 14d-9(d) specifies the persons who are required to comply with Rule 14d-9. Paragraph (d)(1) identifies the persons whose solicitations/ recommendations are subject to the rule and paragraph (d)(2) exempts specific persons from the rule. While the two paragraphs operate independently, they also interrelate. Thus, a person may be included within the first paragraph but not be required to comply with the rule because of an exemption provided in the second paragraph. The only significant changes in the provision from that proposed for comment are with respect to Rule 14d-9(d)(2). As proposed for comment, an exemption was available for persons required to file a Schedule 14D-1. This standard would have created a hiatus in the application of the rule to solicitations/ recommendations by a person during the five-day period between the commencement of his tender offer under Rule 14d-2(b) and the filing of his Schedule 14D-1. By revising Rule 14d-9(d)(2)(i) to exempt bidders who have actually filed a Schedule 14D-1 pursuant to Rule 14d-3, solicitations/ recommendations made during the five-day period will be covered by the rule. The revision also removes any ambiguity in the coverage of persons who are required to file a Schedule 14D-1 but have not done so. In addition, Rule 14d-9(d)(2)(ii) has been revised to eliminate the coverage of attorneys, banks, brokers, fiduciaries or investment advisers who are not participating in a tender offer in more than a ministerial capacity.

A specific exemption is provided for the subject company's initial limited communication regarding a tender offer—the "stop-look-and-listen" letter under Rule 14d-9(e). This provision has been revised to accommodate new Rule 14e-2, described below. A subject company which is sending a "stop-look-and-listen" letter is required to state that on or before a specified date (no later than 10 business days²⁸ from the date of commencement) it will advise security holders of its position with respect to the tender offer. Thus, in order to avail itself of the exemption the subject company is required to make a subsequent communication which is deemed by Rule 14d-9(e) to constitute a solicitation/ recommendation subject to Rule 14d-9.

²⁸ The time period has been shortened from the fifteen business days proposed for comment to conform with Rule 14e-2 and to ensure that security holders have adequate time to consider the subject company's position in making their investment decision.

*Schedule 14D-9: Solicitation/
Recommendation Statement*

Schedule 14D-9 is intended to provide more meaningful information to security holders in the context of a tender offer. The Commission believes that the disclosure elicited by the Schedule will assist security holders in making their investment decision and in evaluating the merits of a solicitation/recommendation. With the exception of amendments to Items 4 and 7, and the Instruction to Item 3(b) the schedule is substantially the same as that proposed for comment.

Item 3(b) requires, if material, a description of any contract, agreement, arrangement or understanding and any actual or potential conflict of interest between the person filing the statement or its affiliates and either: (1) the subject company, its executive officers, directors or affiliates; or (2) the bidder, its executive officers, directors or affiliates. The instruction to Item 3(b) pertains to a Schedule filed by the subject company and provides that when the materiality standard is applicable it is not necessary under certain circumstances²⁹ to include in the Schedule a description of any contract, agreement, arrangement or understanding between the subject company or its affiliates and any executive officer or director of the subject company. As proposed for comment, the instruction would have permitted descriptions to be omitted only if they related to present employment by the subject company or its affiliates and the same information had been previously disclosed. The scope of the instruction has been expanded by permitting the omission of such descriptions which are unrelated to employment and by permitting reference to information which does not differ materially from information contained in communications filed with the Commission and disseminated to security holders.

Item 4 pertains to the solicitation or recommendation itself. Paragraph (a) of Item 4 requires the person filing the statement to state the nature of the

solicitation/recommendation and to specify whether the person is advising security holders to accept, reject or take other action with respect to the tender offer. In order to accommodate new Rule 14e-2, a new requirement has been added to paragraph (a) which requires a subject company which is not making a recommendation to state whether it is expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer. Thus, Item 4 is intended to serve as the vehicle for the subject company to satisfy the disclosure obligation imposed by Rule 14e-2 with respect to a tender offer subject to section 14(d). Item 4(b) has also been revised to account for Rule 14e-2. A subject company will therefore be required under this sub-item to state the reasons for its position with respect to the tender offer. It should be noted that the instruction to Item 4(b) indicates that conclusory statements will not be considered sufficient disclosure of the reasons stated in response thereto.

Item 7 of Schedule 14D-9 requires disclosure with respect to certain negotiations and transactions by the subject company. As proposed for comment, Item 7 would have required disclosure of any negotiation or transaction being undertaken in response to the tender offer by the subject company which related to or would have resulted in any of the following: (1) an extraordinary transaction, such as a merger or reorganization, involving the subject company or any subsidiary of the subject company; (2) a sale or transfer of a material amount of assets of the subject company or any of its subsidiaries; (3) a tender offer for or other acquisition of subject company securities; or (4) any material change in the subject company's present capitalization or dividend policy. The proposal was criticized by commentators who were concerned that it would elicit premature disclosure of negotiations with competing bidders which could dissuade them from making an offer. It was noted that this would be harmful to security holders since they would be prevented from obtaining the highest price for their securities. In addition, concern was expressed that such disclosure may, either innocently or fraudulently, induce security holders to reject a tender offer on the basis of an unjustified inference that a competing bid is imminent.

The Commission recognizes that premature disclosure of the matters contemplated by the proposal may be detrimental to the interests of security

holders. The effective representation of the interests of security holders may at times require management to maintain confidentiality during the formative stages of negotiations. On the other hand, the major developments referred to in Item 7 can be one of the most material items of information received by security holders.

The Commission has addressed these competing concerns by approaching disclosure of these matters at two levels. While the proposal would have required the subject company to describe negotiations in response to a tender offer which related to or would result in the specified events, new Item 7(a) requires a statement as to whether negotiations are being undertaken or are underway with respect to such events without requiring detailed disclosure. An instruction has also been added to Item 7(a) which clarifies the extent of the disclosure required with respect to negotiations. The instruction provides that, if an agreement in principle has not been reached, the possible terms of any transaction or the parties thereto need not be disclosed if in the opinion of the Board of Directors of the subject company such disclosure would jeopardize continuation of such negotiations. In such event, disclosure that negotiations are being undertaken or are underway and are in the preliminary stages will be sufficient. Thus, security holders will be apprised that such negotiations are being held without the subject company's having to furnish disclosure which would discourage further negotiations. A full description is, however, required under Item 7(b) with respect to the matters referred in Item 7(a)(1), (2), (3) or (4) at the time of any transaction, board resolution, agreement in principle, or a signed contract in response to the tender offer. It should be noted, moreover, that Item 7 is not exclusive. Thus, in a particular case, requirements such as those imposed by section 14(e) of the Act may dictate the disclosure comprehended by either paragraphs (a) or (b) of Item 7 at an earlier time or in greater detail than that contemplated by the item.

Rule 14e-1: Unlawful Tender Offer Practices

With one exception Rule 14e-1(a) requires any tender offer to remain open for a minimum of twenty business days from the date it is first published or sent or given to security holders. The exception has been added to remove from the application of the rule tender offers by issuers for their own securities unless such offers are made in anticipation of or in response to another

²⁹ The conditions for not including such descriptions in the schedule are: (1) the information, or information which does not differ materially from such information, has been disclosed in a proxy statement, report or other communication within one year of the date of filing of the Schedule with the Commission; (2) the proxy statement, report or other communication has been filed with the Commission; (3) the schedule and the solicitation/recommendation published, sent or given to security holders contain specific reference to the proxy statement, report or communication; and (4) a copy of the pertinent portion(s) of the proxy statement, report or other communication is filed as an exhibit to the schedule.

person's tender offer for securities of the same class. Requiring a minimum period of twenty business days for issuer tender offers that are made in anticipation of or in response to a third party tender offer will preserve the neutrality of the Williams Act. It should be noted, however, that tender offers by certain issuers which are not made in anticipation of or in response to another person's tender offer would be required by Rule 13e-4³⁰ [17 CFR 240.13e-4] to remain open for fifteen business days from the date the tender offer is first published or sent or given to security holders. The Commission believes that in the special context of such issuer tender offers the minimum period provided by Rule 13e-4 is adequate.

The commentators expressed divergent views with respect to Rule 14e-1(a). While most of the commentators favored the adoption of a minimum period requirement in excess of the period implicit in the operation of the statute, there was no consensus as to what the length of the period should be.

The Commission finds persuasive the views of the commentators who indicated that a minimum period of thirty business days is unnecessarily long. In the Commission's view the objectives of a minimum period, which are discussed below, can be accomplished with a minimum period of twenty business days. These purposes do not, as suggested by some commentators, include the promotion of competing tender offers which normally result in increasing the consideration paid for the securities being sought. This has been the Commission's view in administering the Williams Act³¹ and has also been judicially endorsed.³² In any event, a study conducted by the Commission's Directorate of Economic and Policy Research of 153 cash tender offers for common stock listed on either the New York Stock Exchange or the American Stock Exchange during the

period from 1974 through 1978 reveals that most recent tender offers do not involve offers by competing bidders and do not have offer price revisions.

There are several purposes to be served by Rule 14e-1(a). Tender offers which do not stay open for a reasonable length of time increase the likelihood of hasty, ill-considered decision making on the basis of inadequate or incomplete information as well as the possibility for fraudulent, deceptive or manipulative acts or practices by a bidder and others. The problems engendered by tender offers of excessively short duration also may have provided part of the stimulus for some of the 36 states which have enacted antitakeover statutes since 1968. To the extent this was a purpose of such legislation, the attempt to alleviate the problem was laudable, but has resulted in an inconsistent, overlapping and often counter-productive pattern of regulation and in many instances may have tipped the carefully constructed balance between bidder and subject company envisioned by the Williams Act in favor of subject company. Accordingly, the Commission believes that a uniformly applied federal regulation will better serve the purposes and policies of the Williams Act, including the interests of investors.

Tender offers which do not remain open for a reasonable period may impede the effective operation of Regulation 14D. In particular, Rule 14d-4 contemplates methods of dissemination which require a considerable period of time to accomplish. Two of these methods, summary publication and the use of shareholder lists and security position listings, involve mailings to security holders. The latter method also requires transmittal to beneficial owners of the securities being sought of the bidder's tender offer materials through the facilities of brokers, banks and similar persons. Although these methods will provide improved dissemination of tender offer materials, mailing and transmittal will reduce the amount of time available to security holders to consider the tender offer materials. The Commission therefore believes a minimum period of twenty business days is necessary.

For similar reasons, the Commission is adopting rule 14e-1(b) which requires that any tender offer³³ must remain open for at least ten business days after the date of the notice of an increase in either the offered consideration or the dealer's soliciting fee. The Commission

believes that this provision will facilitate communication during tender offers and provide a realistic time frame for security holders to evaluate certain increases before making an investment decision. In the Commission's view, Rule 14e-1(b) will alleviate undue pressure on security holders without unduly hindering the person making a tender offer.

Paragraphs (a) and (b) of Rule 14e-1 operate on a concurrent, rather than a consecutive, basis. For example, if the offeror increases the consideration offered on business day 3 of the tender offer, the ten business day requirement of Rule 14e-1(b) would expire during the twenty business day period of Rule 14e-1(a) and would not result in requiring the offer to be extended.

Rule 14e-1(c) has been revised to require a person making a tender offer to pay the consideration offered or to return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of the tender offer. This standard is also the standard applicable to issuer tender offers under Rule 13e-4(f)(5). Thus, any person making a tender offer is required to use all reasonable efforts to pay promptly for or to return deposited securities. The commission recognizes that the operation of this standard will be affected by the practices of the financial community and the following factors: current settlement, handling and delivery procedures relating to tenders made by guaranteed deliveries by appropriate institutions; procedures to cure technical defects in tenders; and the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976³⁴ and the rules promulgated thereunder.³⁵ The Commission believes that this provision will protect investors by ensuring that deposited securities are not tied up for an unreasonable length of time and will not unduly burden either the offeror or its depository in their operations after the termination of a tender offer.³⁶

³⁰ 15 U.S.C. 18a et seq.

³¹ See Release by Federal Trade Commission announcing promulgation of final rules re: Premerger Notification; Reporting and Waiting Period Requirements (July 31, 1978) (43 FR 33450).

³² A memorandum from the Division of Corporation Finance which was submitted to the Senate Committee considering the Williams Act amendment pursuant to the request of Senator Williams to then Chairman Budge for examples of how the Commission proposed to implement the grant of rulemaking authority under section 14(e) identified one area to be addressed by the rulemaking authority as the situation in which:

[T]he person who makes a tender offer may fail (a) to pay for securities purchased, or (b) to return to their owner's securities not purchased promptly upon the termination of the tender offer in

Footnotes continued on next page

³ Rule 13e-4 applies to an issuer which has a class of equity security registered pursuant to section 12 of the Act, or which is required to file periodic reports pursuant to section 15(d) of the Act, or which is a closed-end investment company registered under the Investment Company Act of 1940.

³¹ During his testimony at Senate hearings held with respect to the regulation of tender offers, Commissioner Loomis remarked: "[W]e think it reasonable to conclude that the primary objective of the Williams Act was to provide investor protection in takeover situations rather than to regulate tender offers as an economic phenomenon." Testimony of Philip A. Loomis, Commissioner, SEC, Hearings on Regulation Under Federal Banking and Securities Laws of Persons Involved in Corporate Takeovers, Before the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 87 (1976).

³² See *Bucher v. Shumway*, 452 F. Supp. 1288, 1294 (S.D.N.Y. 1978).

³³ Rule 14e-1(b) also includes an exception for issuer tender offers which are not made in anticipation of or in response to another person's tender offer for securities of the same class.

Finally, Rule 14e-1(d) has been revised to require notice of an extension of the tender offer to be issued through a press release or other public announcement no later than the earlier of: (i) 9:00 a.m. Eastern time, on the next business day after the scheduled expiration date of the offer; or (ii) if the class of securities which is the subject of the tender offer is registered on one or more national securities exchanges, the first opening of any one of such exchanges on the next business day after the scheduled expiration date of the offer. The notice is required to include a statement of the approximate number of securities deposited up to the date of such notice. As proposed for comment, a notice of extension would have been required to be issued promptly, but not later than one business day before the scheduled expiration date of the tender offer. Since most shares are tendered on the last day of the tender offer, the Commission agrees with the commentators that the proposal was not feasible.

Proposed Rule 14e-2

Proposed Rule 14e-2 included three provisions designed to address the problem of purchases of subject company securities by any person, including a bidder, on the basis of certain material, non-public information, i.e., the undisclosed determination of the bidder to make a tender offer for such securities. For the reasons discussed below, this proposal has been withdrawn and a revised proposed Rule 14e-3, is being published for comment in the companion release.

Proposed Rule 14e-2(a) would have applied to any person, other than the bidder, who purchased subject company securities on the basis of non-public information received directly or indirectly from a bidder that enabled the person to know or reasonably believe that the bidder would make a tender offer for such securities. The proposal would have proscribed any purchase of subject company securities by a person in receipt of such information unless prior to the purchase the person publicly announced the information received and its source. In view of the comments received and its subsequent experience, the Commission believes that a more generic approach to this question is needed. Therefore, the Commission is concurrently proposing for comment proposed Rule 14e-3(a) which pertains to purchases of subject company

securities by persons on the basis of any material non-public information relating to a tender offer, including the determination to make a tender offer.

Proposed Rule 14e-2(b) would have required a bidder who knew or had reason to believe that another person had violated, was in the process of violating, or was about to violate proposed Rule 14e-2(a) to promptly make a public announcement of appropriate information with respect to the bidder's tender offer for subject company securities. This proposal was intended to provide a reasonable assurance that in the event of violations of proposed Rule 14e-2(a) the marketplace and investors would be promptly alerted by the bidder. The Commission continues to believe that the bidder's role is critical in preventing the misuse of material non-public information relating to a tender offer. However, in view of the substantial concerns raised by the commentators with respect to the proposal, the Commission has determined that a different approach to the problem is more feasible. Therefore, the Commission is concurrently publishing for comment a proposed Rule 14e-3(b) which addresses the source rather than the effect of the problem. Generally, the proposal would prohibit any tender offeror from communicating material non-public information relating to the tender offer to any other person if the tender offeror knows or has reason to believe such other person is likely to purchase subject company securities on the basis of such information.

Proposed Rule 14e-2(c) would have prohibited the purchase of subject company securities by a bidder which had determined to make a tender offer therefor but had not yet publicly announced its intention to do so unless prior to any such purchase the bidder made a public announcement of certain information. The commentators raised a number of problems with respect to the proposal. They noted that it would prohibit the widely used acquisition technique of making a negotiated block purchase followed by an "any and all" tender offer at the same price to all other stockholders. It was also noted that the increased risk that purchases made to test the market would be construed in hindsight to have violated the proposal would cause many prospective bidders to stay out of the market. In the commentators' view, this problem is exacerbated by the absence of a definition of the term "tender offer." It was submitted that without a definition it would be difficult to know when a determination to make a tender

has been reached. Because of these changes and other changes in tender offer practice which would be brought about by the proposal, commentators were of the view that it would shift the balance of regulation and would dissuade bidders from making tender offers. For these as well as other reasons, the Commission has determined not to adopt the proposal at this time. However, the Commission continues to be concerned by purchases by bidders after the determination to make a tender offer has been made and may revisit the issue after final rulemaking action has been taken with respect to the proposed definition of the term "tender offer."

Rule 14e-2: Position of Subject Company With Respect to a Tender Offer

The Commission requested specific comment in the February release with regard to whether a rule should be adopted under the Williams Act which would require subject company management to disclose to security holders that: (1) the subject company recommends acceptance or rejection of a tender offer; (2) the subject company is expressing no opinion and is remaining neutral toward the tender offer; or (3) the subject company is unable to take a position with respect to the tender offer. It was also noted that if the subject company's position changed during the tender offer, timely disclosure of such change would be required. Comment was also requested as to the appropriateness of specifying this obligation by rule under section 14(d)(4) and/or section 14(e) of the Williams Act.

Rule 14e-2 implements this specific inquiry by requiring the subject company to publish or send or give to security holders a statement disclosing its position with respect to the tender offer within ten business days of the commencement of a tender offer by a person other than the issuer. The statement of position would take one of three forms: (1) the subject company recommends acceptance or rejection of a tender offer; (2) the subject company expresses no opinion and will remain neutral toward the tender offer; or (3) the subject company is unable to take a position with respect to the tender offer. In addition, the subject company is required to include the reason(s) for its position with respect to the tender offer, including the inability to take a position. If a subject company changes its position or other material changes occur in the disclosure required by the rule, the subject company is required to promptly publish or send or give to security holders a statement disclosing such material change.

Footnotes continued from last page accordance with the practices of the financial community for settlement of transactions, usually within five days.

As noted previously, a statement of position pursuant to Rule 14e-2 with respect to a tender offer which is subject to section 14(d)(1) of the Act is deemed by Rule 14d-9(f) to constitute a solicitation or recommendation within the meaning of Rule 14d-9 and section 14(d)(4) of the Act. In such case, a subject company is required to comply with the requirements of Rule 14d-9. Thus, among other things, a subject company is required to file a Schedule 14D-9 with the Commission and include the information required by certain items thereof in the information disseminated to security holders. Item 4 of the Schedule is among the items of information which is required to be communicated to security holders and is intended to serve as the vehicle by which the subject company will satisfy its disclosure obligation under Rule 14e-2 with respect to tender offers subject to section 14(d)(1).

Rule 14e-2 is predicated primarily on section 14(e) which grants to the Commission authority to define and prescribe means reasonably designed to prevent fraudulent, deceptive or manipulative acts and practices in connection with any tender offer. This rulemaking authority was granted to the Commission by the 1970 Williams Act amendments. During his testimony at the Senate hearings on this legislation, then Chairman Budge was asked by Senator Williams to give the committee "some examples of fraudulent, deceptive or manipulative practices used in tender offers which the proposed Commission rulemaking powers would prevent."³⁷ In response to this specific request, a memorandum from the Commission's Division of Corporation Finance was submitted for the record. Among the "problem areas" enumerated by this memorandum which the staff proposed to deal with by the rulemaking authority under section 14(e), as amended, was the situation in which:

Management of the target company in a tender offer may omit to make timely disclosure of its position in favor of or in opposition to such bids or change in such position.³⁸

Rule 14e-2 is designed to address the problem identified by the Commission staff memorandum in a manner similar to that described therein. The subject company's position with respect to a tender offer can have a determinative effect on the outcome of a tender offer and thus is material to security holders. The subject company

therefore should not be permitted to state its position when it maximizes its tactical advantage and to remain silent when it does not. Such complete discretion increases the likelihood for hasty, ill-considered decision-making by security holders and the possibility for fraudulent, deceptive or manipulative acts or practices by a subject company and others. It is also inconsistent with the neutrality between bidders and subject companies sought to be achieved by the Williams Act.

The Commission believes that the ten business day period will provide the subject company with sufficient time to consider, analyze and formulate a position with respect to the tender offer. Since Rule 14e-1(a) requires a third-party tender offer to remain open for twenty business days, the subject company has an effective opportunity to furnish "any information at its disposal pertinent to the merits of the offer before security holders are required to respond to it."⁴⁰ Moreover, since Rule 14d-7(a)(1) allows security holders to withdraw their securities until the expiration of fifteen business days from the date the tender offer commences, security holders will have at least five business days to reconsider their decision to deposit their securities in light of the information provided to them by the subject company. The Commission believes that the statement of the subject company's position within ten business days of commencement together with a twenty business day minimum period will "Avoid tipping the balance of regulation either in favor of [the subject company] or in favor of the person making the takeover bid."⁴¹

III. Certain Findings

In publishing the February proposals, the Commission specifically invited comments with respect to: (1) whether the costs imposed on bidders, subject companies and/or others by the proposals would outweigh their benefits to investors and the public interest; and (2) whether any proposed rule or the proposed schedule, if adopted, would have an adverse effect on competition or would impose a burden on competition or would impose a burden on competition which is neither necessary nor appropriate in furthering the purposes of the Exchange Act.

³⁹"By reason of the special relationship between them, shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control." *Chris Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 364-65 (2d Cir. 1973), *Cert. denied*, 414 U.S. 910 (1973).

⁴⁰Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 19 (1967).

⁴¹S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

The comment letters did not provide any significant basis for concluding that the implementation of the Commission's statutory mandate in the manner proposed would be outweighed by such possible additional costs. Accordingly, the Commission finds that the costs imposed on bidders, subject companies and others by the rules and schedule published herein are not unreasonable and are far outweighed by the benefits which will accrue to investors.

As required by section 23(a)(2) of the Exchange Act, the Commission has specifically considered the impact which the rules and schedule published herein will have on competition. The Commission finds that compliance with the rules and schedule will not impose any significant burden on competition. In any event, the Commission has determined that any possible competitive burden will be outweighed by, and is necessary and appropriate to achieve, the benefits of the rules and schedule to investors.

IV. Operation of Rules and Schedule, Effective Date

The rules and schedule published herein are not applicable to any tender offer which has been published or sent or given to security holders prior to their effective date. The rules and schedule will become effective January 7, 1980. No person is relieved from such person's present obligations under other provisions of the Federal securities laws pending the effective date of the rules and schedule.

V. Text of Adopted Rules and Schedule

The text of the rules and schedule is set forth below.

Text of Rules

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

I. Section 230.434b of 17 CFR Part 230 is amended to read as follows:

§ 230.434b Additional information required to be included in prospectuses relating to tender offers.

Notwithstanding the provisions of any form for the registration of securities under the Act, any prospectus relating to securities to be offered in connection with a tender offer for, or a request or invitation for tenders of, securities which is subject to section 14(d) of the Securities Exchange Act of 1934 shall include all of the information, not otherwise required to be included therein, required by § 240.14d-6(e)(1) of this chapter to be included in all such tender offers, requests or invitations, published or sent or given to the holders of such securities.

³⁷Hearings on S. 336 and S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking 91st Cong., 2d Sess. 11 (1970) [the "1970 Senate Hearings"].

³⁸*Id.* at 12.

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

II. Section 240.13d-101 of 17 CFR Part 240 is amended by revising Instruction B to read as follows:

§ 240.13d-101 Schedule 13D—Information to be included in statements filed pursuant to § 240.13d-1(a) and amendments thereto filed pursuant to § 240.13d-2(a).

B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render such answer misleading, incomplete, unclear or confusing. Material 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. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be deemed to be filed with the Commission for all purposes of the Act.

III. Sections 240.14d-1 through 240.14d-101 (Regulation 14D) of 17 CFR Part 240 are revised as follows:

Regulation 14D

§ 240.14d-1 Scope of and definitions applicable to Regulations 14D and 14E.

(a) *Scope.* Regulation 14D (§§ 240.14d-1 through 240.14d-101) shall apply to any tender offer which is subject to section 14(d)(1) of the Act, including, but not limited to, any tender offer for securities of a class described in that section which is made by an affiliate of the issuer of such class. Regulation 14E (§§ 240.14e-1 and 240.14e-2) shall apply to any tender offer for securities (other than exempted securities) unless otherwise noted therein.

(b) *Definitions.* Unless the context otherwise requires, all terms used in Regulation 14D and Regulation 14E have the same meaning as in the Act and in Rule 12b-2 (§ 240.12b-2) promulgated thereunder. In addition, for purposes of sections 14(d) and 14(e) of the Act and Regulations 14D and 14E, the following definitions apply:

(1) The term "bidder" means any person who makes a tender offer or on whose behalf a tender offer is made: *Provided, however,* That the term does not include an issuer which makes a tender offer for securities of any class of which it is the issuer;

(2) The term "subject company" means any issuer of securities which are

sought by a bidder pursuant to a tender offer;

(3) The term "security holders" means holders of record and beneficial owners of securities which are the subject of a tender offer;

(4) The term "beneficial owner" shall have the same meaning as that set forth in Rule 13d-3: *Provided, however,* That, except with respect to Rule 14d-3, Rule 14d-9(d) and Item 6 of Schedule 14D-1, the term shall not include a person who does not have or share investment power or who is deemed to be a beneficial owner by virtue of Rule 13d-3(d)(1) (§ 240.13d-3(d)(1));

(5) The term "tender offer material" means:

(i) The bidder's formal offer, including all the material terms and conditions of the tender offer and all amendments thereto;

(ii) The related transmittal letter (whereby securities of the subject company which are sought in the tender offer may be transmitted to the bidder or its depository) and all amendments thereto; and

(iii) Press releases, advertisements, letters and other documents published by the bidder or sent or given by the bidder to security holders which, directly or indirectly, solicit, invite or request tenders of the securities being sought in the tender offer;

(6) The term "executive officer" means the president, secretary, treasurer, any vice president in charge of a principal business function (such as sales, administration or finance) or any other person who performs similar policy making functions for a corporation;

(7) The term "business day" means any day, other than Saturday, Sunday or a federal holiday, and shall consist of the time period from 12:01 a.m. through 12:00 midnight Eastern time. In computing any time period under section 14(d)(5) or section 14(d)(6) of the Act or under Regulation 14D or Regulation 14E, the date of the event which begins the running of such time period shall be included *except that* if such event occurs on other than a business day such period shall begin to run on and shall include the first business day thereafter; and

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

§ 240.14d-2 Date of commencement of a tender offer.

(a) *Commencement.* A tender offer shall commence for the purposes of section 14(d) of the Act and the rules promulgated thereunder at 12:01 a.m. on the date when the first of the following events occurs:

(1) The long form publication of the tender offer is first published by the bidder pursuant to Rule 14d-4 (a)(1) (§ 240.14d-4(a)(1));

(2) The summary advertisement of the tender offer is first published by the bidder pursuant to Rule 14d-4 (a)(2) (§ 240.14d-4(a)(2));

(3) The summary advertisement or the long form publication of the tender offer is first published by the bidder pursuant to Rule 14d-4(a)(3) (§ 240.14d-4(a)(3));

(4) Definitive copies of a tender offer, in which the consideration offered by the bidder consists of securities registered pursuant to the Securities Act of 1933, are first published or sent or given by the bidder to security holders; or

(5) The tender offer is first published or sent or given to security holders by the bidder by any means not otherwise referred to in paragraphs (a)(1) through (a)(4) of this section.

(b) *Public announcement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section *except that* such tender offer shall not be deemed to be first published or sent or given to security holders by the bidder under paragraph (a)(5) of this section on the date of such public announcement if within five business days of such public announcement, the bidder either:

(1) Makes a subsequent public announcement stating that the bidder has determined not to continue with such tender offer, in which event paragraph (a)(5) of this section shall not apply to the initial public announcement; or

(2) Complies with Rule 14d-3(a) (§ 240.14d-3(a)) and contemporaneously disseminates the disclosure required by Rule 14d-6 (§ 240.14d-6) to security holders pursuant to Rule 14d-4 (§ 240.14d-4) or otherwise in which event:

(i) The date of commencement of such tender offer under paragraph (a) of this section will be determined by the date

the information required by Rule 14d-6 is first published or sent or given to security holders pursuant to Rule 14d-4 or otherwise; and

(ii) Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

(c) *Information.* The information referred to in paragraph (b) of this section is as follows:

(1) The identity of the bidder;

(2) The identity of the subject company; and

(3) The amount and class of securities being sought and the price or range of prices being offered therefor.

(d) *Announcements not resulting in commencement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which only discloses the information in paragraphs (d)(1) through (d)(3) of this section concerning a tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall not be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section.

(1) The identity of the bidder;

(2) The identity of the subject company; and

(3) A statement that the bidder intends to make a tender offer in the future for a class of equity securities of the subject company which statement does not specify the amount of securities of such class to be sought or the consideration to be offered therefor.

(e) *Announcement made pursuant to Rule 135.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which discloses only the information in Rule 135(a)(4) (§ 230.135(a)(4)) concerning a tender offer in which the consideration consists solely or in part of securities to be registered under the Securities Act of 1933 shall not be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section: *Provided,* That such bidder files a registration statement with respect to such securities promptly after such public announcement.

§ 240.14d-3 Filing and transmission of tender offer statement.

(a) *Filing and transmittal.* No bidder shall make a tender offer if, after consummation thereof, such bidder would be the beneficial owner of more than 5 percent of the class of the subject company's securities for which the tender offer is made, unless as soon as

practicable on the date of the commencement of the tender offer such bidder:

(1) Files with the Commission ten copies of a Tender Offer Statement on Schedule 14D-1 (§ 240.14d-100), including all exhibits thereto;

(2) Hand delivers a copy of such Schedule 14D-1, including all exhibits thereto:

(i) To the subject company at its principal executive office; and

(ii) To any other bidder, which has filed a Schedule 14D-1 with the Commission relating to a tender offer which has not yet terminated for the same class of securities of the subject company, at such bidder's principal executive office or at the address of the person authorized to receive notices and communications (which is disclosed on the cover sheet of such other bidder's Schedule 14D-1);

(3) Gives telephonic notice of the information required by Rule 14d-6(e)(2) (i) and (ii) (§ 240.14d-6(e)(2) (i) and (ii)) and mails by means of first class mail a copy of such Schedule 14D-1, including all exhibits thereto:

(i) To each national securities exchange where such class of the subject company's securities is registered and listed for trading (which may be based upon information contained in the subject company's most recent Annual Report on Form 10-K (§ 249.310) filed with the Commission unless the bidder has reason to believe that such information is not current) which telephonic notice shall be made when practicable prior to the opening of each such exchange; and

(ii) To the National Association of Securities Dealers, Inc. ("NASD") if such class of the subject company's securities is authorized for quotation in the NASDAQ interdealer quotation system.

(b) *Additional materials.* The bidder shall file with the Commission ten copies of any additional tender offer materials as an exhibit to the Schedule 14D-1 required by this section, and if a material change occurs in the information set forth in such Schedule 14D-1, ten copies of an amendment to Schedule 14D-1 (each of which shall include all exhibits other than those required by Item 11(a) of Schedule 14D-1) disclosing such change and shall send a copy of such additional tender offer material or such amendment to the subject company and to any exchange and/or the NASD, as required by paragraph (a) of this section, promptly but not later than the date such additional tender offer material or such change is first published or sent or given to security holders.

(c) *Certain announcements.*

Notwithstanding the provisions of paragraph (b) of this section, if the additional tender offer material or an amendment to Schedule 14d-1 discloses only the number of shares deposited to date, and/or announces an extension of the time during which shares may be tendered, then the bidder may file such tender offer material or amendment and send a copy of such tender offer material or amendment to the subject company, any exchange and/or the NASD, as required by paragraph (a) of this section, promptly after the date such tender offer material is first published or sent or given to security holders.

§ 240.14d-4 Dissemination of certain tender offers.

(a) *Materials deemed published or sent or given.* A tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall be deemed "published or sent or given to security holders" within the meaning of section 14(d)(1) of the Act if the bidder complies with all of the requirements of any one of the following sub-paragraphs: *Provided, however,* That any such tender offers may be published or sent or given to security holders by other methods, but with respect to summary publication, and the use of stockholder lists and security position listings pursuant to Rule 14d-5, paragraphs (a)(2) and (a)(3) of this section are exclusive.

(1) *Long-form publication.* The bidder makes adequate publication in a newspaper or newspapers of long-form publication of the tender offer.

(2) *Summary publication.* (i) If the tender offer is not subject to Rule 13e-3 (§ 240.13e-3), the bidder makes adequate publication in a newspaper or newspapers of a summary advertisement of the tender offer; and

(ii) Mails by first class mail or otherwise furnishes with reasonable promptness the bidder's tender offer materials to any security holder who requests such tender offer materials pursuant to the summary advertisement or otherwise.

(3) *Use of stockholder lists and security position listings.* Any bidder using stockholder lists and security position listings pursuant to Rule 14d-5 shall comply with paragraphs (a)(1) or (a)(2) of this section on or prior to the date of the bidder's request for such lists or listing pursuant to Rule 14d-5(a).

(b) *Adequate publication.* Depending on the facts and circumstances involved, adequate publication of a tender offer pursuant to this section may require

publication in a newspaper with a national circulation or may only require publication in a newspaper with metropolitan or regional circulation or may require publication in a combination thereof: *Provided, however*, That publication in all editions of a daily newspaper with a national circulation shall be deemed to constitute adequate publication.

(c) *Publication of changes.* If a tender offer has been published or sent or given to security holders by one or more of the methods enumerated in paragraph (a) of this section, a material change in the information published or sent or given to security holders shall be promptly disseminated to security holders in a manner reasonably designed to inform security holders of such change; *Provided, however*, That if the bidder has elected pursuant to rule 14d-5 (f)(1) of this section to require the subject company to disseminate amendments disclosing material changes to the tender offer materials pursuant to Rule 14d-5, the bidder shall disseminate material changes in the information published or sent or given to security holders at least pursuant to Rule 14d-5.

§ 240.14d-5 Dissemination of certain tender offers by the use of stockholder lists and security position listings.

(a) *Obligations of the subject company.* Upon receipt by a subject company at its principal executive offices of a bidder's written request, meeting the requirements of paragraph (e) of this section, the subject company shall comply with the following subparagraphs.

(1) The subject company shall notify promptly transfer agents and any other person who will assist the subject company in complying with the requirements of this section of the receipt by the subject company of a request by a bidder pursuant to this section.

(2) The subject company shall promptly ascertain whether the most recently prepared stockholder list, written or otherwise, within the access of the subject company was prepared as of a date earlier than ten business days before the date of the bidder's request and, if so, the subject company shall promptly prepare or cause to be prepared a stockholder list as of the most recent practicable date which shall not be more than ten business days before the date of the bidder's request.

(3) The subject company shall make an election to comply and shall comply with all of the provisions of either paragraph (b) or paragraph (c) of this section. The subject company's election once made shall not be modified or

revoked during the bidder's tender offer and extensions thereof.

(4) No later than the second business day after the date of the bidder's request, the subject company shall orally notify the bidder, which notification shall be confirmed in writing, of the subject company's election made pursuant to paragraph (a)(3) of this section. Such notification shall indicate (i) the approximate number of security holders of the class of securities being sought by the bidder and, (ii) if the subject company elects to comply with paragraph (b) of this section, appropriate information concerning the location for delivery of the bidder's tender offer materials and the approximate direct costs incidental to the mailing to security holders of the bidder's tender offer materials computed in accordance with paragraph (g)(2) of this section.

(b) *Mailing of tender offer materials by the subject company.* A subject company which elects pursuant to paragraph (a)(3) of this section to comply with the provisions of this paragraph shall perform the acts prescribed by the following subparagraphs.

(1) The subject company shall promptly contact each participant named on the most recent security position listing of any clearing agency within the access of the subject company and make inquiry of each such participant as to the approximate number of beneficial owners of the subject company securities being sought in the tender offer held by each such participant.

(2) No later than the third business day after delivery of the bidder's tender offer materials pursuant to paragraph (g)(1) of this section, the subject company shall begin to mail or cause to be mailed by means of first class mail a copy of the bidder's tender offer materials to each person whose name appears as a record holder of the class of securities for which the offer is made on the most recent stockholder list referred to in paragraph (a)(2) of this section. The subject company shall use its best efforts to complete the mailing in a timely manner but in no event shall such mailing be completed in a substantially greater period of time than the subject company would complete a mailing to security holders of its own materials relating to the tender offer.

(3) No later than the third business day after the delivery of the bidder's tender offer materials pursuant to paragraph (g)(1) of this section, the subject company shall begin to transmit or cause to be transmitted a sufficient number of sets of the bidder's tender

offer materials to the participants named on the security position listings described in paragraph (b)(1) of this section. The subject company shall use its best efforts to complete the transmittal in a timely manner but in no event shall such transmittal be completed in a substantially greater period of time than the subject company would complete a transmittal to such participants pursuant to security position listings of clearing agencies of its own material relating to the tender offer.

(4) The subject company shall promptly give oral notification to the bidder, which notification shall be confirmed in writing, of the commencement of the mailing pursuant to paragraph (b)(2) of this section and of the transmittal pursuant to paragraph (b)(3) of this section.

(5) During the tender offer and any extension thereof the subject company shall use reasonable efforts to update the stockholder list and shall mail or cause to be mailed promptly following each update a copy of the bidder's tender offer materials (to the extent sufficient sets of such materials have been furnished by the bidder) to each person who has become a record holder since the later of (i) the date of preparation of the most recent stockholder list referred to in paragraph (a)(2) of this section or (ii) the last preceding update.

(6) If the bidder has elected pursuant to paragraph (f)(1) of this section to require the subject company to disseminate amendments disclosing material changes to the tender offer materials pursuant to this section, the subject company, promptly following delivery of each such amendment, shall mail or cause to be mailed a copy of each such amendment to each record holder whose name appears on the shareholder list described in paragraphs (a)(2) and (b)(5) of this section and shall transmit or cause to be transmitted sufficient copies of such amendment to each participant named on security position listings who received sets of the bidder's tender offer materials pursuant to paragraph (b)(3) of this section.

(7) The subject company shall not include any communication other than the bidder's tender offer materials or amendments thereto in the envelopes or other containers furnished by the bidder.

(8) Promptly following the termination of the tender offer, the subject company shall reimburse the bidder the excess, if any, of the amounts advanced pursuant to paragraph (f)(3)(iii) over the direct costs incidental to compliance by the subject company and its agents in

performing the acts required by this section computed in accordance with paragraph (g)(2) of this section.

(c) *Delivery of stockholder lists and security position listings.* A subject company which elects pursuant to paragraph (a)(3) of this section to comply with the provisions of this paragraph shall perform the acts prescribed by the following subparagraphs.

(1) No later than the third business day after the date of the bidder's request, the subject company shall furnish to the bidder at the subject company's principal executive office a copy of the names and addresses of the record holders on the most recent stockholder list referred to in paragraph (a)(2) of this section and a copy of the names and addresses of participants identified on the most recent security position listing of any clearing agency which is within the access of the subject company.

(2) If the bidder has elected pursuant to paragraph (f)(1) of this section to require the subject company to disseminate amendments disclosing material changes to the tender offer materials, the subject company shall update the stockholder list by furnishing the bidder with the name and address of each record holder named on the stockholder list, and not previously furnished to the bidder, promptly after such information becomes available to the subject company during the tender offer and any extensions thereof.

(d) *Liability of subject company and others.* Neither the subject company nor any affiliate or agent of the subject company nor any clearing agency shall be:

(1) Deemed to have made a solicitation or recommendation respecting the tender offer within the meaning of section 14(d)(4) based solely upon the compliance or noncompliance by the subject company or any affiliate or agent of the subject company with one or more requirements of this section;

(2) Liable under any provision of the Federal securities laws to the bidder or to any security holder based solely upon the inaccuracy of the current names or addresses on the stockholder list or security position listing, unless such inaccuracy results from a lack of reasonable care on the part of the subject company or any affiliate or agent of the subject company;

(3) Deemed to be an "underwriter" within the meaning of section (2)(11) of the Securities Act of 1933 for any purpose of that Act or any rule or regulation promulgated thereunder based solely upon the compliance or noncompliance by the subject company

or any affiliate or agent of the subject company with one or more of the requirements of this section;

(4) Liable under any provision of the Federal securities laws for the disclosure in the bidder's tender offer materials, including any amendment thereto, based solely upon the compliance or noncompliance by the subject company or any affiliate or agent of the subject company with one or more of the requirements of this section.

(e) *Content of the bidder's request.* The bidder's written request referred to in paragraph (a) of this section shall include the following:

(1) The identity of the bidder;

(2) The title of the class of securities which is the subject of the bidder's tender offer;

(3) A statement that the bidder is making a request to the subject company pursuant to paragraph (a) of this section for the use of the stockholder list and security position listings for the purpose of disseminating a tender offer to security holders;

(4) A statement that the bidder is aware of and will comply with the provisions of paragraph (f) of this section;

(5) A statement as to whether or not it has elected pursuant to paragraph (f)(1) of this section to disseminate amendments disclosing material changes to the tender offer materials pursuant to this section; and

(6) The name, address and telephone number of the person whom the subject company shall contact pursuant to paragraph (a)(4) of this section.

(f) *Obligations of the bidder.* Any bidder who requests that a subject company comply with the provisions of paragraph (a) of this section shall comply with the following subparagraphs.

(1) The bidder shall make an election whether or not to require the subject company to disseminate amendments disclosing material changes to the tender offer materials pursuant to this section, which election shall be included in the request referred to in paragraph (a) of this section and shall not be revocable by the bidder during the tender offer and extensions thereof.

(2) With respect to a tender offer subject to section 14(d)(1) of the Act in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933, the bidder shall comply with the requirements of Rule 14d-4(a)(3).

(3) If the subject company elects to comply with paragraph (b) of this section,

(i) The bidder shall promptly deliver the tender offer materials after receipt of the notification from the subject company as provided in paragraph (a)(4) of this section;

(ii) The bidder shall promptly notify the subject company of any amendment to the bidder's tender offer materials requiring compliance by the subject company with paragraph (b)(6) of this section and shall promptly deliver such amendment to the subject company pursuant to paragraph (g)(1) of this section;

(iii) The bidder shall advance to the subject company an amount equal to the approximate cost of conducting mailings to security holders computed in accordance with paragraph (g)(2) of this section;

(iv) The bidder shall promptly reimburse the subject company for the direct costs incidental to compliance by the subject company and its agents in performing the acts required by this section computed in accordance with paragraph (g)(2) of this section which are in excess of the amount advanced pursuant to paragraph (f)(2)(iii) of this section; and

(v) The bidder shall mail by means of first class mail or otherwise furnish with reasonable promptness the tender offer materials to any security holder who requests such materials.

(4) If the subject company elects to comply with paragraph (c) of this section,

(i) The bidder shall use the stockholder list and security position listings furnished to the bidder pursuant to paragraph (c) of this section exclusively in the dissemination of tender offer materials to security holders in connection with the bidder's tender offer and extensions thereof;

(ii) The bidder shall return the stockholder lists and security position listings furnished to the bidder pursuant to paragraph (c) of this section promptly after the termination of the bidder's tender offer;

(iii) The bidder shall accept, handle and return the stockholder lists and security position listings furnished to the bidder pursuant to paragraph (c) of this section to the subject company on a confidential basis;

(iv) The bidder shall not retain any stockholder list or security position listing furnished by the subject company pursuant to paragraph (c) of this section, or any copy thereof, nor retain any information derived from any such list or listing or copy thereof after the termination of the bidder's tender offer;

(v) The bidder shall mail by means of first class mail, at its own expense, a copy of its tender offer materials to each

person whose identity appears on the stockholder list as furnished and updated by the subject company pursuant to paragraphs (c)(1) and (c)(2) of this section;

(vi) The bidder shall contact the participants named on the security position listing of any clearing agency, make inquiry of each participant as to the approximate number of sets of tender offer materials required by each such participant, and furnish, at its own expense, sufficient sets of tender offer materials and any amendment thereto to each such participant for subsequent transmission to the beneficial owners of the securities being sought by the bidder;

(vii) The bidder shall mail by means of first class mail or otherwise furnish with reasonable promptness the tender offer materials to any security holder who requests such materials; and

(viii) The bidder shall promptly reimburse the subject company for direct costs incidental to compliance by the subject company and its agents in performing the acts required by this section computed in accordance with paragraph (g)(2) of this section.

(g) *Delivery of materials, computation of direct costs.*

(1) Whenever the bidder is required to deliver tender offer materials or amendments to tender offer materials, the bidder shall deliver to the subject company at the location specified by the subject company in its notice given pursuant to paragraph (a)(4) of this section a number of sets of the materials or of the amendment, as the case may be, at least equal to the approximate number of security holders specified by the subject company in such notice, together with appropriate envelopes or other containers therefor: *Provided, however,* That such delivery shall be deemed not to have been made unless the bidder has complied with paragraph (f)(3)(iii) of this section at the time the materials or amendments, as the case may be, are delivered.

(2) The approximate direct cost of mailing the bidder's tender offer materials shall be computed by adding (i) the direct cost incidental to the mailing of the subject company's last annual report to shareholders (excluding employee time), less the costs of preparation and printing of the report, and postage, plus (ii) the amount of first class postage required to mail the bidder's tender offer materials. The approximate direct costs incidental to the mailing of the amendments to the bidder's tender offer materials shall be computed by adding (iii) the estimated direct costs of preparing mailing labels, of updating shareholder lists and of

third party handling charges plus (iv) the amount of first class postage required to mail the bidder's amendment. Direct costs incidental to the mailing of the bidder's tender offer materials and amendments thereto when finally computed may include all reasonable charges paid by the subject company to third parties for supplies or services, including costs attendant to preparing shareholder lists, mailing labels, handling the bidder's materials, contacting participants named on security position listings and for postage, but shall exclude indirect costs, such as employee time which is devoted to either contesting or supporting the tender offer on behalf of the subject company. The final billing for direct costs shall be accompanied by an appropriate accounting in reasonable detail.

§ 240.14d-6 Disclosure requirements with respect to tender offers.

(a) *Information required on date of commencement.*

(1) *Long-form publication.* If a tender offer is published or sent or given to security holders on the date of commencement by means of long-form publication pursuant to Rule 14d-4(a)(1) (§ 240.14d-4(a)(1)), such long-form publication shall include the information required by paragraph (e)(1) of this section.

(2) *Summary publication.* If a tender offer is published or sent or given to security holders on the date of commencement by means of summary publication pursuant to Rule 14d-4(a)(2) (§ 240.14d-4(a)(2)),

(i) The summary advertisement shall contain and shall be limited to, the information required by paragraph (e)(2) of this section; and

(ii) The tender offer materials furnished by the bidder upon the request of any security holder shall include the information required by paragraph (e)(1) of this section.

(3) *Use of stockholder lists and security position listings.* If a tender offer is published or sent or given to security holders on the date of commencement by the use of stockholders lists and security position listings pursuant to Rule 14d-4(a)(3) (§ 240.14d-4(a)(3)),

(i) Either (A) the summary advertisement shall contain, and shall be limited to the information required by paragraph (e)(2) of this section, or (B) if long form publication of the tender offer is made, such long form publication shall include the information required by paragraph (e)(1) of this section; and

(ii) The tender offer materials transmitted to security holders pursuant

to such lists and security position listings and furnished by the bidder upon the request of any security holder shall include the information required by paragraph (e)(1) of this section.

(4) *Other tender offers.* If a tender offer is published or sent or given to security holders other than pursuant to Rule 14d-4(a) (§ 240.14d-4(a)), the tender offer materials which are published or sent or given to security holders on the date of commencement of such offer shall include the information required by paragraph (e)(1) of this section.

(b) *Information required in summary advertisement made after commencement.* A summary advertisement published subsequent to the date of commencement of the tender offer shall include at least the information specified in paragraphs (e)(1)(i)-(iv) and (e)(2)(iv) of this section.

(c) *Information required in other tender offer materials published after commencement.* Except for summary advertisements described in paragraph (b) of this section and tender offer materials described in paragraphs (a)(2)(ii) and (a)(3)(ii) of this section, additional tender offer materials published, sent or given to security holders subsequent to the date of commencement shall include the information required by paragraphs (e)(1) and may omit any of the information required by paragraphs (e)(1)(v)-(viii) of this section which has been previously furnished by the bidder in connection with the tender offer.

(d) *Material changes.* A material change in the information published or sent or given to security holders shall be promptly disclosed to security holders in additional tender offer materials.

(e) *Information to be included.—(1) Long-form publication and tender offer materials.* The information required to be disclosed by paragraphs (a)(1), (a)(2)(ii), (a)(3)(i)(B) and (a)(4) of this section shall include the following:

(i) The identity of the bidder,
 (ii) The identity of the subject company;
 (iii) The amount and class of securities being sought and the type and amount of consideration being offered therefor;
 (iv) The scheduled expiration date of the tender offer, whether the tender offer may be extended and, if so, the procedures for extension of the tender offer;

(v) The exact dates prior to which, and after which, security holders who deposit their securities will have the right to withdraw their securities pursuant to section 14(d)(5) of the Act and Rule 14d-7 (§ 240.14d-7) and the manner in which shares will be

accepted for payment and in which withdrawal may be effected;

(vi) If the tender offer is for less than all the outstanding securities of a class of equity securities and the bidder is not obligated to purchase all of the securities tendered, the period or periods, and in the case of the period from the commencement of the offer, the date of the expiration of such period during which the securities will be taken up pro rata pursuant to section 14(d)(6) of the Act or Rule 14d-8 (§ 240.14d-8), and the present intention or plan of the bidder with respect to the tender offer in the event of an oversubscription by security holders;

(vii) The disclosure required by Items 1(c); 2 (with respect to persons other than the bidder, excluding sub-items (b) and (d)); 3; 4; 5; 6; 7; 8; and 10 of Schedule 14D-1 (§ 240.14d-100) or a fair and adequate summary thereof; *Provided, however,* That negative responses to any such item or sub-item or Schedule 14D-1 (§ 240.14d-100) need not be included; and

(viii) The disclosure required by Item 9 of Schedule 14D-1 or a fair and adequate summary thereof. (Under normal circumstances, summary financial information equivalent to that required by paragraph (e) of Guide 59 of the Guides for Preparation and Filing of Registration Statements for the periods covered by the financial information furnished in response to Item 9 will be a sufficient summary. If the information required by Item 9 is summarized, appropriate instructions shall be included stating how complete financial information can be obtained).

(2) *Summary publication.* The information required to be disclosed by paragraphs (a)(2)(i) and (a)(3)(i)(A) of this section in a summary advertisement is as follows:

(i) The information required by paragraphs (e)(1)(i) through (vi) of this section;

(ii) If the tender offer is for less than all the outstanding securities of a class of equity securities, a statement as to whether the purpose or one of the purposes of the tender offer is to acquire or influence control of the business of the subject company;

(iii) A statement that the information required by paragraph (e)(1)(vii) of this section is incorporated by reference into the summary advertisement;

(iv) Appropriate instructions as to how security holders may obtain promptly, at the bidder's expense, the bidder's tender offer materials; and

(v) In a tender offer published or sent or given to security holders by the use of stockholder lists and security position listings pursuant to Rule 14d-4(a)(3)

(§ 240.14d-4(a)(3)), a statement that a request is being made for such lists and listings and that tender offer materials will be mailed to record holders and will be furnished to brokers, banks and similar persons whose name appears or whose nominee appears on the list of stockholders or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal to beneficial owners of such securities.

(3) *No transmittal letter.* Neither the initial summary advertisement nor any subsequent summary advertisement shall include a transmittal letter (whereby securities of the subject company which are sought in the tender offer may be transmitted to the bidder or its depository) or any amendment thereto.

§ 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 following periods:

(1) At any time until the expiration of fifteen business days from the date of commencement of such tender offer; and

(2) On the date and until the expiration of ten business days following the date of commencement of another bidder's tender offer other than pursuant to Rule 14d-2(b) for securities of the same class *provided that* the bidder has received notice or otherwise has knowledge of the commencement of such other tender offer and, *Provided further,* That withdrawal may only be effected with respect to securities which have not been accepted for payment in the manner set forth in the bidder's tender offer prior to the date such other tender offer is first published, sent or given to security holders.

(b) *Computation of time periods.* The time periods for withdrawal rights pursuant to this section shall be computed on a concurrent, as opposed to a consecutive, basis.

(c) *Knowledge of competing offer.* For the purposes of this section, a bidder shall be presumed to have knowledge of another tender offer, as described in paragraph (a)(2) of this section, on the date such bidder receives a copy of the Schedule 14D-1 (§ 240.14d-100) pursuant to Rule 14d-3 (§ 240.14d-3) from such other bidder.

(d) *Notice of withdrawal.* Notice of withdrawal pursuant to this section shall be deemed to be timely upon the receipt by the bidder's depository of a written notice of withdrawal specifying the name(s) of the tendering stockholder(s), the number or amount of

the securities to be withdrawn and the name(s) in which the certificate(s) is (are) registered, if different from that of the tendering security holder(s). A bidder may impose other reasonable requirements, including certificate numbers and a signed request for withdrawal accompanied by a signature guarantee, as conditions precedent to the physical release of withdrawn securities.

§ 240.14d-8 Exemption from statutory pro rata requirement.

The limited pro rata provisions of section 14(d)(6) of the Act shall not apply to any tender offer for less than all the outstanding securities of the class for which the tender offer is made to the extent that the bidder provides in the tender offer materials disseminated to security holders on the date of commencement of the tender offer that in the event more securities are deposited during the period(s) described in paragraphs (a) and/or (b) of this section than the bidder is bound or willing to accept for payment, all securities deposited during such period(s) will be accepted for payment as nearly as practicable on a pro rata basis, disregarding fractions, according to the number of securities deposited by each depositor.

(a) Any period which exceeds ten days from the date of commencement of the tender offer.

(b) Any period which exceeds ten days from the date that notice of an increase in the consideration offered is first published, sent or given to security holders.

§ 240.14d-9 Solicitation/recommendation statements with respect to certain tender offers.

(a) *Filing and transmittal of recommendation statement.* No solicitation or recommendation to security holders shall be made by any person described in paragraph (d) of this section with respect to a tender offer for such securities unless as soon as practicable on the date such solicitation or recommendation is first published or sent or given to security holders such person complies with the following subparagraphs.

(1) Such person shall file with the Commission eight copies of a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9 (§ 240.14d-101), including all exhibits thereto; and

(2) If such person is either the subject company or an affiliate of the subject company,

(i) Such person shall hand deliver a copy of the Schedule 14D-9 to the bidder

at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule 14D-1 (§ 240.14d-100) filed with the Commission; and

(ii) Such person shall give telephonic notice (which notice to the extent possible shall be given prior to the opening of the market) of the information required by Items 2 and 4(a) of Schedule 14D-9 and shall mail a copy of the Schedule to each national securities exchange where the class of securities is registered and listed for trading and, if the class is authorized for quotation in the NASDAQ interdealer quotation system, to the National Association of Securities Dealers, Inc. ("NASD").

(3) If such person is neither the subject company nor an affiliate of the subject company,

(i) Such person shall mail a copy of the schedule to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule 14D-1 (§ 240.14d-100) filed with the Commission); and

(ii) Such person shall mail a copy of the Schedule to the subject company at its principal office.

(b) *Amendments.* If any material change occurs in the information set forth in the Schedule 14D-9 (§ 240.14d-101) required by this section, the person who filed such Schedule 14D-9 shall:

(1) File with the Commission eight copies of an amendment on Schedule 14D-9 (§ 240.14d-101) disclosing such change promptly, but not later than the date such material is first published, sent or given to security holders; and

(2) Promptly deliver copies and give notice of the amendment in the same manner as that specified in paragraph (a)(2) or paragraph (a)(3) of this section, whichever is applicable; and

(3) Promptly disclose and disseminate such change in a manner reasonably designed to inform security holders of such change.

(c) *Information required in solicitation or recommendation.* Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1, 2, 3(b), 4, 6, 7 and 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof:

Provided, however, That such solicitation or recommendation may omit any of such information previously

furnished to security holders of such class of securities by such person with respect to such tender offer.

(d) *Applicability.* (1) Except as is provided in paragraphs (d)(2) and (e) of this section, this section shall only apply to the following persons:

(i) The subject company, any director, officer, employee, affiliate or subsidiary of the subject company;

(ii) Any record holder or beneficial owner of any security issued by the subject company, by the bidder, or by any affiliate of either the subject company or the bidder; and

(iii) Any person who makes a solicitation or recommendation to security holders on behalf of any of the foregoing or on behalf of the bidder other than by means of a solicitation or recommendation to security holders which has been filed with the Commission pursuant to this section or Rule 14d-3 (§ 240.14d-3).

(2) Notwithstanding paragraph (d)(1) of this section, this section shall not apply to the following persons:

(i) A bidder who has filed a Schedule 14D-1 (§ 240.14d-101) pursuant to Rule 14d-3 (§ 240.14d-3);

(ii) Attorneys, banks, brokers, fiduciaries or investment advisers who are not participating in a tender offer in more than a ministerial capacity and who furnish information and/or advice regarding such tender offer to their customers or clients on the unsolicited request of such customers or clients or solely pursuant to a contract or a relationship providing for advice to the customer or client to whom the information and/or advice is given.

(e) *Stop-look-and-listen communication.* This section shall not apply to the subject company with respect to a communication by the subject company to its security holders which only:

(1) Identifies the tender offer by the bidder;

(2) States that such tender offer is under consideration by the subject company's board of directors and/or management;

(3) States that on or before a specified date (which shall be no later than 10 business days from the date of commencement of such tender offer) the subject company will advise such security holders of (i) whether the subject company recommends acceptance or rejection of such tender offer; expresses no opinion and remains neutral toward such tender offer; or is unable to take a position with respect to such tender offer and (ii) the reason(s) for the position taken by the subject company with respect to the tender offer

(including the inability to take a position); and

(4) Requests such security holders to defer making a determination whether to accept or reject such tender offer until they have been advised of the subject company's position with respect thereto pursuant to paragraph (e)(3) of this section.

(f) *Statement of management's position.* A statement by the subject company's of its position with respect to a tender offer which is required to be published or sent or given to security holders pursuant to Rule 14e-2 shall be deemed to constitute a solicitation or recommendation within the meaning of this section and section 14(d)(4) of the Act.

§ 240.14d-100 Schedule 14D-1. Tender offer statement pursuant to section 14(d)(1) of the Securities Exchange Act of 1934.

* * * * *

General Instructions. A. * * *
B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render such answer misleading, incomplete, unclear or confusing. Material 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. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be deemed to be filed with the Commission for all purposes of the Act.

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 statement is filed by a corporation, or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the above mentioned items shall be given with respect to: (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation ultimately in control of such corporation. A response to an item in the statement is required with respect to the bidder and to all other persons referred to in this instruction unless such item specifies to the contrary.

* * * * *

Item 6. Interest in Securities of the Subject Company

* * * * *

Instructions. 1. * * *

2. If the information required by Item 6(b) of this schedule is available to the bidder at the time this statement is initially filed with the Commission pursuant to Rule 14d-3(a)(1) [§ 240.14d-3(a)(1)], such information should be included in such initial filing. However, if such information is not available to the bidder at the time of such initial filing, it shall be filed with the Commission promptly but in no event later than two business days after the date of such filing and, if material, shall be disclosed in a manner reasonably designed to inform security holders. The procedure specified by this instruction is provided for the purpose of maintaining the confidentiality of the tender offer in order to avoid possible misuse of inside information.

§ 240.14d-101 Schedule 14D-9.

Securities and Exchange Commission

Washington, D.C. 20549

Schedule 14D-9

Solicitation/Recommendation Statement Pursuant to Section 14(d)(4) of the Securities Exchange Act of 1934

(Amendment No. —)

(Name of Subject Company)

(Name of Person(s) Filing Statement)

(Title of Class of Securities)

(CUSIP Number of Class of Securities)

(Name, address and telephone number of person authorized to receive notice and communications on behalf of the person(s) filing statement)

Instructions: Eight copies of this statement, including all exhibits, should be filed with the Commission.

General 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 sub-item of the statement unless it would render such answer misleading, incomplete, unclear or confusing. Material 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. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be deemed to be filed with the Commission for all purposes of the Act.

Item 1. Security and Subject Company

State the title of the class of equity securities to which this statement relates and

the name and the address of the principal executive offices of the subject company.

Item 2. Tender Offer of the Bidder

Identify the tender offer to which this statement relates, the name of the bidder and the address of its principal executive offices or, if the bidder is a natural person, the bidder's residence or business address (which may be based on the bidder's Schedule 14D-1 [§ 240.14d-100] filed with the Commission).

Item 3. Identity and Background

(a) State the name and business address of the person filing this statement.

(b) If material, describe any contract, agreement, arrangement or understanding and any actual or potential conflict of interest between the person filing this statement or its affiliates and: (1) the subject company, its executive officers, directors or affiliates; or (2) the bidder, its executive officers, directors or affiliates.

Instruction: If the person filing this statement is the subject company and if the materiality requirement of Item 3(b) is applicable to any contract, agreement, arrangement or understanding between the subject company or any affiliate of the subject company and any executive officer or director of the subject company, it shall not be necessary to include a description thereof in this statement, or in any solicitation or recommendation published or sent or given to security holders if such information, or information which does not differ materially from such information, has been disclosed in any proxy statement, report or other communication sent within one year of the filing date of this statement by the subject company to the then holders of the securities and has been filed with the Commission: *Provided,* That this statement and the solicitation or recommendation published or sent or given to security holders shall contain specific reference to such proxy statement, report or other communication and that a copy of the pertinent portion(s) thereof is filed as an exhibit to this statement.

Item 4. The Solicitation or Recommendation

(a) State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the person filing this statement is advising security holders of the securities being sought by the bidder to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, furnish a description of such other action being recommended. If the person filing this statement is the subject company and a recommendation is not being made, state whether the subject company is either expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) State the reason(s) for the position (including the inability to take a position) stated in (a) of this Item.

Instruction: Conclusory statements such as "The tender offer is in the best interest of shareholders," will not be considered sufficient disclosure in response to Item 4(b).

Item 5. Persons Retained, Employed or To Be Compensated

Identify any person or class of persons employed, retained or to be compensated by the person filing this statement or by any person on its behalf, to make solicitations or recommendations to security holders and describe briefly the terms of such employment, retainer or arrangement for compensation.

Item 6. Recent Transactions and Intent With Respect to Securities

(a) Describe any transaction in the securities referred to in Item 1 which was effected during the past 60 days by the person(s) named in response to Item 3(a) and by any executive officer, director, affiliate or subsidiary of such person(s).

(b) To the extent known by the person filing this statement, state whether the persons referred to in Item 6(a) presently intend to tender to the bidder, sell or hold securities of the class of securities being sought by the bidder which are held of record or beneficially owned by such persons.

Item 7. Certain Negotiations and Transactions by the Subject Company

(a) If the person filing this statement is the subject company, state whether or not any negotiation is being undertaken or is underway by the subject company in response to the tender offer which relates to or would result in:

(1) An extraordinary transaction such as a merger or reorganization, involving the subject company or any subsidiary of the subject company;

(2) A purchase, sale or transfer of a material amount of assets by the subject company or any subsidiary of the subject company;

(3) A tender offer for or other acquisition of securities by or of the subject company; or

(4) Any material change in the present capitalization or dividend policy of the subject company.

Instruction: If no agreement in principle has yet been reached, the possible terms of any transaction or the parties thereto need not be disclosed if in the opinion of the Board of Directors of the subject company such disclosure would jeopardize continuation of such negotiations. In such event, disclosure that negotiations are being undertaken or are underway and are in the preliminary stages will be sufficient.

(b) Describe any transaction, board resolution, agreement in principle, or a signed contract in response to the tender offer, other than one described pursuant to Item 3(b) of this statement, which relates to or would result in one or more of the matters referred to in Item 7(a)(1), (2), (3) or (4).

Item 8. Additional Information To Be Furnished

Furnish such additional 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 9. Material To Be Filed as Exhibits

Furnish a copy of:

(a) Any written solicitation or recommendation which is published or sent or given to security holders in connection with the solicitation or recommendation referred to in Item 4.

(b) If any oral solicitation or recommendation to security holders is to be made by or on behalf of the person filing this statement, any written instruction, or other material which is furnished to the persons making the actual oral solicitation or recommendation for their use, directly or indirectly, in connection with the solicitation or recommendation.

(c) Any contract, agreement, arrangement or understanding described in Item 3(b) or the pertinent portions(s) of any proxy statement, report or other communication referred to in Item 3(b).

Signature. After reasonable 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)

Instruction. 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 (other than an executive officer of a corporation or a general partner of a partnership), 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.

IV, 17 CFR Part 240 is amended by adding new §§ 240.14e-1 and 240.14e-2 (Regulation 14E) to read as follows:

Regulation 14E

§ 240.14e-1 Unlawful tender offer practices.

As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, no person who makes a tender offer shall:

(a) Hold such tender offer open for less than twenty business days from the date such tender offer is first published or sent or given to security holders: *Provided, however,* That this paragraph shall not apply to a tender offer by the issuer of the class of securities being sought which is not made in anticipation of or in response to another person's tender offer for securities of the same class.

(b) Increase the offered consideration or the dealer's soliciting fee to be given in a tender offer unless such tender offer remains open for at least ten business days from the date that notice of such increase is first published, or sent or given to security holders: *Provided, however,*

That this paragraph shall not apply to a tender offer by the issuer of the class of securities being sought which is not made in anticipation of or in response to another person's tender offer for securities of the same class.

(c) Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer;

(d) Extend the length of a tender offer without issuing a notice of such extension by press release or other public announcement, which notice shall include disclosure of the approximate number of securities deposited to date and shall be issued no later than the earlier of (i) 9:00 a.m. Eastern time, on the next business day after the scheduled expiration date of the offer or (ii), if the class of securities which is the subject of the tender offer is registered on one or more national securities exchanges, the first opening of any one of such exchanges on the next business day after the scheduled expiration date of the offer.

§ 240.14e-2 Position of subject company with respect to a tender offer.

(a) *Position of subject company.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, the subject company, no later than 10 business days from the date the tender offer is first published or sent or given, shall publish, send or give to security holders a statement disclosing that the subject company:

(1) Recommends acceptance or rejection of the bidder's tender offer;

(2) Expresses no opinion and is remaining neutral toward the bidder's tender offer; or

(3) Is unable to take a position with respect to the bidder's tender offer. Such statement shall also include the reason(s) for the position (including the inability to take a position) disclosed therein.

(b) *Material change.* If any material change occurs in the disclosure required by paragraph (a) of this section, the subject company shall promptly publish or send or give a statement disclosing such material change to security holders.

(Secs. 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 209, 48 Stat. 9067, 908; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57, secs. 3(b), 10(b), 13, 14, 23(a), 48 Stat. 882, 891, 894, 895, 901; sec. 203(a), 49 Stat. 704; sec. 8, 49 Stat. 1379; secs. 4, 5, 78 Stat. 569, 570; secs. 2, 3, 82 Stat. 454, 455; secs. 1, 2, 3-5, 84 Stat. 1497; secs. 3, 10, 18, 89 Stat. 97, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 91 Stat. 1494, 1498, 1499; sec. 20, 49 Stat. 833; sec. 319(a), 53 Stat. 1173; sec. 38(a), 54 Stat. 841; 15 U.S.C. 77g, 77j, 77s(a),

78c(b), 78j(b), 78m, 78n, 78w(a), 79t, 77ttt(a), 80a-37(a)).

Authority

The Commission hereby adopts: amendments to Rule 434(b) (§ 230.434(b)) pursuant to sections 7, 10 and 19(a) of the Securities Act; amendments to Schedule 13D (§ 240.13d-101) pursuant to sections 13(d) and 23(a) of the Exchange Act; Rules 14d-1, 14d-2, 14d-3, 14d-4, 14d-6, 14d-7, 14d-8, 14d-9 Schedule 14D-9 and amendments to Schedule 14D-1 (§ 240.14d-100) pursuant to sections 3(b), 10(b), 13(d), 14(d), 14(e), and 23(a) of the Exchange Act; Rule 14d-5 pursuant to section 19(a) of the Securities Act; sections 3(b), 10(b), 13(d), 14(d), 14(e) and 23(a) of the Exchange Act; section 20 of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.); section 319(a) of the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.); and section 38(a) of the Investment Company Act of 1940 (15 U.S.C. 80a et seq.); Rules 14e-1 and 14e-2 pursuant to sections 14(d), 14(e) and 23(a) of the Exchange Act.

By the Commission.
George A. Fitzsimmons,
Secretary.

November 29, 1979.

[FR Doc. 79-37406 Filed 12-5-79; 8:45 am]

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