

same treatment under the EAR as other "software"; and for export licensing purposes encryption software is treated under the EAR in the same manner as a commodity included in ECCN 5A002. License Exceptions for commodities are not applicable.

Note: Encryption software controlled for EI reasons under this entry remains subject to the EAR even when made publicly available in accordance with part 734 of the EAR, and it is not eligible for the General Software Note ("mass market" treatment under License Exception TSU for mass market software). After a one-time BXA review, certain encryption software may be released from EI controls and made eligible for the General Software Note treatment as well as other provisions of the EAR applicable to software. Refer to § 742.15(b)(1) of the EAR, and Supplement No. 6 to part 742.

License Exceptions

CIV: N/A

TSR: N/A

List of Items Controlled

Unit: \$ value

Related Controls: N/A

Related Definitions: 5D002.a controls "software" designed or modified to use "cryptography" employing digital or analog techniques to ensure "information security".

Items:

a. "Software" specially designed or modified for the "development", "production" or "use" of equipment or "software" controlled by 5A002, 5B002 or 5D002.

b. "Software" specially designed or modified to support "technology" controlled by 5E002.

c. Specific "software" as follows:

c.1. "Software" having the characteristics, or performing or simulating the functions of the equipment controlled by 5A002 or 5B002;

c.2. "Software" to certify "software" controlled by 5D002.c.1;

c.3. "Software" designed or modified to protect against malicious computer damage, e.g., viruses;

Note: 5D002 does not control:

a. "Software required" for the "use" of equipment excluded from control under the Note to 5A002;

b. "Software" providing any of the functions of equipment excluded from control under the Note to 5A002.

5E002 "Technology" According to the General Technology Note for the "Development", "Production" or Use of Equipment Controlled by 5A002 or 5B002 or "Software" Controlled by 5D002

License Requirements

Reason for Control: NS, AT, EI
Control(s) Country Chart

NS applies to entire entry—NS
Column 1

AT applies to entire entry—AT
Column 1

EI controls applies only to encryption technology transferred from the U.S. Munitions List consistent with E.O. 13026 of November 15, 1996 (61 FR 58767) and pursuant to the Presidential Memorandum of that date. Refer to § 742.15 of the EAR.

License Exceptions

CIV: N/A

TSR: N/A

List of Items Controlled

Unit: N/A

Related Controls: N/A

Related Definitions: N/A

Items:

The list of items controlled is contained in the ECCN heading.

34. In Supplement No. 2 to Part 774 the "General Software Note" is revised to read as follows:

Supplement No. 2 to Part 774—General Technology and Software Notes

I. *General Technology Note.* * * *

II. *General Software Note.* License Exception TSU ("mass market" software) is available to all destinations, except Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria, for release of software that is generally available to the public by being:

a. Sold from stock at retail selling points, without restriction, by means of:

1. Over the counter transactions;
2. Mail order transactions; or
3. Telephone call transactions; and

b. Designed for installation by the user without further substantial support by the supplier.

Note: License Exception TSU for mass market software does not apply to encryption software controlled for EI reasons under ECCN 5D002. Encryption software may become eligible after a one-time BXA review according to the provision of § 742.15(b)(1) of the EAR.

Dated: December 23, 1996.

Sue E. Eckert,

Assistant Secretary for Export Administration.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 33-7376; 34-38068; IC-22413; File No. S7-12-96]

RIN 3235-AG78

Odd-Lot Tender Offers by Issuers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting an amendment to Rule 13e-4 under the Securities Exchange Act of 1934 ("Exchange Act"). The amendment removes the rule's requirement that an issuer cash tender offer made to odd-lot holders specify a record date of ownership for eligibility to tender into the offer. The amendment enables issuers to conduct continuous, periodic, or extended odd-lot offers for their equity securities. The Commission also is granting a class exemption from Rule 10b-13, and a temporary class exemption from Rule 10b-6, under the Exchange Act to permit issuers to conduct odd-lot offers, to "round-up" odd-lots on behalf of odd-lot holders, and to make purchases of their securities otherwise than pursuant to the odd-lot offer.

EFFECTIVE DATE: December 30, 1996.

FOR FURTHER INFORMATION CONTACT: Lauren C. Mullen, Attorney, Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 5-1, Washington, DC 20549, at (202) 942-0772.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

The Commission is adopting an amendment to paragraph (h)(5) of Rule 13e-4 ("Rule 13e-4" or "Rule")¹ under the Exchange Act,² and is granting a class exemption from Rule 10b-13,³ and a temporary class exemption from Rule 10b-6,⁴ under the Exchange Act in connection with issuers' odd-lot tender offers. The amendment, which was published for comment on April 25, 1996 ("Proposing Release"),⁵ and the class exemptions permit issuers to conduct continuous, periodic, or extended odd-lot offers for their equity

¹ 17 CFR 240.13e-4.

² 15 U.S.C. 78a et seq.

³ 17 CFR 240.10b-13.

⁴ 17 CFR 240.10b-6.

⁵ Securities Exchange Act Release No. 37132 (April 25, 1996), 61 FR 18306.

securities without seeking exemptions from Rules 10b-6, 10b-13, and 13e-4 from the Commission.

II. Discussion of the Amendment

Rule 13e-4 governs cash tender and exchange offers by issuers for their equity securities. Paragraph (h)(5) of Rule 13e-4 excepts issuers' odd-lot offers from the provisions of the Rule, other than the "all holders" and "best price" provisions of paragraphs (f)(8)(i) and (f)(8)(ii), respectively.⁶ In an odd-lot offer, the offer to purchase is limited to securityholders who own fewer than 100 shares of the subject security.

Prior to this amendment, paragraph (h)(5) of Rule 13e-4 required an issuer making an odd-lot offer to set a record date prior to the offer's announcement for the purpose of determining a securityholder's eligibility to participate in the offer. As discussed in the Proposing Release, the record date requirement was imposed to prevent certain perceived abuses.⁷ The Commission's experience with odd-lot offers, and the two comments received in response to the Proposing Release, indicate that such abuses rarely, if ever, occur. Therefore, to reduce the regulatory burdens for issuers conducting odd-lot offers, and to eliminate the need for the Commission to grant exemptions from Rule 13e-4 on a case-by-case basis for extended odd-lot offers, the Commission proposed amending Rule 13e-4 to delete the record date requirement from paragraph (h)(5). The amendment was proposed to permit issuers to conduct odd-lot offers on a continuous, extended, or periodic basis, and also to enable odd-lot holders who obtain their holdings prior to or during the odd-lot offer to participate in the offer.

The Commission has determined to adopt the amendment to Rule 13e-4(h)(5) as proposed, with a minor modification.⁸ In order to provide

issuers with flexibility, the rule as amended permits, but does not require, an issuer to set a record date for eligibility to participate in an odd-lot offer.

One commenter requested clarification regarding the appropriate procedures under the Rule for notifying beneficial holders of odd-lots about the offer. As previously noted, paragraph (h)(5) of Rule 13e-4 excepts issuers from the Rule's requirements other than the "all holders" and "best price" provisions. Nonetheless, in proposing paragraph (h)(5), the Commission noted an issuer's affirmative duty under the Exchange Act, and various rules promulgated thereunder, to disclose material information to its shareholders as well as its own interest in the success of an odd-lot offer.⁹ In adopting the odd-lot exception, the Commission further stated that odd-lot offers are required to be extended equally to beneficial holders and record holders.¹⁰

The ability to participate equally means that beneficial holders should have the same access to information about the offer as record holders.¹¹ Accordingly, while Rule 13e-4(h)(5) does not contain dissemination requirements, an issuer or its agent must take reasonable steps to disseminate information about an odd-lot offer to beneficial holders in a manner comparable to the dissemination to record holders.

The same commenter also suggested excepting issuer tender offers made to a class of shareholders owning, in the aggregate, less than five percent of the issuer's outstanding securities; this commenter also suggested redefining the term "odd-lot" to include more than 99 shares. The Commission believes that the odd-lot exception to Rule 13e-4 is meant to cover an offer for economically *de minimis* holdings, e.g., an amount of securities for which high transaction costs create a disincentive for trading the shares and which also is too small to warrant servicing by the issuer. Moreover, increasing the exception's threshold to an amount greater than 99 shares would raise various concerns under the Rule, including the "all-holders" provisions. Nevertheless, the

Commission recognizes that the odd-lot exception is intended to allow issuers to reduce the number of small shareholdings where the costs to issuers of servicing small shareholders, and the costs to shareholders of selling small holdings, are disproportionate to the value of the security. Accordingly, the Commission will consider, on a case-by-case basis, issuer offers involving tenders of more than 99 shares from each holder, where such offers involve a number of securities that represent a *de minimis* proportion of the value of the issuer's outstanding securities.¹²

III. Class Exemption From Rule 10b-13 and Temporary Class Exemption From Rule 10b-6

As discussed in the Proposing Release, odd-lot offers also raise issues under Rule 10b-13, which prohibits an issuer conducting a cash tender or exchange offer from purchasing the same security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the offer. Rule 10b-13 is designed, *inter alia*, to prevent larger shareholders from demanding greater or different consideration for the tender of their shares than that which is paid pursuant to the tender offer. Larger shareholders are ineligible to participate in odd-lot offers because, by definition, an odd-lot offer is available only to shareholders owning 99 or fewer shares of the issuer's securities. Accordingly, the Commission believes that purchases of an issuer's securities otherwise than pursuant to an odd-lot offer do not raise the concerns that Rule 10b-13 is designed to address.

The Commission, therefore, hereby grants an exemption from Rule 10b-13 to permit any issuer or agent acting on behalf of an issuer in connection with an odd-lot offer to purchase or arrange to purchase the security that is the subject of the offer (or any other security which is immediately convertible into or exchangeable for such security) otherwise than pursuant to the odd-lot offer from the time that the odd-lot offer is publicly announced or otherwise made known to odd-lot holders, until the offer's expiration. Among other things, this will allow the issuer or its agent to purchase the issuer's securities to satisfy requests of odd-lot holders to

⁶ 17 CFR 240.13e-4(h)(5); see Securities Exchange Act Release No. 19988 (July 21, 1983), 48 FR 34251 ("Release No. 34-19988") (adopting the paragraph now designated as (h)(5) of Rule 13e-4, which excepts odd-lot offers from the Rule's requirements).

Rule 13e-4(f)(8)(i) requires that the tender offer be open to all securityholders of the class of securities subject to the tender offer. 17 CFR 240.13e-4(f)(8)(i). Rule 13e-4(f)(8)(ii) requires that consideration paid to any securityholder pursuant to an issuer tender offer be the highest consideration paid to any other security holder during such tender offer. 17 CFR 240.13e-4(f)(8)(ii).

⁷ See Securities Exchange Act Release No. 19246 (November 17, 1982), 47 FR 53398, 53400 ("Release 34-19246") (proposing adoption of the paragraph now designated as (h)(5) of Rule 13e-4).

⁸ One commenter suggested that the Commission exempt issuers that conduct odd-lot offers from the broker-dealer registration requirements under Section 15(a) of the Exchange Act. The Commission

notes that this commenter's concerns were specifically addressed by the staff in *Letter regarding Shareholder Communications Corporation* (July 25, 1996), 1996 SEC. No-Act. LEXIS 610. This letter discusses the extent to which issuers may participate in an odd-lot offer without requiring registration as a broker-dealer.

⁹ Release No. 34-19246, 47 FR at 53399 n. 18.

¹⁰ Release No. 34-19988, 48 FR at 34252.

¹¹ Cf. paragraph (e)(1)(ii) of Rule 13e-4, 17 CFR 240.13e-4(e)(1)(ii), and paragraph (a)(2) of Rule 14a-7 under the Exchange Act, 17 CFR 240.14a-7(a)(2), respectively.

¹² The Commission, through its Division of Market Regulation, will consider requests regarding such programs. Such requests should be directed to the Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 5-1, Washington, DC 20549 at (202) 942-0772.

"round-up" their holdings to 100 shares.

Also, the Commission today is adopting Regulation M under the Exchange Act, the Securities Act of 1933,¹³ and the Investment Company Act of 1940,¹⁴ and is rescinding Rule 10b-6 under the Exchange Act, among other rules.¹⁵ Rule 102 of Regulation M, which along with Rule 101 replaces Rule 10b-6, contains an exception that permits issuers to purchase odd-lots while engaged in a distribution of the same or related securities. This exception allows issuers to conduct odd-lot tender offers, including continuous, periodic, or extended odd-lot offers, during a distribution of the same or related securities. The exception also allows issuers to purchase securities on behalf of odd-lot holders who wish to "round-up" their holdings to a round lot (*i.e.*, 100 shares).¹⁶ The exceptions for odd-lot transactions under Regulation M will accomplish the same relief intended by the class exemption from Rule 10b-6 that was discussed in the Proposing Release.¹⁷ The exception for odd-lot transactions from Rule 102 of Regulation M, and a similar exception from Rule 101 for distribution participants and their affiliated purchasers, will be effective as of 60 days from publication of Regulation M in the Federal Register.

To accommodate odd-lot offers in the interim, the Commission hereby grants an exemption from Rule 10b-6 on a temporary basis to permit an issuer, or an agent acting on behalf of the issuer, to bid for or purchase odd-lots, or to effect transactions to allow odd-lot holders to "round-up" their holdings to 100 shares during an odd-lot offer conducted pursuant to Rule 13e-4(h)(5), during a distribution for the purposes of Rule 10b-6. This class exemption will terminate as of the effective date of Regulation M.

IV. Regulatory Flexibility Act Analysis

The Chairman of the Securities and Exchange Commission certified in connection with the Proposing Release that the proposed amendment to Rule 13e-4 and the proposed class exemptions from Rules 10b-6 and 10b-

13, if adopted, would not have a significant impact on a substantial number of small entities. None of the comments addressed the certification.

V. Effects on Competition and Other Findings

Section 23(a)(2) of the Exchange Act¹⁸ requires the Commission, in adopting rules under the Exchange Act, to consider the anti-competitive effects of such rules, if any, and to balance any impact against regulatory benefits gained in terms of furthering the purposes of the Exchange Act. Furthermore, Section 2 of the Securities Act of 1933¹⁹ and Section 3 of the Exchange Act,²⁰ as amended by the recently enacted National Securities Markets Improvement Act of 1996 ("Markets Improvement Act"),²¹ provide that whenever the Commission is engaged in rulemaking, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission also shall consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The Commission has considered the amendment to Rule 13e-4 and the class exemption from Rule 10b-13 in light of the standards cited in Sections 3 and 23(a)(2) of the Exchange Act and believes that, for the reasons stated herein, the adoption of the amendment and the granting of the class exemption will promote efficiency for issuers conducting odd-lot offers, will have no adverse effect on capital formation, and will not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act.

The Commission finds, in accordance with the Administrative Procedure Act,²² that the adoption of the amendment to Rule 13e-4 and the class exemptions from Rules 10b-6 and 10b-13 relieve mandatory restrictions and are exemptive in nature. Accordingly, the foregoing action becomes effective immediately.

VI. Statutory Basis

Pursuant to Sections 3(b), 9(a)(6), 10(b), 13(e), 14(e), and 23(a) of the Exchange Act; 15 U.S.C. 78c(b), 78i(a)(6), 78j(b), 78m(e), 78n(e), and 78w(a); the Commission amends Rule 13e-4 in Chapter II of Title 17 of the

Code of Federal Regulations by amending paragraph (h)(5) of § 240.13e-4.

List of Subjects in 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendment

For the reasons set out in the preamble, the Commission amends Title 17, Chapter II of the Code of Federal Regulations as follows:

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

1. 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, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78w, 78x, 78ll(d), 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

* * * * *

2. Section 240.13e-4 is amended by revising paragraph (h)(5) to read as follows:

§ 240.13e-4 Tender offers by issuers.

* * * * *

(h) * * *

(5) Offers to purchase from security holders who own an aggregate of not more than a specified number of shares that is less than one hundred: *Provided, however, That:*

(i) The offer complies with paragraph (f)(8)(i) of this section with respect to security holders who own a number of shares equal to or less than the specified number of shares, except that an issuer can elect to exclude participants in an issuer's plan, as that term is defined in § 242.100 of Regulation M, or to exclude security holders who do not own their shares as of a specified date determined by the issuer; and

(ii) The offer complies with paragraph (f)(8)(ii) of this section or the consideration paid pursuant to the offer is determined on the basis of a uniformly applied formula based on the market price of the subject security;

* * * * *

Dated: December 20, 1996.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

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¹³ 15 U.S.C. 77a *et seq.*

¹⁴ 15 U.S.C. 80a-1 *et seq.*

¹⁵ Securities Exchange Act Release No. 38067 (December 20, 1996).

¹⁶ Additionally, the Commission notes that sales of tendered odd-lots into the open market are not subject to Rules 101 and 102 of Regulation M (or Rule 10b-6) where such sales do not satisfy the magnitude and special selling efforts and selling methods elements of a distribution for purposes of those provisions.

¹⁷ Proposing Release, 61 FR at 18307.

¹⁸ 15 U.S.C. 78w(a)(2).

¹⁹ 15 U.S.C. 77b.

²⁰ 15 U.S.C. 78c.

²¹ Pub. L. No. 104-290, § 106, 110 Stat. 3416 (1996).

²² 5 U.S.C. 553(d).