SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 230 and 240

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RIN 3235–AG85

Offshore Press Conferences, Meetings With Company Representatives Conducted Offshore and Press Related Materials Released Offshore

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is publishing for comment proposed safe harbors designed to facilitate U.S. press access to offshore press activities. The safe harbors would clarify the conditions under which journalists may be provided with access to offshore press conferences, offshore meetings and press materials released offshore, where a present or proposed offering of securities or tender offer is discussed, without violating the provisions of section 5 of the Securities Act, or the procedural requirements of the tender offer rules promulgated under the Williams Act.

DATES: Comments should be received on or before December 17, 1996.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Stop 6–9, Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comment@sec.gov. Comment letters should refer to File No. S7–26–96; this file number should be included in the subject line if electronic mail is used. All comment letters received will be available for public inspection and copying in the Commission's public reference room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Luise M. Welby, Office of International Corporate Finance, Division of Corporation Finance, at (202) 942–2990.

SUPPLEMENTARY INFORMATION: The Commission is publishing for comment a proposed rule[1] that would establish a safe harbor whereby an issuer, selling security holder, or their representatives, would not be deemed to have made an ''offer'' for the purposes of Section 5[2] of the Securities Act of 1933 (the ''Securities Act''), by virtue of providing any journalist, whether foreign or domestic, with access to press conferences held outside the United States, to meetings with issuer or selling security holder representatives conducted outside the United States, or to press related materials released outside the United States, at or in which a present or proposed offering of securities is discussed. Likewise, the Commission proposes amending existing rules[3] to make clear that providing such access would not be deemed ''directed selling efforts'' within the meaning of Regulation S[4] under the Securities Act, or a ''general solicitation'' within the meaning of Regulation D[5] under the Securities Act. In addition, a bidder for securities of a foreign private issuer, as well as the subject company, their representatives, or any other person specified in Rule 14d–9(d)[6] under the Securities Exchange Act of 1934 (the ''Exchange Act''), will not be subject to the filing and procedural requirements of Regulations 14D and 14E[7] under the Exchange Act, by virtue of providing any journalist, whether foreign or domestic, with access to its press conferences held outside the United States, to meetings with its representatives conducted outside the United States, or to press related materials released outside the United States, at or in which a present or proposed tender offer is discussed.

I. Background

In today's global securities markets, corporate transactions involving securities (whether public offerings, acquisitions, exchange offers or tender offers) are increasingly newsworthy events, regardless of where in the world these transactions are taking place. The U.S. financial press, and foreign publications with a general circulation in the United States, often provide news coverage of these transactions, even if the transaction does not involve U.S. companies and will not take place in the United States. In addition, in some foreign countries, companies offering securities, or soliciting tenders of securities, commonly conduct press conferences, issue press releases, and meet with members of the press when offering securities or conducting a tender offer. As contrasted with the traditional and permitted offering process in the United States which does not freely allow such activities to occur, these activities are not only permitted by foreign regulatory regimes, but in fact often are an integral part of the offering or tender offer process in some foreign jurisdictions.

The Commission has been made aware for a number of years that journalists for publications with a significant U.S. circulation (whether the publication is U.S.-based or foreign-based) have had difficulty obtaining direct access to offshore press conferences, offshore meetings with company representatives and press materials released offshore where a present or proposed offering of securities or tender offer is discussed. These journalists have been told by company representatives that their access to these events or materials is restricted because of uncertainty whether such access would result in a violation of the U.S. federal regulatory requirements for offerings of securities or tender offers.

The Commission has been sensitive to the concerns of journalists for publications with U.S. circulation that they not be denied access to the same information made available to journalists for foreign publications with minimal or no U.S. circulation when covering offshore offerings or tender offers and has provided prior guidance in this area. The Commission and staff already have taken a number of actions, both through rulemaking and interpretations, to address the problem of press access to information about offerings of securities by foreign companies,[8] including specific guidance in Regulation S stating that such contacts do not raise Securities Act registration concerns under certain circumstances.[9] Similarly, the

[1] Proposed Rule 135e.

[2] 15 U.S.C. 77e.

[3] Proposed amendments to Rule 502(c) of Regulation D (17 CFR 230.502(c)) and Rule 902(b) of Regulation S (17 CFR 230.902(b)).

[4] 17 CFR 230.901–230.904 and Preliminary Notes.

[5] 17 CFR 230.501–230.508 and Preliminary Notes.

[6] 17 CFR 240.14d–9(d). *See infra* n.29.

[7] 17 CFR 240.14d–1—240.14d–10; 17 CFR 240.14e–1—240.14e–2.

[8] *See generally* Securities Act Rules 135 (notice given by an issuer that it proposes to make a registered public offering of securities) and 135c (notice by an issuer that it proposes to make, is making, or has made an offering of securities not registered or required to be registered under the Securities Act), 17 CFR 230.135 and 230.135c.

[9] Preliminary Note 7 to Regulation S specifically states that: ''Nothing in these rules precludes access by journalists for publications with a general circulation in the United States to offshore press conferences, press releases and meetings with company press spokespersons in which an offshore offering or tender offer is discussed, provided that the information is made available to the foreign and United States press generally and is not intended to induce purchases of securities by persons in the United States or tenders of securities by United States holders in the case of exchange offers.'' *Supra* n.4.

Commission staff has emphasized that U.S. press coverage of tender offers for the securities of foreign companies does not trigger the procedural requirements of the Williams Act.[10]

Despite the previous efforts by the Commission and its staff to clarify this area, the Commission has been informed that U.S. journalists, and foreign journalists for publications or other news services with a general circulation in the United States, continue to be excluded from offshore press conferences and offshore meetings with representatives, and denied access to press related materials released offshore. Foreign issuers involved in global offerings with a public or private U.S. tranche continue to be concerned that contacts with journalists for publications with a general circulation in the United States could constitute ''gun jumping'' and thus improper offers under the Securities Act,[11] or a general solicitation in violation of a private offering exemption. Even where no U.S. offering is contemplated, foreign issuers conducting large newsworthy offshore offerings of securities in accordance with local offering practices also deny such journalists access to offshore meetings, news conferences and press materials due to concern that allowing such access would violate the prohibition on directed selling efforts under Regulation S. In addition, a foreign company that is either the bidder for the securities of another foreign company, or the subject of a present or proposed tender offer itself, may deny such journalists access to the same activities or materials due to concerns regarding triggering the filing and procedural requirements of the Williams Act. The Commission has been advised that continued concerns focus on uncertainty regarding the applicability of the language in previous Commission guidance that the provision of the access not be ''intended to induce'' participation in the offer by persons in the United States.

The U.S. Congress also has been aware of this continued exclusion and has expressed its concern through the legislative process. Recently passed legislation directs the Commission to adopt rules to address the applicability of the Securities Act to the issue of foreign press conferences and foreign press releases.[12]

In response to the concerns expressed by the press and the recently passed legislation, the Commission reiterates its previously expressed view that the U.S. federal securities laws do not require that journalists for publications with U.S. circulation be excluded from offshore press conferences, meetings, or other press coverage concerning offshore offerings or tender offers. The Commission believes that such access currently is provided for legitimate journalistic purposes consistent with traditional international practices, not to circumvent the U.S. federal securities laws. Moreover, in the Commission's view, the imposition of such a requirement would be meaningless in many instances in terms of investor protection, since denying access to journalists for publications with U.S. circulation does not prevent such journalists from indirectly receiving the information disseminated to the foreign press. Rather, the receipt of such information is merely delayed, thereby unnecessarily competitively disadvantaging the journalist denied direct access to the information. The proposed safe harbors are intended to reflect existing offering practices in certain foreign countries and level the playing field between U.S. and foreign journalists with respect to these practices, although the proposed rule does not require that press activities be limited to countries where such press activities are a traditional part of the offering process.

Moreover, the proposed safe harbors also would allow U.S. companies to avail themselves of local offering practices when conducting an offshore offering, or a tender offer for the securities of a foreign company. The Commission preliminarily believes that U.S. companies conducting offerings in foreign countries, or soliciting tenders of the securities of foreign companies, should be able to conduct the *offshore* portion of their offering or tender offer in the same manner as foreign issuers—*i.e.*, in accordance with local practice, such as by holding press conferences or meetings with the press, or by issuing press releases that discuss the offering or tender offer—without running afoul of U.S. securities regulations. Otherwise, U.S. issuers may be unfairly disadvantaged in their ability to raise capital in other countries, or to acquire the securities of foreign companies.

The proposed rules are intended to provide greater assurance to companies that such access does not implicate the procedural and filing provisions of the federal securities laws. The new rule, and amendment of existing rules, should eliminate perceived grounds for the exclusion of U.S. journalists, or journalists for foreign publications and other news services with a general circulation in the United States, from access to foreign press conferences, offshore meetings with representatives, or press related materials released offshore. The safe harbors proposed today address only the regulatory filing and disclosure requirements of Section 5 of the Securities Act and the Williams Act,[13] but not the antifraud, civil liability, or other provisions of the federal securities laws with respect to material misstatements or omissions in the press communications, whether oral or written.

The proposed safe harbors are intended to address a specific identified problem—to remove obstacles faced by journalists for publications with U.S. circulation in obtaining access to offshore press activities. The Commission recognizes that the proposed safe harbor is broad in application because it applies to press activities in any foreign country and can be utilized by any issuer conducting some portion of its offering offshore. This release includes specific questions about the appropriate scope of the proposed safe harbors.[14] These proposals, however, do not attempt to address, or to suggest a framework for addressing, broader policy questions, such as how publicity during the offering process should be regulated generally or the U.S. regulatory implications of the dissemination of information concerning present or proposed offerings or tender offers using electronic media such as the Internet in the international environment. The Commission's Securities Act Concept

[10] *See* Reuters Holding plc, SEC No-Action Letter (publicly available March 6, 1990), stating: ''* * * the Commission's rules are not intended to limit or interfere with news stories or other bona fide journalistic activities, or otherwise hinder the flow of normal corporate news. Access by American journalists or non-U.S. journalists whose reports are disseminated in the U.S. to offshore press conferences, press releases and company press spokesmen in which an offshore tender offer is discussed need not be limited where the information is made available to the foreign and U.S. press generally and is not intended to induce participation in the offer by U.S. holders.''

[11] *See* Report of the Task Force on Disclosure Simplification to the Securities and Exchange Commission (March 5, 1996), at 33.

[12] H.R. 3005, the National Securities Markets Improvements Act of 1996, which was recently passed by the Congress and is awaiting the signature of the President, recognizes this problem and directs the Commission to conduct rulemaking to clarify the status under the Securities Act of offshore press activity.

[13] If a proposed transaction potentially could implicate both the Securities Act and the Williams Act (for example, an exchange offer), the provisions of the Securities Act safe harbor would be available for relief under the Securities Act, and the tender offer safe harbor would provide relief with respect to the Williams Act, assuming that all the conditions of the respective safe harbors are satisfied.

[14] *See infra* p. 14–16, and p. 24–27.

Release issued in July 1996[15] raises a number of questions, and presents a variety of approaches, to dealing with some of these issues in the context of an overall framework.

II. Proposals

A. Securities Act Safe Harbor

Under the proposed Securities Act safe harbor, an issuer, selling security holder, or their representatives, would not be deemed to have (i) made an offer for purposes of Section 5; (ii) engaged in a general solicitation or general advertising within the meaning of Regulation D; or (iii) engaged in ''directed selling efforts'' within the meaning of Regulation S, by allowing journalists access to offshore press conferences, meetings with issuer or selling security holder representatives conducted offshore, or press related materials released offshore, where or in which a present or proposed offering of securities is discussed, provided certain conditions are met. As described below, these four conditions require that the press activity be conducted offshore, at least part of the offering be conducted outside the United States, that the access also be provided to foreign press, not just the U.S. press, and that any written materials to which journalists are provided access under the safe harbor that are related to certain offerings likely to have significant U.S. investor interest contain a cautionary legend and do not attach any form of purchase order or coupon that could be returned to express interest in the offering.

As noted above, the safe harbor relates solely to the applicability of the registration requirements of Section 5 of the Securities Act and does not limit in any way the scope or applicability of the antifraud or other provisions of the federal securities laws, including Sections 12(a)(2) and 17(a) of the Securities Act, relating to both oral and written material misstatements and omissions in the offer and sale of securities.

1. Use of an Objective Test

Prior Commission and staff guidance concerning foreign press activities has stated that such activities generally do not raise concerns *provided that* they are not undertaken for the purpose of inducing purchases of securities by persons in the United States.[16] As stated above, the Commission understands that this ''intent'' standard is considered by issuers and their counsel to be too subjective and causes many issuers to continue to feel uncomfortable about admitting journalists for publications with a general circulation in the United States to offshore press activities. It also is the Commission's understanding that offshore press conferences, meetings with representatives conducted offshore, and the release of press related materials offshore, are conducted today based on local practices and for legitimate business purposes—not to induce participation in the offering by persons in the United States without the protections of the U.S. federal securities laws. Consistent with this background and to increase the utility of the safe harbor, the Commission is proposing a purely objective test—no intent or similar subjective elements are included. In the event that abusive practices designed to evade the investor protection mandate of the federal securities laws develop under the proposed safe harbor, the Commission will revisit some or all portions of the rules as appropriate.

Comment is requested as to whether this lack of an ''intent'' requirement is appropriate, or whether a subjective standard should continue to apply. If a subjective standard is appropriate, should the same ''inducement'' standard be retained, or would a different subjective standard be more appropriate? Would the absence of an intent element permit conduct that, while in technical compliance with the safe harbor, nevertheless is inconsistent with the purposes of the Securities Act? Conversely, if an intent element were included as a condition of the safe harbor, would issuers continue to exclude U.S. press?

2. Coverage of the Safe Harbor

The proposed Securities Act safe harbor would apply to the definition of ''offer'' for the purposes of Section 5, the concept of ''directed selling efforts'' under Rule 902(b) of Regulation S, and ''general solicitation'' under Rule 502(c) of Regulation D. Consequently, the safe harbor would be available in each of the following situations:

- An offshore offering that will include a registered U.S. tranche;
- An offshore offering that will not include any U.S. offering (whether registered or exempt); and
- An offshore offering that will include a U.S. tranche not registered in reliance upon the Section 4(2) private placement exemption or any other available Securities Act exemption.

The Commission proposes to make the safe harbor available for each of these situations based on the Commission's understanding that offshore press activities traditionally have occurred in each of these cases and journalists for publications with a circulation in the United States have been excluded due to perceived problems with Commission rules. Thus, the safe harbor would not be available for an offering exclusively in the United States, because similar press activities in the United States have been viewed as inconsistent with offering practices in the United States due to, among other things, a concern that these press activities may be used to ''condition the market.''

Comment is requested whether the proposed application of the safe harbor in each of the situations enumerated above is appropriate. For example, is it appropriate, as proposed, to provide protections for these activities when a U.S. private placement is planned? Are there types of offerings, such as initial public offerings, that should be excluded from the safe harbor? Are there any other contexts not covered by the proposed safe harbor in which the proposed safe harbor should be applied? Should the safe harbor apply to press activities, whether offshore or in the United States, in connection with offerings exclusively in the United States? Do U.S.-only offerings have unique characteristics that would make these press activities inappropriate?

As currently proposed, all domestic and foreign issuers conducting offshore offerings would be eligible for the safe harbor, regardless of the type of issuer, and whether it files periodic reports under the Exchange Act with the Commission. The Commission preliminarily believes that ''issuer'' limitations of this kind would be inconsistent with the purposes of the proposed safe harbor and would not further investor protection. Restricting the access of U.S. journalists to offshore press activities of specified classes of issuers would not appear to prevent the information from reaching U.S. persons—it merely delays the receipt and places U.S. journalists at a competitive disadvantage. Comment is requested, however, whether issuer eligibility requirements should be imposed. First, as discussed above, the safe harbors would be available to domestic issuers conducting offerings that include an offshore tranche so that domestic and foreign issuers would be on equal footing in seeking capital offshore. Is it appropriate to include domestic issuers, or would their inclusion raise concerns that these issuers might be more likely to use offshore press activities to evade important investor protections provided by the federal securities laws?

[15] Securities Act Rel. 7314 (July 25, 1996) [61 FR 40044 (July 31, 1996)].

[16] *See supra* n.9 and n.10.

Assuming domestic issuers are included, should different eligibility standards apply to domestic issuers than to foreign issuers? For example, should only large multinational domestic companies be covered, or should smaller companies be eligible as well? Would it be appropriate to limit the safe harbor for domestic companies to those eligible to use Form S–3 for a primary common stock offering based on, among other things, an assumption that their activities are followed by the press? Should the threshold be higher than the current Form S–3 eligibility requirements? Should any distinction depend on whether the domestic issuer will be conducting any portion of the offering in the United States, and if so, how?

Comment also is requested whether there are classes of issuers, whether foreign or domestic, that should not be eligible for the safe harbor. For example, are there classes of issuers who lack legitimate (*i.e.*, non-market conditioning) reasons to inform the press of their offering activities due to their small size or lack of press following? Should historically ''problematic'' types of issuers (*e.g.*, partnerships, blank check companies or penny stock issuers) be excluded from the proposed rule?

The Commission also proposes that the safe harbor be available for selling security holders as well as issuers. The Commission staff has been informed that governments conducting privatizations, or holding companies conducting demergers, often avail themselves of local offering practices when offering securities as selling security holders. Comment is requested whether selling security holders should be able to avail themselves of the safe harbor.

In addition, the Commission does not propose limiting relief to press conferences or meetings held only by the issuer or a selling security holder, or press related materials released by either of them. Rather, the proposed safe harbor also would cover any of such activities conducted by representatives of the issuer or the selling security holder, such as underwriters and public relations firms. The Commission preliminarily believes that the safe harbor should be available to issuers and selling security holders that use agents and other advisers to conduct their press related activities; on the other hand, there does not appear to be any need to extend the safe harbor to press related activities of persons with no relationship to the issuer. Comment is requested as to the appropriateness of the applicability of the safe harbor to activities conducted by entities or individuals other than the issuer or the selling security holder. Should the Commission specifically define who or what parties would constitute ''representatives'' of the issuer or the selling security holder? Should such definition be inclusionary or exclusionary in nature?

The Commission is not proposing a definition of ''journalist'' as part of the proposed safe harbor. It is expected that the term ''journalist'' would be broadly interpreted to cover reporters and other representatives of news services. Comment is requested whether the Commission should include a definition of the term ''journalist'' as part of the proposed safe harbor, and if so, according to what criteria.

The Commission also does not propose limiting the safe harbor to journalists for publications with a specified minimum U.S. circulation or to any particular news medium. In the Commission's view, journalists for smaller publications, newsletters and other services should benefit from the safe harbor as well. Is this view appropriate, or should the safe harbor be limited to large international news organizations only? If the latter approach is used, should the rule define ''international news organization,'' and if so, how?

The Commission is concerned, however, that the safe harbor be available only for legitimate meetings with, or releases to, members of the press. Therefore, the safe harbor would not cover paid advertisements.[17] Should the Commission define ''paid advertisements'' or provide further interpretive guidance on the ability to utilize wire services that the issuer pays to run its press releases and other news items? Also, the Commission would not consider analysts' reports to come within the new safe harbor—analysts' reports would continue to be governed by the existing Securities Act research report rules, such as Rules 138 and 139.[18] The benefit of the safe harbor to issuers or selling security holders with respect to oral or written communications to journalists would not become unavailable, however, merely because nonjournalists attend the press conferences or meetings, or have access to the press related materials.

The proposed rule would not restrict the content of the information that may be discussed during the press related activities. The Commission preliminarily is concerned that such a restriction would limit the ability of issuers to use the safe harbor or that U.S. journalists may continue to be excluded from offshore press activities where the issuer expects the content to exceed the scope of the rule. Comment is requested whether the proposed safe harbor should limit the information that may be discussed at the press conference or meeting. Further, should the information set forth in any written press related materials released under the safe harbor be restricted (*e.g.*, similar to the restrictions in Rules 135 or 135c under the Securities Act)? Should the rule limit the type or nature of written materials that may be distributed to the press under the safe harbor (*e.g.*, press releases, prospectuses, sales literature)?

3. Conditions To Minimize Possibility of Abuse

The Commission is concerned that, in the future, issuers may attempt to use the new procedural protections of the safe harbor to circumvent important Securities Act protections. Consequently, the proposed safe harbor includes certain conditions that may minimize the possibility of abuse. Comment is requested generally whether there is a different approach that would accomplish the Commission's stated objectives consistent with investor protection.

a. *Press Activity Must Take Place Offshore.* Under the proposed safe harbor, the press conference or meeting with issuer or selling security holder representatives to which access is provided to journalists must be conducted outside the United States, and any press related materials to which access is provided to journalists must be released outside the United States. The proposed safe harbor is intended to be a narrow statement regarding whether the procedural and filing requirements under the U.S. federal securities laws are triggered by allowing journalists for publications with U.S. circulation access to certain offshore press

[17] For similar statements previously made by the Commission regarding paid advertisements, *see* the definition of ''directed selling efforts'' under Regulation S, stating that directed selling efforts would include the ''placement of an advertisement in a publication with a general circulation in the United States that refers to the offering of securities being made in reliance upon this Regulation S.'' 17 CFR 230.902(b)(1). *See also Offshore Offers and Sales,* Securities Act Rel. 6863 (April 24, 1990) [55 FR 18306 (May 2, 1990)], stating that the prohibition in Regulation S against ''directed selling efforts'' would preclude, among other things, activities such as ''placing advertisements with radio and television stations broadcasting into the United States or in publications with a general circulation in the United States, which discuss the offering or are otherwise intended to condition, or could reasonably be expected to condition, the market for the securities purportedly being offered abroad.''

[18] 17 CFR 230.138 and 230.139.

activities, recognizing that foreign offering practices differ from the U.S. offering practices currently permitted under the U.S. federal securities laws.[19] Comment is requested whether this narrow approach is appropriate. Should it matter under the proposed safe harbor where the press activity takes place? Should U.S. and foreign issuers be able to conduct press activity in the United States without triggering the procedural and filing requirements of the federal securities laws? If extended to cover press activity in the United States, should the applicability depend on the type of offering (registered or exempt), the type of security to be offered (*e.g.*, debt or equity), or the type or size of issuer of the securities to be offered (*e.g.*, foreign or domestic, Exchange Act reporting or nonreporting, eligible for Form S–3/F–3), or otherwise? Under each scenario, commenters are requested to address what liability standard should apply to any statements made or written materials released within the United States, and whether any written materials released in the United States should be required to be filed with the Commission.

With respect to written press related materials, the condition that the access take place offshore would require that the journalist receive such material at an offshore address. Thus, for example, materials sent by facsimile or electronic mail to an offshore address would satisfy this condition; materials sent to a U.S. address would not. Comment is requested whether this distinction is appropriate or necessary.

The Commission recognizes that the evolution of communications technology increasingly has blurred geographic boundaries. Is it appropriate to require that U.S. journalists travel offshore or maintain foreign offices in order to have access to issuer press activities in compliance with this condition, particularly where the information eventually may be disseminated in the United States? How should follow-up conversations be treated when a U.S. journalist attends offshore press activities and returns to the United States? Should the rule provide guidance on whether follow-up activities can take place with one participant in a communication being physically located in the United States? Should the rule contain geographical restrictions at all, or, alternatively, should the rule require that only part of the press activity take place offshore (*e.g.*, a ''conference call'' press conference originating offshore at which U.S. journalists within the geographic boundaries of the United States participate)? Is there any particular potential for abuse from press activities with all or part of the activity physically located in the United States? Is potential for abuse eliminated or reduced by requiring the activity to take place offshore?

b. *Offshore Offering.* The Commission is proposing as a condition to the safe harbor that the offering cannot be conducted *solely* in the United States. In this way, issuers cannot claim the protections of the safe harbor for offshore press activities where there is no offshore nexus or apparent reason for conducting offshore press activities. As currently proposed, if any portion of the offering is offshore, this condition would be satisfied. Comment is requested whether the Commission should require as a condition of the safe harbor that a minimum amount of the offering take place offshore, and whether such requirement should include a quantifiable standard or not. It is the Commission's understanding that some global offerings do not have separately identifiable tranches, or that such tranches may not be identified until after the offshore press activity takes place. Consequently, at the time of the offshore press activity, the issuer or selling security holder may not know how much of the offering ultimately will be conducted in the United States, if any. This potential uncertainty in advance of the offering as to whether the standard would be met may make it more difficult for issuers to rely on the safe harbor, thus limiting its utility.

Comment is sought on whether the Commission should require that a certain amount of the offering be conducted outside the United States, *e.g.*, a ''minimal'' amount of the offering, a ''majority'' of the offering, or a ''substantial'' amount of the offering. Should the portion to be conducted outside the United States be quantified (*e.g.*, 10%, 25%, 50%, or some other percentage), and if so, how should such standard be defined (*e.g.*, as a percentage of the total offering, as a percentage of the issuer's outstanding securities, or otherwise)? Should the same standard apply to all issuers, or should the standard differ depending on whether, for example, the issuer is a foreign or domestic issuer, Exchange Act reporting or nonreporting, eligible for Form S–3/F–3, or otherwise? Should the standard depend on the type of offering (registered or exempt), or the type of security to be offered (*e.g.*, debt or equity)?

c. *Access Provided to Both U.S. and Foreign Journalists.* As noted, the purpose of the proposed rule is to remove uncertainties that impede the ability of issuers and selling security holders to allow U.S. journalists, and journalists for foreign publications or other news services with a general circulation in the United States, the same access to press conferences, press materials and meetings with representatives that non-U.S. journalists have. The safe harbor is not designed as a means for issuers and other offering participants to channel widespread publicity regarding the offering exclusively into the United States. To limit the rule's ability to be used in this manner, the proposed rule requires that ''access is provided to both U.S. and foreign journalists,'' *i.e.*, that whatever is made available to U.S. journalists also must be made available to foreign journalists. For example, an issuer would not qualify for the safe harbor if it held an offshore press conference and *only* allowed U.S. journalists to attend. Comment is requested whether this requirement is appropriate or necessary for investor protection. Are there any circumstances where excluding all or certain non-U.S. journalists would be consistent with the purposes of the proposed safe harbor? Assuming that press activity takes place offshore and subsequently is reported in the United States, does requiring that foreign journalists have ''access'' provide additional investor protections? Should the status of the issuer (*e.g.*, foreign or domestic, Exchange Act reporting or nonreporting, eligible for Form S–3/F–3) affect the applicability or interpretation of this condition? Should the type of offering, or the type of security to be offered, matter?

The focus of this provision of the proposed rule is on the access—not whether in fact any foreign journalists attend the offshore press conference or meeting with representatives, or receive the press related materials. The Commission preliminarily believes that it may be burdensome to require that foreign journalists actually take part since their attendance or receipt of materials likely is beyond the issuer's control. Comment is requested whether this approach is appropriate. With respect to meetings with the issuer, selling security holder, or their

[19] Under the U.S. federal securities laws, unless exempted, no written or oral offers of securities may be made prior to filing a registration statement with the Commission. After filing, oral offers may be made, but written offers may only be made through the delivery to a prospective investor of a document containing the information mandated by Section 10 of the Securities Act. Consequently, press conferences conducted by issuers or their representatives in the United States or press releases released by issuers or their representatives in the United States prior to or during the registration process in which a present or proposed offering of securities is discussed may violate the U.S. federal securities laws.

representatives, under the proposed safe harbor, the ability to request a meeting must not be limited to U.S. journalists. In this regard, the Commission staff has been informed that, in some countries, ''one-on-one'' presentations are commonly conducted during the offering process and as part of the offering process. Thus, this requirement would not prohibit ''one-on-one'' presentations to a U.S. journalist, so long as ''one-on-one'' meetings also are made available to foreign journalists.

The Commission staff also has been informed that some ''one-on-one'' presentations are granted to a journalist on an ''exclusive'' basis. Therefore, it is conceivable that an issuer or its representatives might only conduct a single ''one-on-one'' interview. The Commission does not intend for this requirement to prevent journalists for publications with a general circulation in the United States from competing for such exclusive interviews.

The Commission preliminarily believes, however, that exclusive ''one-on-one'' presentations to *purely domestic* publications *in the absence of* any other press contact during the offering may be indicative of a scheme to channel publicity regarding the offering into the United States, rather than for legitimate journalistic purposes, and therefore, are not covered by the proposed safe harbor. However, if prior to or subsequent to the exclusive ''one-on-one,'' the issuer or its representatives conducts a press conference complying with the requirements of the proposed safe harbor, *i.e.*, both U.S. and foreign journalists are allowed access, then this requirement will be deemed satisfied with respect to the exclusive ''one-on-one'' to a purely domestic publication as well.

Comment is requested whether this interpretation regarding exclusives is appropriate or necessary for investor protection. Are exclusive ''one-on-one'' meetings with purely domestic publications potentially indicative of an improper scheme to channel publicity into the United States? Is any potential for abuse lessened by requiring other press activities to which foreign journalists have access? Would it be too burdensome on issuers to require that other press activities beyond an exclusive ''one-on-one'' meeting take place, thereby leading issuers to deny exclusives to journalists with a general circulation in the United States? Is the potential for abuse any greater than if a foreign journalist, or a journalist for a news service with both foreign and domestic circulation, conducts an exclusive ''one-on-one'' meeting and the U.S. press reports the same information secondhand? Should exclusive ''one-on-one'' meetings be covered by the safe harbor at all?

d. *Written Materials Requirements.* With regard to any written materials released to U.S. journalists under the safe harbor, the Commission is concerned that such written materials be released to journalists for legitimate press purposes, and not for the purpose of offering securities in the United States without the protections of the federal securities laws, or conditioning the market in the United States for the securities to be offered. In certain offers where there is likely to be a significant interest in the offering by U.S. investors, the Commission is proposing additional procedural safeguards for written materials in order to alert U.S. investors that these materials are not to be considered an offer of securities for sale in the United States, and that when and if an offer is made in the United States, the appropriate required disclosure will be disseminated at that time.

As proposed, where the written materials released under the proposed safe harbor discuss (i) any offering of the securities of a domestic issuer (whether registered or exempt or conducted wholly offshore), or (ii) any offering of the securities of any foreign private issuer[20] where part of the offering is or will be conducted in the United States (whether registered or exempt), the following ''Written Materials Requirements'' must be satisfied:

- The materials must include the following information:[21]

fl A statement that the materials are not an offer of securities for sale in the United States;

fl A statement that the securities may not be offered or sold in the United States absent registration or an exemption from registration, that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or selling security holder and that will contain detailed information about the company and management, as well as financial statements;

fl A statement that no money, securities or other consideration is being solicited, and, if sent in response by a U.S. resident, will not be accepted;

fl If the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, a statement regarding this intention; and

- The issuer or selling security holder cannot attach to, or otherwise make a part of, the written materials any form of purchase order or coupon that could be returned indicating interest in the offering.

Comment is requested as to whether the addition of the Written Materials Requirements, in whole or in part, will be effective in deterring the use of the written materials for the purpose of conditioning the market in the United States for the securities to be offered, and if not, why not. Do written materials present more danger of market conditioning than oral statements reported by the press, and if so, why? To what extent do issuers conducting offshore press activities disseminate written materials? In addition, are each of the Written Materials Requirements necessary and appropriate for their stated purpose? Will the Written Materials Requirements unnecessarily deter reliance on the safe harbor by issuers and selling security holders? Are there alternative or additional procedural or substantive requirements that could or should be imposed on written materials released offshore, and if so, what kind? Should the Written Materials Requirements be imposed on all offerings by domestic issuers, and all offerings by foreign issuers that will include a U.S. tranche, or should the applicability depend upon some other criteria, such as, among others, the type of offering (registered or exempt), the type of security to be issued (*e.g.*, debt or equity), or the type of issuer of the securities to be offered (*e.g.*, foreign or domestic, Exchange Act reporting or nonreporting, eligible for Form S–3/F–3)? Should a different definition of a foreign issuer be used rather than the current definition of ''foreign private issuer,'' as defined in Rule 405 under the Securities Act?[22]

The Commission does not currently believe that it is necessary to impose the

[20] ''Foreign private issuer'' is defined in Securities Act Rule 405. Under the rule, a foreign private issuer is any foreign issuer other than a foreign government except an issuer meeting the following conditions: (1) more than 50 percent of the outstanding voting securities of such issuer are held of record either directly or through voting trust certificates or depositary receipts by residents of the United States; and (2) any of the following: (i) the majority of the executive officers or directors are United States citizens or residents, (ii) more than 50 percent of the assets of the issuer are located in the United States, or (iii) the business of the issuer is administered principally in the United States. 17 CFR 230.405.

[21] The statements required under the proposed Written Materials Requirements are similar to information currently required under other Commission rules. *See* Securities Act Rule 254 (solicitation of interest document for use prior to an offering statement) and Securities Act Rule 135c (notice by an issuer that it proposes to make, is making, or has made an offering of securities not registered or required to be registered under the Securities Act), 17 CFR 230.254 and 230.135c.

[22] *See supra* n.20.

Written Materials Requirements on wholly offshore offerings of the securities of foreign issuers since these offerings would appear to be of less significant interest to U.S. investors, and therefore, foreign issuers would be less likely to release written materials offshore for the purpose of conditioning the U.S. market for the securities to be offered. Comment is requested whether there are some wholly offshore offerings by foreign issuers that would appear more likely to be of significant interest to U.S. investors, and thus, possibly should require the additional protections of the Written Materials Requirements. For example, should the Written Materials Requirements be imposed on wholly offshore offerings of the securities of foreign issuers with a ''substantial U.S. market interest'' (as currently defined in Regulation S)[23] in the class of securities to be offered or sold (or, in the case of an exchange offer, the securities to be tendered) at the time of the offering? Would any other distinction be more appropriate?

Should the Written Materials Requirements be imposed on all written materials released under the safe harbor, or just certain types—*e.g.*, press releases, prospectuses, sales literature? Should it matter for the purposes of imposing the Written Materials Requirements whether the written materials are released at an offshore press conference or some other type of offshore meeting with issuer or selling security holder representatives, or just pursuant to a press release issued offshore without a press conference or other meeting?

The Commission intends that written materials released to the press under the safe harbor be for legitimate press purposes, not for the purpose of offering securities in the United States without the protections of the federal securities laws. For this reason, the Commission currently proposes prohibiting the issuer or selling security holder from attaching to, or otherwise making a part of, the written materials any form of purchase order or coupon that could be returned indicating interest in the offering. Comment is requested whether this prohibition is appropriate and accomplishes this stated objective. Would any other alternative approach, such as prohibiting the acceptance of purchase orders at the press conference or meeting, be more appropriate? Should this limitation only apply where the offer will be extended into the United States?

While the Commission does not intend to interfere with customary news coverage of offshore offerings, previous Commission guidance has made clear that the press activities should not be intended to generate buying interest (''condition the market'') in the United States for any securities offered or to be offered. Where the issuer or selling security holder intends to register part or all of the offering in the United States, the Commission is concerned that they might conduct prefiling offering activities offshore, including releasing written materials outside the registration process to the U.S. press, for the sole purpose of conditioning the market in the United States for those securities. Consequently, where an issuer, whether foreign or domestic, or a selling security holder intends to file a registration statement with the Commission registering any part of the offering, the Commission requests comment as to whether there should be a requirement in that context that the registration statement for the offering be filed as a precondition to reliance on the proposed safe harbor. If a prefiling of the registration statement is required, should such registration statement be required to contain all information required to be included in a preliminary prospectus under Section 10(a)[24] of the Securities Act, or would a simplified registration statement be sufficient, with the normal, full information regarding the issuer and the offering filed by amendment as the offering proceeds? Would such a prefiling requirement lead issuers or selling security holders to exclude U.S. press because they might not believe that the benefits of allowing access to U.S. press outweigh whatever burden is imposed by a prefiling requirement?

The Commission also is considering whether any written materials covered by the safe harbor should be required to be filed with the Commission. The Commission currently does not believe that a filing requirement is appropriate because it would appear to impose a burden that might deter otherwise appropriate access for U.S. press. Comment is requested whether the Commission's belief is correct, and whether any written materials should be required to be filed with the Commission, and if so, according to what criteria: whether the offering is being conducted in the United States (either registered or exempt), the type of issuer (*e.g.*, foreign or domestic, Exchange Act reporting or nonreporting), type of offering (debt or equity), or otherwise. If the materials are to be filed with the Commission, how should they be treated for liability purposes? If any part of the offering is to be registered in the United States, would such materials be filed as part of the registration statement, as part of the Section 10(a) prospectus, both, or neither? Should the written materials be treated in the same manner as ''Test the Waters'' materials under Regulation A?[25] If not registering, should these written materials nevertheless be required to be filed, and should such decision depend on whether the issuer is a reporting company? If required to be filed, should the written materials be filed on Form 8–K, or merely furnished to the Commission similar to the treatment of Form 6–Ks and materials furnished under Rule 12g3–2(b) by foreign private issuers?[26]

B. Tender Offer Safe Harbor

The Commission also is proposing to address concerns about access to foreign press conferences and press materials in

[23] Under Rule 902(n) of Regulation S, with respect to a class of an issuer's equity securities, ''substantial U.S. market interest'' is defined as: (i) The securities exchanges and inter-dealer quotation systems in the United States in the aggregate constituted the single largest market for such class of securities in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation; or (ii) 20 percent or more of all trading in such class of securities took place in, on or through the facilities of securities exchanges and inter-dealer quotation systems in the United States and less than 55 percent of such trading took place in, on or through the facilities of securities markets of a single foreign country in the shorter of the issuer's prior fiscal year or the period since the issuer's incorporation. With respect to an issuer's debt securities, ''substantial U.S. market interest'' is defined as: (i) Its debt securities and the securities described in 230.903(c)(4)(1) and (ii) (*i.e.*, certain non-participating preferred stock and asset-backed securities), in the aggregate, are held of record by 300 or more U.S. persons; (ii) $1 billion or more of: The principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in 230.903(c)(4)(i) (*i.e.*, certain non-participating preferred stock), and the principal amount or principal balance of its securities described in 230.903(c)(4)(ii) (*i.e.*, certain asset-backed securities), in the aggregate, is held of record by U.S. persons; and (iii) 20 percent or more of: the principal amount outstanding of its debt securities, the greater of liquidation preference or par value of its securities described in 230.903(c)(4)(i) (*i.e.*, certain non-participating preferred stock), and the principal amount or principal balance of its securities described in 230.903(c)(4)(ii) (*i.e.*, certain asset-backed securities), in the aggregate, is held of record by U.S. persons. 17 CFR 230.902(n).

[24] 15 U.S.C. 77j(a).

[25] Written solicitation of interest materials submitted to the Commission and otherwise in compliance with Securities Act Rule 254 [17 CFR 230.254] are not deemed to be a prospectus as defined in Section 2(10) of the Securities Act. Such materials, however, are subject to the antifraud provisions of the federal securities laws.

[26] Information ''furnished'' to the Commission under cover of Form 6–K or pursuant to Rule 12g3–2(b) is not deemed to be ''filed'' with the Commission or otherwise subject to the liabilities of Section 18 of the Exchange Act. *See* Exchange Act Rules 13a–16 [17 CFR 240.13a–16] and 12g3–2(b)(4) [17 CFR 240.12g3–2(b)(4)].

the tender offer area.[27] This goal would be accomplished by amending Rule 14d–1[28] under the Exchange Act to make clear that a bidder for securities of a foreign private issuer, as well as the foreign target company, either of their representatives, and any other person who may have a filing obligation under the Williams Act,[29] would not be deemed to have triggered the filing and procedural requirements of the Williams Act by virtue of providing U.S. or foreign journalists access to offshore press conferences, offshore meetings with their representatives, and press related materials released offshore, at or in which a present or proposed tender offer of securities is discussed.

As explained more fully below, the safe harbor would be available to a U.S. or foreign bidder for the securities of a foreign private issuer target company, but not for the securities of a domestic issuer. Thus, for example, a bidder or its representatives could hold a foreign news conference to announce a tender offer for a foreign private issuer and would not, on that basis, trigger the requirements for formal commencement of the offer within five business days as required by Rule 14d–2(b),[30] and the requirement under Rule 14d–10 to extend the offer to all holders of the target company's securities.[31] Similarly, when the target company is both a reporting issuer and a foreign private issuer, the target company and its representatives would not incur an obligation to file a Tender Offer Solicitation/Recommendation Statement on Schedule 14D–9 by virtue of granting the U.S. press access to an offshore news conference where the tender offer is addressed. The safe harbor, however, would not affect the applicability of the antifraud prohibition of Section 14(e)[32] of the Exchange Act, as well as the prohibition against trading on material nonpublic information regarding a tender offer contained in Rule 14e–3[33] under the Exchange Act.

The Commission recognizes that, even in the absence of the proposed safe harbor, press coverage of the announcement of a tender offer for the securities of a foreign private issuer often results in U.S. holders of the foreign target company's securities selling their securities into the open market. To the extent that large amounts of U.S. holders were to engage in market sales, bidders may have a reduced incentive to comply with the procedural and filing requirements of the Williams Act and formally extend the offer to U.S. holders in compliance with U.S. law. Particularly in the case of foreign private issuers that have significant U.S. ownership, have securities registered under Section 12 of the Exchange Act, and are listed on a U.S. exchange or actively traded in the United States in the over-the-counter market, the proposed safe harbor could, in effect, allow persons seeking shares of these companies to ''commence'' a tender offer by engaging in press activities without implicating the procedural protections of the Williams Act and Regulation 14D (although the antifraud prohibition of Section 14(e) would continue to apply). Recognizing that journalists for publications with a general circulation in the United States often indirectly receive information from offshore press activity, would allowing direct access as permitted by the proposed safe harbor affect this market dynamic, and if so, how? The Commission requests comment whether these potential effects of the proposed rule would be appropriate in light of the purposes of the U.S. tender offer regulations.

Should other procedural requirements be imposed? Alternatively, should the safe harbor exempt all press activity (by any U.S. or foreign bidder) with regard to a foreign target company, regardless of whether the press activity is conducted in the United States or offshore, from triggering the procedural requirements of the tender offer rules? Should the Commission instead address this issue in the context of broader rulemaking on foreign tender offers?

1. Coverage of the Safe Harbor

The principal intended benefit of the safe harbor would be to prevent application of the U.S. tender offer rules where the bidder is not yet prepared to proceed with the offer or does not intend to extend the offer to U.S. holders of the target's shares. Accordingly, once an offer has commenced with the filing of documents under Regulation 14D with the Commission, the Commission currently proposes that the safe harbor would no longer be available.

The Commission also proposes limiting the availability of the safe harbor only to tender offers or proposed tender offers for the securities of foreign companies. The safe harbor would not be available for tender offers by foreign private issuers for the securities of domestic companies because there appears to be no need in that case to accommodate foreign offering practices.

In the interest of consistent application of Commission rules applicable to offshore regulatory issues, the Commission proposes using the current definition of ''foreign private issuer,'' as defined in Exchange Act Rule 3b–4,[34] for purposes of the tender offer safe harbor. Comment is solicited as to whether a different (either broader or narrower) definition should be used for the purposes of the safe harbor. For example, would the primary market for the target company's securities be a more appropriate focus? If so, how should the primary market be determined? Should the ''substantial U.S. market interest''[35] standard be used? Should the standard depend upon the percentage of the target company's securities held by U.S. holders or whether the target company is eligible for the use of Form F–3?

All bidders, whether U.S. or foreign, their representatives, and any other person who may incur a filing obligation under the Williams Act,[36] may avail themselves of the proposed safe harbor as long as the tender offer is for securities of a foreign private issuer. Where the tender offer is or will be for the securities of a foreign issuer, the Commission believes that all such

[27] Although the recent legislation directs rulemaking only with respect to the Securities Act (*see supra* n.12 and accompanying text), the Commission stated in its testimony on the Senate bill (which contained a provision regarding press activity in the tender offer area) that the tender offer question also should be addressed through rulemaking. *See* Testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission, Concerning S. 1815, the ''Securities Investment Promotion Act of 1996,'' Before the Committee on Banking, Housing, and Urban Affairs of the U.S. Senate (June 5, 1996). In addition, the Commission staff previously has provided guidance in the tender offer area. *See supra* n.10.

[28] 17 CFR 240.14d–1.

[29] *See* Exchange Act Rule 14d–9(d) [17 CFR 240.14d–9], specifying that, subject to certain exclusions, the filing and transmittal requirements of the rule 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 [Rule 14d–9] or Rule 14d–3 (17 CFR 240.14d–3).

[30] 17 CFR 240.14d–2(b).

[31] 17 CFR 240.14d–10.

[32] 15 U.S.C. 78n(e).

[33] 17 CFR 240.14e–3.

[34] The term ''foreign private issuer'' as defined in Rule 3b–4 [17 CFR 240.3b–4] is the same as defined under Securities Act Rule 405. *See supra* n.20 for the current definition.

[35] *See supra* n.23 for the current definition under the Securities Act of ''substantial U.S. market interest.''

[36] *See supra* n.29 for the definition of those other persons who may incur a filing obligation under the Williams Act.

parties should be able to conduct their activities in a manner consistent with local offering practices, although the proposed safe harbor does not include a requirement that the press activity be consistent with local practice. Comment is requested whether any limitations should be imposed, and if so, based upon what criteria. Should the status of the bidder (*e.g.*, foreign or domestic, Exchange Act reporting or nonreporting, eligible for Form S–3/F–3), or the status of the present or proposed tender offer (*e.g.*, intend to comply, or are complying, with the Williams Act; intend to, or will be required to, register the offer under the Securities Act) matter? Likewise, the Commission proposes that foreign companies that are the subject of the tender offer or proposed tender offer also may claim the protections of the safe harbor. Should the subject company be able to use the safe harbor, and if not, why not? If extended to either the bidder or the subject company, must the safe harbor be extended to both, and if not, why not? Should, as proposed, the other persons specified in Rule 14d–9(d) (such as officers, directors, and shareholders) be permitted to avail themselves of the safe harbor, and if not, why not?

2. Conditions

The proposed safe harbor for tender offers, like the proposed Securities Act safe harbor described above, will be subject to the conditions that access be provided to both U.S. and foreign journalists, that written materials proposed to be covered by the tender offer safe harbor include a legend similar to that proposed under the Written Materials Requirements of the Securities Act safe harbor in circumstances where there is likely to be significant interest in the tender offer by U.S. investors, and that no means to tender securities, or coupons that could be returned to indicate interest in the tender offer, be provided as part of, or attached to, any press related materials. Comment is requested as to whether some or all areas of the proposed tender offer safe harbor should function, or be interpreted, differently from the Securities Act safe harbor. Any such areas should be identified and an explanation of the difference in treatment, and the bases therefor, provided.

As proposed, where the present or proposed tender offer discussed in the written materials released under the proposed tender offer safe harbor is for equity securities registered under Section 12[37] of the Exchange Act, the Commission is proposing that such written materials released by the bidder or its representatives under the safe harbor be required to satisfy the following ''Tender Offer Written Materials Requirements'':

- The materials must include the following information:

fl A statement that the materials are not an extension of a tender offer in the United States for a class of equity securities of the subject company;

fl A statement that no money, securities or other consideration is being solicited at this time, and, if sent in response by a U.S. resident, will not be accepted;

fl If the bidder intends to extend a tender offer in the United States at some future time for a class of equity securities of the subject company, a statement regarding this intention and that the procedural and filing requirements of the Williams Act will be satisfied at that time; and

- No means to tender securities, or coupons that could be returned to indicate interest in the tender offer, may be provided as part of, or attached to, any press related materials.

Comment is requested as to whether the addition of the Tender Offer Written Materials Requirements, in whole or in part, will be effective in deterring the use of the written materials for the purpose of conducting a tender offer in the United States without compliance with the procedural and filing requirements of the Williams Act, and if not, why not. In addition, are each of the Tender Offer Written Materials Requirements necessary and appropriate for their stated purpose? Will the Tender Offer Written Materials Requirements unnecessarily deter reliance on the safe harbor by bidders and their representatives? Are there alternative or additional procedural or substantive requirements that could or should be imposed on written materials released offshore, and if so, what kind? Should the Tender Offer Written Materials Requirements, or some variation thereof, be imposed on written materials released under the tender offer safe harbor by parties other than the bidder and its representatives, such as the subject company or any other person who may incur a filing obligation under the Williams Act?

The Commission proposes requiring the Tender Offer Written Materials Requirements only on written materials that discuss a present or proposed tender offer for equity securities registered under Section 12 of the Exchange Act, because no mandated disclosure document would be required to be filed with the Commission unless the target's equity securities are registered under Section 12. Comment is requested whether this distinction is appropriate. Should the Tender Offer Written Materials Requirements be limited to offers for Section 12 equity securities only if the bidder intends to extend the offer to U.S. holders in compliance with the procedural and filing requirements of the Williams Act?

The Commission also is considering whether any written materials covered by the safe harbor should be required to be filed with the Commission. Comment is requested whether a filing requirement should be imposed (particularly where there is a ''substantial U.S. market interest''[38] in the securities of the target company), and if so, according to what criteria, when, and with what legal effect. Should written materials only be required to be filed with the Commission when the tender offer is or will be extended to U.S. holders in compliance with the procedural and filing requirements of the Williams Act?

III. Request for Comment

Any interested persons wishing to submit written comments on the proposed safe harbor for offshore press conferences, meetings with issuer representatives conducted offshore, or press releases or other related material released offshore, as well as on other matters that might have an impact on the proposals contained herein, are requested to do so by submitting them in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comment letters also may be submitted electronically to the following electronic mail address: rule-comment@sec.gov. Comments are requested on the impact of the proposals on issuers, investors, and others. Comments should specifically address any possible effects on investor protection resulting from the proposed safe harbors. The Commission also requests comment on whether the proposed rules, if adopted, would have an adverse impact on competition that is neither necessary nor appropriate in furthering the purposes of the Exchange Act. Comments will be considered by the Commission in complying with its responsibilities under Section 23(a)[39] of the Exchange Act. Comment letters should refer to File No. S7–26–96; this file number should be included in the

[37] 15 U.S.C. 78*l*.

[38] *See supra* n.23.

[39] 15 U.S.C. 78w(a).

subject line if electronic mail is used. All comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

IV. Cost-Benefit Analysis

To assist the Commission in its evaluation of the costs and benefits that may result from the proposals, commenters are requested to provide views and empirical data relating to any costs and benefits associated with these proposals.

V. Summary of the Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (''IRFA''), pursuant to the requirements of the Regulatory Flexibility Act,[40] regarding the proposed rules. The IRFA notes that the proposed rules are intended to provide companies with greater certainty in determining when journalists, both foreign and domestic, may access offshore press conferences, meetings with company representatives conducted offshore, or press releases or other related material released offshore, without violating the U.S. federal securities laws. Other than the proposed Written Materials Requirements which the Commission does not consider unduly burdensome on small businesses, the proposed rules would not impose any new reporting, recordkeeping or compliance requirements on any entities. No alternatives to the proposed rules consistent with their objectives and the Commission's statutory authority were found.

In general, the proposed rules under the Securities Act are not limited to foreign private issuers, but instead provide a safe harbor for all issuers, irrespective of size, conducting offshore press conferences, meetings with company representatives conducted offshore, or releasing press releases or other related materials offshore. In addition, while the proposed rule under the Exchange Act is limited to tender offers for the securities of foreign private issuers only, both foreign and domestic bidders, irrespective of size, are eligible under this safe harbor, subject to the same conditions.

The term ''small business,'' as used in reference to a registrant for purposes of the Regulatory Flexibility Act, is defined by Rule 157[41] under the Securities Act as an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less and is engaged or proposing to engage in small business financing. An issuer is considered to be engaged in small business financing if it is conducting or proposes to conduct an offering of securities which does not exceed the $5 million dollar limitation prescribed by Section 3(b) of the Securities Act. When used with reference to an issuer other than an investment company, the term also is defined in Rule 0–10[42] of the Exchange Act as an issuer that, on the last day of its most recent fiscal year, had total assets of $5 million or less. When used with respect to an investment company, the term is defined under Rule 0–10 as an investment company with net assets of $50 million or less as of the end of its most recent fiscal year.

Small entities meeting these definitions would be able to rely on the proposed safe harbor on the same basis as larger entities, provided that they meet the same conditions for relying on it. The Commission is aware of approximately 1100 Exchange Act reporting companies that currently satisfy the definition of ''small business'' under Rule 0–10. There is no reliable way of determining, however, how many small businesses may become subject to Commission registration and reporting obligations in the future. Further, the Commission has no data that would assist it in determining how many small businesses may actually rely on the proposed safe harbor, or may otherwise be impacted by the rule proposals. The Commission solicits comments regarding how to estimate the number of small businesses that may rely on the safe harbor or otherwise be affected by these proposals together with data or assumptions to support such an approach.

Comments are encouraged on any aspect of this analysis. A copy of the analysis may be obtained by contacting Luise M. Welby, Office of International Corporate Finance, Division of Corporation Finance, Mail Stop 3–9, 450 Fifth Street, N.W., Washington, D.C. 20549.

VI. Statutory Basis for Rules

The amendments to the Securities Act rules and Regulation S are being proposed pursuant to Sections 3, 4, 5 and 19 of the Securities Act, as amended.[43] The amendment to the Exchange Act rule is being proposed pursuant to Sections 14(d), 14(e) and 23(a) of the Exchange Act.[44]

List of Subjects in 17 CFR Parts 230 and 240

Reporting and recordkeeping requirements, Securities.

Text of the Proposals

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

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

1. The authority citation for part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78d, 78*l*, 78m, 78n, 78o, 78w, 78*ll*(d), 79t, 80a–8, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. By adding § 230.135e to read as follows:

§ 230.135e Offshore press conferences, meetings with issuer representatives conducted offshore, and press related materials released offshore.

(a) For the purposes only of Section 5 of the Act [15 U.S.C. 77e], an issuer, selling security holder, or their representatives, will not be deemed to offer any security for sale by virtue of providing any journalist with access to its press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, if:

(1) The present or proposed offering is not being, or to be, conducted solely in the United States;

(2) Access is provided to both U.S. and foreign journalists; and

(3) Any written press related materials pertaining to transactions in which any of the securities will be or are being offered in the United States, or where the issuer of the securities to be or being offered is not a foreign government or a foreign private issuer, as defined in § 230.405, satisfy the requirements of paragraph (b) of this section.

(b) Any written press related materials specified in paragraph (a)(3) of this section must:

(1) State that the written press related materials are not an offer of securities for sale in the United States, that securities may not be offered or sold in

[40] 5 U.S.C. 603.

[41] 17 CFR 230.157.

[42] 17 CFR 240.0–10.

[43] 15 U.S.C. 77c, 77d, 77e and 77s.

[44] 15 U.S.C. 78n(d), 78n(e), and 78w.

the United States absent registration or an exemption from registration, that any public offering of securities to be made in the United States will be made by means of a prospectus that may be obtained from the issuer or the selling security holder and that will contain detailed information about the company and management, as well as financial statements;

(2) State that no money, securities or other consideration is being solicited, and, if sent in response by a U.S. resident, will not be accepted;

(3) If the issuer or selling security holder intends to register any part of the present or proposed offering in the United States, include a statement regarding this intention; and

(4) Not include any purchase order, or coupon that could be returned indicating interest in the offering, as part of, or attached to, the written press related materials.

§ 230.502 [Amended]

3. By amending § 230.502 to remove the period at the end of paragraph (c) and add the following: ''; *Provided further,* that, if the requirements of § 230.135e are satisfied, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed to constitute general solicitation or general advertising for purposes of this section.''

* * * * *

4. By removing Preliminary Note 7 and redesignating Preliminary Note 8 as Preliminary Note 7 following the undesignated heading ''Regulation S'' and before § 230.901.

5. By amending § 230.902 to add paragraph (b)(8) to read as follows:

§ 230.902 Definitions.

* * * * *

(b) *Directed Selling Efforts.** * *

(8) Notwithstanding paragraph (b)(1) of this section, providing any journalist with access to press conferences held outside of the United States, to meetings with issuer or selling security holder representatives conducted outside of the United States, or to written press related materials released outside the United States, at or in which a present or proposed offering of securities is discussed, will not be deemed ''directed selling efforts'' if the requirements of § 230.135e are satisfied.

* * * * *

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

6. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78*ll*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

7. By amending § 240.14d–1 by redesignating paragraphs (c) and (d) as paragraphs (d) and (e), and adding paragraph (c) to read as follows:

§ 240.14d–1 Scope of and definitions applicable to regulations 14D and 14E.

* * * * *

(c) Notwithstanding paragraph (a) of this section, the requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act [15 U.S.C. 78n(d)(1) through 78n(d)(7)], Regulation 14D promulgated thereunder (§§ 240.14d–1 through 240.14d–10), and §§ 240.14e–1 and 240.14e–2 shall not apply by virtue of the fact that a bidder for the securities of a foreign private issuer, as defined in § 240.3b–4, the subject company of such a tender offer, their representatives, or any other person specified in § 240.14d–9(d), provides any journalist with access to its press conferences held outside of the United States, to meetings with its representatives conducted outside of the United States, or to written press related materials released outside the United States, at or in which a present or proposed tender offer is discussed, if:

(1) Access is provided to both U.S. and foreign journalists; and

(2) With respect to any written press related materials released by the bidder or its representatives that discuss a present or proposed tender offer for equity securities registered under section 12 of the Act [15 U.S.C. 78*l*], the written press related materials must state that these written press related materials are not an extension of a tender offer in the United States for a class of equity securities of the subject company, that no money, securities or other consideration is being solicited at this time, and, if sent in response by a U.S. resident, will not be accepted. If the bidder intends to extend such tender offer in the United States at some future time, a statement regarding this intention, and that the procedural and filing requirements of the Williams Act will be satisfied at that time, also must be included in these written press related materials. No means to tender securities, or coupons that could be returned to indicate interest in the tender offer, may be provided as part of, or attached to, these written press related materials.

* * * * *

Dated: October 10, 1996.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 96–26562 Filed 10–17–96; 8:45 am]

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