

APA requirements because it involves a foreign and military affairs function of the United States. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule. Accordingly, it is being issued in final form. However, as with other Department of Commerce rules, comments from the public are always welcome. Comments should be submitted to Vincent Greenwald, Office of Technology and Policy Analysis, Export Administration, U.S. Department of Commerce, P.O. Box 273, Washington, DC 20044.

3. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. § 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

4. This rule does not contain a collection of information subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 15 CFR Part 399

Exports, reporting and recordkeeping requirements.

Accordingly, the Export Administration Regulations (15 CFR Parts 368-399) are amended as follows:

1. The authority citation for Part 399 continues to read as follows:

Authority: Pub. L. 96-72, 93 Stat. 503, 50 U.S.C. App. 2401 *et seq.*, as amended by Pub. L. 97-145 of December 29, 1981 and by Pub. L. 99-64 of July 12, 1985; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95-223, 50 U.S.C. 1701 *et seq.*; E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99-440 (October 2, 1986); E.O. 12571, October 27, 1986 (51 FR 39505, October 29, 1986).

§ 399.1 [Amended]

2. In Supplement No. 1 to § 399.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1548A is amended by adding an Advisory Note at the end of the entry, reading as follows:

1548A Photosensitive components, including linear and focal plane arrays, and dice and wafers therefor.

* * * * *

(Advisory) Note for the People's Republic of China: Licenses are likely to be approved for export to satisfactory end-users in the People's Republic of China of semiconductor

photodiodes for previously approved and installed Western civil communications equipment with a response time constant of 0.5 ns or more and with a peak sensitivity at a wavelength neither longer than 1,350 nm nor shorter than 300 nm.

(Note: The photodiodes will be supplied on a replacement basis with no enhancement of the system.)

3. In Supplement No. 1 to § 399.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1564A is amended by revising the heading of the Advisory Note for the People's Republic of China to read as follows:

1564A Electronic component assemblies, sub-assemblies, printed circuit boards, substrates and microcircuits, including packages therefor.

* * * * *

(Advisory) Note for the People's Republic of China: Licenses are likely to be approved for export to satisfactory end-users in the People's Republic of China of "assemblies", printed circuit boards and integrated circuits not specially designed to military standards for radiation hardening and temperature, as follows:

* * * * *

4. In Supplement No. 1 to § 399.1 (the Commodity Control List), Commodity Group 5 (Electronics and Precision Instruments), ECCN 1585A is amended by adding an Advisory Note at the end of the entry, reading as follows:

1585A Photographic equipment.

* * * * *

(Advisory) Note for the People's Republic of China: Licenses are likely to be approved for export to satisfactory end-users in the People's Republic of China of non-ruggedized cinema recording cameras, controlled by sub-paragraph (a) of this ECCN 1585A, for normal civil purposes.

5. In Supplement No. 1 to § 399.1 (the Commodity Control List), Commodity Group 7 (Chemicals, Metalloids, Petroleum Products and Related Materials), ECCN 1757A is amended by adding an Advisory Note at the end of the entry, reading as follows:

1757A Compounds and materials as described in this entry.

* * * * *

(Advisory) Note for the People's Republic of China: Licenses are likely to be approved for export to satisfactory end-users in the People's Republic of China of monocrystalline silicon, as follows:

(a) N-type, crystal orientation 1-1-1 with a resistivity not exceeding 100 ohm.cm;

(b) P-type, crystal orientation 1-1-1 with a resistivity not exceeding 5 ohm.cm.

Dated: April 6, 1987.

Vincent F. DeCain,
Deputy Assistant Secretary for Export
Administration.
[FR Doc. 87-7908 Filed 4-8-87; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 241

[Rel. No. 34-24296]

Interpretive Release Relating To Tender Offers Rules

AGENCY: SEC.

ACTION: Interpretation.

SUMMARY: The Securities and Exchange Commission today authorized the issuance of its views with respect to the disclosure and dissemination of material changes in the information in tender offer materials previously provided to security holders, in accordance with Rules 14d-d(c) [17 CFR 240.14d(c)] and 14d-6(d) [17 CFR 240.14d-6(d)] of Regulation 14D, applicable to third-party tender offers, and Rule 13e-4 (d)(2) and (e)(2) [17 CFR 240.13e-4 (d)(2), (e)(2)], applicable to issuer tender offers. This release will provide guidance to the public and assist persons subject to the tender offer rules in complying with applicable requirements.

FOR FURTHER INFORMATION CONTACT: Persons with questions concerning the subject matter of this release or the operation of the tender offer rules should contact David A. Sirignano or Bradley D. Belt at (202) 272-3097 or Larry E. Bergmann at (202) 272-2874.

SUPPLEMENTARY INFORMATION: On July 11, 1986 the Commission issued Release No. 34-23421 (51 FR 25873), which announced the adoption of the all-holders and best-price amendments to the tender offer rules. In addition, *inter alia*, the Commission at that time amended existing rules concerning minimum offering periods to require that a tender offer would be required to remain open for ten business days upon the announcement of an increase or decrease in (i) the percentage of securities being sought or (ii) the consideration offered by the offeror. The Commission expressed the view that the minimum time period an offer must remain open following other material changes in the terms of the offer or information concerning the offer will depend on the facts and circumstances, including the degree of significance of

the information and the appropriate manner of dissemination.

I. Introduction

The tender offer rules promulgated under the Williams Act are designed to ensure that security holders have appropriate information about the terms of the offer and sufficient time to consider such information in deciding whether to tender, sell in the market, or hold their securities. In promulgating these rules, the Commission recognized that the fluid, dynamic nature of corporate control contests could result in changed market conditions and revisions in the terms of a tender offer, which could have an impact on the investment decisions of security holders. Therefore, the rules require that material changes in the information published, sent, or given to security holders be disclosed and that the new information be disseminated in a manner reasonably designed to inform security holders of the change. The disclosure and dissemination requirements will not be effective unless security holders have sufficient time to consider and react to the new information. In two recent tender offers, a material change to a condition of the offer, specifically, a waiver of a minimum share condition, has been attempted on the last day of the offer without adequate dissemination to shareholders or time for the shareholders to determine whether to hold, sell, tender, or withdraw based on the new information.

The Commission is issuing this release to clarify its view that a waiver of a minimum share condition is a material change in the terms of an offer and to reiterate its view that compliance with Rules 14d-4(c) and 14d-6(d) and 13e-4(d)(2) and (e)(2) requires that material changes be disseminated in a manner reasonably calculated to inform security holders of such changes and with sufficient time for security holders to absorb such new information. Thus, if a bidder makes a material change near or at the end of its offer, it will have to extend the offer to permit adequate dissemination. The obligation to provide security holders the information and time to act is not avoided by reserving the right to make the change in the initial tender offer materials. Statements in tender offer materials which state that a material change may be made without further notice or extension are misleading.

II. Discussion

A. Material changes

The Williams Act and rules are designed to ensure that security holders confronted with a tender offer for their shares of the subject company have adequate information upon which to base their investment decisions,¹ and sufficient time in which to determine whether to tender, sell, or hold their securities.² In section 14(d)(1), Congress required that, at the time the offer is first published, sent, or given to security holders, an offeror provide investors with appropriate disclosures about the terms of the offer, the offeror's plans or proposals with respect to the subject company, and other information concerning the offer.

In fashioning a comprehensive framework for the regulation of tender offers, Congress recognized that not all the details of the contemplated system could or should be delineated in statutory provisions. Thus, Congress vested the Commission with broad rulemaking authority to establish standards to govern the conduct of tender offers. Completion of the regulatory system was left to Commission rulemaking so that the Commission could make the disclosure meaningful and effective and could adjust the legal requirements to meet the "very fast changing phenomena" in tender offer practice.³

In promulgating the rules and regulations under the Williams Act, the Commission recognized that there could be changes in the information published, sent, or given to security holders that could affect their investment decisions. Accordingly, in adopting Regulation 14D and Rule 13e-4, the Commission included provisions requiring the disclosure and dissemination of such changes, where material. Rules 14d-6 and 13e-4(d) establish the disclosure requirements for bidders in making tender offers. Paragraphs 14d-6(d) and 13e-4(d)(2) thereunder, respectively, obligate the offeror to disclose material changes. Rule 14d-6(d) provides:

Material changes. A material change in the information published or sent or given to security holders shall be promptly disclosed

¹ *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975). See also S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

² Rule 14e-1(a) [17 CFR 240.14e-1(a)] requires tender offers to be held open for a minimum of 20 business days.

³ Hearings on S. 510 Before the Securities Subcommittee of the Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 30 (1967).

to security holders in additional tender offer materials.

Similarly, Rule 13e-4(d)(2) states:

If a material change occurs in the information previously disclosed to security holders, the issuer or affiliate shall disclose promptly such change in the manner prescribed by (e)(2) of this section.

Rules 14d-4 and 13e-4(e) specify the procedure by which offerors may disseminate the information required to be disclosed. Rule 14d-4(c) establishes the manner in which material changes in third-part offers are to be disseminated to security holders:

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, 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 * * *.

Rule 13e-4(e)(2) provides the dissemination requirement for issuer tender offers:

If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate shall disseminate promptly disclosure of such change in a manner reasonably calculated to inform security holders of such change.

Changes that most directly impact the security holder's investment decision are those with respect to the consideration offered and the number of shares sought. Changes in these terms are addressed by Rule 14e-1(b), as amended in July 1986, which provides that:

no person who makes a tender offer shall * * * [i]ncrease or decrease the percentage of the class of securities being sought or the consideration offered or the dealer's soliciting fee to be given in a tender offer unless such tender offer remains open for at least ten business days from the date that notice of such increase or decrease is first published or sent or given to security holders * * *.

The tender offer provisions do not specifically establish a minimum time period with respect to disclosure and dissemination of other material changes. Given the continually evolving nature of tender offer practice, it is impracticable to delineate every possible material change, its degree of significance, or the requisite time period attendant to that change. However, disclosure and dissemination of material changes must

allow security holders the opportunity effectively to consider such information and factor it into the decision whether, to tender shares, withdraw shares already tendered, sell into the market, or hold their shares.⁴

Judicial decisions have discussed the time necessary for security holders to obtain information and react to it in both the tender offer and proxy areas.⁵ As stated in the Commission's release announcing adoption of the recent all-holders and best-price and other related amendments to the tender offer rules:

As a general rule, the Commission is of the view that to allow dissemination to shareholders "in a manner reasonably designed to inform [them] of such change" (17 CFR 240.14d-4(c)), the offer should remain open for a minimum of five business days from the date that the material change is first published, sent or given to security holders. If

⁴ The Commission expressed this view in its amicus brief filed in the Seventh Circuit in *McDermott, Inc v. Wheelabrator-Frye, Inc.*, 649 F.2d 489 (7th Cir. 1980). The Commission stated that a press release by the bidder on the last day of its offer, announcing an increase in the number of shares it would accept (a situation now addressed by Rule 14e-1(b)), "did not permit dissemination of the material change by means of adequate publication in a newspaper of national circulation on [that day]." Brief at 20. The Commission endorsed "a brief extension of the tender offer so as to permit adequate dissemination of the material change to security holders and an opportunity for them to react to it." *Id.* The court, in overturning the preliminary injunction entered by the lower court, determined, without specifically deciding the issue, that sufficient dissemination had been achieved by the time of its expedited decision (six days from the press release date). 649 F.2d at 493.

⁵ In the tender offer area, see *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 944 (2d Cir. 1969) (describing district court opinion declining to order divestiture of shares acquired in tender offer or to enjoin voting and holding that withdrawal offer lasting for eight days afforded equivalent relief to rescission offer); *Pabst Brewing Co. v. Kalmanovitz*, 551 F. Supp. 882, 893 (D. Del. 1982) (four business days sufficient time to disseminate disclosure relating to financial condition of individuals who were bidders in an any and all cash offer); *Nicholson File Co. v. H.K. Porter Co.*, 341 F. Supp. 508 (D.R.I. 1972), *aff'd*, 482 F.2d 421 (1st Cir. 1973) (curative letter and rescission offer mailed within seven days of a tender offer withdrawal date sufficient to counter any effect of misstatement). In the proxy area, see *In re Anderson, Clayton Litigation*, 519 A.2d 669, 679 (Del. Ch. 1986) (three business day solicitation period found not sufficient to allow security holders a reasonable opportunity to receive and consider additional soliciting material prior to the meeting). See also *Smith v. Van Gorkom*, 488 A.2d 858, 893 (Del. 1985) ("In an appropriate case, an otherwise candid proxy statement may be so untimely as to defeat its purpose of meeting the needs of a fully informed electorate"); Securities Exchange Act Release No. 16343 (November 15, 1979) (Commission report under Exchange Act Section 21(a), stating that when facts change prior to meeting, appropriate steps should be taken to disseminate complete and accurate information to security holders; possibilities to be considered include postponing the meeting, sending a letter to all security holders advising them of the changes that have been made, revising the proxy statement and resoliciting proxies, and/or offering new proxy cards).

material changes are made with respect to information that approaches the significance of price and share levels, a minimum period of ten business days may be required to allow for adequate dissemination and investor response. Moreover, the five business day period may not be sufficient where revised or additional materials are required because disclosure disseminated to security holders is found to be materially deficient. Similarly, a particular form of dissemination may be required. For example, amended disclosure material designed to correct materially deficient material previously delivered to security holders would have to be delivered rather than disseminated by publication.⁶

B. Reservations of Rights

Tender offer materials typically contain various reservations of rights whereby the bidder reserves the right to, among other things, extend or terminate the offer, waive conditions, increase or decrease the consideration offered or the number of shares being sought, or otherwise alter terms. The Commission recognizes that such reservations are an acceptable means of permitting the bidder to take action varying the terms of an offer, so long as the action taken would not contravene the Williams Act and rules. Nevertheless, for disclosure and dissemination purposes, the actual exercise of the right to modify the offer has a significance that is independent of the reservation of that right. Under the Williams Act, and the rules and regulations thereunder, shareholders are entitled to base their investment decision on the current terms of the offer. Thus, reservation of a right to change an offer does not render an otherwise material change immaterial and does not obviate the need for dissemination.

In this regard, the Commission specifically notes its view that a waiver by the offeror of the number of shares it has set as its fixed minimum is material and that the reservation of the right to waive such a minimum share condition does not render such waiver, when effected, immaterial. Further, the Commission is of the view that, when an offer to purchase states that the bidder reserves the right to waive a minimum share condition or other material term of the offer without notice or extension, the provision will be misleading to security holders.

Dated: April 3, 1987.

By the Commission.

Shirley E. Hollis,

Assistant Secretary.

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⁶ Rel. No. 34-23421 (July 11, 1986) at n. 70.

DEPARTMENT OF LABOR Employment and Training Administration

20 CFR Part 655

Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging; Adjustments to Piece Rates

AGENCY: Employment and Training
Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (DOL) is amending the temporary alien agricultural and logging labor certification regulations to change the procedures for adjustment of piece rates employers offer and pay their United States and alien workers. The rule requires each piece rate to be no less than the prevailing piece rate for the crop activity in the area of intended employment. It also sets limitations on minimum productivity standards. The effect of this change is to eliminate the confusion created by the ambiguous, unclear nature of the previous provision.

EFFECTIVE DATE: May 11, 1987.

FOR FURTHER INFORMATION CONTACT: Mr. Thomas M. Bruening, Telephone: 202-535-0163.

SUPPLEMENTARY INFORMATION:

I. Introduction

On June 5, 1986, the Department of Labor (DOL) published in the *Federal Register*, at 51 FR 20516, a proposed rule to amend the temporary alien agricultural and logging labor certification regulations regarding piece rates which employers seeking temporary alien labor certification offer and pay their U.S. and alien workers. Interested persons were requested to submit written comments by July 7, 1986. The comment period subsequently was reopened on August 8, 1986, for an additional thirty days in response to requests from the public. (51 FR 28599 (August 8, 1986)). This document adopts the proposed rule as the final rule.

II. Temporary Alien Labor Certification Process

Whether to grant or deny an employer's petition to import a nonimmigrant alien to the United States for the purpose of temporary employment is solely the decision of the Attorney General and his designee, the Commissioner of the Immigration and Naturalization Service (INS). 8 U.S.C. 1101(a)(15)(H)(ii) and 1184(c); 8 CFR 2.1. Pursuant to the requirement in 8 U.S.C. 1184(c) that the Attorney General