

Manual of Publicly Available Telephone Interpretations

P. GOING PRIVATE RULES AND SCHEDULE 13e-3

1. Rule 13e-1(b)

During the period of a tender offer subject to Regulation 14D, an issuer (and, pursuant to Section 13(e)(2) of the Exchange Act, its controlling persons) may not purchase any of its equity securities unless, in accordance with Rule 13e-1(b), it has within the last six months sent or given to its equity security holders the information specified in Rule 13e-1(a). Since Rule 13e-1(b) requires that the information be "sent or given", publication of the information in a press release is not sufficient dissemination under the rule. The information required by the rule must be mailed or otherwise specifically given to each security holder, and must be provided before the purchases may be effected. See Release No. 34-8392 (Aug. 30, 1968).

2. Rule 13e-3

Rule 13e-3 does not require an investment banker who renders a fairness opinion on a going private transaction to be "independent" of the issuer. However, any material relationship with the issuer or its affiliates must be disclosed in the Schedule 13E-3 pursuant to Item 9(a)(4).

3. Rule 13e-3

Company X is not affiliated with Company Y. X and Y enter into arms-length negotiations concerning the acquisition of Y by X. Pursuant to the resultant agreement for the acquisition, Y will become a wholly-owned subsidiary of X; however, Y's management will remain intact. Release 34-16075 indicates that where such continuity of management exists, a Schedule 13E-3 may be required. Factors considered to determine whether such a requirement exists include: increases in consideration to be received by management, alterations in management's executive agreements favorable to such management, the equity participation of management in X, and the representation of management on the Board of X.

4. Rule 13e-3

In a "going-private" issuer tender offer, the requirements: (a) in General Instruction A4 to Schedule 13E-3 that the Schedule must be filed with the Commission 30 days prior to any purchase of the subject securities, and (b) in Rule 13e-3(f)(l)(i) that the statement containing the disclosures required by Rule 13e-3 be provided to shareholders twenty days prior to any purchase of the subject securities, do not apply. General Instruction A3 provides that the Schedule 13E-3 shall be filed as soon as practicable on the date the tender offer is first published, sent, or given to security holders. Rule 13e-3(f)(l) only applies to transactions described in 13e-3(a)(4)(i)(A) and (C) [amended in Release No. 34-18524 to 13e-3(a)(3)(i)(A) and (C)], and not to Subparagraph (B) which deals with tender offers.

5. Rule 13e-3

The "unitary transaction" no-action position which permits certain persons to conduct multi-step acquisitions without filing Schedule 13E-3, is dependent upon, among other things, the

acquisition of the entire class of securities at the same unit price. Sellers in an initial block transaction, however, may receive installment notes while the remaining shareholders receive only cash, provided the value represented by the notes (giving effect to the yield) is no more than the cash amounts offered to the other shareholders.

6. Rule 13e-3

In a "going private" merger transaction involving the leveraged buy-out by an affiliate of an issuer which is subject to the reporting requirements of Section 13 of the Exchange Act, both the issuer and the affiliate, as filing persons on Schedule 13E-3, must speak to the issuer's shareholders as to the fairness of the transaction. The issuer's obligation to comply with Rule 13e-3 arises from its engagement in a solicitation subject to Regulation 14A, or a distribution subject to Regulation 14C, in connection with the "going private" merger with its affiliate. See Rule 13e-3(a)(3)(i)(C). The affiliate, as a Rule 13e-3(a)(3)(i)(A) purchaser of the equity securities of the issuer, is also subject to Rule 13e-3. The affiliate is deemed to be a "purchaser" of the equity securities of the issuer due to the definition of "purchase" in Rule 13e-3(a)(2). This definition states that "purchase" includes "any acquisition pursuant to a merger." Both the affiliate and the issuer, therefore, are clearly required under Rule 13e-3(b)(2)(i) to complete, file and disseminate a Schedule 13E-3 in accordance with Rules 13e-3(d), (e) and (f). Item 8 of Schedule 13E-3 directs that each person filing the Schedule state whether it ". . . reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders". It is the position of the Division staff, therefore, that as both the issuer and the affiliate are reporting persons on Schedule 13E-3, each must evaluate the "going private" transaction from the standpoint of fairness to the issuer's shareholders and appropriately disclose the results of such evaluation. See Question 5 in Release No. 34-17719.

7. Rule 13e-3

A parent corporation holds a majority of a subsidiary's outstanding common stock. The subsidiary's common stock is registered pursuant to Section 12(g) of the Exchange Act. The parent proposes to make the subsidiary wholly-owned through the following sequence of transactions: (1) an issuer tender offer for any and all of the subsidiary's common stock; (2) the filing of a Form 15; and (3) after effectiveness of the Form 15, a short-form merger with a newly formed, wholly-owned subsidiary. On the date the issuer tender offer commences Schedules 13E-4 and 13E-3 must be filed with the Commission and dissemination must occur in accordance with Rule 13e-4. Provided that the Schedule 13E-3 is appropriately amended when the final amendment to Schedule 13E-4 is filed, disclosing that the Form 12g-4/15d-6 will be filed as well as the plans for the "freeze-out" merger, no further amendment to the Schedule 13E-3 will be required when the merger ultimately takes place, since at that time the issuer will not be subject to either Section 12 or Section 15(d) of the Exchange Act.

8. Rule 13e-3(g)(l)

Rule 13e-3(g)(l) provides an exception from the requirement to file a Schedule 13E-3 for second-step clean-up transactions within one year of a tender offer provided, among other things, that the consideration offered in the second-step is "at least equal to the highest consideration offered during such tender offer". When the consideration in the second-step is a security, the value of the security at the time the second-step occurs (not at the time preceding the tender offer when the original agreement concerning the series of transactions is signed) is used to determine whether the consideration in the second-step is sufficient to satisfy this requirement.

9. Rule 13e-3(g)(1)

Rule 13e-3(g)(1) provides an exemption from the requirement to file a Schedule 13E-3 for second-step clean-up transactions within one year of the tender offer in which the bidder becomes an affiliate of the subject company. However, if the affiliation exists prior to the tender offer, then the exemption provided by Rule 13e-3(g)(1) is not available. Where shareholders of the subject company execute an unconditional agreement with the bidder prior to the tender offer, pursuant to which their shares (which represent a sizable block of the subject company's outstanding securities which will by its size make the bidder an affiliate) will be sold to the bidder after the expiration of the tender offer, the bidder and the subject company become affiliates on the date the agreement is signed and the exception in Rule 13e-3(g)(1) is, therefore, not available. The unitary transaction no-action position, however, may be available provided all the conditions of that position are satisfied (See Release No. 34-17719 Question 8).

10. Rule 13e-3(g)(2)

Where an issuer offers to exchange non-interest bearing convertible debentures which are exempt from registration under Section 3(a)(9) of the Securities Act and may or may not be accepted for listing on an exchange depending on the number of debentureholders participating in the exchange, for outstanding interest bearing convertible debentures which are registered under Section 12(b) of the Exchange Act and listed on a national exchange, the exemption provided by Rule 13e-3(g)(2) from filing a Schedule 13e-3 is not available. The exemption is not available (1) both because the new debentures may not be accepted for listing and, (2) the new non-interest bearing debentures being offered do not contain substantially the same rights as the interest bearing debentures being exchanged.

11. Rule 13e-3(g)(2)

In a two-step acquisition where the first step is a cash tender offer, and the second step is a merger under which shareholders of the subject company are to receive shares of common stock of the bidder, the parties may claim a Rule 13e-3(g)(2) exemption from the Rule 13e-3 filing requirements relating to the merger, provided all of the conditions for that exemption are satisfied. The availability of the exemption would not be affected if (a) the value of the security offered in the second step is lower than the cash amount offered in the tender offer, or (b) the board of directors of the subject company is changed by the bidder immediately following the tender offer.

12. Rule 13e-3(g)(ii)

A limited partnership roll-up offered an option to the limited partners to take notes instead of an equity interest in the new master limited partnership. The general partner was an affiliate of all the limited partnerships. The question arose whether the exemption from Rule 13e-3 for transactions where investors are offered "solely" an equity security was available. In a prior Q & A release, the Division staff took the position that the option to receive cash instead of the equity security did not defeat the availability of the exemption. The theory of the Q & A release, that the exemption is available so long as all investors have the option to continue their equity interest, was deemed to apply because the notes would be substantially equivalent in value to the limited partnership interests.

13. Rule 13e-3(g)(4)

Rule 13e-3(g)(4) provides that Rule 13e-3 shall not apply to redemptions, calls, or similar purchases of an equity security by an issuer "pursuant to specific provisions set forth in the instrument(s) creating or governing that class of equity securities". This exemption is not lost when provisions relating to the repurchase of limited partnership interests by the general partner are contained in an attachment to the limited partnership agreement as opposed to being in the agreement itself, provided each limited partner has consented to the buy-back provisions and the provisions are uniformly applied to each limited partner.

14. Rule 13e-3; Regulation 14D

An affiliate of the subject company will conduct a Regulation 14D tender offer, resulting in the subject company "going private". Dissemination of the tender offer materials and the disclosures required by Rule 13e-3 will be made by mailing the disclosure document to shareholders. The shareholder list is being voluntarily provided to the bidder by the subject company without the latter's invocation of Rule 14d-5. Although Rule 14d-4(a)(2)(i) states that a summary advertisement may not be used to commence a tender offer subject to Rule 13e-3, the Division staff did not object where several days after the tender offer had commenced via other permissible means (*see, e.g.*, Rules 14d-3(a) and 14d-4(a)(1)), the bidder published a summary advertisement complying with Rule 14d-6(b), and noted that the offer will result in the issuer "going private".

15. Rule 13e-4

The applicability of Regulation 14D is conditioned on the bidder being the beneficial owner of more than 5% of the outstanding securities of a class registered pursuant to Section 12 of the Exchange Act, immediately following the tender offer. Rule 13e-4, however, applies to all issuer tender offers for any class of equity securities made by the issuer (as defined in Rule 13e-4(a)(1)), regardless of the percentage of the class being sought. The Division of Market Regulation, however, will consider requests for a "no-action" position when the amount sought in the issuer tender offer is deemed to be de minimis.

16. Rule 13e-4

An issuer commenced a tender offer subject to Rule 13e-4 for 10,000 common shares reserving the right, however, to purchase an additional 50,000 common shares. The issuer desired to wait until the tender offer had expired, so that it could determine how many shares had been tendered, before establishing the number of shares it would purchase. The issuer was informed that it is the position of the Division staff that the utilization of such a wide range, from 10,000 to 60,000 shares, is not in compliance with Item 1(b) of Schedule 13E-4 which requires a statement as to "the exact amount of such securities being sought", and that therefore the issuer must amend its material to disclose a precise figure.

17. Rule 13e-4; Rule 14d-1

An issuer made a tender offer for its debt securities that were convertible into the common stock of another unaffiliated issuer. The common stock, amounting to less than 5% of the class, had been purchased and placed in escrow at the time the debt securities were issued. The Division staff took the position that the offer was not subject to Rule 13e-4, but rather was an exempt offer under Rule 14d-1. To the extent it was an offer for an equity security, it was the equity security of another company. Since the offer related to less than 5 percent of the common stock, it was not subject to Regulation 14D. It was, however, subject to the Regulation 14E rules.

18. Rule 13e-4; Section 13(e); Section 14(e); Rule 14d-1; Rule 14d-9

A general partner making a tender offer for the interests of the limited partners, which are registered under Section 12 of the Exchange Act, must file on a Schedule 14D-1 and may not use a Schedule 13E-4. The general partner, however, may include a statement in the Schedule and offering materials on behalf of the partnership to satisfy the partnership's obligations under Rules 14e-2 and 14d-9.

19. Rule 13e-4; Regulation 14D

A tender offer by an issuer's ESOP, for equity securities of the issuer, is treated the same as a tender offer by any other affiliate of the issuer. If the securities are registered pursuant to Section 12 of the Exchange Act, and after the tender offer the ESOP will hold more than 5% of the outstanding shares of the class, then the ESOP must comply with Regulation 14D. Schedule 13E-4 would not be required, inasmuch as Rule 13e-4(g)(4) exempts tender offers governed by Section 14(d) from Rule 13e-4. If, however, the tender offer is not within the scope of Section 14(d), then Rule 13e-4 should be examined to determine whether the offer must be made in compliance with that rule. In all events, a tender offer by an ESOP will be subject to Section 14(e) of the Exchange Act and Regulation 14E.

20. Rule 13e-4(f)(3); Regulation 14D

Rule 13e-4(f)(3)(i) permits the issuer or an affiliate making an issuer tender offer to accept all shares tendered by persons who own an aggregate of not more than a specified number of shares, provided that the number is less than 100 shares and such persons tender all their shares. No such "odd-lot" preference is available, however, for tender offers governed by Regulation 14D.

21. Schedule 13E-3, Item 10

Since the term "associate" as used in Item 10 is not defined in the Schedule or Rule 13e-3, and is not discussed in the adopting or interpretive releases, it was determined that the definition of associate in Rule 12b-2 should be applied in the Rule 13e-3 context.