M&A STATUTES, RULES, AND DOCUMENTS

FOR

BUSINESS PLANNING FOR MERGERS AND ACQUISITIONS

FOURTH EDITION

This book contains the following materials referred to in the fourth edition of Business Planning for Mergers and Acquisitions: various statutes, such as selected provisions of the Delaware General Corporation Law and the federal securities laws; rules and regulations, such as rules under the federal securities laws and the Hart-Scott-Rodino premerger notification law; and Documentary Appendices with commentary, such as various merger and other acquisition agreements.

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Samuel C. Thompson, Jr.
August 18, 2015

STATUTORY SUPPLEMENT

SELECTED STATUTES, RULES, AND FORMS FROM:

AMERICAN BAR ASSOCIATION, MODEL BUSINESS CORPORATION ACT
AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS
CALIFORNIA GENERAL CORPORATION LAW
DELAWARE GENERAL CORPORATION LAW
PENNSYLVANIA BUSINESS CORPORATION LAW
SECURITIES ACT OF 1933
SECURITIES ACT OF 1933, RULES AND REGULATIONS
SECURITIES EXCHANGE ACT OF 1934
SECURITIES ACT OF 1934, RULES AND REGULATIONS
PRE-MERGER NOTIFICATION RULES
COMMITTEE ON FOREIGN INVESTMENT IN THE U.S. (CFIUS) REGS
DELAWARE REVISED UNIFORM LIMITED PARTNERSHIP ACT
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CHAPTER 1 ABA, MODEL BUSINESS CORPORATION ACT

[*See* Principally Chapters 2 and 3 of Business Planning for Mergers and Acquisitions]

A. *§ 1.40. Act Definitions*

(27) "Voting power" means the current power to vote in the election of directors.

B. *§ 2.02. Articles of Incorporation*

(a) The articles of incorporation must set forth:

(1) a corporate name for the corporation that satisfies the requirements of section 4.01;

(2) the number of shares the corporation is authorized to issue;

(3) the street address of the corporation's initial registered office and the name of its initial registered agent at that office; and

(4) the name and address of each incorporator.

(b) The articles of incorporation may set forth: * * *

(4)a provision eliminating or limiting the liability of a director to the corporation of its shareholders for money damages for any action taken, or any failure to take any action, as a director, except liability for (A) the amount of a financial benefit received by a director to which he is not entitled; (B) an intentional infliction of harm on the corporation or the shareholders; (C) a violation of section 8.33 [relating to illegal distributions]; or (D) an intentional violation of criminal law. * * *

C. *§ 6.21. Issuance of Shares*

(b) The board of directors may authorize shares to be issued for consideration consisting of any tangible or intangible property or benefit to the corporation, including cash, promissory notes, services performed, contracts for services to be performed, or other securities of the corporation. * * *

(f) (1) An issuance of shares or other securities convertible into or rights exercisable for shares, in a transaction or a series of integrated transactions, requires approval of the shareholders, at a meeting at which a quorum exists consisting of at least a majority of the votes entitled to be cast on the matter, if:

(i) the shares, other securities, or rights are issued for consideration other than cash or cash equivalents, and

(ii) the voting power of shares that are issued and issuable as a result of the transaction or series of integrated transactions will comprise more than 20 percent of the voting power of the shares of the corporation that were outstanding immediately before the transaction.

(2) In this subsection:

(i) For purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares shall be the greater of (A) the voting power of the shares to be issued, or (B) the voting power of the shares that would be outstanding after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued.

(ii) A series of transactions is integrated if consummation of one transaction is made contingent on consummation of one or more of the other transactions. * * *

D. *§ 6.31. Corporation's Acquisition of Its Own Shares*

(a) A corporation may acquire its own shares, and shares so acquired constitute authorized but unissued shares.

(b) If the articles of incorporation prohibit the reissue of the acquired shares, the number of authorized shares is reduced by the number of shares acquired. * * *

E. *§ 6.40. Distribution to Shareholders*

(a) A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (c). * * *

(c) No distribution may be made if, after giving it effect:

(1) the corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) the corporation's total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to satisfy the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.

(d) The board of directors may base a determination that a distribution is not prohibited under subsection (c) either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances. * * *

F. *§ 7.25. Quorum and Voting Requirements for Voting Groups*

(a) Shares entitled to vote as a separate voting group may take action on a matter at a meeting only if a quorum of those shares exists with respect to that matter. Unless the articles of incorporation or this Act provide otherwise, a majority of the votes entitled to be cast on the matter by the voting group constitutes a quorum of that voting group for action on that matter. * * *

(c) If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this Act require a greater number of affirmative votes. * * *

G. *§ 7.26. Action by Single and Multiple Voting Groups*

(a) If the articles of incorporation or this Act provide for voting by a single voting group on a matter, action on that matter is taken when voted upon by that voting group as provided in section 7.25. ***

(b) If the articles of incorporation or this Act provide for voting by two or more voting groups on a matter, action on that matter is taken only when voted upon by each of those voting groups counted separately as provided in section 7.25. * * *

H. *§ 8.33. Liability for Unlawful Distributions*

(a) A director who votes for or assents to a distribution made in violation of section 6.40 or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating section 6.40 or the articles of incorporation if it is established that he did not perform his duties in compliance with section 8.30. * * *

I. *§ 10.03. Amendment by Board of Directors and Shareholders*

If a corporation has issued shares, an amendment to the articles of incorporation shall be adopted in the following manner:

(a) The proposed amendment must be adopted by the board of directors.

(b) Except as provided in sections 10.05, 10.07, and 10.08, after adopting the proposed amendment the board of directors must submit the amendment to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the amendment, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination. * * *

J. *§ 10.04. Voting on Amendments by Voting Groups*

(a) If a corporation has more than one class of shares outstanding, the holders of the outstanding shares of a class are entitled to vote as a separate voting group (if shareholder voting is otherwise required by this Act) on a proposed amendment to the articles of incorporation if the amendment would:

(1) effect an exchange or reclassification of all or part of the shares of the class into shares of another class;

(2) effect an exchange or reclassification, or create the right of exchange, of all or part of the shares of another class into shares of the class;

(3) change the rights, preferences, or limitations of all or part of the shares of the class;

(4) change the shares of all or part of the class into a different number of shares of the same class;

(5) create a new class of shares having rights or preferences with respect to distributions or to dissolution that are prior or superior to the shares of the class;

(6) increase the rights, preferences, or number of authorized shares of any class that, after giving effect to the amendment, have rights or preferences with respect to distributions or to dissolution that are prior or superior to the shares of the class;

(7) limit or deny an existing preemptive right of all or part of the shares of the class; or

(8) cancel or otherwise affect rights to distributions that have accumulated but not yet been authorized on all or part of the shares of the class.

(b) If a proposed amendment would affect a series of a class of shares in one or more of the ways described in subsection (a), the holders of shares of that series are entitled to vote as a separate voting group on the proposed amendment. * * *

K. *§ 10.20. Amendment by Board of Directors or Shareholders [of Bylaws]*

(a) A corporation's shareholders may amend or repeal the corporation's bylaws.

(b) A corporation's board of directors may amend or repeal the corporation's bylaws, unless:

(1) the articles of incorporation or section 10.21 reserve that power exclusively to the shareholders in whole or part; or

(2) the shareholders in amending, repealing, or adopting a bylaw expressly provide that the board of directors may not amend, repeal, or reinstate that bylaw.

L. *§ 10.21. Bylaw Increasing Quorum or Voting Requirement for Directors*

(a) A bylaw that increases a quorum or voting requirement for the board of directors may be amended or repealed:

(1) if adopted by the shareholders, only by the shareholders, unless the bylaw otherwise provides;

(2) if adopted by the board of directors, either by the shareholders or by the board of directors.

(b) A bylaw adopted or amended by the shareholders that increases a quorum or voting requirement for the board of directors may provide that it can be amended or repealed only by a specified vote of either the shareholders or the board of directors.

(c) Action by the board of directors under subsection (a) to amend or repeal a bylaw that changes the quorum or voting requirement for the board of directors must meet the same quorum requirement and be adopted by the same vote required to take action under the quorum and voting requirement then in effect or proposed to be adopted, whichever is greater. * * *

M. *CHAPTER 11. MERGER AND SHARE EXCHANGE*

1. § 11.01. Definitions

As used in this chapter:

(a) "Interests" means the proprietary interests in an other entity.

(b) "Merger" means a business combination pursuant to section 11.02.

(c) "Organizational documents" means the basic document or documents that create, or determine the internal governance of, another entity.

(d) "Other entity" means any association or legal entity, other than a domestic or foreign corporation, organized to conduct business, including, without limitation, limited partnerships, general partnerships, limited liability partnerships, limited liability companies, joint ventures, joint stock companies, and business trusts.

(e) "Party to a merger" or "party to a share exchange" means any domestic or foreign corporation or other entity that will either:

(1) merge under a plan of merger;

(2) acquire shares or interests of another corporation or an other entity in a share exchange; or

(3) have all of its shares or interests or all of one or more classes or series of its shares or interests acquired in a share exchange.

(f) "Share exchange" means a business combination pursuant to section 11.03.

(g) "Survivor" in a merger means the corporation or other entity into which one or more other corporations or other entities are merged. A survivor of a merger may preexist the merger or be created by the merger.

2. § 11.02. Merger

(a) One or more domestic corporations may merge with a domestic or foreign corporation or other entity pursuant to a plan of merger.

(b) A foreign corporation, or a domestic or foreign other entity, may be a party to the merger, or may be created by the terms of the plan of merger, only if:

(1) the merger is permitted by the laws under which the corporation or other entity is organized or by which it is governed; and

(2) in effecting the merger, the corporation or other entity complies with such laws and with its articles of incorporation or organizational documents.

(c) The plan of merger must include:

(1) the name of each corporation or other entity that will merge and the name of the corporation or other entity that will be the survivor of the merger;

(2) the terms and conditions of the merger;

(3) the manner and basis of converting the shares of each merging corporation and interests of each merging other entity into shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing;

(4) the articles of incorporation of any corporation, or the organizational documents of any other entity, to be created by the merger, or if a new corporation or other entity is not to be created by the merger, any amendments to the survivor's articles of incorporation or organizational documents; and

(5) any other provisions required by the laws under which any party to the merger is organized or by which it is governed, or by the articles of incorporation or organizational documents of any such party.

(d) The terms described in subsections (c)(2) and (c)(3) may be made dependent on facts ascertainable outside the plan of merger, provided that those facts are objectively ascertainable. The term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(e) The plan of merger may also include a provision that the plan may be amended prior to filing the articles of merger with the secretary of state, provided that if the shareholders of a domestic corporation that is a party to the merger are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to:

(1) change the amount or kind of shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, or other property to be received by the shareholders of or owners of interests in any party to the merger upon conversion of their shares or interests under the plan;

(2) change the articles of incorporation of any corporation, or the organizational documents of any other entity, that will survive or be created as a result of the merger, except for changes permitted by section 10.05 or by comparable provisions of the laws under which the foreign corporation or other entity is organized or governed; or

(3) change any of the other terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

3. § 11.03. Share Exchange

(a) Through a share exchange:

(1) a domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign corporation, or all of the interests of one or more classes or series of interests of a domestic or foreign other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange, or

(2) all of the shares of one or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign corporation or other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange.

(b) A foreign corporation, or a domestic or foreign other entity, may be a party to the share exchange only if:

(1) the share exchange is permitted by the laws under which the corporation or other entity is organized or by which it is governed; and

(2) in effecting the share exchange, the corporation or other entity complies with such laws and with its articles of incorporation or organizational documents.

(c) The plan of share exchange must include:

(1) the name of each corporation or other entity whose shares or interests will be acquired and the name of the corporation or other entity that will acquire those shares or interests;

(2) the terms and conditions of the share exchange;

(3) the manner and basis of exchanging shares of a corporation or interests in an other entity whose shares or interests will be acquired under the share exchange into shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing; and

(4) any other provisions required by the laws under which any party to the share exchange is organized or by the articles of incorporation or organizational documents of any such party.

(d) The terms described in subsections (c)(2) and (c)(3) may be made dependent on facts ascertainable outside the plan of share exchange, provided that those facts are objectively ascertainable. The term "facts" includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(e) The plan of share exchange may also include a provision that the plan may be amended prior to filing of the articles of share exchange with the secretary of state, provided that if the shareholders of a domestic corporation that is a party to the share exchange are required or permitted to vote on the plan, the plan must provide that subsequent to approval of the plan by such shareholders the plan may not be amended to:

(1) change the amount or kind of shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, or other property to be issued by the corporation or to be received by the shareholders of or owners of interests in any party to the share exchange in exchange for their shares or interests under the plan; or

(2) change any of the terms or conditions of the plan if the change would adversely affect such shareholders in any material respect.

(f) Section 11.03 does not limit the power of a domestic corporation to acquire shares of another corporation or interests in another entity in a transaction other than a share exchange.

4. § 11.04. Action on a Plan of Merger or Share Exchange

In the case of a domestic corporation that is a party to a merger or share exchange:

(a) The plan of merger or share exchange must be adopted by the board of directors.

(b) Except as provided in subsection (g) and in section 11.05, after adopting the plan of merger or share exchange the board of directors must submit the plan to the shareholders for their approval. The board of directors must also transmit to the shareholders a recommendation that the shareholders approve the plan, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors must transmit to the shareholders the basis for that determination.

(c) The board of directors may condition its submission of the plan of merger or share exchange to the shareholders on any basis.

(d) If the plan of merger or share exchange is required to be approved by the shareholders, and if the approval is to be given at a meeting, the corporation must notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the plan is to be submitted for approval. The notice must state that the purpose, or one of the purposes, of the meeting is to consider the plan and must contain or be accompanied by a copy or summary of the plan. If the corporation is to be merged into an existing corporation or other entity, the notice shall also include or be accompanied by a copy or summary of the articles of incorporation or organizational documents of that corporation or other entity. If the corporation is to be merged into a corporation or other entity that is to be created pursuant to the merger, the notice shall include or be accompanied by a copy or a summary of the articles of incorporation or organizational documents of the new corporation or other entity.

(e) Unless the articles of incorporation, or the board of directors acting pursuant to subsection (c), requires a greater vote or a greater number of votes to be present, approval of the plan of merger or share exchange requires the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the plan exists, and, if any class or series of shares is entitled to vote as a separate group on the plan of merger or share exchange, the approval of each such separate voting group at a meeting at which a quorum of the voting group consisting of at least a majority of the votes entitled to be cast on the merger or share exchange by that voting group is present.

(f) Separate voting by voting groups is required:

(1) on a plan of merger, by each class or series of shares that (A) are to be converted, pursuant to the provisions of the plan of merger, into shares or other securities, interests, obligations, rights to acquire shares or

other securities, cash, other property, or any combination of the foregoing, or (B) would have a right to vote as a separate group on a provision in the plan that, if contained in a proposed amendment to articles of incorporation, would require action by separate voting groups under section 10.04;

(2) on a plan of share exchange, by each class or series of shares included in the exchange, with each class or series constituting a separate voting group; and

(3) on a plan of merger or share exchange, if the voting group is entitled under the articles of incorporation to vote as a voting group to approve a plan of merger or share exchange.

(g) Unless the articles of incorporation otherwise provide, approval by the corporation's shareholders of a plan of merger or share exchange is not required if:

(1) the corporation will survive the merger or is the acquiring corporation in a share exchange;

(2) except for amendments permitted by section 10.05, its articles of incorporation will not be changed;

(3) each shareholder of the corporation whose shares were outstanding immediately before the effective date of the merger or share exchange will hold the same number of shares, with identical preferences, limitations, and relative rights, immediately after the effective date of change; and

(4) the issuance in the merger or share exchange of shares or other securities convertible into or rights exercisable for shares does not require a vote under section 6.21(f).

(h) If as a result of a merger or share exchange one or more shareholders of a domestic corporation would become subject to personal liability for the obligations or liabilities of any other person or entity, approval of the plan of merger shall require the execution, by each such shareholder, of a separate written consent to become subject to such personal liability.

5. § 11.05. Merger Between Parent and Subsidiary or Between Subsidiaries

(a) A domestic parent corporation that owns shares of a domestic or foreign subsidiary corporation that carry at least 90 percent of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary into itself or into another such subsidiary, or merge itself into the subsidiary, without the approval of the board of directors or shareholders of the subsidiary, unless the articles of incorporation of any of the corporations otherwise provide, and unless, in the case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.

(b) If under subsection (a) approval of a merger by the subsidiary's shareholders is not required, the parent corporation shall, within ten days after the effective date of the merger, notify each of the subsidiary's shareholders that the merger has become effective.

(c) Except as provided in subsections (a) and (b), a merger between a parent and a subsidiary shall be governed by the provisions of chapter 11 applicable to mergers generally.

6. § 11.06. Articles of Merger or Share Exchange

(a) After a plan of merger or share exchange has been adopted and approved as required by this Act, articles of merger or share exchange shall be executed on behalf of each party to the merger or share exchange by any officer or other duly authorized representative. The articles shall set forth:

(1) the names of the parties to the merger or share exchange and the date on which the merger or share exchange occurred or is to be effective;

(2) if the articles of incorporation of the survivor of a merger are amended, or if a new corporation is created as a result of a merger, the amendments to the survivor's articles of incorporation or the articles of incorporation of the new corporation;

(3) if the plan of merger or share exchange required approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement that the plan was duly approved by the shareholders and, if voting by any separate voting group was required, by each such separate voting group, in the manner required by this Act and the articles of incorporation;

(4) if the plan of merger or share exchange did not require approval by the shareholders of a domestic corporation that was a party to the merger or share exchange, a statement to that effect; and

(5) as to each foreign corporation and each other entity that was a party to the merger or share exchange, a statement that the plan and the performance of its terms were duly authorized by all action required by the laws under which the corporation or other entity is organized, or by which it is governed, and by its articles of incorporation or organizational documents.

(b) Articles of merger or share exchange shall be delivered to the secretary of state for filing by the survivor of the merger or the acquiring corporation in a share exchange and shall take effect on the effective date.

7. § 11.07. Effect of Merger or Share Exchange

(a) When a merger becomes effective:

(1) the corporation or other entity that is designated in the plan of merger as the survivor continues or comes into existence, as the case may be;

(2) the separate existence of every corporation or other entity that is merged into the survivor ceases;

(3) all property owned by, and every contract right possessed by, each corporation or other entity that merges into the survivor is vested in the survivor without reversion or impairment;

(4) all liabilities of each corporation or other entity that is merged into the survivor are vested in the survivor;

(5) the name of the survivor may, but need not be, substituted in any pending proceeding for the name of any party to the merger whose separate existence ceased in the merger;

(6) the articles of incorporation or organizational documents of the survivor are amended to the extent provided in the plan of merger;

(7) the articles of incorporation or organizational documents of a survivor that is created by the merger become effective; and

(8) the shares of each corporation that is a party to the merger, and the interests in an other entity that is a party to a merger, that are to be converted under the plan of merger into shares, interests, obligations, rights to acquire securities, other securities, cash, other property, or any combination of the foregoing, are converted, and the former holders of such shares or interests are entitled only to the rights provided to them in the plan of merger or to any rights they may have under chapter 13.

(b) When a share exchange becomes effective, the shares of each domestic corporation that are to be exchanged for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, are entitled only to the rights provided to them in the plan of share exchange or to any rights they may have under chapter 13.

(c) Any shareholder of a domestic corporation that is a party to a merger or share exchange who, prior to the merger or share exchange, was liable for the liabilities or obligations of such corporation, shall not be released from such liabilities or obligations by reason of the merger or share exchange.

(d) Upon a merger becoming effective, a foreign corporation, or a foreign other entity, that is the survivor of the merger is deemed to:

(1) appoint the secretary of state as its agent for service of process in a proceeding to enforce the rights of shareholders of each domestic corporation that is a party to the merger who exercise appraisal rights, and

(2) agree that it will promptly pay the amount, if any, to which such shareholders are entitled under chapter 13.

8. § 11.08. Abandonment of a Merger or Share Exchange

(a) Unless otherwise provided in a plan of merger or share exchange or in the laws under which a foreign corporation or a domestic or foreign other entity that is a party to a merger or a share exchange is organized or by which it is governed, after the plan has been adopted and approved as required by this chapter, and at any time before the merger or share exchange has become effective, it may be abandoned by any party thereto without action by the party's shareholders or owners of interests, in accordance with any procedures set forth in the plan of merger or share exchange or, if no such procedures are set forth in the plan, in the manner determined by the board of directors of a corporation, or the managers of an other entity, subject to any contractual rights of other parties to the merger or share exchange, exchange shall be deemed abandoned and shall not become effective.

N. *CHAPTER 12. DISPOSITION OF ASSETS*

1. § 12.01. Disposition of Assets Not Requiring Shareholder Approval

No approval of the shareholders of a corporation is required, unless the articles of incorporation otherwise provide:

(1) to sell, lease, exchange, or otherwise dispose of any or all of the corporation's assets in the usual and regular course of business;

(2) to mortgage, pledge, dedicate to the repayment of indebtedness (whether with or without recourse), or otherwise encumber any or all of the corporation's assets, whether or not in the usual and regular course of business;

(3) to transfer any or all of the corporation's assets to one or more corporations or other entities all of the shares or interests of which are owned by the corporation; or

(4) to distribute assets pro rata to the holders of one or more classes or series of the corporation's shares.

2. § 12.02. Shareholder Approval of Certain Dispositions

(a) A sale, lease, exchange, or other disposition of assets, other than a disposition described in section 12.01, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. If a corporation retains a business activity that represented at least 25 percent of total assets at the end of the most recently completed fiscal year, and 25 percent of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.

(b) A disposition that requires approval of the shareholders under subsection (a) shall be initiated by a resolution by the board of directors authorizing the disposition. After adoption of such a resolution, the board of directors shall submit the proposed disposition to the shareholders for their approval. The board of directors shall also transmit to the shareholders a recommendation that the shareholders approve the proposed disposition, unless the board of directors makes a determination that because of conflicts of interest or other special circumstances it should not make such a recommendation, in which case the board of directors shall transmit to the shareholders the basis for that determination.

(c) The board of directors may condition its submission of a disposition to the shareholders under subsection (b) on any basis.

(d) If a disposition is required to be approved by the shareholders under subsection (a), and if the approval is to be given at a meeting, the corporation shall notify each shareholder, whether or not entitled to vote, of the meeting of shareholders at which the disposition is to be submitted for approval. The notice shall state that the purpose, or one of the purposes, of the meeting is to consider the disposition and shall contain a description of the disposition, including the terms and conditions thereof and the consideration to be received by the corporation.

(e) Unless the articles of incorporation or the board of directors acting pursuant to subsection (c) requires a greater vote, or a greater number of votes to be present, the approval of a disposition by the shareholders shall require the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast on the disposition exists.

(f) After a disposition has been approved by the shareholders under subsection (b), and at any time before the disposition has been consummated, it may be abandoned by the corporation without action by the shareholders, subject to any contractual rights of other parties to the disposition.

(g) A disposition of assets in the course of dissolution under chapter 14 is not governed by this section.

(h) The assets of a direct or indirect consolidated subsidiary shall be deemed the assets of the parent corporation for the purposes of this section.

O. *CHAPTER 13 APPRAISAL RIGHTS*

1. § 13.01. Definitions

In this chapter:

(1) "Affiliate" means a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another person or is a senior executive thereof. For purposes of section 13.02(b)(4), a person is deemed to be an affiliate of its senior executives.

(2) "Beneficial shareholder" means a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owner's behalf.

(3) "Corporation" means the issuer of the shares held by a shareholder demanding appraisal and, for matters covered in sections 13.22-13.31, includes the surviving entity in a merger.

(4) "Fair value" means the value of the corporation's shares determined:

(i) immediately before the effectuation of the corporate action to which the shareholder objects;

(ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and

(iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 13.02(a)(5).

(5) "Interest" means interest from the effective date of the corporate action until the date of payment, at the rate of interest on judgments in this state on the effective date of the corporate action.

(6) "Preferred shares" means a class or series of shares whose holders have preference over any other class or series with respect to distributions.

(7) "Record shareholder" means the person in whose name shares are registered in the records of the corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with the corporation.

(8) "Senior executive" means the chief executive officer, chief operating officer, chief financial officer,

and anyone in charge of a principal business unit or function.

(9) "Shareholder" means both a record shareholder and a beneficial shareholder.

2. § 13.02. Right to Appraisal

(a) A shareholder is entitled to appraisal rights, and to obtain payment of the fair value of that shareholder's shares, in the event of any of the following corporate actions:

(1) consumption of a merger to which the corporation is a party (i) if shareholder approval is required for the merger by section 11.04 and the shareholder is entitled to vote on the merger, except that appraisal rights shall not be available to any shareholder of the corporation with respect to shares of any class or series that remain outstanding after consummation of the merger, or (ii) if the corporation is a subsidiary and the merger is governed by section 11.05;

(2) consummation of a share exchange to which the corporation is a party as the corporation whose shares will be acquired if the shareholder is entitled to vote on the exchange, except that appraisal rights shall not be available to any shareholder of the corporation with respect to any class or series of shares of the corporation that is not exchanged;

(3) consummation of a disposition of assets pursuant to section 12.02 if the shareholder is entitled to vote on the disposition;

(4) an amendment of the articles of incorporation with respect to a class or series of shares that reduces the number of shares of a class or series owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share so created; or

(5) any other amendment to the articles of incorporation, merger, share exchange or disposition of assets to the extent provided by the articles of incorporation, bylaws or a resolution of the board of directors.

(b) Notwithstanding subsection (a), the availability of appraisal rights under subsections (a)(1), (2), (3) and (4) shall be limited in accordance with the following provisions:

(1) Appraisal rights shall not be available for the holders of shares of any class or series of shares which is:

(i) listed on the New York Stock Exchange or the American Stock Exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or

(ii) not so listed or designated, but has at least 2,000 shareholders and the outstanding shares of such class or series has a market value of at least $ 20 million (exclusive of the value of such shares held by its subsidiaries, senior executives, directors and beneficial shareholders owning more than 10 percent of such shares).

(2) The applicability of subsection (b)(1) shall be determined as of:

(i) the record date fixed to determine the shareholders entitled to receive notice of, and to vote at, the meeting of shareholders to act upon the corporate action requiri0ng appraisal rights; or

(ii) the day before the effective date of such corporate action if there is no meeting of shareholders.

(3) Subsection (b)(1) shall not be applicable and appraisal rights shall be available pursuant to subsection (a) for the holders of any class or series of shares who are required by the terms of the corporate action requiring appraisal rights to accept for such shares anything other than cash or shares of any class or any series of shares of any corporation, or any other proprietary interest of any other entity, that satisfies the standards set forth in subsection (b)(1) at the time the corporate action becomes effective.

(4) Subsection (b)(1) shall not be applicable and appraisal rights shall be available pursuant to subsection (a) for the holders of any class or series of shares where:

(i) any of the shares or assets of the corporation are being acquired or converted, whether by merger, share exchange or otherwise, pursuant to the corporate action by a person, or by an affiliate of a person, who:

(A) is, or at any time in the one-year period immediately preceding approval by the board of directors of the corporate action requiring appraisal rights was, the beneficial owner of 20 percent or more of the voting power of the corporation, excluding any shares acquired pursuant to an offer for all shares having voting power if such offer was made within one year prior to the corporate action requiring appraisal rights for consideration of the same kind and of a value equal to or less than that paid in connection with the corporate action; or

(B) directly or indirectly has, or at any time in the one-year period immediately preceding approval by the board of directors of the corporation of the corporate action requiring appraisal rights had, the power, contractually or otherwise, to cause the appointment or election of 25 percent or more of the directors to the board of directors of the corporation; or

(ii) any of the shares or assets of the corporation are being acquired or converted, whether by merger, share exchange or otherwise, pursuant to such corporate action by a person, or by an affiliate

of a person, who is, or at any time in the one-year period immediately preceding approval by the board of directors of the corporate action requiring appraisal rights was, a senior executive or director of the corporation or a senior executive of any affiliate thereof, and that senior executive or director will receive, as a result of the corporate action, a financial benefit not generally available to other shareholders as such, other than:

(A) employment, consulting, retirement or similar benefits established separately and not as part of or in contemplation of the corporate action; or

(B) employment, consulting, retirement or similar benefits established in contemplation of, or as part of, the corporate action that are not more favorable than those existing before the corporate action or, if more favorable, that have been approved on behalf of the corporation in the same manner as is provided in section 8.62; or

(C) in the case of a director of the corporation who will, in the corporate action, become a director of the acquiring entity in the corporate action or one of its affiliates, rights and benefits as a director that are provided on the same basis as those afforded by the acquiring entity generally to other directors of such entity or such affiliate.

(5) For the purposes of paragraph (4) only, the term "beneficial owner" means any person who, directly or indirectly, through any contract, arrangement, or understanding, other than a revocable proxy, has or shares the power to vote, or to direct the voting of, shares, provided that a member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities if the member is precluded by the rules of such exchange from voting without instruction on contested matters or matters that may affect substantially the rights or privileges of the holders of the securities to be voted. When two or more persons agree to act together for the purpose of voting their shares of the corporation, each member of the group formed thereby shall be deemed to have acquired beneficial ownership, as of the date of such agreement, of all voting shares of the corporation beneficially owned by any member of the group.

(c) Notwithstanding any other provision of section 13.02, the articles of incorporation as originally filed or any amendment thereto may limit or eliminate appraisal rights for any class or series of preferred shares, but any such limitation or elimination contained in an amendment to the articles of incorporation that limits or eliminates appraisal rights for any of such shares that are outstanding immediately prior to the effective date of such amendment or that the corporation is or may be required to issue or sell thereafter pursuant to any conversion, exchange or other right existing immediately before the effective date of such amendment shall not apply to any corporate action that becomes effective within one year of that date if such action would otherwise afford appraisal rights.

(d) A shareholder entitled to appraisal rights under this chapter may not challenge a completed corporate action for which appraisal rights are available unless such corporate action:

(1) was not effectuated in accordance with the applicable provisions of chapters 10, 11 or 12 or the corporation's articles of incorporation, bylaws or board of directors' resolution authorizing the corporate action; or

(2) was procured as a result of fraud or material misrepresentation.

3. § 13.03. Assertion of Rights by Nominees and Beneficial Owners

(a) A record shareholder may assert appraisal rights as to fewer than all the shares registered in the record shareholder's name but owned by a beneficial shareholder only if the record shareholder objects with respect to all shares of the class or series owned by the beneficial shareholder and notifies the corporation in writing of the name and address of each beneficial shareholder on whose behalf appraisal rights are being asserted. The rights of a record shareholder who asserts appraisal rights for only part of the shares held of record in the record shareholder's name under this subsection shall be determined as if the shares as to which the record shareholder objects and the record shareholder's other shares were registered in the names of different record shareholders.

(b) A beneficial shareholder may assert appraisal rights as to shares of any class or series held on behalf of the shareholder only if such shareholder:

(1) submits to the corporation the record shareholder's written consent to the assertion of such rights no later than the date referred to in section 13.22(b)(2)(ii); and

(2) does so with respect to all shares of the class or series that are beneficially owned by the beneficial shareholder.

4. § 13.20. Notice of Appraisal Rights

(a) If proposed corporate action described in section 13.02(a) is to be submitted to a vote at a shareholders' meeting, the meeting notice must state that the corporation has concluded that shareholders are, are not or may be entitled to assert appraisal rights under this chapter. If the corporation concludes that appraisal rights are or may be available, a copy of this chapter must accompany the meeting notice sent to those record shareholders entitled to exercise appraisal

rights.

(b) In a merger pursuant to section 11.05, the parent corporation must notify in writing all record shareholders of the subsidiary who are entitled to assert appraisal rights that the corporate action became effective. Such notice must be sent within ten days after the corporate action became effective and include the materials described in section 13.22.

5. § 13.21. Notice of Intent to Demand Payment

(a) If proposed corporate action requiring appraisal rights under section 13.02 is submitted to a vote at a shareholders' meeting, a shareholder who wishes to assert appraisal rights with respect to any class or series of shares:

(1) must deliver to the corporation before the vote is taken written notice of the shareholder's intent to demand payment if the proposed action is effectuated; and

(2) must not vote, or cause or permit to be voted, any shares of such class or series in favor of the proposed action.

(b) A shareholder who does not satisfy the requirements of subsection (a) is not entitled to payment under this chapter.

6. § 13.22. Appraisal Notice and Form

(a) If proposed corporate action requiring appraisal rights under section 13.02(a) becomes effective, the corporation must deliver a written appraisal notice and form required by subsection (b)(1) to all shareholders who satisfied the requirements of section 13.21. In the case of a merger under section 11.05, the parent must deliver a written appraisal notice and form to all record shareholders who may be entitled to assert appraisal rights. * * *

7. § 13.23. Perfection of Rights; Right to Withdraw

(a) A shareholder who receives notice pursuant to section 13.22 and who wishes to exercise appraisal rights must certify on the form sent by the corporation whether the beneficial owner of such shares acquired beneficial ownership of the shares before the date required to be set forth in the notice pursuant to section 13.22(b)(1). * * *

8. § 13.24. Payment

(a) Except as provided in section 13.25, within 30 days after the form required by section 13.22(b)(2)(ii) is due, the corporation shall pay in cash to those shareholders who complied with section 13.23(a) the amount the corporation estimates to be the fair value of their shares, plus interest. * * *

9. § 13.25. After-Acquired Shares

(a) A corporation may elect to withhold payment required by section 13.24 from any shareholder who did not certify that beneficial ownership of all of the shareholder's shares for which appraisal rights are asserted was acquired before the date set forth in the appraisal notice sent pursuant to section 13.22(b)(1). * * *

10. § 13.26. Procedure If Shareholder Dissatisfied with Payment or Offer

(a) A shareholder paid pursuant to section 13.24 who is dissatisfied with the amount of the payment must notify the corporation in writing of that shareholder's estimate of the fair value of the shares and demand payment of that estimate plus interest (less any payment under section 13.24). A shareholder offered payment under section 13.25 who is dissatisfied with that offer must reject the offer and demand payment of the shareholder's stated estimate of the fair value of the shares plus interest. * * *

11. § 13.30. Court Action

(a) If a shareholder makes demand for payment under section 13.26 which remains unsettled, the corporation shall commence a proceeding within 60 days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay in cash to each shareholder the amount the shareholder demanded pursuant to section 13.26 plus interest. * * *

12. § 13.31. Court Costs and Counsel Fees

(a) The court in an appraisal proceeding commenced under section 13.30 shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court. The court shall assess the costs against the corporation, except that the court may assess costs against all or some of the shareholders demanding appraisal, in amounts the court finds equitable, to the extent the court finds such shareholders acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this chapter. * * *

P. *CHAPTER 14. DISSOLUTION*

1. § 14.02. Dissolution by Board of Directors and Shareholders

(a) A corporation's board of directors may propose dissolution for submission to the shareholders.
(b) For a proposal to dissolve to be adopted:
(1) the board of directors must recommend dissolution to the shareholders unless the board of directors determines that because of conflict of interest or other special circumstances it should make no recommendation and communicates the basis for its determination to the shareholders; and
(2) the shareholders entitled to vote must approve the proposal to dissolve as provided in subsection (e).
(c) The board of directors may condition its submission of the proposal for dissolution on any basis.
(d) The corporation shall notify each shareholder, whether or not entitled to vote, of the proposed shareholders' meeting. The notice must also state that the purpose, or one of the purposes, of the meeting is to consider dissolving the corporation.
(e) Unless the articles of incorporation or the board of directors acting pursuant to subsection (c) require a greater vote, a greater number of shares to be present, or a vote by voting groups, adoption of the proposal to dissolve shall require the approval of the shareholders at a meeting at which a quorum consisting of at least a majority of the votes entitled to be cast exists.

2. § 14.03. Articles of Dissolution

(a) At any time after dissolution is authorized, the corporation may dissolve by delivering to the secretary of state for filing articles of dissolution setting forth:
(1) the name of the corporation;
(2) the date dissolution was authorized; and
(3) if dissolution was approved by the shareholders, a statement that the proposal to dissolve was duly approved by the shareholders in the manner required by this Act and by the articles of incorporation.
(b) A corporation is dissolved upon the effective date of its articles of dissolution.

3. § 14.04. Revocation of Dissolution

(a) A corporation may revoke its dissolution within 120 days of its effective date. * * *

CHAPTER 2 AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS

[*See* Principally Chapters 2 and 3 of Business Planning for Mergers and Acquisitions]

A. *§ 1.23. Interested*

(a) A director [§ 1.13] or officer [§ 1.27] is "interested" in a transaction or conduct if either:

(1) The director or officer, or an associate [§ 1.03] of the director or officer, is a party to the transaction or conduct;

(2) The director or officer has a business, financial, or familial relationship with a party to the transaction or conduct, and that relationship would reasonably be expected to affect the director's or officer's judgment with respect to the transaction or conduct in a manner adverse to the corporation;

(3) The director or officer, an associate of the director or officer, or a person with whom the director or officer has a business, financial, or familial relationship, has a material pecuniary interest in the transaction or conduct (other than usual and customary directors' fees and benefits) and that interest and (if present) that relationship would reasonably be expected to affect the director's or officer's judgment in a manner adverse to the corporation; or

(4) The director or officer is subject to a controlling influence by a party to the transaction or conduct or a person who has a material pecuniary interest in the transaction or conduct, and that controlling influence could reasonably be expected to affect the director's or officer's judgment with respect to the transaction or conduct in a manner adverse to the corporation.

(b) A shareholder is interested in a transaction or conduct if either the shareholder or, to the shareholder's knowledge, an associate of the shareholder is a party to the transaction or conduct, or the shareholder is also an interested director or officer with respect to the same transaction or conduct. * * *

B. *§ 1.38. Transaction in Control*

(a) Subject to Subsection (b), a "transaction in control" with respect to a corporation means:

(1) A business combination effected through (i) a merger, (ii) a consolidation, (iii) an issuance of voting equity securities [§ 1.40] to effect an acquisition of the assets of another corporation that would constitute a transaction in control under Subsection (a)(2) with respect to the other corporation, or (iv) an issuance of voting equity securities in exchange for at least a majority of the voting equity securities of another corporation, in each case whether effected directly or by means of a subsidiary;

(2) A sale of assets that would leave the corporation without a significant continuing business; or

(3) An issuance of securities or any other transaction by the corporation (other than pursuant to a transaction described in Subsection (a)(1)) that, alone or in conjunction with other transactions or circumstances, would cause a change in control [§ 1.081 of the] corporation; ***

C. *§ 4.01. Duty of Care of Directors and Officers; the Business Judgment Rule*

(a) A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances. This Subsection (a) is subject to the provisions of Subsection (c) (the business judgment rule) where applicable.

(1) The duty in Subsection (a) includes the obligation to make, or cause to be made, an inquiry when, but only when, the circumstances would alert a reasonable director or officer to the need therefore. The extent of such inquiry shall be such as the director or officer reasonably believes to be necessary.

(2) In performing any of his or her functions (including oversight functions), a director or officer is entitled to rely on materials and persons in accordance with §§ 4.02 and 4.03 (reliance on directors, officers, employees, experts, other persons, and committees of the board).

(b) Except as otherwise provided by statute or by a standard of the corporation [§ 1.36] and subject to the board's ultimate responsibility for oversight, in performing its functions (including oversight functions), the board may delegate, formally or informally by course of conduct, any function (including the function of identifying matters requiring the attention of the board) to committees of the board or to directors, officers, employees, experts, or other persons; a director may rely on such committees and persons in fulfilling the duty under this Section with respect to any delegated function if the reliance is in accordance with §§ 4.02 and 4.03.

(c) A director or officer who makes a business judgment in good faith fulfills the duty under this Section if

the director or officer:

(1) is not interested [§ 1.23] in the subject of the business judgment;

(2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and

(3) rationally believes that the business judgment is in the best interests of the corporation.

d) A person challenging the conduct of a director or officer under this Section has the burden of proving a breach of the duty of care, including the inapplicability of the provisions as to the fulfillment of duty under Subsection (b) or (c), and, in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the corporation. * * *

D. *§ 5.10. Transactions by a Controlling Shareholder with the Corporation*

(a) *General Rule*. A controlling shareholder [§ 1.10] who enters into a transaction with the corporation fulfills the duty of fair dealing to the corporation with respect to the transaction if:

(1) The transaction is fair to the corporation when entered into; or

(2) The transaction is authorized in advance or ratified by disinterested shareholders [§ 1.16], following disclosure concerning the conflict of interest [§ 1.14(a)] and the transaction [§ 1.14(b)], and does not constitute a waste of corporate assets [§ 1.42] at the time of the shareholder action.

(b) *Burden of Proof*. If the transaction was authorized in advance by disinterested directors [§ 1.15], or authorized in advance or ratified by disinterested shareholders, following such disclosure, the party challenging the transaction has the burden of proof. The party challenging the transaction also has the burden of proof if the transaction was ratified by disinterested directors and the failure to obtain advance authorization did not adversely affect the interests of the corporation in a significant way. If the transaction was not so authorized or ratified, the controlling shareholder has the burden of proof, except to the extent otherwise provided in Subsection (c).

(c) *Transactions in the Ordinary Course of Business.* In the case of a transaction between a controlling shareholder and the corporation that was in the ordinary course of the corporation's business, a party who challenges the transaction has the burden of coming forward with evidence that the transaction was unfair, whether or not the transaction was authorized in advance or ratified by disinterested directors or disinterested shareholders.

E. *§ 5.15. Transfer of Control in Which a Director or Principal Senior Executive Is Interested*

(a) If directors or principal senior executives [§ 1.30] of a corporation are interested [§ 1.23] in a transaction in control [§ 1.38] or a tender offer that results in a transfer of control [§ 1.08] of the corporation to another person [§ 1.28], then those directors or principal senior executives have the burden of proving that the transaction was fair to the shareholders of the corporation unless (1) the transaction involves a transfer by a controlling shareholder [§ 1.10] or (2) the conditions of Subsection (b) are satisfied.

(b) If in connection with a transaction described in Subsection (a) involving a publicly held corporation [§ 1.31]:

(1) Public disclosure of the proposed transaction is made;

(2) Responsible persons who express an interest are provided relevant information concerning the corporation and given a reasonable opportunity to submit a competing proposal;

(3) The transaction is authorized in advance by disinterested directors [§ 1.15] after the procedures set forth in Subsections (1) and (2) have been complied with; and

(4) The transaction is authorized or ratified by disinterested shareholders [§ 1.16] (or, if the transaction is effected by a tender offer, the offer is accepted by disinterested shareholders), after disclosure concerning the conflict of interest [§ 1.14(a)] and the transaction [§ 1.14(b)] has been made; then a party challenging the transaction has the burden of proving that the terms of the transaction are equivalent to a waste of corporate assets [§ 1.42].

(c) The fact that holders of equity securities are entitled to an appraisal remedy reflecting the general principles embodied in §§ 7.21-7.23 with respect to a transaction specified In Subsection (a) does not make an appraisal proceeding the exclusive remedy of a shareholder who proposes to challenge the transaction, unless the transaction falls within § 7.25 (Transactions in Control Involving Corporate Combinations to Which a Majority Shareholder Is a Party).

F. *§ 6.01. Role of Directors and Holders of Voting Equity Securities with Respect to Transactions in Control Proposed to the Corporation*

(a) The board of directors, in the exercise of its business judgment [§ 4.01(c)], may approve, reject, or decline to consider a proposal to the corporation to engage in a transaction in control [§ 1.38].

(b) A transaction in control of the corporation to which the corporation is a party should require approval by the shareholders [§ 1.02].

G. *§ 6.02. Action of Directors That Has the Foreseeable Effect of Blocking Unsolicited Tender Offers*

(a) The board of directors may take an action that has the foreseeable effect of blocking an unsolicited tender offer [§ 1.39], if the action is a reasonable response to the offer.

(b) In considering whether its action is a reasonable response to the offer:

(1) The board may take into account all factors relevant to the best interests of the corporation and shareholders, including, among other things, questions of legality and whether the offer, if successful, would threaten the corporation's essential economic prospects; and

(2) The board may, in addition to the analysis under § 6.02(b)(1), have regard for interests or groups (other than shareholders) with respect to which the corporation has a legitimate concern if to do so would not significantly disfavor the long-term interests of shareholders.

(c) A person who challenges an action of the board on the ground that it fails to satisfy the standards of Subsection (a) has the burden of proof that the board's action is an unreasonable response to the offer.

(d) An action that does not meet the standards of Subsection (a) may be enjoined or set aside, but directors who authorize such an action are not subject to liability for damages if their conduct meets the standard of the business judgment rule [§ 4.01(c)].

H. *§ 7.21. Corporate Transactions Giving Rise to Appraisal Rights*

An eligible holder [§ 1.17] of the corporation [§ 1.12(b)] should be entitled on demand to be paid in cash the fair value of the shares owned by the eligible holder as provided in §§ 7.22 (Standards for Determining Fair Value) and 7.23 (Procedural Standards) in the event of:

(a) A merger, a consolidation, a mandatory share exchange, or an exchange by the corporation of its stock for substantial assets or equity securities [§ 1.20] of another corporation (hereinafter collectively referred to as a "business combination"), whether effected directly or by means of a subsidiary, unless those persons who were shareholders of the corporation immediately before the combination own 60 percent or more of the total voting power of the surviving or issuing corporation immediately thereafter, in approximately the same proportions (in relation to the other preexisting shareholders) as before the combination; * * *

I. *§ 7.22. Standards for Determining Fair Value*

(a) The fair value of shares under § 7.21 (Corporate Transactions Giving Rise to Appraisal Rights) should be the value of the eligible holder's [§ 1.17] proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability. Subject to subsections (b) and (c), fair value should be determined using the customary valuation concepts and techniques generally employed in the relevant securities and financial markets for similar businesses in the context of the transaction giving rise to appraisal. * * *

(b) In the case of a business combination that gives rise to appraisal rights, but does not fall within § 5.10 (Transactions by a Controlling Shareholder with the Corporation), § 5.15 (Transfer of Control in Which a Director or Principal Senior Executive Is Interested), or § 7.25 (Transactions in Control Involving Corporate Combinations to Which a Majority Shareholder Is a Party), the aggregate price accepted by the board of directors of the subject corporation should be presumed to represent the fair value of the corporation, or of the assets sold in the case of an asset sale, unless the plaintiff can prove otherwise by clear and convincing evidence.

(c) If the transaction giving rise to appraisal falls within § 5.10, § 5.15, or § 7.25, the court generally should give substantial weight to the highest realistic price that a willing, able, and fully informed buyer would pay for the corporation as an entirety. In determining what such a buyer would pay, the court may include a proportionate share of any gain reasonably to be expected to result from the combination, unless special circumstances would make such an allocation unreasonable.

J. *§ 7.23. Procedural Standards*

(a) *Notice*. A corporation that proposes to engage in a transaction giving rise to appraisal rights under § 7.21 (Corporate Transactions Giving Rise to Appraisal Rights) should:

(i) Notify each record holder [§ 1.32] as of the record date set for the shareholder vote, and attempt in good faith to notify each other beneficial holder [§ 1.22] of shares as of such date who is known to it, of the right to exercise appraisal reasonably in advance of the date on which the transaction is to be voted upon by the shareholders, or, if no shareholder vote is required, the date on which the corporate action giving rise to appraisal is to be taken;

(ii) Describe the method for exercising the right, including the procedures in § 7.23(f);

(iii) Disclose the material facts [§ 1.25] concerning the transaction or other action and furnish copies of the corporation's financial statements; and

(iv) Provide a reasonable means by which eligible holders [§ 1.17] can easily and effectively indicate their election to dissent.

(b) *Shareholder Response*. To perfect a right to dissent, an eligible holder should be required only to utilize the means provided for under § 7.23(a)(iv), or otherwise deliver a written instrument expressing an election to dissent, at or before the shareholders' meeting, or, if no shareholder vote is to be taken, on or before the day preceding the date on which the corporate action giving rise to the right to appraisal is to be taken; provided, however, that eligible holders should have a reasonable period in which to elect to dissent from the time notice is first sent by the corporation pursuant to § 7.23(a)(i). Any eligible holder who so responds should be deemed a "dissenting holder" for purposes of § 7.23. If notice is not given as required under § 7.23(a), any eligible holder may initiate an appraisal proceeding without taking any other action.

(c) *Mandatory Prepayment*. Promptly after the transaction that gives rise to appraisal under § 7.21 is consummated and upon the tender of the dissenting holder's shares to the corporation's transfer agent for the notation of an appropriate legend to reflect the payment required under this § 7.23(c), the corporation should pay to such dissenting holder the amount in cash that it reasonably estimates to be the fair value of the shares plus any interest due. Acceptance of such prepayment shall not constitute a waiver of the dissenting holder's rights under § 7.21. * * *

(f) *Consolidation*. If there are any dissenting holders, the corporation should commence a consolidated proceeding in the state of incorporation under § 7.21 to fix fair value and determine eligibility to dissent. * * *

K. *§ 7.24. Transactions in Control Involving Corporate Combinations in Which Directors, Principal Senior Executives, and Controlling Shareholders Are Not Interested*

(a) An appraisal proceeding is the exclusive remedy of an eligible holder [§ 1.17] to challenge a transaction in control [§ 1.38] involving a corporate combination that requires shareholder approval and is not subject to § 5.10 (Transactions by a Controlling Shareholder with the Corporation), § 5.15 (Transfer of Control in Which a Director or Principal Senior Executive Is Interested), or § 7.25 (Transactions in Control Involving Corporate Combinations to Which a Majority Shareholder Is a Party), if:

(1) Disclosure concerning the transaction [§ 1.14(b)] is made to the shareholders who are entitled to authorize the transaction;

(2) The transaction is approved pursuant to, and is otherwise in accordance with, applicable provisions of law and the corporation's charter documents [§ 1.05]; and

(3) Eligible holders who are entitled to but do not vote to approve the transaction are entitled to an appraisal remedy reflecting the general principles embodied in §§ 7.22 (Standards for Determining Fair Value) and 7.23 (Procedural Standards). * * *

CHAPTER 3 CALIFORNIA GENERAL CORPORATION LAW

[*See* Principally Chapter 2 of Business Planning for Mergers and Acquisitions]

A. *§ 159. "Common shares"*

"Common shares" means shares which have no preference over any other shares with respect to distribution of assets on liquidation or with respect to payment of dividends.

B. *§ 160. "Control"; Exception*

(a) Except as provided in subdivision (b), "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation.

(b) "Control" in Sections 181, 1001, and 1200 means the ownership directly or indirectly of shares or equity securities possessing more than 50 percent of the voting power of a domestic corporation, a foreign corporation, or an other business entity.

C. *§ 161. "Constituent corporation"*

"Constituent corporation" means a corporation which is merged with or into one or more other corporations or one or more other business entities and includes a surviving corporation

D. *§ 175. "Parent"*

Except as used in Sections 1001, 1101, and 1113, a "parent" of a specified corporation is an affiliate in control (Section 160(a)) of that corporation directly or indirectly through one or more intermediaries. In Sections 1001, 1101, and 1113, "parent" means a person in control (Section 160(b)) of a domestic corporation, a foreign corporation, or an other business entity.

E. *§ 181. "Reorganization"*

"Reorganization" means either:

(a) A merger pursuant to Chapter 11 (commencing with Section 1100) other than a short-form merger (a "merger reorganization").

(b) The acquisition by one domestic corporation, foreign corporation, or other business entity in exchange, in whole or in part, for its equity securities (or the equity securities of a domestic corporation, a foreign corporation, or an other business entity which is in control of the acquiring entity) of equity securities of another domestic corporation, foreign corporation, or other business entity if, immediately after the acquisition, the acquiring entity has control of the other entity (an "exchange reorganization").

(c) The acquisition by one domestic corporation, foreign corporation, or other business entity in exchange in whole or in part for its equity securities (or the equity securities of a domestic corporation, a foreign corporation, or an other business entity which is in control of the acquiring entity) or for its debt securities (or debt securities of a domestic corporation, foreign corporation, or other business entity which is in control of the acquiring entity) which are not adequately secured and which have a maturity date in excess of five years after the consummation of the reorganization, or both, of all or substantially all of the assets of another domestic corporation, foreign corporation, or other business entity (a "sale-of-assets reorganization").

F. *§ 183.5. "Share exchange tender offer"*

"Share exchange tender offer" means any acquisition by one corporation in exchange in whole or in part for its equity securities (or the equity securities of a corporation which is in control of the acquiring corporation) of shares of another corporation, other than an exchange reorganization (subdivision (b) of Section 181).

G. *§ 187. "Short-form merger"*

"Short-form merger" means a merger pursuant to Section 1110.

H. *§ 189. "Subsidiary"*

(a) Except as provided in subdivision (b), "subsidiary" of a specified corporation means a corporation shares of which possessing more than 50 percent of the voting power are owned directly or indirectly through one or more subsidiaries by the specified corporation.

(b) For the purpose of Section 703, "subsidiary" of a specified corporation means a corporation shares of which possessing more than 25 percent of the voting power are owned directly or indirectly through one or more subsidiaries as defined in subdivision (a) by the specified corporation.

I. *§ 190. "Surviving corporation"*

"Surviving corporation" means a corporation into which one or more other corporations or one or more other business entities are merged.

J. *§ 194. "Vote"*

"Vote" includes authorization by written consent, subject to the provisions of subdivision (b) of Section 307 and subdivision (d) of Section 603.

K. *§ 194.5. "Voting power"*

"Voting power" means the power to vote for the election of directors at the time any determination of voting power is made and does not include the right to vote upon the happening of some condition or event which has not yet occurred. In any case where different classes of shares are entitled to vote as separate classes for different members of the board, the determination of percentage of voting power shall be made on the basis of the percentage of the total number of authorized directors which the shares in question (whether of one or more classes) have the power to elect in an election at which all shares then entitled to vote for the election of any directors are voted.

L. *§ 194.7. "Voting shift"*

"Voting shift" means a change, pursuant to or by operation of a provision of the articles, in the relative rights of the holders of one or more classes or series of shares, voting as one or more separate classes or series, to elect one or more directors.

M. *§ 402.5. Preferred shares; Provisions regarding majority vote; Voluntary wind up and dissolution; Distributions*

The rights, preferences, privileges, and restrictions granted to or imposed upon a class or series of preferred shares (Section 176) the designation of which includes either the word "preferred" or the word "preference" may:

(a) Notwithstanding paragraph (9) of subdivision (a) of Section 204, include a provision requiring a vote of a specified percentage or proportion of the outstanding shares of the class or series that is less than a majority of the class or series to approve any corporate action, except where the vote of a majority or greater proportion of the class or series is required by this division, regardless of restrictions or limitations on the voting rights thereof.

(b) Notwithstanding paragraph (5) of subdivision (a) of Section 204, provide that in addition to the requirement of subdivision (a) of Section 1900 the corporation may voluntarily wind up and dissolve only upon the vote of a specified percentage (which shall not exceed 66 2/3 percent) of such class or series.

(c) Provide that Section 502 or 503 not apply in whole or in part with respect to distributions on shares junior to the class or series.

N. *§ 1001. Mode of disposition of entire corporate assets*

(a) A corporation may sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its assets when the principal terms are approved by the board, and, unless the transaction is in the usual and regular course of its business, approved by the outstanding shares (Section 152), either before or after approval by the board and before or after the transaction. A transaction constituting a reorganization (Section 181) is subject to the provisions of Chapter 12 (commencing with Section 1200) and not this section (other than subdivision (d)). A transaction constituting a conversion (Section 161.9) is subject to the provisions of Chapter 11.5 (commencing with Section 1150) and not this section.

(b) Notwithstanding approval of the outstanding shares (Section 152), the board may abandon the proposed transaction without further action by the shareholders, subject to the contractual rights, if any, of third parties.

(c) The sale, lease, conveyance, exchange, transfer or other disposition may be made upon those terms and conditions and for that consideration as the board may deem in the best interests of the corporation. The consideration may be money, securities, or other property.

(d) If the acquiring party in a transaction pursuant to subdivision (a) of this section or subdivision (g) of Section 2001 is in control of or under common control with the disposing corporation, the principal terms of the sale must be approved by at least 90 percent of the voting power of the disposing corporation unless the disposition is to a domestic or foreign corporation or other business entity in consideration of the nonredeemable common shares or nonredeemable equity securities of the acquiring party or its parent.

(e) Subdivision (d) does not apply to any transaction if the Commissioner of Corporations, the Commissioner of Financial Institutions, the Insurance Commissioner or the Public Utilities Commission has approved the terms and conditions of the transaction and the fairness of those terms and conditions pursuant to Section 25142, Section 696.5 of the Financial Code, Section 838.5 of the Insurance Code, or Section 822 of the Public Utilities Code.

O. *§ 1100. Authority to merge*

Any two or more corporations may be merged into one of those corporations . A corporation may merge with one or more domestic corporations (Section 167), foreign corporations (Section 171), or other business entities (Section 174.5) pursuant to this chapter. Mergers in which a foreign corporation but no other business entity is a constituent party are governed by Section 1108, and mergers in which an other business entity is a constituent party are governed by Section 1113.

P. *§ 1101. Approval of agreement to merge; Contents*

The board of each corporation which desires to merge shall approve an agreement of merger. The constituent corporations shall be parties to the agreement of merger and other persons, including a parent party (Section 1200), may be parties to the agreement of merger. The agreement shall state all of the following:

(a) The terms and conditions of the merger.

(b) The amendments, subject to Sections 900 and 907, to the articles of the surviving corporation to be effected by the merger, if any. If any amendment changes the name of the surviving corporation the new name may be the same as or similar to the name of a disappearing domestic or foreign corporation, subject to subdivision (b) of Section 201.

(c) The name and place of incorporation of each constituent corporation and which of the constituent corporations is the surviving corporation.

(d) The manner of converting the shares of each of the constituent corporations into shares or other securities of the surviving corporation and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities of the surviving corporation, the cash, rights, securities, or other property which the holders of those shares are to receive in exchange for the shares, which cash, rights, securities, or other property may be in addition to or in lieu of shares or other securities of the surviving corporation, or that the shares are canceled without consideration.

(e) Other details or provisions as are desired, if any, including, without limitation, a provision for the payment of cash in lieu of fractional shares or for any other arrangement with respect thereto consistent with the provisions of Section 407.

Each share of the same class or series of any constituent corporation (other than the cancellation of shares held by a constituent corporation or its parent or a wholly owned subsidiary of either in another constituent

corporation) shall, unless all shareholders of the class or series consent and except as provided in Section 407, be treated equally with respect to any distribution of cash, rights, securities, or other property. Notwithstanding subdivision (d), except in a short-form merger, and in the merger of a corporation into its subsidiary in which it owns at least 90 percent of the outstanding shares of each class, the nonredeemable common shares or nonredeemable equity securities of a constituent corporation may be converted only into nonredeemable common shares of the surviving party or a parent party if a constituent corporation or its parent owns, directly or indirectly, prior to the merger shares of another constituent corporation representing more than 50 percent of the voting power of the other constituent corporation prior to the merger, unless all of the shareholders of the class consent and except as provided in Section 407.

Q. *§ 1102. Signing of agreement*

Each corporation shall sign the agreement by its chairman of the board, president or a vice president and secretary or an assistant secretary acting on behalf of their respective corporations.

R. *§ 1103. Filing agreement and certificate; Certificate of satisfaction showing certain taxes paid or secured*

After approval of a merger by the board and any approval of the outstanding shares (Section 152) required by Chapter 12 (commencing with Section 1200), the surviving corporation shall file a copy of the agreement of merger with an officers' certificate of each constituent corporation attached stating the total number of outstanding shares of each class entitled to vote on the merger, that the principal terms of the agreement in the form attached were approved by that corporation by a vote of a number of shares of each class which equaled or exceeded the vote required, specifying each class entitled to vote and the percentage vote required of each class, or that the merger agreement was entitled to be and was approved by the board alone under the provisions of Section 1201. * * *

S. *§ 1107. Cessation of existence of disappearing corporation and surviving corporations; Rights of creditors and liens on property; Pending actions*

(a) Upon merger pursuant to this chapter the separate existence of the disappearing corporations ceases and the surviving corporation shall succeed, without other transfer, to all the rights and property of each of the disappearing corporations and shall be subject to all the debts and liabilities of each in the same manner as if the surviving corporation had itself incurred them. * * *

T. *§ 1108. Merger of domestic and foreign corporations; Laws pursued in effecting merger*

(a) The merger of any number of domestic corporations with any number of foreign corporations may be effected if the foreign corporations are authorized by the laws under which they are formed to effect the merger. The surviving corporation may be any one of the constituent corporations and shall continue to exist under the laws of the state or place of its incorporation.

(b) If the surviving corporation is a domestic corporation, the merger proceedings with respect to that corporation and any domestic disappearing corporation shall conform to the provisions of this chapter governing the merger of domestic corporations, but if the surviving corporation is a foreign corporation, then, subject to the requirements of subdivision (d) and of Section 407 and Chapters 12 (commencing with Section 1200) and 13 (commencing with Section 1300)(with respect to any domestic constituent corporations), the merger proceedings may be in accordance with the laws of the state or place of incorporation of the surviving corporation. * * *

U. *§ 1110. Effecting merger of subsidiary corporation into parent corporation by resolution; Requirements of resolution; Certificate of ownership*

(a) If a domestic corporation owns all the outstanding shares, or owns less than all the outstanding shares but at least 90 percent of the outstanding shares of each class, of a corporation or corporations, domestic or foreign, the merger of the subsidiary corporation or corporations into the parent corporation or the merger into the subsidiary corporation of the parent corporation and any other subsidiary corporation or corporations, may be effected by a resolution or plan of merger adopted and approved by the board of the parent corporation and the filing of a

certificate of ownership as provided in subdivision (e). The resolution or plan of merger shall provide for the merger and shall provide that the surviving corporation assumes all the liabilities of each disappearing corporation and shall include any other provisions required by this section.

(b) If the parent corporation owns less than all the outstanding shares but at least 90 percent of the outstanding shares of each class of the subsidiary corporation that is a party to the merger, the resolution or plan of merger also shall set forth the securities, cash, property, or rights to be issued, paid, delivered, or granted upon surrender of each outstanding share of the subsidiary corporation not owned by the parent corporation and the entire resolution or plan of merger as well as the consideration to be received for each share of the subsidiary corporation not owned by the parent corporation, shall be approved by the board of that subsidiary corporation. * * *

V. *§ 1200. Board's approval*

A reorganization (Section 181) or a share exchange tender offer (Section 183.5) shall be approved by the board of:

(a) Each constituent corporation in a merger reorganization;

(b) The acquiring corporation in an exchange reorganization;

(c) The acquiring corporation and the corporation whose property and assets are acquired in a sale-of-assets reorganization;

(d) The acquiring corporation in a share exchange tender offer (Section 183.5); and

(e) The corporation in control of any constituent or acquiring domestic or foreign corporation or other business entity under subdivision (a), (b) or (c) and whose equity securities are issued, transferred, or exchanged in the reorganization (a "parent party").

W. *§ 1201. Shareholders' approval of principal terms; Abandonment of proposed reorganization*

(a) The principal terms of a reorganization shall be approved by the outstanding shares (Section 152) of each class of each corporation the approval of whose board is required under Section 1200, except as provided in subdivision (b) and except that (unless otherwise provided in the articles) no approval of any class of outstanding preferred shares of the surviving or acquiring corporation or parent party shall be required if the rights, preferences, privileges and restrictions granted to or imposed upon that class of shares remain unchanged (subject to the provisions of subdivision (c)). For the purpose of this subdivision, two classes of common shares differing only as to voting rights shall be considered as a single class of shares.

(b) No approval of the outstanding shares (Section 152) is required by subdivision (a) in the case of any corporation if that corporation, or its shareholders immediately before the reorganization, or both, shall own (immediately after the reorganization) equity securities, other than any warrant or right to subscribe to or purchase those equity securities, of the surviving or acquiring corporation or a parent party (subdivision (d) of Section 1200) possessing more than five-sixths of the voting power of the surviving or acquiring corporation or parent party. In making the determination of ownership by the shareholders of a corporation, immediately after the reorganization, of equity securities pursuant to the preceding sentence, equity securities which they owned immediately before the reorganization as shareholders of another party to the transaction shall be disregarded. For the purpose of this section only, the voting power of a corporation shall be calculated by assuming the conversion of all equity securities convertible (immediately or at some future time) into shares entitled to vote but not assuming the exercise of any warrant or right to subscribe to or purchase those shares.

(c) Notwithstanding subdivision (b), the principal terms of a reorganization shall be approved by the outstanding shares (Section 152) of the surviving corporation in a merger reorganization if any amendment is made to its articles which would otherwise require that approval.

(d) Notwithstanding subdivision (b), the principal terms of a reorganization shall be approved by the outstanding shares (Section 152) of any class of a corporation which is a party to a merger or sale-of-assets reorganization if holders of shares of that class receive shares of the surviving or acquiring corporation or parent party having different rights, preferences, privileges or restrictions than those surrendered. Shares in a foreign corporation received in exchange for shares in a domestic corporation have different rights, preferences, privileges and restrictions within the meaning of the preceding sentence.

(e) Notwithstanding subdivisions (a) and (b), the principal terms of a reorganization shall be approved by the affirmative vote of at least two-thirds of each class of the outstanding shares of any close corporation if the reorganization would result in their receiving shares of a corporation which is not a close corporation. However, the articles may provide for a lesser vote, but not less than a majority of the outstanding shares of each class.

(f) Notwithstanding subdivisions (a) and (b), the principal terms of a reorganization shall be approved by the outstanding shares (Section 152) of any class of a corporation which is a party to a merger reorganization if holders of shares of that class receive interests of a surviving other business entity in the merger.

(g) Notwithstanding subdivisions (a) and (b), the principal terms of a reorganization shall be approved by all shareholders of any class or series if, as a result of the reorganization, the holders of that class or series become personally liable for any obligations of a party to the reorganization, unless all holders of that class or series have the dissenters' rights provided in Chapter 13 (commencing with Section 1300).

(h) Any approval required by this section may be given before or after the approval by the board. Notwithstanding approval required by this section, the board may abandon the proposed reorganization without further action by the shareholders, subject to the contractual rights, if any, of third parties.

X. *§ 1300. Shareholder in short-form merger; Purchase at fair market value; "Dissenting shares"; "Dissenting shareholder"*

(a) If the approval of the outstanding shares (Section 152) of a corporation is required for a reorganization under subdivisions (a) and (b) or subdivision (e) or (f) of Section 1201, each shareholder of the corporation entitled to vote on the transaction and each shareholder of a subsidiary corporation in a short-form merger may, by complying with this chapter, require the corporation in which the shareholder holds shares to purchase for cash at their fair market value the shares owned by the shareholder which are dissenting shares as defined in subdivision (b). The fair market value shall be determined as of the day before the first announcement of the terms of the proposed reorganization or short-form merger, excluding any appreciation or depreciation in consequence of the proposed action, but adjusted for any stock split, reverse stock split, or share dividend which becomes effective thereafter.

(b) As used in this chapter, "dissenting shares" means shares which come within all of the following descriptions:

(1) Which were not immediately prior to the reorganization or short-form merger either (A) listed on any national securities exchange certified by the Commissioner of Corporations under subdivision (o) of Section 25100 or (B) listed on the National Market System of the NASDAQ Stock Market, and the notice of meeting of shareholders to act upon the reorganization summarizes this section and Sections 1301, 1302, 1303 and 1304; provided, however, that this provision does not apply to any shares with respect to which there exists any restriction on transfer imposed by the corporation or by any law or regulation; and provided, further, that this provision does not apply to any class of shares described in subparagraph (A) or (B) if demands for payment are filed with respect to 5 percent or more of the outstanding shares of that class.

(2) Which were outstanding on the date for the determination of shareholders entitled to vote on the reorganization and (A) were not voted in favor of the reorganization or, (B) if described in subparagraph (A) or (B) of paragraph (1) (without regard to the provisos in that paragraph), were voted against the reorganization, or which were held of record on the effective date of a short-form merger; provided, however, that subparagraph (A) rather than subparagraph (B) of this paragraph applies in any case where the approval required by Section 1201 is sought by written consent rather than at a meeting.

(3) Which the dissenting shareholder has demanded that the corporation purchase at their fair market value, in accordance with Section 1301.

(4) Which the dissenting shareholder has submitted for endorsement, in accordance with Section 1302.

(c) As used in this chapter, "dissenting shareholder" means the record holder of dissenting shares and includes a transferee of record.

Y. *§ 1301. Notice to holder of dissenting shares of reorganization approval; Demand for purchase of shares; Contents of demand*

(a) If, in the case of a reorganization, any shareholders of a corporation have a right under Section 1300, subject to compliance with paragraphs (3) and (4) of subdivision (b) thereof, to require the corporation to purchase their shares for cash, such corporation shall mail to each such shareholder a notice of the approval of the reorganization by its outstanding shares (Section 152) within 10 days after the date of such approval, accompanied by a copy of Sections 1300, 1302, 1303, 1304 and this section, a statement of the price determined by the corporation to represent the fair market value of the dissenting shares, and a brief description of the procedure to be followed if the shareholder desires to exercise the shareholder's right under such sections. The statement of price

constitutes an offer by the corporation to purchase at the price stated any dissenting shares as defined in subdivision (b) of Section 1300, unless they lose their status as dissenting shares under Section 1309.

(b) Any shareholder who has a right to require the corporation to purchase the shareholder's shares for cash under Section 1300, subject to compliance with paragraphs (3) and (4) of subdivision (b) thereof, and who desires the corporation to purchase such shares shall make written demand upon the corporation for the purchase of such shares and payment to the shareholder in cash of their fair market value. * * *

Z. ***§ 1302. Stamping or endorsing dissenting shares*** ***

AA. ***§ 1303. Dissenting shareholder entitled to agreed price with interest thereon; When price to be paid*** ***

BB. ***§ 1304. Action by dissenters to determine whether shares are dissenting shares or fair market value of dissenting shares or both; Joinder of shareholders; Consolidation of actions; Determination of issues; Appointment of appraisers***

(a) If the corporation denies that the shares are dissenting shares, or the corporation and the shareholder fail to agree upon the fair market value of the shares, then the shareholder demanding purchase of such shares as dissenting shares or any interested corporation, within six months after the date on which notice of the approval by the outstanding shares (Section 152) or notice pursuant to subdivision (i) of Section 1110 was mailed to the shareholder, but not thereafter, may file a complaint in the superior court of the proper county praying the court to determine whether the shares are dissenting shares or the fair market value of the dissenting shares or both or may intervene in any action pending on such a complaint. * * *

CC. ***§ 1305. Duty and report of appraisers; Court's confirmation of report; Determination of fair market value by court; Judgment and payment; Appeal; Costs of action*** ***

DD. ***§ 1306. Prevention of payment to holders of dissenting shares of fair market value; Effect*** ***

EE. ***§ 1307. Disposition of dividends upon dissenting shares*** ***

FF. ***§ 1308. Rights and privileges of dissenting shares; Withdrawal of demand for payment*** ***

GG. ***§ 1309. When dissenting shares lose their status*** ***

HH. ***§ 1310. Suspension of proceedings for compensation or valuation pending litigation*** ***

II. ***§ 1311. Shares to which chapter inapplicable***

This chapter, except Section 1312, does not apply to classes of shares whose terms and provisions specifically set forth the amount to be paid in respect to such shares in the event of a reorganization or merger.

JJ. ***§ 1312. Attack on validity of reorg or short-form merger; Rights of shareholders; Burden of proof***

(a) No shareholder of a corporation who has a right under this chapter to demand payment of cash for the shares held by the shareholder shall have any right at law or in equity to attack the validity of the reorganization or short-form merger, or to have the reorganization or short-form merger set aside or rescinded, except in an action to test whether the number of shares required to authorize or approve the reorganization have been legally voted in favor thereof; but any holder of shares of a class whose terms and provisions specifically set forth the amount to be paid in respect to them in the event of a reorganization or short-form merger is entitled to payment in accordance with those terms and provisions or, if the principal terms of the reorganization are approved pursuant to subdivision

(b) of Section 1202, is entitled to payment in accordance with the terms and provisions of the approved reorganization.

(b) If one of the parties to a reorganization or short-form merger is directly or indirectly controlled by, or under common control with, another party to the reorganization or short-form merger, subdivision (a) shall not apply to any shareholder of such party who has not demanded payment of cash for such shareholder's shares pursuant to this chapter; but if the shareholder institutes any action to attack the validity of the reorganization or short-form merger or to have the reorganization or short-form merger set aside or rescinded, the shareholder shall not thereafter have any right to demand payment of cash for the shareholder's shares pursuant to this chapter. The court in any action attacking the validity of the reorganization or short-form merger or to have the reorganization or short-form merger set aside or rescinded shall not restrain or enjoin the consummation of the transaction except upon 10 days' prior notice to the corporation and upon a determination by the court that clearly no other remedy will adequately protect the complaining shareholder or the class of shareholders of which such shareholder is a member.

(c) If one of the parties to a reorganization or short-form merger is directly or indirectly controlled by, or under common control with, another party to the reorganization or short-form merger, in any action to attack the validity of the reorganization or short-form merger or to have the reorganization or short-form merger set aside or rescinded, (1) a party to a reorganization or short-form merger which controls another party to the reorganization or short-form merger shall have the burden of proving that the transaction is just and reasonable as to the shareholders of the controlled party, and (2) a person who controls two or more parties to a reorganization shall have the burden of proving that the transaction is just and reasonable as to the shareholders of any party so controlled.

KK. *§ 1900. Dissolution elections by vote of shareholders; Election by approval of board*

(a) Any corporation may elect voluntarily to wind up and dissolve by the vote of shareholders holding shares representing 50 percent or more of the voting power. * * *

CHAPTER 4 DELAWARE GENERAL CORPORATION LAW

[*See* Principally Chapters 2, 3, 22 and 23 of 26 of Business Planning for Mergers and Acquisitions]

A. *§ 101. Incorporators; how corporation formed; purposes*

(a) Any person, partnership, association or corporation, singly or jointly with others, and without regard to such person's or entity's residence, domicile or state of incorporation, may incorporate or organize a corporation under this chapter by filing with the Division of Corporations in the Department of State a certificate of incorporation which shall be executed, acknowledged and filed in accordance with § 103 of this title.

(b) A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this State.

(c) Corporations for constructing, maintaining and operating public utilities, whether in or outside of this State, may be organized under this chapter, but corporations for constructing, maintaining and operating public utilities within this State shall be subject to, in addition to this chapter, the special provisions and requirements of Title 26 applicable to such corporations.

B. *§ 102. Contents of certificate of incorporation*

(a) The certificate of incorporation shall set forth:

(1) The name of the corporation, which (i) shall contain 1 of the words "association," "company," "corporation, …

(2) The address (which shall include the street, number, city and county) of the corporation's registered office in this State, and the name of its registered agent at such address;

(3) The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any;

(4) If the corporation is to be authorized to issue only 1 class of stock, the total number of shares of stock which the corporation shall have authority to issue and the par value of each of such shares, or a statement that all such shares are to be without par value. If the corporation is to be authorized to issue more than 1 class of stock, the certificate of incorporation shall set forth the total number of shares of all classes of stock which the corporation shall have authority to issue and the number of shares of each class and shall specify each class the shares of which are to be without par value and each class the shares of which are to have par value and the par value of the shares of each such class. The certificate of incorporation shall also set forth a statement of the designations and the powers, preferences and rights, and the qualifications, limitations or restrictions thereof, which are permitted by § 151 of this title in respect of any class or classes of stock or any series of any class of stock of the corporation and the fixing of which by the certificate of incorporation is desired, and an express grant of such authority as it may then be desired to grant to the board of directors to fix by resolution or resolutions any thereof that may be desired but which shall not be fixed by the certificate of incorporation. …

(5) The name and mailing address of the incorporator or incorporators;

(6) If the powers of the incorporator or incorporators are to terminate upon the filing of the certificate of incorporation, the names and mailing addresses of the persons who are to serve as directors until the first annual meeting of stockholders or until their successors are elected and qualify.

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

(1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation; * * *

(4) Provisions requiring for any corporate action, the vote of a larger portion of the stock or of any class or series thereof, or of any other securities having voting power, or a larger number of the directors, than is required by this chapter;

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

(c) It shall not be necessary to set forth in the certificate of incorporation any of the powers conferred on corporations by this chapter. * * *

C. *§ 109. Bylaws*

(a) The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors if they were named in the certificate of incorporation, or, before a corporation has received any payment for any of its stock, by its board of directors. After a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote, or, in the case of a nonstock corporation, in its members entitled to vote; provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body by whatever name designated. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

(b) The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

D. *§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonprofit corporations; reliance upon books; action without meeting; removal*

(a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.

(c) * * *

(2) The board of directors may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by this chapter to be submitted to stockholders for approval or (ii) adopting, amending or repealing any bylaw of the corporation.

(3) Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, a committee may create 1 or more subcommittees, each subcommittee to consist of 1 or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

(d) The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the annual meeting next ensuing; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification and election, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire. * * *

(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation. * * *

(k) Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, except as follows:

(1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, shareholders may effect such removal only for cause; or

(2) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no director may be removed without cause if the votes cast against such director's removal would be sufficient to elect such director if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which such director is a part.

Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, this subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole.

E. *§ 142(a). Officers; titles, duties, selection, term; failure to elect; vacancies*

(a) Every corporation organized under this chapter shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws and as may be necessary to enable it to sign instruments and stock certificates which comply with §§ 103(a)(2) and 158 of this title. One of the officers shall have the duty to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose. Any number of offices may be held by the same person unless the certificate of incorporation or bylaws otherwise provide. * * *

F. *§ 144. Interested directors; quorum*

(a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a

corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:

(1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the shareholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.

G. *§ 145. Indemnification of officers, directors, employees and agents; insurance*

(a) A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful. * * *

(g) A corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under this section. * * *

H. *§ 146. Submission of matters for stockholder vote*

A corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the stockholders reject or vote against the matter.

I. *§ 154. Determination of amount of capital; capital, surplus and net assets defined*

Any corporation may, by resolution of its board of directors, determine that only a part of the consideration which shall be received by the corporation for any of the shares of its capital stock which it shall issue from time to time shall be capital; but, in case any of the shares issued shall be shares having a par value, the amount of the part of such consideration so determined to be capital shall be in excess of the aggregate par value of the shares issued for such consideration having a par value, unless all the shares issued shall be shares having a par value, in which case the amount of the part of such consideration so determined to be capital need be only equal to the aggregate par value of

such shares. * * *

J. *§ 157. Rights and options respecting stock*

(a) Subject to any provisions in the certificate of incorporation, every corporation may create and issue, whether or not in connection with the issue and sale of any shares of stock or other securities of the corporation, rights or options entitling the holders thereof to acquire from the corporation any shares of its capital stock of any class or classes, such rights or options to be evidenced by or in such instrument or instruments as shall be approved by the board of directors.

(b) The terms upon which, including the time or times which may be limited or unlimited in duration, at or within which, and the consideration (including a formula by which such consideration may be determined) for which any such shares may be acquired from the corporation upon the exercise of any such right or option, shall be such as shall be stated in the certificate of incorporation, or in a resolution adopted by the board of directors providing for the creation and issue of such rights or options, and, in every case, shall be set forth or incorporated by reference in the instrument or instruments evidencing such rights or options. In the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive. * * *

K. *§ 160. Corporation's powers respecting ownership, voting, etc., of its own stock; rights of stock called for redemption*

(a) Every corporation may purchase, redeem, receive, take or otherwise acquire, own and hold, sell, lend, exchange, transfer or otherwise dispose of, pledge, use and otherwise deal in and with its own shares; provided, however, that no corporation shall:

(1) Purchase or redeem its own shares of capital stock for cash or other property when the capital of the corporation is impaired or when such purchase or redemption would cause any impairment of the capital of the corporation, * * *

L. *§ 170. Dividends; payment; wasting asset corporations*

(a) The directors of every corporation, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends upon the shares of its capital stock, * * * either (1) out of its surplus, as defined in and computed in accordance with §§ 154 and 244 of this title, or (2) in case there shall be no such surplus, out of its net profits for the fiscal year in which the dividend is declared and/or the preceding fiscal year. * * *

M. *§ 172. Liability of directors and committee members as to dividends or stock redemption*

A member of the board of directors, or a member of any committee designated by the board of directors, shall be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of its officers or employees, or committees of the board of directors, or by any other person as to matters the director reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation, as to the value and amount of the assets, liabilities and/or net profits of the corporation or any other facts pertinent to the existence and amount of surplus or other funds from which dividends might properly be declared and paid, or with which the corporation's stock might properly be purchased or redeemed.

N. *§ 173. Declaration and payment of dividends*

No corporation shall pay dividends except in accordance with this chapter. Dividends may be paid in cash, in property, or in shares of the corporation's capital stock. If the dividend is to be paid in shares of the corporation's theretofore unissued capital stock the board of directors shall, by resolution, direct that there be designated as capital in respect of such shares an amount which is not less than the aggregate par value of par value being declared as a

dividend and, in the case of shares without par value being declared as a dividend, such amount as shall be determined by the board of directors. No such designation as capital shall be necessary if shares are being distributed by a corporation pursuant to a split-up or division of its stock rather than as payment of a dividend declared payable in stock of the corporation.

O. *§ 174. Liability of directors for unlawful payment of dividend or unlawful stock purchase or redemption; exoneration from liability; contribution among directors; subrogation*

(a) In case of any wilful or negligent violation of § 160 or 173 of this title, the directors under whose administration the same may happen shall be jointly and severally liable, at any time within 6 years after paying such unlawful dividend or after such unlawful stock purchase or redemption, to the corporation, and to its creditors in the event of its dissolution or insolvency, to the full amount of the dividend unlawfully paid, or to the full amount unlawfully paid for the purchase or redemption of the corporation's stock, with interest from the time such liability accrued. * * *

P. *§ 203. Business combinations with interested stockholders*

(a) Notwithstanding any other provisions of this chapter, a corporation shall not engage in any business combination with any interested stockholder for a period of 3 years following the time that such stockholder became an interested stockholder, unless:

(1) Prior to such time the board of directors of the corporation approved either the business combination or the transaction which resulted in the stockholder becoming an interested stockholder;

(2) Upon consummation of the transaction which resulted in the stockholder becoming an interested stockholder, the interested stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding for purposes of determining the voting stock outstanding (but not the outstanding voting stock owned by the interested stockholder) those shares owned (i) by persons who are directors and also officers and (ii) employee stock plans in which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer; or

(3) At or subsequent to such time the business combination is approved by the board of directors and authorized at an annual or special meeting of stockholders, and not by written consent, by the affirmative vote of at least 66 2/3% of the outstanding voting stock which is not owned by the interested stockholder.

(b) The restrictions contained in this section shall not apply if:

(1) The corporation's original certificate of incorporation contains a provision expressly electing not to be governed by this section;

(2) The corporation, by action of its board of directors, adopts an amendment to its bylaws within 90 days of February 2, 1988, expressly electing not to be governed by this section, which amendment shall not be further amended by the board of directors;

(3) The corporation, by action of its stockholders, adopts an amendment to its certificate of incorporation or bylaws expressly electing not to be governed by this section; provided that, in addition to any other vote required by law, such amendment to the certificate of incorporation or bylaws must be approved by the affirmative vote of a majority of the shares entitled to vote. An amendment adopted pursuant to this paragraph shall be effective immediately in the case of a corporation that both (i) has never had a class of voting stock that falls within any of the 3 categories set out in subsection (b)(4) hereof, and (ii) has not elected by a provision in its original certificate of incorporation or any amendment thereto to be governed by this section. In all other cases, an amendment adopted pursuant to this paragraph shall not be effective until 12 months after the adoption of such amendment and shall not apply to any business combination between such corporation and any person who became an interested stockholder of such corporation on or prior to such adoption. A bylaw amendment adopted pursuant to this paragraph shall not be further amended by the board of directors;

(4) The corporation does not have a class of voting stock that is: (i) Listed on a national securities exchange; (ii) authorized for quotation on The NASDAQ Stock Market; or (iii) held of record by more than 2,000 stockholders, unless any of the foregoing results from action taken, directly or indirectly, by an interested stockholder or from a transaction in which a person becomes an interested stockholder;

(5) A stockholder becomes an interested stockholder inadvertently and (i) as soon as practicable

divests itself of ownership of sufficient shares so that the stockholder ceases to be an interested stockholder; and (ii) would not, at any time within the 3-year period immediately prior to a business combination between the corporation and such stockholder, have been an interested stockholder but for the inadvertent acquisition of ownership;

(6) The business combination is proposed prior to the consummation or abandonment of and subsequent to the earlier of the public announcement or the notice required hereunder of a proposed transaction which (i) constitutes one of the transactions described in the 2nd sentence of this paragraph; (ii) is with or by a person who either was not an interested stockholder during the previous 3 years or who became an interested stockholder with the approval of the corporation's board of directors or during the period described in paragraph (7) of this subsection (b); and (iii) is approved or not opposed by a majority of the members of the board of directors then in office (but not less than 1) who were directors prior to any person becoming an interested stockholder during the previous 3 years or were recommended for election or elected to succeed such directors by a majority of such directors. The proposed transactions referred to in the preceding sentence are limited to (x) a merger or consolidation of the corporation (except for a merger in respect of which, pursuant to § 251(f) of this title, no vote of the stockholders of the corporation is required); (y) a sale, lease, exchange, mortgage, pledge, transfer or other disposition (in 1 transaction or a series of transactions), whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation (other than to any direct or indirect wholly-owned subsidiary or to the corporation) having an aggregate market value equal to 50% or more of either that aggregate market value of all of the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation; or (z) a proposed tender or exchange offer for 50% or more of the outstanding voting stock of the corporation. The corporation shall give not less than 20 days' notice to all interested stockholders prior to the consummation of any of the transactions described in clause (x) or (y) of the 2nd sentence of this paragraph; or

(7) The business combination is with an interested stockholder who became an interested stockholder at a time when the restrictions contained in this section did not apply by reason of any of paragraphs (1) through (4) of this subsection (b), provided, however, that this paragraph (7) shall not apply if, at the time such interested stockholder became an interested stockholder, the corporation's certificate of incorporation contained a provision authorized by the last sentence of this subsection (b).

Notwithstanding paragraphs (1), (2), (3) and (4) of this subsection, a corporation may elect by a provision of its original certificate of incorporation or any amendment thereto to be governed by this section; provided that any such amendment to the certificate of incorporation shall not apply to restrict a business combination between the corporation and an interested stockholder of the corporation if the interested stockholder became such prior to the effective date of the amendment.

(c) As used in this section only, the term:

(1) "Affiliate" means a person that directly, or indirectly through 1 or more intermediaries, controls, or is controlled by, or is under common control with, another person.

(2) "Associate," when used to indicate a relationship with any person, means: (i) Any corporation, partnership, unincorporated association or other entity of which such person is a director, officer or partner or is, directly or indirectly, the owner of 20% or more of any class of voting stock; (ii) any trust or other estate in which such person has at least a 20% beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and (iii) any relative or spouse of such person, or any relative of such spouse, who has the same residence as such person.

(3) "Business combination," when used in reference to any corporation and any interested stockholder of such corporation, means:

(i) Any merger or consolidation of the corporation or any direct or indirect majority-owned subsidiary of the corporation with (A) the interested stockholder, or (B) with any other corporation, partnership, unincorporated association or other entity if the merger or consolidation is caused by the interested stockholder and as a result of such merger or consolidation subsection (a) of this section is not applicable to the surviving entity;

(ii) Any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in 1 transaction or a series of transactions), except proportionately as a stockholder of such corporation, to or with the interested stockholder, whether as part of a dissolution or otherwise, of assets of the corporation or of any direct or indirect majority-owned subsidiary of the corporation which assets have an aggregate market value equal to 10% or more of either the aggregate market value of all the assets of the corporation determined on a consolidated basis or the aggregate market value of all the outstanding stock of the corporation;

(iii) Any transaction which results in the issuance or transfer by the corporation or by any direct or indirect majority-owned subsidiary of the corporation of any stock of the corporation or of such subsidiary to the interested stockholder, except: (A) Pursuant to the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which securities were outstanding prior to the time that the interested stockholder became such; (B) pursuant to a merger under § 251(g) of this title; (C) pursuant to a dividend or distribution paid or made, or the exercise, exchange or conversion of securities exercisable for, exchangeable for or convertible into stock of such corporation or any such subsidiary which security is distributed, pro rata to all holders of a class or series of stock of such corporation subsequent to the time the interested stockholder became such; (D) pursuant to an exchange offer by the corporation to purchase stock made on the same terms to all holders of said stock; or (E) any issuance or transfer of stock by the corporation; provided however, that in no case under items (C)-(E) of this subparagraph shall there be an increase in the interested stockholder's proportionate share of the stock of any class or series of the corporation or of the voting stock of the corporation;

(iv) Any transaction involving the corporation or any direct or indirect majority-owned subsidiary of the corporation which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series, or securities convertible into the stock of any class or series, of the corporation or of any such subsidiary which is owned by the interested stockholder, except as a result of immaterial changes due to fractional share adjustments or as a result of any purchase or redemption of any shares of stock not caused, directly or indirectly, by the interested stockholder; or

(v) Any receipt by the interested stockholder of the benefit, directly or indirectly (except proportionately as a stockholder of such corporation), of any loans, advances, guarantees, pledges or other financial benefits (other than those expressly permitted in subparagraphs (i)-(iv) of this paragraph) provided by or through the corporation or any direct or indirect majority-owned subsidiary.

(4) "Control," including the terms "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary; Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for 1 or more owners who do not individually or as a group have control of such entity.

(5) "Interested stockholder" means any person (other than the corporation and any direct or indirect majority-owned subsidiary of the corporation) that (i) is the owner of 15% or more of the outstanding voting stock of the corporation, or (ii) is an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock of the corporation at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder, and the affiliates and associates of such person; provided, however, that the term "interested stockholder" shall not include (x) any person who (A) owned shares in excess of the 15% limitation set forth herein as of, or acquired such shares pursuant to a tender offer commenced prior to, December 23, 1987, or pursuant to an exchange offer announced prior to the aforesaid date and commenced within 90 days thereafter and either (I) continued to own shares in excess of such 15% limitation or would have but for action by the corporation or (II) is an affiliate or associate of the corporation and so continued (or so would have continued but for action by the corporation) to be the owner of 15% or more of the outstanding voting stock of the corporation at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such a person is an interested stockholder or (B) acquired said shares from a person described in item (A) of this paragraph by gift, inheritance or in a transaction in which no consideration was exchanged; or (y) any person whose ownership of shares in excess of the 15% limitation set forth herein is the result of action taken solely by the corporation; provided that such person shall be an interested stockholder if thereafter such person acquires additional shares of voting stock of the corporation, except as a result of further corporate action not caused, directly or indirectly, by such person. For the purpose of determining whether a person is an interested stockholder, the voting stock of the corporation deemed to be outstanding shall include stock deemed to be owned by the

person through application of paragraph (9) of this subsection but shall not include any other unissued stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(6) "Person" means any individual, corporation, partnership, unincorporated association or other entity.

(7) "Stock" means, with respect to any corporation, capital stock and, with respect to any other entity, any equity interest.

(8) "Voting stock" means, with respect to any corporation, stock of any class or series entitled to vote generally in the election of directors and, with respect to any entity that is not a corporation, any equity interest entitled to vote generally in the election of the governing body of such entity. Every reference to a percentage of voting stock shall refer to such percentage of the votes of such voting stock.

(9) "Owner," including the terms "own" and "owned," when used with respect to any stock, means a person that individually or with or through any of its affiliates or associates:

(i) Beneficially owns such stock, directly or indirectly; or

(ii) Has (A) the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement or understanding, or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or (B) the right to vote such stock pursuant to any agreement, arrangement or understanding; provided, however, that a person shall not be deemed the owner of any stock because of such person's right to vote such stock if the agreement, arrangement or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made to 10 or more persons; or

(iii) Has any agreement, arrangement or understanding for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in item (B) of subparagraph (ii) of this paragraph), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

(d) No provision of a certificate of incorporation or bylaw shall require, for any vote of stockholders required by this section, a greater vote of stockholders than that specified in this section.

(e) The Court of Chancery is hereby vested with exclusive jurisdiction to hear and determine all matters with respect to this section.

Q. § 211. Meetings of stockholders

(a) (1) Meetings of stockholders may be held at such place, either within or without this State as may be designated by or in the manner provided in the certificate of incorporation or bylaws, or if not so designated, as determined by the board of directors. * * *

(b) Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws. Stockholders may, unless the certificate of incorporation otherwise provides, act by written consent to elect directors; provided, however, that, if such consent is less than unanimous, such action by written consent may be in lieu of holding an annual meeting only if all of the directorships to which directors could be elected at an annual meeting held at the effective time of such action are vacant and are filled by such action. Any other proper business may be transacted at the annual meeting. * * *

(d) Special meetings of the stockholders may be called by the board of directors or by such person or persons as may be authorized by the certificate of incorporation or by the bylaws. * * *

R. § 220. Inspection of books and records

(a) As used in this section:

(1) "List of stockholders" includes lists of members in a nonstock corporation.

(2) "Stockholder" means a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person, and also a member of a nonstock corporation as reflected on the records of the nonstock

corporation.

(3) "Subsidiary" means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures.

(4) "Under oath" includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

(1) The corporation's stock ledger, a list of its stockholders, and its other books and records; * * *

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection (b) of this section or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. * * *

S. *§ 225. Contested election of directors; proceedings to determine validity*

(a) Upon application of any stockholder or director, or any officer whose title to office is contested, or any member of a corporation without capital stock, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director, member of the governing body, or officer of any corporation, and the right of any person to hold or continue to hold such office, and, in case any such office is claimed by more than 1 person, may determine the person entitled thereto; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the corporation relating to the issue. * * *

T. *§ 228. Consent of stockholders or members in lieu of meeting*

(a) Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted and shall be delivered to the corporation by delivery to its registered office in this State, its principal place of business or an officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded. * * *

U. *§ 242(b). Amendment of certificate of incorporation after receipt of payment for stock; nonstock corporations*

(b) Every amendment authorized by subsection (a) of this section shall be made and effected in the following manner:

(1) If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders. Such special or annual meeting shall be called and held upon notice in accordance with § 222 of this title. The notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby, as the directors shall deem advisable. At the meeting a vote of the stockholders entitled to vote thereon shall be taken for and against the proposed amendment. If a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with this section shall be executed, acknowledged and filed and shall become effective in accordance with § 103 of this title.

(2) The holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would

increase or decrease the aggregate number of authorized shares of such class, increase or decrease the par value of the shares of such class, or alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely. * * *

V. *§ 251. Merger or consolidation of domestic corporations and limited liability company*

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) in the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation; (4) in the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the agreement; (5) the manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and (6) such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with § 155 of this title. The agreement so adopted shall be executed and acknowledged in accordance with § 103 of this title. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement required by subsection (b) of this section shall be submitted to the stockholders of each constituent corporation at an annual or special meeting for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or nonvoting, of the corporation at the stockholder's address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. The notice shall contain a copy of the agreement or a brief summary thereof, as the directors shall deem advisable. At the meeting, the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation. If the agreement shall be so adopted and certified by each constituent corporation, it shall then be filed and shall become effective, in accordance with § 103 of this title. In lieu of filing the agreement of merger or consolidation required by this section, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title, which states:

(1) The name and state of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with this section;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving

corporation, stating the address thereof; and

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations; in the event the agreement of merger or consolidation is terminated after the filing of the agreement (or a certificate in lieu thereof) with the Secretary of State but before the agreement (or a certificate in lieu thereof) has become effective, a certificate of termination or merger or consolidation shall be filed in accordance with § 103 of this title. Any agreement of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the agreement at any time prior to the time that the agreement (or a certificate in lieu thereof) filed with the Secretary of State becomes effective in accordance with § 103 of this title, provided that an amendment made subsequent to the adoption of the agreement by the stockholders of any constituent corporation shall not (1) alter or change the amount or kind of shares, securities, cash, property and/or rights to be received in exchange for or on conversion of all or any of the shares of any class or series thereof of such constituent corporation, (2) alter or change any term of the certificate of incorporation of the surviving corporation to be effected by the merger or consolidation, or (3) alter or change any of the terms and conditions of the agreement if such alteration or change would adversely affect the holders of any class or series thereof of such constituent corporation; in the event the agreement of merger or consolidation is amended after the filing thereof with the Secretary of State but before the agreement has become effective, a certificate of amendment of merger or consolidation shall be filed in accordance with § 103 of this title.

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c) of this section, unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the effective date of the merger is to be an identical outstanding or treasury share of the surviving corporation after the effective date of the merger, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20% of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger. No vote of stockholders of a constituent corporation shall be necessary to authorize a merger or consolidation if no shares of the stock of such corporation shall have been issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and, (1) if it has been adopted pursuant to the first sentence of this subsection, that the conditions specified in that sentence have been satisfied, or (2) if it has been adopted pursuant to the second sentence of this subsection, that no shares of stock of such corporation were issued prior to the adoption by the board of directors of the resolution approving the agreement of merger or consolidation. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

(g) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent entities to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of share of capital stock of a holding company having the same designations, rights, powers and preferences, and the qualifications, limitations and restrictions thereof, as the share of stock of the constituent corporation being converted in the merger; (3) the holding company and the constituent corporation are corporations

of this State and the direct or indirect wholly-owned subsidiary that is the other constituent entity to the merger is a corporation or limited liability company of this State; (4) the certificate of incorporation and by-laws of the holding company immediately following the effective time of the merger contain provisions identical to the certificate of incorporation and by-laws of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination, or cancellation has become effective); (5) as a result of the merger the constituent corporation or its successor becomes or remains a direct or indirect wholly-owned subsidiary of the holding company; (6) the directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger; (7) the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the effective time of the merger …

(h) Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation whose shares are listed on a national securities exchange or held of record by more than 2,000 holders immediately prior to the execution of the agreement of merger by such constituent corporation shall be necessary to authorize a merger if:

(1) The agreement of merger expressly:

a. Permits or requires such merger to be effected under this subsection; and

b. Provides that such merger shall be effected as soon as practicable following the consummation of the offer referred to in paragraph (h)(2) of this section if such merger is effected under this subsection;

(2) A corporation consummates a tender or exchange offer for any and all of the outstanding stock of such constituent corporation on the terms provided in such agreement of merger that, absent this subsection, would be entitled to vote on the adoption or rejection of the agreement of merger; provided, however, that such offer may exclude stock of such constituent corporation that is owned at the commencement of such offer by:

a. Such constituent corporation;

b. The corporation making such offer;

c. Any person that owns, directly or indirectly, all of the outstanding stock of the corporation making such offer; or

d. Any direct or indirect wholly-owned subsidiary of any of the foregoing;

(3) Following the consummation of the offer referred to in paragraph (h)(2) of this section, the stock irrevocably accepted for purchase or exchange pursuant to such offer and received by the depository prior to expiration of such offer, plus the stock otherwise owned by the consummating corporation equals at least such percentage of the stock, and of each class or series thereof, of such constituent corporation that, absent this subsection, would be required to adopt the agreement of merger by this chapter and by the certificate of incorporation of such constituent corporation;

(4) The corporation consummating the offer referred to in paragraph (h)(2) of this section merges with or into such constituent corporation pursuant to such agreement; and

(5) Each outstanding share of each class or series of stock of the constituent corporation that is the subject of and not irrevocably accepted for purchase or exchange in the offer referred to in paragraph (h)(2) of this section is to be converted in such merger into, or into the right to receive, the same amount and kind of cash, property, rights or securities to be paid for shares of such class or series of stock of such constituent corporation irrevocably accepted for purchase or exchange in such offer.

(6) As used in this section only, the term:

a. "Consummates" (and with correlative meaning, "consummation" and "consummating") means irrevocably accepts for purchase or exchange stock tendered pursuant to a tender or exchange offer;

b. "Depository" means an agent, including a depository, appointed to facilitate consummation of the offer referred to in paragraph (h)(2) of this section;

c. "Person" means any individual, corporation, partnership, limited liability company, unincorporated association or other entity; and

d. "Received" (solely for purposes of paragraph (h)(3) of this section) means physical receipt of a stock certificate in the case of certificated shares and transfer into the depository's account, or an agent's message being received by the depository, in the case of uncertificated shares.

If an agreement of merger is adopted without the vote of stockholders of a corporation pursuant to this subsection,

the secretary or assistant secretary of the surviving corporation shall certify on the agreement that the agreement has been adopted pursuant to this subsection and that the conditions specified in this subsection (other than the condition listed in paragraph (h)(4) of this section) have been satisfied; provided that such certification on the agreement shall not be required if a certificate of merger is filed in lieu of filing the agreement. The agreement so adopted and certified shall then be filed and shall become effective, in accordance with § 103 of this title. Such filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing.

W. § 252. Merger or consolidation of domestic and foreign corporations; service of process upon surviving or resulting corporation

(a) Any 1 or more corporations of this State may merge or consolidate with 1 or more other corporations of any other state or states of the United States, or of the District of Columbia if the laws of the other state or states, or of the District permit a corporation of such jurisdiction to merge or consolidate with a corporation of another jurisdiction. The constituent corporations may merge into a single corporation, which may be any 1 of the constituent corporations, or they may consolidate into a new corporation formed by the consolidation, which may be a corporation of the state of incorporation of any 1 of the constituent corporations, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section. In addition, any 1 or more corporations existing under the laws of this State may merge or consolidate with 1 or more corporations organized under the laws of any jurisdiction other than 1 of the United States if the laws under which the other corporation or corporations are organized permit a corporation of such jurisdiction to merge or consolidate with a corporation of another jurisdiction.

(b) All the constituent corporations shall enter into an agreement of merger or consolidation. The agreement shall state: (1) The terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) the manner, if any, of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, or of cancelling some or all of such shares, and, if any shares of any of the constituent corporations are not to remain outstanding, to be converted solely into shares or other securities of the surviving or resulting corporation or to be cancelled, the cash, property, rights or securities of any other corporation or entity which the holders of such shares are to receive in exchange for, or upon conversion of, such shares and the surrender of any certificates evidencing them, which cash, property, rights or securities of any other corporation or entity may be in addition to or in lieu of the shares or other securities of the surviving or resulting corporation; (4) such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares of the surviving or resulting corporation or of any other corporation the securities of which are to be received in the merger or consolidation, or for some other arrangement with respect thereto consistent with § 155 of this title; and (5) such other provisions or facts as shall be required to be set forth in certificates of incorporation by the laws of the state which are stated in the agreement to be the laws that shall govern the surviving or resulting corporation and that can be stated in the case of a merger or consolidation. Any of the terms of the agreement of merger or consolidation may be made dependent upon facts ascertainable outside of such agreement, provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement of merger or consolidation. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation.

(c) The agreement shall be adopted, approved, certified, executed and acknowledged by each of the constituent corporations in accordance with the laws under which it is formed, and, in the case of a Delaware corporation, in the same manner as is provided in § 251 of this title. The agreement shall be filed and shall become effective for all purposes of the laws of this State when and as provided in § 251 of this title with respect to the merger or consolidation of corporations of this State. In lieu of filing the agreement of merger or consolidation, the surviving or resulting corporation may file a certificate of merger or consolidation, executed in accordance with § 103 of this title, which states:

(1) The name and state or jurisdiction of incorporation of each of the constituent corporations;

(2) That an agreement of merger or consolidation has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with this subsection;

(3) The name of the surviving or resulting corporation;

(4) In the case of a merger, such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger, or, if no such amendments or changes are

desired, a statement that the certificate of incorporation of the surviving corporation shall be its certificate of incorporation;

(5) In the case of a consolidation, that the certificate of incorporation of the resulting corporation shall be as is set forth in an attachment to the certificate;

(6) That the executed agreement of consolidation or merger is on file at an office of the surviving corporation and the address thereof;

(7) That a copy of the agreement of consolidation or merger will be furnished by the surviving corporation, on request and without cost, to any stockholder of any constituent corporation;

(8) If the corporation surviving or resulting from the merger or consolidation is to be a corporation of this State, the authorized capital stock of each constituent corporation which is not a corporation of this State; and

(9) The agreement, if any, required by subsection (d) of this section.

(d) If the corporation surviving or resulting from the merger or consolidation is to be governed by the laws of the District of Columbia or any state or jurisdiction other than this State, it shall agree that it may be served with process in this State in any proceeding for enforcement of any obligation of any constituent corporation of this State, as well as for enforcement of any obligation of the surviving or resulting corporation arising from the merger or consolidation, including any suit or other proceeding to enforce the right of any stockholders as determined in appraisal proceedings pursuant to § 262 of this title, and shall irrevocably appoint the Secretary of State as its agent to accept service of process in any such suit or other proceedings and shall specify the address to which a copy of such process shall be mailed by the Secretary of State. In the event of such service upon the Secretary of State in accordance with this subsection, the Secretary of State shall forthwith notify such surviving or resulting corporation thereof by letter, certified mail, return receipt requested, directed to such surviving or resulting corporation at its address so specified, unless such surviving or resulting corporation shall have designated in writing to the Secretary of State a different address for such purpose, in which case it shall be mailed to the last address so designated. Such letter shall enclose a copy of the process and any other papers served on the Secretary of State pursuant to this subsection. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being effected pursuant to this subsection and to pay the Secretary of State the sum of $ 50 for the use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such service setting forth the name of the plaintiff and the defendant, the title, docket number and nature of the proceeding in which process has been served, the fact that service has been effected pursuant to this subsection, the return date thereof, and the day and hour service was made. The Secretary of State shall not be required to retain such information longer than 5 years from receipt of the service of process.

(e) Subsection (d) and the second sentence of subsection (c) of § 251 of this title shall apply to any merger or consolidation under this section; subsection (e) of § 251 of this title shall apply to a merger under this section in which the surviving corporation is a corporation of this State; subsection (f) of § 251 of this title shall apply to any merger under this section.

X. *§ 253. Merger of parent corporation and subsidiary or subsidiaries*

(a) In any case in which at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by § 251(g)(7)(i) of this title), of which class there are outstanding shares that, absent this subsection, would be entitled to vote on such merger, is owned by another corporation and 1 of the corporations is a corporation of this State and the other or others are corporations of this State, or any other state or states, or the District of Columbia and the laws of the other state or states, or the District permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction, the corporation having such stock ownership may either merge the other corporation or corporations into itself and assume all of its or their obligations, or merge itself, or itself and 1 or more of such other corporations, into 1 of the other corporations by executing, acknowledging and filing, in accordance with § 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation, or the cancellation of some or all of such shares. Any of the terms of the resolution of the board of directors to so merge may be made dependent upon

facts ascertainable outside of such resolution, provided that the manner in which such facts shall operate upon the terms of the resolution is clearly and expressly set forth in the resolution. The term "facts," as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, including the corporation. If the parent corporation be not the surviving corporation, the resolution shall include provision for the pro rata issuance of stock of the surviving corporation to the holders of the stock of the parent corporation on surrender of any certificates therefor, and the certificate of ownership and merger shall state that the proposed merger has been approved by a majority of the outstanding stock of the parent corporation entitled to vote thereon at a meeting duly called and held after 20 days' notice of the purpose of the meeting mailed to each such stockholder at the stockholder's address as it appears on the records of the corporation if the parent corporation is a corporation of this State or state that the proposed merger has been adopted, approved, certified, executed and acknowledged by the parent corporation in accordance with the laws under which it is organized if the parent corporation is not a corporation of this State. If the surviving corporation exists under the laws of the District of Columbia or any state or jurisdiction other than this State, subsection (d) of § 252 of this title shall also apply to a merger under this section.

(b) If the surviving corporation is a Delaware corporation, it may change its corporate name by the inclusion of a provision to that effect in the resolution of merger adopted by the directors of the parent corporation and set forth in the certificate of ownership and merger, and upon the effective date of the merger, the name of the corporation shall be so changed.

(c) Subsection (d) of § 251 of this title shall apply to a merger under this section, and subsection (e) of § 251 of this title shall apply to a merger under this section in which the surviving corporation is the subsidiary corporation and is a corporation of this State. References to "agreement of merger" in subsections (d) and (e) of § 251 of this title shall mean for purposes of this subsection the resolution of merger adopted by the board of directors of the parent corporation. Any merger which effects any changes other than those authorized by this section or made applicable by this subsection shall be accomplished under § 251 or § 252 of this title. Section 262 of this title shall not apply to any merger effected under this section, except as provided in subsection (d) of this section.

(d) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under this section is not owned by the parent corporation immediately prior to the merger, the stockholders of the subsidiary Delaware corporation party to the merger shall have appraisal rights as set forth in § 262 of this title.

(e) A merger may be effected under this section although 1 or more of the corporations parties to the merger is a corporation organized under the laws of a jurisdiction other than 1 of the United States; provided that the laws of such jurisdiction permit a corporation of such jurisdiction to merge with a corporation of another jurisdiction.

Y. § 259. Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation

(a) When any merger or consolidation shall have become effective under this chapter, for all purposes of the laws of this State the separate existence of all the constituent corporations, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into 1 of such corporations, as the case may be, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so merged or consolidated; and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the surviving or resulting corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. * * *

Z. *§ 261. Effect of merger upon pending actions*

Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

AA. *§ 262. Appraisal rights*

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation; and the words "depository receipt" mean a receipt or other instrument issued by a depository representing an interest in one or more shares, or fractions thereof, solely of stock of a corporation, which stock is deposited with the depository.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger or consolidation to be effected pursuant to § 251 (other than a merger effected pursuant to § 251(g) of this title), § 252, § 254, § 257, § 258, § 263 or § 264 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock, which stock, or depository receipts in respect thereof, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or (ii) held of record by more than 2,000 holders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of § 251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 257, 258, 263 and 264 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation, or depository receipts in respect thereof;

b. Shares of stock of any other corporation, or depository receipts in respect thereof, which shares of stock (or depository receipts in respect thereof) or depository receipts at the effective date of the merger or consolidation will be either listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc. or held of record by more than 2,000 holders;

c. Cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as

is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders who was such on the record date for such meeting with respect to shares for which appraisal rights are available pursuant to subsection (b) or (c) hereof that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of such stockholder's shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of such stockholder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such stockholder's shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228 or § 253 of this title, then either a constituent corporation before the effective date of the merger or consolidation or the surviving or resulting corporation within 10 days thereafter shall notify each of the holders of any class or series of stock of such constituent corporation who are entitled to appraisal rights of the approval of the merger or consolidation and that appraisal rights are available for any or all shares of such class or series of stock of such constituent corporation, and shall include in such notice a copy of this section. Such notice may, and, if given on or after the effective date of the merger or consolidation, shall, also notify such stockholders of the effective date of the merger or consolidation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of such notice, demand in writing from the surviving or resulting corporation the appraisal of such holder's shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of such holder's shares. If such notice did not notify stockholders of the effective date of the merger or consolidation, either (i) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation or (ii) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date; provided, however, that if such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with this subsection. An affidavit of the secretary or assistant secretary or of the transfer agent of the corporation that is required to give either notice that such notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. For purposes of determining the stockholders entitled to receive either notice, each constituent corporation may fix, in advance, a record date that shall be not more than 10 days prior to the date the notice is given, provided, that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) hereof and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw such stockholder's demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder's written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) hereof, whichever is

later.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted such stockholder's certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that such stockholder is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Interest may be simple or compound, as the Court may direct. Payment shall be so made to each such stockholder, in the case of holders of uncertificated stock forthwith, and the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of such stockholder's demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

BB. *§ 271. Sale, lease or exchange of assets; consideration; procedure*

(a) Every corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or other property, including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon or, if the corporation is a nonstock corporation, by a majority of the members having the right to vote for the election of the members of the governing body, at a meeting duly called upon at least 20 days' notice. The notice of the meeting shall state that such a resolution will be considered.

(b) Notwithstanding authorization or consent to a proposed sale, lease or exchange of a corporation's property and assets by the stockholders or members, the board of directors or governing body may abandon such proposed sale, lease or exchange without further action by the stockholders or members, subject to the rights, if any, of third parties under any contract relating thereto.

(c) For purposes of this section only, the property and assets of the corporation include the property and assets of any subsidiary of the corporation. As used in this subsection, "subsidiary" means any entity wholly-owned and controlled, directly or indirectly, by the corporation and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, and/or statutory trusts. Notwithstanding subsection (a) of this section, except to the extent the certificate of incorporation otherwise provides, no resolution by stockholders or members shall be required for a sale, lease or exchange of property and assets of the corporation to a subsidiary.

CC. *§ 275. Dissolution generally; procedure*

(a) If it should be deemed advisable in the judgment of the board of directors of any corporation that it should be dissolved, the board, after the adoption of a resolution to that effect by a majority of the whole board at any meeting called for that purpose, shall cause notice to be mailed to each stockholder entitled to vote thereon of the adoption of the resolution and of a meeting of stockholders to take action upon the resolution.

(b) At the meeting a vote shall be taken upon the proposed dissolution. If a majority of the outstanding stock of the corporation entitled to vote thereon shall vote for the proposed dissolution, a certification of dissolution shall be filed with the Secretary of State pursuant to subsection (d) of this section.

(c) Dissolution of a corporation may also be authorized without action of the directors if all the stockholders entitled to vote thereon shall consent in writing and a certificate of dissolution shall be filed with the Secretary of State pursuant to subsection (d) of this section.

(d) If dissolution is authorized in accordance with this section, a certificate of dissolution shall be executed, acknowledged and filed, and shall become effective, in accordance with § 103 of this title. Such certificate of dissolution shall set forth:

(1) The name of the corporation;

(2) The date dissolution was authorized;

(3) That the dissolution has been authorized by the board of directors and stockholders of the corporation, in accordance with subsections (a) and (b) of this section, or that the dissolution has been authorized by all of the stockholders of the corporation entitled to vote on a dissolution, in accordance with subsection (c) of this section; and

(4) The names and addresses of the directors and officers of the corporation.

(e) The resolution authorizing a proposed dissolution may provide that notwithstanding authorization or consent to the proposed dissolution by the stockholders, or the members of a nonstock corporation pursuant to § 276 of this title, the board of directors or governing body may abandon such proposed dissolution without further action by the stockholders or members.

(f) Upon a certificate of dissolution becoming effective in accordance with § 103 of this title, the corporation shall be dissolved.

DD. *§ 277. Payment of franchise taxes before dissolution or merger*

No corporation shall be dissolved or merged under this chapter until all franchise taxes due to or assessable

by the State including all franchise taxes due or which would be due or assessable for the entire calendar month during which the dissolution or merger becomes effective have been paid by the corporation.

EE. *§ 278. Continuation of corporation after dissolution for purposes of suit and winding up affairs*

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

CHAPTER 5 PENNSYLVANIA BUSINESS CORPORATION LAW, FUNDAMENTAL CHANGES AND TAKEOVERS

[*See* Principally Chapters 2, 3, and 22 of Business Planning for Mergers and Acquisitions]

A. Shareholder Voting Rights Provisions (Chapter 17):

Shareholders (Subchapter E)

1. § 1756. Quorum.

(a) General rule.--A meeting of shareholders of a business corporation duly called shall not be organized for the transaction of business unless a quorum is present. Unless otherwise provided in a bylaw adopted by the shareholders:

(1) The presence of shareholders entitled to cast at least a majority of the votes that all shareholders are entitled to cast on a particular matter to be acted upon at the meeting shall constitute a quorum for the purposes of consideration and action on the matter.

(2) The shareholders present at a duly organized meeting can continue to do business until adjournment notwithstanding the withdrawal of enough shareholders to leave less than a quorum.

(3) If a meeting cannot be organized because a quorum has not attended, those present may, except as otherwise provided in this subpart, adjourn the meeting to such time and place as they may determine.

(4) If a proxy casts a vote or takes other action on behalf of a shareholder on any issue other than a procedural motion considered at a meeting of shareholders, the shareholder shall be deemed to be present during the entire meeting for purposes of determining whether a quorum is present for consideration of any other issue.

(b) Exceptions.--Unless otherwise provided in a bylaw adopted by the shareholders, those shareholders entitled to vote who attend a meeting of shareholders:

(1) At which directors are to be elected that has been previously adjourned for lack of a quorum, although less than a quorum as fixed in this section or in the bylaws, shall nevertheless constitute a quorum for the purpose of electing directors.

(2) That has been previously adjourned for one or more periods aggregating at least 15 days because of an absence of a quorum, although less than a quorum as fixed in this section or in the bylaws, shall nevertheless constitute a quorum for the purpose of acting upon any matter set forth in the notice of the meeting if the notice states that those shareholders who attend the adjourned meeting shall nevertheless constitute a quorum for the purpose of acting upon the matter.

(c) Cross references.--See sections 2523 (relating to quorum at shareholder meetings) and 3134 (relating to quorum at shareholder or member meetings).

(Dec. 19, 1990, P.L.834, No.198, eff. imd.; Dec. 18, 1992, P.L.1333, No.169, eff. 60 days; June 22, 2001, P.L.418, No.34, eff. 60 days; July 9, 2013, P.L.476, No.67, eff. 60 days)

2013 Amendment. Act 67 amended subsec. (a)(4).
1992 Amendment. Act 169 amended subsec. (b).
1990 Amendment. Act 198 amended subsec. (c).
Cross References. Section 1756 is referred to in sections 1504, 2523, 3134 of this title.

2. § 1758. Voting rights of shareholders.

(a) General rule.--Unless otherwise provided in the articles, every shareholder of a business corporation shall be entitled to one vote for every share standing in his name on the books of the corporation. The articles may restrict the number of votes that a single holder or beneficial owner, or such a group of holders or owners as the bylaws may define, of shares of any class or series may directly or indirectly cast in the aggregate for the election of directors or on any other matter coming before the shareholders on the basis of any facts or circumstances that are not manifestly unreasonable, including without limitation:

(1) the number of shares of any class or series held by such single holder or beneficial owner or group of holders or owners; or

(2) the length of time shares of any class or series have been held by such single holder or beneficial owner or group of holders or owners.

(b) Procedures for election of directors.--Unless otherwise restricted in the bylaws, in elections for directors, voting need not be by ballot unless required by vote of the shareholders before the voting for election of directors begins. The candidates for election as directors receiving the highest number of votes from each class or group of classes, if any, entitled to elect directors separately up to the number of directors to be elected by the class or group of classes shall be elected. If at any meeting of shareholders, directors of more than one class are to be elected, each class of directors shall be elected in a separate election.

(c) Cumulative voting.--

(1) Except as otherwise provided in paragraph (2) or in the articles, in each election of directors every shareholder entitled to vote shall have the right to multiply the number of votes to which he may be entitled by the total number of directors to be elected in the same election by the holders of the class or classes of shares of which his shares are a part and he may cast the whole number of his votes for one candidate or he may distribute them among any two or more candidates.

(2) The shareholders of a corporation not incorporated under the Business Corporation Law of 1933 or this subpart, the shareholders of which were not entitled to cumulate their votes for the election of directors at the date the corporation became subject to the provisions of the Business Corporation Law of 1933 or became or becomes subject to the provisions of this subpart, shall be entitled so to cumulate their votes only if and to the extent its articles so provide.

(d) Redeemable shares.--Unless otherwise provided in the articles, redeemable shares that have been called for redemption shall not be entitled to vote on any matter and shall not be deemed outstanding shares after written notice has been mailed to holders thereof that the shares have been called for redemption and that a sum sufficient to redeem the shares has been deposited with a specified financial institution with irrevocable instruction and authority to pay the redemption price to the holders of the shares on the redemption date, in the case of uncertificated shares, or upon surrender of certificates therefor in the case of certificated shares, and the sum has been so deposited.

(e) Advance notice of nominations and other business.--If the bylaws provide a fair and reasonable procedure for the nomination of candidates for election as directors, only candidates who have been duly nominated in accordance therewith shall be eligible for election. If the bylaws impose a fair and reasonable requirement of advance notice of proposals to be made by a shareholder at the annual meeting of the shareholders, only proposals for which advance notice has been properly given may be acted upon at the meeting.

(Dec. 19, 1990, P.L.834, No.198, eff. imd.; June 22, 2001, P.L.418, No.34, eff. 60 days)

2001 Amendment. Act 34 amended subsec. (b) and added subsec. (e).

1990 Amendment. Act 198 amended subsecs. (a) and (b).

Cross References. Section 1758 is referred to in sections 1106, 1725 of this title.

3. § 1766. Consent of shareholders in lieu of meeting.

(a) Unanimous consent.--Unless otherwise restricted in the bylaws, any action required or permitted to be taken at a meeting of the shareholders or of a class of shareholders of a business corporation may be taken without a meeting if a consent or consents to the action in record form are signed, before, on or after the effective date of the action by all of the shareholders who would be entitled to vote at a meeting for such purpose. The consent or consents must be filed with the minutes of the proceedings of the shareholders.

(b) Partial consent.--If the bylaws so provide, any action required or permitted to be taken at a meeting of the shareholders or of a class of shareholders may be taken without a meeting upon the signed consent of shareholders who would have been entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all shareholders entitled to vote thereon were present and voting. The consents shall be filed in record form with the minutes of the proceedings of the shareholders.

(c) Effectiveness of action by partial consent.--An action taken pursuant to subsection (b) shall not become effective until after at least ten days' notice of the action has been given to each shareholder entitled to vote thereon who has not consented thereto. This subsection may not be relaxed by any provision of the articles.

(d) Cross references.--See sections 1702 (relating to manner of giving notice) and 2524 (relating to consent of shareholders in lieu of meeting).

(Dec. 19, 1990, P.L.834, No.198, eff. imd.; Dec. 18, 1992, P.L.1333, No.169, eff. 60 days; June 22, 2001, P.L.418, No.34, eff. 60 days; July 9, 2013, P.L.476, No.67, eff. 60 days)

2013 Amendment. Act 67 amended subsecs. (a), (b) and (d).

2001 Amendment. Act 34 amended subsecs. (b) and (c).
1992 Amendment. Act 169 amended subsec. (b) and added subsecs. (c) and (d).
Cross References. Section 1766 is referred to in section 1504 of this title.

B. Fundamental Changes (Chapter 19):

Preliminary Provisions (Subchapter A)

1. § 1901. Omission of certain provisions from filed plans

(a) General rule.--A plan as filed in the Department of State under any provision of this chapter may omit all provisions of the plan except provisions, if any:

(1) that are intended to amend or constitute the operative provisions of the articles of a corporation as in effect subsequent to the effective date of the plan; or

(2) that allocate or specify the respective assets and liabilities of the resulting corporations, in the case of a plan of division.

(b) Availability of full plan.--If any of the provisions of a plan are omitted from the plan as filed in the department, the articles of amendment, merger, consolidation, exchange, division or conversion shall state that the full text of the plan is on file at the principal place of business of the reclassifying, surviving or new or a resulting corporation and shall state the address thereof. A corporation that takes advantage of this section shall furnish a copy of the full text of the plan, on request and without cost, to any shareholder of any corporation that was a party to the plan and, unless all parties to the plan were closely held corporations, on request and at cost to any other person.

Cross References. Section 1901 is referred to in sections 1926, 1931, 1954, 1963 of this title.

2. § 1902. Statement of termination

(a) General rule.--If a statement with respect to shares, articles of amendment or articles of merger, consolidation, exchange, division or conversion of a business corporation or to which it is a party have been filed in the Department of State prior to the termination of the amendment or plan pursuant to provisions therefor set forth in the resolution or petition relating to the amendment or in the plan, the termination shall not be effective unless the corporation shall, prior to the time the amendment or plan is to become effective, file in the department a statement of termination. The statement of termination shall be executed by the corporation that filed the amendment or by each corporation that is a party to the plan, unless the plan permits termination by less than all of the corporations, in which case the statement shall be executed on behalf of the corporation or corporations exercising the right to terminate, and shall set forth:

(1) A copy of the statement with respect to shares, articles of amendment or articles of merger, consolidation, exchange, division or conversion relating to the amendment or plan that is terminated.

(2) A statement that the amendment or plan has been terminated in accordance with the provisions therefor set forth therein.

(b) Cross references.--See sections 134 (relating to docketing statement) and 138 (relating to statement of correction).

Cross References. Section 1902 is referred to in sections 1522, 1914, 1924 of this title.

3. § 1903. Bankruptcy or insolvency proceedings

(a) General rule.--Whenever a business corporation is insolvent or in financial difficulty, the board of directors may, by resolution and without the consent of the shareholders, authorize and designate the officers of the corporation to execute a deed of assignment for the benefit of creditors, or file a voluntary petition in bankruptcy, or file an answer consenting to the appointment of a receiver upon a complaint in the nature of an equity action filed by creditors or shareholders, or file an answer to an involuntary petition in bankruptcy admitting the willingness of the corporation to have relief ordered against it.

(b) Bankruptcy proceedings.--A business corporation may participate in a case and proceedings under and in the manner provided by the Bankruptcy Code (11 U.S.C. § 101 et seq.) notwithstanding any contrary provision of its articles or bylaws or this subpart, other than section 103 (relating to subordination of title to regulatory laws). The corporation shall have full power and authority to put into effect and carry out a plan of reorganization and the decrees and orders of the court or judge, and may take any proceeding and do any act provided in the plan or directed by such decrees and orders, without further action by its directors or shareholders.

Such power and authority may be exercised, and such proceedings and acts may be taken, as may be directed by such plan or decrees or orders, by designated officers of the corporation or by a trustee appointed by the court or judge, with the effect as if exercised and taken by unanimous action of the directors and shareholders of the corporation. Without limiting the generality or effect of the foregoing, the corporation may:

(1) alter, amend or repeal its bylaws;

(2) constitute or reconstitute and classify or reclassify its board of directors and name, constitute or appoint directors and officers in place of or in addition to all or some of the directors or officers then in office;

(3) amend its articles of incorporation, including, without limitation, for the purpose of:

(i) canceling or modifying the relative rights or preferences of any or all authorized classes or series of shares, whether or not any shares thereof are outstanding;

(ii) providing that any of Subchapter E (relating to control transactions), F (relating to business combinations), G (relating to control-share acquisitions) or H (relating to disgorgement by certain controlling shareholders following attempts to acquire control) of Chapter 25 shall not be applicable to the corporation, whether or not the amendment is adopted in conformance with the procedures specified in those subchapters, which amendment may take effect immediately without regard to any passage of time otherwise required by those subchapters; or

(iii) otherwise altering, amending or repealing any provision of the articles or bylaws notwithstanding any provision therein that the articles or bylaws may be altered, amended or repealed only under certain conditions or only upon receiving the approval of a specified number or percentage of votes of shareholders or of a class of shareholders;

(4) be dissolved, transfer all or part of its assets, merge, consolidate, participate in a share exchange, divide or convert to a nonprofit corporation, as permitted by this chapter, but in any such case a shareholder shall not be entitled to dissenters rights with respect to his shares;

(5) authorize and fix the terms, manner and conditions of the issuance of obligations, whether or not convertible into shares of any class or series, or bearing warrants or other evidence of optional rights to purchase or subscribe for shares of any class or series; or

(6) lease its property and franchises to any person.

(c) Cross reference.--See the definition of "officer" in section 1103 (relating to definitions).

4. § 1904. De facto transaction doctrine abolished

The doctrine of de facto mergers, consolidations and other fundamental transactions is abolished and the rules laid down by Bloch v. Baldwin Locomotive Works, 75 Pa. D. & C. 24 (C.P. Del. Cty. 1950), and Marks v. The Autocar Co., 153 F.Supp. 768 (E.D. Pa. 1954), and similar cases are overruled. A transaction that in form satisfies the requirements of this subpart may be challenged by reason of its substance only to the extent permitted by section 1105 (relating to restriction on equitable relief).

Cross References. Section 1904 is referred to in sections 1571, 1930 of this title.

5. § 1905. Proposal of fundamental transactions

Where any provision of this chapter requires that an amendment of the articles, a plan or the dissolution of a business corporation be proposed or approved by action of the board of directors, that requirement shall be construed to authorize and be satisfied by the written agreement or consent of all of the shareholders of the corporation entitled to vote thereon.

6. § 1906. Special treatment of holders of shares of same class or series

(a) General rule.--Except as otherwise restricted in the articles, a plan may contain a provision classifying the holders of shares of a class or series into one or more separate groups by reference to any facts or circumstances that are not manifestly unreasonable and providing mandatory treatment for shares of the class or series held by particular shareholders or groups of shareholders that differs materially from the treatment accorded other shareholders or groups of shareholders holding shares of the same class or series (including a provision modifying or rescinding rights previously created under this section) if:

(1) (i) such provision is specifically authorized by a majority of the votes cast by all shareholders entitled to vote on the plan, as well as by a majority of the votes cast by any class or series of shares any of the shares of which are so classified into groups, whether or not such class or series would otherwise be entitled to vote on the plan; and

(ii) the provision voted on specifically enumerates the type and extent of the special treatment authorized; or

(2) under all the facts and circumstances, a court of competent jurisdiction finds such special treatment is undertaken in good faith, after reasonable deliberation and is in the best interest of the corporation.

(b) Statutory voting rights upon special treatment.--Except as provided in subsection (c), if a plan contains a provision for special treatment, each group of holders of any outstanding shares of a class or series who are to receive the same special treatment under the plan shall be entitled to vote as a special class in respect to the plan regardless of any limitations stated in the articles or bylaws on the voting rights of any class or series.

(c) Dissenters rights upon special treatment.--If any plan contains a provision for special treatment without requiring for the adoption of the plan the statutory class vote required by subsection (b), the holder of any outstanding shares the statutory class voting rights of which are so denied, who objects to the plan and complies with Subchapter D of Chapter 15 (relating to dissenters rights), shall be entitled to the rights and remedies of dissenting shareholders provided in that subchapter.

(c.1) Determination of groups.--For purposes of applying subsections (a)(1) and (b), the determination of which shareholders are part of each group receiving special treatment shall be made as of the record date for shareholder action on the plan.

(d) Exceptions.--This section shall not apply to:

(1) The creation or issuance of securities, contracts, warrants or other instruments evidencing any shares, option rights, securities having conversion or option rights or obligations authorized by section 2513 (relating to disparate treatment of certain persons).

(2) A provision of a plan that offers to all holders of shares of a class or series the same option to elect certain treatment.

(3) A plan that contains an express provision that this section shall not apply or that fails to contain an express provision that this section shall apply.

(4) A provision of a plan that treats all of the holders of a particular class or series of shares differently from the holders of another class or series. A provision of a plan that treats the holders of a class or series of shares differently from the holders of another class or series of shares shall not constitute a violation of section 1521(d) (relating to authorized shares).

(e) Definition.--As used in this section, the term "plan" includes:

(1) an amendment of the articles that effects a reclassification of shares, whether or not the amendment is accompanied by a separate plan of reclassification; and

(2) a resolution recommending that the corporation dissolve voluntarily adopted under section 1972(a) (relating to proposal of voluntary dissolution).

Cross References. Section 1906 is referred to in sections 1103, 1521, 1571, 1911, 1922, 1930, 1931, 1932, 1952, 1962, 1972, 2537 of this title.

7. § 1907. Purpose of fundamental transactions

A transaction under this chapter does not require an independent business purpose in order for the transaction to be lawful.

8. § 1908. Submission of matters to shareholders

A business corporation may agree, in record form, to submit an amendment or plan to its shareholders whether or not the board of directors determines, at any time after approving the matter, that the matter is no longer advisable and recommends that the shareholders reject or vote against it, regardless of whether the board of directors changes its recommendation. If a corporation so agrees to submit a matter to its shareholders, the matter is deemed to have been validly adopted by the corporation when it has been approved by the shareholders.
(July 9, 2013, P.L.476, No.67, eff. 60 days)

Amendment of Articles (Subchapter B)

1. § 1911. Amendment of articles authorized

(a) General rule.--A business corporation, in the manner provided in this subchapter, may from time to time amend its articles for one or more of the following purposes:

(1) To adopt a new name, subject to the restrictions provided in this subpart.

(2) To modify any provision of the articles relating to its term of existence.

(3) To change, add to or diminish its purposes or to set forth different or additional purposes.

(4) To cancel or otherwise affect the right of holders of the shares of any class or series to receive dividends that have accrued but have not been declared or to otherwise effect a reclassification of or otherwise affect the substantial rights of the holders of any shares, including, without limitation, by providing special treatment of shares held by any shareholder or group of shareholders consistent with section 1906 (relating to special treatment of holders of shares of same class or series).

(5) To restate the articles in their entirety.

(6) In any and as many other respects as desired.

(b) Exceptions.--An amendment adopted under this section shall not amend articles in such a way that as so amended they would not be authorized by this subpart as original articles of incorporation except that:

(1) Restated articles shall, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), state the address of the current instead of the initial registered office of the corporation in this Commonwealth and need not state the names and addresses of the incorporators.

(2) The corporation shall not be required to revise any other provision of its articles if the provision is valid and operative immediately prior to the filing of the amendment in the Department of State.

(c) Cross reference.--See section 1521(b)(1)(i) (relating to provisions specifically authorized).

2. § 1912. Proposal of amendments

(a) General rule.--Every amendment of the articles of a business corporation shall be proposed:

(1) by the adoption by the board of directors of a resolution setting forth the proposed amendment; or

(2) unless otherwise provided in the articles, by petition of shareholders entitled to cast at least 10% of the votes that all shareholders are entitled to cast thereon, setting forth the proposed amendment, which petition shall be directed to the board of directors and filed with the secretary of the corporation.

Except where the approval of the shareholders is unnecessary under this subchapter, the board of directors shall direct that the proposed amendment be submitted to a vote of the shareholders entitled to vote thereon. An amendment proposed pursuant to paragraph (2) shall be submitted to a vote either at the next annual meeting held not earlier than 120 days after the amendment is proposed or at a special meeting of the shareholders called for that purpose by the shareholders. See sections 1106(b)(4) (relating to uniform application of subpart) and 2535 (relating to proposal of amendment to articles).

(b) Form of amendment.--The resolution or petition shall contain the language of the proposed amendment of the articles:

(1) by setting forth the existing text of the articles or the provision thereof that is proposed to be amended, with brackets around language that is to be deleted and underscoring under language that is to be added; or

(2) by providing that the articles shall be amended so as to read as therein set forth in full, or that any provision thereof be amended so as to read as therein set forth in full, or that the matter stated in the resolution or petition be added to or stricken from the articles.

(c) Terms of amendment.--The resolution or petition may set forth the manner and basis of reclassifying the shares of the corporation. Any of the terms of a plan of reclassification or other action contained in an amendment may be made dependent upon facts ascertainable outside of the amendment if the manner in which the facts will operate upon the terms of the amendment is set forth in the amendment. Such facts may include, without limitation, actions or events within the control of or determinations made by the corporation or a representative of the corporation.

3. § 1913. Notice of meeting of shareholders

(a) General rule.--Notice in record form of the meeting of shareholders of a business corporation that will act on the proposed amendment must be given to each shareholder entitled to vote thereon. The notice must include the proposed amendment or a summary of the changes to be effected thereby and, if Subchapter D of Chapter 15 (relating to dissenters rights) is applicable, the text of that subchapter.

(b) Cross references.--See Subchapter A of Chapter 17 (relating to notice and meetings generally) and section 2528 (relating to notice of shareholder meetings).

4. § 1914. Adoption of amendments

(a) General rule.--A vote of the shareholders entitled to vote on a proposed amendment shall be taken at the next annual or special meeting of which notice for that purpose has been duly given. Unless the articles or a specific provision of this subpart requires a greater vote, a proposed amendment of the articles of a business corporation shall be adopted upon receiving the affirmative vote of a majority of the votes cast by all shareholders entitled to vote thereon and, if any class or series of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each such class vote. Any number of amendments may be submitted to the shareholders and voted upon by them at one meeting. Except as provided in section 1912(a)(2) (relating to proposal of amendments), a proposed amendment of the articles shall not be deemed to have been adopted by the corporation unless it has also been approved by the board of directors, regardless of the fact that the board has directed or suffered the submission of the amendment to the shareholders for action.

(b) Statutory voting rights.--Except as provided in this subpart, the holders of the outstanding shares of a class or series of shares shall be entitled to vote as a class in respect of a proposed amendment regardless of any limitations stated in the articles or bylaws on the voting rights of any class or series if the amendment would:

(1) authorize the board of directors to fix and determine the relative rights and preferences, as between series, of any preferred or special class;

(2) make any change in the preferences, limitations or special rights (other than preemptive rights or the right to vote cumulatively) of the shares of a class or series adverse to the class or series;

(3) authorize a new class or series of shares having a preference as to dividends or assets which is senior to the shares of a class or series;

(4) increase the number of authorized shares of any class or series having a preference as to dividends or assets which is senior in any respect to the shares of a class or series; or

(5) make the outstanding shares of a class or series redeemable by a method that is not pro rata, by lot or otherwise equitable.

(c) Adoption by board of directors.--Unless otherwise restricted in the articles, an amendment of articles shall not require the approval of the shareholders of the corporation if:

(1) shares have not been issued;

(2) the amendment is restricted to one or more of the following:

(i) changing the corporate name;

(ii) providing for perpetual existence;

(iii) reflecting a reduction in authorized shares effected by operation of section 1552(a) (relating to power of corporation to acquire its own shares) and, if appropriate, deleting all references to a class or series of shares that is no longer outstanding;

(iv) adding or deleting a provision authorized by section 1528(f) (relating to uncertificated shares); or

(v) adding, changing or eliminating the par value of any class or series of shares if the par value of that class or series does not have any substantive effect under the terms of that or any other class or series of shares;

(3) (i) the corporation has only one class or series of voting shares outstanding;

(ii) the corporation does not have any class or series of shares outstanding that is:

(A) convertible into those voting shares;

(B) junior in any way to those voting shares; or

(C) entitled to participate on any basis in distributions with those voting shares; and

(iii) the amendment is effective solely to accomplish one of the following purposes with respect to those voting shares:

(A) in connection with effectuating a stock dividend of voting shares on the voting shares, to increase the number of authorized shares of the voting shares in the same proportion that the voting shares to be distributed in the stock dividend increase the issued voting shares; or

(B) to split the voting shares and, if desired, increase the number of authorized shares of the voting shares or change the par value of the voting shares, or both, in proportion thereto;

(4) to the extent the amendment has not been approved by the shareholders, it restates without change all of the operative provisions of the articles as theretofore amended or as amended thereby; or

(5) the amendment accomplishes any combination of purposes specified in this subsection.

Whenever a provision of this subpart authorizes the board of directors to take any action without the approval of the shareholders and provides that a statement, certificate, plan or other document relating to such action shall be filed in the Department of State and shall operate as an amendment of the articles, the board upon taking such action may, in lieu of filing the statement, certificate, plan or other document, amend the articles under this subsection without the approval of the shareholders to reflect the taking of such action. An amendment of articles under this subsection shall be deemed adopted by the corporation when it has been adopted by the board of directors pursuant to section 1912 (relating to proposal of amendments).

(d) Termination of proposal.--Prior to the time when an amendment becomes effective, the amendment may be terminated pursuant to provisions therefor, if any, set forth in the resolution or petition. If articles of amendment have been filed in the department prior to the termination, a statement under section 1902 (relating to statement of termination) shall be filed in the department.

(e) Amendment of voting provisions.--Unless otherwise provided in the articles, whenever the articles require for the taking of any action by the shareholders or a class of shareholders a specific number or percentage of votes, the provision of the articles setting forth that requirement shall not be amended or repealed by any lesser number or percentage of votes of the shareholders or of the class of shareholders.

(f) Definition.--As used in this section, the term "voting shares" has the meaning specified in section 2552 (relating to definitions).

Cross References. Section 1914 is referred to in sections 1552, 1757, 1922, 1924, 1952, 1953 of this title.

5. § 1915. Articles of amendment

Upon the adoption of an amendment by a business corporation, as provided in this subchapter, articles of amendment shall be executed by the corporation and shall set forth:

(1) The name of the corporation and, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office.

(2) The statute under which the corporation was incorporated and the date of incorporation.

(3) If the amendment is to be effective on a specified date, the hour, if any, and the month, day and year of the effective date.

(4) The manner in which the amendment was adopted by the corporation.

(5) The amendment adopted by the corporation, which shall be set forth in full.

(6) If the amendment effects a restatement of the articles, a statement that the restated articles supersede the original articles and all amendments thereto.

Cross References. Section 1915 is referred to in sections 2104, 2704, 2722, 2904, 7104 of this title.

6. § 1916. Filing and effectiveness of articles of amendment

(a) Filing.--The articles of amendment of a business corporation shall be filed in the Department of State. See section 134 (relating to docketing statement).

(b) Effectiveness.--Upon the filing of the articles of amendment in the department or upon the effective date specified in the articles of amendment, whichever is later, the amendment shall become effective and the articles of incorporation shall be deemed to be amended accordingly. An amendment shall not affect any existing cause of action in favor of or against the corporation, or any pending action or proceeding to which the corporation is a party, or the existing rights of persons other than shareholders. If the corporate name is changed by the amendment, an action brought by or against the corporation under its former name shall not be abated for that reason.

Mergers & Consolidation (Subchapter C)

1. § 1921. Merger and consolidation authorized

(a) Domestic surviving or new corporation.--Any two or more domestic business corporations, or any two or more foreign business corporations, or any one or more domestic business corporations and any one or more foreign business corporations, may, in the manner provided in this subchapter, be merged into one of the domestic business corporations, designated in this subchapter as the surviving corporation, or consolidated into a new corporation to be formed under this subpart, if the foreign business corporations are authorized by the laws of the jurisdiction under which they are incorporated to effect a merger or consolidation with a corporation of another jurisdiction.

(b) Foreign surviving or new corporation.--Any one or more domestic business corporations, and any

one or more foreign business corporations, may, in the manner provided in this subchapter, be merged into one of the foreign business corporations, designated in this subchapter as the surviving corporation, or consolidated into a new corporation to be incorporated under the laws of the jurisdiction under which one of the foreign business corporations is incorporated, if the laws of that jurisdiction authorize a merger with or consolidation into a corporation of another jurisdiction.

(c) Business trusts, partnerships and other associations.--The provisions of this subchapter applicable to domestic and foreign business corporations shall also be applicable to a merger, consolidation or share exchange to which a domestic business corporation is a party or in which such a corporation is the resulting entity with, into or involving a domestic or foreign partnership, business trust or other association. The surviving, resulting or exchanging entity in such a merger, consolidation or share exchange may be a corporation, partnership, business trust or other association. Subject to the provisions of Subchapter F of Chapter 85 (relating to merger and consolidation), the powers and duties vested in and imposed upon the board of directors and shareholders in this subchapter shall be exercised and performed by the group of persons under the direction of whom the business and affairs of the partnership, business trust or other association are managed and the holders or owners of beneficial or other interests in the partnership, business trust or other association, respectively, irrespective of the names by which the managing group and the holders or owners of beneficial or other interests are designated. The units into which the beneficial or other interests in the partnership, business trust or other association are divided shall be deemed to be shares for the purposes of applying the provisions of this subchapter to a merger, consolidation or share exchange involving the partnership, business trust or other association. Dissenters rights shall be available to a holder of beneficial or other interests only to the extent, if any, provided by the law under which the partnership, business trust or other association is organized.

2. § 1922. Plan of merger or consolidation

(a) Preparation of plan.--A plan of merger or consolidation, as the case may be, shall be prepared, setting forth:

(1) The terms and conditions of the merger or consolidation.

(2) If the surviving or new corporation is or is to be a domestic business corporation:

(i) any changes desired to be made in the articles, which may include a restatement of the articles in the case of a merger; or

(ii) in the case of a consolidation, all of the statements required by this subpart to be set forth in restated articles.

(3) The manner and basis of converting the shares of each corporation into shares or other securities or obligations of the surviving or new corporation, or of canceling some or all of the shares of a corporation, as the case may be, and, if any of the shares of any of the corporations that are parties to the merger or consolidation are not to be canceled or converted solely into shares or other securities or obligations of the surviving or new corporation, the shares or other securities or obligations of any other person or cash, property or rights that the holders of such shares are to receive in exchange for, or upon conversion of, such shares, and the surrender of any certificates evidencing them, which securities or obligations, if any, of any other person or cash, property or rights may be in addition to or in lieu of the shares or other securities or obligations of the surviving or new corporation.

(4) Any provisions desired providing special treatment of shares held by any shareholder or group of shareholders as authorized by, and subject to the provisions of, section 1906 (relating to special treatment of holders of shares of same class or series).

(5) Such other provisions as are deemed desirable.

(b) Post-adoption amendment.--A plan of merger or consolidation may contain a provision that the boards of directors of the constituent corporations may amend the plan at any time prior to its effective date, except that an amendment made subsequent to the adoption of the plan by the shareholders of any constituent domestic business corporation shall not change:

(1) The amount or kind of shares, obligations, cash, property or rights to be received in exchange for or on conversion of all or any of the shares of the constituent domestic business corporation adversely to the holders of those shares.

(2) Any provision of the articles of the surviving or new corporation as it is to be in effect immediately following consummation of the merger or consolidation except provisions that may be amended without the approval of the shareholders under section 1914(c)(2) (relating to adoption of amendments).

(3) Any of the other terms and conditions of the plan if the change would adversely affect the

holders of any shares of the constituent domestic business corporation.

(c) Proposal.--Except where the approval of the board of directors is unnecessary under this subchapter, every merger or consolidation shall be proposed in the case of each domestic business corporation by the adoption by the board of directors of a resolution approving the plan of merger or consolidation. Except where the approval of the shareholders is unnecessary under this subchapter, the board of directors shall direct that the plan be submitted to a vote of the shareholders entitled to vote thereon at a regular or special meeting of the shareholders.

(d) Party to plan or transaction.--A corporation, partnership, business trust or other association that approves a plan in its capacity as a shareholder or creditor of a merging or consolidating corporation, or that furnishes all or a part of the consideration contemplated by a plan, does not thereby become a party to the plan or the merger or consolidation for the purposes of this subchapter.

(e) Reference to outside facts.--Any of the terms of a plan of merger or consolidation may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by a party to the plan or a representative of a party to the plan.

3. § 1923. Notice of meeting to shareholders

(a) General rule.--Notice in record form of the meeting of shareholders that will act on the proposed plan must be given to each shareholder of record, whether or not entitled to vote thereon, of each domestic business corporation that is a party to the merger or consolidation. The notice must include or be accompanied by the proposed plan or a summary thereof. If Subchapter D of Chapter 15 (relating to dissenters rights) is applicable to the holders of shares of any class or series, the text of that subchapter and of section 1930 (relating to dissenters rights) must be furnished to the holders of shares of that class or series. If the surviving or new corporation will be a nonregistered corporation, the notice must state that a copy of its bylaws as they will be in effect immediately following the merger or consolidation will be furnished to any shareholder on request and without cost.

(b) Cross references.--See Subchapter A of Chapter 17 (relating to notice and meetings generally) and sections 2512 (relating to dissenters rights procedure) and 2528 (relating to notice of shareholder meetings).

4. § 1924. Adoption of plan

(a) General rule.--The plan of merger or consolidation shall be adopted upon receiving the affirmative vote of a majority of the votes cast by all shareholders entitled to vote thereon of each of the domestic business corporations that is a party to the merger or consolidation and, if any class or series of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each class vote. The holders of any class or series of shares of a domestic corporation that is a party to a merger or consolidation that effects any change in the articles of the corporation shall be entitled to vote as a class on the plan if they would have been entitled to a class vote under the provisions of section 1914 (relating to adoption of amendments) had the change been accomplished under Subchapter B (relating to amendment of articles). A proposed plan of merger or consolidation shall not be deemed to have been adopted by the corporation unless it has also been approved by the board of directors, regardless of the fact that the board has directed or suffered the submission of the plan to the shareholders for action.

(b) Adoption by board of directors.--

(1) Unless otherwise required by its bylaws, a plan of merger or consolidation shall not require the approval of the shareholders of a constituent domestic business corporation if:

(i) whether or not the constituent corporation is the surviving corporation:

(A) the surviving or new corporation is a domestic business corporation and the articles of the surviving or new corporation are identical to the articles of the constituent corporation, except changes that under section 1914(c) (relating to adoption by board of directors) may be made without shareholder action;

(B) each share of the constituent corporation outstanding immediately prior to the effective date of the merger or consolidation is to continue as or to be converted into, except as may be otherwise agreed by the holder thereof, an identical share of the surviving or new corporation after the effective date of the merger or consolidation; and

(C) the plan provides that the shareholders of the constituent corporation are to hold in the aggregate shares of the surviving or new corporation to be outstanding immediately after the effectiveness of the plan entitled to cast at least a majority of the votes entitled to be cast generally for the election of directors;

(ii) immediately prior to the adoption of the plan and at all times thereafter prior to its

effective date, another corporation that is a party to the plan owns directly or indirectly 80% or more of the outstanding shares of each class of the constituent corporation; or

(iii) no shares of the constituent corporation have been issued prior to the adoption of the plan of merger or consolidation by the board of directors pursuant to section 1922 (relating to plan of merger or consolidation).

(2) If a merger or consolidation is effected pursuant to paragraph (1)(i) or (iii), the plan of merger or consolidation shall be deemed adopted by the constituent corporation when it has been adopted by the board of directors pursuant to section 1922.

(3) If a merger or consolidation of a subsidiary corporation with a parent corporation is effected pursuant to paragraph (1)(ii), the plan of merger or consolidation shall be deemed adopted by the subsidiary corporation when it has been adopted by the board of the parent corporation and neither approval of the plan by the board of directors of the subsidiary corporation nor execution of articles of merger or consolidation by the subsidiary corporation shall be necessary.

(4) (i) Unless otherwise required by its bylaws, a plan of merger or consolidation providing for the merger or consolidation of a domestic business corporation (referred to in this paragraph as the "constituent corporation") with or into a single indirect wholly owned subsidiary (referred to in this paragraph as the "subsidiary corporation") of the constituent corporation shall not require the approval of the shareholders of either the constituent corporation or the subsidiary corporation if all of the provisions of this paragraph are satisfied.

(ii) A merger or consolidation under this paragraph shall satisfy the following conditions:

(A) The constituent corporation and the subsidiary corporation are the only parties to the merger or consolidation, other than the resulting corporation, if any, in a consolidation (the corporation that survives or results from the merger or consolidation is referred to in this paragraph as the "resulting subsidiary").

(B) Each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger or consolidation is converted in the merger or consolidation into a share or equal fraction of a share of capital stock of a holding company having the same designations, rights, powers and preferences and the qualifications, limitations and restrictions as the share of stock of the constituent corporation being converted in the merger or consolidation.

(C) The holding company and the resulting subsidiary are each domestic business corporations.

(D) Immediately following the effective time of the merger or consolidation, the articles of incorporation and bylaws of the holding company are identical to the articles of incorporation and bylaws of the constituent corporation immediately before the effective time of the merger or consolidation except for changes that could be made without shareholder approval under section 1914(c) (relating to adoption by board of directors).

(E) Immediately following the effective time of the merger or consolidation, the resulting subsidiary is a direct or indirect wholly owned subsidiary of the holding company.

(F) The directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger or consolidation.

(G) The board of directors of the constituent corporation has made a good faith determination that the shareholders of the constituent corporation will not recognize gain or loss for United States Federal Income Tax purposes.

(iii) As used in this paragraph only, the term "holding company" means a corporation that, from its incorporation until consummation of the merger or consolidation governed by this paragraph, was at all times a direct wholly owned subsidiary of the constituent corporation and whose capital stock is issued in the merger or consolidation.

(iv) If the holding company is a registered corporation, the shares of the holding company issued in connection with the merger or consolidation shall be deemed to have been acquired at the time that the shares of the constituent corporation converted in the merger or consolidation were acquired.

(5) A plan of merger or consolidation adopted by the board of directors under this subsection without the approval of the shareholders shall not, by itself, create or impair any rights or obligations on the part of any person under section 2538 (relating to approval of transactions with interested shareholders) or under Subchapters E (relating to control transactions), F (relating to business combinations), G (relating to

control-share acquisitions), H (relating to disgorgement by certain controlling shareholders following attempts to acquire control), I (relating to severance compensation for employees terminated following certain control-share acquisitions) and J (relating to business combination transactions - labor contracts) of Chapter 25, nor shall it change the standard of care applicable to the directors under Subchapter B of Chapter 17 (relating to fiduciary duty).

(c) Termination of plan.--Prior to the time when a merger or consolidation becomes effective, the merger or consolidation may be terminated pursuant to provisions therefor, if any, set forth in the plan. If articles of merger or consolidation have been filed in the Department of State prior to the termination, a statement under section 1902 (relating to statement of termination) shall be filed in the department.

(d) Cross reference.--See section 2539 (relating to adoption of plan of merger by board of directors).

5. § 1925. Authorization by foreign corporations

The plan of merger or consolidation shall be authorized, adopted or approved by each foreign business corporation that desires to merge or consolidate in accordance with the laws of the jurisdiction in which it is incorporated.

6. § 1926. Articles of merger or consolidation

Upon the adoption of the plan of merger or consolidation by the corporations desiring to merge or consolidate, as provided in this subchapter, articles of merger or articles of consolidation, as the case may be, shall, except as provided by section 1924(b)(3) (relating to adoption by board of directors), be executed by each corporation and shall, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), set forth:

(1) The name and the location of the registered office, including street and number, if any, of the domestic surviving or new corporation or, in the case of a foreign surviving or new corporation, the name of the corporation and its jurisdiction of incorporation, together with either:

(i) If a qualified foreign business corporation, the address, including street and number, if any, of its registered office in this Commonwealth.

(ii) If a nonqualified foreign business corporation, the address, including street and number, if any, of its principal office under the laws of the jurisdiction in which it is incorporated.

(2) The name and address, including street and number, if any, of the registered office of each other domestic business corporation and qualified foreign business corporation that is a party to the merger or consolidation.

(3) If the plan is to be effective on a specified date, the hour, if any, and the month, day and year of the effective date.

(4) The manner in which the plan was adopted by each domestic corporation and, if one or more foreign corporations are parties to the merger or consolidation, the fact that the plan was authorized, adopted or approved, as the case may be, by each of the foreign corporations in accordance with the laws of the jurisdiction in which it is incorporated.

(5) Except as provided in section 1901 (relating to omission of certain provisions from filed plans), the plan of merger or consolidation.

7. § 1927. Filing of articles of merger or consolidation

(a) General rule.--The articles of merger or articles of consolidation, as the case may be, and the certificates or statement, if any, required by section 139 (relating to tax clearance of certain fundamental transactions) shall be filed in the Department of State.

(b) Cross reference.--See section 134 (relating to docketing statement).

8. § 1928. Effective date of merger or consolidation

Upon the filing of the articles of merger or the articles of consolidation in the Department of State or upon the effective date specified in the plan of merger or consolidation, whichever is later, the merger or consolidation shall be effective. The merger or consolidation of one or more domestic business corporations into a foreign business corporation shall be effective according to the provisions of law of the jurisdiction in which the foreign corporation is incorporated, but not until articles of merger or articles of consolidation have been adopted and filed, as provided in this subchapter.

9. § 1929. Effect of merger or consolidation

(a) Single surviving or new corporation.--Upon the merger or consolidation becoming effective, the several corporations parties to the merger or consolidation shall be a single corporation which, in the case of a merger, shall be the corporation designated in the plan of merger as the surviving corporation and, in the case of a consolidation, shall be the new corporation provided for in the plan of consolidation. The separate existence of all corporations parties to the merger or consolidation shall cease, except that of the surviving corporation, in the case of a merger. The surviving or new corporation, as the case may be, if it is a domestic business corporation, shall not thereby acquire authority to engage in any business or exercise any right that a corporation may not be incorporated under this subpart to engage in or exercise.

(b) Property rights.--All the property, real, personal and mixed, and franchises of each of the corporations parties to the merger or consolidation, and all debts due on whatever account to any of them, including subscriptions for shares and other choses in action belonging to any of them, shall be deemed to be vested in and shall belong to the surviving or new corporation, as the case may be, without further action, and the title to any real estate, or any interest therein, vested in any of the corporations shall not revert or be in any way impaired by reason of the merger or consolidation. The surviving or new corporation shall thenceforth be responsible for all the liabilities of each of the corporations so merged or consolidated. Liens upon the property of the merging or consolidating corporations shall not be impaired by the merger or consolidation and any claim existing or action or proceeding pending by or against any of the corporations may be prosecuted to judgment as if the merger or consolidation had not taken place or the surviving or new corporation may be proceeded against or substituted in its place.

(c) Taxes.--Any taxes, interest, penalties and public accounts of the Commonwealth claimed against any of the merging or consolidating corporations that are settled, assessed or determined prior to or after the merger or consolidation shall be the liability of the surviving or new corporation and, together with interest thereon, shall be a lien against the franchises and property, both real and personal, of the surviving or new corporation.

(d) Articles of incorporation.--In the case of a merger, the articles of incorporation of the surviving domestic business corporation, if any, shall be deemed to be amended to the extent, if any, that changes in its articles are stated in the plan of merger. In the case of a consolidation into a domestic business corporation, the statements that are set forth in the plan of consolidation, or articles of incorporation set forth therein, shall be deemed to be the articles of incorporation of the new corporation.

10. § 1930. Dissenter's rights

(a) General rule.--If any shareholder of a domestic business corporation that is to be a party to a merger or consolidation pursuant to a plan of merger or consolidation objects to the plan of merger or consolidation and complies with the provisions of Subchapter D of Chapter 15 (relating to dissenters rights), the shareholder shall be entitled to the rights and remedies of dissenting shareholders therein provided, if any. See also section 1906(c) (relating to dissenters rights upon special treatment).

(b) Plans adopted by directors only.--Except as otherwise provided pursuant to section 1571(c) (relating to grant of optional dissenters rights), Subchapter D of Chapter 15 shall not apply to any of the shares of a corporation that is a party to a merger or consolidation pursuant to section 1924(b)(1)(i) or (4) (relating to adoption by board of directors).

(c) Cross references.--See sections 1571(b) (relating to exceptions) and 1904 (relating to de facto transaction doctrine abolished).

Share Exchanges (Subchapter C)

1. § 1931. Share exchanges

(a) General rule.--All the outstanding shares of one or more classes or series of a domestic business corporation, designated in this section as the exchanging corporation, may, in the manner provided in this section, be acquired by any person, designated in this section as the acquiring person, through an exchange of all the shares pursuant to a plan of exchange. The plan of exchange may also provide for the shares of any other class or series of the exchanging corporation to be canceled or converted into shares, other securities or obligations of any person or cash, property or rights. The procedure authorized by this section shall not be deemed to limit the power of any person to acquire all or part of the shares or other securities of any class or series of a corporation through a voluntary exchange or otherwise by agreement with the holders of the shares or other securities.

(b) Plan of exchange.--A plan of exchange shall be prepared, setting forth:

(1) The terms and conditions of the exchange.

(2) The manner and basis of canceling the shares of the exchanging corporation or exchanging or converting the shares of the exchanging corporation into shares or other securities or obligations of the acquiring person, and, if any of the shares of the exchanging corporation are not to be exchanged or converted solely into shares or other securities or obligations of the acquiring person, the shares or other securities or obligations of any other person or cash, property or rights that the holders of the shares of the exchanging corporation are to receive in exchange for, or upon conversion of, the shares and the surrender of any certificates evidencing them, which securities or obligations, if any, of any other person or cash, property and rights may be in addition to or in lieu of the shares or other securities or obligations of the acquiring person.

(3) Any changes desired to be made in the articles of the exchanging corporation, which may include a restatement of the articles.

(4) Any provisions desired providing special treatment of shares held by any shareholder or group of shareholders as authorized by, and subject to the provisions of, section 1906 (relating to special treatment of holders of shares of same class or series). Notwithstanding subsection (a), a plan that provides special treatment may affect less than all of the outstanding shares of a class or series.

(5) Such other provisions as are deemed desirable.

(c) Proposal and adoption.--The plan of exchange shall be proposed and adopted and may be amended after its adoption and terminated by the exchanging corporation in the manner provided by this subchapter for the proposal, adoption, amendment and termination of a plan of merger except section 1924(b) (relating to adoption by board of directors). There shall be included in, or enclosed with, the notice of the meeting of shareholders to act on the plan a copy or a summary of the plan and, if Subchapter D of Chapter 15 (relating to dissenters rights) is applicable, a copy of the subchapter and of subsection (d). The holders of any class of shares to be exchanged or converted pursuant to the plan of exchange shall be entitled to vote as a class on the plan if they would have been entitled to vote on a plan of merger that affects the class in substantially the same manner as the plan of exchange.

(d) Dissenters rights in share exchanges.--Any holder of shares that are to be canceled, exchanged or converted pursuant to a plan of exchange who objects to the plan and complies with the provisions of Subchapter D of Chapter 15 shall be entitled to the rights and remedies of dissenting shareholders therein provided, if any. See section 1906(c) (relating to dissenters rights upon special treatment).

(e) Articles of exchange.--Upon adoption of a plan of exchange, as provided in this section, articles of exchange shall be executed by the exchanging corporation and shall set forth:

(1) The name and, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the location of the registered office, including street and number, if any, of the exchanging corporation.

(2) If the plan is to be effective on a specified date, the hour, if any, and the month, day and year of the effective date.

(3) The manner in which the plan was adopted by the exchanging corporation.

(4) Except as provided in section 1901 (relating to omission of certain provisions from filed plans), the plan of exchange.

The articles of exchange shall be filed in the Department of State. See sections 134 (relating to docketing statement) and 135 (relating to requirements to be met by filed documents).

(f) Effective date.--Upon the filing of articles of exchange in the department or upon the effective date specified in the plan of exchange, whichever is later, the plan shall become effective.

(g) Effect of plan.--Upon the plan of exchange becoming effective, the shares of the exchanging corporation that are, under the terms of the plan, to be canceled, converted or exchanged shall cease to exist or shall be converted or exchanged. The former holders of the shares shall thereafter be entitled only to the shares, other securities or obligations or cash, property or rights into which they have been converted or for which they have been exchanged in accordance with the plan, and the acquiring person shall be the holder of the shares of the exchanging corporation stated in the plan to be acquired by such person. The articles of incorporation of the exchanging corporation shall be deemed to be amended to the extent, if any, that changes in its articles are stated in the plan of exchange.

(h) Special requirements.--If any provision of the articles or bylaws of an exchanging domestic business corporation adopted before October 1, 1989, requires for the proposal or adoption of a plan of merger, consolidation or asset transfer a specific number or percentage of votes of directors or shareholders or other special procedures, the plan of exchange shall not be proposed by the directors or adopted by the shareholders without that number or percentage of votes or compliance with the other special procedures.

(i) Reference to outside facts.--Any of the terms of a plan of exchange may be made dependent upon facts

ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by a party to the plan or a representative of a party to the plan.

Sale of Assets (Subchapter C)

1. § 1932. Voluntary transfer of corporate assets

(a) Shareholder approval not required.--The sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a business corporation, when made in the usual and regular course of the business of the corporation, or for the purpose of relocating all, or substantially all, of the business of the corporation, may be made upon such terms and conditions, and for such consideration, as shall be authorized by its board of directors. Except as otherwise restricted by the bylaws, authorization or consent of the shareholders shall not be required for such a transaction.

(b) Shareholder approval required.--

(1) A sale, lease, exchange or other disposition of all, or substantially all, the property and assets, with or without the goodwill, of a business corporation, if not made pursuant to subsection (a) or (d) or to section 1551 (relating to distributions to shareholders) or Subchapter D (relating to division), may be made only pursuant to a plan of asset transfer in the manner provided in this subsection. A corporation selling, leasing or otherwise disposing of all, or substantially all, its property and assets is referred to in this subsection and in subsection (c) as the "transferring corporation."

(2) The property or assets of a direct or indirect subsidiary corporation that is controlled by a parent corporation shall also be deemed the property or assets of the parent corporation for the purposes of this subsection and of subsection (c). A merger or consolidation to which such a subsidiary corporation is a party and in which a third party acquires direct or indirect ownership of the property or assets of the subsidiary corporation constitutes an "other disposition" of the property or assets of the parent corporation within the meaning of that term as used in this section.

(3) The plan of asset transfer shall set forth the terms and conditions of the sale, lease, exchange or other disposition or may authorize the board of directors to fix any or all of the terms and conditions, including the consideration to be received by the corporation therefor. The plan may provide for the distribution to the shareholders of some or all of the consideration to be received by the corporation, including provisions for special treatment of shares held by any shareholder or group of shareholders as authorized by, and subject to the provisions of, section 1906 (relating to special treatment of holders of shares of same class or series). It shall not be necessary for the person acquiring the property or assets of the transferring corporation to be a party to the plan. Any of the terms of the plan may be made dependent upon facts ascertainable outside of the plan if the manner in which the facts will operate upon the terms of the plan is set forth in the plan. Such facts may include, without limitation, actions or events within the control of or determinations made by the corporation or a representative of the corporation.

(4) The plan of asset transfer shall be proposed and adopted, and may be amended after its adoption and terminated, by the transferring corporation in the manner provided in this subchapter for the proposal, adoption, amendment and termination of a plan of merger, except section 1924(b) (relating to adoption by board of directors). The procedures of this subchapter shall not be applicable to the person acquiring the property or assets of the transferring corporation. There shall be included in, or enclosed with, the notice of the meeting of the shareholders of the transferring corporation to act on the plan a copy or a summary of the plan and, if Subchapter D of Chapter 15 (relating to dissenters rights) is applicable, a copy of the subchapter and of subsection (c).

(5) In order to make effective the plan of asset transfer so adopted, it shall not be necessary to file any articles or other documents in the Department of State.

(c) Dissenters rights in asset transfers.--

(1) If a shareholder of a transferring corporation that adopts a plan of asset transfer objects to the plan and complies with Subchapter D of Chapter 15, the shareholder shall be entitled to the rights and remedies of dissenting shareholders therein provided, if any.

(2) Paragraph (1) shall not apply to a sale pursuant to an order of court having jurisdiction in the premises or a sale pursuant to a plan of asset transfer that requires that all or substantially all of the net proceeds of sale be distributed to the shareholders in accordance with their respective interests within one year after the date of sale or to a liquidating trust.

(3) See sections 1906(c) (relating to dissenters rights upon special treatment) and 2537 (relating to

dissenters rights in asset transfers).

(d) Exceptions.--Subsections (b) and (c)(1) shall not apply to a sale, lease, exchange or other disposition of all, or substantially all, of the property and assets of a business corporation:

(1) that directly or indirectly owns all of the outstanding shares of another corporation to the other corporation if the voting rights, preferences, limitations or relative rights, granted to or imposed upon the shares of any class of the parent corporation are not altered by the sale, lease, exchange or other disposition;

(2) when made in connection with the dissolution or liquidation of the corporation, which transaction shall be governed by the provisions of Subchapter F (relating to voluntary dissolution and winding up) or G (relating to involuntary liquidation and dissolution), as the case may be; or

(3) when made in connection with a transaction pursuant to which all the assets sold, leased, exchanged or otherwise disposed of are simultaneously leased back to the corporation.

(e) Mortgage.--A mortgage, pledge, grant of a security interest or dedication of property to the repayment of indebtedness (with or without recourse) shall not be deemed a sale, lease, exchange or other disposition for the purposes of this section.

(f) Restrictions.--This section shall not be construed to authorize the conversion or exchange of property or assets in fraud of corporate creditors or in violation of law.

(g) Presumption.--A corporation will conclusively be deemed not to have sold, leased, exchanged or otherwise disposed of all, or substantially all, of its property and assets, with or without goodwill, if the corporation or any direct or indirect subsidiary controlled by the corporation retains a business activity that represented at the end of its most recently completed fiscal year, on a consolidated basis, at least:

(1) 25% of total assets; and

(2) 25% of either:

(i) income from continuing operations before taxes; or

(ii) revenues from continuing operations.

Voluntary Dissolution and Winding Up (Subchapter F)

1. § 1971. Voluntary dissolution by shareholders or incorporators

(a) General rule.--The shareholders or incorporators of a business corporation that has not commenced business may effect the dissolution of the corporation by filing articles of dissolution in the Department of State. The articles of dissolution shall be executed in the name of the corporation by a majority of the incorporators or a majority in interest of the shareholders and shall set forth:

(1) The name of the corporation and, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office.

(2) The statute under which the corporation was incorporated and the date of incorporation.

(3) That the corporation has not commenced business.

(4) That the amount, if any, actually paid in on subscriptions for its shares, less any part thereof disbursed for necessary expenses, has been returned to those entitled thereto.

(5) That all liabilities of the corporation have been discharged or that adequate provision has been made therefor.

(6) That a majority of the incorporators or a majority in interest of the shareholders elect that the corporation be dissolved.

(b) Filing.--The articles of dissolution shall be filed in the Department of State. See section 134 (relating to docketing statement).

(c) Effect.--Upon the filing of the articles of dissolution, the existence of the corporation shall cease.

2. § 1972. Proposal of voluntary dissolution

(a) General rule.--Any business corporation that has commenced business may dissolve voluntarily in the manner provided in this subchapter and wind up its affairs in the manner provided in section 1975 (relating to predissolution provision for liabilities) or Subchapter H (relating to postdissolution provision for liabilities). Voluntary dissolution shall be proposed by the adoption by the board of directors of a resolution recommending that the corporation be dissolved voluntarily. The resolution shall contain a statement either that the dissolution shall proceed under section 1975 or that the dissolution shall proceed under Subchapter H. The resolution may set forth provisions for the distribution to shareholders of any surplus remaining after paying or providing for all liabilities of

the corporation, including provisions for special treatment of shares held by any shareholder or group of shareholders as authorized by, and subject to the provisions of, section 1906 (relating to special treatment of holders of shares of same class or series).

(b) Submission to shareholders.--The board of directors shall direct that the resolution recommending dissolution be submitted to a vote of the shareholders of the corporation entitled to vote thereon at a regular or special meeting of the shareholders.

(c) Cross reference.--See section 1974(d) (relating to amendment of winding-up election).

3. § 1973. Notice of meeting of shareholders

(a) General rule.--Notice in record form of the meeting of shareholders that will consider the resolution recommending dissolution of the business corporation must be given to each shareholder of record entitled to vote thereon. The purpose of the meeting must be stated in the notice.

(b) Cross references.--See Subchapter A of Chapter 17 (relating to notice and meetings generally) and section 2528 (relating to notice of shareholder meetings).

4. § 1974. Adoption of proposal

(a) General rule.--The resolution shall be adopted upon receiving the affirmative vote of a majority of the votes cast by all shareholders of the business corporation entitled to vote thereon and, if any class of shares is entitled to vote thereon as a class, the affirmative vote of a majority of the votes cast in each class vote. A proposal for the voluntary dissolution of a corporation shall not be deemed to have been adopted by the corporation unless it has also been recommended by resolution of the board of directors, regardless of the fact that the board has directed or suffered the submission of such a proposal to the shareholders for action.

(b) Termination of proposal.--Prior to the time when articles of dissolution are filed in the Department of State, the proposal may be terminated pursuant to provisions therefor, if any, set forth in the resolution.

(c) Action rescinding election to dissolve.--Prior to the time when articles of dissolution are filed in the department, any business corporation may rescind its election to dissolve in the same manner and by the same procedure as that provided in this subchapter for the election of a corporation to dissolve voluntarily.

(d) Amendment of winding-up election.--If the resolution with respect to voluntary dissolution so provides, an election to proceed under section 1975 (relating to predissolution provision for liabilities) or Subchapter H (relating to postdissolution provision for liabilities) may be reversed by the board of directors prior to the time when articles of dissolution are filed in the department, notwithstanding the adoption by the shareholders of the proposal for voluntary dissolution.

5. § 1975. Predissolution provision for liabilities

(a) Powers of board.--The board of directors of a business corporation that has elected to proceed under this section shall have full power to wind up and settle the affairs of the corporation in accordance with this section prior to filing articles of dissolution in accordance with section 1977 (relating to articles of dissolution).

(b) Notice to creditors and taxing authorities.--After the approval by the shareholders of the resolution recommending that the corporation dissolve voluntarily, the corporation shall immediately cause notice of the winding up proceedings to be officially published and to be mailed by certified or registered mail to each known creditor and claimant and to each municipal corporation in which it has a place of business in this Commonwealth.

(c) Winding up and distribution.--The corporation shall, as speedily as possible, proceed to collect all sums due it, convert into cash all corporate assets the conversion of which into cash is required to discharge its liabilities and, out of the assets of the corporation, discharge or make adequate provision for the discharge of all liabilities of the corporation, according to their respective priorities. Any surplus remaining after paying or providing for all liabilities of the corporation shall be distributed to the shareholders according to their respective rights and preferences. See section 1972(a) (relating to proposal of voluntary dissolution).

Cross References. Section 1975 is referred to in sections 1972, 1974, 1976, 1977, 1978, 1979, 1985, 4129 of this title.

6. § 1976. Judicial super vision of proceedings

A business corporation that has elected to proceed under section 1975 (relating to predissolution provision for liabilities), at any time during the winding up proceedings, may apply to the court to have the proceedings

continued under the supervision of the court and thereafter the proceedings shall continue under the supervision of the court as provided in Subchapter G (relating to involuntary liquidation and dissolution).

7. § 1977. Articles of dissolution

(a) General rule.--Articles of dissolution and the certificates or statement required by section 139 (relating to tax clearance of certain fundamental transactions) shall be filed in the Department of State when:

(1) all liabilities of the business corporation have been discharged, or adequate provision has been made therefor, in accordance with section 1975 (relating to predissolution provision for liabilities), and all of the remaining assets of the corporation have been distributed as provided in section 1975 (or in case its assets are not sufficient to discharge its liabilities, when all the assets have been fairly and equitably applied, as far as they will go, to the payment of such liabilities); or

(2) an election to proceed under Subchapter H (relating to postdissolution provision for liabilities) has been made.

(b) Contents of articles.--The articles of dissolution shall be executed by the corporation and shall set forth:

(1) The name of the corporation and, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office.

(2) The statute under which the corporation was incorporated and the date of incorporation.

(3) The names and respective addresses, including street and number, if any, of its directors and officers.

(4) The manner in which the proposal to dissolve voluntarily was adopted by the corporation.

(5) A statement that:

(i) all liabilities of the corporation have been discharged or that adequate provision has been made therefor;

(ii) the assets of the corporation are not sufficient to discharge its liabilities, and that all the assets of the corporation have been fairly and equitably applied, as far as they will go, to the payment of such liabilities; or

(iii) the corporation has elected to proceed under Subchapter H.

(6) A statement:

(i) that all the remaining assets of the corporation, if any, have been distributed as provided in the Business Corporation Law of 1988; or

(ii) that the corporation has elected to proceed under Subchapter H and that any remaining assets of the corporation will be distributed as provided in that subchapter.

(7) In the case of a corporation that has not elected to proceed under Subchapter H, a statement that no actions or proceedings are pending against the corporation in any court, or that adequate provision has been made for the satisfaction of any judgment or decree that may be obtained against the corporation in each pending action or proceeding.

(8) In the case of a corporation that has not elected to proceed under Subchapter H, a statement that notice of the winding-up proceedings of the corporation was mailed by certified or registered mail to each known creditor and claimant and to each municipal corporation in which the corporation has a place of business in this Commonwealth.

(c) Effect.--Upon the filing of the articles of dissolution in the department, the existence of the corporation shall cease.

(d) Cross references.--See sections 134 (relating to docketing statement) and 135 (relating to requirements to be met by filed documents).

Cross References. Section 1977 is referred to in sections 1975, 1980, 1989, 1991.1, 1992, 9319 of this title.

8. § 1978. Winding up of corporation after dissolution

(a) Winding up and distribution.--Every business corporation that is dissolved by expiration of its period of duration or otherwise shall, nevertheless, continue to exist for the purpose of winding up its affairs, prosecuting and defending actions or proceedings by or against it, collecting and discharging obligations, disposing of and conveying its property and collecting and dividing its assets, but not for the purpose of continuing business except

insofar as necessary for the winding up of the corporation. The board of directors of the corporation may continue as such and shall have full power to wind up the affairs of the corporation.

(b) Standard of care of directors and officers.--The dissolution of the corporation shall not subject its directors or officers to standards of conduct different from those prescribed by or pursuant to Chapter 17 (relating to officers, directors and shareholders). Directors of a dissolved corporation who have complied with section 1975 (relating to predissolution provision for liabilities) or Subchapter H (relating to post dissolution provision for liabilities) and governing persons of a successor entity who have complied with Subchapter H shall not be personally liable to the creditors or claimants of the dissolved corporation.

9. § 1979. Survival of remedies and rights after dissolution

(a) General rule.--The dissolution of a business corporation, either under this subchapter or under Subchapter G (relating to involuntary liquidation and dissolution) or by expiration of its period of duration or otherwise, shall not eliminate nor impair any remedy available to or against the corporation or its directors, officers or shareholders for any right or claim existing, or liability incurred, prior to the dissolution, if an action or proceeding thereon is brought on behalf of:

(1) the corporation within the time otherwise limited by law; or

(2) any other person before or within two years after the date of the dissolution or within the time otherwise limited by this subpart or other provision of law, whichever is less. See sections 1987 (relating to proof of claims), 1993 (relating to acceptance or rejection of matured claims) and 1994 (relating to disposition of unmatured claims).

(b) Rights and assets.--The dissolution of a business corporation shall not affect the limited liability of a shareholder of the corporation theretofore existing with respect to transactions occurring or acts or omissions done or omitted in the name of or by the corporation except that, subject to subsection (d) and sections 1992(d) (relating to claims barred) and 1993(b) (relating to claims barred), if applicable, each shareholder shall be liable for his pro rata portion of the unpaid liabilities of the corporation up to the amount of the net assets of the corporation distributed to the shareholder in connection with the dissolution. Should any property right of a corporation be discovered after the dissolution of the corporation, the surviving member or members of the board of directors that wound up the affairs of the corporation, or a receiver appointed by the court, shall have authority to enforce the property right and to collect and divide the assets so discovered among the persons entitled thereto and to prosecute actions or proceedings in the corporate name of the corporation. Any assets so collected shall be distributed and disposed of in accordance with the applicable order of court, if any, and otherwise in accordance with this subchapter.

(c) Liability of shareholders.--A shareholder of a dissolved business corporation, the assets of which were distributed under section 1975(c) (relating to winding up and distribution) or 1997 (relating to payments and distributions), shall not be liable for any claim against the corporation in an amount in excess of the shareholder's pro rata share of the claim or the amount so distributed to the shareholder, whichever is less. The aggregate liability of any shareholder of a dissolved corporation for claims against the dissolved corporation shall not exceed the amount distributed to the shareholder in dissolution.

(d) Limitation of actions.--A shareholder of a dissolved corporation, the assets of which were distributed under section 1975(c) or 1997(a) through (c), shall not be liable for any claim against the corporation on which an action is not commenced prior to the expiration of the period specified in subsection (a)(2).

(e) Conduct of actions.--An action or proceeding may be prosecuted against and defended by a dissolved corporation in its corporate name.

10. § 1980. Dissolution by domestication

Whenever a domestic business corporation has domesticated itself under the laws of another jurisdiction by action similar to that provided by section 4161 (relating to domestication) and has authorized that action by the vote required by this subchapter for the approval of a proposal that the corporation dissolve voluntarily, the corporation may surrender its charter under the laws of this Commonwealth by filing in the Department of State articles of dissolution under this subchapter containing the statement specified by section 1977(b)(1) through (4) (relating to articles of dissolution). If the corporation as domesticated in the other jurisdiction qualifies to do business in this Commonwealth either prior to or simultaneously with the filing of the articles of dissolution under this section, the corporation shall not be required to file with the articles of dissolution the tax clearance certificates that would

otherwise be required by section 139 (relating to tax clearance of certain fundamental transactions).

C. *Fundamental Changes & Registered Corporations (Chapter 25):*

Preliminary Provisions (Subchapter A)

1. § 2501. Application and effect of chapter

(a) General rule.--Except as otherwise provided in the scope provisions of subsequent subchapters of this chapter, this chapter shall be applicable to any business corporation that is a registered corporation as defined in section 2502 (relating to registered corporation status).

(b) Laws applicable to registered corporations.--Except as otherwise provided in this chapter, this subpart shall be generally applicable to all registered corporations. The specific provisions of this chapter shall control over the general provisions of this subpart. Except as otherwise provided in this article, a registered corporation may be simultaneously subject to this chapter and one or more other chapters of this article.

(c) Effect of a contrary provision of the articles.--

(1) The articles of a registered corporation may provide either expressly or by necessary implication that any one or more of the provisions of Subchapters B (relating to powers, duties and safeguards), C (relating to directors and shareholders) and D (relating to fundamental changes generally) shall not be applicable in whole or in part to the corporation.

(2) The articles of a registered corporation may provide that any one or more of the provisions of Subchapter E (relating to control transactions) and following of this chapter shall not be applicable in whole or in part to the corporation only if, to the extent and in the manner, expressly permitted by the subchapter the applicability of which is so affected. Where any provision of Subchapter E and following of this chapter permits the applicability of a subchapter to be varied by a provision of the articles, the applicability may be varied by an amendment of the articles only if, to the extent and in the manner, expressly permitted by the subchapter the applicability of which is so affected.

(d) Rights cumulative.--The rights, remedies, prohibitions and requirements provided in Subchapter E and following of this chapter shall be in addition to and not in lieu of any other rights, remedies, prohibitions or requirements provided by this subpart, the articles or bylaws of the corporation, any securities, option rights or obligations of the corporation or otherwise.

2. § 2502. Registered corporation status

Subject to additional definitions contained in subsequent provisions of this chapter which are applicable to specific subchapters of this chapter, as used in this chapter, the term "registered corporation" shall mean:

(1) A domestic business corporation:

(i) that:

(A) has a class or series of shares entitled to vote generally in the election of directors of the corporation registered under the Exchange Act; or

(B) is registered as a management company under the Investment Company Act of 1940 and in the ordinary course of business does not redeem outstanding shares at the option of a shareholder at the net asset value or at another agreed method or amount of value thereof; or

(ii) that is:

(A) subject to the reporting obligations imposed by section 15(d) of the Exchange Act by reason of having filed a registration statement which has become effective under the Securities Act of 1933 relating to shares of a class or series of its equity securities entitled to vote generally in the election of directors; or

(B) registered as a management company under the Investment Company Act of 1940 and in the ordinary course of business redeems outstanding shares at the option of a shareholder at the net asset value or at another agreed method or amount of value thereof.

A corporation which satisfies both subparagraphs (i) and (ii) shall be deemed to be described solely in subparagraph (i) for the purposes of this chapter.

(2) A domestic business corporation all of the shares of which are owned, directly or indirectly, by one or more registered corporations or foreign corporations for profit described in section 4102(b) (relating to registered corporation exclusions).

3. § 2503. Acquisition of registered corporation status

(a) Registered corporations.--This chapter shall apply to a registered corporation described in section 2502(1) (relating to registered corporation status) on the day following the day on which the corporation becomes a registered corporation.

(b) Subsidiary corporations.--This chapter shall apply to a registered corporation described in section 2502(2) immediately upon the happening of any event whereby all of the shares of the corporation are owned, directly or indirectly, by one or more registered corporations or foreign corporations for profit described in section 4102(b) (relating to registered corporation exclusions).

(a) § 2504. Termination of registered corporation status

(a) Registered corporations.--The applicability of this chapter to a registered corporation described in section 2502(1) (relating to registered corporation status) shall terminate immediately upon the termination of the status of the corporation as a registered corporation.

(b) Subsidiary corporations.--The applicability of this chapter to a registered corporation described in section 2502(2) shall terminate immediately upon the happening of any event whereby all of the shares of the corporation are no longer owned, directly or indirectly, by one or more registered corporations or foreign corporations for profit described in section 4102(b) (relating to registered corporation exclusions).

Powers, Duties, and Safeguards (Subchapter B)

1. § 2512. Dissenters rights procedures

(a) General rule.--A registered corporation, except one described in section 2502(1)(ii) or (2) (relating to registered corporation status), shall not be required by statute to supply a copy of Subchapter D of Chapter 15 (relating to dissenters rights) to any of its shareholders entitled to dissenters rights in connection with a proposed corporate action from whom the corporation solicits a proxy relating to approval of, or to whom it sends an information statement relating to, the proposed corporate action.

(b) Exception.--Subsection (a) does not apply to notice given under sections 1575(a)(4) (relating to notice to demand payment) and 1577(c)(3) (relating to payment of fair value of shares).

2. § 2513. Disparate treatment of certain persons

(a) General rule.--A registered corporation, except one described in section 2502(1)(ii) or (2) (relating to registered corporation status), that creates and issues any securities, contracts, warrants or other instruments evidencing any shares, option rights, securities having conversion or option rights, or obligations under section 1525 (relating to stock rights and options) may set forth therein such terms as are fixed by the board of directors, including, without limiting the generality of such authority, conditions including, but not limited to, conditions that preclude or limit any person or persons owning or offering to acquire a specified number or percentage of the outstanding common shares, other shares, option rights, securities having conversion or option rights, or obligations of the corporation or transferee or transferees of the person or persons from exercising, converting, transferring or receiving the shares, option rights, securities having conversion or option rights, or obligations.

(b) Cross reference.--See section 1525(c) (relating to standard of care unaffected).

Directors and Shareholders (Subchapter C)

1. § 2523. Quorum at shareholder meetings

The board of directors of a registered corporation may adopt or change a bylaw on any subject otherwise expressly committed to the shareholders by section 1756(a) (relating to quorum).

Cross References. Section 2523 is referred to in section 1756 of this title.

2. § 2524. Consent of shareholders in lieu of meeting

(a) General rule.--An action may be authorized by the shareholders of a registered corporation without a meeting by less than unanimous consent only if permitted by its articles.

(b) Effectiveness of action.--An action authorized by the shareholders of a registered corporation without

a meeting by less than unanimous consent may become effective immediately upon its authorization, but prompt notice of the action shall be given to those shareholders entitled to vote thereon who have not consented.

Fundamental Changes Generally (Subchapter D)

3. § 2535. Proposal of amendment to articles

The shareholders of a registered corporation shall not be entitled by statute to propose an amendment to the articles.

4. § 2536. Application by directors for involuntary dissolution. * * *

5. § 2537. Dissenters rights in asset transfers

The shareholders of a registered corporation that adopts a plan of asset transfer shall not be entitled to dissenters rights except as provided by section 1906(c) (relating to dissenters rights upon special treatment) or unless the board of directors or the bylaws so provide pursuant to section 1571(c) (relating to grant of optional dissenters rights).

6. § 2538. Approval of transactions with interested shareholders.

(a) General rule.--The following transactions shall require the affirmative vote of the shareholders entitled to cast at least a majority of the votes that all shareholders other than the interested shareholder are entitled to cast with respect to the transaction, without counting the vote of the interested shareholder:

(1) Any transaction authorized under Subchapter C of Chapter 19 (relating to merger, consolidation, share exchanges and sale of assets) between a registered corporation or subsidiary thereof and a shareholder of the registered corporation.

(2) Any transaction authorized under Subchapter D of Chapter 19 (relating to division) in which the interested shareholder receives a disproportionate amount of any of the shares or other securities of any corporation surviving or resulting from the plan of division.

(3) Any transaction authorized under Subchapter F of Chapter 19 (relating to voluntary dissolution and winding up) in which a shareholder is treated differently from other shareholders of the same class (other than any dissenting shareholders under Subchapter D of Chapter 15 (relating to dissenters rights)).

(4) Any reclassification authorized under Subchapter B of Chapter 19 (relating to amendment of articles) in which the percentage of voting or economic share interest in the corporation of a shareholder is materially increased relative to substantially all other shareholders.

(b) Exceptions.--Subsection (a) shall not apply to a transaction:

(1) that has been approved by a majority vote of the board of directors without counting the vote of directors who:

(i) are directors or officers of, or have a material equity interest in, the interested shareholder; or

(ii) were nominated for election as a director by the interested shareholder, and first elected as a director, within 24 months of the date of the vote on the proposed transaction;

(2) in which the consideration to be received by the shareholders for shares of any class of which shares are owned by the interested shareholder is not less than the highest amount paid by the interested shareholder in acquiring shares of the same class; or

(3) effected pursuant to section 1924(b)(1)(ii) (relating to adoption by board of directors).

(c) Additional approvals.--The approvals required by this section shall be in addition to, and not in lieu of, any other approval required by this subpart, the articles of the corporation, the bylaws of the corporation or otherwise.

(d) Definition of "interested shareholder".--As used in this section, the term "interested shareholder" includes the shareholder who is a party to the transaction or who is treated differently from other shareholders and any person, or group of persons, that is acting jointly or in concert with the interested shareholder and any person who, directly or indirectly, controls, is controlled by or is under common control with the interested shareholder. An interested shareholder shall not include any person who, in good faith and not for the purpose of circumventing this section, is an agent, bank, broker, nominee or trustee for one or more other persons, to the extent that the other person or persons are not interested shareholders.

(Dec. 19, 1990, P.L.834, No.198, eff. imd.; Dec. 18, 1992, P.L.1333, No.169, eff. 60 days)

Cross References. Section 2538 is referred to in sections 1745, 1746, 1924, 1953 of this title.

7. § 2539. Adoption of plan of merger by board of directors

Section 1924(b)(1)(ii) (relating to adoption by board of directors) shall be applicable to a plan relating to a merger or consolidation to which a registered corporation described in section 2502(1)(i) (relating to registered corporation status) is a party only if the plan:

(1) has been approved by the board of directors of the registered corporation; and

(2) is consistent with the requirements, if applicable, of Subchapter F (relating to business combinations).

D. *Dissenters' Rights (Chapter 15):*

Dissenters Rights(Subchapter D)

1. § 1571. Application and effect of dissenters rights

(a) General rule.--Except as otherwise provided in subsection (b), any shareholder (as defined in section 1572 (relating to definitions)) of a business corporation shall have the right to dissent from, and to obtain payment of the fair value of his shares in the event of, any corporate action, or to otherwise obtain fair value for his shares, only where this part expressly provides that a shareholder shall have the rights and remedies provided in this subchapter. See:

Section 1906(c) (relating to dissenters rights upon special treatment).
Section 1930 (relating to dissenters rights).
Section 1931(d) (relating to dissenters rights in share exchanges).
Section 1932(c) (relating to dissenters rights in asset transfers).
Section 1952(d) (relating to dissenters rights in division).
Section 1962(c) (relating to dissenters rights in conversion).
Section 2104(b) (relating to procedure).
Section 2324 (relating to corporation option where a restriction on transfer of a security is held invalid).
Section 2325(b) (relating to minimum vote requirement).
Section 2704(c) (relating to dissenters rights upon election).
Section 2705(d) (relating to dissenters rights upon renewal of election).
Section 2904(b) (relating to procedure).
Section 2907(a) (relating to proceedings to terminate breach of qualifying conditions).
Section 7104(b)(3) (relating to procedure).

(b) Exceptions.--

(1) Except as otherwise provided in paragraph (2), the holders of the shares of any class or series of shares shall not have the right to dissent and obtain payment of the fair value of the shares under this subchapter if, on the record date fixed to determine the shareholders entitled to notice of and to vote at the meeting at which a plan specified in any of section 1930, 1931(d), 1932(c) or 1952(d) is to be voted on or on the date of the first public announcement that such a plan has been approved by the shareholders by consent without a meeting, the shares are either:

(i) listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Securities Dealers, Inc.; or

(ii) held beneficially or of record by more than 2,000 persons.

(2) Paragraph (1) shall not apply to and dissenters rights shall be available without regard to the exception provided in that paragraph in the case of:

(i) (Repealed).

(ii) Shares of any preferred or special class or series unless the articles, the plan or the terms of the transaction entitle all shareholders of the class or series to vote thereon and require for the adoption of the plan or the effectuation of the transaction the affirmative vote of a majority of the votes cast by all shareholders of the class or series.

(iii) Shares entitled to dissenters rights under section 1906(c) (relating to dissenters rights

upon special treatment).

(3) The shareholders of a corporation that acquires by purchase, lease, exchange or other disposition all or substantially all of the shares, property or assets of another corporation by the issuance of shares, obligations or otherwise, with or without assuming the liabilities of the other corporation and with or without the intervention of another corporation or other person, shall not be entitled to the rights and remedies of dissenting shareholders provided in this subchapter regardless of the fact, if it be the case, that the acquisition was accomplished by the issuance of voting shares of the corporation to be outstanding immediately after the acquisition sufficient to elect a majority or more of the directors of the corporation.

(c) Grant of optional dissenters rights.--The bylaws or a resolution of the board of directors may direct that all or a part of the shareholders shall have dissenters rights in connection with any corporate action or other transaction that would otherwise not entitle such shareholders to dissenters rights.

(d) Notice of dissenters rights.--Unless otherwise provided by statute, if a proposed corporate action that would give rise to dissenters rights under this subpart is submitted to a vote at a meeting of shareholders, there shall be included in or enclosed with the notice of meeting:

(1) a statement of the proposed action and a statement that the shareholders have a right to dissent and obtain payment of the fair value of their shares by complying with the terms of this subchapter; and

(2) a copy of this subchapter.

(e) Other statutes.--The procedures of this subchapter shall also be applicable to any transaction described in any statute other than this part that makes reference to this subchapter for the purpose of granting dissenters rights.

(f) Certain provisions of articles ineffective.--This subchapter may not be relaxed by any provision of the articles.

(g) Computation of beneficial ownership.--For purposes of subsection (b)(1)(ii), shares that are held beneficially as joint tenants, tenants by the entireties, tenants in common or in trust by two or more persons, as fiduciaries or otherwise, shall be deemed to be held beneficially by one person.

(h) Cross references.--See sections 1105 (relating to restriction on equitable relief), 1904 (relating to de facto transaction doctrine abolished), 1763(c) (relating to determination of shareholders of record) and 2512 (relating to dissenters rights procedure).

2. § 1572. Dissenters rights definitions

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Corporation." The issuer of the shares held or owned by the dissenter before the corporate action or the successor by merger, consolidation, division, conversion or otherwise of that issuer. A plan of division may designate which one or more of the resulting corporations is the successor corporation for the purposes of this subchapter. The designated successor corporation or corporations in a division shall have sole responsibility for payments to dissenters and other liabilities under this subchapter except as otherwise provided in the plan of division.

"Dissenter." A shareholder who is entitled to and does assert dissenters rights under this subchapter and who has performed every act required up to the time involved for the assertion of those rights.

"Fair value." The fair value of shares immediately before the effectuation of the corporate action to which the dissenter objects, taking into account all relevant factors, but excluding any appreciation or depreciation in anticipation of the corporate action.

"Interest." Interest from the effective date of the corporate action until the date of payment at such rate as is fair and equitable under all the circumstances, taking into account all relevant factors, including the average rate currently paid by the corporation on its principal bank loans.

"Shareholder." A shareholder as defined in section 1103 (relating to definitions) or an ultimate beneficial owner of shares, including, without limitation, a holder of depository receipts, where the beneficial interest owned includes an interest in the assets of the corporation upon dissolution.

3. § 1573. Record and beneficial holders and owners

(a) Record holders of shares.--A record holder of shares of a business corporation may assert dissenters rights as to fewer than all of the shares registered in his name only if he dissents with respect to all the shares of the same class or series beneficially owned by any one person and discloses the name and address of the person or persons on whose behalf he dissents. In that event, his rights shall be determined as if the shares as to which he has dissented and his other shares were registered in the names of different shareholders.

(b) Beneficial owners of shares.--A beneficial owner of shares of a business corporation who is not the record holder may assert dissenters rights with respect to shares held on his behalf and shall be treated as a dissenting shareholder under the terms of this subchapter if he submits to the corporation not later than the time of the assertion of dissenters rights a written consent of the record holder. A beneficial owner may not dissent with respect to some but less than all shares of the same class or series owned by the owner, whether or not the shares so owned by him are registered in his name.

4. § 1574. Notice of intention to dissent

If the proposed corporate action is submitted to a vote at a meeting of shareholders of a business corporation, any person who wishes to dissent and obtain payment of the fair value of his shares must file with the corporation, prior to the vote, a written notice of intention to demand that he be paid the fair value for his shares if the proposed action is effectuated, must effect no change in the beneficial ownership of his shares from the date of such filing continuously through the effective date of the proposed action and must refrain from voting his shares in approval of such action. A dissenter who fails in any respect shall not acquire any right to payment of the fair value of his shares under this subchapter. Neither a proxy nor a vote against the proposed corporate action shall constitute the written notice required by this section.

5. § 1575. Notice to demand payment

(a) General rule.--If the proposed corporate action is approved by the required vote at a meeting of shareholders of a business corporation, the corporation shall mail a further notice to all dissenters who gave due notice of intention to demand payment of the fair value of their shares and who refrained from voting in favor of the proposed action. If the proposed corporate action is approved by the shareholders by less than unanimous consent without a meeting or is taken without the need for approval by the shareholders, the corporation shall send to all shareholders who are entitled to dissent and demand payment of the fair value of their shares a notice of the adoption of the plan or other corporate action. In either case, the notice shall:

(1) State where and when a demand for payment must be sent and certificates for certificated shares must be deposited in order to obtain payment.

(2) Inform holders of uncertificated shares to what extent transfer of shares will be restricted from the time that demand for payment is received.

(3) Supply a form for demanding payment that includes a request for certification of the date on which the shareholder, or the person on whose behalf the shareholder dissents, acquired beneficial ownership of the shares.

(4) Be accompanied by a copy of this subchapter.

(b) Time for receipt of demand for payment.--The time set for receipt of the demand and deposit of certificated shares shall be not less than 30 days from the mailing of the notice.

6. § 1576. Failure to comply with notice to demand payment, etc

(a) Effect of failure of shareholder to act.--A shareholder who fails to timely demand payment, or fails (in the case of certificated shares) to timely deposit certificates, as required by a notice pursuant to section 1575 (relating to notice to demand payment) shall not have any right under this subchapter to receive payment of the fair value of his shares.

(b) Restriction on uncertificated shares.--If the shares are not represented by certificates, the business corporation may restrict their transfer from the time of receipt of demand for payment until effectuation of the proposed corporate action or the release of restrictions under the terms of section 1577(a) (relating to failure to effectuate corporate action).

(c) Rights retained by shareholder.--The dissenter shall retain all other rights of a shareholder until those rights are modified by effectuation of the proposed corporate action.

7. § 1577. Release of restrictions or payment for shares

(a) Failure to effectuate corporate action.--Within 60 days after the date set for demanding payment and depositing certificates, if the business corporation has not effectuated the proposed corporate action, it shall return any certificates that have been deposited and release uncertificated shares from any transfer restrictions imposed by reason of the demand for payment.

(b) Renewal of notice to demand payment.--When uncertificated shares have been released from transfer

restrictions and deposited certificates have been returned, the corporation may at any later time send a new notice conforming to the requirements of section 1575 (relating to notice to demand payment), with like effect.

(c) Payment of fair value of shares.--Promptly after effectuation of the proposed corporate action, or upon timely receipt of demand for payment if the corporate action has already been effectuated, the corporation shall either remit to dissenters who have made demand and (if their shares are certificated) have deposited their certificates the amount that the corporation estimates to be the fair value of the shares, or give written notice that no remittance under this section will be made. The remittance or notice shall be accompanied by:

(1) The closing balance sheet and statement of income of the issuer of the shares held or owned by the dissenter for a fiscal year ending not more than 16 months before the date of remittance or notice together with the latest available interim financial statements.

(2) A statement of the corporation's estimate of the fair value of the shares.

(3) A notice of the right of the dissenter to demand payment or supplemental payment, as the case may be, accompanied by a copy of this subchapter.

(d) Failure to make payment.--If the corporation does not remit the amount of its estimate of the fair value of the shares as provided by subsection (c), it shall return any certificates that have been deposited and release uncertificated shares from any transfer restrictions imposed by reason of the demand for payment. The corporation may make a notation on any such certificate or on the records of the corporation relating to any such uncertificated shares that such demand has been made. If shares with respect to which notation has been so made shall be transferred, each new certificate issued therefor or the records relating to any transferred uncertificated shares shall bear a similar notation, together with the name of the original dissenting holder or owner of such shares. A transferee of such shares shall not acquire by such transfer any rights in the corporation other than those that the original dissenter had after making demand for payment of their fair value.

8. § 1578. Estimate by dissenter of fair value of shares

(a) General rule.--If the business corporation gives notice of its estimate of the fair value of the shares, without remitting such amount, or remits payment of its estimate of the fair value of a dissenter's shares as permitted by section 1577(c) (relating to payment of fair value of shares) and the dissenter believes that the amount stated or remitted is less than the fair value of his shares, he may send to the corporation his own estimate of the fair value of the shares, which shall be deemed a demand for payment of the amount or the deficiency.

(b) Effect of failure to file estimate.--Where the dissenter does not file his own estimate under subsection (a) within 30 days after the mailing by the corporation of its remittance or notice, the dissenter shall be entitled to no more than the amount stated in the notice or remitted to him by the corporation.

Cross References. Section 1578 is referred to in sections 1579, 1580 of this title.

9. § 1579. Valuation proceedings generally

(a) General rule.--Within 60 days after the latest of:

(1) effectuation of the proposed corporate action;

(2) timely receipt of any demands for payment under section 1575 (relating to notice to demand payment); or

(3) timely receipt of any estimates pursuant to section 1578 (relating to estimate by dissenter of fair value of shares);

if any demands for payment remain unsettled, the business corporation may file in court an application for relief requesting that the fair value of the shares be determined by the court.

(b) Mandatory joinder of dissenters.--All dissenters, wherever residing, whose demands have not been settled shall be made parties to the proceeding as in an action against their shares. A copy of the application shall be served on each such dissenter. If a dissenter is a nonresident, the copy may be served on him in the manner provided or prescribed by or pursuant to 42 Pa.C.S. Ch. 53 (relating to bases of jurisdiction and interstate and international procedure).

(c) Jurisdiction of the court.--The jurisdiction of the court shall be plenary and exclusive. The court may appoint an appraiser to receive evidence and recommend a decision on the issue of fair value. The appraiser shall have such power and authority as may be specified in the order of appointment or in any amendment thereof.

(d) Measure of recovery.--Each dissenter who is made a party shall be entitled to recover the amount by which the fair value of his shares is found to exceed the amount, if any, previously remitted, plus interest.

(e) Effect of corporation's failure to file application.--If the corporation fails to file an application as

provided in subsection (a), any dissenter who made a demand and who has not already settled his claim against the corporation may do so in the name of the corporation at any time within 30 days after the expiration of the 60-day period. If a dissenter does not file an application within the 30-day period, each dissenter entitled to file an application shall be paid the corporation's estimate of the fair value of the shares and no more, and may bring an action to recover any amount not previously remitted.

Cross References. Section 1579 is referred to in section 1580 of this title.

10. § 1580. Costs and expenses of valuation proceedings

(a) General rule.--The costs and expenses of any proceeding under section 1579 (relating to valuation proceedings generally), including the reasonable compensation and expenses of the appraiser appointed by the court, shall be determined by the court and assessed against the business corporation except that any part of the costs and expenses may be apportioned and assessed as the court deems appropriate against all or some of the dissenters who are parties and whose action in demanding supplemental payment under section 1578 (relating to estimate by dissenter of fair value of shares) the court finds to be dilatory, obdurate, arbitrary, vexatious or in bad faith.

(b) Assessment of counsel fees and expert fees where lack of good faith appears.--Fees and expenses of counsel and of experts for the respective parties may be assessed as the court deems appropriate against the corporation and in favor of any or all dissenters if the corporation failed to comply substantially with the requirements of this subchapter and may be assessed against either the corporation or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted in bad faith or in a dilatory, obdurate, arbitrary or vexatious manner in respect to the rights provided by this subchapter.

(c) Award of fees for benefits to other dissenters.--If the court finds that the services of counsel for any dissenter were of substantial benefit to other dissenters similarly situated and should not be assessed against the corporation, it may award to those counsel reasonable fees to be paid out of the amounts awarded to the dissenters who were benefited.

E. Fiduciary Duty Provisions under Chapter 17 of PBCL:

1. § 1711. Alternative provisions.

(a) General rule.--Section 1716 (relating to alternative standard) shall not be applicable to any business corporation to which section 1715 (relating to exercise of powers generally) is applicable.

(b) Exceptions.--Section 1715 shall be applicable to:

(1) Any registered corporation described in section 2502(1)(i) (relating to registered corporation status), except a corporation:

(i) the bylaws of which explicitly provide that section 1715 or corresponding provisions of prior law shall not be applicable to the corporation by amendment adopted by the board of directors on or before July 26, 1990, in the case of a corporation that was a registered corporation described in section 2502(1)(i) on April 27, 1990; or

(ii) in any other case, the articles of which explicitly provide that section 1715 or corresponding provisions of prior law shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted on or before 90 days after the corporation first becomes a registered corporation described in section 2502(1)(i).

(2) Any registered corporation described solely in section 2502(1)(ii), except a corporation:

(i) the bylaws of which explicitly provide that section 1715 or corresponding provisions of prior law shall not be applicable to the corporation by amendment adopted by the board of directors on or before April 27, 1991, in the case of a corporation that was a registered corporation described solely in section 2502(1)(ii) on April 27, 1990; or

(ii) in any other case, the articles of which explicitly provide that section 1715 or corresponding provisions of prior law shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted on or before one year after the corporation first becomes a registered corporation described in section 2502(1)(ii).

(3) Any business corporation that is not a registered corporation described in section 2502(1), except a corporation:

(i) the bylaws of which explicitly provide that section 1715 or corresponding provisions of prior law shall not be applicable to the corporation by amendment adopted by the board of directors on or before April 27, 1991, in the case of a corporation that was a business corporation

on April 27, 1990; or

(ii) in any other case, the articles of which explicitly provide that section 1715 or corresponding provisions of prior law shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted on or before one year after the corporation first becomes a business corporation.

(c) Transitional provision.--A provision of the articles or bylaws adopted pursuant to section 511(b) (relating to alternative provisions) at a time when the corporation was not a business corporation that provides that section 515 (relating to exercise of powers generally) or corresponding provisions of prior law shall not be applicable to the corporation shall be deemed to provide that section 1715 shall not be applicable to the corporation.

Cross References. Section 1711 is referred to in sections 1715, 1716, 8943 of this title.

2. § 1712. Standard of care and justifiable reliance.

(a) Directors.--A director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

(1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

(2) Counsel, public accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person.

(3) A committee of the board upon which he does not serve, duly designated in accordance with law, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

(b) Effect of actual knowledge.--A director shall not be considered to be acting in good faith if he has knowledge concerning the matter in question that would cause his reliance to be unwarranted.

(c) Officers.--Except as otherwise provided in the bylaws, an officer shall perform his duties as an officer in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. A person who so performs his duties shall not be liable by reason of having been an officer of the corporation.

Cross References. Section 1712 is referred to in sections 1553, 1715, 1716, 1717, 1732, 3321, 3323, 8943 of this title.

3. § 1713. Personal liability of directors.

(a) General rule.--If a bylaw adopted by the shareholders of a business corporation so provides, a director shall not be personally liable, as such, for monetary damages for any action taken unless:

(1) the director has breached or failed to perform the duties of his office under this subchapter; and

(2) the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness.

(b) Exceptions.--Subsection (a) shall not apply to:

(1) the responsibility or liability of a director pursuant to any criminal statute; or

(2) the liability of a director for the payment of taxes pursuant to Federal, State or local law.

(c) Cross reference.--See 42 Pa.C.S. § 8332.5 (relating to corporate representatives).

Cross References. Section 1713 is referred to in sections 1504, 1505, 1553, 3322, 8943 of this title.

4. § 1714. Notation of dissent.

A director of a business corporation who is present at a meeting of its board of directors, or of a committee of the board, at which action on any corporate matter is taken on which the director is generally competent to act, shall be presumed to have assented to the action taken unless his dissent is entered in the minutes of the meeting or

unless he files his written dissent to the action with the secretary of the meeting before the adjournment thereof or transmits the dissent in writing to the secretary of the corporation immediately after the adjournment of the meeting. The right to dissent shall not apply to a director who voted in favor of the action. Nothing in this subchapter shall bar a director from asserting that minutes of the meeting incorrectly omitted his dissent if, promptly upon receipt of a copy of such minutes, he notifies the secretary in writing of the asserted omission or inaccuracy.

Cross References. Section 1714 is referred to in section 8943 of this title.

5. § 1715. Exercise of powers generally.

(a) General rule.--In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:

(1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

(2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.

(b) Consideration of interests and factors.--The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described in this subsection and in subsection (a) shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance).

(c) Specific applications.--In exercising the powers vested in the corporation, including, without limitation, those powers pursuant to section 1502 (relating to general powers), and in no way limiting the discretion of the board of directors, committees of the board and individual directors pursuant to subsections (a) and (b), the fiduciary duty of directors shall not be deemed to require them:

(1) to redeem any rights under, or to modify or render inapplicable, any shareholder rights plan, including, but not limited to, a plan adopted pursuant or made subject to section 2513 (relating to disparate treatment of certain persons);

(2) to render inapplicable, or make determinations under, the provisions of Subchapter E (relating to control transactions), F (relating to business combinations), G (relating to control-share acquisitions) or H (relating to disgorgement by certain controlling shareholders following attempts to acquire control) of Chapter 25 or under any other provision of this title relating to or affecting acquisitions or potential or proposed acquisitions of control; or

(3) to act as the board of directors, a committee of the board or an individual director solely because of the effect such action might have on an acquisition or potential or proposed acquisition of control of the corporation or the consideration that might be offered or paid to shareholders in such an acquisition.

(d) Presumption.--Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation. In assessing whether the standard set forth in section 1712 has been satisfied, there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act as the board of directors, any committee of the board or any individual director relating to or affecting an acquisition or potential or proposed acquisition of control of the corporation than is applied to any other act as a board of directors, any committee of the board or any individual director. Notwithstanding the preceding provisions of this subsection, any act as the board of directors, a committee of the board or an individual director relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy the standard set forth in section 1712, unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.

(e) Definition.--The term "disinterested director" as used in subsection (d) and for no other purpose means:

(1) A director of the corporation other than:

(i) A director who has a direct or indirect financial or other interest in the person acquiring or seeking to acquire control of the corporation or who is an affiliate or associate, as defined in section 2552 (relating to definitions), of, or was nominated or designated as a director by, a person acquiring or seeking to acquire control of the corporation.

(ii) Depending on the specific facts surrounding the director and the act under consideration, an officer or employee or former officer or employee of the corporation.

(2) A person shall not be deemed to be other than a disinterested director solely by reason of any or all of the following:

(i) The ownership by the director of shares of the corporation.

(ii) The receipt as a holder of any class or series of any distribution made to all owners of shares of that class or series.

(iii) The receipt by the director of director's fees or other consideration as a director.

(iv) Any interest the director may have in retaining the status or position of director.

(v) The former business or employment relationship of the director with the corporation.

(vi) Receiving or having the right to receive retirement or deferred compensation from the corporation due to service as a director, officer or employee.

(f) Cross reference.--See section 1711 (relating to alternative provisions).

Cross References. Section 1715 is referred to in sections 1711, 1717, 3321, 8943 of this title.

6. § 1716. Alternative standard.

(a) General rule.--In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors. The consideration of those factors shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance).

(b) Presumption.--Absent breach of fiduciary duty, lack of good faith or self-dealing, actions taken as a director shall be presumed to be in the best interests of the corporation.

(c) Cross reference.--See section 1711 (relating to alternative provisions).

Cross References. Section 1716 is referred to in sections 1711, 1717, 3321, 8943 of this title.

7. § 1717. Limitation on standing.

The duty of the board of directors, committees of the board and individual directors under section 1712 (relating to standard of care and justifiable reliance) is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group. Notwithstanding the preceding sentence, sections 1715(a) and (b) (relating to exercise of powers generally) and 1716(a) (relating to alternative standard) do not impose upon the board of directors, committees of the board and individual directors any legal or equitable duties, obligations or liabilities or create any right or cause of action against, or basis for standing to sue, the board of directors, committees of the board and individual directors.

Cross References. Section 1717 is referred to in section 8943 of this title.

8. § 1718. Inconsistent articles ineffective.

Except as otherwise expressly provided in this subchapter, the articles may not contain any provision that relaxes, restricts, is inconsistent with or supersedes any provision of this subchapter. The last sentence of section 1306(b) (relating to other provisions authorized) shall not apply to this subchapter.

9. § 1728. 1Interested directors or officers; quorum.

(a) General rule.--A contract or transaction between a business corporation and one or more of its directors or officers or between a business corporation and another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise in which one or more of its directors or officers are

directors or officers or have a financial or other interest, shall not be void or voidable solely for that reason, or solely because the director or officer is present at or participates in the meeting of the board of directors that authorizes the contract or transaction, or solely because his or their votes are counted for that purpose, if:

(1) the material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors and the board authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors even though the disinterested directors are less than a quorum;

(2) the material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon and the contract or transaction is specifically approved in good faith by vote of those shareholders; or

3) the contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified by the board of directors or the shareholders.

(b) Quorum.--Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board that authorizes a contract or transaction specified in subsection (a).

(c) Applicability.--The provisions of this section shall be applicable except as otherwise restricted in the bylaws.

Special Provisions in Appendix. See section 404(b)(1) of Act 198 of 1990 in the appendix to this title for special provisions relating to applicability.

Cross References. Section 1728 is referred to in sections 1745, 1746 of this title.

10. § 1742. Derivative and corporate actions.

Unless otherwise restricted in its bylaws, a business corporation shall have power to indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending or completed action by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a representative of the corporation or is or was serving at the request of the corporation as a representative of another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of the action if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the corporation. Indemnification shall not be made under this section in respect of any claim, issue or matter as to which the person has been adjudged to be liable to the corporation unless and only to the extent that the court of common pleas of the judicial district embracing the county in which the registered office of the corporation is located or the court in which the action was brought determines upon application that, despite the adjudication of liability but in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for the expenses that the court of common pleas or other court deems proper.

Cross References. Section 1742 is referred to in sections 1743, 1744 of this title.

11. § 1782. Actions against directors and officers.

(a) General rule.--Except as provided in subsection (b), in any action or proceeding brought to enforce a secondary right on the part of one or more shareholders of a business corporation against any present or former officer or director of the corporation because the corporation refuses to enforce rights that may properly be asserted by it, each plaintiff must aver and it must be made to appear that each plaintiff was a shareholder of the corporation or owner of a beneficial interest in the shares at the time of the transaction of which he complains, or that his shares or beneficial interest in the shares devolved upon him by operation of law from a person who was a shareholder or owner of a beneficial interest in the shares at that time.

(b) Exception.--Any shareholder or person beneficially interested in shares of the corporation who, except for the provisions of subsection (a), would be entitled to maintain the action or proceeding and who does not meet such requirements may, nevertheless in the discretion of the court, be allowed to maintain the action or proceeding on preliminary showing to the court, by application and upon such verified statements and depositions as may be required by the court, that there is a strong prima facie case in favor of the claim asserted on behalf of the corporation and that without the action serious injustice will result.

(c) Security for costs.--In any action or proceeding instituted or maintained by holders or owners of less than 5% of the outstanding shares of any class of the corporation, unless the shares held or owned by the holders or owners have an aggregate fair market value in excess of $200,000, the corporation in whose right the action or

proceeding is brought shall be entitled at any stage of the proceedings to require the plaintiffs to give security for the reasonable expenses, including attorneys' fees, that may be incurred by it in connection therewith or for which it may become liable pursuant to section 1743 (relating to mandatory indemnification) (but only insofar as relates to actions by or in the right of the corporation) to which security the corporation shall have recourse in such amount as the court determines upon the termination of the action or proceeding. The amount of security may, from time to time, be increased or decreased in the discretion of the court upon showing that the security provided has or may become inadequate or excessive. The security may be denied or limited in the discretion of the court upon preliminary showing to the court, by application and upon such verified statements and depositions as may be required by the court, establishing prima facie that the requirement of full or partial security would impose undue hardship on plaintiffs and serious injustice would result.

(d) Cross reference.--See section 4146 (relating to provisions applicable to all foreign corporations).

Suspension by Court Rule. Section 1782(a) and (b) were suspended by Pennsylvania Rule of Civil Procedure No. 1506(e), amended April 12, 1999, insofar as inconsistent with Rule No. 1506 relating to stockholder's derivative action. Rule No. 1506(e) further provided that section 1782(c) and (d) shall not be deemed suspended or affected by Rule No. 1506.

Cross References. Section 1782 is referred to in section 4146 of this title.

F. Pennsylvania Rules of Civil Procedure:

1. Pa. R.C.P. No. 1506

(a) In an action to enforce a secondary right brought by one or more stockholders or members of a corporation or similar entity because the corporation or entity refuses or fails to enforce rights which could be asserted by it, the complaint shall set forth:

(1) that each plaintiff is a stockholder or owner of an interest in the corporation or other entity.

(2) the efforts made to secure enforcement by the corporation or similar entity or the reason for not making any such efforts, and

(3) either

(i) that each plaintiff was a stockholder or owner of an interest in the corporation or other entity at the time of the transaction of which the plaintiff complains or that the plaintiff's stock or interest devolved upon the plaintiff by operation of law from a person who was a stockholder or owner at that time, or

(ii) that there is a strong prima facie case in favor of the claim asserted on behalf of the corporation and that without the action serious injustice will result.

Note: See Section 1782(c) of the Associations Code, 15 Pa.C.S.A. § 1782, providing for security for costs in stockholder's actions.

(b) A plaintiff who files a complaint containing an allegation pursuant to subdivision (a)(3)(ii) shall forthwith file a motion to maintain the action. If the plaintiff sustains the allegation, the court shall allow the action to continue.

(c) If it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association, an appropriate person shall be substituted as plaintiff or, if an appropriate person is not substituted, the action shall be dismissed as provided by subdivision (d).

(d) The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

(e)

(1) Section 1782(a) and (b) of the Associations Code, 15 Pa.C.S. § 1782(a) and (b), shall be suspended only insofar as it is inconsistent with the provisions of this rule.

Note: Section 1782(a) and (b) of the Associations Code relate to the bringing of a shareholder's action.

(2) Section 1782(c) and (d) of the Associations Code, 15 Pa.C.S. § 1782(c) and (d), shall not be deemed suspended or affected by this rule.

Note: Section 1782(c) and (d) relate to security for costs in such actions and applicability of the statute to foreign corporations.

EXPLANATORY COMMENT--1990

Recommendation 96 proposes to amend Rule 1506 governing stockholder's actions in light of recent appellate court interpretations and the enactment of the new Associations Code.

I. Averments of the Complaint

a. Ownership of stock at commencement of action Chief Judge Teitelbaum of the United States District Court for the Western District of Pennsylvania stated the current Pennsylvania law with respect to ownership of stock in the corporation inOverberger v. BT Financial Corp., 106 F.R.D. 438, 441 (1985):

New subdivision (a)(1) explicitly requires the plaintiff to allege that "each plaintiff is a stockholder or owner of an interest in the corporation or other entity." This provision brings the Pennsylvania procedure in line with its Federal counterpart. The rule makes no statement with respect to continuing ownership subsequent to the commencement of the action.

b. Efforts to secure enforcement of rights

Subdivision (a)

(2) incorporates unchanged the provisions of paragraph (2) of the prior rule requiring an allegation of the efforts made by the corporation or similar entity to secure enforcement of the rights which are the subject of the action "or the reason for not making any such efforts."

c. Ownership of stock at time of the transaction

Subdivision (a)

(3) requires a complaint to set forth one of two alternative allegations. The allegation required by subparagraph (3)(i) incorporates the essence of Section 1782(a) of the Associations Code which provides:

The alternative allegation required by subdivision (a)(3)(ii) incorporates the exception stated in section 1782(b) of the Associations Code:

The rule provides that the plaintiff must allege either ownership of stock at the time of the transaction complained of under subdivision (a)(3)(i) or "a strong prima facie case" and "serious injustice" if the actions is not maintained under subdivision (a)(3)(ii).

While the allegations in the complaint pursuant to subdivision (a)(3)(ii) allow the plaintiff to bring the action, the plaintiff must make a preliminary showing to the court sustaining the allegations in order to continue the action. New subdivision (b) requires the plaintiff to file a motion to maintain the action and the court to allow the action to continue if the allegation is sustained.

II. Adequacy of Representation and Dismissal Subdivisions (c) and (d) are new provisions derived from Federal Rule 23.1. Subdivision (c), like the Federal rule, requires the plaintiff to adequately represent the interests of the shareholders. The subdivision adds the requirement that if there is no adequate representation, "an appropriate person shall be substituted as plaintiff". If no such person is substituted, then the action may be dismissed as provided in subdivision (d).

Subdivision (d) is taken verbatim from the last sentence of Fed.R.C.P. 23.1 requiring court approval of any dismissal or compromise of the action and notice to the shareholders.

G. PBCL Takeover Legislation:

1. § 1715. Exercise of powers generally.

(i) (a) ***General rule.*** **-- In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider to the extent they deem appropriate:**

(1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located.

(2) The short-term and long-term interests of the corporation, including benefits that may accrue to the corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the corporation.

(3) The resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation.

(4) All other pertinent factors.

(b) ***Consideration of interests and factors.*** **--** The board of directors, committees of the board and individual directors shall not be required, in considering the best interests of the corporation or the effects of any action, to regard any corporate interest or the interests of any particular group affected by such action as a dominant or controlling interest or factor. The consideration of interests and factors in the manner described in this subsection and in subsection (a) shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance).

(c) ***Specific applications.*** **--** In exercising the powers vested in the corporation, including, without limitation, those powers pursuant to section 1502 (relating to general powers), and in no way limiting the discretion of the board of directors, committees of the board and individual directors pursuant to subsections (a) and (b), the fiduciary duty of directors shall not be deemed to require them:

(1) to redeem any rights under, or to modify or render inapplicable, any shareholder rights plan, including, but not limited to, a plan adopted pursuant or made subject to section 2513 (relating to disparate treatment of certain persons);

(2) to render inapplicable, or make determinations under, the provisions of Subchapter E (relating to control transactions), F (relating to business combinations), G (relating to control-share acquisitions) or H (relating to disgorgement by certain controlling shareholders following attempts to acquire control) of Chapter 25 or under any other provision of this title relating to or affecting acquisitions or potential or proposed acquisitions of control; or

(3) to act as the board of directors, a committee of the board or an individual director solely because of the effect such action might have on an acquisition or potential or proposed acquisition of control of the corporation or the consideration that might be offered or paid to shareholders in such an acquisition.

(d) ***Presumption.*** **--** Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation. In assessing whether the standard set forth in section 1712 has been satisfied, there shall not be any greater obligation to justify, or higher burden of proof with respect to, any act as the board of directors, any committee of the board or any individual director relating to or affecting an acquisition or potential or proposed acquisition of control of the corporation than is applied to any other act as a board of directors, any committee of the board or any individual director. Notwithstanding the preceding provisions of this subsection, any act as the board of directors, a committee of the board or an individual director relating to or affecting an acquisition or potential or proposed acquisition of control to which a majority of the disinterested directors shall have assented shall be presumed to satisfy the standard set forth in section 1712, unless it is proven by clear and convincing evidence that the disinterested directors did not assent to such act in good faith after reasonable investigation.

(e) ***Definition.*** **--** The term "disinterested director" as used in subsection (d) and for no other purpose means:

(1) A director of the corporation other than:

(i) A director who has a direct or indirect financial or other interest in the person acquiring or seeking to acquire control of the corporation or who is an affiliate or associate, as defined in section 2552 (relating to definitions), of, or was nominated or designated as a director by, a person acquiring or seeking to acquire control of the corporation.

(ii) Depending on the specific facts surrounding the director and the act under consideration, an officer or employee or former officer or employee of the corporation.

(2) A person shall not be deemed to be other than a disinterested director solely by reason of any or all of the following:

(i) The ownership by the director of shares of the corporation.

(ii) The receipt as a holder of any class or series of any distribution made to all owners of shares of that class or series.

(iii) The receipt by the director of director's fees or other consideration as a director.

(iv) Any interest the director may have in retaining the status or position of director.

(v) The former business or employment relationship of the director with the corporation.

(vi) Receiving or having the right to receive retirement or deferred compensation from the corporation due to service as a director, officer or employee.

(f) ***Cross reference.*** **--** See section 1711 (relating to alternative provisions).

2. § 1716. Alternative standard.

(a) ***General rule.*** **--** In discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a business corporation may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors. The consideration of those factors shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance).

(b) ***Presumption.*** **--** Absent breach of fiduciary duty, lack of good faith or self-dealing, actions taken as a director shall be presumed to be in the best interests of the corporation.

(c) ***Cross reference.*** **--** See section 1711 (relating to alternative provisions).

3. § 1717. Limitation on standing.

The duty of the board of directors, committees of the board and individual directors under section 1712 (relating to standard of care and justifiable reliance) is solely to the business corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group. Notwithstanding the preceding sentence, sections 1715(a) and (b) (relating to exercise of powers generally) and 1716(a) (relating to alternative standard) do not impose upon the board of directors, committees of the board and individual directors any legal or equitable duties, obligations or liabilities or create any right or cause of action against, or basis for standing to sue, the board of directors, committees of the board and individual directors.

4. § 1721. Board of directors.

(a) ***General rule.*** **--** Unless otherwise provided by statute or in a bylaw adopted by the shareholders, all powers enumerated in section 1502 (relating to general powers) and elsewhere in this subpart or otherwise vested by law in a business corporation shall be exercised by or under the authority of, and the business and affairs of every business corporation shall be managed under the direction of, a board of directors. If any such provision is made in the bylaws, the powers and duties conferred or imposed upon the board of directors by this subpart shall be exercised or performed to such extent and by such person or persons as shall be provided in the bylaws. Persons upon whom the liabilities of directors are imposed by this section shall to that extent be entitled to the rights and immunities conferred by or pursuant to this part and other provisions of law upon directors of a corporation.

(b) ***Cross reference.*** **--** See section 2527 (relating to authority of board of directors).

5. § 1724. Term of office of directors.

(a) ***General rule.*** **--** Each director of a business corporation shall hold office until the expiration of the term for which he was selected and until his successor has been selected and qualified or until his earlier death,

resignation or removal. Any director may resign at any time upon written notice to the corporation. The resignation shall be effective upon receipt thereof by the corporation or at such subsequent time as shall be specified in the notice of resignation. Each director shall be selected for the term of office provided in the bylaws, which shall be one year and until his successor has been selected and qualified or until his earlier death, resignation or removal, unless the board is classified as provided by subsection (b). A decrease in the number of directors shall not have the effect of shortening the term of any incumbent director.

(b) ***Classified board of directors.*** **--** Except as otherwise provided in the articles, if the directors are classified in respect of the time for which they shall severally hold office:

(1) Each class shall be as nearly equal in number as possible.

(2) The term of office of at least one class shall expire in each year.

(3) The members of a class shall not be elected for a longer period than four years.

6. § 1726. Removal of directors.

(a) ***Removal by the shareholders.***

(1) Unless otherwise provided in a bylaw adopted by the shareholders, the entire board of directors, or a class of the board where the board is classified with respect to the power to select directors, or any individual director of a business corporation may be removed from office without assigning any cause by the vote of shareholders, or of the holders of a class or series of shares, entitled to elect directors, or the class of directors. In case the board or a class of the board or any one or more directors are so removed, new directors may be elected at the same meeting. Notwithstanding the first sentence of this paragraph, unless otherwise provided in the articles by a specific and unambiguous statement that directors may be removed from office without assigning any cause, the entire board of directors, or any class of the board, or any individual director of a corporation having a board classified as permitted by section 1724(b) (relating to classified board of directors), may be removed from office by vote of the shareholders entitled to vote thereon only for cause, if such classification has been effected in the articles or by a bylaw adopted by the shareholders.

(2) The repeal of a provision of the articles or bylaws prohibiting, or the addition of a provision to the articles or bylaws permitting, the removal by the shareholders of the board, a class of the board or a director without assigning any cause shall not apply to any incumbent director during the balance of the term for which he was selected.

(3) An individual director shall not be removed (unless the entire board or class of the board is removed) from the board of a corporation in which shareholders are entitled to vote cumulatively for the board or a class of the board if sufficient votes are cast against the resolution for his removal which, if cumulatively voted at an annual or other regular election of directors, would be sufficient to elect one or more directors to the board or to the class.

(4) The board of directors may be removed at any time with or without cause by the unanimous vote or consent of shareholders entitled to vote thereon.

(5) The articles may not prohibit the removal of directors by the shareholders for cause.

(b) ***Removal by the board.*** **--** Unless otherwise provided in a bylaw adopted by the shareholders, the board of directors may declare vacant the office of a director who has been judicially declared of unsound mind or who has been convicted of an offense punishable by imprisonment for a term of more than one year or for any other proper cause which the bylaws may specify or if, within 60 days or such other time as the bylaws may specify after notice of his selection, he does not accept the office either in writing or by attending a meeting of the board of directors and fulfill such other requirements of qualification as the bylaws may specify.

(c) ***Removal by the court.*** **--** Upon application of any shareholder or director, the court may remove from office any director in case of fraudulent or dishonest acts, or gross abuse of authority or discretion with reference to the corporation, or for any other proper cause, and may bar from office any director so removed for a period prescribed by the court. The corporation shall be made a party to the action and as a prerequisite to the maintenance of an action under this subsection a shareholder shall comply with Subchapter F (relating to derivative actions).

(d) ***Effect of reinstatement.*** **--** An act of the board done during the period when a director has been suspended or removed for cause shall not be impugned or invalidated if the suspension or removal is thereafter rescinded by the shareholders or by the board or by the final judgment of a court.

(e) ***Cross reference.*** **--** See section 1106(b)(4) (relating to uniform application of subpart).

7. § 1525. Stock rights and options.

(a) ***General rule.*** **--** Except as otherwise provided in its articles prior to the creation and issuance thereof, a business corporation may create and issue (whether or not in connection with the issuance of any of its shares or other securities) option rights or securities having conversion or option rights entitling the holders thereof to purchase or acquire shares, option rights, securities having conversion or option rights, or obligations, of any class or series, or assets of the corporation, or to purchase or acquire from the corporation shares, option rights, securities having conversion or option rights, or obligations, of any class or series, owned by the corporation and issued by any other person. Except as otherwise provided in its articles, the shares, option rights, securities having conversion or option rights, or obligations shall be evidenced in such manner as the corporation may determine and may be offered without first offering them to shareholders of any class or classes.

(b) ***Specifically authorized provisions.*** **--** The securities, contracts, warrants or other instruments evidencing any shares, option rights, securities having conversion or option rights, or obligations of a corporation may contain such terms as are fixed by the board of directors, including, without limiting the generality of such authority:

(1) Restrictions upon the authorization or issuance of additional shares, option rights, securities having conversion or option rights, or obligations.

(2) Provisions for the adjustment of the conversion or option rights price.

(3) Provisions concerning rights or adjustments in the event of reorganization, merger, consolidation, sale of assets, exchange of shares or other fundamental changes.

(4) Provisions for the reservation of authorized but unissued shares or other securities.

(5) Restrictions upon the declaration or payment of dividends or distributions or related party transactions.

(6) Conditions relating to the exercise, conversion, transfer or receipt of such shares, option rights, securities having conversion or option rights, or obligations.

There shall be no authority under this subsection to include a provision authorized by section 2513 (relating to disparate treatment of certain persons).

(c) ***Standard of care unaffected.*** **--** The provisions of subsections (a) and (b) and section 2513 shall not be construed to effect a change in the fiduciary relationship between a director and a business corporation or to change the standard of care of a director provided for in Subchapter B of Chapter 17 (relating to fiduciary duty).

(d) ***Pricing and payment.*** **--** The provisions of this subchapter applicable to the pricing of and payment for shares shall be applicable to the pricing of and payment for rights and options except that the rights and options may be issued to representatives of the corporation or any of its affiliates as an incentive to service or continued service with the corporation and its affiliates or for such other purpose and upon such other terms as its directors, who may benefit by their action, deem advantageous to the corporation.

(e) ***Shares subject to preemptive rights.*** **--** Authorized but unissued shares subject to preemptive rights may be issued and sold pursuant to a plan providing for the issuance of rights or options entitling the holders thereof to purchase shares of the same class or series as the shares subject to such preemptive rights upon the exercise of such rights or options if the plan is approved by the affirmative vote of a majority of the votes cast by the shareholders entitled to exercise such preemptive rights.

8. § 2513. Disparate treatment of certain persons.

(a) General rule.--A registered corporation, except one described in section 2502(1)(ii) or (2) (relating to registered corporation status), that creates and issues any securities, contracts, warrants or other instruments evidencing any shares, option rights, securities having conversion or option rights, or obligations under section 1525 (relating to stock rights and options) may set forth therein such terms as are fixed by the board of directors, including, without limiting the generality of such authority, conditions including, but not limited to, conditions that preclude or limit any person or persons owning or offering to acquire a specified number or percentage of the outstanding common shares, other shares, option rights, securities having conversion or option rights, or obligations of the corporation or transferee or transferees of the person or persons from exercising, converting, transferring or receiving the shares, option rights, securities having conversion or option rights, or obligations.

(b) Cross reference.--See section 1525(c) (relating to standard of care unaffected).

Cross References. Section 2513 is referred to in sections 1525, 1715, 1906 of this title.

H. Registered Corporation:

Control Transactions (Subchapter 25E, §§ 2541 – 2548)

1. § 2541. Application and effect of subchapter.

(a) General rule.--Except as otherwise provided in this section, this subchapter shall apply to a registered corporation unless:

(1) the registered corporation is one described in section 2502(1)(ii) or (2) (relating to registered corporation status);

(2) the bylaws, by amendment adopted either:

(i) by March 23, 1984; or

(ii) on or after March 23, 1988, and on or before June 21, 1988;

and, in either event, not subsequently rescinded by an article amendment, explicitly provide that this subchapter shall not be applicable to the corporation in the case of a corporation which on June 21, 1988, did not have outstanding one or more classes or series of preference shares entitled, upon the occurrence of a default in the payment of dividends or another similar contingency, to elect a majority of the members of the board of directors (a bylaw adopted on or before June 21, 1988, by a corporation excluded from the scope of this paragraph by the restriction of this paragraph relating to certain outstanding preference shares shall be ineffective unless ratified under paragraph (3));

(3) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment ratified by the board of directors on or after December 19, 1990, and on or before March 19, 1991, in the case of a corporation:

(i) which on June 21, 1988, had outstanding one or more classes or series of preference shares entitled, upon the occurrence of a default in the payment of dividends or another similar contingency, to elect a majority of the members of the board of directors; and

(ii) the bylaws of which on that date contained a provision described in paragraph (2); or

(4) the articles explicitly provide that this subchapter shall not be applicable to the corporation by a provision included in the original articles, by an article amendment adopted prior to the date of the control transaction and prior to or on March 23, 1988, pursuant to the procedures then applicable to the corporation, or by an articles amendment adopted prior to the date of the control transaction and subsequent to March 23, 1988, pursuant to both:

(i) the procedures then applicable to the corporation; and

(ii) unless such proposed amendment has been approved by the board of directors of the corporation, in which event this subparagraph shall not be applicable, the affirmative vote of the shareholders entitled to cast at least 80% of the votes which all shareholders are entitled to cast thereon.

A reference in the articles or bylaws to former section 910 (relating to right of shareholders to receive payment for shares following a control transaction) of the act of May 5, 1933 (P.L.364, No.106), known as the Business Corporation Law of 1933, shall be deemed a reference to this subchapter for the purposes of this section. See section 101(c) (relating to references to prior statutes).

(b) Inadvertent transactions.--This subchapter shall not apply to any person or group that inadvertently becomes a controlling person or group if that controlling person or group, as soon as practicable, divests itself of a sufficient amount of its voting shares so that it is no longer a controlling person or group.

(c) Certain subsidiaries.--This subchapter shall not apply to any corporation that on December 23, 1983, was a subsidiary of any other corporation.

(d) Rights cumulative.--(Deleted by amendment).

(Dec. 19, 1990, P.L.834, No.198, eff. imd.; Dec. 18, 1992, P.L.1333, No.169, eff. 60 days)

1992 Amendment. Act 169 deleted subsec. (d).

1990 Amendment. Act 198 amended subsec. (a).

Cross References. Section 2541 is referred to in section 1106 of this title.

2. § 2542. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Control transaction." The acquisition by a person or group of the status of a controlling person or group.

"Controlling person or group." A controlling person or group as defined in section 2543 (relating to controlling person or group).

"Fair value." A value not less than the highest price paid per share by the controlling person or group at any time during the 90-day period ending on and including the date of the control transaction plus an increment representing any value, including, without limitation, any proportion of any value payable for acquisition of control of the corporation, that may not be reflected in such price.

"Partial payment amount." The amount per share specified in section 2545(c)(2) (relating to contents of notice).

"Subsidiary." Any corporation as to which any other corporation has or has the right to acquire, directly or indirectly, through the exercise of all warrants, options and rights and the conversion of all convertible securities, whether issued or granted by the subsidiary or otherwise, voting power over voting shares of the subsidiary that would entitle the holders thereof to cast in excess of 50% of the votes that all shareholders would be entitled to cast in the election of directors of such subsidiary, except that a subsidiary will not be deemed to cease being a subsidiary as long as such corporation remains a controlling person or group within the meaning of this subchapter.

"Voting shares." The term shall have the meaning specified in section 2552 (relating to definitions).
(Apr. 27, 1990, P.L.129, No.36, eff. imd.)

3. § 2543. Controlling person or group.

(a) General rule.--For the purpose of this subchapter, a "controlling person or group" means a person who has, or a group of persons acting in concert that has, voting power over voting shares of the registered corporation that would entitle the holders thereof to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation.

(b) Exceptions generally.--Notwithstanding subsection (a):

(1) A person or group which would otherwise be a controlling person or group within the meaning of this section shall not be deemed a controlling person or group unless, subsequent to the later of March 23, 1988, or the date this subchapter becomes applicable to a corporation by bylaw or article amendment or otherwise, that person or group increases the percentage of outstanding voting shares of the corporation over which it has voting power to in excess of the percentage of outstanding voting shares of the corporation over which that person or group had voting power on such later date, and to at least the amount specified in subsection (a), as the result of forming or enlarging a group or acquiring, by purchase, voting power over voting shares of the corporation.

(2) No person or group shall be deemed to be a controlling person or group at any particular time if voting power over any of the following voting shares is required to be counted at such time in order to meet the 20% minimum:

(i) Shares which have been held continuously by a natural person since January 1, 1983, and which are held by such natural person at such time.

(ii) Shares which are held at such time by any natural person or trust, estate, foundation or other similar entity to the extent the shares were acquired solely by gift, inheritance, bequest, devise or other testamentary distribution or series of these transactions, directly or indirectly, from a natural person who had acquired the shares prior to January 1, 1983.

(iii) Shares which were acquired pursuant to a stock split, stock dividend, reclassification or similar recapitalization with respect to shares described under this paragraph that have been held continuously since their issuance by the corporation by the natural person or entity that acquired them from the corporation or that were acquired, directly or indirectly, from such natural person or entity, solely pursuant to a transaction or series of transactions described in subparagraph (ii), and that are held at such time by a natural person or entity described in subparagraph (ii).

(iv) Control shares as defined in section 2562 (relating to definitions) which have not yet been accorded voting rights pursuant to section 2564(a) (relating to voting rights of shares acquired in a control-share acquisition).

(v) Shares, the voting rights of which are attributable to a person under subsection (d) if:

(A) the person acquired the option or conversion right directly from or made the contract, arrangement or understanding or has the relationship directly with the corporation; and

(B) the person does not at the particular time own or otherwise effectively possess the voting rights of the shares.

(vi) Shares acquired directly from the corporation or an affiliate or associate, as defined in section 2552 (relating to definitions), of the corporation by a person engaged in business as an underwriter of securities who acquires the shares through his participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933.

(vii) Shares acquired directly from the corporation in a transaction exempt from the registration requirements of the Securities Act of 1933.

(3) In determining whether a person or group is or would be a controlling person or group at any particular time, there shall be disregarded voting power arising from a contingent right of the holders of one or more classes or series of preference shares to elect one or more members of the board of directors upon or during the continuation of a default in the payment of dividends on such shares or another similar contingency.

(c) Certain record holders.--A person shall not be a controlling person under subsection (a) if the person holds voting power, in good faith and not for the purpose of circumventing this subchapter, as an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or, if they are a group acting in concert, as a group have the voting power specified in subsection (a), or who are not deemed a controlling person or group under subsection (b).

(d) Existence of voting power.--For the purposes of this subchapter, a person has voting power over a voting share if the person has or shares, directly or indirectly, through any option, contract, arrangement, understanding, conversion right or relationship, or by acting jointly or in concert or otherwise, the power to vote, or to direct the voting of, the voting share.

(Dec. 19, 1990, P.L.834, No.198, eff. imd.; Feb. 10, 2006, P.L.21, No.6, eff. imd.)

2006 Amendment. Act 6 added subsec. (b)(2)(vii).

1990 Amendment. Act 198 amended subsecs. (a) and (b).

Cross References. Section 2543 is referred to in sections 1106, 2542 of this title.

4. § 2544. Right of shareholders to receive payment for shares.

Any holder of voting shares of a registered corporation that becomes the subject of a control transaction who shall object to the transaction shall be entitled to the rights and remedies provided in this subchapter.

5. § 2545. Notice to shareholders.

(a) General rule.--Prompt notice that a control transaction has occurred shall be given by the controlling person or group to:

(1) Each shareholder of record of the registered corporation holding voting shares.

(2) The court, accompanied by a petition to the court praying that the fair value of the voting shares of the corporation be determined pursuant to section 2547 (relating to valuation procedures) if the court should receive, pursuant to section 2547, certificates from shareholders of the corporation or an equivalent request for transfer of uncertificated securities.

(b) Obligations of the corporation.--If the controlling person or group so requests, the corporation shall, at the option of the corporation and at the expense of the person or group, either furnish a list of all such shareholders and their postal addresses to the person or group or provide the notice to all such shareholders.

(c) Contents of notice.--The notice shall state that:

(1) All shareholders are entitled to demand that they be paid the fair value of their shares.

(2) The minimum value the shareholder can receive under this subchapter is the highest price paid per share by the controlling person or group within the 90-day period ending on and including the date of the control transaction, and stating that value.

(3) If the shareholder believes the fair value of his shares is higher, this subchapter provides an appraisal procedure for determining the fair value of such shares, specifying the name of the court and its address and the caption of the petition referenced in subsection (a)(2), and stating that the information is provided for the possible use by the shareholder in electing to proceed with a court-appointed appraiser under section 2547.

There shall be included in, or enclosed with, the notice a copy of this subchapter.

(d) Optional procedure.--The controlling person or group may, at its option, supply with the notice referenced in subsection (c) a form for the shareholder to demand payment of the partial payment amount directly from the controlling person or group without utilizing the court-appointed appraiser procedure of section 2547,

requiring the shareholder to state the number and class or series, if any, of the shares owned by him, and stating where the payment demand must be sent and the procedures to be followed.

(e) Cross reference.--See section 1702 (relating to manner of giving notice).

(July 9, 2013, P.L.476, No.67, eff. 60 days)

2013 Amendment. Act 67 amended subsec. (b) and added subsec. (e).

Cross References. Section 2545 is referred to in sections 2542, 2546, 2547 of this title.

6. § 2546. Shareholder demand for fair value.

(a) General rule.--After the occurrence of the control transaction, any holder of voting shares of the registered corporation may, prior to or within a reasonable time after the notice required by section 2545 (relating to notice to shareholders) is given, which time period may be specified in the notice, make written demand on the controlling person or group for payment of the amount provided in subsection (c) with respect to the voting shares of the corporation held by the shareholder, and the controlling person or group shall be required to pay that amount to the shareholder pursuant to the procedures specified in section 2547 (relating to valuation procedures).

(b) Contents of demand.--The demand of the shareholder shall state the number and class or series, if any, of the shares owned by him with respect to which the demand is made.

(c) Measure of value.--A shareholder making written demand under this section shall be entitled to receive cash for each of his shares in an amount equal to the fair value of each voting share as of the date on which the control transaction occurs, taking into account all relevant factors, including an increment representing a proportion of any value payable for acquisition of control of the corporation.

(d) Purchases independent of subchapter.--The provisions of this subchapter shall not preclude a controlling person or group subject to this subchapter from offering, whether in the notice required by section 2545 or otherwise, to purchase voting shares of the corporation at a price other than that provided in subsection (c), and the provisions of this subchapter shall not preclude any shareholder from agreeing to sell his voting shares at that or any other price to any person.

Cross References. Section 2546 is referred to in section 2547 of this title.

7. § 2547. Valuation procedures.

(a) General rule.--If, within 45 days (or such other time period, if any, as required by applicable law) after the date of the notice required by section 2545 (relating to notice to shareholders), or, if such notice was not provided prior to the date of the written demand by the shareholder under section 2546 (relating to shareholder demand for fair value), then within 45 days (or such other time period, if any, required by applicable law) of the date of such written demand, the controlling person or group and the shareholder are unable to agree on the fair value of the shares or on a binding procedure to determine the fair value of the shares, then each shareholder who is unable to agree on both the fair value and on such a procedure with the controlling person or group and who so desires to obtain the rights and remedies provided in this subchapter shall, no later than 30 days after the expiration of the applicable 45-day or other period, surrender to the court certificates representing any of the shares that are certificated shares, duly endorsed for transfer to the controlling person or group, or cause any uncertificated shares to be transferred to the court as escrow agent under subsection (c) with a notice stating that the certificates or uncertificated shares are being surrendered or transferred, as the case may be, in connection with the petition referenced in section 2545 or, if no petition has theretofore been filed, the shareholder may file a petition within the 30-day period in the court praying that the fair value (as defined in this subchapter) of the shares be determined.

(b) Effect of failure to give notice and surrender certificates.--Any shareholder who does not so give notice and surrender any certificates or cause uncertificated shares to be transferred within such time period shall have no further right to receive, with respect to shares the certificates of which were not so surrendered or the uncertificated shares which were not so transferred under this section, payment under this subchapter from the controlling person or group with respect to the control transaction giving rise to the rights of the shareholder under this subchapter.

(c) Escrow and notice.--The court shall hold the certificates surrendered and the uncertificated shares transferred to it in escrow for, and shall promptly, following the expiration of the time period during which the certificates may be surrendered and the uncertificated shares transferred, provide a notice to the controlling person or group of the number of shares so surrendered or transferred.

(d) Partial payment for shares.--The controlling person or group shall then make a partial payment for the shares so surrendered or transferred to the court, within ten business days of receipt of the notice from the court, at a

per-share price equal to the partial payment amount. The court shall then make payment as soon as practicable, but in any event within ten business days, to the shareholders who so surrender or transfer their shares to the court of the appropriate per-share amount received from the controlling person or group.

(e) Appointment of appraiser.--Upon receipt of any share certificate surrendered or uncertificated share transferred under this section, the court shall, as soon as practicable but in any event within 30 days, appoint an appraiser with experience in appraising share values of companies of like nature to the registered corporation to determine the fair value of the shares.

(f) Appraisal procedure.--The appraiser so appointed by the court shall, as soon as reasonably practicable, determine the fair value of the shares subject to its appraisal and the appropriate market rate of interest on the amount then owed by the controlling person or group to the holders of the shares. The determination of any appraiser so appointed by the court shall be final and binding on both the controlling person or group and all shareholders who so surrendered their share certificates or transferred their shares to the court, except that the determination of the appraiser shall be subject to review to the extent and within the time provided or prescribed by law in the case of other appointed judicial officers. See 42 Pa.C.S. §§ 5105(a)(3) (relating to right to appellate review) and 5571(b) (relating to appeals generally).

(g) Supplemental payment.--Any amount owed, together with interest, as determined pursuant to the appraisal procedures of this section shall be payable by the controlling person or group after it is so determined and upon and concurrently with the delivery or transfer to the controlling person or group by the court (which shall make delivery of the certificate or certificates surrendered or the uncertificated shares transferred to it to the controlling person or group as soon as practicable but in any event within ten business days after the final determination of the amount owed) of the certificate or certificates representing shares surrendered or the uncertificated shares transferred to the court, and the court shall then make payment, as soon as practicable but in any event within ten business days after receipt of payment from the controlling person or group, to the shareholders who so surrendered or transferred their shares to the court of the appropriate per-share amount received from the controlling person or group.

(h) Voting and dividend rights during appraisal proceedings.--Shareholders who surrender their shares to the court pursuant to this section shall retain the right to vote their shares and receive dividends or other distributions thereon until the court receives payment in full for each of the shares so surrendered or transferred of the partial payment amount (and, thereafter, the controlling person or group shall be entitled to vote such shares and receive dividends or other distributions thereon). The fair value (as determined by the appraiser) of any dividends or other distributions so received by the shareholders shall be subtracted from any amount owing to such shareholders under this section.

(i) Powers of the court.--The court may appoint such agents, including the transfer agent of the corporation, or any other institution, to hold the share certificates so surrendered and the shares surrendered or transferred under this section, to effect any necessary change in record ownership of the shares after the payment by the controlling person or group to the court of the amount specified in subsection (h), to receive and disburse dividends or other distributions, to provide notices to shareholders and to take such other actions as the court determines are appropriate to effect the purposes of this subchapter.

(j) Costs and expenses.--The costs and expenses of any appraiser or other agents appointed by the court shall be assessed against the controlling person or group. The costs and expenses of any other procedure to determine fair value shall be paid as agreed to by the parties agreeing to the procedure.

(k) Jurisdiction exclusive.--The jurisdiction of the court under this subchapter is plenary and exclusive and the controlling person or group, and all shareholders who so surrendered or transferred their shares to the court shall be made a party to the proceeding as in an action against their shares.

(l) Duty of corporation.--The corporation shall comply with requests for information, which may be submitted pursuant to procedures maintaining the confidentiality of the information, made by the court or the appraiser selected by the court. If any of the shares of the corporation are not represented by certificates, the transfer, escrow or retransfer of those shares contemplated by this section shall be registered by the corporation, which shall give the written notice required by section 1528(f) (relating to uncertificated shares) to the transferring shareholder, the court and the controlling shareholder or group, as appropriate in the circumstances.

(m) Payment under optional procedure.--Any amount agreed upon between the parties or determined pursuant to the procedure agreed upon between the parties shall be payable by the controlling person or group after it is agreed upon or determined and upon and concurrently with the delivery of any certificate or certificates representing such shares or the transfer of any uncertificated shares to the controlling person or group by the shareholder.

(n) Title to shares.--Upon full payment by the controlling person or group of the amount owed to the shareholder or to the court, as appropriate, the shareholder shall cease to have any interest in the shares.

Cross References. Section 2547 is referred to in sections 2545, 2546, 2556 of this title.

8. § 2548. Coordination with control transaction.

(a) General rule.--A person or group that proposes to engage in a control transaction may comply with the requirements of this subchapter in connection with the control transaction, and the effectiveness of the rights afforded in this subchapter to shareholders may be conditioned upon the consummation of the control transaction.

(b) Notice.--The person or group shall give prompt written notice of the satisfaction of any such condition to each shareholder who has made demand as provided in this subchapter.

Business Combinations (Subchapter 25F, §§ 2551-2556)

1. § 2551. Application and effect of subchapter.

(a) General rule.--Except as otherwise provided in this section, this subchapter shall apply to every registered corporation.

(b) Exceptions.--The provisions of this subchapter shall not apply to any business combination:

(1) Of a registered corporation described in section 2502(1)(ii) or (2) (relating to registered corporation status).

(2) Of a corporation whose articles have been amended to provide that the corporation shall be subject to the provisions of this subchapter, which was not a registered corporation described in section 2502(1)(i) on the effective date of such amendment, and which is a business combination with an interested shareholder whose share acquisition date is prior to the effective date of such amendment.

(3) Of a corporation:

(i) the bylaws of which, by amendment adopted by June 21, 1988, and not subsequently rescinded either by an article amendment or by a bylaw amendment approved by at least 85% of the whole board of directors, explicitly provide that this subchapter shall not be applicable to the corporation; or

(ii) the articles of which explicitly provide that this subchapter shall not be applicable to the corporation by a provision included in the original articles, or by an article amendment adopted pursuant to both:

(A) the procedures then applicable to the corporation; and

(B) the affirmative vote of the holders, other than interested shareholders and their affiliates and associates, of shares entitling the holders to cast a majority of the votes that all shareholders would be entitled to cast in an election of directors of the corporation, excluding the voting shares of interested shareholders and their affiliates and associates, expressly electing not to be governed by this subchapter.

The amendment to the articles shall not be effective until 18 months after the vote of the shareholders of the corporation and shall not apply to any business combination of the corporation with an interested shareholder whose share acquisition date is on or prior to the effective date of the amendment.

(4) Of a corporation with an interested shareholder of the corporation which became an interested shareholder inadvertently, if the interested shareholder:

(i) as soon as practicable, divests itself of a sufficient amount of the voting shares of the corporation so that it no longer is the beneficial owner, directly or indirectly, of shares entitling the person to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation; and

(ii) would not at any time within the five-year period preceding the announcement date with respect to the business combination have been an interested shareholder but for such inadvertent acquisition.

(5) With an interested shareholder who was the beneficial owner, directly or indirectly, of shares entitling the person to cast at least 15% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation on March 23, 1988, and remains so to the share acquisition date of the interested shareholder.

(6) Of a corporation that on March 23, 1988, was a subsidiary of any other corporation. A corporation that was a subsidiary on such date will not be deemed to cease being a subsidiary as long as the other corporation remains a controlling person or group of the subsidiary within the meaning of Subchapter E (relating to control transactions). A reference in the articles or bylaws to former section 911 (relating to requirements relating to certain business combinations) of the act of May 5, 1933 (P.L.364, No.106), known as the Business Corporation Law of 1933, shall be deemed a reference to this subchapter for the purposes of this section. See section 101(c) (relating to references to prior statutes).

(c) Continuing applicability.--A registered corporation that is organized under the laws of this Commonwealth shall not cease to be subject to this subchapter by reason of events occurring or actions taken while

the corporation is subject to the provisions of this subchapter. See section 4146 (relating to provisions applicable to all foreign corporations).
(Dec. 18, 1992, P.L.1333, No.169, eff. 60 days)

1992 Amendment. Act 169 deleted subsec. (c) andreletteredsubsec. (d) tosubsec. (c).
Cross References. Section 2551 is referred to in sections 1106, 2555, 4146 of this title.

2. § 2552. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Affiliate." A person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified person.

"Announcement date." When used in reference to any business combination, the date of the first public announcement of the final, definitive proposal for such business combination.

"Associate." When used to indicate a relationship with any person:

(1) any corporation or organization of which such person is an officer, director or partner or is, directly or indirectly, the beneficial owner of shares entitling that person to cast at least 10% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation or organization;

(2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and

(3) any relative or spouse of such person, or any relative of the spouse, who has the same home as such person.

"Beneficial owner." When used with respect to any shares, a person:

(1) that, individually or with or through any of its affiliates or associates, beneficially owns such shares, directly or indirectly;

(2) that, individually or with or through any of its affiliates or associates, has:

(i) the right to acquire such shares (whether the right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise, except that a person shall not be deemed the beneficial owner of shares tendered pursuant to a tender or exchange offer made by such person or the affiliates or associates of any such person until the tendered shares are accepted for purchase or exchange; or

(ii) the right to vote such shares pursuant to any agreement, arrangement or understanding (whether or not in writing), except that a person shall not be deemed the beneficial owner of any shares under this subparagraph if the agreement, arrangement or understanding to vote such shares:

(A) arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act; and

(B) is not then reportable on a Schedule 13D under the Exchange Act, (or any comparable or successor report); or

(3) that has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in paragraph (2)(ii)), or disposing of such shares with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such shares.

"Business combination." A business combination as defined in section 2554 (relating to business combination).

"Common shares." Any shares other than preferred shares.

"Consummation date." With respect to any business combination, the date of consummation of the business combination, or, in the case of a business combination as to which a shareholder vote is taken, the later of the business day prior to the vote or 20 days prior to the date of consummation of such business combination.

"Control," "controlling," "controlled by" or "under common control with." The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise. A person's beneficial ownership of shares entitling that person to cast at least 10% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation shall create a presumption that such person has control of the corporation. Notwithstanding the foregoing, a person shall not be deemed to have control of a corporation if such person holds voting shares, in good faith and not for the purpose of circumventing this subchapter, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of the corporation.

"Interested shareholder." An interested shareholder as defined in section 2553 (relating to interested shareholder).

"Market value." When used in reference to shares or property of any corporation:

(1) In the case of shares, the highest closing sale price during the 30-day period immediately preceding the date in question of the share on the composite tape for New York Stock Exchange-listed shares, or, if the shares are not quoted on the composite tape or if the shares are not listed on the exchange, on the principal United States securities exchange registered under the Exchange Act, on which such shares are listed, or, if the shares are not listed on any such exchange, the highest closing bid quotation with respect to the share during the 30-day period preceding the date in question on the National Association of Securities Dealers, Inc., Automated Quotations System or any system then in use, or if no quotations are available, the fair market value on the date in question of the share as determined by the board of directors of the corporation in good faith.

(2) In the case of property other than cash or shares, the fair market value of the property on the date in question as determined by the board of directors of the corporation in good faith.

"Preferred shares." Any class or series of shares of a corporation which, under the bylaws or articles of the corporation, is entitled to receive payment of dividends prior to any payment of dividends on some other class or series of shares, or is entitled in the event of any voluntary liquidation, dissolution or winding up of the corporation to receive payment or distribution of a preferential amount before any payments or distributions are received by some other class or series of shares.

"Share acquisition date." With respect to any person and any registered corporation, the date that such person first becomes an interested shareholder of such corporation.

"Shares."

(1) Any shares or similar security, any certificate of interest, any participation in any profit-sharing agreement, any voting trust certificate, or any certificate of deposit for shares.

(2) Any security convertible, with or without consideration, into shares, or any option right, conversion right or privilege of buying shares without being bound to do so, or any other security carrying any right to acquire, subscribe to or purchase shares.

"Subsidiary." Any corporation as to which any other corporation is the beneficial owner, directly or indirectly, of shares of the first corporation that would entitle the other corporation to cast in excess of 50% of the votes that all shareholders would be entitled to cast in the election of directors of the first corporation.

"Voting shares." Shares of a corporation entitled to vote generally in the election of directors.
(Dec. 19, 1990, P.L.834, No.198, eff. imd.)

1990 Amendment. Act 198 deleted the def. of "Exchange Act."

Cross References. Section 2552 is referred to in sections 515, 1510, 1715, 1914, 2542, 2543, 2553, 2562, 2571, 2573, 2581, 2586, 5510, 5715 of this title.

3. § 2553. Interested shareholder.

(a) General rule.--The term "interested shareholder," when used in reference to any registered corporation, means any person (other than the corporation or any subsidiary of the corporation) that:

(1) is the beneficial owner, directly or indirectly, of shares entitling that person to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation; or

(2) is an affiliate or associate of such corporation and at any time within the five-year period immediately prior to the date in question was the beneficial owner, directly or indirectly, of shares entitling that person to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation.

(b) Exception.--For the purpose of determining whether a person is an interested shareholder:

(1) the number of votes that would be entitled to be cast in an election of directors of the corporation shall be calculated by including shares deemed to be beneficially owned by the person through application of the definition of "beneficial owner" in section 2552 (relating to definitions), but excluding any other unissued shares of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion or option rights, or otherwise; and

(2) there shall be excluded from the beneficial ownership of the interested shareholder any:

(i) shares which have been held continuously by a natural person since January 1, 1983, and which are then held by that natural person;

(ii) shares which are then held by any natural person or trust, estate, foundation or other similar entity to the extent such shares were acquired solely by gift, inheritance, bequest, devise or other testamentary distribution or

series of those transactions, directly or indirectly, from a natural person who had acquired such shares prior to January 1, 1983; or

(iii) shares which were acquired pursuant to a stock split, stock dividend, reclassification or similar recapitalization with respect to shares described under this paragraph that have been held continuously since their issuance by the corporation by the natural person or entity that acquired them from the corporation, or that were acquired, directly or indirectly, from the natural person or entity, solely pursuant to a transaction or series of transactions described in subparagraph (ii), and that are then held by a natural person or entity described in subparagraph (ii).

Cross References. Section 2553 is referred to in sections 1106, 2521, 2552 of this title.

4. § 2554. Business combination.

The term "business combination," when used in reference to any registered corporation and any interested shareholder of the corporation, means any of the following:

(1) A merger, consolidation, share exchange or division of the corporation or any subsidiary of the corporation:

(i) with the interested shareholder; or

(ii) with, involving or resulting in any other corporation (whether or not itself an interested shareholder of the registered corporation) which is, or after the merger, consolidation, share exchange or division would be, an affiliate or associate of the interested shareholder.

(2) A sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with the interested shareholder or any affiliate or associate of such interested shareholder of assets of the corporation or any subsidiary of the corporation:

(i) having an aggregate market value equal to 10% or more of the aggregate market value of all the assets, determined on a consolidated basis, of such corporation;

(ii) having an aggregate market value equal to 10% or more of the aggregate market value of all the outstanding shares of such corporation; or

(iii) representing 10% or more of the earning power or net income, determined on a consolidated basis, of such corporation.

(3) The issuance or transfer by the corporation or any subsidiary of the corporation (in one transaction or a series of transactions) of any shares of such corporation or any subsidiary of such corporation which has an aggregate market value equal to 5% or more of the aggregate market value of all the outstanding shares of the corporation to the interested shareholder or any affiliate or associate of such interested shareholder except pursuant to the exercise of option rights to purchase shares, or pursuant to the conversion of securities having conversion rights, offered, or a dividend or distribution paid or made, pro rata to all shareholders of the corporation.

(4) The adoption of any plan or proposal for the liquidation or dissolution of the corporation proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of such interested shareholder.

(5) A reclassification of securities (including, without limitation, any split of shares, dividend of shares, or other distribution of shares in respect of shares, or any reverse split of shares), or recapitalization of the corporation, or any merger or consolidation of the corporation with any subsidiary of the corporation, or any other transaction (whether or not with or into or otherwise involving the interested shareholder), proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, the interested shareholder or any affiliate or associate of the interested shareholder, which has the effect, directly or indirectly, of increasing the proportionate share of the outstanding shares of any class or series of voting shares or securities convertible into voting shares of the corporation or any subsidiary of the corporation which is, directly or indirectly, owned by the interested shareholder or any affiliate or associate of the interested shareholder, except as a result of immaterial changes due to fractional share adjustments.

(6) The receipt by the interested shareholder or any affiliate or associate of the interested shareholder of the benefit, directly or indirectly (except proportionately as a shareholder of such corporation), of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by or through the corporation.

(Dec. 19, 1990, P.L.834, No.198, eff. imd.)

1990 Amendment. Act 198 amended par. (1).

Cross References. Section 2554 is referred to in section 2552 of this title.

5. § 2555. Requirements relating to certain business combinations.

Notwithstanding anything to the contrary contained in this subpart (except the provisions of section 2551 (relating to application and effect of subchapter)), a registered corporation shall not engage at any time in any business combination with any interested shareholder of the corporation other than:

(1) A business combination approved by the board of directors of the corporation prior to the interested shareholder's share acquisition date, or where the purchase of shares made by the interested shareholder on the interested shareholder's share acquisition date had been approved by the board of directors of the corporation prior to the interested shareholder's share acquisition date.

(2) A business combination approved:

(i) by the affirmative vote of the holders of shares entitling such holders to cast a majority of the votes that all shareholders would be entitled to cast in an election of directors of the corporation, not including any voting shares beneficially owned by the interested shareholder or any affiliate or associate of such interested shareholder, at a meeting called for such purpose no earlier than three months after the interested shareholder became, and if at the time of the meeting the interested shareholder is, the beneficial owner, directly or indirectly, of shares entitling the interested shareholder to cast at least 80% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation, and if the business combination satisfies all the conditions of section 2556 (relating to certain minimum conditions); or

(ii) by the affirmative vote of all of the holders of all of the outstanding common shares.

(3) A business combination approved by the affirmative vote of the holders of shares entitling such holders to cast a majority of the votes that all shareholders would be entitled to cast in an election of directors of the corporation, not including any voting shares beneficially owned by the interested shareholder or any affiliate or associate of the interested shareholder, at a meeting called for such purpose no earlier than five years after the interested shareholder's share acquisition date.

(4) A business combination approved at a shareholders' meeting called for such purpose no earlier than five years after the interested shareholder's share acquisition date that meets all of the conditions of section 2556.

Cross References. Section 2555 is referred to in sections 2521, 2556 of this title.

6. § 2556. Certain minimum conditions.

A business combination conforming to section 2555(2)(i) or (4) (relating to requirements relating to certain business combinations) shall meet all of the following conditions:

(1) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding common shares of such registered corporation in the business combination is at least equal to the higher of the following:

(i) The highest per share price paid by the interested shareholder at a time when the shareholder was the beneficial owner, directly or indirectly, of shares entitling that person to cast at least 5% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation, for any common shares of the same class or series acquired by it:

(A) within the five-year period immediately prior to the announcement date with respect to such business combination; or

(B) within the five-year period immediately prior to, or in, the transaction in which the interested shareholder became an interested shareholder;

whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per-share acquisition price was paid through the consummation date at the rate for one year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per common share since such earliest date, up to the amount of the interest.

(ii) The market value per common share on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from such date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per common share since such date, up to the amount of the interest.

(2) The aggregate amount of the cash and the market value as of the consummation date of consideration other than cash to be received per share by holders of outstanding shares of any class or series of shares, other than common shares, of the corporation is at least equal to the highest of the following (whether or not the interested shareholder has previously acquired any shares of such class or series of shares):

(i) The highest per-share price paid by the interested shareholder at a time when the shareholder was the beneficial owner, directly or indirectly, of shares entitling that person to cast at least 5% of the votes that all shareholders would be entitled to cast in an election of directors of such corporation, for any shares of such class or series of shares acquired by it:

(A) within the five-year period immediately prior to the announcement date with respect to the business combination; or

(B) within the five-year period immediately prior to, or in, the transaction in which the interested shareholder became an interested shareholder;

whichever is higher; plus, in either case, interest compounded annually from the earliest date on which the highest per-share acquisition price was paid through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid, and the market value of any dividends paid other than in cash, per share of such class or series of shares since such earliest date, up to the amount of the interest.

(ii) The highest preferential amount per share to which the holders of shares of such class or series of shares are entitled in the event of any voluntary liquidation, dissolution or winding up of the corporation, plus the aggregate amount of any dividends declared or due as to which such holders are entitled prior to payment of dividends on some other class or series of shares (unless the aggregate amount of the dividends is included in such preferential amount).

(iii) The market value per share of such class or series of shares on the announcement date with respect to the business combination or on the interested shareholder's share acquisition date, whichever is higher; plus interest compounded annually from such date through the consummation date at the rate for one-year United States Treasury obligations from time to time in effect; less the aggregate amount of any cash dividends paid and the market value of any dividends paid other than in cash, per share of such class or series of shares since such date, up to the amount of the interest.

(3) The consideration to be received by holders of a particular class or series of outstanding shares (including common shares) of the corporation in the business combination is in cash or in the same form as the interested shareholder has used to acquire the largest number of shares of such class or series of shares previously acquired by it, and the consideration shall be distributed promptly.

(4) The holders of all outstanding shares of the corporation not beneficially owned by the interested shareholder immediately prior to the consummation of the business combination are entitled to receive in the business combination cash or other consideration for such shares in compliance with paragraphs (1), (2) and (3).

(5) After the interested shareholder's share acquisition date and prior to the consummation date with respect to the business combination, the interested shareholder has not become the beneficial owner of any additional voting shares of such corporation except:

(i) as part of the transaction which resulted in such interested shareholder becoming an interested shareholder;

(ii) by virtue of proportionate splits of shares, share dividends or other distributions of shares in respect of shares not constituting a business combination as defined in this subchapter;

(iii) through a business combination meeting all of the conditions of section 2555(1), (2), (3) or (4);

(iv) through purchase by the interested shareholder at any price which, if the price had been paid in an otherwise permissible business combination the announcement date and consummation date of which were the date of such purchase, would have satisfied the requirements of paragraphs (1), (2) and (3); or

(v) through purchase required by and pursuant to the provisions of, and at no less than the fair value (including interest to the date of payment) as determined by a court-appointed appraiser under section 2547 (relating to valuation procedures) or, if such fair value was not then so determined, then at a price that would satisfy the conditions in subparagraph (iv).

Cross References. Section 2556 is referred to in section 2555 of this title.

Control-Share Acquisitions (Subchapter G, §§ 2561 – 2568):

1. § 2561. Application and effect of subchapter.

(a) ***General rule.*** **--** Except as otherwise provided in this section, this subchapter shall apply to every registered corporation.

(b) ***Exceptions.*** **--** This subchapter shall not apply to any control-share acquisition:

(1) Of a registered corporation described in section 2502(1)(ii) or (2) (relating to registered corporation status).

(2) Of a corporation:

(i) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment adopted by the board of directors on or before July 26, 1990, in the case of a corporation:

(A) which on April 27, 1990, was a registered corporation described in section 2502(1)(i); and

(B) did not on that date have outstanding one or more classes or series of preference shares entitled, upon the occurrence of a default in the payment of dividends or another similar contingency, to elect a majority of the members of the board of directors (a bylaw adopted on or before July 26, 1990, by a corporation excluded from the scope of this subparagraph by this clause shall be ineffective unless ratified under subparagraph (ii));

(ii) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment ratified by the board of directors on or after December 19, 1990, and on or before March 19, 1991, in the case of a corporation:

(A) which on April 27, 1990, was a registered corporation described in section 2502(1)(i);

(B) which on that date had outstanding one or more classes or series of preference shares entitled, upon the occurrence of a default in the payment of dividends or another similar contingency, to elect a majority of the members of the board of directors; and

(C) the bylaws of which on that date contained a provision described in subparagraph (i); or

(iii) in any other case, the articles of which explicitly provide that this subchapter shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted at any time while it is a corporation other than a registered corporation described in section 2502(1)(i) or on or before 90 days after the corporation first becomes a registered corporation described in section 2502(1)(i).

(3) Consummated before October 17, 1989.

(4) Consummated pursuant to contractual rights or obligations existing before:

(i) October 17, 1989, in the case of a corporation which was a registered corporation described in section 2502(1)(i) on that date; or

(ii) in any other case, the date this subchapter becomes applicable to the corporation.

(5) Consummated:

(i) Pursuant to a gift, devise, bequest or otherwise through the laws of inheritance or descent.

(ii) By a settlor to a trustee under the terms of a family, testamentary or charitable trust.

(iii) By a trustee to a trust beneficiary or a trustee to a successor trustee under the terms of, or the addition, withdrawal or demise of a beneficiary or beneficiaries of, a family, testamentary or charitable trust.

(iv) Pursuant to the appointment of a guardian or custodian.

(v) Pursuant to a transfer from one spouse to another by reason of separation or divorce or pursuant to community property laws or other similar laws of any jurisdiction.

(vi) Pursuant to the satisfaction of a pledge or other security interest created in good faith and not for the purpose of circumventing this subchapter.

(vii) Pursuant to a merger, consolidation or plan of share exchange effected in compliance with the provisions of this chapter if the corporation is a party to the agreement of merger, consolidation or plan of share exchange.

(viii) Pursuant to a transfer from a person who beneficially owns voting shares of the corporation that would entitle the holder thereof to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation and who acquired beneficial ownership of such shares prior to October 17, 1989.

(ix) By the corporation or any of its subsidiaries.

(x) By any savings, stock ownership, stock option or other benefit plan of the corporation or any of its subsidiaries, or by any fiduciary with respect to any such plan when acting in such capacity.

(xi) By a person engaged in business as an underwriter of securities who acquires the shares

directly from the corporation or an affiliate or associate of the corporation through his participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933.

(xii) Or commenced by a person who first became an acquiring person:

(A) after April 27, 1990; and

(I) at a time when this subchapter was or is not applicable to the corporation; or

(II) on or before ten business days after the first public announcement by the corporation that this subchapter is applicable to the corporation, if this subchapter was not applicable to the corporation on July 27, 1990.

(c) ***Effect of distributions.*** **--** For purposes of this subchapter, voting shares of a corporation acquired by a holder as a result of a stock split, stock dividend or other similar distribution by a corporation of voting shares issued by the corporation and not involving a sale of such voting shares shall be deemed to have been acquired by the holder in the same transaction (at the same time, in the same manner and from the same person) in which the holder acquired the shares with respect to which such voting shares were subsequently distributed by the corporation.

(d) ***Status of certain shares and effect of formation of group on status.***

(1) No share over which voting power, or of which beneficial ownership, was or is acquired by the acquiring person in or in connection with a control-share acquisition described in subsection (b) shall be deemed to be a control share.

(2) In the case of affiliate, disinterested or existing shares, the acquisition of a beneficial ownership interest in a voting share by a group shall not, by itself, affect the status of an affiliate, disinterested or existing share, as such, if and so long as the person who had beneficial ownership of the share immediately prior to the acquisition of the beneficial ownership interest in the share by the group (or a direct or indirect transferee from the person to the extent such shares were acquired by the transferee solely pursuant to a transfer or series of transfers under subsection (b)(5)(i) through (vi)):

(i) is a participant in the group; and

(ii) continues to have at least the same voting and dispositive power over the share as the person had immediately prior to the acquisition of the beneficial ownership interest in the share by the group.

(3) Voting shares which are beneficially owned by a person described in paragraph (1), (2) or (3) of the definition of "affiliate shares" in section 2562 (relating to definitions) shall continue to be deemed affiliate shares, notwithstanding paragraph (2) of this subsection or the fact that such shares are also beneficially owned by a group.

(4) No share of a corporation over which voting power, or of which beneficial ownership, was or is acquired by the acquiring person after April 27, 1990, at a time when this subchapter was or is not applicable to the corporation shall be deemed to be a control share.

(e) ***Application of duties.*** **--** The duty of the board of directors, committees of the board and individual directors under section 2565 (relating to procedure for establishing voting rights of control shares) is solely to the corporation and may be enforced directly by the corporation or may be enforced by a shareholder, as such, by an action in the right of the corporation, and may not be enforced directly by a shareholder or by any other person or group.

2. § 2562. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Acquiring person." --A person who makes or proposes to make a control-share acquisition. Two or more persons acting in concert, whether or not pursuant to an express agreement, arrangement, relationship or understanding, including as a partnership, limited partnership, syndicate, or through any means of affiliation whether or not formally organized, for the purpose of acquiring, holding, voting or disposing of shares of a registered corporation, shall also constitute a person for the purposes of this subchapter. A person, together with its affiliates and associates, shall constitute a person for the purposes of this subchapter.

"Affiliate," "associate" and "beneficial owner." --The terms shall have the meanings specified in section 2552 (relating to definitions). The corporation may adopt reasonable provisions to evidence beneficial ownership, specifically including requirements that holders of voting shares of the corporation provide verified statements

evidencing beneficial ownership and attesting to the date of acquisition thereof.

"Affiliate shares." --All voting shares of a corporation beneficially owned by:

(1) an acquiring person;

(2) executive officers or directors who are also officers (including executive officers); or

(3) employee stock plans in which employee participants do not have, under the terms of the plan, the right to direct confidentially the manner in which shares held by the plan for the benefit of the employee will be voted in connection with the consideration of the voting rights to be accorded control shares.

The term does not include existing shares beneficially owned by executive officers or directors who are also officers (including executive officers) if the shares are shares described in paragraph (2) of the definition of "existing shares" that were beneficially owned continuously by the same person or entity described in such paragraph since January 1, 1988, or are shares described in paragraph (3) of that definition that were acquired with respect to such existing shares.

"Control." --The term shall have the meaning specified in section 2573 (relating to definitions).

"Control-share acquisition." --An acquisition, directly or indirectly, by any person of voting power over voting shares of a corporation that, but for this subchapter, would, when added to all voting power of the person over other voting shares of the corporation (exclusive of voting power of the person with respect to existing shares of the corporation), entitle the person to cast or direct the casting of such a percentage of the votes for the first time with respect to any of the following ranges that all shareholders would be entitled to cast in an election of directors of the corporation:

(1) at least 20% but less than 33 1/3%;

(2) at least 33 1/3% but less than 50%; or

(3) 50% or more.

"Control shares." --Those voting shares of a corporation that, upon acquisition of voting power over such shares by an acquiring person, would result in a control-share acquisition. Voting shares beneficially owned by an acquiring person shall also be deemed to be control shares where such beneficial ownership was acquired by the acquiring person:

(1) within 180 days of the day the person makes a control-share acquisition; or

(2) with the intention of making a control-share acquisition.

"Disinterested shares." --All voting shares of a corporation that are not affiliate shares and that were beneficially owned by the same holder (or a direct or indirect transferee from the holder to the extent such shares were acquired by the transferee solely pursuant to a transfer or series of transfers under section 2561(b)(5)(i) through (vi) (relating to application and effect of subchapter)) continuously during the period from:

(1) the last to occur of the following dates:

(i) 12 months preceding the record date described in paragraph (2);

(ii) five business days prior to the date on which there is first publicly disclosed or caused to be disclosed information that there is a person (including the acquiring person) who intends to engage or may seek to engage in a control-share acquisition or that there is a person (including the acquiring person) who has acquired shares as part of, or with the intent of making, a control-share acquisition, as determined by the board of directors of the corporation in good faith considering all the evidence that the board deems to be relevant to such determination, including, without limitation, media reports, share trading volume and changes in share prices; or

(A) October 17, 1989, in the case of a corporation which was a registered corporation on that date; or

(B) in any other case, the date this subchapter becomes applicable to the corporation; through

(2) the record date established pursuant to section 2565(c) (relating to notice and record date).

"Executive officer." --When used with reference to a corporation, the president, any vice-president in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policymaking function or any other person who performs similar policymaking functions. Executive officers of subsidiaries shall be deemed executive officers of the corporation if they perform such policymaking functions for the corporation.

"Existing shares."

(1) Voting shares which have been beneficially owned continuously by the same natural person since January 1, 1988.

(2) Voting shares which are beneficially owned by any natural person or trust, estate, foundation or other similar entity to the extent the voting shares were acquired solely by gift, inheritance, bequest, devise or other testamentary distribution or series of these transactions, directly or indirectly, from a natural person who had beneficially owned the voting shares prior to January 1, 1988.

(3) Voting shares which were acquired pursuant to a stock split, stock dividend, or other similar distribution described in section 2561(c) (relating to effect of distributions) with respect to existing shares that have been beneficially owned continuously since their issuance by the corporation by the natural person or entity that acquired them from the corporation or that were acquired, directly or indirectly, from such natural person or entity, solely pursuant to a transaction or series of transactions described in paragraph (2), and that are held at such time by a natural person or entity described in paragraph (2).

"Proxy." --Includes any proxy, consent or authorization.

"Proxy solicitation" or "solicitation of proxies." --Includes any solicitation of a proxy, including a solicitation of a revocable proxy of the nature and under the circumstances described in section 2563(b)(3) (relating to acquiring person safe harbor).

"Publicly disclosed or caused to be disclosed." --Includes, but is not limited to, any disclosure (whether or not required by law) that becomes public made by a person:

(1) with the intent or expectation that such disclosure become public; or

(2) to another where the disclosing person knows, or reasonably should have known, that the receiving person was not under an obligation to refrain from making such disclosure, directly or indirectly, to the public and such receiving person does make such disclosure, directly or indirectly, to the public.

"Voting shares." --The term shall have the meaning specified in section 2552 (relating to definitions).

3. § 2563. Acquiring person safe harbor.

(a) ***Nonparticipant.*** **--** For the purposes of this subchapter, a person shall not be deemed an acquiring person, absent significant other activities indicating that a person should be deemed an acquiring person, by reason of voting or giving a proxy or consent as a shareholder of the corporation if the person is one who:

(1) did not acquire any voting shares of the corporation with the purpose of changing or influencing control of the corporation, seeking to acquire control of the corporation or influencing the outcome of a vote of shareholders under section 2564 (relating to voting rights of shares acquired in a control-share acquisition) or in connection with or as a participant in any agreement, arrangement, relationship, understanding or otherwise having any such purpose;

(2) if the control-share acquisition were consummated, would not be a person that has control over the corporation and will not receive, directly or indirectly, any consideration from a person that has control over the corporation other than consideration offered proportionately to all holders of voting shares of the corporation; and

(3) if a proxy or consent is given, executes a revocable proxy or consent given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act under circumstances not then reportable on Schedule 13d under the Exchange Act (or any comparable or successor report) by the person who gave the proxy or consent.

(b) ***Certain holders.*** **--** For the purpose of this subchapter, a person shall not be deemed an acquiring person if such person holds voting power within any of the ranges specified in the definition of "control-share acquisition":

(1) in good faith and not for the purpose of circumventing this subchapter, as an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or, if they are a group acting in concert, as a group have the voting power specified in any of the ranges in the definition of "control-share acquisition";

(2) in connection with the solicitation of proxies or consents by or on behalf of the corporation in connection with shareholder meetings or actions of the corporation;

(3) as a result of the solicitation of revocable proxies or consents with respect to voting shares if such proxies or consents both:

(i) are given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act; and

(ii) do not empower the holder thereof, whether or not this power is shared with any other person, to vote such shares except on the specific matters described in such proxy or consent

and in accordance with the instructions of the giver of such proxy or consent; or

(4) to the extent of voting power arising from a contingent right of the holders of one or more classes or series of preference shares to elect one or more members of the board of directors upon or during the continuation of a default in the payment of dividends on such shares or another similar contingency.

4. § 2564. Voting rights of shares acquired in a control-share acquisition.

(a) ***General rule.*** **--** Control shares shall not have any voting rights unless a resolution approved by a vote of shareholders of the registered corporation at an annual or special meeting of shareholders pursuant to this subchapter restores to the control shares the same voting rights as other shares of the same class or series with respect to elections of directors and all other matters coming before the shareholders. Any such resolution may be approved only by the affirmative vote of the holders of a majority of the voting power entitled to vote in two separate votes as follows:

(1) all the disinterested shares of the corporation; and

(2) all voting shares of the corporation.

(b) ***Lapse of voting rights.*** **--** Voting rights accorded by approval of a resolution of shareholders shall lapse and be lost if any proposed control-share acquisition which is the subject of the shareholder approval is not consummated within 90 days after shareholder approval is obtained.

(c) ***Restoration of voting rights.*** **--** Any control shares that do not have voting rights accorded to them by approval of a resolution of shareholders as provided by subsection (a) or the voting rights of which lapse pursuant to subsection (b) shall regain such voting rights on transfer to a person other than the acquiring person or any affiliate or associate of the acquiring person (or direct or indirect transferee from the acquiring person or such affiliate or associate solely pursuant to a transfer or series of transfers under section 2561(b)(5)(i) through (vi) (relating to application and effect of subchapter)) unless such shares shall constitute control shares of the other person, in which case the voting rights of those shares shall again be subject to this subchapter.

5. § 2565. Procedure for establishing voting rights of control shares.

(a) ***Special meeting.*** **--** A special meeting of the shareholders of a registered corporation shall be called by the board of directors of the corporation for the purpose of considering the voting rights to be accorded to the control shares if an acquiring person:

(1) files an information statement fully conforming to section 2566 (relating to information statement of acquiring person);

(2) makes a request in writing for a special meeting of the shareholders at the time of delivery of the information statement;

(3) makes a control-share acquisition or a bona fide written offer to make a control-share acquisition; and

(4) gives a written undertaking at the time of delivery of the information statement to pay or reimburse the corporation for the expenses of a special meeting of the shareholders.

The special meeting requested by the acquiring person shall be held on the date set by the board of directors of the corporation, but in no event later than 50 days after the receipt of the information statement by the corporation, unless the corporation and the acquiring person mutually agree to a later date. If the acquiring person so requests in writing at the time of delivery of the information statement to the corporation, the special meeting shall not be held sooner than 30 days after receipt by the corporation of the complete information statement.

(b) ***Special meeting not requested.*** **--** If the acquiring person complies with subsection (a)(1) and (3), but no request for a special meeting is made or no written undertaking to pay or reimburse the expenses of the meeting is given, the issue of the voting rights to be accorded to control shares shall be submitted to the shareholders at the next annual or special meeting of the shareholders of which notice had not been given prior to the receipt of such information statement, unless the matter of the voting rights becomes moot.

(c) ***Notice and record date.*** **--** The notice of any annual or special meeting at which the issue of the voting rights to be accorded the control shares shall be submitted to shareholders shall be given at least ten days prior to the date named for the meeting and shall be accompanied by:

(1) A copy of the information statement of the acquiring person.

(2) A copy of any amendment of such information statement previously delivered to the corporation at least seven days prior to the date on which such notice is given.

(3) A statement disclosing whether the board of directors of the corporation recommends approval of,

expresses no opinion and remains neutral toward, recommends rejection of, or is unable to take a position with respect to according voting rights to control shares. In determining the position that it shall take with respect to according voting rights to control shares, including to express no opinion and remain neutral or to be unable to take a position with respect to such issue, the board of directors shall specifically consider, in addition to any other factors it deems appropriate, the effect of according voting rights to control shares upon the interests of employees and of communities in which offices or other establishments of the corporation are located.

(4) Any other matter required by this subchapter to be incorporated into or to accompany the notice of meeting of shareholders or that the corporation elects to include with such notice.

Only shareholders of record on the date determined by the board of directors in accordance with the provisions of section 1763 (relating to determination of shareholders of record) shall be entitled to notice of and to vote at the meeting to consider the voting rights to be accorded to control shares.

(d) ***Special meeting or submission of issue at annual or special meeting not required.*--** Notwithstanding subsections (a) and (b), the corporation is not required to call a special meeting of shareholders or otherwise present the issue of the voting rights to be accorded to the control shares at any annual or special meeting of shareholders unless:

(1) the acquiring person delivers to the corporation a complete information statement pursuant to section 2566; and

(2) at the time of delivery of such information statement, the acquiring person has:

(i) entered into a definitive financing agreement or agreements (which shall not include best efforts, highly confident or similar undertakings but which may have the usual and customary conditions, including conditions requiring that the control-share acquisition be consummated and that the control shares be accorded voting rights) with one or more financial institutions or other persons having the necessary financial capacity as determined by the board of directors of the corporation in good faith to provide for any amounts of financing of the control-share acquisition not to be provided by the acquiring person; and

(ii) delivered a copy of such agreements to the corporation.

6. § 2566. Information statement of acquiring person.

(a) ***Delivery of information statement.*** **--** An acquiring person may deliver to the registered corporation at its principal executive office an information statement which shall contain all of the following:

(1) The identity of the acquiring person and the identity of each affiliate and associate of the acquiring person.

(2) A statement that the information statement is being provided under this section.

(3) The number and class or series of voting shares and of any other security of the corporation beneficially owned, directly or indirectly, prior to the control-share acquisition and at the time of the filing of this statement by the acquiring person.

(4) The number and class or series of voting shares of the corporation acquired or proposed to be acquired pursuant to the control-share acquisition by the acquiring person and specification of the following ranges of votes that the acquiring person could cast or direct the casting of relative to all the votes that would be entitled to be cast in an election of directors of the corporation that the acquiring person in good faith believes would result from consummation of the control-share acquisition:

(i) At least 20% but less than 33 1/3%.

(ii) At least 33 1/3% but less than 50%.

(iii) 50% or more.

(5) The terms of the control-share acquisition or proposed control-share acquisition, including:

(i) The source of moneys or other consideration and the material terms of the financial arrangements for the control-share acquisition and the plans of the acquiring person for meeting its debt-service and repayment obligations with respect to any such financing.

(ii) A statement identifying any pension fund of the acquiring person or of the corporation which is a source or proposed source of money or other consideration for the control-share acquisition, proposed control-share acquisition or the acquisition of any control shares and the amount of such money or other consideration which has been or is proposed to be used, directly or indirectly, in the financing of such acquisition.

(6) Plans or proposals of the acquiring person with regard to the corporation, including plans or proposals under consideration to:

(i) Enter into a business combination or combinations involving the corporation.
(ii) Liquidate or dissolve the corporation.
(iii) Permanently or temporarily shut down any plant, facility or establishment, or substantial part thereof, of the corporation, or sell any such plant, facility or establishment, or substantial part thereof, to any other person.
(iv) Otherwise sell all or a material part of the assets of, or merge, consolidate, divide or exchange the shares of the corporation to or with any other person.
(v) Transfer a material portion of the work, operations or business activities of any plant, facility or establishment of the corporation to a different location or to a plant, facility or establishment owned, as of the date the information statement is delivered, by any other person.
(vi) Change materially the management or policies of employment of the corporation or the policies of the corporation with respect to labor relations matters, including, but not limited to, the recognition of or negotiations with any labor organization representing employees of the corporation and the administration of collective bargaining agreements between the corporation and any such organization.
(vii) Change materially the charitable or community involvement or contributions or policies, programs or practices relating thereto of the corporation.
(viii) Change materially the relationship with suppliers or customers of, or the communities in which there are operations of, the corporation.
(ix) Make any other material change in the business, corporate structure, management or personnel of the corporation.

(7) The funding or other provisions the acquiring person intends to make with respect to all retiree insurance and employee benefit plan obligations.
(8) Any other facts that would be substantially likely to affect the decision of a shareholder with respect to voting on the control-share acquisition pursuant to section 2564 (relating to voting rights of shares acquired in a control-share acquisition).

(b) ***Amendment of information statement.*** **--** If any material change occurs in the facts set forth in the information statement, including any material increase or decrease in the number of voting shares of the corporation acquired or proposed to be acquired by the acquiring person, the acquiring person shall promptly deliver, to the corporation at its principal executive office, an amendment to the information statement fully explaining such material change.

7. § 2567. Redemption.

Unless prohibited by the terms of the articles of a registered corporation in effect before a control-share acquisition has occurred, the corporation may redeem all control shares from the acquiring person at the average of the high and low sales price of shares of the same class and series as such prices are specified on a national securities exchange, national quotation system or similar quotation listing service on the date the corporation provides notice to the acquiring person of the call for redemption:

(1) at any time within 24 months after the date on which the acquiring person consummates a control-share acquisition, if the acquiring person does not, within 30 days after consummation of the control-share acquisition, properly request that the issue of voting rights to be accorded control shares be presented to the shareholders under section 2565(a) or (b) (relating to procedure for establishing voting rights of control shares); and
(2) at any time within 24 months after the issue of voting rights to be accorded such shares is submitted to the shareholders pursuant to section 2565(a) or (b); and
(i) such voting rights are not accorded pursuant to section 2564(a) (relating to voting rights of shares acquired in control-share acquisition); or
(ii) such voting rights are accorded and subsequently lapse pursuant to section 2564(b) (relating to lapse of voting rights).

8. § 2568. Board determinations.

All determinations made by the board of directors of the registered corporation under this subchapter shall be presumed to be correct unless shown by clear and convincing evidence that the determination was not made by the

directors in good faith after reasonable investigation or was clearly erroneous.

Disgorgement by Certain Controlling Shareholders Following Attempts to Acquire Control (Subchapter 25H, §§ 2571-2576):

1. § 2571. Application and effect of subchapter.

(a) ***General rule.*** **--** Except as otherwise provided in this section, this subchapter shall apply to every registered corporation.

(b) ***Exceptions.*** **--** This subchapter shall not apply to any transfer of an equity security:

(1) Of a registered corporation described in section 2502(1)(ii) or (2) (relating to registered corporation status).

(2) Of a corporation:

(i) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment adopted by the board of directors on or before July 26, 1990, in the case of a corporation:

(A) which on April 27, 1990, was a registered corporation described in section 2502(1)(i); and

(B) did not on that date have outstanding one or more classes or series of preference shares entitled, upon the occurrence of a default in the payment of dividends or another similar contingency, to elect a majority of the members of the board of directors (a bylaw adopted on or before July 26, 1990, by a corporation excluded from the scope of this subparagraph by this clause shall be ineffective unless ratified under subparagraph (ii));

(ii) the bylaws of which explicitly provide that this subchapter shall not be applicable to the corporation by amendment ratified by the board of directors on or after December 19, 1990, and on or before March 19, 1991, in the case of a corporation:

(A) which on April 27, 1990, was a registered corporation described in section 2502(1)(i);

(B) which on that date had outstanding one or more classes or series of preference shares entitled, upon the occurrence of a default in the payment of dividends or another similar contingency, to elect a majority of the members of the board of directors; and

(C) the bylaws of which on that date contained a provision described in subparagraph (i); or

(iii) in any other case, the articles of which explicitly provide that this subchapter shall not be applicable to the corporation by a provision included in the original articles, or by an articles amendment adopted at any time while it is a corporation other than a registered corporation described in section 2502(1)(i) or on or before 90 days after the corporation first becomes a registered corporation described in section 2502(1)(i).

(3) Consummated before October 17, 1989, if both the acquisition and disposition of such equity security were consummated before October 17, 1989.

(4) Consummated by a person or group who first became a controlling person or group prior to:

(i) October 17, 1989, if such person or group does not after such date commence a tender or exchange offer for or proxy solicitation with respect to voting shares of the corporation, in the case of a corporation which was a registered corporation described in section 2502(1)(i) on that date; or

(ii) in any other case, the date this subchapter becomes applicable to the corporation.

(5) Constituting:

(i) In the case of a person or group that, as of October 17, 1989, beneficially owned shares entitling the person or group to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation:

(A) The disposition of equity securities of the corporation by the person or group.

(B) Subsequent dispositions of any or all equity securities of the corporation disposed of by the person or group where such subsequent dispositions are effected by the direct purchaser of the securities from the person or group if, as a result of the acquisition by the purchaser of the securities disposed of by the person or group, the

purchaser, immediately following the acquisition, is entitled to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation.

(ii) The transfer of the beneficial ownership of the equity security by:

(A) Gift, devise, bequest or otherwise through the laws of inheritance or descent.

(B) A settlor to a trustee under the terms of a family, testamentary or charitable trust.

(C) A trustee to a trust beneficiary or a trustee to a successor trustee under the terms of a family, testamentary or charitable trust.

(iii) The addition, withdrawal or demise of a beneficiary or beneficiaries of a family, testamentary or charitable trust.

(iv) The appointment of a guardian or custodian with respect to the equity security.

(v) The transfer of the beneficial ownership of the equity security from one spouse to another by reason of separation or divorce or pursuant to community property laws or other similar laws of any jurisdiction.

(vi) The transfer of record or the transfer of a beneficial interest or interests in the equity security where the circumstances surrounding the transfer clearly demonstrate that no material change in beneficial ownership has occurred.

(6) Consummated by:

(i) The corporation or any of its subsidiaries.

(ii) Any savings, stock ownership, stock option or other benefit plan of the corporation or any of its subsidiaries, or any fiduciary with respect to any such plan when acting in such capacity, or by any participant in any such plan with respect to any equity security acquired pursuant to any such plan or any equity security acquired as a result of the exercise or conversion of any equity security (specifically including any options, warrants or rights) issued to such participant by the corporation pursuant to any such plan.

(iii) A person engaged in business as an underwriter of securities who acquires the equity securities directly from the corporation or an affiliate or associate, as defined in section 2552 (relating to definitions), of the corporation through his participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933.

(i) Where the acquisition of the equity security has been approved by a resolution adopted prior to the acquisition of the equity security; or

(ii) where the disposition of the equity security has been approved by a resolution adopted prior to the disposition of the equity security if the equity security at the time of the adoption of the resolution is beneficially owned by a person or group that is or was a controlling person or group with respect to the corporation and is in control of the corporation if:

the resolution in either subparagraph (i) or (ii) is approved by the board of directors and ratified by the affirmative vote of the shareholders entitled to cast at least a majority of the votes which all shareholders are entitled to cast thereon and identifies the specific person or group that proposes such acquisition or disposition, the specific purpose of such acquisition or disposition and the specific number of equity securities that are proposed to be acquired or disposed of by such person or group.

(8) Acquired at any time by a person or group who first became a controlling person or group:

(i) after April 27, 1990; and

(A) at a time when this subchapter was or is not applicable to the corporation; or

(B) on or before ten business days after the first public announcement by the corporation that this subchapter is applicable to the corporation, if this subchapter was not applicable to the corporation on July 27, 1990.

(c) ***Effect of distributions.*** **--** For purposes of this subchapter, equity securities acquired by a holder as a result of a stock split, stock dividend or other similar distribution by a corporation of equity securities issued by the corporation not involving a sale of the securities shall be deemed to have been acquired by the holder in the same transaction (at the same time, in the same manner and from the same person) in which the holder acquired the existing equity security with respect to which the equity securities were subsequently distributed by the corporation.

(d) ***Formation of group.*** **--** For the purposes of this subchapter, if there is no change in the beneficial ownership of an equity security held by a person, then the formation of or participation in a group involving the person shall not be deemed to constitute an acquisition of the beneficial ownership of such equity security by the group.

2. § 2572. Policy and purpose.

(a) ***General rule.*** **--** The purpose of this subchapter is to protect certain registered corporations and legitimate interests of various groups related to such corporations from certain manipulative and coercive actions. Specifically, this subchapter seeks to:

(1) Protect registered corporations from being exposed to and paying "greenmail."

(2) Promote a stable relationship among the various parties involved in registered corporations, including the public whose confidence in the future of a corporation tends to be undermined when a corporation is put "in play."

(3) Ensure that speculators who put registered corporations "in play" do not misappropriate corporate values for themselves at the expense of the corporation and groups affected by corporate actions.

(4) Discourage such speculators from putting registered corporations "in play" through any means, including, but not limited to, offering to purchase at least 20% of the voting shares of the corporation or threatening to wage or waging a proxy contest in connection with or as a means toward or part of a plan to acquire control of the corporation, with the effect of reaping short-term speculative profits.

Moreover, this subchapter recognizes the right and obligation of the Commonwealth to regulate and protect the corporations it creates from abuses resulting from the application of its own laws affecting generally corporate governance and particularly director obligations, mergers and related matters. Such laws, and the obligations imposed on directors or others thereunder, should not be the vehicles by which registered corporations are manipulated in certain instances for the purpose of obtaining short-term profits.

(b) ***Limitations.*** **--** The purpose of this subchapter is not to affect legitimate shareholder activity that does not involve putting a corporation "in play" or involve seeking to acquire control of the corporation. Specifically, the purpose of this subchapter is not to:

(1) curtail proxy contests on matters properly submitted for shareholder action under applicable State or other law, including, but not limited to, certain elections of directors, corporate governance matters such as cumulative voting or staggered boards, or other corporate matters such as environmental issues or conducting business in a particular country if, in any such instance, such proxy contest is not utilized in connection with or as a means toward or part of a plan to put the corporation "in play" or to seek to acquire control of the corporation; or

(2) affect the solicitation of proxies or consents by or on behalf of the corporation in connection with shareholder meetings or actions of the corporation.

3. § 2573. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Beneficial owner." --The term shall have the meaning specified in section 2552 (relating to definitions).

"Control." --The power, whether or not exercised, to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract or otherwise.

"Controlling person or group."

(i) A person or group who has acquired, offered to acquire or, directly or indirectly, publicly disclosed or caused to be disclosed (other than for the purpose of circumventing the intent of this subchapter) the intention of acquiring voting power over voting shares of a registered corporation that would entitle the holder thereof to cast at least 20% of the votes that all shareholders would be entitled to cast in an election of directors of the corporation; or

(ii) a person or group who has otherwise, directly or indirectly, publicly disclosed or caused to be disclosed (other than for the purpose of circumventing the intent of this subchapter) that it may seek to acquire control of a corporation through any means.

(2) Two or more persons acting in concert, whether or not pursuant to an express agreement, arrangement, relationship or understanding, including as a partnership, limited partnership, syndicate, or through any means of affiliation whether or not formally organized, for the purpose of acquiring, holding, voting or disposing of equity securities of a corporation shall be deemed a group for purposes of this subchapter. Notwithstanding any other provision of this subchapter to the contrary and regardless of whether a group has been deemed to acquire beneficial ownership of an equity security under this subchapter, each person who participates in a group,

where such group is a controlling person or group as defined in this subchapter, shall also be deemed to be a controlling person or group for the purposes of this subchapter, and a direct or indirect transferee solely pursuant to a transfer or series of transfers under section 2571(b)(5)(ii) through (vi) (relating to application and effect of subchapter) of an equity security acquired from any person or group that is or becomes a controlling person or group, shall be deemed, with respect to such equity security, to be acting in concert with the controlling person or group, and shall be deemed to have acquired such equity security in the same transaction (at the same time, in the same manner and from the same person) as its acquisition by the controlling person or group.

"Equity security." --Any security, including all shares, stock or similar security, and any security convertible into (with or without additional consideration) or exercisable for any such shares, stock or similar security, or carrying any warrant, right or option to subscribe to or purchase such shares, stock or similar security or any such warrant, right, option or similar instrument.

"Profit." --The positive value, if any, of the difference between:

(1) the consideration received from the disposition of equity securities less only the usual and customary broker's commissions actually paid in connection with such disposition; and

(2) the consideration actually paid for the acquisition of such equity securities plus only the usual and customary broker's commissions actually paid in connection with such acquisition.

"Proxy." --Includes any proxy, consent or authorization.

"Proxy solicitation" or "solicitation of proxies." --Includes any solicitation of a proxy, including a solicitation of a revocable proxy of the nature and under the circumstances described in section 2574(b)(3) (relating to controlling person or group safe harbor).

"Publicly disclosed or caused to be disclosed." --The term shall have the meaning specified in section 2562 (relating to definitions).

"Transfer." --Acquisition or disposition.

"Voting shares." --The term shall have the meaning specified in section 2552 (relating to definitions).

4. § 2574. Controlling person or group safe harbor.

(a) ***Nonparticipant.*** **--** For the purpose of this subchapter, a person or group shall not be deemed a controlling person or group, absent significant other activities indicating that a person or group should be deemed a controlling person or group, by reason of voting or giving a proxy or consent as a shareholder of the corporation if the person or group is one who or which:

(1) did not acquire any voting shares of the corporation with the purpose of changing or influencing control of the corporation or seeking to acquire control of the corporation or in connection with or as a participant in any agreement, arrangement, relationship, understanding or otherwise having any such purpose;

(2) if control were acquired, would not be a person or group or a participant in a group that has control over the corporation and will not receive, directly or indirectly, any consideration from a person or group that has control over the corporation other than consideration offered proportionately to all holders of voting shares of the corporation; and

(3) if a proxy or consent is given, executes a revocable proxy or consent given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act under circumstances not then reportable on Schedule 13d under the Exchange Act (or any comparable or successor report) by the person or group who gave the proxy or consent.

(b) ***Certain holders.*** **--** For the purpose of this subchapter, a person or group shall not be deemed a controlling person or group under paragraph (1)(i) of the definition of "controlling person or group" in section 2573 (relating to definitions) if such person or group holds voting power:

(1) in good faith and not for the purpose of circumventing this subchapter, as an agent, bank, broker, nominee or trustee for one or more beneficial owners who do not individually or, if they are a group acting in concert, as a group have the voting power specified in paragraph (1)(i) of the definition of "controlling person or group" in section 2573;

(2) in connection with the solicitation of proxies or consents by or on behalf of the corporation in connection with shareholder meetings or actions of the corporation; or

(3) in the amount specified in paragraph (1)(i) of the definition of "controlling person or group" in section 2573 as a result of the solicitation of revocable proxies or consents with respect to voting shares

if such proxies or consents both:

(i) are given without consideration in response to a proxy or consent solicitation made in accordance with the applicable rules and regulations under the Exchange Act; and

(ii) do not empower the holder thereof, whether or not this power is shared with any other person, to vote such shares except on the specific matters described in such proxy or consent and in accordance with the instructions of the giver of such proxy or consent.

(c) ***Preference shares.*** **--** In determining whether a person or group would be a controlling person or group within the meaning of this subchapter, there shall be disregarded voting power, and the seeking to acquire control of a corporation to the extent based upon voting power arising from a contingent right of the holders of one or more classes or series of preference shares to elect one or more members of the board of directors upon or during the continuation of a default in the payment of dividends on such shares or another similar contingency.

5. § 2575. Ownership by corporation of profits resulting from certain transactions.

Any profit realized by any person or group who is or was a controlling person or group with respect to a registered corporation from the disposition of any equity security of the corporation to any person (including under Subchapter E (relating to control transactions) or otherwise), including, without limitation, to the corporation (including under Subchapter G (relating to control-share acquisitions) or otherwise) or to another member of the controlling person or group, shall belong to and be recoverable by the corporation where the profit is realized by such person or group:

(1) from the disposition of the equity security within 18 months after the person or group obtained the status of a controlling person or group; and

(2) the equity security had been acquired by the controlling person or group within 24 months prior to or 18 months subsequent to the obtaining by the person or group of the status of a controlling person or group.

Any transfer by a controlling person or group of the ownership of any equity security may be suspended on the books of the corporation, and certificates representing such securities may be duly legended, to enforce the rights of the corporation under this subchapter.

6. § 2576. Enforcement actions.

(a) ***Venue.*** **--** Actions to recover any profit due under this subchapter may be commenced in any court of competent jurisdiction by the registered corporation issuing the equity security or by any holder of any equity security of the corporation in the name and on behalf of the corporation if the corporation fails or refuses to bring the action within 60 days after written request by a holder or shall fail to prosecute the action diligently. If a judgment requiring the payment of any such profits is entered, the party bringing such action shall recover all costs, including reasonable attorney fees, incurred in connection with enforcement of this subchapter.

(b) ***Jurisdiction.*** **--** By engaging in the activities necessary to become a controlling person or group and thereby becoming a controlling person or group, the person or group and all persons participating in the group consent to personal jurisdiction in the courts of this Commonwealth for enforcement of this subchapter. Courts of this Commonwealth may exercise personal jurisdiction over any controlling person or group in actions to enforce this subchapter. The terms of this section shall be supplementary to the provisions of 42 Pa.C.S. §§ 5301 (relating to persons) through 5322 (relating to bases of personal jurisdiction over persons outside this Commonwealth) and, for the purpose of this section, 42 Pa.C.S. § 5322(a)(7)(iv) shall be deemed to include a controlling person or group as defined in section 2573 (relating to definitions). Service of process may be made upon such persons outside this Commonwealth in accordance with the procedures specified by 42 Pa.C.S. § 5323(relating to service of process on persons outside this Commonwealth).

(c) ***Limitation.*** **--** Any action to enforce this subchapter shall be brought within two years from the date any profit recoverable by the corporation was realized.

Severance Compensation for Employees Terminated Following Certain Control-Share Acquisitions (Subchapter I, §§ 2581-2583):

1. § 2581. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this

section unless the context clearly indicates otherwise:

"Acquiring person." --The term shall have the meaning specified in section 2562 (relating to definitions).

"Control-share acquisition." --The term shall have the meaning specified in section 2562.

"Control-share approval."

(1) The occurrence of both:

(i) a control-share acquisition to which Subchapter G (relating to control-share acquisitions) applies with respect to a registered corporation described in section 2502(1)(i) (relating to registered corporation status) by an acquiring person; and

(ii) the according by such registered corporation of voting rights pursuant to section 2564(a) (relating to voting rights of shares acquired in a control-share acquisition) in connection with such control-share acquisition to control shares of the acquiring person.

(2) The term shall also include a control-share acquisition effected by an acquiring person, other than a control-share acquisition described in section 2561(b)(3), (4) or (5) (other than section 2561(b)(5)(vii)) (relating to application and effect of subchapter) if the control-share acquisition:

(A) occurs primarily in response to the actions of an other acquiring person where Subchapter G applies to a control-share acquisition or proposed control-share acquisition by such other acquiring person; and

(B) either:

(I) pursuant to an agreement or plan described in section 2561(b)(5)(vii);

(II) after adoption of an amendment to the articles of the registered corporation pursuant to section 2561(b)(2)(iii); or

(III) after reincorporation of the registered corporation in another jurisdiction;

if the agreement or plan is approved or the amendment or reincorporation is adopted by the board of directors of the corporation during the period commencing after the satisfaction by such other acquiring person of the requirements of section 2565(a) or (b) (relating to procedure for establishing voting rights of control shares) and ending 90 days after the date such issue is voted on by the shareholders, is withdrawn from consideration or becomes moot; or

(ii) is consummated in any manner by a person who satisfied, within two years prior to such acquisition, the requirements of section 2565(a) or (b).

"Control shares." --The term shall have the meaning specified in section 2562.

"Eligible employee." --Any employee of a registered corporation (or any subsidiary thereof) if:

(1) the registered corporation was the subject of a control-share approval;

(2) the employee was an employee of such corporation (or any subsidiary thereof) within 90 days before or on the day of the control-share approval and had been so employed for at least two years prior thereto; and

(3) the employment of the employee is in this Commonwealth.

"Employee." --Any person lawfully employed by an employer.

"Employment in this Commonwealth."

(1) The entire service of an employee, performed inside and outside of this Commonwealth, if the service is localized in this Commonwealth.

(2) Service shall be deemed to be localized in this Commonwealth if:

(i) the service is performed entirely inside this Commonwealth; or

(ii) the service is performed both inside and outside of this Commonwealth but the service performed outside of this Commonwealth is incidental to the service of the employee inside this Commonwealth, as where such service is temporary or transitory in nature or consists of isolated transactions.

(3) Employment in this Commonwealth shall also include service of the employee, performed inside and outside of this Commonwealth, if the service is not localized in any state, but some of the service is performed in this Commonwealth, and:

(i) the base of operations of the employee is in this Commonwealth;

(ii) there is no base of operations, and the place from which such service is directed

or controlled is in this Commonwealth; or

(iii) the base of operations of the employee or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the residence of the employee is in this Commonwealth.

"Minimum severance amount." --With respect to an eligible employee, the weekly compensation of the employee multiplied by the number of the completed years of service of the employee, up to a maximum of 26 times the weekly compensation of the employee.

"Subsidiary." --The term shall have the meaning specified in section 2552 (relating to definitions).

"Termination of employment." --The layoff of at least six months, or the involuntary termination of an employee, except that any employee employed in a business operation who is continued or employed or offered employment (within 60 days) by the purchaser of such business operation, on substantially the same terms (including geographic location) as those pursuant to which the employee was employed in such business operation, shall not be deemed to have been laid off or involuntarily terminated for the purposes of this subchapter by such transfer of employment to the purchaser, but the purchaser shall make the lump-sum payment under this subchapter in the event of a layoff of at least six months or the involuntary termination of the employee within the period specified in section 2582 (relating to severance compensation).

"Weekly compensation." --The average regular weekly compensation of an employee based on normal schedule of hours in effect for such employee over the last three months preceding the control-share approval.

"Year of service." --Each full year during which the employee has been employed by the employer.

2. § 2582. Severance compensation.

(a) ***General rule.*** **--** Any eligible employee whose employment is terminated, other than for willful misconduct connected with the work of the employee, within 90 days before the control-share approval with respect to the registered corporation if such termination was pursuant to an agreement, arrangement or understanding, whether formal or informal, with the acquiring person whose control shares were accorded voting rights in connection with such control-share approval or within 24 calendar months after the control-share approval with respect to the registered corporation shall receive a one-time, lump-sum payment from the employer equal to:

(1) the minimum severance amount with respect to the employee; less

(2) any payments made to the employee by the employer due to termination of employment, whether pursuant to any contract, policy, plan or otherwise, but not including any final wage payments to the employee or payments to the employee under pension, savings, retirement or similar plans.

(b) ***Limitation.*** **--** If the amount specified in subsection (a)(2) is at least equal to the amount specified in subsection (a)(1), no payment shall be required to be made under this subchapter.

(c) ***Due date of payment.*** **--** Severance compensation under this subchapter to eligible employees shall be made within one regular pay period after the last day of work of the employee, in the case of a layoff known at such time to be at least six months or an involuntary termination and in all other cases within 30 days after the eligible employee first becomes entitled to compensation under this subchapter.

3. § 2583. Enforcement and remedies.

(a) ***Notice.*** **--** Within 30 days of the control-share approval, the employer shall provide written notice to each eligible employee and to the collective bargaining representative, if any, of the rights of eligible employees under this subchapter.

(b) ***Remedies.*** **--** In the event any eligible employee is denied a lump-sum payment in violation of this subchapter or the employer fails to provide the notice required by subsection (a), the employee on his or her own behalf or on behalf of other employees similarly situated, or the collective bargaining representative, if any, on the behalf of the employee, may, in addition to all other remedies available at law or in equity, bring an action to remedy such violation. In any such action, the court may order such equitable or legal relief as it deems just and proper.

(c) ***Civil penalty.*** **--** In the case of violations of subsection (a), the court may order the employer to pay to each employee who was subject to a termination of employment and entitled to severance compensation under this subchapter a civil penalty not to exceed $ 75 per day for each business day that notice was not provided to such employee.

(d) ***Successor liability.*** **--** The rights under this subchapter of any individual who was an eligible employee at the time of the control-share approval shall vest at that time, and, in any action based on a violation of this subchapter, recovery may be secured against:

(1) a merged, consolidated or resulting domestic or foreign corporation or other successor employer; or

(2) the corporation after its status as a registered corporation has terminated;

notwithstanding any provision of law to the contrary.

Business Combination Transactions - Labor Contracts (Subchapter J, §§ 2585-2588):

1. § 2585. Application and effect of subchapter.

(a) ***General rule.*** **--** Except as otherwise provided in this section, this subchapter shall apply to every business combination transaction relating to a business operation if such business operation was owned by a registered corporation (or any subsidiary thereof) at the time of a control-share approval with respect to the corporation (regardless of the fact, if such be the case, that such operation after the control-share approval is owned by the registered corporation or any other person).

(b) ***Exceptions.*** **--** This subchapter shall not apply to:

(1) Any business combination transaction occurring more than five years after the control-share approval of the registered corporation.

(2) Any business operation located other than in this Commonwealth.

2. § 2586. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Business combination transaction." --Any merger or consolidation, sale, lease, exchange or other disposition, in one transaction or a series of transactions, whether affecting all or substantially all the property and assets, including its good will, of the business operation that is the subject of the labor contract referred to in section 2587 (relating to labor contracts preserved in business combination transactions) or any transfer of a controlling interest in such business operation.

"Control-share approval." --The term shall have the meaning specified in section 2581 (relating to definitions).

"Covered labor contract." --Any labor contract if such contract:

(1) covers persons engaged in employment in this Commonwealth;

(2) was negotiated by a labor organization or by a collective bargaining agent or other representative;

(3) relates to a business operation that was owned by the registered corporation (or any subsidiary thereof) at the time of the control-share approval with respect to such corporation; and

(4) was in effect and covered such business operation and such employees at the time of such control-share approval.

"Employee" and "employment in this Commonwealth." --The terms shall have the meanings specified in section 2581.

"Subsidiary." --The term shall have the meaning specified in section 2552 (relating to definitions).

3. § 2587. Labor contracts preserved in business combination transactions.

No business combination transaction shall result in the termination or impairment of the provisions of any covered labor contract, and the contract shall continue in effect pursuant to its terms until it is terminated pursuant to any termination provision contained therein or until otherwise agreed upon by the parties to such contract or their successors.

4. § 2588. Civil remedies.

(a) ***General rule.*** **--** In the event that an employee is denied or fails to receive wages, benefits or wage supplements or suffers any contractual loss as a result of a violation of this subchapter, the employee on his or her own behalf or on behalf of other employees similarly situated, or the labor organization or collective bargaining agent party to the labor contract, may, in addition to all other remedies available at law or in equity, bring an action in any court of competent jurisdiction to recover such wages, benefits, wage supplements or contractual losses and to enjoin the violation of this subchapter.

(b) ***Successor liability.*** **--** The rights under this subchapter of any employee at the time of the control-share approval shall vest at that time, and, in any action based on a violation of this subchapter, recovery may be

secured against:

(1) a merged, consolidated or resulting domestic or foreign corporation or other successor employer; or

(2) the corporation after its status as a registered corporation has terminated;

notwithstanding any provision of law to the contrary.

Miscellaneous Provisions Applicble Primarily to Registered Corporations:

1. § 2538. Approval of transactions with interested shareholders.

(a) ***General rule.*** **--** The following transactions shall require the affirmative vote of the shareholders entitled to cast at least a majority of the votes that all shareholders other than the interested shareholder are entitled to cast with respect to the transaction, without counting the vote of the interested shareholder:

(1) Any transaction authorized under Subchapter C of Chapter 19 (relating to merger, consolidation, share exchanges and sale of assets) between a registered corporation or subsidiary thereof and a shareholder of the registered corporation.

(2) Any transaction authorized under Subchapter D of Chapter 19 (relating to division) in which the interested shareholder receives a disproportionate amount of any of the shares or other securities of any corporation surviving or resulting from the plan of division.

(3) Any transaction authorized under Subchapter F of Chapter 19 (relating to voluntary dissolution and winding up) in which a shareholder is treated differently from other shareholders of the same class (other than any dissenting shareholders under Subchapter D of Chapter 15 (relating to dissenters rights)).

(4) Any reclassification authorized under Subchapter B of Chapter 19 (relating to amendment of articles) in which the percentage of voting or economic share interest in the corporation of a shareholder is materially increased relative to substantially all other shareholders.

(b) ***Exceptions.*** **--** Subsection (a) shall not apply to a transaction:

(1) that has been approved by a majority vote of the board of directors without counting the vote of directors who:

(i) are directors or officers of, or have a material equity interest in, the interested shareholder; or

(ii) were nominated for election as a director by the interested shareholder, and first elected as a director, within 24 months of the date of the vote on the proposed transaction;

(2) in which the consideration to be received by the shareholders for shares of any class of which shares are owned by the interested shareholder is not less than the highest amount paid by the interested shareholder in acquiring shares of the same class; or

(3) effected pursuant to section 1924(b)(1)(ii) (relating to adoption by board of directors).

(c) ***Additional approvals.*** **--** The approvals required by this section shall be in addition to, and not in lieu of, any other approval required by this subpart, the articles of the corporation, the bylaws of the corporation or otherwise.

(d) ***Definition of "interested shareholder".*** **--** As used in this section, the term "interested shareholder" includes the shareholder who is a party to the transaction or who is treated differently from other shareholders and any person, or group of persons, that is acting jointly or in concert with the interested shareholder and any person who, directly or indirectly, controls, is controlled by or is under common control with the interested shareholder. An interested shareholder shall not include any person who, in good faith and not for the purpose of circumventing this section, is an agent, bank, broker, nominee or trustee for one or more other persons, to the extent that the other person or persons are not interested shareholders.

CHAPTER 6 SECURITIES ACT OF 1933

[*See* Principally Chapters 4 and 13 of Business Planning for Mergers and Acquisitions]

A. *§ 1. Short title*

This subchapter may be cited as the Securities Act of 1933.

B. *§ 2. Definitions*

(a) When used in this subchapter, unless the context otherwise requires--

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting- trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. * * *

(3) The term "sale" or "sell" shall include every contract of sale or disposition of a security or interest in a security, for value. The term "offer to sell", "offer for sale", or "offer" shall include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value. The terms defined in this paragraph and the term "offer to buy" as used in subsection (c) of section 5 shall not include preliminary negotiations or agreements between an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer) and any underwriter or among underwriters who are or are to be in privity of contract with an issuer (or any person directly or indirectly controlling or controlled by an issuer, or under direct or indirect common control with an issuer). * * *

(4) The term "issuer" means every person who issues or proposes to issue any security; * * *

(5) The term "Commission" means the Securities and Exchange Commission. * * *

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum filed as part of such statement or incorporated therein by reference. * * *

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10 of this title) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 10 of this title at the time of such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 of this title may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deemed necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a

participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person. * * *

(15) The term "accredited investor" shall mean—

(i) a bank * * * whether acting in its individual or fiduciary capacity; an insurance company as defined in paragraph (13) of this subsection; an investment company registered under the Investment Company Act of 1940 * * *; a Small Business Investment Company licensed by the Small Business Administration; or an employee benefit plan, including an individual retirement account, which is subject to the provisions of the Employee Retirement Income Security Act of 1974, if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is either a bank, insurance company, or registered investment adviser; or

(ii) any person who, on the basis of such factors as financial sophistication, net worth, knowledge, and experience in financial matters, or amount of assets under management qualifies as an accredited investor under rules and regulations which the Commission shall prescribe. * * *

(19) The term "emerging growth company" means an issuer that had total annual gross revenues of less than $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) during its most recently completed fiscal year. An issuer that is an emerging growth company as of the first day of that fiscal year shall continue to be deemed an emerging growth company until the earliest of—

(A) the last day of the fiscal year of the issuer during which it had total annual gross revenues of $1,000,000,000 (as such amount is indexed for inflation every 5 years by the Commission to reflect the change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics, setting the threshold to the nearest 1,000,000) or more;

(B) the last day of the fiscal year of the issuer following the fifth anniversary of the date of the first sale of common equity securities of the issuer pursuant to an effective registration statement under this subchapter;

(C) the date on which such issuer has, during the previous 3-year period, issued more than $1,000,000,000 in non-convertible debt; or

(D) the date on which such issuer is deemed to be a "large accelerated filer", as defined in section 240.12b–2 of title 17, Code of Federal Regulations, or any successor thereto.

C. *§ 3. Exempted Securities*

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities: * * *

(9) Except with respect to a security exchanged in a case under Title 11, any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Except with respect to a security exchanged in a case under Title 11, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval;

(11) Any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or, if a corporation, incorporated by and doing business within, such State or Territory.

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this

section, if it finds that the enforcement of this subchapter with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $5,000,000. * * *

D. *§ 4. Exempted Transactions*

(a) The provisions of section 5 shall not apply to—

(1) transactions by any person other than an issuer, underwriter, or dealer.

(2) transactions by an issuer not involving any public offering.

(3) transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except—

(A) transactions taking place prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter,

(B) transactions in a security as to which a registration statement has been filed taking place prior to the expiration of forty days after the effective date of such registration statement or prior to the expiration of forty days after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter after such effective date, whichever is later (excluding in the computation of such forty days any time during which a stop order issued under section 8 is in effect as to the security), or such shorter period as the Commission may specify by rules and regulations or order, and

(C) transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

With respect to transactions referred to in clause (B), if securities of the issuer have not previously been sold pursuant to an earlier effective registration statement the applicable period, instead of forty days, shall be ninety days, or such shorter period as the Commission may specify by rules and regulations or order.

(4) brokers' transactions executed upon customers' orders on any exchange or in the over-the-counter market but not the solicitation of such orders.

(5) transactions involving offers or sales by an issuer solely to one or more accredited investors, if the aggregate offering price of an issue of securities offered in reliance on this paragraph does not exceed the amount allowed under section 3(b)(1), if there is no advertising or public solicitation in connection with the transaction by the issuer or anyone acting on the issuer's behalf, and if the issuer files such notice with the Commission as the Commission shall prescribe.

(6) transactions involving the offer or sale of securities by an issuer (including all entities controlled by or under common control with the issuer), provided that—

(A) the aggregate amount sold to all investors by the issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, is not more than $1,000,000;

(B) the aggregate amount sold to any investor by an issuer, including any amount sold in reliance on the exemption provided under this paragraph during the 12-month period preceding the date of such transaction, does not exceed—

(i) the greater of $2,000 or 5 percent of the annual income or net worth of such investor, as applicable, if either the annual income or the net worth of the investor is less than $100,000; and

(ii) 10 percent of the annual income or net worth of such investor, as applicable, not to exceed a maximum aggregate amount sold of $100,000, if either the annual income or net worth of the investor is equal to or more than $100,000;

(C) the transaction is conducted through a broker or funding portal that complies with the requirements of section 4A(a); and

(D) the issuer complies with the requirements of section 4A(b).

(b) Offers and sales exempt under section 230.506 of title 17, Code of Federal Regulations (as revised pursuant to section 201 of the Jumpstart Our Business Startups Act) shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.

(b)

(1) With respect to securities offered and sold in compliance with Rule 506 of Regulation D under this subchapter, no person who meets the conditions set forth in paragraph (2) shall be subject to registration as a broker or dealer pursuant to section 15(a)(1), solely because—

(A) that person maintains a platform or mechanism that permits the offer, sale, purchase, or negotiation of or with respect to securities, or permits general solicitations, general advertisements, or similar or related activities by issuers of such securities, whether online, in person, or through any other means;

(B) that person or any person associated with that person co-invests in such securities; or

(C) that person or any person associated with that person provides ancillary services with respect to such securities.

(2) The exemption provided in paragraph (1) shall apply to any person described in such paragraph if—

(A) such person and each person associated with that person receives no compensation in connection with the purchase or sale of such security;

(B) such person and each person associated with that person does not have possession of customer funds or securities in connection with the purchase or sale of such security; and

(C) such person is not subject to a statutory disqualification as defined in section 3(a)(39) and does not have any person associated with that person subject to such a statutory disqualification.

(3) For the purposes of this subsection, the term "ancillary services" means—

(A) the provision of due diligence services, in connection with the offer, sale, purchase, or negotiation of such security, so long as such services do not include, for separate compensation, investment advice or recommendations to issuers or investors; and

(B) the provision of standardized documents to the issuers and investors, so long as such person or entity does not negotiate the terms of the issuance for and on behalf of third parties and issuers are not required to use the standardized documents as a condition of using the service.

E. *§ 4A. Requirements with respect to certain small transactions*

(a) Requirements on intermediaries

A person acting as an intermediary in a transaction involving the offer or sale of securities for the account of others pursuant to section 4(a)(6) shall—

(1) register with the Commission as—

(A) a broker; or

(B) a funding portal * * *;

(2) register with any applicable self-regulatory organization * * *;

(3) provide such disclosures, including disclosures related to risks and other investor education materials, as the Commission shall, by rule, determine appropriate;

(4) ensure that each investor—

(A) reviews investor-education information, in accordance with standards established by the Commission, by rule;

(B) positively affirms that the investor understands that the investor is risking the loss of the entire investment, and that the investor could bear such a loss; and

(C) answers questions demonstrating—

(i) an understanding of the level of risk generally applicable to investments in startups, emerging businesses, and small issuers;

(ii) an understanding of the risk of illiquidity; and

(iii) an understanding of such other matters as the Commission determines appropriate, by rule;

(5) take such measures to reduce the risk of fraud with respect to such transactions, as established by the Commission, by rule, including obtaining a background and securities enforcement regulatory history check on each officer, director, and person holding more than 20 percent of the outstanding equity of every issuer whose securities are offered by such person;

(6) not later than 21 days prior to the first day on which securities are sold to any investor (or such other period as the Commission may establish), make available to the Commission and to potential investors any information provided by the issuer pursuant to subsection (b);

(7) ensure that all offering proceeds are only provided to the issuer when the aggregate capital raised from all investors is equal to or greater than a target offering amount, and allow all investors to cancel their commitments to invest, as the Commission shall, by rule, determine appropriate;

(8) make such efforts as the Commission determines appropriate, by rule, to ensure that no investor in a 12-month period has purchased securities offered pursuant to section 4(a)(6) that, in the aggregate, from all issuers, exceed the investment limits set forth in section 4(a)(6)(B);

(9) take such steps to protect the privacy of information collected from investors as the Commission shall, by rule, determine appropriate;

(10) not compensate promoters, finders, or lead generators for providing the broker or funding

portal with the personal identifying information of any potential investor;

(11) prohibit its directors, officers, or partners (or any person occupying a similar status or performing a similar function) from having any financial interest in an issuer using its services; and

(12) meet such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.

(b) Requirements for issuers

For purposes of section 4(a)(6), an issuer who offers or sells securities shall—

(1) file with the Commission and provide to investors and the relevant broker or funding portal, and make available to potential investors—

(A) the name, legal status, physical address, and website address of the issuer;

(B) the names of the directors and officers (and any persons occupying a similar status or performing a similar function), and each person holding more than 20 percent of the shares of the issuer;

(C) a description of the business of the issuer and the anticipated business plan of the issuer;

(D) a description of the financial condition of the issuer, including, for offerings that, together with all other offerings of the issuer under section 4(a)(6) within the preceding 12-month period, have, in the aggregate, target offering amounts of—

(i) $100,000 or less—

(I) the income tax returns filed by the issuer for the most recently completed year (if any); and

(II) financial statements of the issuer, which shall be certified by the principal executive officer of the issuer to be true and complete in all material respects;

(ii) more than $100,000, but not more than $500,000, financial statements reviewed by a public accountant who is independent of the issuer, using professional standards and procedures for such review or standards and procedures established by the Commission, by rule, for such purpose; and

(iii) more than $500,000 (or such other amount as the Commission may establish, by rule), audited financial statements;

(E) a description of the stated purpose and intended use of the proceeds of the offering sought by the issuer with respect to the target offering amount;

(F) the target offering amount, the deadline to reach the target offering amount, and regular updates regarding the progress of the issuer in meeting the target offering amount;

(G) the price to the public of the securities or the method for determining the price, provided that, prior to sale, each investor shall be provided in writing the final price and all required disclosures, with a reasonable opportunity to rescind the commitment to purchase the securities;

(H) a description of the ownership and capital structure of the issuer, including—

(i) terms of the securities of the issuer being offered and each other class of security of the issuer, including how such terms may be modified, and a summary of the differences between such securities, including how the rights of the securities being offered may be materially limited, diluted, or qualified by the rights of any other class of security of the issuer;

(ii) a description of how the exercise of the rights held by the principal shareholders of the issuer could negatively impact the purchasers of the securities being offered;

(iii) the name and ownership level of each existing shareholder who owns more than 20 percent of any class of the securities of the issuer;

(iv) how the securities being offered are being valued, and examples of methods for how such securities may be valued by the issuer in the future, including during subsequent corporate actions; and

(v) the risks to purchasers of the securities relating to minority ownership in the issuer, the risks associated with corporate actions, including additional issuances of shares, a sale of the issuer or of assets of the issuer, or transactions with related parties; and

(I) such other information as the Commission may, by rule, prescribe, for the protection of investors and in the public interest;

(2) not advertise the terms of the offering, except for notices which direct investors to the funding portal or broker;

(3) not compensate or commit to compensate, directly or indirectly, any person to promote its offerings through communication channels provided by a broker or funding portal, without taking such steps as the Commission shall, by rule, require to ensure that such person clearly discloses the receipt, past or prospective, of such compensation, upon each instance of such promotional communication;

(4) not less than annually, file with the Commission and provide to investors reports of the results of operations and financial statements of the issuer, as the Commission shall, by rule, determine appropriate, subject to such exceptions and termination dates as the Commission may establish, by rule; and

(5) comply with such other requirements as the Commission may, by rule, prescribe, for the protection of investors and in the public interest.

(c) Liability for material misstatements and omissions

(1) Actions authorized

(A) In general

Subject to paragraph (2), a person who purchases a security in a transaction exempted by the provisions of section 4(a)(6) of this title may bring an action against an issuer described in paragraph (2), either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if such person no longer owns the security.

(B) Liability

An action brought under this paragraph shall be subject to the provisions of section 12(b) and section 13, as if the liability were created under section 12(a)(2).

(2) Applicability * * *

(3) Definition

As used in this subsection, the term "issuer" includes any person who is a director or partner of the issuer, and the principal executive officer or officers, principal financial officer, and controller or principal accounting officer of the issuer (and any person occupying a similar status or performing a similar function) that offers or sells a security in a transaction exempted by the provisions of section 4(a)(6), and any person who offers or sells the security in such offering.

(d) Information available to States * * *

(e) Restrictions on sales

Securities issued pursuant to a transaction described in section 4(a)(6)—

(1) may not be transferred by the purchaser of such securities during the 1-year period beginning on the date of purchase, unless such securities are transferred—

(A) to the issuer of the securities;

(B) to an accredited investor;

(C) as part of an offering registered with the Commission; or

(D) to a member of the family of the purchaser or the equivalent, or in connection with the death or divorce of the purchaser or other similar circumstance, in the discretion of the Commission; and

(2) shall be subject to such other limitations as the Commission shall, by rule, establish.

(f) Applicability

Section 4(a)(6) of this title shall not apply to transactions involving the offer or sale of securities by any issuer that—

(1) is not organized under and subject to the laws of a State or territory of the United States or the District of Columbia;

(2) is subject to the requirement to file reports pursuant to section 13 or section 15(d);

(3) is an investment company * * *; or

(4) the Commission, by rule or regulation, determines appropriate.

(g) Rule of construction * * *

(h) Certain calculations

F. *§ 5. Prohibitions relating to interstate commerce and the mails*

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 10

It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10..

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

(d) Limitation

Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17. Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with respect to such securities with the Commission, subject to the requirement of subsection (b)(2).

G. *§ 6. Registration of Securities and Signing of Registration Statement*

(a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

H. *§ 7. Information required in registration statement*

(a) The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A of this title, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B of this title; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any

person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(b) (1) The Commission shall prescribe special rules with respect to registration statements filed by any issuer that is a blank check company. Such rules may, as the Commission determines necessary or appropriate in the public interest or for the protection of investors--

(A) require such issuers to provide timely disclosure, prior to or after such statement becomes effective under section 8 of this title, of (i) information regarding the company to be acquired and the specific application of the proceeds of the offering, or (ii) additional information necessary to prevent such statement from being misleading;

(B) place limitations on the use of such proceeds and the distribution of securities by such issuer until the disclosures required under subparagraph (A) have been made; and

(C) provide a right of rescission to shareholders of such securities.

(2) The Commission may, as it determines consistent with the public interest and the protection of investors, by rule or order exempt any issuer or class of issuers from the rules prescribed under paragraph (1).

(3) For purposes of paragraph (1) of this subsection, the term "blank check company" means any development stage company that is issuing a penny stock (within the meaning of section 78c(a)(51) of this title) and that--

(A) has no specific business plan or purpose; or

(B) has indicated that its business plan is to merge with an unidentified company or companies.

I. § 8. Taking effect of registration statements and amendments thereto

(a) Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filedprior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) of this section or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order, the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d) of this section. In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement. * * *

J. § 10. Information required in prospectus

(a) Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e) of this section--

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A of this title;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B of this title;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(b) In addition to the prospectus permitted or required in subsection (a) of this section, the Commission shall by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors permit the use of a prospectus for the purposes of subsection (b)(1) of section 5 which omits in part or summarizes information in the prospectus specified in subsection (a) of this section. A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for the purposes of section 11 of this title. The Commission may at any time issue an order preventing or suspending the use of a prospectus permitted under this subsection, if it has reason to believe that such prospectus has not been filed (if required to be filed as part of the registration statement) or includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which such prospectus is or is to be used, not misleading. Upon issuance of an order under this subsection, the Commission shall give notice of the issuance of such order and opportunity for hearing by personal service or the sending of confirmed telegraphic notice. The Commission shall vacate or modify the order at any time for good cause or if such prospectus has been filed or amended in accordance with such order.

(c) Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) In the exercise of its powers under subsections (a), (b), or (c) of this section, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d) of this section, when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

(f) In any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the offer or sale of securities

registered under this subchapter.

K. *§ 11. Civil liabilities on account of false registration statement*

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract

from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

L. *§ 12. Civil liabilities arising in connection with prospectuses and communications*

In General --

(a) Any person who--

(1) offers or sells a security in violation of section 5, or

(2) offers or sells a security (whether or not exempted by the provisions of section 3 of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission shall be liable, subject to subsection (b) of this section, to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.* * *

M. *§ 13. Limitation of actions*

No action shall be maintained to enforce any liability created under section 11 or 12(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or 12(1) of this title more than three years after the security was bona fide offered to the public, or under section 12(2) of this title more than three years after the sale. * * *

N. *§ 15. Liability of controlling persons*

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 11 or 12 of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist. * * *

O. *§ 17. Fraudulent interstate transactions*

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

P. *§ 18. Exemption from State Regulation of Securities Offerings*

(a) SCOPE OF EXEMPTION.—Except as otherwise provided in this section, no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof—

(1) requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a security that—

(A) is a covered security; or

(B) will be a covered security upon completion of the transaction;

(2) shall directly or indirectly prohibit, limit, or impose any conditions upon the use of—

(A) with respect to a covered security described in subsection (b), any offering document that is prepared by or on behalf of the issuer; or

(B) any proxy statement, report to shareholders, or other disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission or any national securities organization registered under section 15A of the Securities Exchange Act of 1934, except that this subparagraph does not apply to the laws, rules, regulations, or orders, or other administrative actions of the State of incorporation of the issuer; or

(3) shall directly or indirectly prohibit, limit, or impose conditions, based on the merits of such offering or issuer, upon the offer or sale of any security described in paragraph (1).

(b) COVERED SECURITIES.—For purposes of this section, the following are covered securities:

(1) EXCLUSIVE FEDERAL REGISTRATION OF NATIONALLY TRADED SECURITIES.—A security is a covered security if such security is—

(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);

(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or

(C) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B). * * *

Q. *§ 27A. Application of Safe Harbor for forward-looking statements*

(a) *Applicability*. This section shall apply only to a forward-looking statement made by:

(1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m(a) or 78o(d) of this title;

(2) a person acting on behalf of such issuer;

(3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or

(4) an underwriter, with respect to information provided by such issuer or information derived from information provided by the issuer.

(b) *Exclusions*. Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement:

(1) that is made with respect to the business or operations of the issuer, if the issuer:

(A) during the 3-year period preceding the date on which the statement was first made:

(i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 78o(b)(4)(B) of this title; or

(ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that:

(I) prohibits future violations of the antifraud provisions of the securities laws;

(II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or

(III) determines that the issuer violated the antifraud provisions of the securities laws;

(B) makes the forward-looking statement in connection with an offering of securities by a blank check company;

(C) issues penny stock;

(D) makes the forward-looking statement in connection with a rollup transaction; or

(E) makes the forward-looking statement in connection with a going private transaction; or

(2) that is:

(A) included in a financial statement prepared in accordance with generally accepted accounting principles;

(B) contained in a registration statement of, or otherwise issued by, an investment company;

(C) made in connection with a tender offer;

(D) made in connection with an initial public offering;

(E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or

(F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 78m(d) of this title.

(c) *Safe Harbor*.

(1) *In general*. Except as provided in subsection (b) of this section, in any private action arising under this subchapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) of this section shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that:

(A) the forward-looking statement is:

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or

(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement--

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity; was:

(I) made by or with the approval of an executive officer of that entity, and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) *Oral forward-looking statements*. In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 78m(a) or 78o(d) of this title, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied:

(A) if the oral forward-looking statement is accompanied by a cautionary statement:

(i) that the particular oral statement is a forward-looking statement; and

(ii) that the actual results could differ materially from those projected in the forward-looking statement; and

(B) if:

(i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to differ materially from those in the forward-looking statement is contained in a readily available written document, or portion thereof;

(ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and

(iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) *Availability*. Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) *Effect on other safe harbors*. The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g) of this section.

(d) *Duty to update*. Nothing in this section shall impose upon any person a duty to update a forward-looking statement.

(e) *Dispositive motion*. On any motion to dismiss based upon subsection (c)(1) of this section, the court shall consider any statement cited in the complaint and cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

(f) *Stay pending decision on motion*. In any private action arising under this subchapter, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on the grounds that:

(1) the statement or omission upon which the complaint is based is a forward- looking statement within the meaning of this section; and

(2) the exemption provided for in this section precludes a claim for relief.

(g) *Exemption authority*. In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this subchapter, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission.

(h) *Effect on other authority of Commission*. Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority.

(i) *Definitions*. For purposes of this section, the following definitions shall apply:

(1) *Forward-looking statement*. The term "forward-looking statement" means:

(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission;

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C);

(E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or

(F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

(2) *Investment company*. The term "investment company" has the same meaning as in section 80a-3(a) of this title.

(3) *Penny stock*. The term "penny stock" has the same meaning as in section 78c(a)(51) of this title, and the rules and regulations, or orders issued pursuant to that section.

(4) *Going private transaction*. The term "going private transaction" has the meaning given that term under the rules or regulations of the Commission issued pursuant to section 78m(e) of this title.

(5) *Securities laws*. The term "securities laws" has the same meaning as in section 78c of this title.

(6) *Person acting on behalf of an issuer*. The term "person acting on behalf of an issuer" means an officer, director, or employee of the issuer.

(7) *Other terms*. The terms "blank check company", "roll-up transaction", "partnership", "limited liability company", "executive officer of an entity" and "direct participation investment program", have the meanings given those terms by rule or regulation of the Commission. * * *

CHAPTER 7 GENERAL RULES AND REGULATIONS UNDER THE SECURITIES ACT OF 1933: RULES 100-473 (INCLUDING REGS. D, S, S-K, AND MA)

[*See* Principally Chapters 4 and 13 of Business Planning for Mergers and Acquisitions]

A. *Rule 100. Definition of terms used in the rules and regulations.*

(a) As used in the rules and regulations prescribed in this part by the Securities and Exchange Commission pursuant to the Securities Act of 1933, unless the context otherwise requires:

(1) The term "Commission" means the Securities and Exchange Commission.

(2) The term "act" means the Securities Act of 1933.

(3) The term "rules and regulations" refers to all rules and regulations adopted by the Commission pursuant to the act, including the forms and accompanying instructions thereto.

(4) The term "registrant" means the issuer of securities for which a registration statement is filed.

* * *

B. *Rule 134. Communications not deemed a prospectus*

Except as provided in paragraphs (e) and (g) of this section, the terms "prospectus" as defined in section 2(a)(10) of the Act or "free writing prospectus" as defined in Rule 405 (§230.405) shall not include a communication limited to the statements required or permitted by this section, provided that the communication is published or transmitted to any person only after a registration statement relating to the offering that includes a prospectus satisfying the requirements of section 10 of the Act (except as otherwise permitted in paragraph (a) of this section) has been filed.

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph, provided that, except as to paragraphs (a)(4), (a)(5), (a)(6), and (a)(17) of this section, the prospectus included in the filed registration statement does not have to include a price range otherwise required by rule:

(1) Factual information about the legal identity and business location of the issuer limited to the following: the name of the issuer of the security, the address, phone number, and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, and the geographic areas in which it conducts business;

(2) The title of the security or securities and the amount or amounts being offered, which title may include a designation as to whether the securities are convertible, exercisable, or exchangeable, and as to the ranking of the securities;

(3) A brief indication of the general type of business of the issuer, limited to the following:

(i) In the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;

(ii) In the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business;

(iii) In the case of an asset-backed issuer, the identity of key parties, such as sponsor, depositor, issuing entity, servicer or servicers, and trustee, the asset class of the transaction, and the identity of any credit enhancement or other support; and

(iv) In the case of any other type of company, a corresponding statement;

(4) The price of the security, or if the price is not known, the method of its determination or the *bona fide* estimate of the price range as specified by the issuer or the managing underwriter or underwriters;

* * *

(7) A brief description of the intended use of proceeds of the offering, if then disclosed in the prospectus that is part of the filed registration statement

(8) The name, address, phone number, and e-mail address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;

(9) The type of underwriting, if then included in the disclosure in the prospectus that is part of the filed registration statement;

(10) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(11) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them); * * *

(b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:

(1) If the registration statement has not yet become effective, the following statement: A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective; and

(2) The name and address of a person or persons from whom a written prospectus for the offering meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) including as to the identified paragraphs above a price range where required by rule, may be obtained.

(c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication which

(1) Does no more than state from whom and include the uniform resource locator (URL) where a written prospectus meeting the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405) may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or

(2) Is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405, which meets the requirements of section 10 of the Act, including a price range where required by rule, at the date of such preliminary communication.

(d) A communication sent or delivered to any person pursuant to this section which is accompanied or preceded by a prospectus which meets the requirements of section 10 of the Act (other than a free writing prospectus as defined in Rule 405), including a price range where required by rule, at the date of such communication, may solicit from the recipient of the communication an offer to buy security or request the recipient to indicate whether he or she might be interested in the security, if the communication contains substantially the following statement:

No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date.

Provided, That such statement need not be included in such a communication to a dealer.

(e) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.

(f) The provision in paragraphs (c)(2) and (d) of this section that a prospectus that meets the requirements of section 10 of the Act precede or accompany a communication will be satisfied if such communication is an electronic communication containing an active hyperlink to such prospectus. * * *

C. Rule 135. Notice of proposed registered offerings.

(a) When notice is not an offer. For purposes of section 5 of the Act (15 U.S.C. 77e) only, an issuer or a selling security holder (and any person acting on behalf of either of them) that publishes through any medium a notice of a proposed offering to be registered under the Act will not be deemed to offer its securities for sale through that notice if:

(1) *Legend.* The notice includes a statement to the effect that it does not constitute an offer of any securities for sale; and

(2) *Limited notice content.* The notice otherwise includes no more than the following information:

(i) The name of the issuer;

(ii) The title, amount and basic terms of the securities offered;

(iii) The amount of the offering, if any, to be made by selling security holders;

(iv) The anticipated timing of the offering;

(v) A brief statement of the manner and the purpose of the offering, without naming the

underwriters;

(vi) Whether the issuer is directing its offering to only a particular class of purchasers;

(vii) Any statements or legends required by the laws of any state or foreign country or administrative authority; and

(viii) In the following offerings, the notice may contain additional information, as follows:

* * *

(C) *Exchange offer.* In an exchange offer:

(1) The basic terms of the exchange offer;

(2) The name of the subject company;

(3) The subject class of securities sought in the exchange offer.

(D) *Rule 145(a) offering.* In a § 230.145(a) offering:

(1) The name of the person whose assets are to be sold in exchange for the securities to be offered;

(2) The names of any other parties to the transaction;

(3) A brief description of the business of the parties to the transaction;

(4) The date, time and place of the meeting of security holders to vote on or consent to the transaction; and

(5) A brief description of the transaction and the basic terms of the transaction.

(b) *Corrections of misstatements about the offering.* A person that publishes a notice in reliance on this section may issue a notice that contains no more information than is necessary to correct inaccuracies published about the proposed offering.

Note to Rule 135: Communications under this section relating to business combination transactions must be filed as required by Rule 425(b).

D. Rule 137. Publications or distributions of research reports by brokers or dealers not participating in an issuer's registered distribution of securities. * * *

E. Rule 138. Publications or distributions of research reports by brokers or dealers about securities other than those they are distributing. * * *

F. Rule 139. Publications or distributions of research reports by brokers or dealers distributing securities. * * *

G. Rule 144. Persons Deemed Not to Be Engaged in a Distribution and Therefore Not Underwriters

PRELIMINARY NOTE:

Certain basic principles are essential to an understanding of the registration requirements in the Securities Act of 1933 (the Act or the Securities Act) and the purposes underlying Rule 144:

1. If any person sells a non-exempt security to any other person, the sale must be registered unless an exemption can be found for the transaction.

2. Section 4(1) of the Securities Act provides one such exemption for a transaction "by a person other than an issuer, underwriter, or dealer." Therefore, an understanding of the term "underwriter" is important in determining whether or not the Section 4(1) exemption from registration is available for the sale of the securities.

The term "underwriter" is broadly defined in Section 2(a)(11) of the Securities Act to mean any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates, or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking. The interpretation of this definition traditionally has focused on the words "with a view to" in the phrase "purchased from an issuer with a view to * * *

distribution." An investment banking firm which arranges with an issuer for the public sale of its securities is clearly an "underwriter" under that section. However, individual investors who are not professionals in the securities business also may be "underwriters" if they act as links in a chain of transactions through which securities move from an issuer to the public.

Since it is difficult to ascertain the mental state of the purchaser at the time of an acquisition of securities, prior to and since the adoption of Rule 144, subsequent acts and circumstances have been considered to determine whether the purchaser took the securities "with a view to distribution" at the time of the acquisition. Emphasis has been placed on factors such as the length of time the person held the securities and whether there has been an unforeseeable change in circumstances of the holder. Experience has shown, however, that reliance upon such factors alone has led to uncertainty in the application of the registration provisions of the Act.

The Commission adopted Rule 144 to establish specific criteria for determining whether a person is not engaged in a distribution. Rule 144 creates a safe harbor from the Section 2(a)(11) definition of "underwriter." A person satisfying the applicable conditions of the Rule 144 safe harbor is deemed not to be engaged in a distribution of the securities and therefore not an underwriter of the securities for purposes of Section 2(a)(11). Therefore, such a person is deemed not to be an underwriter when determining whether a sale is eligible for the Section 4(1) exemption for "transactions by any person other than an issuer, underwriter, or dealer." If a sale of securities complies with all of the applicable conditions of Rule 144:

1. Any affiliate or other person who sells restricted securities will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction;

2. Any person who sells restricted or other securities on behalf of an affiliate of the issuer will be deemed not to be engaged in a distribution and therefore not an underwriter for that transaction; and

3. The purchaser in such transaction will receive securities that are not restricted securities.

Rule 144 is not an exclusive safe harbor. A person who does not meet all of the applicable conditions of Rule 144 still may claim any other available exemption under the Act for the sale of the securities. The Rule 144 safe harbor is not available to any person with respect to any transaction or series of transactions that, although in technical compliance with Rule 144, is part of a plan or scheme to evade the registration requirements of the Act.

(a) *Definitions.* The following definitions shall apply for the purposes of this section.

(1) An *affiliate* of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer.

(2) The term *person* when used with reference to a person for whose account securities are to be sold in reliance upon this section includes, in addition to such person, all of the following persons:

(i) Any relative or spouse of such person, or any relative of such spouse, any one of whom has the same home as such person; * * *

(3) The term *restricted securities* means:

(i) Securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering;

(ii) Securities acquired from the issuer that are subject to the resale limitations of §230.502(d) under Regulation D or §230.701(c);

(iii) Securities acquired in a transaction or chain of transactions meeting the requirements of §230.144A; * * *

(4) The term *debt securities* means: * * *

(b) *Conditions to be met.* Subject to paragraph (i) of this section, the following conditions must be met:

(1) *Non-affiliates.* (i) If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act), any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of paragraphs (c)(1) and (d) of this section are met. The requirements of paragraph (c)(1) of this section shall not apply to restricted securities sold for the account of a person who is not an affiliate of the issuer at the time of the sale and has not been an affiliate during the preceding three months, provided a period of one year has elapsed since the later of the date the securities were acquired from the issuer or from an affiliate of the issuer.

(ii) If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, any person who is not an affiliate of the issuer at the time of the sale, and has not been an affiliate during the preceding three months, who sells restricted securities of the issuer for his or her own account shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if the condition of paragraph (d) of this section is met.

(2) *Affiliates or persons selling on behalf of affiliates.* Any affiliate of the issuer, or any person who was an affiliate at any time during the 90 days immediately before the sale, who sells restricted securities, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, or any person who sells restricted or any other securities for the account of a person who was an affiliate at any time during the 90 days immediately before the sale, shall be deemed not to be an underwriter of those securities within the meaning of section 2(a)(11) of the Act if all of the conditions of this section are met.

(c) *Current public information.* Adequate current public information with respect to the issuer of the securities must be available. Such information will be deemed to be available only if the applicable condition set forth in this paragraph is met:

(1) *Reporting issuers.* The issuer is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and has:

(i) Filed all required reports under section 13 or 15(d) of the Exchange Act, as applicable, during the 12 months preceding such sale (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter); * * * or

(2) *Non-reporting issuers.* If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, there is publicly available the information concerning the issuer specified in paragraphs (a)(5)(i) to (xiv), inclusive, and paragraph (a)(5)(xvi) of §240.15c2-11 of this chapter, or, if the issuer is an insurance company, the information specified in section 12(g)(2)(G)(i) of the Exchange Act (15 U.S.C. 78*l*(g)(2)(G)(i)).

NOTE TO §230.144(c): With respect to paragraph (c)(1), the person can rely upon:

1. A statement in whichever is the most recent report, quarterly or annual, required to be filed and filed by the issuer that such issuer has:

a. Filed all reports required under section 13 or 15(d) of the Exchange Act, as applicable, during the preceding 12 months (or for such shorter period that the issuer was required to file such reports), other than Form 8-K reports (§249.308 of this chapter), and has been subject to such filing requirements for the past 90 days; * * * or

2. A written statement from the issuer that it has complied with such reporting, submission or posting requirements.

3. Neither type of statement may be relied upon, however, if the person knows or has reason to believe that the issuer has not complied with such requirements.

(d) *Holding period for restricted securities.* If the securities sold are restricted securities, the following provisions apply:

(1) *General rule.*

(i) [**Public Issuer**] If the issuer of the securities is, and has been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of six months must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

(ii) [**Non-Public Issuer**] If the issuer of the securities is not, or has not been for a period of at least 90 days immediately before the sale, subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, a minimum of one year must elapse between the later of the date of the acquisition of the securities from the issuer, or from an affiliate of the issuer, and any resale of such securities in reliance on this section for the account of either the acquiror or any subsequent holder of those securities.

(iii) If the acquiror takes the securities by purchase, the holding period shall not begin until the full purchase price or other consideration is paid or given by the person acquiring the securities from the issuer or from an affiliate of the issuer.

(2) *Promissory notes, other obligations or installment contracts.* * * *

(3) *Determination of holding period.* The following provisions shall apply for the purpose of determining the period securities have been held: * * *

(v) *Gifts of securities.* Securities acquired from an affiliate of the issuer by gift shall be deemed to have been acquired by the donee when they were acquired by the donor. * * *

(viii) *Rule 145(a) transactions.* The holding period for securities acquired in a transaction specified in §230.145(a) shall be deemed to commence on the date the securities were acquired by the purchaser in such transaction, except as otherwise provided in paragraphs (d)(3)(ii) and (ix) of this section. * * *

(e) *Limitation on amount of securities sold.* Except as hereinafter provided, the amount of securities sold for the account of an affiliate of the issuer in reliance upon this section shall be determined as follows:

(1) If any securities are sold for the account of an affiliate of the issuer, regardless of whether those securities are restricted, the amount of securities sold, together with all sales of securities of the same class sold for the account of such person within the preceding three months, shall not exceed the greatest of:

(i) One percent of the shares or other units of the class outstanding as shown by the most recent report or statement published by the issuer, or

(ii) The average weekly reported volume of trading in such securities on all national securities exchanges and/or reported through the automated quotation system of a registered securities association during the four calendar weeks preceding the filing of notice required by paragraph (h), or if no such notice is required the date of receipt of the order to execute the transaction by the broker or the date of execution of the transaction directly with a market maker, or

(iii) The average weekly volume of trading in such securities reported pursuant to an *effective transaction reporting plan* or an *effective national market system plan* as those terms are defined in §242.600 of this chapter during the four-week period specified in paragraph (e)(1)(ii) of this section. * * *

(3) *Determination of amount.* For the purpose of determining the amount of securities specified in paragraph (e)(1) of this section and, as applicable, paragraph (e)(2) of this section, the following provisions shall apply: * * *

(vii) The following sales of securities need not be included in determining the amount of securities to be sold in reliance upon this section:

(A) Securities sold pursuant to an effective registration statement under the Act;

(B) Securities sold pursuant to an exemption provided by Regulation A (§230.251 through §230.263) under the Act;

(C) Securities sold in a transaction exempt pursuant to section 4 of the Act (15 U.S.C. 77d) and not involving any public offering; * * *

(f) *Manner of sale.*

(1) The securities shall be sold in one of the following manners:

(i) *Brokers' transactions* within the meaning of section 4(4) of the Act;

(ii) Transactions directly with a *market maker*, as that term is defined in section 3(a)(38) of the Exchange Act; or

(iii) *Riskless principal transactions* * * *

(g) *Brokers' transactions.* The term *brokers' transactions* in section 4(4) of the Act shall for the purposes of this rule be deemed to include transactions by a broker in which such broker:

(1) Does no more than execute the order or orders to sell the securities as agent for the person for whose account the securities are sold;

(2) Receives no more than the usual and customary broker's commission;

(3) Neither solicits nor arranges for the solicitation of customers' orders to buy the securities in anticipation of or in connection with the transaction; *Provided,* that the foregoing shall not preclude:

(i) Inquiries by the broker of other brokers or dealers who have indicated an interest in the securities within the preceding 60 days;

(ii) Inquiries by the broker of his customers who have indicated an unsolicited bona fide interest in the securities within the preceding 10 business days; * * *

(4) After reasonable inquiry is not aware of circumstances indicating that the person for whose account the securities are sold is an underwriter with respect to the securities or that the transaction is

a part of a distribution of securities of the issuer. Without limiting the foregoing, the broker shall be deemed to be aware of any facts or statements contained in the notice required by paragraph (h) of this section.

NOTES:

(i) The broker, for his own protection, should obtain and retain in his files a copy of the notice required by paragraph (h) of this section.

(ii) The reasonable inquiry required by paragraph (g)(3) of this section should include, but not necessarily be limited to, inquiry as to the following matters:

(*a*) The length of time the securities have been held by the person for whose account they are to be sold. If practicable, the inquiry should include physical inspection of the securities;

(*b*) The nature of the transaction in which the securities were acquired by such person;

(*c*) The amount of securities of the same class sold during the past 3 months by all persons whose sales are required to be taken into consideration pursuant to paragraph (e) of this section;

(*d*) Whether such person intends to sell additional securities of the same class through any other means;

(*e*) Whether such person has solicited or made any arrangement for the solicitation of buy orders in connection with the proposed sale of securities;

(*f*) Whether such person has made any payment to any other person in connection with the proposed sale of the securities; and

(*g*) The number of shares or other units of the class outstanding, or the relevant trading volume.

(h) *Notice of proposed sale.* (1) If the amount of securities to be sold in reliance upon this rule during any period of three months exceeds 5,000 shares or other units or has an aggregate sale price in excess of $50,000, three copies of a notice on Form 144 (§239.144 of this chapter) shall be filed with the Commission. If such securities are admitted to trading on any national securities exchange, one copy of such notice also shall be transmitted to the principal exchange on which such securities are admitted.

(2) The Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale. * * *

H. *Rule 144A. Private resales of securities to institutions.*

Preliminary Notes

1. This section relates solely to the application of section 5 of the Act and not to antifraud or other provisions of the federal securities laws.

2. Attempted compliance with this section does not act as an exclusive election; any seller hereunder may also claim the availability of any other applicable exemption from the registration requirements of the Act.

3. In view of the objective of this section and the policies underlying the Act, this section is not available with respect to any transaction or series of transactions that, although in technical compliance with this section, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

4. Nothing in this section obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (the "Exchange Act"),

whenever such requirements are applicable.

5. Nothing in this section obviates the need for any person to comply with any applicable state law relating to the offer or sale of securities.

6. Securities acquired in a transaction made pursuant to the provisions of this section are deemed to be "restricted securities" within the meaning of § 144(a)(3) of this chapter.

7. The fact that purchasers of securities from the issuer thereof may purchase such securities with a view to reselling such securities pursuant to this section will not affect the availability to such issuer of an exemption under section 4(2) of the Act, or Regulation D under the Act, from the registration requirements of the Act.

(a) *Definitions*. (1) For purposes of this section, "qualified institutional buyer" shall mean:

(i) Any of the following entities, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with the entity:

(A) Any *insurance company* as defined in section 2(13) of the Act; * * *

(B) Any *investment company* registered under the Investment Company Act or any business development company as defined in section 2(a)(48) of that Act; * * *

(I) Any *investment adviser* registered under the Investment Advisers Act.

(ii) Any *dealer* registered pursuant to section 15 of the Exchange Act, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $10 million of securities of issuers that are not affiliated with the dealer, Provided, That securities constituting the whole or a part of an unsold allotment to or subscription by a dealer as a participant in a public offering shall not be deemed to be owned by such dealer;

(iii) Any *dealer* registered pursuant to section 15 of the Exchange Act acting in a riskless principal transaction on behalf of a qualified institutional buyer; * * *

(v) Any entity, all of the equity owners of which are qualified institutional buyers, acting for its own account or the accounts of other qualified institutional buyers; and

(vi) Any *bank* as defined in section 3(a)(2) of the Act, any savings and loan association or other institution as referenced in section 3(a)(5)(A) of the Act, or any foreign bank or savings and loan association or equivalent institution, acting for its own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least $100 million in securities of issuers that are not affiliated with it and that has an audited net worth of at least $25 million as demonstrated in its latest annual financial statements, as of a date not more than 16 months preceding the date of sale under the Rule in the case of a U.S. bank or savings and loan association, and not more than 18 months preceding such date of sale for a foreign bank or savings and loan association or equivalent institution. * * *

(b) *Sales by persons other than issuers or dealers*. Any person, other than the issuer or a dealer, who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter of such securities within the meaning of sections 2(11) and 4(1) of the Act.

(c) *Sales by Dealers*. Any dealer who offers or sells securities in compliance with the conditions set forth in paragraph (d) of this section shall be deemed not to be a participant in a distribution of such securities within the meaning of section 4(3)(C) of the Act and not to be an underwriter of such securities within the meaning of section 2(11) of the Act, and such securities shall be deemed not to have been offered to the public within the meaning of section 4(3)(A) of the Act.

(d) *Conditions to be met*. To qualify for exemption under this section, an offer or sale must meet the following conditions:

(1) The securities are offered or sold only to a qualified institutional buyer or to an offeree or purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer. In determining whether a prospective purchaser is a qualified institutional buyer, the seller and any person acting on its behalf shall be entitled to rely upon the following non-exclusive methods of establishing the prospective purchaser's ownership and discretionary investments of securities:

(i) The prospective purchaser's most recent publicly available financial statements, *Provided* That such statements present the information as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

(ii) The most recent publicly available information appearing in documents filed by the prospective purchaser with the Commission or another United States federal, state, or local governmental agency or self-regulatory organization, or with a foreign governmental agency or self-regulatory organization, Provided That any such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser;

(iii) The most recent publicly available information appearing in a recognized securities

manual, Provided That such information is as of a date within 16 months preceding the date of sale of securities under this section in the case of a U.S. purchaser and within 18 months preceding such date of sale for a foreign purchaser; or

(iv) A certification by the chief financial officer, a person fulfilling an equivalent function, or other executive officer of the purchaser, specifying the amount of securities owned and invested on a discretionary basis by the purchaser as of a specific date on or since the close of the purchaser's most recent fiscal year, or, in the case of a purchaser that is a member of a family of investment companies, a certification by an executive officer of the investment adviser specifying the amount of securities owned by the family of investment companies as of a specific date on or since the close of the purchaser's most recent fiscal year;

(2) The seller and any person acting on its behalf takes reasonable steps to ensure that the purchaser is aware that the seller may rely on the exemption from the provisions of section 5 of the Act provided by this section;

(3) The securities offered or sold:

(i) Were not, when issued, of the same class as securities listed on a national securities exchange registered under section 6 of the Exchange Act or quoted in a U.S. automated inter-dealer quotation system; Provided, That securities that are convertible or exchangeable into securities so listed or quoted at the time of issuance and that had an effective conversion premium of less than 10 percent, shall be treated as securities of the class into which they are convertible or exchangeable; and that warrants that may be exercised for securities so listed or quoted at the time of issuance, for a period of less than 3 years from the date of issuance, or that had an effective exercise premium of less than 10 percent, shall be treated as securities of the class to be issued upon exercise; and Provided further, That the Commission may from time to time, taking into account then-existing market practices, designate additional securities and classes of securities that will not be deemed of the same class as securities listed on a national securities exchange or quoted in a U.S. automated inter-dealer quotation system; and

(ii) Are not securities of an open-end investment company, unit investment trust or face-amount certificate company that is or is required to be registered under section 8 of the Investment Company Act; and

(4) (i) In the case of securities of an issuer that is neither subject to section 13 or 15(d) of the Exchange Act, nor exempt from reporting pursuant to Rule 12g3-2(b) under the Exchange Act, nor a foreign government as defined in Rule 405 eligible to register securities under Schedule B of the Act, the holder and a prospective purchaser designated by the holder have the right to obtain from the issuer, upon request of the holder, and the prospective purchaser has received from the issuer, the seller, or a person acting on either of their behalf, at or prior to the time of sale, upon such prospective purchaser's request to the holder or the issuer, the following information (which shall be reasonably current in relation to the date of resale under this section): a very brief statement of the nature of the business of the issuer and the products and services it offers; and the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).

(ii) The requirement that the information be "reasonably current" will be presumed to be satisfied if:

(A) The balance sheet is as of a date less than 16 months before the date of resale, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the date of resale, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the date of resale; and

(B) The statement of the nature of the issuer's business and its products and services offered is as of a date within 12 months prior to the date of resale; or

(C) With regard to foreign private issuers, the required information meets the timing requirements of the issuer's home country or principal trading markets.

(e) Offers and sales of securities pursuant to this section shall be deemed not to affect the availability of any exemption or safe harbor relating to any previous or subsequent offer or sale of such securities by the issuer or any prior or subsequent holder thereof.

I. Rule 145. Reclassifications of securities, mergers, consolidations and Acquisitions of assets

Preliminary Note to Rule 145

Rule 145 is designed to make available the protection provided by registration under the Securities Act of 1933, as amended (Act), to persons who are offered securities in a business combination of the type described in paragraphs (a)(1), (2), and (3) of the rule. The thrust of the rule is that an *offer*, *offer to sell*, *offer for sale*, or *sale* occurs when there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance a new investment decision, whether to accept a new or different security in exchange for their existing security. Rule 145 embodies the Commission's determination that such transactions are subject to the registration requirements of the Act, and that the previously existing *no-sale* theory of Rule is no longer consistent with the statutory purposes of the Act. *See* Release No. 33-5316 (October 6, 1972). Securities issued in transactions described in paragraph (a) of Rule 145 may be registered on Form S-4 or F-4or Form N-14 under the Act.

Transactions for which statutory exemptions under the Act, including those contained in sections 3(a)(9), (10), (11), and [4(a)(2)], are otherwise available are not affected by Rule 145.

Note 1: Reference is made to Rule 153a describing the prospectus delivery required in a transaction of the type referred to in Rule 145.

Note 2: A reclassification of securities covered by Rule 145 would be exempt from registration pursuant to section 3(a)(9) or (11) of the Act if the conditions of either of these sections are satisfied.

a. *Transactions within the section.* An *offer*, *offer to sell*, *offer for sale* or *sale* shall be deemed to be involved, within the meaning of Section 2(a)(3) of the Act, so far as the security holders of a corporation or other person are concerned where, pursuant to statutory provisions of the jurisdiction under which such corporation or other person is organized, or pursuant to provisions contained in its certificate of incorporation or similar controlling instruments, or otherwise, there is submitted for the vote or consent of such security holders a plan or agreement for:

    1. *Reclassifications.* A reclassification of securities of such corporation or other person, other than a stock split, reverse stock split, or change in par value, which involves the substitution of a security for another security;

    2. *Mergers of Consolidations.* A statutory merger or consolidation, or similar plan or acquisition in which securities of such corporation or other person held by such security holders will become or be exchanged for securities of any person, unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States; or

    3. *Transfers of assets.* A transfer of assets of such corporation or other person, to another person in consideration of the issuance of securities of such other person or any of its affiliates, if:

        i. such plan or agreement provides for dissolution of the corporation or other person whose security holders are voting or consenting; or

        ii. such plan or agreement provides for a pro rata or similar distribution of such securities to the security holders voting or consenting; or

        iii. the board of directors or similar representatives of such corporation or other person, adopts resolutions relative to paragraph (a)(3) (i) or (ii) of this section within 1 year after the taking of such vote or consent; or

        iv. the transfer of assets is a part of a pre-existing plan for distribution of such securities, notwithstanding paragraph (a)(3) (i), (ii) or (iii) of this section.

b. *Communications before a Registration Statement is filed.* Communications made in connection with or relating to a transaction described in paragraph (a) of this section that will be registered under the Act may be made under Rule 135, Rule 165, or Rule 166.

c. *Persons and parties deemed to be underwriters.* For purposes of this section, if any party to a transaction specified in paragraph (a) of this section is a shell company, other than a business combination related shell company, as those terms are defined in Rule 230.405, any party to that transaction, other than the issuer, or any person who is an affiliate of such party at the time such transaction is submitted for vote or consent, who publicly offers or sells securities of the issuer acquired in connection with any such transaction, shall be deemed to be engaged in a distribution and therefore to be an underwriter thereof within the meaning of Section 2(a)(11) of the Act Section 2(a)(11) of the Act.

d. *Resale provisions for persons and parties deemed underwriters*. Notwithstanding the provisions of paragraph (c), a person or party specified in that paragraph shall not be deemed to be engaged in a distribution and therefore not to be an underwriter of securities acquired in a transaction specified in paragraph (a) that was registered under the Act if:

1. The issuer has met the requirements applicable to an issuer of securities in paragraph (i)(2) of Rule 230.144; and

2. One of the following three conditions is met:

   i. Such securities are sold by such person or party in accordance with the provisions of paragraphs (c), (e), (f), and (g) of Rule 230.144 and at least 90 days have elapsed since the date the securities were acquired from the issuer in such transaction; or

   ii. Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least six months, as determined in accordance with paragraph (d) of Rule 230.144, have elapsed since the date the securities were acquired from the issuer in such transaction, and the issuer meets the requirements of paragraph (c) of Rule 230.144; or

   iii. Such person or party is not, and has not been for at least three months, an affiliate of the issuer, and at least one year, as determined in accordance with paragraph (d) of Rule 230.144, has elapsed since the date the securities were acquired from the issuer in such transaction.

   Note to Rule 230.145(c) and (d): Paragraph (d) is not available with respect to any transaction or series of transactions that, although in technical compliance with the rule, is part of a plan or scheme to evade the registration requirements of the Act.

e. *Definitions.*

1. The term affiliate as used in paragraphs (c) and (d) of this section shall have the same meaning as the definition of that term in Rule 230.144.

2. The term party as used in paragraphs (c) and (d) of this section shall mean the corporations, business entities, or other persons, other than the issuer, whose assets or capital structure are affected by the transactions specified in paragraph (a) of this section.

3. The term person as used in paragraphs (c) and (d) of this section, when used in reference to a person for whose account securities are to be sold, shall have the same meaning as the definition of that term in paragraph (a)(2) of Rule 230.144.

J. Rule 153A. Definition of "preceded by a prospectus" as used in section 5(b)(2) of the Act, in

relation to certain transactions requiring approval of security holders.

The term "preceded by a prospectus," as used in section 5(b)(2) of the Act with respect to any requirement for the delivery of a prospectus to security holders of a corporation or other person, in connection with transactions of the character specified in paragraph (a) of § 145, shall mean the delivery of a prospectus:

(a) Prior to the vote of security holders on such transactions; or,
(b) With respect to actions taken by consent, prior to the earliest date on which the corporate action may be taken;

to all security holders of record of such corporation or other person, entitled to vote on or consent to the proposed transaction, at their address of record on the transfer records of the corporation or other person.* * *

K. *Rule 162. Submission of tenders in registered exchange offers.*

(a) Notwithstanding section 5(a) of the Act, offerors may solicit tenders of securities in an exchange offer subject to Rule 13e-4(e) or Rule 14d-4(b) of this chapter before a registration statement is effective as to the security offered, so long as no securities are purchased until the registration statement is effective and the tender offer has expired in accordance with the tender offer rules.

(b) Notwithstanding section 5(b)(2) of the Act (15 U.S.C. 77e(b)(2), a prospectus that meets the requirements of section 10(a) of the Act need not be delivered to security holders in an exchange offer subject to Rule 13e-4(e) or Rule 14d-4(b) of this chapter, so long as a preliminary prospectus, prospectus supplements and revised prospectuses are delivered to security holders in accordance with Rule 13e-4(e)(2) or Rule 14d-4(b) of this chapter, as applicable.

L. *Rule 163. Exemption from section 5(c) of the Act for certain communications by or on behalf of well-known seasoned issuers.*

Preliminary Note to §230.163. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) In an offering by or on behalf of a well-known seasoned issuer, as defined in Rule 405 (§230.405), that will be or is at the time intended to be registered under the Act, an offer by or on behalf of such issuer is exempt from the prohibitions in section 5(c) of the Act on offers to sell, offers for sale, or offers to buy its securities before a registration statement has been filed, provided that:

(1) Any written communication that is an offer made in reliance on this exemption will be a free writing prospectus as defined in Rule 405 and a prospectus under section 2(a)(10) of the Act relating to a public offering of securities to be covered by the registration statement to be filed; and

(2) The exemption from section 5(c) of the Act provided in this section for such written communication that is an offer shall be conditioned on satisfying the conditions in paragraph (b) of this section.

(b) *Conditions*

(1) *Legend.*

(i) Every written communication that is an offer made in reliance on this exemption shall contain substantially the following legend:

The issuer may file a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at www.sec.gov. Alternatively, the company will arrange to send you the prospectus after filing if you request it by calling toll-free 1–8[xx-xxx-xxxx].

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site, and provide the Internet address and the particular location of the documents on the Web site.

* * *

(2) *Filing condition.*

(i) Subject to paragraph (b)(2)(ii) of this section, every written communication that is an offer made in reliance on this exemption shall be filed by the issuer with the Commission promptly upon the filing of the registration statement, if one is filed, or an amendment, if one is filed, covering the securities that have been offered in reliance on this exemption.

(ii) The condition that an issuer shall file a free writing prospectus with the Commission under this section shall not apply in respect of any communication that has previously been filed with, or furnished to, the Commission or that the issuer would not be required to file with the Commission pursuant to the conditions of Rule 433 (§230.433) if the communication was a free writing prospectus used after the filing of the registration statement. The condition that the issuer shall file a free writing prospectus with the Commission under this section shall be satisfied if the issuer satisfies the filing conditions (other than timing of filing which is provided in this section) that would apply under Rule 433 if the communication was a free writing prospectus used after the filing of the registration statement. * * *

(3) *Ineligible offerings.* The exemption in paragraph (a) of this section shall not be available to:

(i) Communications relating to business combination transactions that are subject to Rule 165 (§230.165) or Rule 166 (§230.166); * * *

M. Rule 163A. Exemption from section 5(c) of the Act for certain communications made by or on behalf of issuers more than 30 days before a registration statement is filed.

Preliminary Note to §230.163A. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) Except as excluded pursuant to paragraph (b) of this section, in all registered offerings by issuers, any communication made by or on behalf of an issuer more than 30 days before the date of the filing of the registration statement that does not reference a securities offering that is or will be the subject of a registration statement shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of section 5(c) of the Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.

(b) The exemption in paragraph (a) of this section shall not be available with respect to the following communications:

(1) Communications relating to business combination transactions that are subject to Rule 165 (§230.165) or Rule 166 (§230.166); * * *

N. Rule 164. Post-filing free writing prospectuses in connection with certain registered offerings.

Preliminary Notes to §230.164.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. Attempted compliance with this section does not act as an exclusive election and the person relying on this section also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) In connection with a registered offering of an issuer meeting the requirements of this section, a free writing prospectus, as defined in Rule 405 (§230.405), of the issuer or any other offering participant, including any underwriter or dealer, after the filing of the registration statement will be a section 10(b) prospectus for purposes of section 5(b)(1) of the Act provided that the conditions set forth in Rule 433 (§230.433) are satisfied. * * *

(e) *Ineligible issuers.*

(1) This section and Rule 433 are available only if at the eligibility determination date for the offering in question, determined pursuant to paragraph (h) of this section, the issuer is not an ineligible issuer as defined in Rule 405 (or in the case of any offering participant, other than the issuer, the participant has a reasonable belief that the issuer is not an ineligible issuer);

(g) *Excluded offerings.* This section and Rule 433 are not available if the issuer is registering a business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1)) or the issuer, other than a well-known seasoned issuer, is registering an offering on Form S–8 (§239.16b of this chapter).

O. *Rule 165. Offers made in connection with a business combination transaction.*

Preliminary Note: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications before a registration statement is filed.* Notwithstanding section 5(c) of the Act, the offeror of securities in a business combination transaction to be registered under the Act may make an offer to sell or solicit an offer to buy those securities from and including the first public announcement until the filing of a registration statement related to the transaction, so long as any written communication (other than non-public communications among participants) made in connection with or relating to the transaction (i.e., prospectus) is filed in accordance with Rule 425 and the conditions in paragraph (c) of this section are satisfied.

(b) *Communications after a registration statement is filed.* Notwithstanding section 5(b)(1) of the Act , any written communication (other than non-public communications among participants) made in connection with or relating to a business combination transaction (i.e., prospectus) after the filing of a registration statement related to the transaction need not satisfy the requirements of section 10 of the Act, so long as the prospectus is filed in accordance with Rule 424 or Rule 425 and the conditions in paragraph (c) of this section are satisfied.

(c) *Conditions.* To rely on paragraphs (a) and (b) of this section:

(1) Each prospectus must contain a prominent legend that urges investors to read the relevant documents filed or to be filed with the Commission because they contain important information. The legend also must explain to investors that they can get the documents for free at the Commission's web site and describe which documents are available free from the offeror; and

(2) In an exchange offer, the offer must be made in accordance with the applicable tender offer rules Rule 14d-1 through Rule 14e-8 of this chapter; and, in a transaction involving the vote of security holders, the offer must be made in accordance with the applicable proxy or information statement rules Rule 14a-1 through Rule 14a-101 and Rule 14c-1 through Rule 14c-101 of this chapter).

(d) *Applicability.* This section is applicable not only to the offeror of securities in a business combination transaction, but also to any other participant that may need to rely on and complies with this section in communicating about the transaction.

(e) *Failure to file or delay in filing.* An immaterial or unintentional failure to file or delay in filing a prospectus described in this section will not result in a violation of section 5(b)(1) or (c) of the Act, so long as:

(1) A good faith and reasonable effort was made to comply with the filing requirement; and

(2) The prospectus is filed as soon as practicable after discovery of the failure to file.

(f) *Definitions.*

(1) A business combination transaction means any transaction specified in Rule 145(a) or exchange offer;

(2) A participant is any person or entity that is a party to the business combination transaction and any persons authorized to act on their behalf; and

(3) Public announcement is any oral or written communication by a participant that is reasonably designed to, or has the effect of, informing the public or security holders in general about the business combination transaction.

P. *Rule 166. Exemption from section 5(c) for certain communications in connection with business combination transactions.*

Preliminary Note: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.

(a) *Communications.* In a registered offering involving a business combination transaction, any communication made in connection with or relating to the transaction before the first public announcement of the offering will not constitute an offer to sell or a solicitation of an offer to buy the securities offered for purposes of section 5(c) of the Act, so long as the participants take all reasonable steps within their control to prevent further distribution or publication of the communication until either the first public announcement is made or the registration

statement related to the transaction is filed.

(b) *Definitions*. The terms business combination transaction, participant and public announcement have the same meaning as set forth in Rule 165(f).

Q. Rule 168. Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information and forward-looking information[by Seasoned Issuers].

Preliminary Notes to §230.168.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. This section provides a non-exclusive safe harbor for factual business information and forward-looking information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information or forward-looking information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information or forward-looking information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer (and, in the case of an asset-backed issuer, the other persons specified in paragraph (a)(3) of this section) of communications containing factual business information or forward-looking information shall be deemed not to constitute an offer to sell or offer for sale of a security which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied by any of the following:

(1) An issuer that is required to file reports pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)); * * *

(A) Has its equity securities trading on a designated offshore securities market as defined in Rule 902(b) (§230.902(b)) and has had them so traded for at least 12 months; or

(B) Has a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; or

(3) An asset-backed issuer or a depositor, sponsor, or servicer (as such terms are defined in Item 1101 of Regulation AB (§229.1101 of this chapter)) or an affiliated depositor, whether or not such other person is the issuer.

(b) *Definitions*.

(1) *Factual business information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such factual business information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*):

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business;

(ii) Advertisements of, or other information about, the issuer's products or services; and

(iii) Dividend notices.

(2) *Forward-looking information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section, including, without limitation, such forward-looking information contained in reports or other materials filed with, furnished to, or submitted to the Commission pursuant to the Securities Exchange Act of 1934:

(i) Projections of the issuer's revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure, or other financial items;

(ii) Statements about the issuer management's plans and objectives for future operations, including plans or objectives relating to the products or services of the issuer;

(iii) Statements about the issuer's future economic performance, including statements of the type contemplated by the management's discussion and analysis of financial condition and

results of operation described in Item 303 of Regulations S–B and S–K (§228.303 and §229.303 of this chapter) or the operating and financial review and prospects described in Item 5 of Form 20–F (§249.220f of this chapter); and

(iv) Assumptions underlying or relating to any of the information described in paragraphs (b)(2)(i), (b)(2)(ii) and (b)(2)(iii) of this section. * * *

(c) *Exclusion*. A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.

(d) *Conditions to exemption*. The following conditions must be satisfied:

(1) The issuer * * * has previously released or disseminated information of the type described in this section in the ordinary course of its business;

(2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations; and

(3) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)).

R. Rule 169. Exemption from sections 2(a)(10) and 5(c) of the Act for certain communications of regularly released factual business information.

Preliminary Notes to §230.169.

1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act. 2. This section provides a non-exclusive safe harbor for factual business information released or disseminated as provided in this section. Attempted compliance with this section does not act as an exclusive election and the issuer also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the definition of prospectus in section 2(a)(10) or the requirements of section 5 of the Act.

3. The availability of this section for a release or dissemination of a communication that contains or incorporates factual business information will not be affected by another release or dissemination of a communication that contains all or a portion of the same factual business information that does not satisfy the conditions of this section.

(a) For purposes of sections 2(a)(10) and 5(c) of the Act, the regular release or dissemination by or on behalf of an issuer of communications containing factual business information shall be deemed not to constitute an offer to sell or offer for sale of a security by an issuer which is the subject of an offering pursuant to a registration statement that the issuer proposes to file, or has filed, or that is effective, if the conditions of this section are satisfied.

(b) *Definitions*.

(1) *Factual business information* means some or all of the following information that is released or disseminated under the conditions in paragraph (d) of this section:

(i) Factual information about the issuer, its business or financial developments, or other aspects of its business; and

(ii) Advertisements of, or other information about, the issuer's products or services.

(2) For purposes of this section, the release or dissemination of a communication is by or on behalf of the issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves such release or dissemination before it is made.

(c) *Exclusions*. A communication containing information about the registered offering or released or disseminated as part of the offering activities in the registered offering is excluded from the exemption of this section.

(d) *Conditions to exemption*. The following conditions must be satisfied:

(1) The issuer has previously released or disseminated information of the type described in this section in the ordinary course of its business;

(2) The timing, manner, and form in which the information is released or disseminated is consistent in material respects with similar past releases or disseminations;

(3) The information is released or disseminated for intended use by persons, such as customers and suppliers, other than in their capacities as investors or potential investors in the issuer's securities, by the issuer's employees or agents who historically have provided such information; and

(4) The issuer is not an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)). * * *

S. *Rule 175. Liability for certain statements by issuers.*

(a) A statement within the coverage of paragraph (b) of this section which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement (as defined in paragraph (d) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.

(b) This rule applies to the following statements:

(1) A forward-looking statement (as defined in paragraph (c) of this section) made in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q and Form 10–QSB, §249.308a of this chapter, or in an annual report to shareholders meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) under the Securities Exchange Act of 1934, a statement reaffirming such forward-looking statement subsequent to the date the document was filed or the annual report was made publicly available, or a forward-looking statement made prior to the date the document was filed or the date the annual report was publicly available if such statement is reaffirmed in a filed document, in Part I of a quarterly report on Form 10–Q and Form 10–QSB, or in an annual report made publicly available within a reasonable time after the making of such forward-looking statement; *Provided,* That

(i) At the time such statements are made or reaffirmed, either the issuer is subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934 and has complied with the requirements of rule 13a–1 or 15d–1 thereunder, if applicable, to file its most recent annual report on Form 10–K and Form 10–KSB, Form 20–F or Form 40–F; or if the issuer is not subject to the reporting requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, the statements are made in a registration statement filed under the Act, offering statement or solicitation of interest written document or broadcast script under Regulation A or pursuant to section 12 (b) or (g) of the Securities Exchange Act of 1934, and

(ii) The statements are not made by or on behalf of an issuer that is an investment company registered under the Investment Company Act of 1940; and

(2) Information which is disclosed in a document filed with the Commission, in Part I of a quarterly report on Form 10–Q and Form 10–QSB (§249.308a of this chapter) or in an annual report to shareholders meeting the requirements of Rules 14a–3 (b) and (c) or 14c–3 (a) and (b) under the Securities Exchange Act of 1934 (§§240.14a–3 (b) and (c) or 240.14a–3 (a) and (b) of this chapter) and which relates to (i) the effects of changing prices on the business enterprise, presented voluntarily or pursuant to Item 303 of Regulation S-K (§229.303 of this chapter) or Regulation D-B (§228.303 of this chapter) "Management's Discussion and Analysis of Financial Condition and Results of Operations, or Item 5 of Form 20–F, Operating and Financial Review and Prospects, (§249.220f of this chapter)" or Item 302 of Regulation S-K (§229.302 of this chapter), "Supplementary financial information," or Rule 3–20(c) of Regulation S-X (§210.3–20(c) of this chapter), or (ii) the value of proved oil and gas reserves (such as a standardized measure of discounted future net cash flows relating to proved oil and gas reserves as set forth in paragraphs 30–34 of Statement of Financial Accounting Standards No. 69) presented voluntarily or pursuant to Item 302 of Regulation S-K (§229.302 of this chapter).

(c) For the purpose of this rule, the term *forward-looking statement* shall mean and shall be limited to:

(1) A statement containing a projection of revenues, income (loss), earnings (loss) per share, capital expenditures, dividends, capital structure or other financial items;

(2) A statement of management's plans and objectives for future operations;

(3) A statement of future economic performance contained in management's discussion and analysis of financial condition and results of operations included pursuant to Item 303 of Regulation S-K (§229.303 of this chapter) or Item 9 of Form 20–F; or Item 5 of Form 20–F.

(4) Disclosed statements of the assumptions underlying or relating to any of the statements described in paragraphs (c) (1), (2), or (3) of this section.

(d) For the purpose of this rule the term *fraudulent statement* shall mean a statement which is an untrue statement of a material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or which constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud, as those terms are used in the Securities Act of 1933 or the rules or regulations promulgated thereunder.

T. Rule 176. Circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under Section 11 of the Securities Act.

In determining whether or not the conduct of a person constitutes a reasonable investigation or a reasonable ground for belief meeting the standard set forth in section 11(c), relevant circumstances include, with respect to a person other than the issuer.

(a) The type of issuer;

(b) The type of security;

(c) The type of person;

(d) The office held when the person is an officer;

(e) The presence or absence of another relationship to the issuer when the person is a director or proposed director;

(f) Reasonable reliance on officers, employees, and others whose duties should have given them knowledge of the particular facts (in the light of the functions and responsibilities of the particular person with respect to the issuer and the filing);

(g) When the person is an underwriter, the type of underwriting arrangement, the role of the particular person as an underwriter and the availability of information with respect to the registrant; and

(h) Whether, with respect to a fact or document incorporated by reference, the particular person had any responsibility for the fact or document at the time of the filing from which it was incorporated. * * *

U. Rule 405. Definitions of terms.

Unless the context otherwise requires, all terms used in §§ 400 to 494, inclusive, or in the forms for registration have the same meanings as in the Act and in the general rules and regulations. In addition, the following definitions apply, unless the context otherwise requires:

Affiliate. An "affiliate" of, or person "affiliated" with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified. * * *

Associate. The term *associate,* when used to indicate a relationship with any person, means (1) a corporation or organization (other than the registrant or a majority-owned subsidiary of the registrant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities, (2) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity, and (3) any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries.

Automatic shelf registration statement. The term *automatic shelf registration statement* means a registration statement filed on Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter) by a well-known seasoned issuer pursuant to General Instruction I.D. or I.C. of such forms, respectively.

Business combination related shell company. The term *business combination related shell company* means a shell company (as defined in §230.405) that is:

(1) Formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or

(2) Formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in §230.165(f)) among one or more entities other than the shell company, none of which is a shell company. * * *

Common equity. The term *common equity* means any class of common stock or an equivalent interest, including but not limited to a unit of beneficial interest in a trust or a limited partnership interest. * * *

Control. The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. * * *

Electronic filer. The term *electronic filer* means a person or an entity that submits filings electronically pursuant to Rules 100 and 101 of Regulation S-T (§§232.100 and 232.101 of this chapter, respectively). * * *

Foreign issuer. The term *foreign issuer* means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

Foreign private issuer. The term *foreign private issuer* means 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 directly or indirectly owned of record 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.

Instructions to paragraph (1) of this definition: To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in Rule 12g3–2(a) under the Exchange Act (§240.12g3–2(a) of this chapter), except that your inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(1) The United States,

(2) Your jurisdiction of incorporation, and

(3) The jurisdiction that is the primary trading market for your voting securities, if different than your jurisdiction of incorporation.

B. If, after reasonable inquiry, you are unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

Free writing prospectus. Except as otherwise specifically provided or the context otherwise requires, a *free writing prospectus* is any written communication as defined in this section that constitutes an offer to sell or a solicitation of an offer to buy the securities relating to a registered offering that is used after the registration statement in respect of the offering is filed (or, in the case of a well-known seasoned issuer, whether or not such registration statement is filed) and is made by means other than:

(1) A prospectus satisfying the requirements of section 10(a) of the Act, Rule 430 (§230.430), Rule 430A (§230.430A), Rule 430B (§230.430B), Rule 430C (§230.430C), or Rule 431 (§230.431);

(2) A written communication used in reliance on Rule 167 and Rule 426 (§230.167 and §230.426); or

(3) A written communication that constitutes an offer to sell or solicitation of an offer to buy such securities that falls within the exception from the definition of prospectus in clause (a) of section 2(a)(10) of the Act.

Graphic communication. The term *graphic communication*, which appears in the definition of "write, written" in section 2(a)(9) of the Act and in the definition of written communication in this section, shall include all forms of electronic media, including, but not limited to, audiotapes, videotapes, facsimiles, CD–ROM, electronic mail, Internet Web sites, substantially similar messages widely distributed (rather than individually distributed) on telephone answering or voice mail systems, computers, computer networks and other forms of computer data compilation. Graphic communication shall not include a communication that, at the time of the communication, originates live, in real-time to a live audience and does not originate in recorded form or otherwise as a graphic communication, although it is transmitted through graphic means.

Ineligible issuer.

(1) An *ineligible issuer* is an issuer with respect to which any of the following is true as of the relevant date of determination:

(i) Any issuer that is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that has not filed all reports and other materials required to be filed during the preceding 12 months. * * *

(ii) The issuer is, or during the past three years the issuer or any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in this section;

(C) An issuer in an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§240.3a51–1 of this chapter); * * *

Majority-owned subsidiary. The term *majority-owned subsidiary* means a subsidiary more than 50 percent of whose outstanding securities representing the right, other than as affected by events of default, to vote for the election of directors, is owned by the subsidiary's parent and/or one or more of the parent's other majority-owned subsidiaries.

Material. The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered. * * *

Parent. A *parent* of a specified person is an affiliate controlling such person directly, or indirectly through one or more intermediaries.

Predecessor. The term *predecessor* means a person the major portion of the business and assets of which another person acquired in a single succession, or in a series of related successions in each of which the acquiring person acquired the major portion of the business and assets of the acquired person.

Principal underwriter. The term *principal underwriter* means an underwriter in privity of contract with the issuer of the securities as to which he is underwriter, the term *issuer* having the meaning given in sections 2(4) and 2(11) of the Act. * * *

Prospectus. Unless otherwise specified or the context otherwise requires, the term *prospectus* means a prospectus meeting the requirements of section 10(a) of the Act.

Registrant. The term *registrant* means the issuer of the securities for which the registration statement is filed. * * *

Significant subsidiary. The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions:

(1) The registrant's and its other subsidiaries' investments in and advances to the subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year (for a proposed business combination to be accounted for as a pooling of interests, this condition is also met when the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated); or

(2) The registrant's and its other subsidiaries' proportionate share of the total assets (after intercompany eliminations) of the subsidiary exceeds 10 percent of the total assets of the registrants and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(3) The registrant's and its other subsidiaries' equity in the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle of the subsidiary exceeds 10 percent of such income of the registrant and its subsidiaries consolidated for the most recently completed fiscal year.

Computational note. For purposes of making the prescribed income test the following guidance should be applied:

1. When a loss has been incurred by either the parent and its subsidiaries consolidated or the tested subsidiary, but not both, the equity in the income or loss of the tested subsidiary should be excluded from the income of the registrant and its subsidiaries consolidated for purposes of the computation.

2. If income of the registrant and its subsidiaries consolidated for the most recent fiscal year is at least 10 percent lower than the average of the income for the last five fiscal years, such average income should be substituted for purposes of the computation. Any loss years should be omitted for purposes of computing average income. * * *

Subsidiary. A *subsidiary* of a specified person is an affiliate controlled by such person directly, or indirectly through one or more intermediaries. (See also *majority owned subsidiary, significant subsidiary, totally held subsidiary,* and *wholly owned subsidiary.*) * * *

Voting securities. The term *voting securities* means securities the holders of which are presently entitled to vote for the election of directors.

Well-known seasoned issuer. A *well-known seasoned issuer* is an issuer that, as of the most recent determination date determined pursuant to paragraph (2) of this definition:

(1) (i) Meets all the registrant requirements of General Instruction I.A. of Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter) and either:

(A) As of a date within 60 days of the determination date, has a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million or more; or

(B) (*1*) As of a date within 60 days of the determination date, has issued in the last three years at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in primary offerings for cash, not exchange, registered under the Act; and

(*2*) Will register only non-convertible securities, other than common equity, and full and unconditional guarantees permitted pursuant to paragraph (1)(ii) of this definition unless, at the determination date, the issuer also is eligible to register a primary offering of its securities relying on General Instruction I.B.1. of Form S–3 or Form F–3. * * *

Wholly owned subsidiary. The term *wholly owned subsidiary* means a subsidiary substantially all of whose outstanding voting securities are owned by its parent and/or the parent's other wholly owned subsidiaries.

Written communication. Except as otherwise specifically provided or the context otherwise requires, a *written communication* is any communication that is written, printed, a radio or television broadcast, or a graphic communication as defined in this section.

Note: Note to definition of "written communication."

A communication that is a radio or television broadcast is a written communication regardless of the means of transmission of the broadcast.

V. Rule 408. Additional information.

(a) In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.

(b) Notwithstanding paragraph (a) of this section, unless otherwise required to be included in the registration statement, the failure to include in a registration statement information included in a free writing prospectus will not, solely by virtue of inclusion of the information in a free writing prospectus (as defined in Rule 405 (§230.405)), be considered an omission of material information required to be included in the registration statement.

W. *Rule 411. Incorporation by reference.* * * *

(a) *Information not required in a prospectus.* Except for exhibits covered by paragraph (c) of this section, information may be incorporated by reference in answer, or partial answer, to any item that calls for information not required to be included in a prospectus subject to the following provisions:

(1) Non-financial information may be incorporated by reference to any document;

(2) Financial information may be incorporated by reference to any document, provided any financial statement so incorporated meets the requirements of the forms on which the statement is filed. Financial statements or other financial data required to be given in comparative form for two or more fiscal years or periods shall not be incorporated by reference unless the information incorporated by reference includes the entire period for which the comparative data is given;

(3) Information contained in any part of the registration statement, including the prospectus, may be incorporated by reference in answer, or partial answer, to any item that calls for information not required to be included in the prospectus; and

(4) Unless the information is incorporated by reference to a document which complies with the time limitations of §228.10(f) and §229.10(d) of this chapter, then the document, or part thereof, containing the incorporated information is required to be filed as an exhibit. * * *

X. *Rule 415. Delayed or continuous offering and sale of securities.*

(a) Securities may be registered for an offering to be made on a continuous or delayed basis in the future, *Provided,* That:

(1) The registration statement pertains only to:

(i) Securities which are to be offered or sold solely by or on behalf of a person or persons other than the registrant, a subsidiary of the registrant or a person of which the registrant is a subsidiary;

(ii) Securities which are to be offered and sold pursuant to a dividend or interest reinvestment plan or an employee benefit plan of the registrant;

(iii) Securities which are to be issued upon the exercise of outstanding options, warrants or rights;

(iv) Securities which are to be issued upon conversion of other outstanding securities; * * *

(v) Securities which are to be issued in connection with business combination transactions;

(vi) Securities the offering of which will be commenced promptly, will be made on a continuous basis and may continue for a period in excess of 30 days from the date of initial effectiveness;

(vii) Securities registered (or qualified to be registered) on Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter) which are to be offered and sold on an immediate, continuous or delayed basis by or on behalf of the registrant, a majority-owned subsidiary of the registrant or a person of which the registrant is a majority-owned subsidiary; or * * *

(2) Securities in paragraph (a)(1)(viii) of this section and securities in paragraph (a)(1)(ix) of this section that are not registered on Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter) may only be registered in an amount which, at the time the registration statement becomes effective, is reasonably expected to be offered and sold within two years from the initial effective date of the registration.

(3) The registrant furnishes the undertakings required by Item 512(a) of Regulation S–K (§229.512(a) of this chapter) or Item 512(a) or Item 512(g) of Regulation S–B (§228.512(a) or (g) of this chapter), except that a registrant that is an investment company filing on Form N–2 (§§239.14 and 274.11a–1 of this chapter) must furnish the undertakings required by Item 34.4 of Form N–2.

(4) Securities registered on an automatic shelf registration statement and securities described in paragraphs (a)(1)(vii), (ix), and (x) of this section may be offered and sold only if not more than three years have elapsed since the initial effective date of the registration statement under which they are being offered and sold, *provided, however,* that if a new registration statement has been filed pursuant to paragraph (a)(6) of this section:

(i) If the new registration statement is an automatic shelf registration statement, it shall be immediately effective pursuant to Rule 462(e) (§230.462(e)); or

(ii) If the new registration statement is not an automatic shelf registration statement:

(A) Securities covered by the prior registration statement may continue to be offered and sold until the earlier of the effective date of the new registration statement or 180 days after the third anniversary of the initial effective date of the prior registration statement; and

(B) A continuous offering of securities covered by the prior registration statement that commenced within three years of the initial effective date may continue until the effective date of the new registration statement if such offering is permitted under the new registration statement.

(5) Prior to the end of the three-year period described in paragraph (a)(5) of this section, an issuer may file a new registration statement covering securities described in such paragraph (a)(5) of this section, which may, if permitted, be an automatic shelf registration statement. The new registration statement and prospectus included therein must include all the information that would be required at that time in a prospectus relating to all offering(s) that it covers. Prior to the effective date of the new registration statement (including at the time of filing in the case of an automatic shelf registration statement), the issuer may include on such new registration statement any unsold securities covered by the earlier registration statement by identifying on the bottom of the facing page of the new registration statement or latest amendment thereto the amount of such unsold securities being included and any filing fee paid in connection with such unsold securities, which will continue to be applied to such unsold securities. The offering of securities on the earlier registration statement will be deemed terminated as of the date of effectiveness of the new registration statement. * * *

Y. Rule 421. Presentation of information in prospectuses

(a) The information required in a prospectus need not follow the order of the items or other requirements in the form. Such information shall not, however, be set forth in such fashion as to obscure any of the required information or any information necessary to keep the required information from being incomplete or misleading. Where an item requires information to be given in a prospectus in tabular form it shall be given in substantially the tabular form specified in the item.

(b) You must present the information in a prospectus in a clear, concise and understandable manner. You must prepare the prospectus using the following standards:

(1) Present information in clear, concise sections, paragraphs, and sentences. Whenever possible, use short, explanatory sentences and bullet lists;

(2) Use descriptive headings and subheadings;

(3) Avoid frequent reliance on glossaries or defined terms as the primary means of explaining information in the prospectus. Define terms in a glossary or other section of the document only if the meaning is unclear from the context. Use a glossary only if it facilitates understanding of the disclosure; and

(4) Avoid legal and highly technical business terminology. * * *

(d) (1) To enhance the readability of the prospectus, you must use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors section.

(2) You must draft the language in these sections so that at a minimum it substantially complies with each of the following plain English writing principles:

(i) Short sentences;

(ii) Definite, concrete, everyday words;

(iii) Active voice;

(iv) Tabular presentation or bullet lists for complex material, whenever possible;

(v) No legal jargon or highly technical business terms; and

(vi) No multiple negatives. * * *

Z. Rule 424. Filing of prospectuses, number of copies

(a) Except as provided in paragraph (f) of this section, five copies of every form of prospectus sent or given to any person prior to the effective date of the registration statement which varies from the form or forms of prospectus included in the registration statement as filed pursuant to §230.402(a) of this chapter shall be filed as a part of the registration statement not later than the date such form of prospectus is first sent or given to any person: *Provided, however,* that only a form of prospectus that contains substantive changes from or additions to a prospectus previously filed with the Commission as part of a registration statement need be filed pursuant to this paragraph (a).

(b) Ten copies of each form of prospectus purporting to comply with section 10 of the Act, except for documents constituting a prospectus pursuant to Rule 428(a) (§230.428(a)) or free writing prospectuses pursuant to Rule 164 and Rule 433 (§230.164 and §230.433), shall be filed with the Commission in the form in which it is used after the effectiveness of the registration statement and identified as required by paragraph (e) of this section; *provided, however,* that only a form of prospectus that contains substantive changes from or additions to a previously filed prospectus is required to be filed; Ten copies of the form of prospectus shall be filed or transmitted for filing as follows:

(1) A form of prospectus that discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance upon Rule 430A under the Securities Act (§230.430A of this chapter) shall be filed with the commission no later than the second business day following the earlier of the date of determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date.

(2) A form of prospectus that is used in connection with a primary offering of securities pursuant to Rule 415(a)(1)(x) (§230.415(a)(1)(x)) or a primary offering of securities registered for issuance on a delayed basis pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii)) and that, in the case of Rule 415(a)(1)(viii) discloses the public offering price, description of securities or similar matters, and in the case of Rule 415(a)(1)(vii) and (x) discloses information previously omitted from the prospectus filed as part of an effective registration statement in reliance on Rule 430B (§230.430B), shall be filed with the Commission no later than the second business day following the earlier of the date of the determination of the offering price or the date it is first used after effectiveness in connection with a public offering or sales, or transmitted by a means reasonably calculated to result in filing with the Commission by that date. * * *

AA. Rule 425. Filing of certain prospectuses and communications under Rule 135 in connection with business combination transactions.

(a) All written communications made in reliance on Rule 165 are prospectuses that must be filed with the Commission under this section on the date of first use.

(b) All written communications that contain no more information than that specified in Rule 135 must be filed with the Commission on or before the date of first use except as provided in paragraph (d)(1) of this section. A communication limited to the information specified in Rule 135 will not be deemed an offer in accordance with Rule 135 even though it is filed under this section.

(c) Each prospectus or Rule 135 communication filed under this section must identify the filer, the company that is the subject of the offering and the Commission file number for the related registration statement or, if that file number is unknown, the subject company's Exchange Act or Investment Company Act file number, in the upper right corner of the cover page.

(d) Notwithstanding paragraph (a) of this section, the following need not be filed under this section:

(1) Any written communication that is limited to the information specified in Rule 135 and does not contain new or different information from that which was previously publicly disclosed and filed under this section.

(2) Any research report used in reliance on Rule 137, Rule 138 and Rule 139;

(3) Any confirmation described in Rule 10b-10 of this chapter; and

(4) Any prospectus filed under Rule 424.

Notes to Rule 425:

1. File five copies of the prospectus or Rule 135 communication if paper filing is permitted.
2. No filing is required under Rule 13e-4(c), Rule 14a-12(b), Rule 14d-2(b), or Rule 14d-9(a), if the communication is filed under this section. Communications filed under this section also are deemed filed under the other applicable sections.

BB. *Rule 430. Prospectus for use prior to effective date.*

(a) A form of prospectus filed as a part of the registration statement shall be deemed to meet the requirements of section 10 of the Act for the purpose of section 5(b)(1) thereof prior to the effective date of the registration statement, provided such form of prospectus contains substantially the information required by the Act and the rules and regulations thereunder to be included in a prospectus meeting the requirements of section 10(a) of the Act for the securities being registered, or contains substantially that information except for the omission of information with respect to the offering price, underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices, or other matters dependent upon the offering price. Every such form of prospectus shall be deemed to have been filed as a part of the registration statement for the purpose of section 7 of the Act. * * *

CC. *Rule 430A. Prospectus in a registration statement at the time of effectiveness*

(a) The form of prospectus filed as part of a registration statement that is declared effective may omit information with respect to the public offering price, underwriting syndicate (including any material relationships between the registrant and underwriters not named therein), underwriting discounts or commissions, discounts or commissions to dealers, amount of proceeds, conversion rates, call prices and other items dependent upon the offering price, delivery dates, and terms of the securities dependent upon the offering date; and such form of prospectus need not contain such information in order for the registration statement to meet the requirements of Section 7 of the Securities Act (15 U.S.C. 77g) for the purposes of Section 5 thereof (15 U.S.C. 77e), *Provided,* That:

(1) The securities to be registered are offered for cash;

(2) The registrant furnishes the undertakings required by Item 512(i) of Regulation S-K (§229.512(i) of this chapter); and

(3) The information ommitted in reliance upon paragraph (a) from the form of prospectus filed as part of a registration statement that is declared effective is contained in a form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act (§§230.424(b) or 230.497(h) of this chapter); except that if such form of prospectus is not so filed by the later of fifteen business days after the effective date of the registration statement or fifteen business days after the effectiveness of a post-effective amendment thereto that contains a form of prospectus, or transmitted by a means reasonably calculated to result in filing with the Commission by that date, the information omitted in reliance upon paragraph (a) must be contained in an effective post-effective amendment to the registration statement.

Instruction to paragraph (a): A decrease in the volume of securities offered or change in the bona fide estimate of the maximum offering price range from that indicated in the form of prospectus filed as part of a registration statement that is declared effective may be disclosed in the form of prospectus filed with the Commission pursuant to §230.424(b) or §230.497(h) under the Securities Act so long as the decrease in the volume or change in the price range would not materially change the disclosure contained in the registration statement at effectiveness. Notwithstanding the foregoing, any increase or decrease in volume (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b)(1) (§230.424(b)(1)) or Rule 497(h) (§230.497(h)) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement.

(b) The information omitted in reliance upon paragraph (a) from the form of prospectus filed as part of an effective registration statement, and contained in the form of prospectus filed with the Commission pursuant to Rule 424(b) or Rule 497(h) under the Securities Act (§§230.424(b) or 230.497(h) of this chapter), shall be deemed to be a part of the registration statement as of the time it was declared effective.

(c) When used prior to determination of the offering price of the securities, a form of prospectus relating to the securities offered pursuant to a registration statement that is declared effective with information omitted from the form of prospectus filed as part of such effective registration statement in reliance upon this Rule 430A need not contain information omitted pursuant to paragraph (a), in order to meet the requirements of Section 10 of the Securities Act (15 U.S.C. 77j) for the purpose of section 5(b)(1) (15 U.S.C. 77e(b)(1)) thereof. This provision shall not limit the information required to be contained in a form of prospectus meeting the requirements of section 10(a)

of the Act for the purposes of section 5(b)(2) thereof or exception (a) of Section 2(10) (15 U.S.C. 77b(10)) thereof.
* * *

DD. *Rule 430B. Prospectus in a registration statement after effective date.*

(a) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(vii) or (a)(1)(x) (§230.415(a)(1)(vii) or (a)(1)(x)) may omit from the information required by the form to be in the prospectus information that is unknown or not reasonably available to the issuer pursuant to Rule 409 (§230.409). In addition, a form of prospectus filed as part of an automatic shelf registration statement for offerings pursuant to Rule 415(a) (§230.415(a)), other than Rule 415(a)(1)(vii) or (viii), also may omit information as to whether the offering is a primary offering or an offering on behalf of persons other than the issuer, or a combination thereof, the plan of distribution for the securities, a description of the securities registered other than an identification of the name or class of such securities, and the identification of other issuers. Each such form of prospectus shall be deemed to have been filed as part of the registration statement for the purpose of section 7 of the Act.

(b) A form of prospectus filed as part of a registration statement for offerings pursuant to Rule 415(a)(1)(i) by an issuer eligible to use Form S–3 or Form F–3 (§239.13 or §239.33 of this chapter) for primary offerings pursuant to General Instruction I.B.1 of such forms, may omit the information specified in paragraph (a) of this section, and may also omit the identities of selling security holders and amounts of securities to be registered on their behalf if:

(1) The registration statement is an automatic shelf registration statement as defined in Rule 405 (§230.405); or

(2) All of the following conditions are satisfied:

(i) The initial offering transaction of the securities (or securities convertible into such securities) the resale of which are being registered on behalf of each of the selling security holders, was completed;

(ii) The securities (or securities convertible into such securities) were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities;

(iii) The registration statement refers to any unnamed selling security holders in a generic manner by identifying the initial offering transaction in which the securities were sold; and

(iv) The issuer is not and during the past three years neither the issuer nor any of its predecessors was:

(A) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(B) A shell company, other than a business combination related shell company, each as defined in Rule 405; or

(C) An issuer in an offering of penny stock as defined in Rule 3a51–1 of the Securities Exchange Act of 1934 (§240.3a51–1 of this chapter). * * *

EE. *Rule 432. Additional information required to be included in prospectuses relating to tender offers.*

Notwithstanding the provisions of any form for the registration of securities under the Act, any prospectus relating to securities to be offered in connection with a tender offer for, or a request or invitation for tenders of, securities subject to either Rule 13e-4 or section 14(d) of the Securities Exchange Act of 1934 must include the information required by Rule 13e-4(d)(1) or Rule 14d-6(d)(1) of this chapter, as applicable, in all tender offers, requests or invitations that are published, sent or given to security holders.

FF. *Rule 433. Conditions to permissible post-filing free writing prospectuses.*

(a) *Scope of section.* This section applies to any free writing prospectus with respect to securities of any issuer (except as set forth in Rule 164 (§230.164)) that are the subject of a registration statement that has been filed under the Act. Such a free writing prospectus that satisfies the conditions of this section may include information the substance of which is not included in the registration statement. Such a free writing prospectus that satisfies the conditions of this section will be a prospectus permitted under section 10(b) of the Act for purposes of sections 2(a)(10), 5(b)(1), and 5(b)(2) of the Act and will, for purposes of considering it a prospectus, be deemed to be

public, without regard to its method of use or distribution, because it is related to the public offering of securities that are the subject of a filed registration statement.

(b) *Permitted use of free writing prospectus.* Subject to the conditions of this paragraph (b) and satisfaction of the conditions set forth in paragraphs (c) through (g) of this section, a free writing prospectus may be used under this section and Rule 164 in connection with a registered offering of securities:

(1) *Eligibility and prospectus conditions for seasoned issuers and well-known seasoned issuers.* Subject to the provisions of Rule 164(e), (f), and (g), the issuer or any other offering participant may use a free writing prospectus in the following offerings after a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act:

(i) Offerings of securities registered on Form S–3 (§239.33 of this chapter) pursuant to General Instruction I.B.1, I.B.2, I.B.5, I.C., or I.D. thereof;

(ii) Offerings of securities registered on Form F–3 (§239.13 of this chapter) pursuant to General Instruction I.A.5, I.B.1, I.B.2, or I.C. thereof;

(iii) Any other offering not excluded from reliance on this section and Rule 164 of securities of a well-known seasoned issuer; and

(iv) Any other offering not excluded from reliance on this section and Rule 164 of securities of an issuer eligible to use Form S–3 or Form F–3 for primary offerings pursuant to General Instruction I.B.1 of such Forms.

(2) *Eligibility and prospectus conditions for non-reporting and unseasoned issuers.* If the issuer does not fall within the provisions of paragraph (b)(1) of this section, then, subject to the provisions of Rule 164(e), (f), and (g), any person participating in the offer or sale of the securities may use a free writing prospectus as follows:

(i) If the free writing prospectus is or was prepared by or on behalf of or used or referred to by an issuer or any other offering participant, if consideration has been or will be given by the issuer or other offering participant for the dissemination (in any format) of any free writing prospectus (including any published article, publication, or advertisement), or if section 17(b) of the Act requires disclosure that consideration has been or will be given by the issuer or other offering participant for any activity described therein in connection with the free writing prospectus, then a registration statement relating to the offering must have been filed that includes a prospectus that, other than by reason of this section or Rule 431, satisfies the requirements of section 10 of the Act, including a price range where required by rule, and the free writing prospectus shall be accompanied or preceded by the most recent such prospectus; *provided, however*, that use of the free writing prospectus is not conditioned on providing the most recent such prospectus if a prior such prospectus has been provided and there is no material change from the prior prospectus reflected in the most recent prospectus; *provided further,* that after effectiveness and availability of a final prospectus meeting the requirements of section 10(a) of the Act, no such earlier prospectus may be provided in satisfaction of this condition, and such final prospectus must precede or accompany any free writing prospectus provided after such availability, whether or not an earlier prospectus had been previously provided.

Notes to paragraph (b)(2)(i) of Rule 433.

1. The condition that a free writing prospectus shall be accompanied or preceded by the most recent prospectus satisfying the requirements of section 10 of the Act would be satisfied if a free writing prospectus that is an electronic communication contained an active hyperlink to such most recent prospectus; and

2. A communication for which disclosure would be required under section 17(b) of the Act as a result of consideration given or to be given, directly or indirectly, by or on behalf of an issuer or other offering participant is an offer by the issuer or such other offering participant as the case may be and is, if written, a free writing prospectus of the issuer or other offering participant.

(ii) Where paragraph (b)(2)(i) of this section does not apply, a registration statement relating to the offering has been filed that includes a prospectus that, other than by reason of this section or Rule 431 satisfies the requirements of section 10 of the Act, including a price range where required by rule.

(3) *Successors.* * * *

(c) *Information in a free writing prospectus.* (1) A free writing prospectus used in reliance on this section may include information the substance of which is not included in the registration statement but such information shall not conflict with:

(i) Information contained in the filed registration statement, including any prospectus or prospectus supplement that is part of the registration statement (including pursuant to Rule 430B or Rule 430C) (§230.430B or §230.430C) and not superseded or modified; or

(ii) Information contained in the issuer's periodic and current reports filed or furnished to the Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) that are incorporated by reference into the registration statement and not superseded or modified.

(2) (i) A free writing prospectus used in reliance on this section shall contain substantially the following legend:

The issuer has filed a registration statement (including a prospectus) with the SEC for the offering to which this communication relates. Before you invest, you should read the prospectus in that registration statement and other documents the issuer has filed with the SEC for more complete information about the issuer and this offering. You may get these documents for free by visiting EDGAR on the SEC Web site at *www.sec.gov*. Alternatively, the issuer, any underwriter or any dealer participating in the offering will arrange to send you the prospectus if you request it by calling toll-free 1–8[xx–xxx–xxxx].

(ii) The legend also may provide an e-mail address at which the documents can be requested and may indicate that the documents also are available by accessing the issuer's Web site and provide the Internet address and the particular location of the documents on the Web site.

(d) *Filing conditions.*

(1) Except as provided in paragraphs (d)(3), (d)(4), (d)(5), (d)(6), (d)(7), (d)(8), and (f) of this section, the following shall be filed with the Commission under this section by a means reasonably calculated to result in filing no later than the date of first use. The free writing prospectus filed for purposes of this section will not be filed as part of the registration statement:

(i) The issuer shall file:

(A) Any issuer free writing prospectus, as defined in paragraph (h) of this section;

(B) Any issuer information that is contained in a free writing prospectus prepared by or on behalf of or used by any other offering participant (but not information prepared by or on behalf of a person other than the issuer on the basis of or derived from that issuer information); and

(C) A description of the final terms of the issuer's securities in the offering or of the offering contained in a free writing prospectus or portion thereof prepared by or on behalf of the issuer or any offering participant, after such terms have been established for all classes in the offering; and

(ii) Any offering participant, other than the issuer, shall file any free writing prospectus that is used or referred to by such offering participant and distributed by or on behalf of such person in a manner reasonably designed to lead to its broad unrestricted dissemination. * * *

(7) The condition to file a free writing prospectus or issuer information pursuant to this paragraph (d) for a free writing prospectus used at the same time as a communication in a business combination transaction subject to Rule 425 (§230.425) shall be satisfied if:

(i) The free writing prospectus or issuer information is filed in accordance with the provisions of Rule 425, including the filing timeframe of Rule 425;

(ii) The filed material pursuant to Rule 425 indicates on the cover page that it also is being filed pursuant to Rule 433; and

(iii) The filed material pursuant to Rule 425 contains the information specified in paragraph (c)(2) of this section.

(8) Notwithstanding any other provision of this paragraph (d):

(i) A road show for an offering that is a written communication is a free writing prospectus, provided that, except as provided in paragraph (d)(8)(ii) of this section, a written communication that is a road show shall not be required to be filed; and

(ii) In the case of a road show that is a written communication for an offering of common equity or convertible equity securities by an issuer that is, at the time of the filing of the

registration statement for the offering, not required to file reports with the Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934, such a road show is required to be filed pursuant to this section unless the issuer of the securities makes at least one version of a *bona fide* electronic road show available without restriction by means of graphic communication to any person, including any potential investor in the securities (and if there is more than one version of a road show for the offering that is a written communication, the version available without restriction is made available no later than the other versions).

Note to paragraph (d)(8): A communication that is provided or transmitted simultaneously with a road show and is provided or transmitted in a manner designed to make the communication available only as part of the road show and not separately is deemed to be part of the road show. Therefore, if the road show is not a written communication, such a simultaneous communication (even if it would otherwise be a graphic communication or other written communication) is also deemed not to be written. If the road show is written and not required to be filed, such a simultaneous communication is also not required to be filed. Otherwise, a written communication that is an offer contained in a separate file from a road show, whether or not the road show is a written communication, or otherwise transmitted separately from a road show, will be a free writing prospectus subject to any applicable filing conditions of paragraph (d) of this section.

(e) *Treatment of information on, or hyperlinked from, an issuer's Web site.*

(1) An offer of an issuer's securities that is contained on an issuer's Web site or hyperlinked by the issuer from the issuer's Web site to a third party's Web site is a written offer of such securities by the issuer and, unless otherwise exempt or excluded from the requirements of section 5(b)(1) of the Act, the filing conditions of paragraph (d) of this section apply to such offer.

(2) Notwithstanding paragraph (e)(1) of this section, historical issuer information that is identified as such and located in a separate section of the issuer's Web site containing historical issuer information, that has not been incorporated by reference into or otherwise included in a prospectus of the issuer for the offering and that has not otherwise been used or referred to in connection with the offering, will not be considered a current offer of the issuer's securities and therefore will not be a free writing prospectus.

(f) *Free writing prospectuses published or distributed by media.* * * *

(g) *Record retention.* Issuers and offering participants shall retain all free writing prospectuses they have used, and that have not been filed pursuant to paragraph (d) or (f) of this section, for 3 years following the initial *bona fide* offering of the securities in question. * * *

(h) *Definitions. For purposes of this section:*

(1) An *issuer free writing prospectus* means a free writing prospectus prepared by or on behalf of the issuer or used or referred to by the issuer and, in the case of an asset-backed issuer, prepared by or on behalf of a depositor, sponsor, or servicer (as defined in Item 1101 of Regulation AB) or affiliated depositor or used or referred to by any such person.

(2) *Issuer information* means material information about the issuer or its securities that has been provided by or on behalf of the issuer.

(3) A written communication or information is prepared or provided by or on behalf of a person if the person or an agent or representative of the person authorizes the communication or information or approves the communication or information before it is used. An offering participant other than the issuer shall not be an agent or representative of the issuer solely by virtue of its acting as an offering participant.

(4) A *road show* means an offer (other than a statutory prospectus or a portion of a statutory prospectus filed as part of a registration statement) that contains a presentation regarding an offering by one or more members of the issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and includes discussion of one or more of the issuer, such management, and the securities being offered; and

(5) A *bona fide electronic road show* means a road show that is a written communication transmitted by graphic means that contains a presentation by one or more officers of an issuer or other persons in an issuer's management (and in the case of an offering of asset-backed securities, management involved in the securitization or servicing function of one or more of the depositors, sponsors, or servicers (as such terms are defined in Item 1101 of Regulation AB) or an affiliated depositor) and, if more than one road show that is a written communication is being used, includes discussion of the same general areas of

information regarding the issuer, such management, and the securities being offered as such other issuer road show or shows for the same offering that are written communications.

Note to §230.433. This section does not affect the operation of the provisions of clause (a) of section 2(a)(10) of the Act providing an exception from the definition of "prospectus."

GG. *Rule 434. Prospectus delivery requirements in firm commitment underwritten offerings of securities for cash*

(a) Where securities are offered for cash in a firm commitment underwritten offering or investment grade debt securities are offered for cash on an agency basis under a medium term note program, and such securities are neither asset-backed securities nor structured securities, and the conditions described in paragraph (b) or paragraph (c) of this section are satisfied, then:

(1) The prospectus subject to completion and the term sheet described in paragraph (b) of this section, taken together, and the prospectus subject to completion and the abbreviated term sheet described in paragraph (c) of this section, taken together, shall constitute prospectuses that meet the requirements of section 10(a) of the Act for purposes of section 5(b)2 of the Act and section 2(10)(a) of the Act; and

(2) The section 10(a) prospectus described in paragraph (a)1 of this section shall have:

(i) Been sent or given prior to or at the same time that a confirmation is sent or given for purposes of section 210(a) of the Act; and

(ii) Accompanied or preceded the transmission of the securities for purpose of sale or for delivery after sale for purposes of Section 5(b)2 of the Act. * * *

HH. *Rule 460. Distribution of preliminary prospectus.*

(a) Pursuant to the statutory requirement that the Commission in ruling upon requests for acceleration of the effective date of a registration statement shall have due regard to the adequacy of the information respecting the issuer theretofore available to the public, the Commission may consider whether the persons making the offering have taken reasonable steps to make the information contained in the registration statement conveniently available to underwriters and dealers who it is reasonably anticipated will be invited to participate in the distribution of the security to be offered or sold.

(b)(1) As a minimum, reasonable steps to make the information conveniently available would involve the distribution, to each underwriter and dealer who it is reasonably anticipated will be invited to participate in the distribution of the security, a reasonable time in advance of the anticipated effective date of the registration statement, of as many copies of the proposed form of preliminary prospectus permitted by Rule 430 as appears to be reasonable to secure adequate distribution of the preliminary prospectus. * * *

II. *Rule 461. Acceleration of effective date.*

(a) Requests for acceleration of the effective date of a registration statement shall be made by the registrant and the managing underwriters of the proposed issue, or, if there are no managing underwriters, by the principal underwriters of the proposed issue, and shall state the date upon which it is desired that the registration statement shall become effective. Such requests may be made in writing or orally, provided that, if an oral request is to be made, a letter indicating that fact and stating that the registrant and the managing or principal underwriters are aware of their obligations under the Act must accompany the registration statement for a pre-effective amendment thereto at the time of filing with the Commission. Written requests may be sent to the Commission by facsimile transmission. If, by reason of the expected arrangement in connection with the offering, it is to be requested that the registration statement shall become effective at a particular hour of the day, the Commission must be advised to that effect not later than the second business day before the day which it is desired that the registration statement shall become effective. A person's request for acceleration will be considered confirmation of such person's awareness of the person's obligations under the Act. * * *

JJ. *Rule 462. Immediate effectiveness of certain registration statements and post-effective amendments.*

(b) A registration statement and any post-effective amendment thereto shall become effective upon filing with the Commission if:

(1) The registration statement is for registering additional securities of the same class(es) as were included in an earlier registration statement for the same offering and declared effective by the Commission;

(2) The new registration statement is filed prior to the time confirmations are sent or given; and

(3) The new registration statement registers additional securities in an amount and at a price that together represent no more than 20% of the maximum aggregate offering price set forth for each class of securities in the "Calculation of Registration Fee" table contained in such earlier registration statement. * * *

(e) An automatic shelf registration statement, including an automatic shelf registration statement filed in accordance with Rule 415(a)(6) (§230.415(a)(6)), and any post-effective amendment thereto, including a post-effective amendment filed to register additional classes of securities pursuant to Rule 413(b) (§230.413(b)), shall become effective upon filing with the Commission. * * *

KK. *Rule 473. Delaying amendments*

(a) An amendment in the following form filed with a registration statement, or as an amendment to a registration statement which has not become effective, shall be deemed, for the purpose of section 8(a) of the Act, to be filed on such date or dates as may be necessary to delay the effective date of such registration statement (1) until the registrant shall file a further amendment which specifically states as provided in paragraph (b) of this section that such registration statement shall thereafter become effective in accordance with section 8(a) of the Act, or (2) until the registration statement shall become effective on such date as the Commission, acting pursuant to section 8(a), may determine:

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with section 8(a) of the Securities Act of 1933 or until the registration statement shall become effective on such date as the Commission acting pursuant to said section 8(a), may determine. * * *

LL. *Rules 500 to 508. Regulation D-Rules Governing the Limited Offer and Sale of Securities without Registration under the Securities Act of 1933*

1. Rule 500. Use of Regulation D

Users of Regulation D (§§ 230.500 et seq.) should note the following:

(a) Regulation D relates to transactions exempted from the registration requirements of section 5 of the Securities Act of 1933 (the Act) (15 U.S.C.77a et seq., as amended). Such transactions are not exempt from the antifraud, civil liability, or other provisions of the federal securities laws. Issuers are reminded of their obligation to provide such further material information, if any, as may be necessary to make the information required under Regulation D, in light of the circumstances under which it is furnished, not misleading.

(b) Nothing in Regulation D obviates the need to comply with any applicable state law relating to the offer and sale of securities. Regulation D is intended to be a basic element in a uniform system of federal-state limited offering exemptions consistent with the provisions of sections 18 and 19(c) of the Act (15 U.S.C. 77r and 77(s)(c)). In those states that have adopted Regulation D, or any version of Regulation D, special attention should be directed to the applicable state laws and regulations, including those relating to registration of persons who receive remuneration in connection with the offer and sale of securities, to disqualification of issuers and other persons associated with offerings based on state administrative orders or judgments, and to requirements for filings of notices of sales.

(c) Attempted compliance with any rule in Regulation D does not act as an exclusive election; the issuer can also claim the availability of any other applicable exemption. For instance, an issuer's failure to satisfy all the terms and conditions of rule 506(b) (§ 230.506(b)) shall not raise any presumption that the exemption provided by section 4(a)(2) of the Act (15 U.S.C. 77d(2)) is not available.

(d) Regulation D is available only to the issuer of the securities and not to any affiliate of that issuer or to

any other person for resales of the issuer's securities. Regulation D provides an exemption only for the transactions in which the securities are offered or sold by the issuer, not for the securities themselves.

(e) Regulation D may be used for business combinations that involve sales by virtue of rule 145(a) (§ 230.145(a)) or otherwise.

(f) In view of the objectives of Regulation D and the policies underlying the Act, Regulation D is not available to any issuer for any transaction or chain of transactions that, although in technical compliance with Regulation D, is part of a plan or scheme to evade the registration provisions of the Act. In such cases, registration under the Act is required.

(g) Securities offered and sold outside the United States in accordance with Regulation S (§ 230.901 through 905) need not be registered under the Act. See Release No. 33-6863. Regulation S may be relied upon for such offers and sales even if coincident offers and sales are made in accordance with Regulation D inside the United States. Thus, for example, persons who are offered and sold securities in accordance with Regulation S would not be counted in the calculation of the number of purchasers under Regulation D. Similarly, proceeds from such sales would not be included in the aggregate offering price. The provisions of this paragraph (g), however, do not apply if the issuer elects to rely solely on Regulation D for offers or sales to persons made outside the United States.

2. Rule 501. Definitions and terms used in Regulation D.

As used in Regulation D (§ 230.500 et seq. of this chapter), the following terms shall have the meaning indicated:

(a) Accredited investor. Accredited investor shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person:

(1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $ 5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of $ 5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors;

(2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940;

(3) Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of $ 5,000,000;

(4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer;

(5) Any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $

1,000,000.

(i) Except as provided in paragraph (a)(5)(ii) of this section, for purposes of calculating net worth under this paragraph (a)(5):

(A) The person's primary residence shall not be included as an asset;

(B) Indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, shall not be included as a liability (except that if the amount of such indebtedness outstanding at the time of sale of securities exceeds the amount outstanding 60 days before such time, other than as a result of the acquisition of the primary residence, the amount of such excess shall be included as a liability); and

(C) Indebtedness that is secured by the person's primary residence in excess of the estimated fair market value of the primary residence at the time of the sale of securities shall be included as a liability;

(ii) Paragraph (a)(5)(i) of this section will not apply to any calculation of a person's net worth made in connection with a purchase of securities in accordance with a right to purchase such securities, provided that:

(A) Such right was held by the person on July 20, 2010;

(B) The person qualified as an accredited investor on the basis of net worth at the time the person acquired such right; and

(C) The person held securities of the same issuer, other than such right, on July 20, 2010.

(6) Any natural person who had an individual income in excess of $ 200,000 in each of the two most recent years or joint income with that person's spouse in excess of $ 300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(7) Any trust, with total assets in excess of $ 5,000,000, not formed for the specific purpose of acquiring the securities offered, whose purchase is directed by a sophisticated person as described in § 230.506(b)(2)(ii); and

(8) Any entity in which all of the equity owners are accredited investors.

(b) Affiliate. An affiliate of, or person affiliated with, a specified person shall mean a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

(c) Aggregate offering price. Aggregate offering price shall mean the sum of all cash, services, property, notes, cancellation of debt, or other consideration to be received by an issuer for issuance of its securities. Where securities are being offered for both cash and non-cash consideration, the aggregate offering price shall be based on the price at which the securities are offered for cash. Any portion of the aggregate offering price attributable to cash received in a foreign currency shall be translated into United States currency at the currency exchange rate in effect at a reasonable time prior to or on the date of the sale of the securities. If securities are not offered for cash, the aggregate offering price shall be based on the value of the consideration as established by bona fide sales of that consideration made within a reasonable time, or, in the absence of sales, on the fair value as determined by an accepted standard. Such valuations of non-cash consideration must be reasonable at the time made.

(d) Business combination. Business combination shall mean any transaction of the type specified in paragraph (a) of Rule 145 under the Act (17 CFR 230.145) and any transaction involving the acquisition by one issuer, in exchange for all or a part of its own or its parent's stock, of stock of another issuer if,

immediately after the acquisition, the acquiring issuer has control of the other issuer (whether or not it had control before the acquisition).

(e) Calculation of number of purchasers. For purposes of calculating the number of purchasers under §§ 230.505(b) and 230.506(b) only, the following shall apply:

(1) The following purchasers shall be excluded:

(i) Any relative, spouse or relative of the spouse of a purchaser who has the same primary residence as the purchaser;

(ii) Any trust or estate in which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interests);

(iii) Any corporation or other organization of which a purchaser and any of the persons related to him as specified in paragraph (e)(1)(i) or (e)(1)(ii) of this section collectively are beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests; and

(iv) Any accredited investor.

(2) A corporation, partnership or other entity shall be counted as one purchaser. If, however, that entity is organized for the specific purpose of acquiring the securities offered and is not an accredited investor under paragraph (a)(8) of this section, then each beneficial owner of equity securities or equity interests in the entity shall count as a separate purchaser for all provisions of Regulation D (§§ 230.501-230.508), except to the extent provided in paragraph (e)(1) of this section.

(3) A non-contributory employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974 shall be counted as one purchaser where the trustee makes all investment decisions for the plan.

NOTE: The issuer must satisfy all the other provisions of Regulation D for all purchasers whether or not they are included in calculating the number of purchasers. Clients of an investment adviser or customers of a broker or dealer shall be considered the "purchasers" under Regulation D regardless of the amount of discretion given to the investment adviser or broker or dealer to act on behalf of the client or customer.

(f) Executive officer. Executive officer shall mean the president, any vice president in charge of a principal business unit, division or function (such as sales, administration orfinance), any other officer who performs a policy making function, or any other person who performs similar policy making functions for the issuer. Executive officers of subsidiaries may be deemed executive officers of the issuer if they perform such policy making functions for the issuer.

(g) Final order. Final order shall mean a written directive or declaratory statement issued by a federal or state agency described in § 230.506(d)(1)(iii) under applicable statutory authority that provides for notice and an opportunity for hearing, which constitutes a final disposition or action by that federal or state agency.

(h) Issuer. The definition of the term issuer in section 2(a)(4) of the Act shall apply, except that in the case of a proceeding under the Federal Bankruptcy Code (11 U.S.C. 101 et seq.), the trustee or debtor in possession shall be considered the issuer in an offering under a plan or reorganization, if the securities are to be issued under the plan.

(i) Purchaser representative. Purchaser representative shall mean any person who satisfies all of the following conditions or who the issuer reasonably believes satisfies all of the following conditions:

(1) Is not an affiliate, director, officer or other employee of the issuer, or beneficial owner of 10 percent or more of any class of the equity securities or 10 percent or more of the equity interest in the issuer, except where the purchaser is:

(i) A relative of the purchaser representative by blood, marriage or adoption and not more remote than a first cousin;

(ii) A trust or estate in which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(iii) of this section collectively have more than 50 percent of the beneficial interest (excluding contingent interest) or of which the purchaser representative serves as trustee, executor, or in any similar capacity; or

(iii) A corporation or other organization of which the purchaser representative and any persons related to him as specified in paragraph (h)(1)(i) or (h)(1)(ii) of this section collectively are the beneficial owners of more than 50 percent of the equity securities (excluding directors' qualifying shares) or equity interests;

(2) Has such knowledge and experience in financial and business matters that he is capable of evaluating, alone, or together with other purchaser representatives of the purchaser, or together with the purchaser, the merits and risks of the prospective investment;

(3) Is acknowledged by the purchaser in writing, during the course of the transaction, to be his purchaser representative in connection with evaluating the merits and risks of the prospective investment; and

(4) Discloses to the purchaser in writing a reasonable time prior to the sale of securities to that purchaser any material relationship between himself or his affiliates and the issuer or its affiliates that then exists, that is mutually understood to be contemplated, or that has existed at any time during the previous two years, and any compensation received or to be received as a result of such relationship.

Note 1 to § 230.501: A person acting as a purchaser representative should consider the applicability of the registration and antifraud provisions relating to brokers and dealers under the Securities Exchange Act of 1934 (Exchange Act) (15 U.S.C. 78a et seq., as amended) and relating to investment advisers under the Investment Advisers Act of 1940.

Note 2 to § 230.501: The acknowledgment required by paragraph (h)(3) and the disclosure required by paragraph (h)(4) of this section must be made with specific reference to each prospective investment. Advance blanket acknowledgment, such as for all securities transactions or all private placements, is not sufficient.

Note 3 to § 230.501: Disclosure of any material relationships between the purchaser representative or his affiliates and the issuer or its affiliates does not relieve the purchaser representative of his obligation to act in the interest of the purchaser.

3. Rule 502. General conditions to be met

The following conditions shall be applicable to offers and sales made under Regulation D (§ 230.500 et seq. of this chapter):

(a) Integration. All sales that are part of the same Regulation D offering must meet all of the terms and conditions of Regulation D. Offers and sales that are made more than six months before the start of a Regulation D offering or are made more than six months after completion of a Regulation D offering will not be considered part of that Regulation D offering, so long as during those six month periods there are no offers or sales of securities by or for the issuer that are of the same or a similar class as those offered or sold under Regulation D, other than those offers or sales of securities under an employee benefit plan as defined in rule 405 under the Act (17 CFR 230.405).

NOTE: The term offering is not defined in the Act or in Regulation D. If the issuer offers or sells securities for which the safe harbor rule in paragraph (a) of this § 230.502 is unavailable, the determination as to whether separate sales of securities are part of the same offering (i.e. are considered integrated) depends on the particular facts and circumstances. Generally, transactions otherwise meeting the requirements of an exemption will not be integrated with simultaneous offerings being made outside the United States in compliance with Regulation S. See Release No. 33-6863.

The following factors should be considered in determining whether offers and sales should be integrated for purposes of the exemptions under Regulation D:

(a) Whether the sales are part of a single plan of financing;

(b) Whether the sales involve issuance of the same class of securities;

(c) Whether the sales have been made at or about the same time;

(d) Whether the same type of consideration is being received; and

(e) Whether the sales are made for the same general purpose.

See Release 33-4552 (November 6, 1962) [27 FR 11316].

(b) Information requirements -- (1) When information must be furnished. If the issuer sells securities under § 230.505 or § 230.506(b) to any purchaser that is not an accredited investor, the issuer shall furnish the information specified in paragraph (b)(2) of this section to such purchaser a reasonable time prior to sale. The issuer is not required to furnish the specified information to purchasers when it sells securities under § 230.504, or to any accredited investor.

NOTE: When an issuer provides information to investors pursuant to paragraph (b)(1), it should consider providing such information to accredited investors as well, in view of the anti-fraud provisions of the federal securities laws.

(2) Type of information to be furnished. (i) If the issuer is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser, to the extent material to an understanding of the issuer, its business and the securities being offered:

(A) Non-financial statement information. If the issuer is eligible to use Regulation A (§ 230.251-263), the same kind of information as would be required in Part II of Form 1-A (§ 239.90 of this chapter). If the issuer is not eligible to use Regulation A, the same kind of information as required in Part I of a registration statement filed under the Securities Act on the form that the issuer would be entitled to use.

(B) Financial statement information. (1) Offerings up to $ 2,000,000. The information required in Article 8 of Regulation S-X (§ 210.8 of this chapter), except that only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited.

(2) Offerings up to $ 7,500,000. The financial statement information required in Form S-1 (§ 239.10 of this chapter) for smaller reporting companies. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that

have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(3) Offerings over $ 7,500,000. The financial statement as would be required in a registration statement filed under the Act on the form that the issuer would be entitled to use. If an issuer, other than a limited partnership, cannot obtain audited financial statements without unreasonable effort or expense, then only the issuer's balance sheet, which shall be dated within 120 days of the start of the offering, must be audited. If the issuer is a limited partnership and cannot obtain the required financial statements without unreasonable effort or expense, it may furnish financial statements that have been prepared on the basis of Federal income tax requirements and examined and reported on in accordance with generally accepted auditing standards by an independent public or certified accountant.

(C) If the issuer is a foreign private issuer eligible to use Form 20-F (§ 249.220f of this chapter), the issuer shall disclose the same kind of information required to be included in a registration statement filed under the Act on the form that the issuer would be entitled to use. The financial statements need be certified only to the extent required by paragraph (b)(2)(i) (B) (1), (2) or (3) of this section, as appropriate.

(ii) If the issuer is subject to the reporting requirements of section 13 or 15(d) of the Exchange Act, at a reasonable time prior to the sale of securities the issuer shall furnish to the purchaser the information specified in paragraph (b)(2)(ii)(A) or (B) of this section, and in either event the information specified in paragraph (b)(2)(ii)(C) of this section:

(A) The issuer's annual report to shareholders for the most recent fiscal year, if such annual report meets the requirements of Rules 14a-3 or 14c-3 under the Exchange Act (§ 240.14a-3 or § 240.14c-3 of this chapter), the definitive proxy statement filed in connection with that annual report, and if requested by the purchaser in writing, a copy of the issuer's most recent Form 10-K (§ 249.310 of this chapter) under the Exchange Act.

(B) The information contained in an annual report on Form 10-K (§ 249.310 of this chapter) under the Exchange Act or in a registration statement on Form S-1 (§ 239.11 of this chapter) or S-11 (§ 239.18 of this chapter) under the Act or on Form 10 (§ 249.210 of this chapter) under the Exchange Act, whichever filing is the most recent required to be filed.

(C) The information contained in any reports or documents required to be filed by the issuer under sections 13(a), 14(a), 14(c), and 15(d) of the Exchange Act since the distribution or filing of the report or registration statement specified in paragraphs (b)(2)(ii) (A) or (B), and a brief description of the securities being offered, the use of the proceeds from the offering, and any material changes in the issuer's affairs that are not disclosed in the documents furnished.

(D) If the issuer is a foreign private issuer, the issuer may provide in lieu of the information specified in paragraph (b)(2)(ii) (A) or (B) of this section, the information contained in its most recent filing on Form 20-F or Form F-1 (§ 239.31 of the chapter).

(iii) Exhibits required to be filed with the Commission as part of a registration statement or report, other than an annual report to shareholders or parts of that report incorporated by reference in a Form 10-K report, need not be furnished to each purchaser that is not an accredited investor if the contents of material exhibits are identified and such exhibits are made available to a purchaser, upon his or her written request, a reasonable time before his or her purchase.

(iv) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506(b), the issuer shall furnish to the purchaser a brief description in writing of any material written information concerning the offering that has

been provided by the issuer to any accredited investor but not previously delivered to such unaccredited purchaser. The issuer shall furnish any portion or all of this information to the purchaser, upon his written request a reasonable time prior to his purchase.

(v) The issuer shall also make available to each purchaser at a reasonable time prior to his purchase of securities in a transaction under § 230.505 or § 230.506(b) the opportunity to ask questions and receive answers concerning the terms and conditions of the offering and to obtain any additional information which the issuer possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of information furnished under paragraph (b)(2) (i) or (ii) of this section.

(vi) For business combinations or exchange offers, in addition to information required by Form S-4 (17 CFR 239.25), the issuer shall provide to each purchaser at the time the plan is submitted to security holders, or, with an exchange, during the course of the transaction and prior to sale, written information about any terms or arrangements of the proposed transactions that are materially different from those for all other security holders. For purposes of this subsection, an issuer which is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act may satisfy the requirements of Part I.B. or C. of Form S-4 by compliance with paragraph (b)(2)(i) of this § 230.502.

(vii) At a reasonable time prior to the sale of securities to any purchaser that is not an accredited investor in a transaction under § 230.505 or § 230.506(b), the issuer shall advise the purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of this section. Such disclosure may be contained in other materials required to be provided by this paragraph.

(c) Limitation on manner of offering. Except as provided in § 230.504(b)(1) or § 230.506(c), neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising, including, but not limited to, the following:

(1) Any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and

(2) Any seminar or meeting whose attendees have been invited by any general solicitation or general advertising; Provided, however, that publication by an issuer of a notice in accordance with § 230.135c or filing with the Commission by an issuer of a notice of sales on Form D (17 CFR 239.500) in which the issuer has made a good faith and reasonable attempt to comply with the requirements of such form, shall not be deemed to constitute general solicitation or general advertising for purposes of this section; 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.

(d) Limitations on resale. Except as provided in § 230.504(b)(1), securities acquired in a transaction under Regulation D shall have the status of securities acquired in a transaction under section 4(a)(2) of the Act and cannot be resold without registration under the Act or an exemption therefrom. The issuer shall exercise reasonable care to assure that the purchasers of the securities are not underwriters within the meaning of section 2(a)(11) of the Act, which reasonable care may be demonstrated by the following:

(1) Reasonable inquiry to determine if the purchaser is acquiring the securities for himself or for other persons;

(2) Written disclosure to each purchaser prior to sale that the securities have not been registered

under the Act and, therefore, cannot be resold unless they are registered under the Act or unless an exemption from registration is available; and

(3) Placement of a legend on the certificate or other document that evidences the securities stating that the securities have not been registered under the Act and setting forth or referring to the restrictions on transferability and sale of the securities.

While taking these actions will establish the requisite reasonable care, it is not the exclusive method to demonstrate such care. Other actions by the issuer may satisfy this provision. In addition, § 230.502(b)(2)(vii) requires the delivery of written disclosure of the limitations on resale to investors in certain instances.

4. Rule 503. Filing of notice of sales

(a) When notice of sales on Form D is required and permitted to be filed.

(1) An issuer offering or selling securities in reliance on § 230.504, § 230.505, or § 230.506 must file with the Commission a notice of sales containing the information required by Form D (17 CFR 239.500) for each new offering of securities no later than 15 calendar days after the first sale of securities in the offering, unless the end of that period falls on a Saturday, Sunday or holiday, in which case the due date would be the first business day following.

(2) An issuer may file an amendment to a previously filed notice of sales on Form D at any time.

(3) An issuer must file an amendment to a previously filed notice of sales on Form D for an offering:

(i) To correct a material mistake of fact or error in the previously filed notice of sales on Form D, as soon as practicable after discovery of the mistake or error;

(ii) To reflect a change in the information provided in the previously filed notice of sales on Form D, as soon as practicable after the change, except that no amendment is required to reflect a change that occurs after the offering terminates or a change that occurs solely in the following information:

(A) The address or relationship to the issuer of a related person identified in[[Page 10616 response to Item 3 of the notice of sales on Form D;

(B) An issuer’s revenues or aggregate net asset value;

(C) The minimum investment amount, if the change is an increase, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in a decrease of more than 10%;

(D) Any address or state(s) of solicitation shown in response to Item 12 of the notice of sales on Form D;

(E) The total offering amount, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%;

(F) The amount of securities sold in the offering or the amount remaining to be sold;

(G) The number of non-accredited investors who have invested in the offering, as long as the change does not increase the number to more than 35;

(H) The total number of investors who have invested in the offering; or

(I) The amount of sales commissions, finders' fees or use of proceeds for payments to executive officers, directors or promoters, if the change is a decrease, or if the change, together with all other changes in that amount since the previously filed notice of sales on Form D, does not result in an increase of more than 10%; and

(iii) Annually, on or before the first anniversary of the filing of the notice of sales on Form D or the filing of the most recent amendment to the notice of sales on Form D, if the offering is continuing at that time.

(4) An issuer that files an amendment to a previously filed notice of sales on Form D must provide current information in response to all requirements of the notice of sales on Form D regardless of why the amendment is filed.

(b) How notice of sales on Form D must be filed and signed.

(1) A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T (17 CFR Part 232).

(2) Every notice of sales on Form D must be signed by a person duly authorized by the issuer.

5. Rule 504. Exemption for limited offerings and sales of securities not exceeding $1,000,000

(a) Exemption. Offers and sales of securities that satisfy the conditions in paragraph (b) of this § 230.504 by an issuer that is not:

(1) Subject to the reporting requirements of section 13 or 15(d) of the Exchange Act,;

(2) An investment company; or

(3) A development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in a merger or acquisition with an unidentified company or companies, or other entity or person, shall be exempt from the provision of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met. (1) General conditions. To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502 (a), (c) and (d), except that the provisions of § 230.502 (c) and (d) will not apply to offers and sales of securities under this § 230.504 that are made:

(i) Exclusively in one or more states that provide for the registration of the securities, and require the public filing and delivery to investors of a substantive disclosure document before sale, and are made in accordance with those state provisions;

(ii) In one or more states that have no provision for the registration of the securities or the public filing or delivery of a disclosure document before sale, if the securities have been registered in at least one state that provides for such registration, public filing and delivery before sale, offers and sales are made in that state in accordance with such provisions, and the disclosure document is delivered before sale to all purchasers (including those in the states that have no such procedure); or

(iii) Exclusively according to state law exemptions from registration that permit general solicitation and general advertising so long as sales are made only to "accredited investors" as defined in § 230.501(a).

(2) The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $ 1,000,000, less the aggregate offering price for all securities sold within the

twelve months before the start of and during the offering of securities under this § 230.504, in reliance on any exemption under section 3(b), or in violation of section 5(a) of the Securities Act.

NOTE 1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold $ 900,000 on June 1, 1987 under this § 230.504 and an additional $ 4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $ 1,000,000 limit within the preceding twelve months.

NOTE 2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $ 1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional $ 500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

6. Rule 505. Exemption for limited offers and sales of securities not exceeging $5,000,000

(a) Exemption. Offers and sales of securities that satisfy the conditions in paragraph (b) of this section by an issuer that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met -- (1) General conditions. To qualify for exemption under this section, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502.

(2) Specific conditions -- (i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.505, as defined in § 203.501(c), shall not exceed $ 5,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this section in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act.

NOTE: The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sold $ 2,000,000 of its securities on June 1, 1982 under this § 230.505 and an additional $ 1,000,000 on September 1, 1982, the issuer would be permitted to sell only $ 2,000,000 more under this § 230.505 until June 1, 1983. Until that date the issuer must count both prior sales towards the $ 5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell $ 4,000,000 of its securities because the June 1, 1982 sale would not be within the preceding twelve months.

Example 2. If an issuer sold $ 500,000 of its securities on June 1, 1982 under § 230.504 and an additional $ 4,500,000 on December 1, 1982 under this section, then the issuer could not sell any of its securities under this section until June 1, 1983. At that time it could sell an additional $ 500,000 of its securities.

(ii) Limitation on number of purchasers. There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

(iii) Disqualifications. No exemption under this section shall be available for the securities of any issuer described in § 230.262 of Regulation A, except that for purposes of this section only:

(A) The term “filing of the offering statement required by § 230.252” as used in § 230.262(a), (b) and (c) shall mean the first sale of securities under this section;

(B) The term “underwriter” as used in § 230.262 (b) and (c) shall mean a person that has been or will be

paid directly or indirectly remuneration for solicitation of purchasers in connection with sales of securities under this section; and

(C) Paragraph (b)(2)(iii) of this section shall not apply to any issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied. Any such determination shall be without prejudice to any other action by the Commission in any other proceeding or matter with respect to the issuer or any other person.

7. Rule 506. Exemption for limited offers and sales without regard to dollar amount of offering

(a) Exemption. Offers and sales of securities by an issuer that satisfy the conditions in paragraph (b) or (c) of this section shall be deemed to be transactions not involving any public offering within the meaning of section 4(a)(2) of the Act.

(b) Conditions to be met in offerings subject to limitation on manner of offering -- (1) General conditions. To qualify for an exemption under this section, offers and sales must satisfy all the terms and conditions of §§ 230.501 and 230.502.

(2) Specific Conditions -- (i) Limitation on number of purchasers. There are no more than or the issuer reasonably believes that there are no more than 35 purchasers of securities from the issuer in any offering under this section.

Note to paragraph (b)(2)(i): See § 230.501(e) for the calculation of the number of purchasers and § 230.502(a) for what may or may not constitute an offering under paragraph (b) of this section.

(ii) Nature of purchasers. Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

(c) Conditions to be met in offerings not subject to limitation on manner of offering-- (1) General conditions. To qualify for exemption under this section, sales must satisfy all the terms and conditions of §§ 230.501 and 230.502(a) and (d).

(2) Specific conditions-- (i) Nature of purchasers. All purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors.

(ii) Verification of accredited investor status. The issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors. The issuer shall be deemed to take reasonable steps to verify if the issuer uses, at its option, one of the following non-exclusive and non-mandatory methods of verifying that a natural person who purchases securities in such offering is an accredited investor; provided, however, that the issuer does not have knowledge that such person is not an accredited investor:

(A) In regard to whether the purchaser is an accredited investor on the basis of income, reviewing any Internal Revenue Service form that reports the purchaser's income for the two most recent years (including, but not limited to, Form W-2, Form 1099, Schedule K-1 to Form 1065, and Form 1040) and obtaining a written representation from the purchaser that he or she has a reasonable expectation of reaching the income level necessary to qualify as an accredited investor during the current year;

(B) In regard to whether the purchaser is an accredited investor on the basis of net worth, reviewing one or more of the following types of documentation dated within the prior three months and obtaining a written representation from the purchaser that all liabilities necessary to make a determination of net worth have been disclosed:

(1) With respect to assets: Bank statements, brokerage statements and other statements of securities holdings, certificates of deposit, tax assessments, and appraisal reports issued by independent third parties; and

(2) With respect to liabilities: A consumer report from at least one of the nationwide consumer reporting agencies; or

(C) Obtaining a written confirmation from one of the following persons or entities that such person or entity has taken reasonable steps to verify that the purchaser is an accredited investor within the prior three months and has determined that such purchaser is an accredited investor:

(1) A registered broker-dealer;

(2) An investment adviser registered with the Securities and Exchange Commission;

(3) A licensed attorney who is in good standing under the laws of the jurisdictions in which he or she is admitted to practice law; or

(4) A certified public accountant who is duly registered and in good standing under the laws of the place of his or her residence or principal office.

(D) In regard to any person who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to September 23, 2013 and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification by such person at the time of sale that he or she qualifies as an accredited investor.

Instructions to paragraph (c)(2)(ii)(A) through (D) of this section:

1. The issuer is not required to use any of these methods in verifying the accredited investor status of natural persons who are purchasers. These methods are examples of the types of non-exclusive and non-mandatory methods that satisfy the verification requirement in § 230.506(c)(2)(ii).

2. In the case of a person who qualifies as an accredited investor based on joint income with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(A) by reviewing copies of Internal Revenue Service forms that report income for the two most recent years in regard to, and obtaining written representations from, both the person and the spouse.

3. In the case of a person who qualifies as an accredited investor based on joint net worth with that person's spouse, the issuer would be deemed to satisfy the verification requirement in § 230.506(c)(2)(ii)(B) by reviewing such documentation in regard to, and obtaining written representations from, both the person and the spouse.

(d) " Bad Actor" disqualification. (1) No exemption under this section shall be available for a sale of securities if the issuer; any predecessor of the issuer; any affiliated issuer; any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; any beneficial owner of 20% or more of the issuer's outstanding voting equity securities, calculated on the basis of voting power; any promoter connected with the issuer in any capacity at the time of such sale; any investment manager of an issuer that is a pooled investment fund; any person that has been or will be paid (directly or indirectly) remuneration for solicitation of purchasers in connection with such sale of securities; any general partner or managing member of any such investment manager or solicitor; or any director, executive officer or other officer participating in the offering of any such investment manager or solicitor or general partner or managing member of such investment manager or solicitor:

(i) Has been convicted, within ten years before such sale (or five years, in the case of issuers, their

predecessors and affiliated issuers), of any felony or misdemeanor:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(ii) Is subject to any order, judgment or decree of any court of competent jurisdiction, entered within five years before such sale, that, at the time of such sale, restrains or enjoins such person from engaging or continuing to engage in any conduct or practice:

(A) In connection with the purchase or sale of any security;

(B) Involving the making of any false filing with the Commission; or

(C) Arising out of the conduct of the business of an underwriter, broker, dealer, municipal securities dealer, investment adviser or paid solicitor of purchasers of securities;

(iii) Is subject to a final order of a state securities commission (or an agency or officer of a state performing like functions); a state authority that supervises or examines banks, savings associations, or credit unions; a state insurance commission (or an agency or officer of a state performing like functions); an appropriate federal banking agency; the U.S. Commodity Futures Trading Commission; or the National Credit Union Administration that:

(A) At the time of such sale, bars the person from:

(1) Association with an entity regulated by such commission, authority, agency, or officer;

(2) Engaging in the business of securities, insurance or banking; or

(3) Engaging in savings association or credit union activities; or

(B) Constitutes a final order based on a violation of any law or regulation that prohibits fraudulent, manipulative, or deceptive conduct entered within ten years before such sale;

(iv) Is subject to an order of the Commission entered pursuant to section 15(b) or 15B(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78 o (b) or 78 o -4(c)) or section 203(e) or (f) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(e) or (f)) that, at the time of such sale:

(A) Suspends or revokes such person's registration as a broker, dealer, municipal securities dealer or investment adviser;

(B) Places limitations on the activities, functions or operations of such person; or

(C) Bars such person from being associated with any entity or from participating in the offering of any penny stock;

(v) Is subject to any order of the Commission entered within five years before such sale that, at the time of such sale, orders the person to cease and desist from committing or causing a violation or future violation of:

(A) Any scienter-based anti-fraud provision of the federal securities laws, including without limitation section 17(a)(1) of the Securities Act of 1933 (15 U.S.C. 77q(a)(1)), section 10(b) of the Securities

Exchange Act of 1934 (15 U.S.C. 78j(b)) and 17 CFR 240.10b-5, section 15(c)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78 o (c)(1)) and section 206(1) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-6(1)), or any other rule or regulation thereunder; or

(B) Section 5 of the Securities Act of 1933 (15 U.S.C. 77e).

(vi) Is suspended or expelled from membership in, or suspended or barred from association with a member of, a registered national securities exchange or a registered national or affiliated securities association for any act or omission to act constituting conduct inconsistent with just and equitable principles of trade;

(vii) Has filed (as a registrant or issuer), or was or was named as an underwriter in, any registration statement or Regulation A offering statement filed with the Commission that, within five years before such sale, was the subject of a refusal order, stop order, or order suspending the Regulation A exemption, or is, at the time of such sale, the subject of an investigation or proceeding to determine whether a stop order or suspension order should be issued; or

(viii) Is subject to a United States Postal Service false representation order entered within five years before such sale, or is, at the time of such sale, subject to a temporary restraining order or preliminary injunction with respect to conduct alleged by the United States Postal Service to constitute a scheme or device for obtaining money or property through the mail by means of false representations.

(2) Paragraph (d)(1) of this section shall not apply:

(i) With respect to any conviction, order, judgment, decree, suspension, expulsion or bar that occurred or was issued before September 23, 2013;

(ii) Upon a showing of good cause and without prejudice to any other action by the Commission, if the Commission determines that it is not necessary under the circumstances that an exemption be denied;

(iii) If, before the relevant sale, the court or regulatory authority that entered the relevant order, judgment or decree advises in writing (whether contained in the relevant judgment, order or decree or separately to the Commission or its staff) that disqualification under paragraph (d)(1) of this section should not arise as a consequence of such order, judgment or decree; or

(iv) If the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known that a disqualification existed under paragraph (d)(1) of this section.

Instruction to paragraph (d)(2)(iv). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

(3) For purposes of paragraph (d)(1) of this section, events relating to any affiliated issuer that occurred before the affiliation arose will be not considered disqualifying if the affiliated entity is not:

(i) In control of the issuer; or

(ii) Under common control with the issuer by a third party that was in control of the affiliated entity at the time of such events.

(e) Disclosure of prior "bad actor" events. The issuer shall furnish to each purchaser, a reasonable time prior to sale, a description in writing of any matters that would have triggered disqualification under paragraph (d)(1) of this section but occurred before September 23, 2013. The failure to furnish such information timely shall not prevent an issuer from relying on this section if the issuer establishes that it did not know and, in the exercise of reasonable care, could not have known of the existence of the undisclosed

matter or matters.

Instruction to paragraph (e). An issuer will not be able to establish that it has exercised reasonable care unless it has made, in light of the circumstances, factual inquiry into whether any disqualifications exist. The nature and scope of the factual inquiry will vary based on the facts and circumstances concerning, among other things, the issuer and the other offering participants.

8. Rule 507. Disqualifying provision relating to exemptions under Rules 504-Rule 506

(a) No exemption under § 230.505, § 230.505 or § 230.506 shall be available for an issuer if such issuer, any of its predecessors or affiliates have been subject to any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoining such person for failure to comply with § 230.503.

(b) Paragraph (a) of this section shall not apply if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the exemption be denied.

9. Rule 508. Insignificant deviations from a term, condition or requirement of Regulation D

(a) A failure to comply with a term, condition or requirement of § 230.504, § 230.505 or § 230.506 will not result in the loss of the exemption from the requirements of section 5 of the Act for any offer or sale to a particular individual or entity, if the person relying on the exemption shows:

(1) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular individual or entity; and

(2) The failure to comply was insignificant with respect to the offering as a whole, provided that any failure to comply with paragraph (c) of § 230.502, paragraph (b)(2) of § 230.504, paragraphs (b)(2)(i) and (ii) of § 230.505 and paragraph (b)(2)(i) of § 230.506 shall be deemed to be significant to the offering as a whole; and

(3) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of § 230.504, § 230.505 or § 230.506.

(b) A transaction made in reliance on § 230.504, § 230.505 or § 230.506 shall comply with all applicable terms, conditions and requirements of Regulation D. Where an exemption is established only through reliance upon paragraph (a) of this section, the failure to comply shall nonetheless be actionable by the Commission under section 20 of the Act.

MM. Exemptions for Cross-Border Rights Offerings, Exchange Offers and Business Combinations

1. General Notes to §230.800, 230.801 and 230.802

1. Sections 230.801 [relating to rights offerings and not addressed here] and 230.802 [relating to business combinations and exchange offers] relate only to the applicability of the registration provisions of the Act (15 U.S.C. 77e) and not to the applicability of the anti-fraud, civil liability or other provisions of the federal securities laws.
2. The exemptions provided by §230.801 and §230.802 are not available for any securities transaction or series of transactions that technically complies with §230.801 and §230.802 but are part of a plan or scheme to evade the registration provisions of the Act.
3. An issuer who relies on §230.801 or an offeror who relies on §230.802 must still comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) and any other applicable provisions of the federal securities laws.

4. An issuer who relies on §230.801 or an offeror who relies on §230.802 must still comply with any applicable state laws relating to the offer and sale of securities.
5. Attempted compliance with §230.801 or §230.802 does not act as an exclusive election; an issuer making an offer or sale of securities in reliance on §230.801 or §230.802 may also rely on any other applicable exemption from the registration requirements of the Act.
6. Section 230.801 and §230.802 provide exemptions only for the issuer of the securities and not for any affiliate of that issuer or for any other person for resales of the issuer's securities. These sections provide exemptions only for the transaction in which the issuer or other person offers or sells the securities, not for the securities themselves. Securities acquired in a §230.801 or §230.802 transaction may be resold in the United States only if they are registered under the Act or an exemption from registration is available.
7. Unregistered offers and sales made outside the United States will not affect contemporaneous offers and sales made in compliance with §230.801 or §230.802. A transaction that complies with §230.801 or §230.802 will not be integrated with offerings exempt under other provisions of the Act, even if both transactions occur at the same time. * * *

2. Rule 800. Definitions for 230.800, 230.801 and 230.802.

The following definitions apply in 230.800, 230.801 and 230.802.

(a) *Business combination.* Business combination means a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of security holders of one or more of the participating companies. It also includes a statutory short form merger that does not require a vote of security holders.

(b) *Equity security.* Equity security means the same as in §240.3a11-1 of this chapter, but for purposes of this section only does not include:

(1) Any debt security that is convertible into an equity security, with or without consideration;

(2) Any debt security that includes a warrant or right to subscribe to or purchase an equity security;

(3) Any such warrant or right; or

(4) Any put, call, straddle, or other option or privilege that gives the holder the option of buying or selling a security but does not require the holder to do so.

(c) *Exchange offer.* Exchange offer means a tender offer in which securities are issued as consideration.

(d) *Foreign private issuer.* Foreign private issuer means the same as in §230.405 of Regulation C.

(e) *Foreign subject company.* Foreign subject company means any foreign private issuer whose securities are the subject of the exchange offer or business combination.

(f) *Home jurisdiction.* Home jurisdiction means both the jurisdiction of the foreign subject company's (or in the case of a rights offering, the foreign private issuer's) incorporation, organization or chartering and the principal foreign market where the foreign subject company's (or in the case of a rights offering, the issuer's) securities are listed or quoted. * * *

(h) *U.S. holder.* U.S. holder means any security holder resident in the United States. To determine the percentage of outstanding securities held by U.S. holders:

(1) Calculate percentage of outstanding securities held by U.S. holders as of the record date for a rights offering, or 30 days before the commencement of an exchange offer or the solicitation for a business combination.

(2) Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities, or that are held by the offeror in an exchange offer or business combination;

(3) Use the method of calculating record ownership in Rule 12g3-2(a) under the Exchange Act (§ 240.12g3-2(a) of this chapter), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different from the subject company's jurisdiction of incorporation;

(4) If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this provision, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

(5) Count securities as owned by U.S. holders when publicly filed reports of beneficial ownership or information that is otherwise provided to you indicates that the securities are held by U.S. residents.

(i) *United States.* United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

3. Rule 802. Exemption for offerings in connection with an exchange offer or business combination for the securities of foreign private issuers.

Offers and sales in any exchange offer for a class of securities of a foreign private issuer, or in any exchange of securities for the securities of a foreign private issuer in any business combination, are exempt from the provisions of Section 5 of the Act (15 U.S.C. 77e), if they satisfy the following conditions:

(a) *Conditions to be met.*

(1) *Limitation on U.S. ownership.* Except in the case of an exchange offer or business combination that is commenced during the pendency of a prior exchange offer or business combination made in reliance on this paragraph, U.S. holders of the foreign subject company must hold no more than 10 percent of the securities that are the subject of the exchange offer or business combination (as determined under the definition of "U.S. holder" in §230.800(h)). In the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders may hold no more than 10 percent of the class of securities of the successor registrant, as if measured immediately after completion of the business combination.

(2) *Equal treatment.* The issuer must permit U.S. holders to participate in the exchange offer or business combination on terms at least as favorable as those offered any other holder of the subject securities. The issuer, however, need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

(3) *Informational documents.* (i) If the issuer publishes or otherwise disseminates an informational document to the holders of the subject securities in connection with the exchange offer or business combination, the issuer must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§239.800 of this chapter) by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F-X (§239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States. (ii) The issuer must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the foreign subject company's home jurisdiction. (iii) If the issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(b) *Legends.* The following legend or an equivalent statement in clear, plain language, to the extent applicable, must be included on the cover page or other prominent portion of any informational document the offeror publishes or disseminates to U.S. holders:

> This exchange offer or business combination is made for the securities of a foreign company. The offer is subject to disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.
>
> It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.
>
> You should be aware that the issuer may purchase securities otherwise than under the exchange offer, such as in open market or privately negotiated purchases.

(c) For exchange offers conducted by persons other than the issuer of the subject securities or its affiliates, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless:

(1) The exchange offer is made pursuant to an agreement with the issuer of the subject securities;

(2) The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the NASDAQ market or on the OTC market, as reported to the NASD,

over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the same period;

(3) The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(4) The offeror knows, or has reason to know, that U.S. ownership exceeds 10 percent of the subject securities.

NN. Regualtion S—Rules Governing Offers and Sales Made Outside the United States without Registration Under the Securities Act of 1933

1. Preliminary Notes

1. The following rules relate solely to the application of Section S of the Securities Act of 1933 (the "Act") and not to antifraud or other provisions of the federal securities laws.

2. In view of the objective of these rules and the policies underlying the Act, Regulation S is not available with respect to any transaction or series of transactions that, although in technical compliance with these rules, is part of a plan or scheme to evade the registration provisions of Act. In such cases, registration under the Act is required.

3. Nothing in these rules obviates the need for any issuer or any other person to comply with the securities registration or broker-dealer registration requirements of the Securities Exchange Act (the "Exchange Act"), whenever such requirements are applicable.

4. Nothing in these rules obviates the need to comply with any applicable state law relating to the offer and the sale of securities .

5. Attempted compliance with any rule in Regulation S does not act as an exclusive election; a person making an offer or sale of securities may also claim the availability of any applicable exemption from the registration requirements of the Act. The availability of the Regulation S safe-harbor to offers and sales that occur outside the United States will not be affected by the subsequent offer and sale of these securities into the United States or to US persons during the distribution compliance period, as long as the subsequent offer and sale are made pursuant to registration or an exemption therefrom under the Act.

6. Regulation S is available only for offers and sales of securities outside the United States. securities acquired overseas, whether or not pursuant to Regulation S, may be resold in the United States only if they are registered under the Act or an exemption from registration is available.

7. 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. Where applicable, issuers and bidders may also look to §230.135e and §240.14d-1(c) of this chapter.

8. The provisions of this Regulation S shall not apply to offers and sales of securities issued by open-end investment companies or unit investment trusts registered or required to be registered or closed-end investment companies required to be registered, but not registered, under the Investment Company Act of 1940 (the "1940 Act").

2. Rule 901. General statement.

For the purposes only of section 5 of the Act, the terms offer, offer to sell, sell, sale, and offer to buy shall be deemed to include offers and sales that occur within the United States and shall be deemed not to include offers and sales that occur outside the United States.

3. Rule 902. Definitions

As used in Regulation S, the following terms shall have the meanings indicated.

a. *Debt securities*. "Debt securities" of an issuer is defined to mean any security other than an equity security as defined in Rule 405, as well as the following:

1. Non-participatory preferred stock, which is defined as non-convertible capital stock, the holders of which are entitled to a preference in payment of dividends and in distribution of assets on liquidation, dissolution,

or winding up of the issuer, but are not entitled to particpate in residual earnings of assets of the issuer; and

2. Asset-backed securities * * *

b. *Designated offshore securities market.* "Designated offshore securities market" means: the Albert Stock Exchange; the Amsterdam Stock Exchange; the Australian Stock Exchange Limited; the Bermuda Stock Exchange; the Bourse deBruxelle; * * *

1. the Eurobond market, as regulated by the International Securities Market Association; Limited; the Bermuda Stock Exchange; the Bourse deBruxelles; * * *

2. Any foreign securities exchange or non-exchange market designated by the Commission. * * *

c. *Directed selling efforts*

1. "Directed selling efforts" means any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S(Rule 901 through Rule 905, and Preliminary Notes). Such activity includes placing 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.

2. Publication "with a general circulation in the United States": * * *

3. The following are not "directed selling efforts":

i. Placing an advertisement required to be published under U.S. or foreign law, or under rules or regulations of a U.S. or foreign regulatory or self- regulatory authority, provided the advertisement contains no more information that legally required and includes a statement to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States (or to a U.S. person, if the advertisement relates to an offering under Category 2 or 3 (paragraph (b)(2) or (b)(3)) in Rule 903) absent registration or an applicable exemption from the registration requirements;

ii. Contact with persons excluded from the definitions of "U.S. person" pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts;

iii. A tombstone advertisement in any publication with a general circulation in the United States, provided: * * *

iv. Bona fide visits to real estate, plants or other facilities located in the United States and tours thereof conducted for a prospective investor by an issuer, a distributor, any of the respective affiliates or a person acting on behalf of any of the foregoing;

v. Distribution in the United States of a foreign broker-dealer's quotations by a third-party system that distributes such quotations primarily in foreign countries if: * * *

vii. Providing any journalist with access to press conferences held outside of the United States, to meetings with the issuer or selling security holder representatives conducted outside the United States , at or in which a present or proposed offering of securities is discussed, if the requirements of Rule 135e are satisfied.

d. *Distributor*. "Distributor" means any underwriters, dealer, or other person who participates, pursuant to a contractual arrangement, in the distribution of the securities offered or sold in reliance on this Regulation S (Rule 901 through Rule 905, and Preliminary Notes).

e. *Domestic issuer/Foreign issuer.* "Domestic issuer" means any issuer other than a "foreign government" or "foreign private issuer" (both as defined in Rule 405). "Foreign issuer" means any issuer other than a "domestic issuer."

f. *Distribution compliance period*. "Distribution compliance period" means a period that begins when the securities were first offered to persons other than distributors in reliance upon this Regulation S (Rule 901 through Rule 905, and Preliminary Notes) or the date of closing of the offering, whichever is later, and continues until the end of the period of time specified in the relevant provision of Rule 903, except that:

1. All offers and sales by a distributor of an unsold allotment or subscription shall be deemed to be made during the distribution compliance period;

2. In a continuous offering, the distribution compliance period shall commence upon completion of the distribution, as determined and certified by the managing underwriter or person performing similar functions. * * *

g. *Offering restrictions.* "Offering restrictions" means:

1. Each distributor agrees in writing:

i. That all offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in Rule 903, as applicable, shall be made only in accordance with the provisions of Rule 903 or 904; pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act; and

ii. For offers and sales of equity securities of domestic issuers, not to engage in hedging transactions with regard to such securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in Rule 903, as applicable, unless in compliance with the Act; and

2. All offering materials and documents (other than press releases) used in connection with offers and sales of the securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) in Rule 903, as applicable, shall include statements to the effect that the securities have not been registered under the Act and may not be offered or sold in the United States or to U.S. persons (other than distributors) unless the securities are registered under the Act, or an exemption from the registration requirements of the Act is available. For offers and sales of equity securities of domestic issuers, such offering materials and documents also must state that hedging transactions involving those securities may not be conducted unless in compliance with the Act. Such states shall appear:

i. On the cover or inside cover page of any prospectus or offering circular used in connection with the offer or sale of the securities;

ii. In the underwriting section of any prospectus or offering circular used in connections with the offer or sale of the securities; and

iii. In any advertisement made or issued by the issuer, any distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing. Such statements may appear in summary form on prospectus cover pages and in advertisements.

h. *Offshore transaction.*

1. An offer or sale of securities is made in an "offshore transaction" if:

i. The offer is not made to a person in the United States; and

ii. Either:

A. At the time the buy order is originated , the buyer is outside the United States, or the seller and any person acting on its behalf reasonably believe that the buyer is outside the United States; or

B. For purposes of:

1. Section Rules 903, the transaction is executed in, on or through a physical trading floor of an established foreign securities exchange that is located outside the United States; or

2. Section Rule 904, the transaction is executed in, on or through the facilities of a designated offshore securities market described in paragraph (b) of this section, and neither the seller nor any person acting on its behalf knows that the transaction has been pre-arranged with a buyer in the United States.

2. Notwithstanding paragraph (h)(1) of this section, offers and sales of securities specifically targeted at identifiable groups of U.S. citizens abroad, such as members of the U.S. armed forces serving overseas, shall not be deemed to be made in "offshore transactions."

3. Notwithstanding paragraph (h)(1) of this section, offers and sales of securities to persons excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(vi) of this section or persons holding accounts excluded from the definition of "U.S. person" pursuant to paragraph (k)(2)(i) of this section, solely in their capacities as holders of such accounts, shall be deemed to be made in "offshore transactions"

i. *Reporting issuer.* "Reporting issuer" means an issuer other than an investment company registered or required to register under the 1940 Act that:

1. Has a class of securities registered pursuant to Section 12(b) or 12(g) of the Exchange Act or is required to file reports pursuant to Section 15(d) of the Exchange Act; and

2. Has filed all the material required to be filed pursuant to Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve months immediately preceding the offer or sale of securities made in reliance upon this Regulation S (Rule 901 through

Rule 905, and Preliminary Notes.

j. *Substantial U.S. market interest.*

1. "Substantial U.S. market interest" with respect to a class of an issuer's equity securities means:

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 of 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.

2. "Substantial U.S. market interest" with respect to an issuer's debt securities means:

i. Its debt securities, in the aggregate, are held of record (as that term is defined in Rule 12g5-1 and used for purpose of paragraph (j)(2) or this section) 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 Rule 902(a)(1), and the principal amount or principal balance of its securities described in Rule 902(a)(2), 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 Rule 902(a)(1), and the principal amount or principal balance of its securities described in Rule 902(a)(1), in the aggregate, is held of record by U.S. persons.

3. Notwithstanding paragraph (j)(2) of this section, substantial U.S. market interest with respect to an issuer's debt securities is calculated without reference to securities that qualify for the exemption provided by Section 3(a)(3) of the Act.

k. *U.S. person.*

1. "U.S. person" means:

i. Any natural person resident in the United States

ii. Any partnership or corporation organized or incorporated under the laws of the United States; * * *

2. *United States. "United States" means the United States of America, its territories and* possessions, any State of the United States, and the District of Columbia.

4. Rule 903. Offers or Sales of Securities by the Issuer, a Distributor, Any of Their Respective Affiliates, or Any Person Acting on Behalf of Any of the Foregoing; Conditions Relating to Specific Securities

a. An offer or sale of securities by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of Rule 901 if:

1. The offer or sale is made in an offshore transaction;

2. No directed selling efforts are made in the United States by the issuer, a distributor, any of their respective affiliates, or any person acting on behalf of any of the foregoing; and

3. The conditions of paragraph (b) of this section, as applicable, are satisfied.

b. *Additional Conditions.*

1. *Category 1*. No conditions other than those set forth in paragraph (a) apply to securities in this category. Securities are eligible for this category if:

i. The securities are issued by a foreign issuer that reasonably believes at the commencement of the offering that:

A. There is no substantial U.S. market interest in the class of securities to be offered or sold (if equity securities are offered or sold);

B. There is no substantial U.S. market interest in its debt securities (if debt securities are offered or sold);

C. There is no substantial U.S. market interest in the securities to be purchased upon exercise (if warrants are offered or sold); and

D. There is no substantial U.S. market interest in either the convertible securities or the underlying securities (if convertible securities are offered or sold);

ii. The securities are offered and sold in an overseas directed offering, which means:

A. An offering of securities of a foreign issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country; or

B. An offering of non-convertible debt securities of a domestic issuer that is directed into a single country other than the United States to the residents thereof and that is made in accordance with the local laws and customary practices and documentation of such country, provided that the principal and interest of the securities (or par value, as applicable) are denominated in a currency other than U.S. dollars and such securities are neither convertible into U.S. dollar-denominated securities nor linked to U.S. dollars (other than through related currency or interest rate swap transactions that are commercial in nature) in a manner that in effect converts the securities to U.S. dollar- denominated securities.

iii. The securities are backed by the full faith and credit of a foreign government; or

iv. The securities are offered and sold to employees of the issuer or its affiliates pursuant to an employee benefit plan established and administered in accordance with the law of a country other than the United States, and customary practices and documentation of such country, provided that: * * *

2. *Category 2*. The following conditions apply to securities that are not eligible for Category 1 (paragraph (b)(1)) of this section and that are equity securities of a reporting foreign issuer, or debt securities of a reporting issuer or of a non-reporting foreign issuer.

i. Offering restrictions are implemented;

ii. The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

iii. Each distributor selling securities to a distributor, a dealer, as defined in section 2(a)(12) of the Act, or a person receiving a selling concession, fee or other remuneration in respect of the securities sold, prior to the expiration of a 40-day distribution compliance period, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor.

3. *Category 3*. The following conditions apply to securities that are not eligible for Category 1 or 2 (paragraph (b)(1) or (b)(2)) of this section:

i. Offering restrictions are implemented;

ii. In the case of debt securities:

A. The offer or sale, if made prior to the expiration of a 40-day distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

B. The securities are represented upon issuance by a temporary global security which is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person who purchased securities in a transaction that did not require registration under the Act;

iii. In the case of equity securities:

A. The offer or sale, if made prior to the expiration of a one-year distribution compliance period, is not made to a U.S. person or for the account or benefit of a U.S. person (other than a distributor); and

B. The offer or sale, if made prior to the expiration of a one-year distribution compliance period, is made pursuant to the following conditions:

1. The purchaser of the securities (other than a distributor) certifies that it is not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person or is a U.S. person who purchased securities in a transaction that did not require registration under the Act;

2. The purchaser of the securities agrees to resell such securities only in accordance with the provisions of this Regulation S (Rule 901 through Rule 905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and agrees not to engage in hedging transactions with regard to such securities unless in compliance with the Act;

3. The securities of a domestic issuer contain a legend to the effect that

transfer is prohibited except in accordance with the provisions of this Regulation S (Rule 901 through Rule 905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; and that hedging transactions involving those securities may not be conducted unless in compliance with the Act;

4. The issuer is required, either by contract or a provision in its bylaws, articles, charter or comparable document, to refuse to register any transfer of the securities not made in accordance with the provisions of this Regulation S (Rule 901 through Rule 905, and Preliminary Notes), pursuant to registration under the Act, or pursuant to an available exemption from registration; provided, however, that if the securities are in bearer form or foreign law prevents the issuer of the securities from refusing to register securities transfers, other reasonable procedures (such as a legend described in paragraph (b)(3)(iii)(B)(3) of this section) are implemented to prevent any transfer of the securities not made in accordance with the provisions of this Regulation S; and

iv. Each distributor selling securities to a distributor, a dealer (as defined in section 2(a)(12) of the Act), or a person receiving a selling concession, fee or other remuneration, prior to the expiration of a 40-day distribution compliance period in the case of debt securities, or a one-year distribution compliance period in the case of equity securities, sends a confirmation or other notice to the purchaser stating that the purchaser is subject to the same restrictions on offers and sales that apply to a distributor. * * *

5. Rule 904. Offshore Resales

(a) An offer or sale of securities by any person other than the issuer, a distributor, any of their respective affiliates (except any officer or director who is an affiliate solely by virtue of holding such position), or any person acting on behalf of any of the foregoing, shall be deemed to occur outside the United States within the meaning of §230.901 if:

(1) The offer or sale are made in an offshore transaction;

(2) No directed selling efforts are made in the United States by the seller, an affiliate, or any person acting on their behalf; and

(3) The conditions of paragraph (b) of this section, if applicable, are satisfied.

(b) *Additional conditions*—(1) *Resales by dealers and persons receiving selling concessions.* In the case of an offer or sale of securities prior to the expiration of the distribution compliance period specified in Category 2 or 3 (paragraph (b)(2) or (b)(3)) of §230.903, as applicable, by a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or a person receiving a selling concession, fee or other remuneration in respect of the securities offered or sold:

(i) Neither the seller nor any person acting on its behalf knows that the offeree or buyer of the securities is a U.S. person; and

(ii) If the seller or any person acting on the seller's behalf knows that the purchaser is a dealer, as defined in Section 2(a)(12) of the Act (15 U.S.C. 77b(a)(12)), or is a person receiving a selling concession, fee or other remuneration in respect of the securities sold, the seller or a person acting on the seller's behalf sends to the purchaser a confirmation or other notice stating that the securities may be offered and sold during the distribution compliance period only in accordance with the provisions of this Regulation S (§230.901 through §230.905, and Preliminary Notes); pursuant to registration of the securities under the Act; or pursuant to an available exemption from the registration requirements of the Act.

(2) *Resales by certain affiliates.* In the case of an offer or sale of securities by an officer or director of the issuer or a distributor, who is an affiliate of the issuer or distributor solely by virtue of holding such position, no selling concession, fee or other remuneration is paid in connection with such offer or sale other than the usual and customary broker's commission that would be received by a person executing such transaction as agent.

6. Rule 905. Resale Limitations

Equity securities of domestic issuers acquired from the issuer, a distributor, or any of their respective affiliates in a transaction subject to the conditions of §230.901 or §230.903 are deemed to be "restricted securities" as defined in §230.144. Resales of any of such restricted securities by the offshore purchaser must be made in accordance with this Regulation S (§230.901 through §230.905, and Preliminary Notes), the registration

requirements of the Act or an exemption therefrom. Any "restricted securities," as defined in §230.144, that are equity securities of a domestic issuer will continue to be deemed to be restricted securities, notwithstanding that they were acquired in a resale transaction made pursuant to §230.901 or §230.904.

OO. *Regulation S-K: Part 229—Standard Instructions for Filing Forms under Securities Act of 1933, Securitis Exchange Act of 1934 and Energy Policy and Conservation Act of 1975*

1. Rule 10. General

a. *Application of Regulation S-K.* This part (together with the General Rules and Regulations under the Securities Act of 1933,as amended (Securities Act), and the Securities Exchange Act of 1934,as amended (Exchange Act), the Interpretative Releases under these Acts and the forms under these Acts) states the requirements applicable to the content of the non-financial statement portions of:

1. Registration statements under the Securities Act to the extent provided in the forms to be used for registration under such Act; and

2. Registration statements under section 12 (subpart C of part 249 of this chapter), annual or other reports under sections 13 and 15(d) (subparts D and E of part 249 of this chapter), going-private transaction statements under section 13 (part 240 of this chapter), tender offer statements under sections 13 and 14 (part 240 of this chapter), annual reports to security holders and proxy and information statements under section 14 (part 240 of this chapter), and any other documents required to be filed under the Exchange Act, to the extent provided in the forms and rules under that Act.

b. *Commission policy on projections.* The Commission encourages the use in documents specified in Rule 175 under the Securities Act and Rule 3b-6 under the Exchange Act of management's projections of future economic performance that have a reasonable basis and are presented in an appropriate format. * * *

c. *Commission policy on security ratings.* In view of the importance of security ratings (ratings) to investors and the marketplace, the Commission permits registrants to disclose, on a voluntary basis, ratings assigned by rating organizations to classes of debt securities, convertible debt securities and preferred stock in registration statements and periodic reports. * * *

d. *Incorporation by Reference.* Where rules, regulations, or instructions to forms of the Commission permit incorporation by reference, a document may be so incorporated by reference to the specific document and to the prior filing or submission in which such document was physically filed or submitted. Except where a registrant or issuer is expressly required to incorporate a document or documents by reference, reference may not be made to any document which incorporates another document by reference if the pertinent portion of the document containing the information or financial statements to be incorporated by reference includes an incorporation by reference to another document. No document on file with the Commission for more than five years may be incorporated by reference except:

1. Documents contained in registration statements, which may be incorporated by reference as long as the registrant has a reporting requirement with the Commission; or

2. Documents that the registrant specifically identifies by physical location by SEC file number reference, provided such materials have not been disposed of by the Commission pursuant to its Records Control Schedule (17 CFR 200.80f).

Regulation S-K

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SUBPART 100--BUSINESS

2. Item 101. Description of business.

a. *General development of business.* Describe the general development of the business of the registrant, its subsidiaries and any predecessor(s) during the past five years, or such shorter period as the registrant may have been engaged in business. Information shall be disclosed for earlier periods if material to an understanding of the general development of the business.

1. In describing developments, information shall be given as to matters such as the following: the year in which the registrant was organized and its form of organization; the nature and results of any bankruptcy, receivership or similar proceedings with respect to the registrant or any of its significant subsidiaries; the nature and results of any other material reclassification, merger or consolidation of the registrant or any of its significant subsidiaries; the acquisition or disposition of any material amount of assets otherwise than in the ordinary course of business; and any material changes in the mode of conducting the business. * * *

b. *Financial information about industry segments.* Report for each segment, as defined by generally accepted accounting principles, revenues from external customers, a measure of profit or loss and total assets. A registrant must report this information for each of the last three fiscal years or for as long as it has been in business, whichever period is shorter.* * *

c. *Narrative description of business.*

1. Describe the business done and intended to be done by the registrant and its subsidiaries, focusing upon the registrant's dominant industry segment or each reportable industry segment about which financial information is presented in the financial statements.* * *

d. *Financial information about geographic areas.* * * *

3. Item 202. Description of registrant's securities.

Note:

If the securities being described have been accepted for listing on an exchange, the exchange may be identified. The document should not however, convey the impression that the registrant may apply successfully for listing of the securities on an exchange or that, in the case of an underwritten offering, the underwriters may request the registrant to apply for such listing, unless there is reasonable assurance that the securities to be offered will be acceptable to a securities exchange for listing.

(a)Capital stock. If capital stock is to be registered, state the title of the class and describe such of the matters listed in paragraphs (a) (1) through (5) as are relevant. A complete legal description of the securities need not be given.

(1) Outline briefly: (i) dividend rights; (ii) terms of conversion; (iii) sinking fund provisions; (iv) redemption provisions; (v) voting rights, including any provisions specifying the vote required by security holders to take action; (vi) any classification of the Board of Directors, and the impact of such classification where cumulative voting is permitted or required; (vii) liquidation rights; (viii) preemption rights; and (ix) liability to further calls or to assessment by the registrant and for liabilities of the registrant imposed on its stockholders under state statutes (e.g., to laborers, servants or employees of the registrant), unless such disclosure would be immaterial because the financial resources of the registrant or other factors make it improbable that liability under such state statues would be imposed; (x) any restriction on alienability of the securities to be registered; and (xi) any provision discriminating against any existing or prospective holder of such securities as a result of such security holder owning a substantial amount of securities.

(2) If the rights of holders of such stock may be modified otherwise than by a vote of a majority or more of the shares outstanding, voting as a class, so state and explain briefly.

(3) If preferred stock is to be registered, describe briefly any restriction on the repurchase or redemption of shares by the registrant while there is any arrearage in the payment of dividends or sinking fund installments. If there is no such restriction, so state.

(4) If the rights evidenced by, or amounts payable with respect to, the shares to be registered are, or may be, materially limited or qualified by the rights of any other authorized class of securities, include the information regarding such other securities as will enable investors to understand such limitations or qualifications. No information need be given, however, as to any class of securities all of which will be retired, provided appropriate steps to ensure such retirement will be completed prior to or upon delivery by

the registrant of the shares.

(5) Describe briefly or cross-reference to a description in another part of the document, any provision of the registrant's charter or by-laws that would have an effect of delaying, deferring or preventing a change in control of the registrant and that would operate only with respect to an extraordinary corporate transaction involving the registrant (or any of its subsidiaries), such as a merger, reorganization, tender offer, sale or transfer of substantially all of its assets, or liquidation. Provisions and arrangements required by law or imposed by governmental or judicial authority need not be described or discussed pursuant to this paragraph (a)(5). Provisions or arrangements adopted by the registrant to effect, or further, compliance with laws or governmental or judicial mandate are not subject to the immediately preceding sentence where such compliance did not require the specific provisions or arrangements adopted.

(b)Debt securities. * * *

4. Item 303. Management's discussion and analysis of financial condition and results of operations.

(a) *Full fiscal years*. Discuss registrant's financial condition, changes in financial condition and results of operations. The discussion shall provide information as specified in paragraphs (a)(1), (2) and (3) with respect to liquidity, capital resources and results of operations and also shall provide such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Discussions of liquidity and capital resources may be combined whenever the two topics are interrelated. Where in the registrant's judgment a discussion of segment information or of other subdivisions of the registrant's business would be appropriate to an understanding of such business, the discussion shall focus on each relevant, reportable segment or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity*. Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(2) *Capital resources.*

(i) Describe the registrant's material commitments for capital expenditures as of the end of the latest fiscal period, and indicate the general purpose of such commitments and the anticipated source of funds needed to fulfill such commitments.

(ii) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any expected material changes in the mix and relative cost of such resources. The discussion shall consider changes between equity, debt and any off-balance sheet financing arrangements.

(3) *Results of operations.*

(i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, should be described in order to understand the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.

(iii) To the extent that the financial statements disclose material increases in net sales or revenues, provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services.

(iv) For the three most recent fiscal years of the registrant, or for those fiscal years beginning after December 25, 1979, or for those fiscal years in which the registrant has been engaged in business, whichever period is shortest, discuss the impact of inflation and changing prices on the registrant's net sales and revenues and on income from continuing operations. * * *

5. Item 402. Executive compensation.

(a) General—* * *

(2) All compensation covered. This Item requires clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to the named executive officers designated under paragraph (a)(3) of this Item, and directors covered by paragraph (k) of this Item, by any person for all services rendered in all capacities to the registrant and its subsidiaries, unless otherwise specifically excluded from disclosure in this Item. * * *

(3) Persons covered. Disclosure shall be provided pursuant to this Item for each of the following (the "named executive officers"):

(i) All individuals serving as the registrant's principal executive officer or acting in a similar capacity during the last completed fiscal year ("PEO"), regardless of compensation level;

(ii) All individuals serving as the registrant's principal financial officer or acting in a similar capacity during the last completed fiscal year ("PFO"), regardless of compensation level;

(iii) The registrant's three most highly compensated executive officers other than the PEO and PFO who were serving as executive officers at the end of the last completed fiscal year; and

(iv) Up to two additional individuals for whom disclosure would have been provided pursuant to paragraph (a)(3)(iii) of this Item but for the fact that the individual was not serving as an executive officer of the registrant at the end of the last completed fiscal year. * * *

(b) **Compensation discussion and analysis**. (1) Discuss the compensation awarded to, earned by, or paid to the named executive officers. The discussion shall explain all material elements of the registrant's compensation of the named executive officers. The discussion shall describe the following:

(i) The objectives of the registrant's compensation programs;

(ii) What the compensation program is designed to reward;

(iii) Each element of compensation;

(iv) Why the registrant chooses to pay each element;

(v) How the registrant determines the amount (and, where applicable, the formula) for each element to pay; and

(vi) How each compensation element and the registrant's decisions regarding that element fit into the registrant's overall compensation objectives and affect decisions regarding other elements. * * *

Instructions to Item 402(b).

1. The purpose of the Compensation Discussion and Analysis is to provide to investors material information that is necessary to an understanding of the registrant's compensation policies and decisions regarding the named executive officers. * * *

(j)Potential payments upon termination or change-in-control. Regarding each contract, agreement, plan or arrangement, whether written or unwritten, that provides for payment(s) to a named executive officer at, following, or in connection with any termination, including without limitation resignation, severance, retirement or a constructive termination of a named executive officer, or a change in control of the registrant or a change in the named executive officer's responsibilities, with respect to each named executive officer:

(1) Describe and explain the specific circumstances that would trigger payment(s) or the provision

of other benefits, including perquisites and health care benefits;

(2) Describe and quantify the estimated payments and benefits that would be provided in each covered circumstance, whether they would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided;

(3) Describe and explain how the appropriate payment and benefit levels are determined under the various circumstances that trigger payments or provision of benefits;

(4) Describe and explain any material conditions or obligations applicable to the receipt of payments or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver of breach of such agreements; and

(5) Describe any other material factors regarding each such contract, agreement, plan or arrangement.

Instructions to Item 402(j). 1. The registrant must provide quantitative disclosure under these requirements, applying the assumptions that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate (or a reasonable estimated range of amounts) applicable to the payment or benefit and disclose material assumptions underlying such estimates or estimated ranges in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

2. Perquisites and other personal benefits or property may be excluded only if the aggregate amount of such compensation will be less than $10,000. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to paragraph (c)(2)(ix) of this Item. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

3. To the extent that the form and amount of any payment or benefit that would be provided in connection with any triggering event is fully disclosed pursuant to paragraph (h) or (i) of this Item, reference may be made to that disclosure. However, to the extent that the form or amount of any such payment or benefit would be enhanced or its vesting or other provisions accelerated in connection with any triggering event, such enhancement or acceleration must be disclosed pursuant to this paragraph.

4. Where a triggering event has actually occurred for a named executive officer and that individual was not serving as a named executive officer of the registrant at the end of the last completed fiscal year, the disclosure required by this paragraph for that named executive officer shall apply only to that triggering event.

5. The registrant need not provide information with respect to contracts, agreements, plans or arrangements to the extent they do not discriminate in scope, terms or operation, in favor of executive officers of the registrant and that are available generally to all salaried employees. * * *

(t)Golden parachute compensation.

(1) In connection with any proxy or consent solicitation material providing the disclosure required by section 14A(b)(1) of the Exchange Act (15 U.S.C. 78n-1(b)(1)) or any proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§ 240.14a-101) pursuant to Note A of Schedule 14A, with respect to each named executive officer of the acquiring company and the target company, provide the information specified in paragraphs (t)(2) and (3) of this section regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the acquiring company or target company, concerning any type of compensation, whether present, deferred or contingent, that is based on or otherwise relates to an acquisition, merger, consolidation, sale or other disposition of all or substantially all assets of the issuer, as follows:

Golden Parachute Compensation

Name	Cash($)	Equity($)	Pension/NQDC($)	Perquisites/benefits($)	Taxreimbursement($)	Other($)	Total($)
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
PEO							
PFO							
A							
B							
C							

(2) The table shall include, for each named executive officer:

(i) The name of the named executive officer (column (a));

(ii) The aggregate dollar value of any cash severance payments, including but not limited to payments of base salary, bonus, and pro-rated non-equity incentive compensation plan payments (column (b));

(iii) The aggregate dollar value of:

(A) Stock awards for which vesting would be accelerated;

(B) In-the-money option awards for which vesting would be accelerated; and

(C) Payments in cancellation of stock and option awards (column (c));

(iv) The aggregate dollar value of pension and nonqualified deferred compensation benefit enhancements (column (d));

(v) The aggregate dollar value of perquisites and other personal benefits or property, and health care and welfare benefits (column (e));

(vi) The aggregate dollar value of any tax reimbursements (column (f));

(vii) The aggregate dollar value of any other compensation that is based on or otherwise relates to the transaction not properly reported in columns (b) through (f) (column (g)); and

(viii) The aggregate dollar value of the sum of all amounts reported in columns (b) through (g) (column (h)).

Instructions to Item 402(t)(2).

1. If this disclosure is included in a proxy or consent solicitation seeking approval of an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of the registrant, or in a proxy or consent solicitation that includes disclosure under Item 14 of Schedule 14A (§ 240.14a-101) pursuant to Note A of Schedule 14A, the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date, and that the price per share of the registrant's securities shall be determined as follows: If the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of the registrant's securities over the first five business days following the first public announcement of the transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the issuer's most recent filing with the Commission under the Securities Act (15 U.S.C. 77aet seq.) or Exchange Act (15 U.S.C. 78aet seq.) that required disclosure pursuant to Item 402(c).

2. If this disclosure is included in a proxy solicitation for the annual meeting at which directors are elected for purposes of subjecting the disclosed agreements or understandings to a shareholder vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n-1(a)(1)), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the last business day of the registrant's last completed fiscal year, and the price per share of the registrant's securities is the closing market price as of that date. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options.

3. In the event that uncertainties exist as to the provision of payments and benefits or the amounts involved, the registrant is required to make a reasonable estimate applicable to the payment or benefit and disclose material assumptions underlying such estimates in its disclosure. In such event, the disclosure would require forward-looking information as appropriate.

4. For each of columns (b) through (g), include a footnote quantifying each separate form of compensation included in the aggregate total reported. Include the value of all perquisites and other personal benefits or property. Individual perquisites and personal benefits shall be identified and quantified as required by Instruction 4 to Item 402(c)(2)(ix) of this section. For purposes of quantifying health care benefits, the registrant must use the assumptions used for financial reporting purposes under generally accepted accounting principles.

5. For each of columns (b) through (h), include a footnote quantifying the amount payable attributable to a double-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is conditioned upon the executive officer's termination without cause or resignation for good reason within a limited time period following the change-in-control), specifying the time-frame in which such termination or resignation must occur in order for the amount to become payable, and the amount payable attributable to a single-trigger arrangement (i.e., amounts triggered by a change-in-control for which payment is not conditioned upon such a termination or resignation of the executive officer).

6. A registrant conducting a shareholder advisory vote pursuant to § 240.14a-21(c) of this chapter to cover new arrangements and understandings, and/or revised terms of agreements and understandings that were previously

subject to a shareholder advisory vote pursuant to § 240.14a-21(a) of this chapter, shall provide two separate tables. One table shall disclose all golden parachute compensation, including both the arrangements and amounts previously disclosed and subject to a shareholder advisory vote under section 14A(a)(1) of the Exchange Act (15 U.S.C. 78n-1(a)(1)) and § 240.14a-21(a) of this chapter and the new arrangements and understandings and/or revised terms of agreements and understandings that were previously subject to a shareholder advisory vote. The second table shall disclose only the new arrangements and/or revised terms subject to the separate shareholder vote under section 14A(b)(2) of the Exchange Act and § 240.14a-21(c) of this chapter.

7. In cases where this Item 402(t)(2) requires disclosure of arrangements between an acquiring company and the named executive officers of the soliciting target company, the registrant shall clarify whether these agreements are included in the separate shareholder advisory vote pursuant to § 240.14a-21(c) of this chapter by providing a separate table of all agreements and understandings subject to the shareholder advisory vote required by section 14A(b)(2) of the Exchange Act (15 U.S.C. 78n-1(b)(2)) and § 240.14a-21(c) of this chapter, if different from the full scope of golden parachute compensation subject to Item 402(t) disclosure.

(3) Provide a succinct narrative description of any material factors necessary to an understanding of each such contract, agreement, plan or arrangement and the payments quantified in the tabular disclosure required by this paragraph. Such factors shall include, but not be limited to a description of:

(i) The specific circumstances that would trigger payment(s);

(ii) Whether the payments would or could be lump sum, or annual, disclosing the duration, and by whom they would be provided; and

(iii) Any material conditions or obligations applicable to the receipt of payment or benefits, including but not limited to non-compete, non-solicitation, non-disparagement or confidentiality agreements, including the duration of such agreements and provisions regarding waiver or breach of such agreements.

Instructions to Item 402(t).

1. A registrant that does not qualify as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(a)(3)(i), (ii) and (iii) of this section. A registrant that qualifies as a "smaller reporting company," as defined by § 229.10(f)(1) of this chapter, must provide the information required by this Item 402(t) with respect to the individuals covered by Items 402(m)(2)(i) and (ii) of this section.

2. The obligation to provide the information in this Item 402(t) shall not apply to agreements and understandings described in paragraph (t)(1) of this section with senior management of foreign private issuers, as defined in § 240.3b-4 of this chapter.

Instruction to Item 402. Specify the applicable fiscal year in the title to each table required under this Item which calls for disclosure as of or for a completed fiscal year.

6. Item 404. Transactions with related persons, promoters and certain control persons.

(a) Transactions with related persons. Describe any transaction, since the beginning of the registrant's last fiscal year, or any currently proposed transaction, in which the registrant was or is to be a participant and the amount involved exceeds $120,000, and in which any related person had or will have a direct or indirect material interest. Disclose the following information regarding the transaction:

(1) The name of the related person and the basis on which the person is a related person.

(2) The related person's interest in the transaction with the registrant, including the related person's position(s) or relationship(s) with, or ownership in, a firm, corporation, or other entity that is a party to, or has an interest in, the transaction.

(3) The approximate dollar value of the amount involved in the transaction.

(4) The approximate dollar value of the amount of the related person's interest in the transaction, which shall be computed without regard to the amount of profit or loss.

(5) In the case of indebtedness, disclosure of the amount involved in the transaction shall include the largest aggregate amount of principal outstanding during the period for which disclosure is provided, the amount thereof outstanding as of the latest practicable date, the amount of principal paid during the periods for which disclosure is provided, the amount of interest paid during the period for which disclosure is provided, and the rate or amount of interest payable on the indebtedness.

(6) Any other information regarding the transaction or the related person in the context of the transaction that is material to investors in light of the circumstances of the particular transaction.

Instructions to Item 404(a).

1. For the purposes of paragraph (a) of this Item, the term related person means:

a. Any person who was in any of the following categories at any time during the specified period for which disclosure under paragraph (a) of this Item is required:

i. Any director or executive officer of the registrant;

ii. Any nominee for director, when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director; or

iii. Any immediate family member of a director or executive officer of the registrant, or of any nominee for director when the information called for by paragraph (a) of this Item is being presented in a proxy or information statement relating to the election of that nominee for director, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of such director, executive officer or nominee for director, and any person (other than a tenant or employee) sharing the household of such director, executive officer or nominee for director; and

b. Any person who was in any of the following categories when a transaction in which such person had a direct or indirect material interest occurred or existed:

i. A security holder covered by Item 403(a) (§229.403(a)); or

ii. Any immediate family member of any such security holder, which means any child, stepchild, parent, stepparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law of such security holder, and any person (other than a tenant or employee) sharing the household of such security holder.

2. For purposes of paragraph (a) of this Item, a transaction includes, but is not limited to, any financial transaction, arrangement or relationship (including any indebtedness or guarantee of indebtedness) or any series of similar transactions, arrangements or relationships. * * *

7. Item 407. Corporate governance.

(a) Director independence. Identify each director and, when the disclosure called for by this paragraph is being presented in a proxy or information statement relating to the election of directors, each nominee for director, that is independent under the independence standards applicable to the registrant under paragraph (a)(1) of this Item. In addition, if such independence standards contain independence requirements for committees of the board of directors, identify each director that is a member of the compensation, nominating or audit committee that is not independent under such committee independence standards. If the registrant does not have a separately designated audit, nominating or compensation committee or committee performing similar functions, the registrant must provide the disclosure of directors that are not independent with respect to all members of the board of directors applying such committee independence standards.

(1) In determining whether or not the director or nominee for director is independent for the purposes of paragraph (a) of this Item, the registrant shall use the applicable definition of independence, as follows:

(i) If the registrant is a listed issuer whose securities are listed on a national securities exchange or in an inter-dealer quotation system which has requirements that a majority of the board of directors be independent, the registrant's definition of independence that it uses for determining if a majority of the board of directors is independent in compliance with the listing standards applicable to the registrant. When determining whether the members of a committee of the board of directors are independent, the registrant's definition of independence that it uses for determining if the members of that specific committee are independent in compliance with the independence standards applicable for the members of the specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the registrant uses for determining if a majority of the board of directors are independent. If the registrant does not have independence standards for a committee, the independence standards for that specific committee in the listing standards of the national securities exchange or inter-dealer quotation system that the registrant uses for determining if a majority of the board of directors are independent. * * *

(b) Board meetings and committees; annual meeting attendance. (1) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of:

(i) The total number of meetings of the board of directors (held during the period for which he has been a director); and

(ii) The total number of meetings held by all committees of the board on which he served (during the periods that he served).

(2) Describe the registrant's policy, if any, with regard to board members' attendance at annual meetings of security holders and state the number of board members who attended the prior year's annual meeting.

(c) Nominating committee. (1) If the registrant does not have a standing nominating committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of director nominees.

(2) Provide the following information regarding the registrant's director nomination process:

(i) State whether or not the nominating committee has a charter. If the nominating committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the nominating committee charter;

(ii) If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders; * * *

(d) Audit committee. (1) State whether or not the audit committee has a charter. If the audit committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the audit committee charter.

(2) If a listed issuer's board of directors determines, in accordance with the listing standards applicable to the issuer, to appoint a director to the audit committee who is not independent (apart from the requirements in §240.10A–3 of this chapter), including as a result of exceptional or limited or similar circumstances, disclose the nature of the relationship that makes that individual not independent and the reasons for the board of directors' determination.

(3)(i) The audit committee must state whether:

(A) The audit committee has reviewed and discussed the audited financial statements with management;

(B) The audit committee has discussed with the independent auditors the matters required to be discussed by the statement on Auditing Standards No. 61, as amended (AICPA, Professional Standards, Vol. 1. AU section 380), 1 as adopted by the Public Company Accounting Oversight Board in Rule 3200T;

1 Available at http://www.pcaobus.org/standards/interim_standards/auditing_standards/index_au.asp?series=300&section=300.

(C) The audit committee has received the written disclosures and the letter from the independent accountants required by Independence Standards Board Standard No. 1 (Independence Standards Board Standard No. 1, Independence Discussions with Audit Committees), 2 as adopted by the Public Company Accounting Oversight Board in Rule 3600T, and has discussed with the independent accountant the independent accountant's independence; and

2 Available at http://www.pcaobus.org/Standards/Interim_Standards/Independence_Standards/ISB1.pdf.

(D) Based on the review and discussions referred to in paragraphs (d)(3)(i)(A) through (d)(3)(i)(C) of this Item, the audit committee recommended to the board of directors that the audited financial statements be included in the company's annual report on Form 10–K (17 CFR 249.310) (or, for closed-end investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 et seq.), the annual report to shareholders required by section 30(e) of the Investment Company Act of 1940 (15 U.S.C. 80a–29(e)) and Rule 30d–1 (17 CFR 270.30d–1) thereunder) for the last fiscal year for filing with the Commission.

(ii) The name of each member of the company's audit committee (or, in the absence of an audit committee, the board committee performing equivalent functions or the entire board of directors) must appear below the disclosure required by paragraph (d)(3)(i) of this Item. * * *

(5) Audit committee financial expert.

(i)(A) Disclose that the registrant's board of directors has determined that the registrant either:

(1) Has at least one audit committee financial expert serving on its audit committee; or

(2) Does not have an audit committee financial expert serving on its audit committee.

(ii) For purposes of this Item, an audit committee financial expert means a person who has the following attributes:

(A) An understanding of generally accepted accounting principles and financial statements;

(B) The ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves;

(C) Experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant's financial statements, or experience actively supervising one or more persons engaged in such activities;

(D) An understanding of internal control over financial reporting; and

(E) An understanding of audit committee functions.

(iii) A person shall have acquired such attributes through:

(A) Education and experience as a principal financial officer, principal accounting officer, controller, public accountant or auditor or experience in one or more positions that involve the performance of similar functions;

(B) Experience actively supervising a principal financial officer, principal accounting officer, controller, public

accountant, auditor or person performing similar functions;

(C) Experience overseeing or assessing the performance of companies or public accountants with respect to the preparation, auditing or evaluation of financial statements; or

(D) Other relevant experience.

(iv) Safe harbor. (A) A person who is determined to be an audit committee financial expert will not be deemed an expert for any purpose, including without limitation for purposes of section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as an audit committee financial expert pursuant to this Item 407.

(B) The designation or identification of a person as an audit committee financial expert pursuant to this Item 407 does not impose on such person any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification.

(C) The designation or identification of a person as an audit committee financial expert pursuant to this Item does not affect the duties, obligations or liability of any other member of the audit committee or board of directors. * * *

(e) Compensation committee. (1) If the registrant does not have a standing compensation committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of executive officer and director compensation.

(2) State whether or not the compensation committee has a charter. If the compensation committee has a charter, provide the disclosure required by Instruction 2 to this Item regarding the compensation committee charter.

(3) Provide a narrative description of the registrant's processes and procedures for the consideration and determination of executive and director compensation, including:

(i)(A) The scope of authority of the compensation committee (or persons performing the equivalent functions); and

(B) The extent to which the compensation committee (or persons performing the equivalent functions) may delegate any authority described in paragraph (e)(3)(i)(A) of this Item to other persons, specifying what authority may be so delegated and to whom; * * *

(5) Under the caption "Compensation Committee Report:"

(i) The compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) must state whether:

(A) The compensation committee has reviewed and discussed the Compensation Discussion and Analysis required by Item 402(b) (§229.402(b)) with management; and

(B) Based on the review and discussions referred to in paragraph (e)(5)(i)(A) of this Item, the compensation committee recommended to the board of directors that the Compensation Discussion and Analysis be included in the registrant's annual report on Form 10–K (§249.310 of this chapter), proxy statement on Schedule 14A (§240.14a–101 of this chapter) or information statement on Schedule 14C (§240.14c–101 of this chapter).

(ii) The name of each member of the registrant's compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board of directors) must appear below the disclosure required by paragraph (e)(5)(i) of this Item. * * *

(f) Shareholder communications. (1) State whether or not the registrant's board of directors provides a process for security holders to send communications to the board of directors and, if the registrant does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of

directors that it is appropriate for the registrant not to have such a process.

(2) If the registrant has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the registrant's process for determining which communications will be relayed to board members. * * *

8. Item 501. Forepart of Registration Statement and Outside Front Cover Page of Prospectus

The registrant must furnish the following information in plain English. See Rule 421(d) of Regulation C of this chapter.

(a) *Front cover page of the registration statement.* Where appropriate, include the delaying amendment legend from Rule 473 of Regulation C of this chapter.

(b) *Outside front cover page of the prospectus.* Limit the outside cover page to one page. If the following information applies to your offering, disclose it on the outside cover page of the prospectus.

1. *Name*. The registrant's name. A foreign registrant must give the English translation of its name. * * *

2. *Title and amount of securities.* The title and amount of securities offered. Separately state the amount of securities offered by selling security holders, if any. If the underwriter has any arrangement with the issuer, such as an over-allotment option, under which the underwriter may purchase additional shares in connection with the offering, indicate that this arrangement exists and state the amount of additional shares that the underwriter may purchase under the arrangement. Give a brief description of the securities except where the information is clear from the title of the security. For example, you are not required to describe common stock that has full voting, dividend and liquidation rights usually associated with common stock.

3. *Offering price of the securities.* Where you offer securities for cash, the price to the public of the securities, the underwriter's discounts and commissions, the net proceeds you receive, and any selling shareholder's net proceeds. Show this information on both a per share or unit basis and for the total amount of the offering. If you make the offering on a minimum/maximum basis, show this information based on the total minimum and total maximum amount of the offering. You may present the information in a table, term sheet format, or other clear presentation. You may present the information in any format that fits the design of the cover page so long as the information can be easily read and is not misleading:

Instruction to paragraph 501(b)(3):

1. If a preliminary prospectus is circulated and you are not subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, provide, as applicable:

A. A bona fide estimate of the range of the maximum offering price and the maximum number of securities offered; or

B. A bona fide estimate of the principal amount of the debt securities offered.

2. If it is impracticable to state the price to the public, explain the method by which the price is to be determined. If the securities are to be offered at the market price, or if the offering price is to be determined by a formula related to the market price, indicate the market and market price of the securities as of the latest practicable date. * * *

4. *Market for the securities*. Whether any national securities exchange or the Nasdaq Stock Market lists the securities offered, naming the particular market(s), and identifying the trading symbol(s) for those securities.

5. *Risk factors.* A cross-reference to the risk factors section, including the page number where it appears in the prospectus. Highlight this cross- reference by prominent type or in another manner.

6. *State legend.* Any legend or statement required by the law of any state in which the securities are to be offered. You may combine this with any legend required by the SEC, if appropriate.

7. *Commission legend*. A legend that indicates that neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of the securities or passed upon the accuracy or adequacy of the disclosures in the prospectus and that any contrary representation is a criminal offense. You may use one of the following or other clear, plain language:

Example A: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of this prospectus.

Any representation to the contrary is a criminal offense.
Example B: Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

8. *Underwriting.*

i. Name(s) of the lead or managing underwriter(s) and an identification of the nature of the underwriting arrangements;

ii. If the offering is not made on a firm commitment basis, a brief description of the underwriting arrangements. * * *

9. *Date of prospectus.* The date of the prospectus.

10. *Prospectus "Subject to Completion" legend.* If you use the prospectus before the effective date of the registration statement, a prominent statement that:

i. The information in the prospectus will be amended or completed;

ii. A registration statement relating to these securities has been filed with the Securities and Exchange Commission;

iii. The securities may not be sold until the registration statement becomes effective; and

iv. The prospectus is not an offer to sell the securities and it is not soliciting an offer to buy the securities in any state where offers or sales are not permitted. The legend may be in the following or other clear, plain language:

The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.

11. If you use Rule 430A of this chapter to omit pricing information and the prospectus is used before you determine the public offering price, the information and legend in paragraph (b)(10) of this section.

9. Item 502. Inside Front and Outside Back Cover Pages of Prospectus

The registrant must furnish this information in plain English. See Rule 421(d) of Regulation C of this chapter.

(a) *Table of contents.* On either the inside front or outside back cover page of the prospectus, provide a reasonably detailed table of contents. It must show the page number of the various sections or subdivisions of the prospectus. Include a specific listing of the risk factors section required by Item 503 of this Regulation S-K. You must include the table of contents immediately following the cover page in any prospectus you deliver electronically.

(b) *Dealer prospectus delivery obligation.* On the outside back cover page of the prospectus, advise dealers of their prospectus delivery obligation, including the expiration date specified by Section 4(3) of the Securities Act and Rule 174 of this chapter. If you do not know the expiration date on the effective date of the registration statement, include the expiration date in the copy of the prospectus you file under Rule 424(b) of this chapter. You do not have to include this information if dealers are not required to deliver a prospectus under Rule 174 of this chapter or Section 24(d) of the Investment Company Act. You may use the following or other clear, plain language:

Dealer Prospectus Delivery Obligation

Until (insert date), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealers' obligation to deliver a prospectus when acting as underwriters and with respect to their unsold allotments or subscriptions.

10. Item 503. Prospectus Summary, Risk Factors, and Ratio of Earnings to Fixed Charges

The registrant must furnish this information in plain English. See Rule 421(d) of Regulation C of this chapter.

(a) *Prospectus summary.* Provide a summary of the information in the prospectus where the length or complexity of the prospectus makes a summary useful. The summary should be brief. The summary should not contain, and is not required to contain, all of the detailed information in the prospectus. If you provide summary business or financial information, even if you do not caption it as a summary, you still must provide that information in plain English.

Instruction to paragraph 503(a): The summary should not merely repeat the text of the prospectus but should provide a brief overview of the key aspects of the offering. Carefully consider and identify those aspects of

the offering that are the most significant and determine how best to highlight those points in clear, plain language.

(b) *Address and telephone number.* Include, either on the cover page or in the summary section of the prospectus, the complete mailing address and telephone number of your principal executive offices.

(c) *Risk factors.* Where appropriate, provide under the caption "Risk Factors" a discussion of the most significant factors that make the offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply to any issuer or any offering. Explain how the risk affects the issuer or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk. The risk factor discussion must immediately follow the summary section. If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on Rule 430A(a) of this chapter. The risk factors may include, among other things, the following:

1. Your lack of an operating history;
2. Your lack of profitable operations in recent periods;
3. Your financial position;
4. Your business or proposed business; or
5. The lack of a market for your common equity securities or securities convertible into or exercisable for common equity securities.

(d) *Ratio of earnings to fixed charges.* * * *

11. Item 504. Use of Proceeds

State how the net proceeds of the offering will be used, indicating the amount to be used for each purpose and the priority of each purpose, if all of the securities are not sold. * * *

12. Item 506. Dilution

(a) If the small business issuer is not a reporting company and is selling common equity at a price significantly more than the price paid by officers, directors, promoters and affiliated persons for common equity purchased by them during the past five years (or which they have rights to purchase) compare these prices. * * *

13. Item 507. Selling Security Holders

If any of the securities to be registered are to be offered for the account of security holders, name each such security holder, indicate the nature of any position, office, or other material relationship which the selling security holder has had within the past three years with the registrant or any of its predecessors or affiliates, and state the amount of securities of the class owned by such security holder prior to the offering, the amount to be offered for the security holder's account, the amount and (if one percent or more) the percentage of the class to be owned by such security holder after completion of the offering. * * *

14. Item 508. Plan of Distribution

(a) *Underwriters* and underwriting obligations. If the securities are to be offered through underwriters, name the principal underwriters, and state the respective amounts underwritten. Identify each such underwriter having a material relationship with the small business issuer and state the nature of the relationship. State the nature of the obligation of the underwriter(s) to take the securities, i.e., firm commitment, best efforts. * * * If there is an arrangement under which the underwriter may purchase additional shares in connection with the offering, such as an over- allotment option, describe that arrangement and disclose information on the total offering price, underwriting discounts and commissions, and total proceeds assuming the underwriter purchases all of the shares subject to that arrangement. * * *

15. Item 512. Undertakings.

Include each of the following undertakings that is applicable to the offering being registered.

(a) *Rule 415 Offering.* Include the following if the securities are registered pursuant to Rule 415 under the Securities Act (§230.415 of this chapter):

The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by section 10(a)(3) of the Securities Act of 1933;

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. * * *

(e) *Incorporated annual and quarterly reports.* Include the following if the registration statement specifically incorporates by reference (other than by indirect incorporation by reference through a Form 10–K and Form 10–KSB (§249.310 of this chapter) report) in the prospectus all or any part of the annual report to security holders meeting the requirements of Rule 14a–3 or Rule 14c–3 under the Exchange Act) §§240.14a–3 and 240.14c–3 of this chapter):

The undersigned registrant hereby undertakes to deliver or cause to be delivered with the prospectus, to each person to whom the prospectus is sent or given, the latest annual report to security holders that is incorporated by reference in the prospectus and furnished pursuant to and meeting the requirements of Rule 14a–3 or Rule 14c–3 under the Securities Exchange Act of 1934; and, where interim financial information required to be presented by Article 3 of Regulation S-X are not set forth in the prospectus, to deliver, or cause to be delivered to each person to whom the prospectus is sent or given, the latest quarterly report that is specifically incorporated by reference in the prospectus to provide such interim financial information.

(f) *Equity offerings of nonreporting registrants.* Include the following if equity securities of a registrant that prior to the offering had no obligation to file reports with the Commission pursuant to section 13(a) or 15(d) of the Exchange Act are being registered for sale in an underwritten offering:

The undersigned registrant hereby undertakes to provide to the underwriter at the closing specified in the underwriting agreements certificates in such denominations and registered in such names as required by the underwriter to permit prompt delivery to each purchaser.

(g) *Registration on Form S–4 or F–4 of securities offered for resale.* Include the following if the securities are being registered on Form S–4 or F–4 (§239.25, or 34 of this chapter) in connection with a transaction specified in paragraph (a) of Rule 145 (§230.145 of this chapter).

(1) The undersigned registrant hereby undertakes as follows: That prior to any public reoffering of the securities registered hereunder through use of a prospectus which is a part of this registration statement, by any person or party who is deemed to be an underwriter within the meaning of Rule 145(c), the issuer undertakes that such reoffering prospectus will contain the information called for by the applicable registration form with respect to reofferings by persons who may be deemed underwriters, in addition to the information called for by the other Items of the applicable form.

(2) The registrant undertakes that every prospectus (i) that is filed pursuant to paragraph (h)(1) immediately preceding, or (ii) that purports to meet the requirements of section 10(a)(3) of the Act and is used in connection with an offering of securities subject to Rule 415 (§230.415 of this chapter), will be filed as a part of an amendment to the registration statement and will not be used until such amendment is effective, and that, for purposes of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof. * * *

PP. Regulation M-A

1. Item 1000. Definitions.

The following definitions apply to the terms used in Regulation M-A (§§229.1000 through

229.1016), unless specified otherwise:

(a) Associate has the same meaning as in Rule 12b-2;

(b) Instruction C means General Instruction C to Schedule 13E-3 and General Instruction C to Schedule TO;

(c) Issuer tender offer has the same meaning as in Rule 13e-4(a)(2) of this chapter;

(d) Offeror means any person who makes a tender offer or on whose behalf a tender offer is made;

(e) Rule 13e-3 transaction has the same meaning as in §240.13e-3(a)(3) of this chapter;

(f) Subject company means the company or entity whose securities are sought to be acquired in the transaction (e.g., the target), or that is otherwise the subject of the transaction;

(g) Subject securities means the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction; and

(h) Third-party tender offer means a tender offer that is not an issuer tender offer.

2. Item 1001. Summary term sheet.

Summary term sheet. Provide security holders with a summary term sheet that is written in plain English. The summary term sheet must briefly describe in bullet point format the most material terms of the proposed transaction. The summary term sheet must provide security holders with sufficient information to understand the essential features and significance of the proposed transaction. The bullet points must cross-reference a more detailed discussion contained in the disclosure document that is disseminated to security holders.

Instructions to Item 1001:

1. The summary term sheet must not recite all information contained in the disclosure document that will be provided to security holders. The summary term sheet is intended to serve as an overview of all material matters that are presented in the accompanying documents provided to security holders.

2. The summary term sheet must begin on the first or second page of the disclosure document provided to security holders.

3. Refer to Rule 421(b) and (d) of Regulation C of the Securities Act (§230.421 of this chapter) for a description of plain English disclosure.

3. Item 1002. Subject company information.

(a) *Name and address.* State the name of the subject company (or the issuer in the case of an issuer tender offer), and the address and telephone number of its principal executive offices.

(b) *Securities.* State the exact title and number of shares outstanding of the subject class of equity securities as of the most recent practicable date. This may be based upon information in the most recently available filing with the Commission by the subject company unless the filing person has more current information.

(c) *Trading market and price.* Identify the principal market in which the subject securities are traded and state the high and low sales prices for the subject securities in the principal market (or, if there is no principal market, the range of high and low bid quotations and the source of the quotations) for each quarter during the past two years. If there is no established trading market for the securities (except for limited or sporadic quotations), so state.

(d) *Dividends.* State the frequency and amount of any dividends paid during the past two years with respect to the subject securities. Briefly describe any restriction on the subject company's current or future ability to pay dividends. If the filing person is not the subject company, furnish this information to the extent known after making reasonable inquiry.

(e) *Prior public offerings.* If the filing person has made an underwritten public offering of the subject securities for cash during the past three years that was registered under the Securities Act of 1933 or exempt from registration under Regulation A (§230.251 through §230.263 of this chapter), state the date of the offering, the amount of securities offered, the offering price per share (adjusted for stock splits, stock dividends, etc. as appropriate) and the aggregate proceeds received by the filing person.

(f) *Prior stock purchases.* If the filing person purchased any subject securities during the past two years, state the amount of the securities purchased, the range of prices paid and the average purchase price for each quarter during that period. Affiliates need not give information for purchases made before becoming an affiliate.

4. Item 1003. Identity and background of filing person.

(a) *Name and address.* State the name, business address and business telephone number of each filing person. Also state the name and address of each person specified in Instruction C to the schedule (except for Schedule 14D-9 (§240.14d-101 of this chapter)). If the filing person is an affiliate of the subject company, state the nature of the affiliation. If the filing person is the subject company, so state.

(b) *Business and background of entities.* If any filing person (other than the subject company) or any person specified in Instruction C to the schedule is not a natural person, state the person's principal business, state or other place of organization, and the information required by paragraphs (c)(3) and (c)(4) of this section for each person.

(c) *Business and background of natural persons.* If any filing person or any person specified in Instruction C to the schedule is a natural person, provide the following information for each person:

(1) Current principal occupation or employment and the name, principal business and address of any corporation or other organization in which the employment or occupation is conducted;

(2) Material occupations, positions, offices or employment during the past five years, giving the starting and ending dates of each and the name, principal business and address of any corporation or other organization in which the occupation, position, office or employment was carried on;

(3) A statement whether or not the person was convicted in a criminal proceeding during the past five years (excluding traffic violations or similar misdemeanors). If the person was convicted, describe the criminal proceeding, including the dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case;

(4) A statement whether or not the person was a party to any judicial or administrative proceeding during the past five years (except for matters that were dismissed without sanction or settlement) that resulted in a judgment, decree or final order enjoining the person from future violations of, or prohibiting activities subject to, federal or state securities laws, or a finding of any violation of federal or state securities laws. Describe the proceeding, including a summary of the terms of the judgment, decree or final order; and

(5) Country of citizenship.

(d) *Tender offer.* Identify the tender offer and the class of securities to which the offer relates, the name of the offeror and its address (which may be based on the offeror's Schedule TO (§240.14d-100 of this chapter) filed with the Commission).

Instruction to Item 1003:

If the filing person is making information relating to the transaction available on the Internet, state the address where the information can be found.

5. Item 1004. Terms of the transaction.

(a) *Material terms.* State the material terms of the transaction.

(1) *Tender offers.* In the case of a tender offer, the information must include:

(i) The total number and class of securities sought in the offer;

(ii) The type and amount of consideration offered to security holders;

(iii) The scheduled expiration date;

(iv) Whether a subsequent offering period will be available, if the transaction is a third-party tender offer;

(v) Whether the offer may be extended, and if so, how it could be extended;

(vi) The dates before and after which security holders may withdraw securities tendered in the offer;

(vii) The procedures for tendering and withdrawing securities;

(viii) The manner in which securities will be accepted for payment;

(ix) If the offer is for less than all securities of a class, the periods for accepting securities on a pro rata basis and the offeror's present intentions in the event that the offer is oversubscribed;

(x) An explanation of any material differences in the rights of security holders as a result of the transaction, if material;

(xi) A brief statement as to the accounting treatment of the transaction, if material; and

(xii) The federal income tax consequences of the transaction, if material.

(2) *Mergers or Similar Transactions.* In the case of a merger or similar transaction, the information must include:

(i) A brief description of the transaction;

(ii) The consideration offered to security holders;

(iii) The reasons for engaging in the transaction;

(iv) The vote required for approval of the transaction;

(v) An explanation of any material differences in the rights of security holders as a result

of the transaction, if material;

(vi) A brief statement as to the accounting treatment of the transaction, if material; and

(vii) The federal income tax consequences of the transaction, if material.

Instruction to Item 1004(a):

If the consideration offered includes securities exempt from registration under the Securities Act of 1933, provide a description of the securities that complies with Item 202 of Regulation S-K (§229.202). This description is not required if the issuer of the securities meets the requirements of General Instructions I.A, I.B.1 or I.B.2, as applicable, or I.C. of Form S-3 (§239.13 of this chapter) and elects to furnish information by incorporation by reference; only capital stock is to be issued; and securities of the same class are registered under section 12 of the Exchange Act and either are listed for trading or admitted to unlisted trading privileges on a national securities exchange; or are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association.

(b) *Purchases.* State whether any securities are to be purchased from any officer, director or affiliate of the subject company and provide the details of each transaction.

(c) *Different terms.* Describe any term or arrangement in the Rule 13e-3 transaction that treats any subject security holders differently from other subject security holders.

(d) *Appraisal rights.* State whether or not dissenting security holders are entitled to any appraisal rights. If so, summarize the appraisal rights. If there are no appraisal rights available under state law for security holders who object to the transaction, briefly outline any other rights that may be available to security holders under the law.

(e) *Provisions for unaffiliated security holders.* Describe any provision made by the filing person in connection with the transaction to grant unaffiliated security holders access to the corporate files of the filing person or to obtain counsel or appraisal services at the expense of the filing person. If none, so state.

(f) *Eligibility for listing or trading.* If the transaction involves the offer of securities of the filing person in exchange for equity securities held by unaffiliated security holders of the subject company, describe whether or not the filing person will take steps to assure that the securities offered are or will be eligible for trading on an automated quotations system operated by a national securities association.

6. Item 1005. Past contacts, transactions, negotiations and agreements.

(a) *Transactions.* Briefly state the nature and approximate dollar amount of any transaction, other than those described in paragraphs (b) or (c) of this section, that occurred during the past two years, between the filing person (including any person specified in Instruction C of the schedule) and;

(1) The subject company or any of its affiliates that are not natural persons if the aggregate value of the transactions is more than one percent of the subject company's consolidated revenues for:

(i) The fiscal year when the transaction occurred; or

(ii) The past portion of the current fiscal year, if the transaction occurred in the current year; and

Instruction to Item 1005(a)(1):

The information required by this Item may be based on information in the subject company's most recent filing with the Commission, unless the filing person has reason to believe the information is not accurate.

(2) Any executive officer, director or affiliate of the subject company that is a natural person if the aggregate value of the transaction or series of similar transactions with that person exceeds $60,000.

(b) *Significant corporate events.* Describe any negotiations, transactions or material contacts during the past two years between the filing person (including subsidiaries of the filing person and any person specified in Instruction C of the schedule) and the subject company or its affiliates concerning any:

(1) Merger;

(2) Consolidation;

(3) Acquisition;

(4) Tender offer for or other acquisition of any class of the subject company's securities;

(5) Election of the subject company's directors; or

(6) Sale or other transfer of a material amount of assets of the subject company.

(c) *Negotiations or contacts.* Describe any negotiations or material contacts concerning the matters referred to in paragraph (b) of this section during the past two years between:

(1) Any affiliates of the subject company; or

(2) The subject company or any of its affiliates and any person not affiliated with the subject company who would have a direct interest in such matters.

Instruction to paragraphs (b) and (c) of Item 1005:

Identify the person who initiated the contacts or negotiations.

(d) *Conflicts of interest.* If material, describe any agreement, arrangement or understanding and any actual or potential conflict of interest between the filing person or its affiliates and:

(1) The subject company, its executive officers, directors or affiliates; or

(2) The offeror, its executive officers, directors or affiliates.

Instruction to Item 1005(d):

If the filing person is the subject company, no disclosure called for by this paragraph is required in the document disseminated to security holders, so long as substantially the same information was filed with the Commission previously and disclosed in a proxy statement, report or other communication sent to security holders by the subject company in the past year. The document disseminated to security holders, however, must refer specifically to the discussion in the proxy statement, report or other communication that was sent to security holders previously. The information also must be filed as an exhibit to the schedule.

(e) *Agreements involving the subject company's securities.* Describe any agreement, arrangement, or understanding, whether or not legally enforceable, between the filing person (including any person specified in Instruction C of the schedule) and any other person with respect to any securities of the subject company. Name all persons that are a party to the agreements, arrangements, or understandings and describe all material provisions.

Instructions to Item 1005(e):

1. The information required by this Item includes: the transfer or voting of securities, joint ventures, loan or option arrangements, puts or calls, guarantees of loans, guarantees against loss, or the giving or withholding of proxies, consents or authorizations.

2. Include information for any securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person the power to direct the voting or disposition of the subject securities. No disclosure, however, is required about standard default and similar provisions contained in loan agreements.

7. Item 1006. Purposes of the transaction and plans or proposals.

(a) *Purposes.* State the purposes of the transaction.

(b) *Use of securities acquired.* Indicate whether the securities acquired in the transaction will be retained, retired, held in treasury, or otherwise disposed of.

(c) *Plans.* Describe any plans, proposals or negotiations that relate to or would result in:

(1) Any extraordinary transaction, such as a merger, reorganization or liquidation, involving the subject company or any of its subsidiaries;

(2) Any purchase, sale or transfer of a material amount of assets of the subject company or any of its subsidiaries;

(3) Any material change in the present dividend rate or policy, or indebtedness or capitalization of the subject company;

(4) Any change in the present board of directors or management of the subject company, including, but not limited to, any plans or proposals to change the number or the term of directors or to fill any existing vacancies on the board or to change any material term of the employment contract of any executive officer;

(5) Any other material change in the subject company's corporate structure or business, including, if the subject company is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by Section 13 of the Investment Company Act of 1940 (15 U.S.C. 80a-13);

(6) Any class of equity securities of the subject company to be delisted from a national securities exchange or cease to be authorized to be quoted in an automated quotations system operated by a national

securities association;

(7) Any class of equity securities of the subject company becoming eligible for termination of registration under Section 12(g)(4) of the Act (15 U.S.C. 78l);

(8) The suspension of the subject company's obligation to file reports under Section 15(d) of the Act (15 U.S.C. 78o);

(9) The acquisition by any person of additional securities of the subject company, or the disposition of securities of the subject company; or

(10) Any changes in the subject company's charter, bylaws or other governing instruments or other actions that could impede the acquisition of control of the subject company.

(d) *Subject company negotiations.* If the filing person is the subject company:

(1) State whether or not that person is undertaking or engaged in any negotiations in response to the tender offer that relate to:

(i) A tender offer or other acquisition of the subject company's securities by the filing person, any of its subsidiaries, or any other person; or

(ii) Any of the matters referred to in paragraphs (c)(1) through (c)(3) of this section; and

(2) Describe any transaction, board resolution, agreement in principle, or signed contract that is entered into in response to the tender offer that relates to one or more of the matters referred to in paragraph (d)(1) of this section.

Instruction to Item 1006(d)(1):

If an agreement in principle has not been reached at the time of filing, no disclosure under paragraph (d)(1) of this section is required of the possible terms of or the parties to the transaction if in the opinion of the board of directors of the subject company disclosure would jeopardize continuation of the negotiations. In that case, disclosure indicating that negotiations are being undertaken or are underway and are in the preliminary stages is sufficient.

8. Item 1007. Source and amount of funds or other consideration.

(a) *Source of funds.* State the specific sources and total amount of funds or other consideration to be used in the transaction. If the transaction involves a tender offer, disclose the amount of funds or other consideration required to purchase the maximum amount of securities sought in the offer.

(b) *Conditions.* State any material conditions to the financing discussed in response to paragraph (a) of this section. Disclose any alternative financing arrangements or alternative financing plans in the event the primary financing plans fall through. If none, so state.

(c) *Expenses.* Furnish a reasonably itemized statement of all expenses incurred or estimated to be incurred in connection with the transaction including, but not limited to, filing, legal, accounting and appraisal fees, solicitation expenses and printing costs and state whether or not the subject company has paid or will be responsible for paying any or all expenses.

(d) *Borrowed funds.* If all or any part of the funds or other consideration required is, or is expected, to be borrowed, directly or indirectly, for the purpose of the transaction:

(1) Provide a summary of each loan agreement or arrangement containing the identity of the parties, the term, the collateral, the stated and effective interest rates, and any other material terms or conditions of the loan; and

(2) Briefly describe any plans or arrangements to finance or repay the loan, or, if no plans or arrangements have been made, so state.

Instruction to Item 1007(d):

If the transaction is a third-party tender offer and the source of all or any part of the funds used in the transaction is to come from a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act (15 U.S.C. 78c), the name of the bank will not be made available to the public if the filing person so requests in writing and files the request, naming the bank, with the Secretary of the Commission.

9. Item 1008. Interest in securities of the subject company.

(a) *Securities ownership.* State the aggregate number and percentage of subject securities that are

beneficially owned by each person named in response to Item 1003 of Regulation M-A (§229.1003) and by each associate and majority-owned subsidiary of those persons. Give the name and address of any associate or subsidiary.

Instructions to Item 1008(a):

1. For purposes of this section, beneficial ownership is determined in accordance with Rule 13d-3 (§240.13d-3 of this chapter) under the Exchange Act. Identify the shares that the person has a right to acquire.

2. The information required by this section may be based on the number of outstanding securities disclosed in the subject company's most recently available filing with the Commission, unless the filing person has more current information.

3. The information required by this section with respect to officers, directors and associates of the subject company must be given to the extent known after making reasonable inquiry.

(b) *Securities transactions.* Describe any transaction in the subject securities during the past 60 days. The description of transactions required must include, but not necessarily be limited to:

(1) The identity of the persons specified in the Instruction to this section who effected the transaction;
(2) The date of the transaction;
(3) The amount of securities involved;
(4) The price per share; and
(5) Where and how the transaction was effected.

Instructions to Item 1008(b):

1. Provide the required transaction information for the following persons:

(a) The filing person (for all schedules);
(b) Any person named in Instruction C of the schedule and any associate or majority-owned subsidiary of the issuer or filing person (for all schedules except Schedule 14D-9 (§240.14d-101 of this chapter));
(c) Any executive officer, director, affiliate or subsidiary of the filing person (for Schedule 14D-9 (§240.14d-101 of this chapter);
(d) The issuer and any executive officer or director of any subsidiary of the issuer or filing person (for an issuer tender offer on Schedule TO (§240.14d-100 of this chapter)); and
(e) The issuer and any pension, profit-sharing or similar plan of the issuer or affiliate filing the schedule (for a going-private transaction on Schedule 13E-3 (§240.13e-100 of this chapter)).

2. Provide the information required by this Item if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not initially available, it must be obtained and filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders. The procedure specified by this instruction is provided to maintain the confidentiality of information in order to avoid possible misuse of inside information.

10. Item 1009. Persons/assets, retained, employed, compensated or used.

(a) *Solicitations or recommendations.* Identify all persons and classes of persons that are directly or indirectly employed, retained, or to be compensated to make solicitations or recommendations in connection with the transaction. Provide a summary of all material terms of employment, retainer or other arrangement for compensation.
(b) *Employees and corporate assets.* Identify any officer, class of employees or corporate assets of the subject company that has been or will be employed or used by the filing person in connection with the transaction. Describe the purpose for their employment or use.

Instruction to Item 1009(b):

Provide all information required by this Item except for the information required by paragraph (a) of this section and Item 1007 of Regulation M-A (§229.1007).

11. Item 1010. Financial statements.

(a) *Financial information.* Furnish the following financial information:

(1) Audited financial statements for the two fiscal years required to be filed with the company's most recent annual report under Sections 13 and 15(d) of the Exchange Act (15 U.S.C. 78m; 15 U.S.C. 78o);

(2) Unaudited balance sheets, comparative year-to-date income statements and related earnings per share data, statements of cash flows, and comprehensive income required to be included in the company's most recent quarterly report filed under the Exchange Act;

(3) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S-K (§229.503(d)), for the two most recent fiscal years and the interim periods provided under paragraph (a)(2) of this section; and

(4) Book value per share as of the date of the most recent balance sheet presented.

(b) *Pro forma information.* If material, furnish pro forma information disclosing the effect of the transaction on:

(1) The company's balance sheet as of the date of the most recent balance sheet presented under paragraph (a) of this section;

(2) The company's statement of income, earnings per share, and ratio of earnings to fixed charges for the most recent fiscal year and the latest interim period provided under paragraph (a)(2) of this section; and

(3) The company's book value per share as of the date of the most recent balance sheet presented under paragraph (a) of this section.

(c) *Summary Information.* Furnish a fair and adequate summary of the information specified in paragraphs (a) and (b) of this section for the same periods specified. A fair and adequate summary includes:

(1) The summarized financial information specified in §210.1-02(bb)(1) of this chapter;

(2) Income per common share from continuing operations (basic and diluted, if applicable);

(3) Net income per common share (basic and diluted, if applicable);

(4) Ratio of earnings to fixed charges, computed in a manner consistent with Item 503(d) of Regulation S-K (§229.503(d));

(5) Book value per share as of the date of the most recent balance sheet; and

(6) If material, pro forma data for the summarized financial information specified in paragraph (c)(1) through (c)(5) of this section disclosing the effect of the transaction.

12. Item 1011. Additional information.

(a) *Agreements, regulatory requirements and legal proceedings.* If material to a security holder's decision whether to sell, tender or hold the securities sought in the tender offer, furnish the following information:

(1) Any present or proposed material agreement, arrangement, understanding or relationship between the offeror or any of its executive officers, directors, controlling persons or subsidiaries and the subject company or any of its executive officers, directors, controlling persons or subsidiaries (other than any agreement, arrangement or understanding disclosed under any other sections of Regulation M-A (§§229.1000 through 229.1016));

Instruction to paragraph (a)(1):

In an issuer tender offer disclose any material agreement, arrangement, understanding or relationship between the offeror and any of its executive officers, directors, controlling persons or subsidiaries.

(2) To the extent known by the offeror after reasonable investigation, the applicable regulatory requirements which must be complied with or approvals which must be obtained in connection with the tender offer;

(3) The applicability of any anti-trust laws;

(4) The applicability of margin requirements under Section 7 of the Act (15 U.S.C. 78g) and the

applicable regulations; and

(5) Any material pending legal proceedings relating to the tender offer, including the name and location of the court or agency in which the proceedings are pending, the date instituted, the principal parties, and a brief summary of the proceedings and the relief sought.

Instruction to Item 1011(a)(5):

A copy of any document relating to a major development (such as pleadings, an answer, complaint, temporary restraining order, injunction, opinion, judgment or order) in a material pending legal proceeding must be furnished promptly to the Commission staff on a supplemental basis.

(b) Furnish the information required by Item 402(t)(2) and (3) of this part (§ 229.402(t)(2) and (3)) and in the tabular format set forth in Item 402(t)(1) of this part (§ 229.402(t)(1)) with respect to each named executive officer

(1) Of the subject company in a Rule 13e-3 transaction; or

(2) Of the issuer whose securities are the subject of a third-party tender offer, regarding any agreement or understanding, whether written or unwritten, between such named executive officer and the subject company, issuer, bidder, or the acquiring company, as applicable, concerning any type of compensation, whether present, deferred or contingent, that is based upon or otherwise relates to the Rule 13e-3 transaction or third-party tender offer.

Instructions to Item 1011(b).

1. The obligation to provide the information in paragraph (b) of this section shall not apply where the issuer whose securities are the subject of the Rule 13e-3 transaction or tender offer is a foreign private issuer, as defined in § 240.3b-4 of this chapter.
2. For purposes of Instruction 1 to Item 402(t)(2) of this part: If the disclosure is included in a Schedule 13E-3 (§ 240.13e-100 of this chapter) or Schedule 14D-9 (§ 240.14d-101 of this chapter), the disclosure provided by this table shall be quantified assuming that the triggering event took place on the latest practicable date and that the price per share of the securities of the subject company in a Rule 13e-3 transaction, or of the issuer whose securities are the subject of the third-party tender offer, shall be determined as follows: If the shareholders are to receive a fixed dollar amount, the price per share shall be that fixed dollar amount, and if such value is not a fixed dollar amount, the price per share shall be the average closing market price of such securities over the first five business days following the first public announcement of the transaction. Compute the dollar value of in-the-money option awards for which vesting would be accelerated by determining the difference between this price and the exercise or base price of the options. Include only compensation that is based on or otherwise relates to the subject transaction. Apply Instruction 1 to Item 402(t) with respect to those executive officers for whom disclosure was required in the most recent filing by the subject company in a Rule 13e-3 transaction or by the issuer whose securities are the subject of a third-party tender offer, with the Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.) that required disclosure pursuant to Item 402(c).

13. Item 1012. The solicitation or recommendation.

(a) *Solicitation or recommendation.* State the nature of the solicitation or the recommendation. If this statement relates to a recommendation, state whether the filing person is advising holders of the subject securities to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, describe the other action recommended. If the filing person is the subject company and is not making a recommendation, state whether the subject company is expressing no opinion and is remaining neutral toward the tender offer or is unable to take a position with respect to the tender offer.

(b) *Reasons.* State the reasons for the position (including the inability to take a position) stated in paragraph (a) of this section. Conclusory statements such as "The tender offer is in the best interests of shareholders" are not considered sufficient disclosure.

(c) *Intent to tender.* To the extent known by the filing person after making reasonable inquiry, state whether the filing person or any executive officer, director, affiliate or subsidiary of the filing person currently intends to tender, sell or hold the subject securities that are held of record or beneficially owned by that person.

(d) *Intent to tender or vote in a going-private transaction.* To the extent known by the filing person after making reasonable inquiry, state whether or not any executive officer, director or affiliate of the issuer (or any person

specified in Instruction C to the schedule) currently intends to tender or sell subject securities owned or held by that person and/or how each person currently intends to vote subject securities, including any securities the person has proxy authority for. State the reasons for the intended action.

Instruction to Item 1012(d):

Provide the information required by this section if it is available to the filing person at the time the statement is initially filed with the Commission. If the information is not available, it must be filed with the Commission promptly, but in no event later than three business days after the date of the initial filing, and if material, disclosed in a manner reasonably designed to inform security holders.

(e) *Recommendations of others.* To the extent known by the filing person after making reasonable inquiry, state whether or not any person specified in paragraph (d) of this section has made a recommendation either in support of or opposed to the transaction and the reasons for the recommendation.

14. Item 1013. Purposes, alternatives, reasons and effects in a going-private transaction.

(a) *Purposes.* State the purposes for the Rule 13e-3 transaction.
(b) *Alternatives.* If the subject company or affiliate considered alternative means to accomplish the stated purposes, briefly describe the alternatives and state the reasons for their rejection.
(c) *Reasons.* State the reasons for the structure of the Rule 13e-3 transaction and for undertaking the transaction at this time.
(d) *Effects.* Describe the effects of the Rule 13e-3 transaction on the subject company, its affiliates and unaffiliated security holders, including the federal tax consequences of the transaction.

Instructions to Item 1013:

1. Conclusory statements will not be considered sufficient disclosure in response to this section.
2. The description required by paragraph (d) of this section must include a reasonably detailed discussion of both the benefits and detriments of the Rule 13e-3 transaction to the subject company, its affiliates and unaffiliated security holders. The benefits and detriments of the Rule 13e-3 transaction must be quantified to the extent practicable.
3. If this statement is filed by an affiliate of the subject company, the description required by paragraph (d) of this section must include, but not be limited to, the effect of the Rule 13e-3 transaction on the affiliate's interest in the net book value and net earnings of the subject company in terms of both dollar amounts and percentages.

15. Item 1014. Fairness of the going-private transaction.

(a) *Fairness.* State whether the subject company or affiliate filing the statement reasonably believes that the Rule 13e-3 transaction is fair or unfair to unaffiliated security holders. If any director dissented to or abstained from voting on the Rule 13e-3 transaction, identify the director, and indicate, if known, after making reasonable inquiry, the reasons for the dissent or abstention.
(b) *Factors considered in determining fairness.* Discuss in reasonable detail the material factors upon which the belief stated in paragraph (a) of this section is based and, to the extent practicable, the weight assigned to each factor. The discussion must include an analysis of the extent, if any, to which the filing person's beliefs are based on the factors described in Instruction 2 of this section, paragraphs (c), (d) and (e) of this section and Item 1015 of Regulation M-A (§229.1015).
(c) *Approval of security holders.* State whether or not the transaction is structured so that approval of at least a majority of unaffiliated security holders is required.
(d) *Unaffiliated representative.* State whether or not a majority of directors who are not employees of the subject company has retained an unaffiliated representative to act solely on behalf of unaffiliated security holders for purposes of negotiating the terms of the Rule 13e-3 transaction and/or preparing a report concerning the fairness of the transaction.
(e) *Approval of directors.* State whether or not the Rule 13e-3 transaction was approved by a majority of the directors of the subject company who are not employees of the subject company.

(f) *Other offers.* If any offer of the type described in paragraph (viii) of Instruction 2 to this section has been received, describe the offer and state the reasons for its rejection.

Instructions to Item 1014:

1. A statement that the issuer or affiliate has no reasonable belief as to the fairness of the Rule 13e-3 transaction to unaffiliated security holders will not be considered sufficient disclosure in response to paragraph (a) of this section.

2. The factors that are important in determining the fairness of a transaction to unaffiliated security holders and the weight, if any, that should be given to them in a particular context will vary. Normally such factors will include, among others, those referred to in paragraphs (c), (d) and (e) of this section and whether the consideration offered to unaffiliated security holders constitutes fair value in relation to:

(i) Current market prices;
(ii) Historical market prices;
(iii) Net book value;
(iv) Going concern value;
(v) Liquidation value;
(vi) Purchase prices paid in previous purchases disclosed in response to Item 1002(f) of Regulation M-A (§229.1002(f));
(vii) Any report, opinion, or appraisal described in Item 1015 of Regulation M-A (§229.1015); and
(viii) Firm offers of which the subject company or affiliate is aware made by any unaffiliated person, other than the filing persons, during the past two years for:
(A) The merger or consolidation of the subject company with or into another company, or vice versa;
(B) The sale or other transfer of all or any substantial part of the assets of the subject company; or
(C) A purchase of the subject company's securities that would enable the holder to exercise control of the subject company.

3. Conclusory statements, such as "The Rule 13e-3 transaction is fair to unaffiliated security holders in relation to net book value, going concern value and future prospects of the issuer" will not be considered sufficient disclosure in response to paragraph (b) of this section.

16. Item 1015. Reports, opinions, appraisals and negotiations.

(a) *Report, opinion or appraisal.* State whether or not the subject company or affiliate has received any report, opinion (other than an opinion of counsel) or appraisal from an outside party that is materially related to the Rule 13e-3 transaction, including, but not limited to: any report, opinion or appraisal relating to the consideration or the fairness of the consideration to be offered to security holders or the fairness of the transaction to the issuer or affiliate or to security holders who are not affiliates.

(b) *Preparer and summary of the report, opinion or appraisal.* For each report, opinion or appraisal described in response to paragraph (a) of this section or any negotiation or report described in response to Item 1014(d) of Regulation M-A (§229.1014) or Item 14(b)(6) of Schedule 14A (§240.14a-101 of this chapter) concerning the terms of the transaction:

(1) Identify the outside party and/or unaffiliated representative;
(2) Briefly describe the qualifications of the outside party and/or unaffiliated representative;
(3) Describe the method of selection of the outside party and/or unaffiliated representative;
(4) Describe any material relationship that existed during the past two years or is mutually understood to be contemplated and any compensation received or to be received as a result of the relationship between:
(i) The outside party, its affiliates, and/or unaffiliated representative; and
(ii) The subject company or its affiliates;
(5) If the report, opinion or appraisal relates to the fairness of the consideration, state whether the subject company or affiliate determined the amount of consideration to be paid or whether the outside party recommended the amount of consideration to be paid; and
(6) Furnish a summary concerning the negotiation, report, opinion or appraisal. The summary must include, but need not be limited to, the procedures followed; the findings and recommendations; the bases for and methods of arriving at such findings and recommendations; instructions received from the subject

company or affiliate; and any limitation imposed by the subject company or affiliate on the scope of the investigation.

Instruction to Item 1015(b):

The information called for by paragraphs (b)(1), (2) and (3) of this section must be given with respect to the firm that provides the report, opinion or appraisal rather than the employees of the firm that prepared the report.

(c) *Availability of documents.* Furnish a statement to the effect that the report, opinion or appraisal will be made available for inspection and copying at the principal executive offices of the subject company or affiliate during its regular business hours by any interested equity security holder of the subject company or representative who has been so designated in writing. This statement also may provide that a copy of the report, opinion or appraisal will be transmitted by the subject company or affiliate to any interested equity security holder of the subject company or representative who has been so designated in writing upon written request and at the expense of the requesting security holder.

17. Item 1016. Exhibits.

File as an exhibit to the schedule:

(a) Any disclosure materials furnished to security holders by or on behalf of the filing person, including:

(1) Tender offer materials (including transmittal letter);

(2) Solicitation or recommendation (including those referred to in Item 1012 of Regulation M-A (§229.1012));

(3) Going-private disclosure document;

(4) Prospectus used in connection with an exchange offer where securities are registered under the Securities Act of 1933; and

(5) Any other disclosure materials;

(b) Any loan agreement referred to in response to Item 1007(d) of Regulation M-A (§229.1007(d));

Instruction to Item 1016(b):

If the filing relates to a third-party tender offer and a request is made under Item 1007(d) of Regulation M-A (§229.1007(d)), the identity of the bank providing financing may be omitted from the loan agreement filed as an exhibit.

(c) Any report, opinion or appraisal referred to in response to Item 1014(d) or Item 1015 of Regulation M-A (§229.1014(d) or §229.1015);

(d) Any document setting forth the terms of any agreement, arrangement, understanding or relationship referred to in response to Item 1005(e) or Item 1011(a)(1) of Regulation M-A (§229.1005(e) or §229.1011(a)(1));

(e) Any agreement, arrangement or understanding referred to in response to §229.1005(d), or the pertinent portions of any proxy statement, report or other communication containing the disclosure required by Item 1005(d) of Regulation M-A (§229.1005(d));

(f) A detailed statement describing security holders' appraisal rights and the procedures for exercising those appraisal rights referred to in response to Item 1004(d) of Regulation M-A (§229.1004(d));

(g) Any written instruction, form or other material that is furnished to persons making an oral solicitation or recommendation by or on behalf of the filing person for their use directly or indirectly in connection with the transaction; and

(h) Any written opinion prepared by legal counsel at the filing person's request and communicated to the filing person pertaining to the tax consequences of the transaction.

Exhibit Table to Item 1016 of Regulation M-A [13E-3 TO 14D-9]

Disclosure Material	X	X	X
Loan Agreement	X	X	.....
Report, Opinion or Appraisal	X	.....	.....
Contracts, Arrangements or Understandings	X	X	X
Statement re: Appraisal Rights	X	.....	.....

Oral Solicitation Materials	X	X	X
Tax Opinion	.....	X	.....

QQ. *Interpretation of Reg. M-A, SEC Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations of Reg. M-A and Related Provisions (July 2000)*

Regulation M-A Release, No. 33-7760, Oct. 22, 1999

A. Public Announcement

Question 1
Q:
If an issuer makes a routine announcement that it intends to make an issuer tender offer sometime in the future, without specifying an exact date, does that trigger the requirement to file written communications made in connection with or relating to the offer?

A:
Yes, see Question A.2. Note that communication restrictions on issuer tender offers are new.

Question 2
Q:
"Public announcement" is defined in Rule 165(c) and the revised tender offer rules, but does not address the specificity of the announcement. Would a vague announcement that does not identify a specific transaction constitute a public announcement that would trigger the obligations of the rule? For example: "We are seeking a buyer for our company..." or "In the third quarter of the year, we intend to make an issuer tender offer at a price to be decided at the time..."

A:
A statement may be a public announcement even if all of the terms of the transaction are not set. If the parties to the transaction are announced, that should be enough to trigger the announcement. For example, if XCo publicly states its intention to acquire YCo, even if it does not give a time frame, price or form of the transaction, this should constitute a public announcement. Similarly, if a company publicly states that it intends to have an issuer tender offer later in the year, this should constitute a public announcement. This result should not be too burdensome since the only communications that need to be filed are those in connection with or relating to the transaction.

In contrast, a public statement that does not identify the parties, for example, a statement that a company is looking for a buyer or is looking for acquisition targets, should not constitute a "public announcement" within the meaning of the rules. Basically, the test is a sliding scale. The more specific that the announcement gets the more likely that it will commence application of the rules.

Question 3
Q:
When does a bidder pay the filing fee, on announcement or commencement? The issue comes up because preliminary written communications must be filed under cover of Schedule TO.

A:
The filing fee must be paid on commencement, when the tender offer disclosure document is filed. See Instruction D to Schedule TO.

B. Filing of Written Information

Question 1
Q:
As a condition to the Rule 165 exemption, offerors must file written communications in connection with or relating to a business combination. Must a written communication be filed if it is not an offer to sell or a solicitation of an offer to buy?

A:

No, if a communication is not an offer to sell or a solicitation of an offer to buy the Rule 165 exemption will not be needed. Therefore, it is not necessary to comply with the conditions of the rule. The party to the transaction and its counsel should make this determination, based upon the facts and circumstances, in accordance with traditional legal principles. A similar analysis also applies to the need to file material under the proxy or tender offer rules. See Question D.1.

Question 2
Q:
Rule 165 requires offerors to file written communications in connection with or relating to a business combination. If a company uses electronic technology--such as posting audio or video information over the Internet--in connection with a business combination, must the company file these materials? One area this might come up is in an Internet road show relating to a planned business combination. Similarly, if a company uses the telephone or Internet technology to make a telephone conversation with analysts or other conference call available to the public, must the company file a transcript of the conversation?

A:
See Note 37 to Release No. 33-7760, which indicates that written communications include electronic communications and other future applications of changing technology. The note states that parties that use videos and CD-ROMs must file them on EDGAR by means of a transcript. (If the transaction relates to a company that is not required to file electronically, such as a foreign private issuer, the transcript will be filed in paper.) It is similarly our view that parties that use Internet or telephone technology to make available video or audio materials in connection with a business combination transaction must file transcripts of those materials.
The staff, however, will not object if parties do not file live, "real-time" audio or video material. For example, a company need not file a transcript of a live video or audio presentation, whether made available over the Internet or by telephone, so long as the presentation does not continue to be made available after it is completed.

This interpretation also applies to the filing of proxy material under Rule 14a-12 and tender offer material under Rules 14d-2 and 14d-6.

Question 3
Q:
If a company decides to make a live presentation, such as a speech or a telephone call to analysts, available to the public afterwards, how should it handle the legend required by Rule 165(c)(1) and similar provisions of the proxy and tender offer rules?

A:
The company is not required to state the legend in the initial live presentation, although it may wish to do so as a matter of good practice. Whether or not the legend is in the live presentation, however, it must be inserted in the material when it is subsequently made available. For example,

- the company should insert the legend in writing at the top of the transcript in the material filed with the SEC;

- in addition, if the company is making the presentation available by telephone, the company should record the legend as part of the phone call so that persons calling in will hear the legend before the conversation begins; and

- if the company is making the presentation available over the Internet in video or audio form, the company may either insert the legend in audio or video form at the beginning of the presentation, or include the legend on its Internet site in the same place where viewers are instructed to "click here" for the video or audio presentation of the particular material.

Question 4
Q:
A company official has a script prepared for a speech he/she is giving about the deal. The speech will be read aloud from the script. Does the script have to be filed?

A:
No. If, however, the script is given out to the audience or the press, attached to a press release, or otherwise distributed, it must be filed. Similarly, if the script is widely distributed throughout the company so the speech can be given many times, it must be filed; this would be analogous to the "proxy solicitation scripts" that are routinely filed.

Question 5
Q:
A company wishes to send a separate communication about the deal to its employees. It plans to send them the basic communication that has already been filed, along with a separate Q & A sheet addressing particular concerns of employees. Must the Q & A sheet be filed?

A:
If this information is reasonably viewed as offering material, it must be filed, since the Q & A sheet will be adding substance to what has previously been filed. Employees are often shareholders, and concerns of employees regarding the transaction may very well be relevant to the investing public at large. In contrast, if the company does not have a Q & A sheet, but instead simply uses a cover letter whose tenor is, "Dear Employee, you may be interested to read the attached letter about the exchange offer" (attaching the communication that has previously been filed), the company would not have to file the cover letter. This is because it would not be providing any information about the transaction in addition to what already has been filed. See note 46 to the release.

Question 6
Q:
Must a bidder file the written communications made to a bank or other financial institution when making financing arrangements for an offer?

A:
No. Communications with banks or other lending institutions in connection with financing arrangements for an offer would not have to be filed. Communications with lenders would be considered internal communications among the parties to the transaction.

Question 7
Q:
Does the company have to file with the Commission all the information it files with other regulators (*e.g.*, IRS, antitrust, material filed with foreign regulators?)

A:
This depends on the circumstances. In most cases, the answer is no, especially where the information is not public. It was not our intent to become a repository of all the information filed with regulators around the world. In most cases, the filings will not have new or different information from what is already required to be filed with the Commission. However, if the filing with the foreign regulator were public, used to communicate with investors, and had new or different information, it could be viewed as an offer that would have to be filed.

Question 8
Q:
If an issuer has publicly announced a business combination transaction, does it need to file the written communications made to a credit rating agency under Rule 425 if they discuss an upcoming business combination? The written communications are made as a part of the company's annual presentation to the rating agency for purposes of obtaining a credit rating for the company's debt securities.

A:
No, so long as the information is not published or otherwise disseminated to security holders. Generally, credit rating agencies do not own securities in the companies that they rate. These communications would not be viewed as offers.

Question 9
Q:
If the offeror and target jointly issue a press release announcing a proposed merger where the consideration consists of securities, what are the filing obligations for these parties under the new regulatory scheme?

A:
The *offeror* must file the press release under Rule 425. If the offeror also is participating in a proxy solicitation, the material is subject to the proxy rules, but the offeror need not make a separate filing under Rule 14a-12, since Note 2 to Rule 425 provides that the filing would be deemed filed under other applicable regulatory sections. However, in this event the Rule 425 filing would have to comply with the disclosure requirements of Rule 14a-12. For example, it would have to contain the participant information called for by Rule 14a-12(a). See Question D.2.
The *target* has a separate filing obligation. Note 2 to Rule 425 does not apply, since that note eliminates the need for duplicative filings by the same party. Each different party has its own liability and must make its own filings. If the

target's security holders are voting on the transaction, then any written statements by the target regarding the transaction may be soliciting material that must be filed under Rule 14a-12. Also, if the target views itself as joining with the bidder in making the offer, the target may want to rely on the Rule 165 exemption from Section 5 and file the written communications under Rule 425 (which would be deemed filed under Rule 14a-12). See Rule 165(d).

Question 10
Q:
Must a dealer-manager that is retained by a bidder in an exchange offer file under Rule 425 any scripts or other written materials used to solicit tenders in the offer?

A:
Yes. A dealer-manager retained by the bidder would in most circumstances be viewed as acting on behalf of the bidder. Even where the dealer-manager is paid the same soliciting fee that all other broker-dealers are paid for tenders, any written materials or scripts used by the dealer-manager are most likely based on information received from the bidder. In addition, the bidder will most likely review and approve the written materials before they are used by the dealer-manager to solicit tenders. Therefore, the dealer-manager should file any written materials it uses to solicit tenders, including scripts.

Question 11
Q:
It is important to identify the filing person and subject company correctly for purposes of Rule 425(c). In the case of an EDGAR filing, misidentifying these parties in the header tags will make it difficult for the SEC staff and public users of the information to locate the filing.
(a) Who is the "filing person"?

A:
The "filing person" is the person making communications about a proposed business combination transaction in reliance on Rules 165 and 166. This person usually is the acquiror, but also may be the subject company or some other party.

Q:
(b) Who is the "subject company"?

A:
The "subject company" is the company whose securities are sought in the proposed business combination transaction. The subject company is sometimes referred to as the "target" company.

Question 12
Q:
What file number should a filing person use in the upper right-hand corner of a communication filed under Rule 425?

A:
When filing written communications about a business combination transaction in reliance on new Rules 165 and 166, use the Securities Act file number of the registration statement (*e.g.*, Form S-4) for the transaction if one has been filed. If a registration statement has not yet been filed, then use the Exchange Act file number (zero-dash or one-dash) of the subject company. If the subject company has no Exchange Act file number (*e.g.*, it is a private company), then use the filing person's Exchange Act file number. If neither the filing person nor the subject company has an Exchange Act number, use a correspondence (132-dash) file number obtained from the file desk.

In a merger of equals where two companies merge into a newly-formed public company, use the file number of the new company (the Securities Act file number of the registration statement). If the registration statement has not been filed, use the file number of one of the component companies--whichever "subject company" made the communication.

Question 13
Q:
When making communications relating to a business combination in reliance on Rule 165 or 166, is a company required to file its Exchange Act reports under Rule 425 if they contain information relating to the transaction?

A:

No. Information that is required to be disclosed in an annual or other Exchange Act report, including the company's glossy annual report to shareholders, need not be filed under Rule 425 so long as the information in the report is being disclosed solely to satisfy the requirements of that report. If, however, a report contains information that goes well beyond the information that is required to be disclosed, and is included to publicize the transaction, the information (not the complete Exchange Act report) would need to be filed separately under Rule 425. Note that providing information in a voluntarily filed Form 8-K does not eliminate the need to file the information under Rule 425.

Question 14
Q:
If a company official is quoted in a newspaper or other media article regarding a business combination, is the company required to file the article under Rule 425? Suppose an article is published based on a company press conference or an in-depth interview with a company official?

A:
Articles that merely quote a company official discussing a business combination transaction would not be viewed as a written communication by a party to the transaction or a person acting on their behalf. This is true even if the article is based on a public communication by the company such as a press conference. The article is viewed as a communication by someone other than a party to the transaction or a person acting on behalf of a party.

In contrast, if a party to the transaction controls or arranges for an article to be published, pays for the article to be published, or disseminates the article (for example, by placing the article on the party's website as discussed in the following question), the article would be a written communication that must be filed under Rule 425. For example, if a company official gives an in-depth interview with a member of the press with the understanding that the interview will be published substantially verbatim, the interview would need to be filed by the company.

Question 15
Q:
If a company posts an article on its website that discusses a business combination involving the company or otherwise provides a hyperlink to that article, would the company need to file the article under Rule 425?

A:
If a party to a business combination posts an article discussing the transaction on its website, the article would be a written communication that must be filed under Rule 425. If the website provides a hyperlink to the article, a strong inference arises that the party has adopted that information, and accordingly must file the article under Rule 425. See Release No. 33-7856 (April 28, 2000), Part II.B.

Question 16
Q:
Do written communications made in reliance on Rule 134 have to be filed under Rule 425?

A:
No. If the party relies on Rule 135 to make its first public announcement and does not go beyond Rules 135 and 134 before the registration statement is effective, the only written communication that must be filed is the initial Rule 135 communication. If the party is relying on Rule 165 to communicate and for some reason then wants to make a limited written communication pursuant to Rule 134, that limited communication would not have to be filed under Rule 425.

Question 17
Q:
After a registration statement is filed, must communications relating to or in connection with the offer continue to be filed under Rule 425?

A:
Communications viewed as offers must be filed under Rules 424 or 425 (or as post-effective amendments), as appropriate, until the offering period is over. In general, communications that must be part of the mandated prospectus must be filed under Rule 424 or as post-effective amendments, as was the case before the new regulatory scheme was adopted. "Optional" communications may be filed under Rule 425 instead. See note 52 of the Regulation M-A release.

Question 18
Q:

Must soliciting material filed under Rule 425 that is used after the definitive proxy statement has been filed or additional tender offer material used after commencement of the offer also be filed under the proxy or tender offer rules?

A:
Certain communications filed under Rule 425 satisfy the filing requirements under the proxy and tender offer rules. See Instruction 2 to Rule 425, which specifies that communications made under Rules 13e-4(c), 14a-12(b), 14d-2(b) and 14d-9(a) may be covered by the Rule 425 filing. These communications, however, generally are limited to those made before filing a proxy statement or tender offer statement.

Rule 14a-6(j) under the proxy rules states that merger proxy materials filed under Rules 424 or 425, or as part of the registration statement, will be deemed filed under the proxy rules even if they are filed only under the Securities Act. But there is no analogous provision in the tender offer rules. Accordingly, in a registered exchange offer, post-commencement communications filed under the Securities Act also must be filed as an amendment to the Schedule TO. The information may be incorporated by reference as provided by General Instruction F of Schedule TO.

C. Scope of Rule 165

Question 1
Q:
What is the scope of Rule 165 in circumstances where the issuer contemporaneously engages in a business combination and capital-raising transaction?

A:
Rule 165 creates an exemption from Sections 5(c) and 5(b)(1) for written communications that offer to sell or solicit offers to buy securities in connection with or related to a business combination transaction so long as those communications are filed upon first use in accordance with Rule 425. Rule 165 does not protect communications in connection with capital-raising transactions, which are still fully subject to the Section 5 restrictions on communications before and after the filing of a registration statement. In situations where an issuer contemporaneously engages in a business combination transaction and a capital-raising transaction, whether or not an issuer can rely on Rule 165 for a specific communication depends on analysis of the facts and circumstances surrounding the communication. Absent the protection of the exemption provided in Rule 165, the dissemination and filing of a communication in connection with the business combination transaction may result in "gun jumping" or illegal free writing in connection with the contemporaneous capital-raising transaction. The preliminary note to Rule 165 states that the exemption does not apply to communications that may be in technical compliance with the rule, "but have the primary *purpose or effect* of conditioning the market for another transaction, such as a capital- raising transaction" (emphasis added). Thus, in the event of contemporaneous transactions, issuers and their counsel must analyze the proposed communication to determine whether its primary purpose or effect relates to the capital-raising transaction. If so, the communication will not be covered by Rule 165. Factors to be considered in determining whether the primary purpose or effect of the communication is capital-raising include, but are not limited to, the following:

1. The audience or targeted audience for the communication. (For example, does the audience consist primarily of potential investors or existing shareholders?)
2. The context in which the communication is made. (For example, is the communication part of a larger package of communications that relate to the business combination transaction?)
3. The content of the communication. (Is the substance of the communication primarily aimed at informing an investment decision in the capital-raising transaction or a voting decision in the business combination transaction?)

We recognize that the purpose of some capital-raising transactions is to finance a contemporaneous business combination. For example, an issuer may offer and sell either debt or equity to pay the purchase price in an acquisition. Under these circumstances it will be difficult for the issuer to establish that the communication for the business combination transaction does not also have the primary purpose or effect of conditioning the market for the capital-raising transaction. Notwithstanding the foregoing analysis, where the net proceeds from a capital-raising transaction are to be used exclusively to finance a contemporaneous acquisition and the acquisition is conditioned upon the success of the capital-raising transaction, any communication that is related to either the business combination transaction or the financing transaction will not be deemed to have as its primary purpose or effect creating interest in the capital-raising transaction. Therefore, Rule 165 is available.

When the transactions are not contemporaneous, this analysis does not apply. For example, communications about the financing transaction that are made after the completion of the business combination transaction will be viewed as relating to the capital-raising transaction, and Rule 165 will not be available.

D. Rule 14a-12

Question 1
Q:
If a company in a merger transaction issues a press release announcing the transaction and files the press release under Rule 14a-12, is the company then obligated to file all subsequent written communications as soliciting material simply because it began its solicitation?

A:
No. The company is not required to file every written communication it makes as soliciting material. The company is required to file only those written communications that relate to or are made in connection with the transaction that are reasonably viewed as soliciting material. However, communications that would not ordinarily be solicitations when the company is not soliciting its shareholders may be viewed as solicitations if made when the company is soliciting its shareholders (*i.e.*, the circumstances under which the communications are made have changed). A solicitation is a communication that is reasonably likely to result in the giving, withholding or revocation of a proxy. See Rule 14a-1(*l*). The company must analyze each written communication on a case-by-case basis to determine whether the communication relates to the transaction and whether the communication is a solicitation. If so, then the party must file the written communication under Rule 14a-12.

Question 2
Q:
Must a written communication filed under Rule 14a-12 include participant information if the solicitation is not contested?

A:
Yes. Written communications filed under Rule 14a-12 must include participant information or a prominent legend advising security holders where they can obtain this information. This is a change from old Rules 14a-11 and 14a-12, which required participant information only in contested solicitations. See Rule 14a-12(a)(1).
If the solicitation relates to a merger in which securities are offered, the offeror may be subject to the proxy rules if it is soliciting proxies on its own behalf or on behalf of the target's security holders. In this event, the offeror's filings under Rule 425 will satisfy the filing requirement under Rule 14a-12. The participant information required by Rule 14a-12 would still be necessary. See Question B.9.

Question 3
Q:
Can you rely on the exemption provided by Rule 14a-12 to engage in soliciting activities before a proxy statement is furnished to security holders if you do not ever intend to file or disseminate a proxy statement? We note that the requirement to furnish a proxy statement "as soon as practicable" was eliminated in adopting revised Rule 14a-12.

A:
No. In order to rely on Rule 14a-12, soliciting parties must intend to furnish a proxy statement to security holders. The "as soon as practicable" requirement was eliminated so that soliciting parties would not have a technical requirement to deliver a proxy statement should the solicitation be discontinued for any reason. One basis for permitting free communications under Rule 14a-12 was that security holders will receive a complete disclosure document containing all material information before having to make a voting decision.

Question 4
Q:
After a proxy statement is furnished to security holders, should subsequent communications be filed under Rule 14a-12?

A:
No. Subsequent communications are filed as "other soliciting material" under Rule 14a-6(b).

Question 5
Q:
Does the Regulation M restricted period begin when the proxy statement and proxy card are mailed to security holders or when soliciting materials are first filed under Rule 14a-12?

A:
The restricted period under Regulation M begins when the proxy statement and proxy card are mailed to security holders.

E. Early Commencement

Question 1
Q:
Revised Rule 14d-4(b) states that a registered exchange offer commences when a preliminary prospectus or a prospectus meeting the requirements of Section 10(a) of the Securities Act, including a letter of transmittal, is "delivered" to security holders. In a hostile transaction, if a bidder must make a request to the target under Rule 14d-5 in order to disseminate the offer to security holders, when does the exchange offer commence?

A:
The offer will commence when the bidder: (i) files a registration statement containing all required information, including pricing information; (ii) files a Schedule TO; and (iii) begins dissemination of the offer by making a request under Rule 14d-5. The 20 business day period required by Rule 14e-1(a) begins on this date. Commencement is not delayed during the time periods provided under Rule 14d-5.

If the prospectus is not mailed to security holders on the date of commencement because the bidder must wait for a response from the target in accordance with Rule 14d-5, then bidders are encouraged to publish a summary advertisement notifying target security holders how they can obtain a copy of the prospectus (*e.g.*, by calling a toll-free number). Bidders also may disseminate their offering materials to as many security holders as possible. For example, a bidder may provide copies of the prospectus to all known target security holders.
This interpretation would not apply to a negotiated transaction since the bidder in a negotiated transaction would generally not have to rely on Rule 14d-5 to disseminate the information. This interpretation applies whether or not the bidder is using "early commencement."

Question 2
Q:
A preliminary prospectus used to commence an exchange offer early under Rule 162 must include the "red herring" legend required by Item 501(b)(10) of Regulation S-K. The sample legend provided in Item 501(b)(10)(iv) indicates that information in the prospectus is "not complete and may be changed." Is the sample legend in Item 501 appropriate for a prospectus used to commence an exchange offer early?

A:
No. The language of the legend should be appropriately tailored to explain that the prospectus may be amended. The legend should not state that the prospectus is not complete or is otherwise subject to completion. The preliminary prospectus disseminated to security holders must contain all required information, including pricing information, in order to effectively "commence" the exchange offer. See Rule 14d-4(b). Information may not be omitted under Rules 430 or 430A. Therefore, the sample legend provided in Rule 501(b)(10)(iv) may be potentially confusing or misleading if it states that the prospectus is not complete or subject to completion.
The following is an example of a legend that may be used when an exchange offer is commenced early under Rule 162:

> The information in this prospectus may change. We may not complete the exchange offer and issue these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer is not permitted.

F. Confidential Treatment of Proxy Material

Question 1
Q:
Rule 135 speaks in terms of Section 5. For purposes of confidential treatment, what about the other types of transactions covered by Item 14 (*e.g.*, sales of assets for cash and cash mergers)? Rule 135 does not take these types of transaction into account.

A:
Rule 135 is used as a bright line test for purposes of ascertaining when public disclosure of information will preclude availability of confidential treatment for an Item 14 proxy statement. See Rule 14a-6(e)(2)(ii). The reference to Rule 135 does not limit the types of transactions for which confidential treatment is available. See the paragraph after fn. 80 in the adopting release.

G. Item 14 of Schedule 14A

Question 1
Q:
Does revised Item 14 still require a description of the merger agreement?

A:
Yes. The substantive disclosure requirements have not changed. See Item 14(b) of Schedule 14A, which includes a requirement to describe the material terms of the transaction.

H. Financial Statements

Question 1
Q:
It appears that some of the financial disclosure requirements were cut back while others were not. See Item 1010(a) of Regulation M-A. For example, book value per share information is only required "as of the most recent balance sheet date" while the ratio of earnings to fixed charges information is required for "the two most recent fiscal years and the interim periods." Why is there a difference?

A:
Book value is a ratio based on balance sheet data, and the ratio of earnings to fixed charges is based on the income statement. We believe book value information is most relevant as of the most recent balance sheet date, while the performance measured by the ratio of earnings to fixed charges is most meaningful when it can be compared among the periods covered by the income statements.

Question 2
Q:
What target "financial information" can be omitted under Item 17(b)(7)(ii) to Form S-4?

A:
Revised Item 17(b)(7)(ii) to Form S-4 states that no financial information (including pro forma and comparative per share information) is required for a non-reporting target when the target is significant to the acquiror at or below the 20% level and the registrant's security holders are not voting on the transaction. In these circumstances, the staff will not object to the omission of pro forma and comparative per share information as well as financial and related information of the target stipulated under Regulation S-K Items 301, 302, 303, 304(b), and 305, and comparable items of Regulation S-B.

Registrants should remember to include the insignificant non-reporting target in measuring the aggregate impact of individually insignificant business acquisitions under Rule 3-05(b)(2)(i) of Regulation S-X (or Item 310(c)(3)(iii) of Regulation S-B).

Question 3
Q:
In proxy materials soliciting votes by an acquiror's security holders for the acquisition of a non-reporting target, the target company must furnish its financial information pursuant to Item 17(b)(7) of Form S-4. Item 17(b)(7) does not specifically require the target to furnish financial statements of its significant business acquisitions pursuant to Rule 3-05 of Regulation S-X. Does the staff interpret Item 17(b)(7) differently when the acquiror's security holders are

voting on the transaction?

A:
Yes. Financial information that is material to a voting security holder's evaluation should be included in the proxy materials. When security holders of the acquiror are voting, the staff believes that a non-reporting target company also must furnish financial statements under Rule 3-05 of Regulation S-X if the omission of those financial statements renders the target company's financial statements substantially incomplete or misleading. The staff's prior practice in these circumstances is not affected by the adoption of the new rules. This answer applies both to cash merger proxy statements and proxy material that is included in a Form S-4 registration statement. *Note*: In this and other Q&As in the Financial Statements section, references to Rule 3-05 of Regulation S-X also apply to Item 310(c) of Regulation S-B.

Question 4
Q:
Instructions 2 and 3 to revised Item 14 of Schedule 14A permit a target company to omit from its proxy materials financial information about itself, as prescribed in Item 14(c)(2), when only its security holders are voting on a transaction in which the consideration being offered consists of exempt securities and/or cash, unless the transaction is a going-private or roll-up transaction. In these circumstances, does that target need to furnish the financial statements required by Rule 3-05 of Regulation S-X in its proxy materials if those financial statements have not previously been filed?

A:
Yes. The target company's security holders are presumed to have access to information about their company, which would include filings it made on Form 8-K containing financial statements of significant businesses acquired. In addition, however, the target company should furnish all financial statements required by Rule 3-05 of Regulation S-X in its proxy materials to the extent those financial statements have not previously been filed, along with related pro forma information, as that information would be considered material to an informed voting decision. The staff's position concerning compliance with Rule 3-05 has not been affected by the adoption of the new rules.

The same analysis applies to the omission of financial information about the acquiror when only the acquiror's security holders are voting, as permitted by Instructions 2 and 3. Again, this information may be omitted because the acquiror's security holders are presumed to have access to information about their own company. The Rule 3-05 information should be furnished along with related pro forma financial information if not previously filed.

Question 5
Q:
In proxy materials soliciting votes by a target company's security holders for an all-cash acquisition, the acquiror must furnish its financial information if it has not demonstrated its financial ability to satisfy the terms of the cash transaction. (See Instruction 2(a) to Item 14 of Schedule 14A.) In these circumstances, should the acquiror also furnish the financial statements of any other business acquisitions that would be required under Rule 3-05 of Regulation S-X?

A:
Yes. When an acquiror is required to furnish its financial information, the revised proxy rules (Item 14(c)(1) of Schedule 14A) refer to Part B of Form S-4, which requires compliance with Rule 3-05 of Regulation S-X. However, if only the target's security holders are voting, the staff would consider granting relief on a case-by-case basis to acquirors with respect to financial statements required by Rule 3-05 in all-cash transactions when those financial statements are not material in assessing the acquiror's financial ability to satisfy the terms of the transaction. The staff's position concerning compliance with Rule 3-05 in these circumstances is not affected by the adoption of the new rules.

Question 6
Q:
What financial statements should be filed with proxy materials soliciting votes with respect to the sale or other transfer of all or any substantial part of assets? See Item 14(a)(4) of Schedule 14A.

A:
The registrant should provide its financial information pursuant to Item 14(c)(1) of Schedule 14A. In addition, if authorization is sought from security holders for disposition of a significant business, unaudited financial statements of that business should be provided in the proxy materials for the same periods as are required for the registrant, along with pro forma information. The staff's position concerning these financial statements is not affected by the adoption of the new rules.

I. Schedule TO

Question 1
Q:
When should the cover of Schedule TO reflect that an amendment is being filed? Beginning after the first filing even when that is a written communication made before commencement of the offer, or only after the tender offer disclosure document is filed?

A:
Amendment numbering should start with the first revision to the disclosure document, or offer to purchase. The EDGAR tag (*i.e.*, "TO-C") for the written communications made before the filing of the disclosure document has no way of indicating an amendment. For example, there is no "TO-C/A" EDGAR tag. Therefore, the cover of the Schedule TO should only indicate an amendment number after the initial disclosure document is filed -- starting with the first revision. The EDGAR tag will then also indicate an amendment by using the "/A" (*e.g.*, "TO-T/A").

Question 2
Q:
Because Rule 14d-2 provides that commencement does not begin until the means of tendering have been given to security holders, would the staff review a Schedule TO filing that does not include a transmittal form, issue and clear comments, and then allow a bidder to disseminate their tender offer materials?

A:
Yes. The staff, however, will give priority in its review to transactions that have already commenced. Because prompt review of a tender offer that has not commenced may be impracticable, the staff still encourages concurrent filing and dissemination of tender offer documents. Prospective bidders are reminded that new Rule 14e-8 requires bidders to have a bona fide intent to commence a tender offer once a Schedule TO has been filed. In addition, if a bidder files a Schedule TO before commencing the offer, the materials should make it clear that the offer has not yet commenced in order to avoid confusing investors.

J. Subsequent Offering Period

Question 1
Q:
Section II.G.1 of the Regulation M-A release states that the staff may, by interpretation, reduce or eliminate the five business day advance notice requirement for the addition of a subsequent offering period. Item 1004 requires disclosure of the material terms of a transaction including "whether a subsequent offering period will be available, if the transaction is a third-party tender offer." Does the fact that Item 1004(a)(1)(iv) specifically requires disclosure of whether a subsequent offering period will be available prevent the staff from revising the advance notice requirement in the future?

A:
No. The item requires the subsequent offering period to be disclosed, but does not address the point at which disclosure must be made. If bidders know that they will have a subsequent offering period, they should so state in their initial offering materials. Alternatively, if they are not sure whether they will provide a subsequent offering period, they may reserve the right to add one later. In this case, the material should state how and when security holders would be notified of the addition of any subsequent offering period. If the bidder does decide to have a subsequent offering period (whether or not the bidder has reserved the right to do so), the bidder must disseminate this information to security holders. Under current interpretation, this information must be disseminated at least five business days before the end of the tender offer (not taking into account the subsequent offering period).

Question 2
Q:
If a subsequent offering period is provided in a tender offer, when must the bidder file the final amendment to its Schedule TO?

A:
The final amendment should be filed, with the correct box on the cover page checked, after the completion of the subsequent offering period.

K. Rule 13e-3 and Schedule 13E-3

Question 1
Q:
In a registered exchange offer that is also a going-private transaction, where the bidder files a joint Schedule 13E-3/Schedule TO, when must the Schedule 13E-3 be filed?

A:
The general instructions to Schedule TO state that a bidder may file a combined Schedule 13E-3/TO where the transaction is both a tender offer and a going private transaction. In a standard unaffiliated transaction, a Schedule TO is typically filed when the Form S-4 is declared effective. However, where a joint Schedule 13E-3/TO is filed, it must be filed when the Form S-4 is initially filed. This will alert the public and the staff that a going private transaction is involved. This is consistent with General Instruction D to Schedule 13E-3, which states that the schedule must be filed "[a]t the same time as filing a registration statement under the Securities Act of 1933." The Schedule should make it clear that the offer has not yet commenced, and should be amended when the offer does commence.

L. Rule 14e-5

Question 1
Q:
Rule 14e-5 (as did Rule 10b-13) applies from the public announcement of the offer (as opposed to commencement). Is "public announcement" for this purpose the same as "public announcement" for purposes of triggering the requirement to file pre-commencement communications (see Rules 165(f)(3), 13e-4(c) and 14d-2(b))?

A:
Yes, the definition of "public announcement" in Rule 14e-5(c)(5) is the same as in the communications rules cited above. The facts and circumstances of any particular communication should be analyzed in order to determine whether it constitutes a public announcement. See Questions A.1 and A.2 above for applicable interpretations.

Question 2
Q:
In cross-border tender offers, determining the U.S. ownership in the target company is important for the purpose of determining if the Tier I (10% or less) exception from Rule 14e-5 contained in 14e-5(b)(10) is available. For the purpose of determining eligibility for treatment as a Tier I offer, the Commission adopted a 30-day "look back" period before the "commencement" of the tender offer. Even if the Tier I exception is not available, counsel must determine U.S. ownership if applying for an individual exemption from Rule 14e-5. What time period should counsel use for purposes of the Tier I exception of 14e-5(b)(10) and for individual exemptions?

A:
For the purpose of the Tier I exception under Rule 14e-5(b)(10), the bidder should calculate U.S. ownership in the target company 30 days before commencement, as set forth in the Instructions to Rules 14d-1(c) and 13e-4(h). (See the questions in Part E of the Cross-Border Interpretations for discussion of this 30-day look back.) Because Rule 14e-5 applies from "announcement," as opposed to "commencement," sometimes these two events are not simultaneous, which may create difficulties in calculating U.S. ownership for purposes of Rule 14e-5. If, at the time of announcement, the offeror cannot calculate the percentage of U.S. ownership for the 30 days before commencement, the exception is not available. The exception may, however, become available if the 30-day "look back" can be performed at a later time. Counsel should contact the Office of Trading Practices in the Division of Market Regulation if this situation arises and the bidder wants to request an individual exemption while the exception is not available. An exemption would be based, in part, on U.S. ownership at the time of announcement.

Question 3
Q:
Read literally, Rule 14e-5 prohibits purchases of the target's shares in a foreign offer after the announcement of a U.S. offer. Since this type of exemption does not involve purchases or arrangements to purchase outside the offers, and is simply so that the transaction may be structured as dual offers, does the bidder need an exemption from Rule

14e-5?

A:
Yes. The bidder should contact the Office of Trading Practices in the Division of Market Regulation to obtain an individual exemption from Rule 14e-5 for this dual offer structure. See Letter re BSCH's Offer for Shares and ADSs of Banco Rio (June 20, 2000). We do not require many of the conditions for this exemption from Rule 14e-5 that we have required in other cross-border contexts.

Question 4
Q:
In U.K. tender offer practice, an "irrevocable undertaking" is an agreement to tender into the offer at the offer price *for no additional compensation*. The U.K. City Code on Takeovers and Mergers (City Code) does not treat an "irrevocable undertaking" as a purchase, and the City Code permits bidders to enter into irrevocable undertakings at any time, subject to certain restrictions. May the bidder enter into irrevocable undertakings with certain shareholders?

A:
Yes, if the arrangement is truly an "irrevocable undertaking" to tender into the offer with *no additional compensation* paid to the shareholder. This interpretation only applies to "hard irrevocables," which are agreements to tender from which the shareholder cannot withdraw, and the consideration must be paid in accordance with the offer. If the irrevocable does not have these features, the offeror may still qualify for an exemption, so counsel should contact the Office of Trading Practices in the Division of Market Regulation. See, *e.g.*, Letter re St David Capital plc Offer for Hyder plc to John M. Basnage, Esq. (April 17, 2000); Letter re WPD Limited Offer for Hyder plc to Bart Capeci, Esq. (May 30, 2000).

Question 5
Q:
The Division of Market Regulation sometimes grants exemptions from Rule 14e-5 in certain circumstances for purchases outside an offer pursuant to a foreign regulatory scheme. One condition for this exemption is that no purchases or arrangements to purchase the shares outside the offer shall be made in the United States. May the bidder solicit a foreign affiliate of a U.S. shareholder or solicit the U.S. shareholder overseas to sell the target's shares outside the offer (often at a higher price) to avoid this condition?

A:
No. We strictly interpret this condition. Any of these scenarios violates the condition of the exemption from Rule 14e-5 that purchases outside the offer not be made in the United States.

Question 6
Q:
Rule 14e-5(b)(8) permits purchases or arrangements to purchase by an affiliate of the dealer-manager if specified conditions are satisfied. May a department, which is not a separately identifiable corporate entity from the dealer-manager, be considered an "affiliate" for the purpose of this exception to Rule 14e-5?

A:
Yes. We have interpreted "affiliate" to include a "department" if all the conditions of Rule 14e-5(b)(8) are satisfied. See Letter re Vodafone AirTouch Offer for Mannesmann to Sebastian R. Sperber, Esq. (January 27, 2000); Letter re Exchange Offers by Telefonica S.A. to Spencer Klein, Esq. (February 29, 2000); Letter re Exchange Offers by Telefonica S.A. to David Golay, Esq. (February 4, 2000). This is similar to the definition of "affiliated purchaser" in Rule 100 of Regulation M, which addresses certain separately identifiable departments or divisions of an entity. See Rule 100(b) of Regulation M, Exchange Act Release No. 38067, n. 22 (January 3, 1997).

Question 7
Q:
A prerequisite for the exception in paragraph (b)(8) of Rule 14e-5 for purchases by affiliates of the dealer-manager is that the dealer-manager be registered as a broker or dealer under Section 15(a) of the Exchange Act. For purposes of the Rule 14e-5(b)(8) exception, what entities are included within the meaning of "dealer-manager" requiring registration as a broker or dealer under Section 15(a)

A:
All entities conducting the tender offer or offering advisory services regarding the tender offer must be either: (i) registered as a broker or dealer under Section 15(a); or (ii) an affiliate within a broker or dealer registered under

Section 15(a). It is extremely important that there is no information sharing between the affiliates seeking to rely on the exception and all entities conducting the tender offer or offering advisory services regarding the offer. Effective information barriers prevent improper motives from influencing purchases by affiliates while permitting the dealer-manager and other affiliates to continue their normal tender offer activities. We can only monitor the sufficiency of these information barriers if those entities conducting, or advising on, the offer are registered under Section 15(a) of the Exchange Act. Otherwise, the potential for abuse exists. Thus, we limit this exception to instances where all entities assisting the offeror (both dealer-managers and other affiliates) are registered under Section 15(a) of the Exchange.

Question 8
Q:
Rule 14e-5(b)(7) permits a purchase or arrangement to purchase outside of a tender offer so long as the contract was entered into before public announcement of the offer, the contract is unconditional and binding on both parties and the existence of the contract and all material terms (including quantity, price and parties) are disclosed in the offering materials. May the obligation to purchase shares be conditioned on the success or completion of the offer?

A:
No. The contract must be unconditional.

M. General

Question 1
Q:
May bidders rely on the provisions for tender offers made in compliance with the Multi-Jurisdictional Disclosure System (MJDS) after adoption of Regulation M-A and the new cross-border exemptions?

A:
Yes. Regulation M-A and the cross-border exemptions have not changed or eliminated availability of MJDS for tender offers involving Canadian issuers. See Rules 13e-4(g) and 14d-1(b).

Cross-Border Release, No. 33-7759, Oct. 22, 1999

A. Tier II

Question 1
Q:
The Cross-Border release states "we will not object if bidders meeting the requirements for the Tier II exemption reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer" if certain identified conditions are met. May a bidder terminate withdrawal rights during the offer even though the offer has not been declared wholly unconditional?

A:
No. In order to terminate withdrawal rights, all conditions must be satisfied or waived and the bidder must declare the offer wholly unconditional. In adopting Tier II, the intent was to codify previous staff interpretations regarding waivers or reductions of minimum conditions in cross-border transactions. In prior no-action letters and exemptive orders the Commission and the staff have typically permitted, with five days advance notice to security holders, a reduction in the minimum condition and termination of withdrawal rights once all other conditions to the offer are satisfied. The reference in the adopting release to "the remainder of the offer" refers to a subsequent offering period. Pursuant to Rules 14d-7(a)(2) and 14d-11, the bidder may include a subsequent offering period during which withdrawal rights are not provided.

B. Equal Treatment

Question 1
Q:
Bidder commences a tender offer for the securities of a foreign private issuer. Bidder initially excludes U.S. security holders. While the offer is pending abroad, bidder chooses to extend the offer into the United States and include U.S. security holders. How long must the U.S. offer remain open?

A:
The equal treatment requirement in the Tier I and Tier II exemptions means that the U.S. offer generally must be

open for at least as many days as the minimum period permitted by the foreign jurisdiction. Where this could cause the offeror to violate the foreign jurisdiction's rules, such as a limit on the maximum allowable offering period, we will consider relief on a case-by-case basis.

C. Rules 801 and 802

Question 1
Q:
Are Rules 801 and 802 available when there are no U.S. security holders of the issuer (in a rights offering) or subject company (in an exchange offer or business combination), or the offer is not extended to U.S. security holders?

A:
No. See General Note 2 to Rules 800, 801 and 802. These exemptions are intended to create an incentive to include U.S. security holders, not to provide an exemption for offerings made only to foreign security holders.

Question 2
Q:
Rule 801 and 802 are conditioned on including a legend advising security holders of the difficulties associated with enforcing claims that may arise under the federal securities laws because the issuer is located in a foreign country and some or all of its officers and directors may be residents of a foreign country. If the offeror relying on Rule 801 or 802 is a U.S. company with officers and directors resident in the United States, must the legend be included verbatim even though it is technically not applicable?

A:
No. An offeror relying on Rule 801 or 802 that is a domestic issuer incorporated in the United States may tailor the legend so that it is not confusing or misleading. If there are no risks associated with enforcing claims under the federal securities laws against the offeror in the United States, then the legend need not advise security holders of this risk.

D. Rule 802

Question 1
Q:
Under German law, a bidder commencing by publication must publish a detailed advertisement that includes an extensive discussion of all terms in a merger agreement. Rule 802(a)(3)(iii) states that if an issuer disseminates by publication in its home jurisdiction, the issuer must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer. Would publication of a summary advertisement in the national edition of the Wall Street Journal that provides a toll-free number for security holders to call to get a complete copy of the offering materials translated into English satisfy this requirement?

A:
Yes. While foreign law may require a very detailed advertisement of a bidder's offer, a less-detailed advertisement in a publication of national circulation in the United States that includes a toll-free number for investors to call to obtain a copy of the complete disclosure document will satisfy the requirement in Rule 802(a)(3)(iii).

E. Determining U.S. Ownership

Question 1
Q:
Are non-U.S. security holders of greater than 10% excluded from the calculation of the U.S. ownership percentage?

A:
Yes. All 10% and greater security holders are excluded from both the numerator and denominator. See Rule 800(h)(2); Instruction (2)(i) of paragraphs (h)(8) and (i) of Rule 13e-4; and, Instruction (2)(ii) to paragraphs (c) and (d) of Rule 14d-1.

Question 2
Q:
Are U.S. institutions and QIBs (qualified institutional buyers under Rule 144A) excluded from the calculation regardless of the size of their holdings?

A:
No. Only security holders with 10% or more of the securities of the target are excluded.

Question 3
Q:
Are the securities held by the bidder excluded from the calculation?

A:
Yes. See Rule 800(h)(2); Instruction (2)(ii) to paragraphs (c) and (d) of Rule 14d-1.

Question 4
Q:
If unable to calculate accurately the U.S. ownership in a target with respect to an exchange offer, can the offeror first file a registration statement to avoid violating Section 5, and then later if it is determined that U.S. ownership is less than 10% (*e.g.*, Tier I), withdraw the registration statement and rely on Rule 802?

A:
Yes. See Securities Act Rule 477 for procedures to withdraw a registration statement.

Question 5
Q:
May a bidder exclude U.S. security holders from an exchange offer made in a foreign jurisdiction at a time when U.S. ownership exceeds 10% (Tier II) and then later extend the offer to U.S. security holders when U.S. ownership falls to 10% or below (Tier I)?

A:
This scenario would concern us if the circumstances suggested that the bidder excluded U.S. persons from an exchange offer either with the purpose or intent of causing a migration of shares from the U.S. to the foreign jurisdiction so that an exemption from registration would then become available. This would be viewed as part of a plan or scheme to evade the registration provisions of the Securities Act. Therefore, the exemptions would not be available. See General Note 2 to Rules 800, 801 and 802.

Question 6
Q:
U.K. law provides for preconditional tender offers. In a preconditional tender offer the bidder announces that it intends to commence an offer after certain stated conditions have been satisfied. For example, the tender offer will commence only after antitrust regulatory approval has been obtained. In preconditional tender offers, commencement may occur months after the announcement of the offer. In this type of tender offer, when must U.S. ownership of the target be determined? Thirty days before commencement or 30 days before announcement?

A:
U.S. ownership should be determined 30 days before commencement. See Rule 800(h)(1). Applicability of the exemptions should turn on the actual shareholder base at a time closer to commencement of the offer.

Question 7
Q:
In determining the number of U.S. persons holding target shares, Rules 801 and 802 speak to the number of U.S. shareholders "as of 30 days before commencement." Since the number of U.S. shareholders may vary daily, can a bidder choose a particular day within the 30 days before commencement to determine U.S. ownership?

A:
No. Bidders must look at U.S. ownership on the 30th day before commencement. If the 30th day is impracticable for reasons outside of the bidder's control, the bidder should use the date within the 30-day period as close to the 30th day as practicable. Also see the following question.

Question 8
Q:
Rule 800(h) requires the calculation of U.S. ownership exactly 30 days before commencement of an exchange offer or solicitation of proxies in a business combination transaction. How do bidders comply with this requirement in a foreign jurisdiction where the information is only published at fixed intervals?

A:
In foreign jurisdictions where the bidder and issuer are limited in their access to security holder list information prepared periodically by third parties, calculation of U.S. ownership may be based on the latest security holder list available, unless the bidder or issuer has access to more accurate information.

F. Internet Issues

Question 1
Q:
Web sites accessible in the U.S. must not be used to entice U.S. investors to participate in the offering offshore. Section II.G.2 of the Cross-Border release states that "reliance on Regulation S to allow participation by U.S. persons offshore would not be appropriate with respect to tender or exchange offers posted on an unrestricted web site." The release goes on to say that business combinations present different issues from tender or exchange offers because participation by U.S. holders is not voluntary in business combinations. (Note: "business combinations" as defined in the Cross-Border release and rules refers to mergers and other voting transactions, as distinct from tender or exchange offers.) The release then goes on to say, "[N]o special precautions should be taken to prevent U.S. holders from receiving the merger consideration in a business combination involving a foreign company merely because the proxy statement/prospectus was posted on a web site available in the United States." Since this statement implies that the web site does not have to be restricted in the U.S. in a business combination where U.S. holders are excluded, can the disclosure document then be sent to U.S. shareholders?

A:
No. The release merely points out that there should be no precautions taken to prevent the U.S. holders from receiving the merger *consideration* when they are excluded from the business combination since participation in a business combination that is approved by shareholders is not voluntary for the U.S. holders. The discussion does not contemplate sending the proxy statement/prospectus to those U.S. holders.
Accordingly, a company using Regulation S to allow participation in a business combination offshore (but not a tender or exchange offer) may put the proxy statement/prospectus on an unrestricted web site. The company need not prevent the U.S. holders from receiving the consideration. These activities will not be viewed as "directed selling efforts" in the United States. However, the company should not engage in any further activities such as sending the material to U.S. holders.

G. Miscellaneous
Question 1
Q:
In the no-action letter *Coral Gold* (available 2-19-91), the staff took the position that if a foreign private issuer does a Regulation S offering and files the offering circular under Form 6-K, the filing would not constitute "directed selling efforts" for purposes of Rule 902(b) of Regulation S, so long as the filing contains no more information than is legally required by the laws of the foreign issuer's jurisdiction. Is there a corresponding interpretation under the Williams Act for exclusionary tender offers abroad where the tender offer disclosure documents are filed under Form 6-K?

A:
No. We have not issued any similar letter under the Williams Act. The issue would have been whether the filing of the tender offer disclosure document under Form 6-K commences the tender offer. Under the former rules, we have taken the position that filing information about a cash tender offer with another government agency, where the bidder knows the filing is made public, may be deemed a public announcement of the tender offer and therefore commences the offer. The commencement issue goes away under Regulation M-A since a tender offer can no longer commence solely by public announcement. However, the question still exists as to whether it would constitute a "public announcement" or an offer that triggers the filing requirements. See Question B.7 in the Regulation M-A interpretations.

CHAPTER 8 SELECTED 33 ACT FORMS: S-1, S-3, & S-4

[*See* Principally Chapters 4 and 13 of Business Planning for Mergers and Acquisitions]

A. Form S-1

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-1
REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

_____
(Exact name of registrant as specified in its charter)

_____
(State or other jurisdiction of incorporation or organization)

_____
(Primary Standard Industrial Classification Code Number)

_____
(I.R.S. Employer Identification Number)

_____
(Address, including zip code, and telephone number,
including area code, of registrant's principal executive offices)

_____
(Name, address, including zip code, and telephone number,
including area code, of agent for service)

_____
(Approximate date of commencement of proposed sale to the public)

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933 check the following box: ☐ * * *

Calculation of Registration Fee

Title of Each Class of Securities to be Registered	Amount to be Registered	Proposed Maximum Offering Price Per Unit	Proposed Maximum Aggregate Offering Price	Amount of Registration Fee

Note: Specific details relating to the fee calculation shall be furnished in notes to the table, including references to provisions of Rule 457 (§230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the table. * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-1

This Form shall be used for the registration under the Securities Act of 1933 ("Securities Act") of securities of all registrants for which no other form is authorized or prescribed, except that this Form shall not be used for securities of foreign governments or political subdivisions thereof.

II. Application of General Rules and Regulations

A. Attention is directed to the General Rules and Regulations under the Securities Act, particularly those comprising Regulation C (17 CFR 230.400 to 230.494) thereunder. That Regulation contains general requirements regarding the preparation and filing of the registration statement.

B. Attention is directed to Regulation S-K (17 CFR Part 229) for the requirements applicable to the content of the non-financial statement portions of registration statements under the Securities Act. Where this Form directs the registrant to furnish information required by Regulation S-K and the item of Regulation S-K so provides, information need only be furnished to the extent appropriate.

III. Exchange Offers

If any of the securities being registered are to be offered in exchange for securities of any other issuer, the prospectus shall also include the information which would be required by item 11 if the securities of such other issuer were registered on this Form. There shall also be included the information concerning such securities of such other issuer which would be called for by Item 9 if such securities were being registered. In connection with this instruction, reference is made to Rule 409.

IV. Roll-up Transactions * * *

V. Registration of Additional Securities * * *

VII. Eligibility to Use Incorporation by Reference

If a registrant meets the following requirements immediately prior to the time of filing a registration statement on this Form, it may elect to provide information required by Items 3 through 11 of this Form in accordance with Item 11A and Item 12 of this Form:

A. The registrant is subject to the requirement to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934 ("Exchange Act").

B. The registrant has filed all reports and other materials required to be filed by Sections 13(a), 14, or 15(d) of the Exchange Act during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials).

C. The registrant has filed an annual report required under Section 13(a) or Section 15(d) of the Exchange Act for its most recently completed fiscal year.

D. The registrant is not:

1. And during the past three years neither the registrant nor any of its predecessors was:

(a) A blank check company as defined in Rule 419(a)(2) (§230.419(a)(2));

(b) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§230.405); or

(c) A registrant for an offering of penny stock as defined in Rule 3a51-1 of the Exchange Act (§240.3a51-1 of this chapter).

2. Registering an offering that effectuates a business combination transaction as defined in Rule 165(f)(1) (§230.165(f)(1) of this chapter). * * *

F. The registrant makes its periodic and current reports filed pursuant to Section 13 or Section 15(d) of the Exchange Act that are incorporated by reference pursuant to Item 11A or Item 12 of this Form readily available and accessible on a Web site maintained by or for the registrant and containing information about the registrant.

PART I—INFORMATION REQUIRED IN PROSPECTUS

Item 1. Forepart of the Registration Statement and Outside Front Cover Page of Prospectus.

Set forth in the forepart of the registration statement and on the outside front cover page of the prospectus the information required by Item 501 of Regulation S-K (§229.501 of this chapter).

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Set forth on the inside front cover page of the prospectus or, where permitted, on the outside back cover page, the information required by Item 502 of Regulation S-K (§229.502 of this chapter).

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges.

Furnish the information required by Item 503 of Regulation S-K (§229.503 of this chapter).

Item 4. Use of Proceeds.

Furnish the information required by Item 504 of Regulation S-K (§229.504 of this chapter).

Item 5. Determination of Offering Price.

Furnish the information required by Item 505 of Regulation S-K (§229.505 of this chapter).

Item 6. Dilution.

Furnish the information required by Item 506 of Regulation S-K (§229.506 of this chapter).

Item 7. Selling Security Holders.

Furnish the information required by Item 507 of Regulation S-K (§229.507 of this chapter).

Item 8. Plan of Distribution.

Furnish the information required by Item 508 of Regulation S-K (§229.508 of this chapter).

Item 9. Description of Securities to be Registered.

Furnish the information required by Item 202 of Regulation S-K (§229.202 of this chapter).

Item 10. Interests of Named Experts and Counsel.

Furnish the information required by Item 509 of Regulation S-K (§229.509 of this chapter).

Item 11. Information with Respect to the Registrant.

Furnish the following information with respect to the registrant:

(a) Information required by Item 101 of Regulation S-K (§229.101 of this chapter), description of business;

(b) Information required by Item 102 of Regulation S-K (§229.102 of this chapter), description of property;

(c) Information required by Item 103 of Regulation S-K (§229.103 of this chapter), legal proceedings;

(d) Where common equity securities are being offered, information required by Item 201 of Regulation S-K (§229.201 of this chapter), market price of and dividends on the registrant's common equity and related stockholder matters;

(e) Financial statements meeting the requirements of Regulation S-X (17 CFR Part 210) (Schedules required under Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 15, Exhibits and Financial Statement Schedules, of this Form), as well as any financial information required by Rule 3-05 and Article 11 of Regulation S-X;

(f) Information required by Item 301 of Regulation S-K (§229.301 of this chapter), selected financial data;

(g) Information required by Item 302 of Regulation S-K (§229.302 of this chapter), supplementary financial in formation;

(h) Information required by Item 303 of Regulation S-K (§229.303 of this chapter), management's discussion and analysis of financial condition and results of operations;

(i) Information required by Item 304 of Regulation S-K (§229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure;

(j) Information required by Item 305 of Regulation S-K (§229.305 of this chapter), quantitative and qualitative disclosures about market risk.

(k) Information required by Item 401 of Regulation S-K (§229.401 of this chapter), directors and executive officers;

(l) Information required by Item 402 of Regulation S-K (§229.402 of this chapter), executive compensation, and information required by paragraph (e)(4) of Item 407 of Regulation S-K (§229.407 of this chapter), corporate governance;

(m) Information required by Item 403 of Regulation S-K (§229.403 of this chapter), security ownership of certain beneficial owners and management; and

(n) Information required by Item 404 of Regulation S-K (§229.404 of this chapter), transactions with related persons, promoters and certain control persons, and Item 407(a) of Regulation S-K (§229.407(a) of this chapter), corporate governance.

Item 11A. Material Changes.

If the registrant elects to incorporate information by reference pursuant to General Instruction VII., describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K or Form 10-KSB and which have not been described in a Form 10-Q, Form 10-QSB, or Form 8-K filed under the Exchange Act.

Item 12. Incorporation of Certain Information by Reference.

If the registrant elects to incorporate information by reference pursuant to General Instruction VII.:

(a) It must specifically incorporate by reference into the prospectus contained in the registration statement the following documents by means of a statement to that effect in the prospectus listing all such documents:

(1) The registrant's latest annual report on Form 10-K or Form 10-KSB filed pursuant to Section 13(a) or Section 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10-K or Form 10-KSB was required to have been filed; and

(2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act or proxy or information statements filed pursuant to Section 14 of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) above. * * *

Item 12A. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Furnish the information required by Item 510 of Regulation S-K (§229.510 of this chapter).

PART II—INFORMATION NOT REQUIRED IN PROSPECTUS

Item 13. Other Expenses of Issuance and Distribution.

Furnish the information required by Item 511 of Regulation S-K (§229.511 of this chapter).

Item 14. Indemnification of Directors and Officers.

Furnish the information required by Item 702 of Regulation S-X (§229.702 of this chapter).

Item 15. Recent Sales of Unregistered Securities.

Furnish the information required by Item 701 of Regulation S-K (§229.701 of this chapter).

Item 16. Exhibits and Financial Statement Schedules.

(a) Subject to the rules regarding incorporation by reference, furnish the exhibits as required by Item 601 of Regulation S-K (§229.601 of this chapter).

(b) Furnish the financial statement schedules required by Regulation S-X (17 CFR Part 210) and Item 11(e) of this Form. These schedules shall be lettered or numbered in the manner described for exhibits in paragraph (a).

Item 17. Undertakings.

Furnish the undertakings required by Item 512 of Regulation S-K (§229.512 of this chapter).

SIGNATURES * * *

B. Form S-3

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-3

REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

_____
(Exact name of registrant as specified in its charter)

_____
(State or other jurisdiction of incorporation or organization)

_____
(I.R.S. Employer Identification Number)

_____
(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

_____
(Name, address, including zip code, and telephone number, including area code, of agent for service)

_____
(Approximate date of commencement of proposed sale to the public)

If the only securities being registered on this Form are being offered pursuant to dividend or interest reinvestment plans, please check the following box: ☐

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933, other than securities offered only in connection with dividend or interest reinvestment plans, check the following box: ☐ * * *

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Notes to the "Calculation of Registration Fee" Table ("Fee Table"):

1. Specific details relating to the fee calculation shall be furnished in notes to the Fee Table, including references to provisions of Rule 457 (§230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the Fee Table. * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S-3

This instruction sets forth registrant requirements and transaction requirements for the use of Form S-3. Any registrant which meets the requirements of I.A. below ("Registrant Requirements") may use this Form for the registration of securities under the Securities Act of 1933 ("Securities Act") which are offered in any transaction specified in I.B. below ("Transaction Requirement") provided that the requirement applicable to the specified transaction are met. With respect to majority-owned subsidiaries, see Instruction I.C. below. With respect to well-known seasoned issuers and majority-owned subsidiaries of well-known seasoned issuers, see Instruction I.D. below.

A. Registrant Requirements. Registrants must meet the following conditions in order to use this Form S-3 for registration under the Securities Act of securities offered in the transactions specified in I. B. below:

l. The registrant is organized under the laws of the United States or any State or Territory or the District of Columbia and has its principal business operations in the United States or its territories.

2. The registrant has a class of securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") or a class of equity securities registered pursuant to Section 12(g) of the Exchange Act or is required to file reports pursuant to Section 15(d) of the Exchange Act.

3. The registrant:

(a) has been subject to the requirements of Section 12 or 15(d) of the Exchange Act and has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) for a period of at least twelve calendar months immediately preceding the filing of the registration statement on this Form; and
(b) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K (§249.308 of this chapter). If the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b-25(b) (§240.12b-25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule. * * *

5. Neither the registrant nor any of its consolidated or unconsolidated subsidiaries have, since the end of the last fiscal year for which certified financial statements of the registrant and its consolidated subsidiaries were included in a report filed pursuant to Section 13(a) or 15(d) of the Exchange Act: (a) failed to pay any dividend or sinking fund installment on preferred stock; or (b) defaulted (i) on any installment or installments on indebtedness for borrowed money, or (ii) on any rental on one or more long term leases, which defaults in the aggregate are material to the financial position of the registrant and its consolidated and unconsolidated subsidiaries, taken as a whole. * * *

B. Transaction Requirements. Security offerings meeting any of the following conditions and made by a registrant meeting the Registrant Requirements specified in I.A. above may be registered on this Form:

1. *Primary Offerings by Certain Registrants*. Securities to be offered for cash by or on behalf of a registrant, or outstanding securities to be offered for cash for the account of any person other than the registrant, including securities acquired by standby underwriters in connection with the call or redemption by the registrant of warrants or a class of convertible securities; *provided* that the aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant is $75 million or more. *Instruction.* For the purposes of this Form, "common equity" is as defined in Securities Act Rule 405 (§230.405 of this chapter). The aggregate market value of the registrant's outstanding voting and non-voting common equity shall be computed by use of the price at which the common equity was last sold, or the

average of the bid and asked prices of such common equity, in the principal market for such common equity as of a date within 60 days prior to the date of filing. See the definition of "affiliate" in Securities Act Rule 405., as of a date within 60 days prior to the date of filing. See the definition of "affiliate" in Securities Act Rule 405 (§230.405 of this chapter).

2. *Primary Offerings of Non-convertible Investment Grade Securities*. Non-convertible securities to be offered for cash by or on behalf of a registrant, provided such securities at the time of sale are "investment grade securities," as defined below. A non-convertible security is an "investment grade security" if, at the time of sale, at least one nationally recognized statistical rating organization (as that term is used in Rule 15c3-1(c)(2)(vi)(F) under the Exchange Act (§240.15c3-1(c)(2)(vi)(F) of this chapter)) has rated the security in one of its generic rating categories which signifies investment grade; typically, the four highest rating categories (within which there may be sub-categories or gradations indicating relative standing) signify investment grade.

3. *Transactions Involving Secondary Offerings*. Outstanding securities to be offered for the account of any person other than the issuer, including securities acquired by standby underwriters in connection with the call or redemption by the issuer of warrants or a class of convertible securities, if securities of the same class are listed and registered on a national securities exchange or are quoted on the automated quotation system of a national securities association. (In addition, attention is directed to General Instruction C to Form S-8 (§239.16b) for the registration of employee benefit plan securities for resale.)

4. *Rights Offerings, Dividend or Interest Reinvestment Plans, and Conversions or Warrants and Options.* * * *

C. Majority-owned Subsidiaries. * * *

D. Automatic Shelf Offerings by Well-Known Seasoned Issuers. Any registrant that is a well-known seasoned issuer, as defined in Rule 405 (§230.405 of this chapter), at the most recent eligibility determination date specified in paragraph (2) of that definition may use this Form for registration under the Securities Act of securities offerings, other than pursuant to Rule 415(a)(1)(vii) or (viii) (§230.415(a)(1)(vii) or (viii) of this chapter), as follows:

1. The securities to be offered are:

   (a) Any securities to be offered pursuant to Rule 415, Rule 430A, or Rule 430B (§230.415, §230.430A, or §230.430B of this chapter) by:

      (i) A registrant that is a well-known seasoned issuer by reason of paragraph (1)(i)(A) of the definition in Rule 405; or

      (ii) A registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 if the registrant also is eligible to register a primary offering of its securities pursuant to Transaction Requirement I.B.1 of this Form.

   (b) Non-convertible securities, other than common equity, to be offered pursuant to Rule 415, Rule 430A, or Rule 430B by a registrant that is a well-known seasoned issuer only by reason of paragraph (1)(i)(B) of the definition in Rule 405 and does not fall within Transaction Requirement I.B.1 of this Form;

   (d) Securities to be offered for the account of any person other than the issuer ("selling security holders"), provided that the registration statement and the prospectus are not required to separately identify the selling security holders or the securities to be sold by such persons until the filing of a prospectus, prospectus supplement, post-effective amendment to the registration statement, or periodic or current report under the Exchange Act that is incorporated by reference into the registration statement and prospectus, identifying the selling security holders and the amount of securities to be sold

by each of them and, if included in a periodic or current report, a prospectus or prospectus supplement is filed, as required by Rule 430B, pursuant to Rule 424(b)(7) (§230.424(b)(7) of this chapter);

2. The registrant pays the registration fee pursuant to Rule 456(b) and Rule 457(r) or in accordance with Rule 456(a). * * *

5. An automatic shelf registration statement and post-effective amendment will become effective immediately pursuant to Rule 462(e) and (f) (§230.462(e) and (f) of this chapter) upon filing. All filings made on or in connection with automatic shelf registration statements on this Form become public upon filing with the Commission.

II. Application of General Rules and Regulations

A. Attention is directed to the General Rules and Regulations under the Securities Act, particularly Regulation C thereunder (l7 CFR 230.400 to 230.494). That Regulation contains general requirements regarding the preparation and filing of registration statements.

B. Attention is directed to Regulation S-K (17 CFR Part 229) for the requirements applicable to the content of the non-financial statement portions of registration statements under the Securities Act. Where this Form directs the registrant to furnish information required by Regulation S-K and the item of Regulation S-K so provides, information need only be furnished to the extent appropriate. Notwithstanding Items 501 and 502 of Regulation S-K, no table of contents is required to be included in the prospectus or registration statement prepared on this Form. In addition to the information expressly required to be included in a registration statement on this Form S-3, registrants also may provide such other information as they deem appropriate. * * *

III. Dividend or Interest Reinvestment Plans: Filing and Effectiveness of Registration Statement; Requests for Confidential Treatment * * *

IV. Registration of Additional Securities and Additional Classes of Securities * * *

PART I
INFORMATION REQUIRED IN PROSPECTUS

Item 1. Forepart of the Registration Statement and Outside Front Cover Pages of Prospectus.

Set forth in the forepart of the registration statement and on the outside front cover page of the prospectus the information required by Item 501 of Regulation S-K (§229.501 of this chapter).

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Set forth on the inside front cover page of the prospectus or, where permitted, on the outside back cover page, the information required by Item 502 of Regulation S-K (§229.502 of this chapter).

Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges.

Furnish the information required by Item 503 of Regulation S-K (§229.503 of this chapter).

Item 4. Use of Proceeds.

Furnish the information required by Item 504 of Regulation S-K (§229.504 of this chapter).

Item 5. Determination of Offering Price.

Furnish the information required by Item 505 of Regulation S-K (§229.505 of this chapter).

Item 6. Dilution.

Furnish the information required by Item 506 of Regulation S-K (§229.506 of this chapter).

Item 7. Selling Security Holders.

Furnish the information required by Item 507 of Regulation S-K (§229.507 of this chapter).

Item 8. Plan of Distribution.

Furnish the information required by Item 508 of Regulation S-K (§229.508 of this chapter).

Item 9. Description of Securities to be Registered.

Furnish the information required by Item 202 of Regulation S-K (§229.202 of this chapter), unless capital stock is to be registered and securities of the same class are registered pursuant to Section 12 of the Exchange Act.

Item 10. Interests of Named Experts and Counsel.

Furnish the information required by Item 509 of Regulation S-K (§229.509 of this chapter).

Item 11. Material Changes.

(a) Describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which certified financial statements were included in the latest annual report to security holders and which have not been described in a report on Form 10-Q (§249.308a of this chapter) and Form 10-QSB (§249.308b of this chapter) or Form 8-K (§249.308 of this chapter) filed under the Exchange Act.

(b) Include in the prospectus, if not incorporated by reference therein from the reports filed under the Exchange Act specified in Item 12(a), a proxy or information statement filed pursuant to Section 14 of the Exchange Act, a prospectus previously filed pursuant to Rule 424(b) or (c) under the Securities Act (§230.424(b) or (c) of this chapter) or, where no prospectus is required to be filed pursuant to Rule 424(b), the prospectus included in the registration statement at effectiveness, or a Form 8-K filed during either of the two preceding years: (i) information required by Rule 3-05 and Article 11 of Regulation S-X (17 CFR Part 210); (ii) restated financial statements prepared in accordance with Regulation S-X if there has been a change in accounting principles or a correction in an error where such change or correction requires a material retroactive restatement of financial statements; (iii) restated financial statements prepared in accordance with Regulation S-X where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11-01(b), or (iv) any financial information required because of a material disposition of assets outside the normal course of business.

Item 12. Incorporation of Certain Information by Reference.

(a) The documents listed in (1) and (2) below shall be specifically incorporated by reference into the prospectus by means of a statement to that effect in the prospectus listing all such documents:

(1) the registrant's latest annual report on Form 10-K (17 CFR 249.310) and Form 10-KSB (17CFR 249.310b) filed pursuant to Section 13(a) or 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10-K and Form 10-KSB were required to have been filed; and

(2) all other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report referred to in (1) above; and

(3) if capital stock is to be registered and securities of the same class are registered under Section 12 of the Exchange Act, the description of such class of securities which is contained in a registration statement filed under the Exchange Act, including any amendment or reports filed for the purpose of updating such description.

(b) The prospectus shall also state that all documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the termination of the offering shall be deemed to be incorporated by reference into the prospectus.

Instruction. Attention is directed to Rule 439 (§230.439 of this chapter) regarding consent to use of material incorporated by reference.

(c) (1) You must state

(i) that you will provide to each person, including any beneficial owner, to whom a prospectus is delivered, a copy of any or all of the information that has been incorporated by reference in the prospectus but not delivered with the prospectus;

(ii) that you will provide this information upon written or oral request;

(iii) that you will provide this information at no cost to the requester; and

(iv) the name, address, and telephone number to which the request for this information must be made.

Note to Item 12(c)(1). If you send any of the information that is incorporated by reference in the prospectus to security holders, you also must send any exhibits that are specifically incorporated by reference in that information.

(2) You must

(i) identify the reports and other information that you file with the SEC; and

(ii) state that the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, D.C. 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet address, if available.

(d) Any information required in the prospectus in response to Item 3 through Item 11 of this Form may be included in the prospectus through documents filed pursuant to Section 13(a), 14, or 15(d) of the Exchange Act that are incorporated or deemed incorporated by reference into the prospectus that is part of the registration statement.

Item 13. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Furnish the information required by Item 510 of Regulation S-K (§229.510 of this chapter).

PART II
INFORMATION NOT REQUIRED IN PROSPECTUS

Item 14. Other Expenses of Issuance and Distribution.

Furnish the information required by Item 511 of Regulation S-K (§229.511 of this chapter).

Item 15. Indemnification of Directors and Officers.

Furnish the information required by Item 702 of Regulation S-K (§229.702 of this chapter).

Item 16. Exhibits.

Subject to the rules regarding incorporation by reference, furnish the exhibits required by Item 601 of Regulation S-K (§229.601 of this chapter).

Item 17. Undertakings.

Furnish the undertakings required by Item 512 of Regulation S-K (§229.512 of this chapter).

SIGNATURES * * *

C. Form S-4

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM S-4

REGISTRATION STATEMENT
UNDER THE SECURITIES ACT OF 1933

_____
(Exact name of registrant as specified in its charter)

_____
(State or other jurisdiction of incorporation or organization)

_____
(Primary Standard Industrial Classification Code Number)

_____
(I.R.S. Employer Identification Number)

_____
(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

_____
(Name, address, including zip code, and telephone number, including area code, of agent for service)

Approximate date of commencement of proposed sale of the securities to the public:
_____

If the securities being registered on this Form are being offered in connection with the formation of a holding company and there is compliance with General Instruction G, check the following box ☐

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. ☐

CALCULATION OF REGISTRATION FEE

Title of each class of securities to be registered	Amount to be registered	Proposed maximum offering price per unit	Proposed maximum aggregate offering price	Amount of registration fee

Note: Specific details relating to the fee calculation shall be furnished in notes to the table, including references to provisions of Rule 457 (§230.457 of this chapter) relied upon, if the basis of the calculation is not otherwise evident from the information presented in the table.

GENERAL INSTRUCTIONS

A. Rule as to Use of Form S-4.

1. This Form may be used for registration under the Securities Act of 1933 ("Securities Act") of securities to be issued (1) in a transaction of the type specified in paragraph (a) of Rule 145 (§230.145 of this chapter); (2) in a merger in which the applicable state law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired; (3) in an exchange offer for securities of the issuer or another entity; (4) in a public reoffering or resale of any such securities acquired pursuant to this registration statement; or (5) in more than one of the kinds of transaction listed in (1) through (4) registered on one registration statement.

2. If the registrant meets the requirements of and elects to comply with the provisions in any item of this Form or Form F-4 (§239.34 of this chapter) that provides for incorporation by reference of information about the registrant or the company being acquired, the prospectus must be sent to the security holders no later than 20 business days prior to the date on which the meeting of such security holders is held or, if no meeting is held, at least 20 business days prior to either (1) the date of such votes, consents or authorizations, or (2) the date the transaction is consummated or the votes, consents or authorizations may be used to effect the transaction. Attention is directed to Sections 13(e), 14(d) and 14(e) of the Securities Exchange Act of 1934 ("Exchange Act") the rules and regulations thereunder regarding other time periods in connection with exchange offers and going private transactions.

3. This Form shall not be used if the registrant is a registered investment company or a business development company as defined in Section 2(a)(48) of the Investment Company Act of 1940.

B. Information with Respect to the Registrant.

1. Information with respect to the registrant shall be provided in accordance with the items referenced in one of the following subparagraphs:

   a. Items 10 and 11 of this Form, if the registrant elects this alternative and meets the following requirements of Form S-3 (§239.13 of this chapter) (hereinafter, with respect to the registrant, "meets the requirements for use of Form S-3") for this offering of securities:

      (i) the registrant meets the requirements of General Instructions I.A. of Form S-3; and

      (ii) one of the following is met:

         A. The registrant meets the aggregate market value requirement of General Instruction I.B.1. of Form S-3; or

         B. Non-convertible debt or preferred securities are to be offered pursuant to this registration statement and are "investment grade securities" as defined in General Instruction I.B.2. of Form S-3; or

         C. The registrant is a majority-owned subsidiary and one of the conditions of General Instruction I.C. of Form S-3 is met.

   b. Items 12 and 13 of this Form, if the registrant meets the requirements for use of Form S-3 and elects this alternative; or

c. Item 14 of this Form, if the registrant does not meet the requirements for use of Form S-3, or if it otherwise elects this alternative.

2. If the registrant is a real estate entity of the type described in General Instruction A to Form S-11 (§239.18 of this chapter), the information prescribed by Items 12, 13, 14, 15 and 16 of Form S-11 shall be furnished about the registrant in addition to the information provided pursuant to Items 10 through 14 of this Form. The information prescribed by such Items of Form S-11 may be incorporated by reference into the prospectus if (a) a registrant qualifies for and elects to provide information pursuant to alternative 1.a. or 1.b. of this instruction and (b) the documents incorporated by reference pursuant to such elected alternative contain such information.

C. Information With Respect to the Company Being Acquired.

1. Information with respect to the company whose securities are being acquired (hereinafter including, where securities of the registrant are being offered in exchange for securities of another company, such other company) shall be provided in accordance with the items referenced in one of the following subparagraphs:

a. Item 15 of this Form, if the company being acquired meets the requirements of General Instructions I.A. and I.B.1. of Form S-3 (hereinafter, with respect to the company being acquired, "meets the requirements for use of Form S-3") of Form S-3 and this alternative is elected;

b. Item 16 of this Form, if the company being acquired meets the requirements for use of Form S-3 and this alternative is elected; or

c. Item 17 of this Form, if the company being acquired does not meet the requirements for use of Form S-3 or if this alternative is otherwise elected.

2. If the company being acquired is a real estate entity of the type described in General Instruction A to Form S-11, the information that would be required by Items 13, 14, 15 and 16(a) of Form S-11 if securities of such company were being registered shall be furnished about such company being acquired in addition to the information provided pursuant to this Form. The information prescribed by such Items of Form S-11 may be incorporated by reference into the prospectus if (a) the company being acquired would qualify for use of the level of disclosure prescribed by alternative 1.a. or 1.b. of this instruction and such alternative is elected and (b) the documents incorporated by reference pursuant to such elected alternative contain such information.

D. Application of General Rules and Regulations.

1. Attention is directed to the General Rules and Regulations under the Securities Act, particularly those comprising Regulation C thereunder (§230.400 et seq. of this chapter). That Regulation contains general requirements regarding the preparation and filing of registration statements.

2. Attention is directed to Regulation S-K (Part 229 of this chapter) for the requirements applicable to the content of nonfinancial statement portions of registration statements under the Securities Act. Where this Form directs the registrant to furnish information required by Regulation S-K and the item of Regulation S-K so provides, information need only be furnished to the extent appropriate.

3. A "small business issuer," defined in §230.405, shall refer to the disclosure items in Regulation S-B (17 CFR 228.10 *et seq.*) and not Regulation S-K except with respect to disclosure called for by subpart 900 of Regulation S-K. Small business issuers shall provide or incorporate by reference the information called for by Item 310 of Regulation S-B.

4. (a) Registrants and Companies to be Acquired that are eligible to use Form SB-1 may rely upon Part (b) or (c), as applicable, of this instruction in lieu of the narrative disclosure items set forth in this Form. These Registrants and Companies to be Acquired should look to Part F/S of Form SB-1 with respect to their financial statement requirements.

(b) Registrants and Companies to be Acquired which relied upon Alternative 1 in their most recent Form 10-KSB:

(i) Part 1.A. — furnish the information required by Part 1.A. of this Form;

(ii) Part I.B. — in lieu of the information required in Item 14, furnish the information required in (a) Questions 3, 4, 11, 43 and 47 – 50 of Model A of Form 1-A, and (b) Item 14(d) and 14(i) of this Form;

(iii) Part 1.C. — in lieu of the information required in Item 17, furnish the information required in (a) Item 17(a), 17(b)(1), 17(b)(2), 17(b)(6), 17(b)(7) and 17(b)(8) of this Form, and (b) Questions 4, 11 and 47 – 50 of Model A of Form 1-A;

(iv) Part 1.D. — (*1*) in lieu of providing the information required in Item 18, furnish the information required in (a) Items 18(a)(1) – 18(a)(6) and (b) Questions 29 – 36 and 39 – 42 of Model A of Form 1-A; and (*2*) in lieu of providing the information required in Item 19(a), furnish the information required in (a) Items 19(a)(1) – 19(a)(6) of this Form and Questions 29 – 36 and 39 – 42 of Model A of Form 1-A; (*3*) in lieu of providing the information required in Item 19(b), furnish the information required in (a) Items 19(a)(4) – 19(a) (6) of this Form and Questions 29 – 36 and 39 – 42 of Model A of Form 1-A.

(v) Part II — in lieu of the exhibits required by Item 21(a) and 21(b), furnish the exhibits required in Part II of Form SB-1.

(c) Registrants and Companies to be Acquired which relied upon Alternative 2 in their most recent Form 10-KSB:

(i) Part 1.A. — furnish the information required by Part 1.A. of this Form;

(ii) Part 1.B. — in lieu of the information required in Item 14, furnish the information required in (a) Items 6 and 7 of Model B of Form 1-A, and (b) Items 14(c), (d), and (i) of this Form;

(iii) Part 1.C. — in lieu of the information required in Item 17, furnish the information required in (a) Item 17(a), 17(b)(1), 17(b)(2), 17(b)(6), 17(b)(7) and 17(b)(8) of this Form, and (b) Item 6(a)(3)(i) of Model B of Form 1-A;

(iv) Part 1.D. — (*1*) in lieu of providing the information required in Item 18, furnish the information required in (a) Items 18(a)(1) – 18(a)(6) and (b) Items 8, 9 and 11 of Model B of Form 1-A; (*2*) in lieu of providing the information required in Item 19(a), furnish the information required in (a) Items 19(a)(1) – 19(a)(6) of this Form and Items 8, 9 and 11 of Model B of Form 1-A; and *(3*) in lieu of providing the information required in Item 19(b), furnish the information required in (a) Items 19(a)(4) – 19(a)(6) of this Form and Questions Items 8, 9 and 11 of Model B of Form 1-A.

(v) Part II — in lieu of the exhibits required by Item 21(a) and 21(b), furnish the exhibits required in Part II of Form SB-1.

E. Compliance with Exchange Act Rules.

1. If a corporation or other person submits a proposal to its security holders entitled to vote on, or consent to, the transaction in which the securities being registered are to be issued, and such person's submission to its security holders is subject to Regulation 14A (§§240.14a-1) through 14b-1 of this chapter) or 14C (§§240.14c-1 through 14c-101 of this chapter) under the Exchange Act, then the provisions of such Regulations shall apply in all respects to such person's submission, except that (a) the prospectus may be in the form of a proxy or information statement and may contain the information required by this Form in lieu of that required by Schedule 14A (§240.14a-101) or 14C (§240.14c-101) of Regulation 14A or 14C under the Exchange Act; and (b) copies of the preliminary and definitive proxy or information statement, form of

proxy or other material filed as a part of the registration statement shall be deemed filed pursuant to such person's obligations under such Regulations.

2. If the proxy or information material sent to security holders is not subject to Regulation 14A or 14C, all such material shall be filed as a part of the registration statement at the time the statement is filed or as an amendment thereto prior to the use of such material.

3. If the transaction in which the securities being registered are to be issued is subject to Section 13(e), 14(d) or 14(e) of the Exchange Act, the provisions of those sections and the rules and regulations thereunder shall apply to the transaction in addition to the provisions of this Form.

F. Transactions Involving Foreign Private Issuers.

If a U.S. registrant is acquiring a foreign private issuer, as defined by Rule 405 (§230.405 of this chapter), such registrant may use this Form and may present information about the foreign private issuer pursuant to Form F-4. If the registrant is a foreign private issuer, such registrant may use Form F-4 and

1. If the company being acquired is a foreign private issuer, may present information about such foreign company pursuant to Form F-4 or 5

2. If the company being acquired is a U.S. company, may present information about such company pursuant to this Form.

G. Filing and Effectiveness of Registration Statement Involving Formation of Hold-Companies; Requests for Confidential Treatment; Number of Copies

Original registration statements on this Form S-4 will become effective automatically on the twentieth day after the date of filing (Rule 456, §230.456 of this chapter), pursuant to the provisions of Section 8(a) of the Act (Rule 459, §230.459 of this chapter) provided:

1. The transaction in connection with which securities are being registered involves the organization of a bank or savings and loan holding company for the sole purpose of issuing common stock to acquire all of the common stock of the company that is organizing the holding company; and

2. The following conditions are met:

a. the financial institution furnishes its security holders with an annual report that includes financial statements prepared on the basis of generally accepted accounting principles;

b. there are no anticipated changes in the security holders' relative equity ownership interest in the underlying company's assets except for redemption of no more than a nominal number of shares of unaffiliated persons who dissent;

c. in the aggregate, only nominal borrowings are to be incurred for such purposes as organizing the holding company to pay non-affiliated persons who dissent, or to meet minimum capital requirements;

d. there are no new classes of stock authorized other than those corresponding to the stock of the company being acquired immediately prior to the reorganization;

e. there are no plans or arrangements to issue any additional shares to acquire any business other than the company being acquired; and

f. there has been no material adverse change in the financial condition of the company being acquired since the latest fiscal year end included in the annual report to security holders.

Pre-effective amendments with respect to such a registration statement may be filed prior to effectiveness, and such amendments will be deemed to have been filed with the consent of the Commission (Rule 475a, §230.475 of this chapter). Accordingly, the filing of a pre-effective amendment to such a registration statement will not commence a new twenty-day period. Post-effective amendments to such a registration statement on this Form shall become effective upon the date of filing (Rule 464, §230.464 of this chapter). Delaying amendments are not permitted in connection with either original filings or amendments on such a registration statement (Rule 473(d) §230.473(d) of this chapter), and any attempt to interpose a delaying amendment of any kind will be ineffective. All filings made on or in connection with this Form pursuant to this instruction become public upon filing with the Commission. As a result, requests for confidential treatment made under Rule 406 (§230.406 of this chapter) must be processed by the Commission's staff prior to the filing of such a registration statement. The number of copies of such a registration statement and of each amendment required by Rules 402 and 472 (§§230.402, 472 of this chapter) shall be filed with the Commission; *provided, however,* that the number of additional copies referred to in Rule 402(b) may be reduced from ten to three and the number of additional copies referred to in Rule 472(a) may be reduced from eight to three, one of which shall be marked to clearly and precisely indicate changes.

H. Registration Statements Subject to Rule 415(a)(1)(viii) (§230.415(a)(1)(viii) of this chapter)

If the registration statement relates to offerings of securities pursuant to Rule 415(a)(1)(viii), required information about the type of contemplated transaction or the company to be acquired only need be furnished as of the date of initial effectiveness of the registration statement to the extent practicable. The required information about the specific transaction and the particular company being acquired, however, must be included in the prospectus by means of a post-effective amendment; *Provided, however,* that where the transaction in which the securities are being offered pursuant to a registration statement under the Securities Act of 1933 would itself qualify for an exemption from Section 5 of the Act, absent the existence of other similar (prior or subsequent) transactions, a prospectus supplement could be used to furnish the information necessary in connection with such transaction.

I. Roll-Up Transactions. * * *

K. Registration of Additional Securities.

With respect to the registration of additional securities for an offering pursuant to Rule 462(b) under the Securities Act, the registrant may file a registration statement consisting only of the following: the facing page; a statement that the contents of the earlier registration statement, identified by file number, are incorporated by reference; required opinions and consents; the signature page; and any price-related information omitted from the earlier registration statement in reliance on Rule 430A that the registrant chooses to include in the new registration statement. The information contained in such a Rule 462(b) registration statement shall be deemed to be a part of the earlier registration statement as of the date of effectiveness of the Rule 462(b) registration statement. Any opinion or consent required in the Rule 462(b) registration statement may be incorporated by reference from the earlier registration statement with respect to the offering, if: (i) such opinion or consent expressly provides for such incorporation; and (ii) such opinion relates to the securities registered pursuant to Rule 462(b). See Rule 411(c) and Rule 439(b) under the Securities Act.

PART I
INFORMATION REQUIRED IN THE PROSPECTUS

A. INFORMATION ABOUT THE TRANSACTION

Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus.

Set forth in the forepart of the registration statement and on the outside front cover page of the prospectus the information required by Item 501 of Regulation S-K (§229.501 of this chapter).

Item 2. Inside Front and Outside Back Cover Pages of Prospectus.

Provide the information required by Item 502 of Regulation S-K. In addition, on the inside front cover page, you must state

(1) that the prospectus incorporates important business and financial information about the company that is not included in or delivered with the document; and
(2) that this information is available without charge to security holders upon written or oral request. Give the name, address, and telephone number to which security holders must make this request. In addition, you must state that to obtain timely delivery, security holders must request the information no later than five business days before the date they must make their investment decision. Specify the date by which security holders must request this information. You must highlight this statement by print type or otherwise.

Note to Item 2. If you send any of the information that is incorporated by reference in the prospectus to security
holders, you also must send any exhibits that are specifically incorporated by reference in that information.

Item 3. Risk Factors, Ratio of Earnings to Fixed Charges and Other Information.

Provide in the forepart of the prospectus a summary containing the information required by Item 503 of Regulation S-K (§229.503 of this chapter) and the following:

(a) The name, complete mailing address (including the Zip Code), and telephone number (including the area code) of the principal executive offices of the registrant and the company being acquired;

(b) A brief description of the general nature of the business conducted by the registrant and by the company being acquired;

(c) A brief description of the transaction in which the securities being registered are to be offered;

(d) The information required by Item 301 of Regulation S-K (§229.301 of this chapter) (selected financial data) for (i) the registrant; (ii) the company being acquired; and (iii) if material, the registrant, on a pro forma basis, giving effect to the transaction. To the extent the information is required to be presented in the prospectus pursuant to Items 12, 14, 16 or 17, it need not be repeated pursuant to this Item;

(e) If material, the information required by Item 301 of Regulation S-K for the registrant on a pro forma basis, giving effect to the transaction. To the extent the information is required to be presented in the prospectus pursuant to Items 12 or 14, it need not be repeated pursuant to this Item.

(f) In comparative columnar form, historical and pro forma per share data of the registrant and historical and equivalent pro forma per share data of the company being acquired for the following items:

(1) book value per share as of the date financial data is presented pursuant to Item 301 of Regulation S-K (§229.301 of this chapter) (selected financial data);

(2) Cash dividends declared per share for the periods for which financial data is presented pursuant to Item 301 of Regulation S-K (§229.301 of this chapter) (selected financial data);

(3) income (loss) per share from continuing operations for the periods for which financial data is presented pursuant to Item 301 of Regulation S-K (§229.301 of this chapter) (selected financial data).

Instruction to paragraph (e) and (f).
For a business combination accounted for as a purchase, the financial information required by paragraphs (e) and (f) shall be presented only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, the financial information required by paragraphs (e) and (f) (except for information with regard to book value) shall be presented for the most recent three fiscal years and interim period. For a business combination accounted for as a pooling, information with regard to book value shall be presented as of the end of the most recent fiscal year and interim period. Equivalent pro forma per share amounts shall be calculated by multiplying the pro forma income (loss) per share before nonrecurring charges or credits directly attributable to the transaction, pro forma book value per share, and

the pro forma dividends per share of the registrant by the exchange ratio so that the per share amounts are equated to the respective values for one share of the company being acquired.

(g) In comparative columnar form, the market value of securities of the company being acquired (on an historical and equivalent per share basis) and the market value of the securities of the registrant (on an historical basis) as of the date preceding public announcement of the proposed transaction, or, if no such public announcement was made, as of the day preceding the day the agreement with respect to the transaction was entered into;

(h) With respect to the registrant and the company being acquired, a brief statement comparing the percentage of outstanding shares entitled to vote held by directors, executive officers and their affiliates and the vote required for approval of the proposed transaction;

(i) A statement as to whether any federal or state regulatory requirements must be complied with or approval must be obtained in connection with the transaction, and if so, the status of such compliance or approval;

(j) A statement about whether or not dissenters' rights of appraisal exist, including a cross-reference to the information provided pursuant to Item 18 or 19 of this Form; and

(k) A brief statement about the tax consequences of the transaction, or if appropriate, consisting of a cross-reference to the information provided pursuant to Item 4 of this Form.

Item 4. Terms of the Transaction.

(a) Furnish a summary of the material features of the proposed transaction. The summary shall include, where applicable:

(1) A brief summary of the terms of the acquisition agreement;

(2) The reasons of the registrant and of the company being acquired for engaging in the transaction;

(3) The information required by Item 202 of Regulation S-K (§229.202 of this chapter), description of registrant's securities, unless: (i) the registrant would meet the requirements for use of Form S-3, (ii) capital stock is to be registered and (iii) securities of the same class are registered under Section 12 of the Exchange Act and (i) listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (ii) are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association;

(4) An explanation of any material differences between the rights of security holders of the company being acquired and the rights of holders of the securities being offered;

(5) A brief statement as to the accounting treatment the transaction; and

(6) The federal income tax consequences of the transaction.

(b) If a report, opinion or appraisal materially relating to the transaction has been received from an outside party, and such report, opinion or appraisal is referred to in the prospectus, furnish the same information as would be required by Item 9(b)(1) through (6) of Schedule 13E-3 (§240.Be-100 of this chapter).

(c) Incorporate the acquisition agreement by reference into the prospectus by means of a statement to that effect.

Item 5. Pro Forma Financial Information.

Furnish financial information required by Article 11 of Regulation S-X (§210.11-01 et. sq. of this chapter) with respect to this transaction.

Instruction.

1. Any other Article 11 information that is presented (rather than incorporated by reference) pursuant to other Items of this Form shall be presented together with the information provided pursuant to Item 5, but the presentation shall clearly distinguish between this transaction and any other.

2. If pro forma financial information with respect to all other transactions is incorporated by reference pursuant to Item 11 or 15 of this Form only the pro forma results need be presented as part of the pro forma financial information required by this Item.

Item 6. Material Contracts with the Company Being Acquired.

Describe any past, present or proposed material contracts, arrangements, understandings, relationships, negotiations or transactions during the periods for which financial statements are presented or incorporated by reference pursuant to Part I.B. or C. of this Form between the company being acquired or its affiliates and the registrant or its affiliates, such as those concerning: a merger, consolidation or acquisition; a tender offer or other acquisition of securities; an election of directors; or a sale or other transfer of a material amount of assets.

Item 7. Additional Information Required for Reoffering by Persons and Parties Deemed to Be Underwriters.

If any of the securities are to be reoffered to the public by any person or party who is deemed to be an underwriter thereof, furnish the following information in the prospectus, at the time it is being used for the reoffer of the securities to the extent it is not already furnished therein:

(a) The information required by Item 507 of Regulation S-K (§229.507 of this chapter), selling security holders; and

(b) Information with respect to the consummation of the transaction pursuant to which the securities were acquired and any material change in the registrant's affairs subsequent to the transaction.

Item 8. Interests of Named Experts and Counsel.

Furnish the information required by Item 509 of Regulation S-K (§229.509 of this chapter).

Item 9. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

Furnish the information required by Item 510 of Regulation S-K (§229.510 of this chapter).

B. INFORMATION ABOUT THE REGISTRANT

Item 10. Information with Respect to S-3 Registrants.

If the registrant meets the requirements for use of Form S-3 and elects to furnish information in accordance with the provisions of this Item, furnish information as required below:

(a) Describe any and all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest annual report to security holders and that have not been described in a report on Form 10-Q (§249.308a of this chapter) or Form 8-K (§249.308 of this chapter) filed under the Exchange Act.

(b) Include in the prospectus, if not incorporated by reference from the reports filed under the Exchange Act specified in Item 11 of this Form, a proxy or information statement filed pursuant to Section 14 of the Exchange Act, a prospectus previously filed pursuant to Rule 424 under the Securities Act (§230.424 of this chapter), or a Form 8-K filed during either of the two preceding fiscal years:

(1) Financial information required by Rule 3-05 (§210.3-05 of this chapter) and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued;

(2) Restated financial statements prepared in accordance with Regulation S-X (Part 210 of this chapter), if there has been a change in accounting principles or a correction of an error where such change or correction requires a material retroactive restatement of financial statements;

(3) Restated financial statements prepared in accordance with Regulation S-X where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11- 01(b) of Regulation S-X (§210.11-01(b) of this chapter); or

(4) Any financial information required because of a material disposition of assets outside the normal course of business.

Item 11. Incorporation of Certain Information by Reference.

If the registrant meets the requirements of Form S-3 and elects to furnish information in accordance with the provisions of Item 10 of this Form:

(a) Incorporate by reference into the prospectus, by means of a statement to that effect listing all documents so incorporated, the documents listed in paragraphs (1), (2) and, if applicable, (3) below.

(1) The registrant's latest annual report on Form 10-K (§249.310 of this chapter) filed pursuant to Section 13(a) or 15(d) of the Exchange Act which contains financial statements for the registrant's latest fiscal year for which a Form 10-K was required to be filed;

(2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report referred to in Item 11(a)(1) of this Form; and

(3) If capital stock is to be registered and securities of the same class are registered under Section 12 of the Exchange Act and: (i) listed for trading or admitted to unlisted trading privileges on a national securities exchange; or (ii) are securities for which bid and offer quotations are reported in an automated quotations system operated by a national securities association, the description of such class of securities which is contained in a registration statement filed under the Exchange Act, including any amendment or reports filed for the purpose of updating such description.

(b) The prospectus also shall state that all documents subsequently filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to one of the following dates, whichever is applicable, shall be deemed to be incorporated by reference into the prospectus:

(1) If a meeting of security holders is to be held, the date on which such meeting is held;

(2) If a meeting of security holders is not to be held, the date on which the transaction is consummated;

(3) If securities of the registrant are being offered in exchange for securities of any other issuer, the date the offering is terminated; or

(4) If securities are being offered in a reoffering or resale of securities acquired pursuant to this registration statement, the date the reoffering is terminated.

(c) You must

(1) identify the reports and other information that you file with the SEC; and

(2) state that the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, D.C. 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet address, if available.

Instruction.
Attention is directed to Rule 439 (§230.439 of this chapter) regarding consent to the use of material incorporated by reference.

Item 12. Information with Respect to S-3 Registrants.

If the registrant meets the requirements for use of Form S-3 and elects to comply with this Item, furnish the Information required by either paragraph (a) or paragraph (b) of this Item. The information required by paragraph (b) shall be furnished if the registrant satisfies the conditions of paragraph (c) of this Item.

(a) If the registrant elects to deliver this prospectus together with a copy of either its latest Form 10-K or Form 10-KSB filed pursuant to Sections 13(a) or 15(d) of the Exchange Act or its latest annual report to security holders, which at the time of original preparation met the requirements of either Rule 14a-3 or Rule 14c-3:

(1) Indicate that the prospectus is accompanied by either a copy of the registrant's latest Form 10-K or Form 10-KSB or a copy of its latest annual report to security holders, whichever the registrant elects to deliver pursuant to paragraph (a) of this Item.

(2) Provide financial and other information with respect to the registrant in the form required by Part I of Form 10-Q or 10-QSB as of the end of the most recent fiscal quarter which ended after the end of the latest fiscal year for which certified financial statements were included in the latest Form 10-K or Form 10-KSB or the latest report to security holders (whichever the registrant elects to deliver pursuant to paragraph (a) of this Item), and more than forty-five days prior to the effective date of this registration statement (or as of a more recent date) by one of the following means:

(i) including such information in the prospectus;

(ii) providing without charge to each person to whom a prospectus is delivered a copy of the registrant's latest Form 10-Q or Form 10-QSB; or

(iii) providing without charge to each person to whom a prospectus is delivered a copy of the registrant's latest quarterly report that was delivered to its security holders and which included the required financial information.

(3) If not reflected in the registrant's latest Form 10-K or Form 10-KSB or its latest annual report to security holders (whichever the registrant elects to deliver pursuant to paragraph (a) of this Item) provide information required by Rule 3-05 (§210.3-05 of this chapter) and Article 11 (§210.11-01 through §210.11.03 of this chapter) of Regulation S-X.

(4) Describe any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which audited financial statements were included in the latest Form 10-K or 10-KSB or the latest annual report to security holders (whichever the registrant elects to deliver pursuant to paragraph (a) of this Item) and that were not described in a Form 10-Q, Form 10-QSB or quarterly report delivered with the prospectus in accordance with paragraphs (a)(2)(ii) or (iii) of this Item.

Instruction. Where the registrant elects to deliver the documents identified in paragraph (a) with a preliminary prospectus, such documents need not be redelivered with the final prospectus.

(b) If the registrant does not elect to deliver its latest Form 10-K or Form 10-KSB or its latest annual report to security holders:

(1) Furnish a brief description of the business done by the registrant and its subsidiaries during the most recent fiscal year as required by Rule 14a-3 to be included in an annual report to security holders. The description also should take into account changes in the registrant's business that have occurred between the end of the latest fiscal year and the effective date of the registration statement.

(2) Include financial statements and information as required by Rule 14a-3(b)(1) (240.14a-3(b)(1) of this chapter) to be included in an annual report to security holders. In addition, provide:

(i) the interim financial information required by Rule 10-01 of Regulation S-X (§210.10-01 of this chapter) for a filing on Form 10-Q;

(ii) financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued;

(iii) restated financial statements prepared in accordance with Regulation S-X if there has been a change in accounting principles or a correction of an error where such change or correction requires a material retroactive restatement of financial statements;

(iv) Restated financial statements prepared in accordance with Regulation S-X where one or more business combinations accounted for by the pooling of interest method of accounting have been consummated subsequent to the most recent fiscal year and the acquired businesses, considered in the aggregate, are significant pursuant to Rule 11-01(b) of Regulation S-X; and

(v) Any financial information required because of a material disposition of assets outside of the normal course of business;

(3) Furnish the information required by the following:

(i) Item 101(b), (c)(1)(i) and (d) of Regulation S-K (§229.101 of this chapter), industry segments, classes of similar products or services, foreign and domestic operations and export sales;

(ii) where common equity securities are being offered, Item 201 of Regulation S-K (§229.201 of this chapter), market price of and dividends on the registrant's common equity and related stockholder matters;

(iii) Item 301 of Regulation S-K (§229.301 of this chapter), selected financial data;

(iv) Item 302 of Regulation S-K (§229.302 of this chapter), supplementary financial information;

(v) Item 303 of Regulation S-K (§229.303 of this chapter), management's discussion and analysis of financial condition and results of operations;

(vi) Item 304 of Regulation S-K (§229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure; and

(vii) Item 305 of Regulation S-K (§ 229.305 of this chapter), quantitative and qualitative disclosures about market risk.

(c) The registrant shall furnish the information required by paragraph (b) of this Item if;

(1) the registrant was required to make a material retroactive restatement of financial statements because of

(i) a change in accounting principles; or

(ii) a correction of an error; or

(iii) a consummation of one or more business combinations accounted for by the pooling of interest method of accounting was effected subsequent to the most recent fiscal year and the acquired businesses considered in the aggregate meet the test of a significant subsidiary; OR

(2) the registrant engaged in a material disposition of assets outside the normal course of business; AND

(3) such restatement of financial statements or disposition of assets was not reflected in the registrant's latest annual report to security holders and/or its latest Form 10-K or Form 10-KSB filed pursuant to Sections 13(a) or 15(d) of the Exchange Act.

Item 13. Incorporation of Certain Information by Reference.

If the registrant meets the requirements of Form S-3 and elects to furnish information in accordance with the provisions of Item 12 of this Form:

(a) Incorporate by reference into the prospectus, means of a statement to that effect in the prospectus listing all documents so incorporated, the documents listed in paragraphs (1) and (2) of this Item and, if applicable, the portions of the documents listed in paragraphs (3) and (4) thereof.

(1) The registrant's latest annual report on Form 10-K filed pursuant to Section 13(a) or 15(d) of the Exchange Act which contains audited financial statements for the registrant's latest fiscal year for which a Form 10-K was required to be filed.

(2) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the annual report referred to in paragraph (a)(1) of this Item.

(3) If the registrant elects to deliver its latest annual report to security holders pursuant to Item 12 of this Form, the information furnished in accordance with the following:

(i) Item 101(b), (c)(1)(i) and (d) of Regulation S-K, segments, classes of similar products or services, foreign and domestic operations and export sales;

(ii) Where common equity securities are being issued, Item 201 of Regulation S-K, market price of and dividends on the registrant's common equity and related stockholder matters;

(iii) Item 301 of Regulation S-K, selected financial data;

(iv) Item 302 of Regulation S-K, supplementary financial information;

(v) Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations;

(vi) Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure; and

(vii) Item 305 of Regulation S-K (§ 229.305 of this chapter) quantitative and qualitative disclosures about market risk.

(4) If the registrant elects, pursuant to Item 12(a)(2)(iii) of this Form, to provide a copy of its latest quarterly report which was delivered to security holders, financial information equivalent to that required to be presented in Part I of Form 10-Q.

Instruction. Attention is directed to Rule 439 regarding consent to the use of material incorporated by reference.

(b) The registrant also may state, if it so chooses, that specifically described portions of its annual or quarterly report to security holders, other than those portions required to be incorporated by reference pursuant to paragraphs (a)(3) and (4) of this Item, are not part of the registration statement. In such case, the description of portions that are not incorporated by reference or that are excluded shall be made with clarity and in reasonable detail.

(c) *Electronic filings*. Electronic filers electing to deliver and incorporate by reference all, or any portion, of the quarterly or annual report to security holders pursuant to this Item shall file as an exhibit such quarterly or annual report to security holders, or such portion thereof that is incorporated by reference, in electronic format.

(d) You must

(1) identify the reports and other information that you file with the SEC; and

(2) state that the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, N.E., Washington, D.C. 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (http://www.sec.gov). You are encouraged to give your Internet address, if available.

Item 14. Information with Respect to Registrants Other Than S-3 Registrants.

If the registrant does not meet the requirements for use of Form or S-3, or otherwise elects to comply with this Item in lieu of Item 10 or 12, furnish the information required by:

(a) Item 101 of Regulation S-K, description of business;

(b) Item 102 of Regulation S-K, description of property;

(c) Item 103 of Regulation S-K, legal proceedings;

(d) Where common equity securities are being issued, Item 201 of Regulation S-K, market price of and dividends on the registrant's common equity and related stockholder matters;

(e) Financial statements meeting the requirements of Regulation S-X, (schedules required by Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form), as well as financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued.

(f) Item 301 of Regulation S-K, selected financial data;

(g) Item 302 of Regulation S-K, supplementary financial information;

(h) Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations;

(i) Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure; and

(j) Item 305 of Regulation S-K (§ 229.305 of this chapter), quantitative and qualitative disclosures about market risk.

C. INFORMATION ABOUT THE COMPANY BEING ACQUIRED

Item 15. Information with Respect to S-3 Companies.

If the company being acquired meets the requirements for use of Form S-3 and compliance with this Item is elected, furnish the information that would be required by Items 10 and 11 of this Form if securities of such company were being registered.

Item 16. Information with Respect to S-3 Companies.

(a) If the company being acquired meets the requirements for use of Form S-3 and elects to comply with this Item, furnish the information that would be required by Items 12 and 13 of this Form if securities of such company were being registered.

(b) *Electronic filings*. In addition to satisfying the requirements of paragraph (a) of this Item, electronic filers that elect to deliver and incorporate by reference all, or any portion, of the quarterly or annual report to security holders of a company being acquired pursuant to this Item shall file as an exhibit such quarterly or annual report to security holders, or such portion thereof that is incorporated by reference, in electronic format.

Item 17. Information with Respect to Companies Other Than S-3 Companies.

If the company being acquired does not meet the requirements for use of Form S-3, or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

(a) If the company being acquired is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, or compliance with this subparagraph in lieu of subparagraph (b) of this Item is selected, furnish the information that would be required by Item 14 of this Form if the securities of such company were being registered; *however*, only those schedules required by Rules 12-15, 28 and 29 of Regulation S-X (§210.12-15, 28, 29 of this chapter) need be provided with respect to the company being acquired.

(b) If the company being acquired is not subject to the reporting requirements of either Section 13(a) or 15(d) of the Exchange Act; or, because of Section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a-3 (§240.14a-3 of this chapter) or Rule 14c-3 (§240.14c-3 of this chapter) for its latest fiscal year; furnish the information that would be required by the following if securities of such company were being registered:

(1) a brief description of the business done by the company which indicates the general nature and scope of the business;

(2) Item 201 of Regulation S-K, market price of and dividends on the registrant's common equity and related stockholder matters;

(3) Item 301 of Regulation S-K, selected financial data;

(4) Item 302 of Regulation S-K, supplementary financial information;

(5) Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations;

(6) Item 304(b) of Regulation S-K (§229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure;

(7) Financial statements that would be required in an annual report sent to security holders under Rules 14a-3(b)(1) and (b)(2) (§240.14b-3 of this chapter), if an annual report was required. If the registrant's security holders are not voting, the transaction is not a roll-up transaction (as described by Item 901 of Regulation S-K (§229.901 of this chapter)), and:

(i) the company being acquired is significant to the registrant in excess of the 20% level as determined under §210.3-05(b)(2), provide financial statements of the company being acquired for the latest fiscal year in conformity with GAAP. In addition, if the company being acquired has provided its security holders with financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, provide the financial statements for those years; or
(ii) the company being acquired is significant to the registrant at or below the 20% level, no financial information (including pro forma and comparative per share information) for the company being acquired need be provided.

Instructions:

1. The financial statements required by this paragraph for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited.

2. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F (§249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

3. If this Form is used to register resales to the public by any person who is deemed an underwriter within the meaning of Rule 145(c) (§230.145(c) of this chapter) with respect to the securities being reoffered, the financial statements must be audited for the fiscal years required to be presented under paragraph (b)(2) of Rule 3-05 of Regulation S-X (17 CFR 210.3-05(b)(2)).

4. In determining the significance of an acquisition for purposes of this paragraph, apply the tests prescribed in Rule 1-02(w) (§210.1-02(w) of this chapter).

(8) the quarterly financial and other information as would have been required had the company being acquired been required to file Part I of Form 10-Q (§249.308a) and Form 10-QSB (§249.308b) for the most recent quarter for which such a report would have been on file at the time the registration statement becomes effective or for a period ending as of a more recent date.
(9) schedules required by Rules 12-15, 28 and 29 of Regulation S-X.

(10) Item 305 of Regulation S-K (§ 229.305 of this chapter), quantitative and qualitative disclosures about market risk.

D. VOTING AND MANAGEMENT INFORMATION

Item 18. Information if Proxies, Consents or Authorizations are to be Solicited.

(a) If proxies, consents or authorizations are to be solicited, furnish the following information, except as provided by paragraph (b) of this Item:

(1) The information required by Item 1 of Schedule 14A, date, time and place information;

(2) The information required by Item 2 of Schedule 14A, revocability of proxy;

(3) The information required by Item 3 of Schedule 14A, dissenters' rights of appraisal;

(4) The information required by Item 4 of Schedule 14A, persons making the solicitation;

(5) With respect to both the registrant and the company being acquired, the information required by:

(i) Item 5 of Schedule 14A, interest of certain persons in matters to be acted upon; and

(ii) Item 6 of Schedule 14A, voting securities and principal holders thereof;

(6) The information required by Item 21 of Schedule 14A, vote required for approval; and

(7) With respect to each person who will serve as a director or an executive officer of the surviving or acquiring company, the information required by:

(i) Item 401 of Regulation S-K (§229.401 of this chapter), directors and executive officers;

(ii) Item 402 of Regulation S-K (§229.402 of this chapter), executive compensation, and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407(e)(4) of this chapter), corporate governance;

(iii) Item 404 of Regulation S-K (§229.404 of this chapter), transactions with related persons, promoters and certain control persons, and Item 407(a) of Regulation SK (§229.407(a) of this chapter), corporate governance.

(b) If the registrant or the company being acquired meets the requirements for use of Form S-3, any information required by paragraphs (a)(5)(ii) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10-K or Form 10-KSB.

Item 19. Information if Proxies, Consents or Authorizations are not to be Solicited or in an Exchange Offer.

(a) If the transaction is an exchange offer or if proxies, consents or authorizations are not to be solicited, furnish, where applicable, the following information, except as provided by paragraph (c) of this item;

(1) The information required by Item 2 of Schedule 14C, statement that proxies are not to be solicited;

(2) The date, time and place of the meeting of security holders, unless such information is otherwise disclosed in material furnished to security holders with the prospectus.

(3) The information required by Item 3 of Schedule 14A, dissenters' rights of appraisal;

(4) With respect to both the registrant and the company being acquired, a brief description of any material interest, direct or indirect, by security holdings or otherwise, of affiliates of the registrant and of the company being acquired, in the proposed transaction;

Instruction. This subparagraph shall not apply to any interest arising from the ownership of securities of the registrant where the security holder receives no extra or special benefit not shared on a pro rata basis by all other holders of the same class.

(5) With respect to both the registrant and the company being acquired, the information required by Item 6 of Schedule 14A, voting securities and principal holders thereof;

(6) The information required by Item 21 of Schedule 14A, vote required for approval;

(7) With respect to each person who will serve as a director or an executive officer of the surviving or acquiring company the information required by:

(i) Item 401 of Regulation S-K, directors and executive officers;

(ii) Item 402 of Regulation S-K (§229.402 of this chapter), executive compensation, and paragraph (e)(4) of Item 407 of Regulation S-K (§229.407(e)(4) of this chapter), corporate governance;

(iii) Item 404 of Regulation S-K (§229.404), transactions with related persons, promoters and certain controls persons, and Item 407(a) of Regulation S-K (§229.407(a)), corporate governance.

(b) If the transaction is an exchange offer, furnish the information required by paragraphs (a)(4), (a)(5), and (a)(7) of this Item, except as provided by paragraph (c) of this Item.

(c) If the registrant or the company being acquired meets the requirements for use of Form S-3, any information required by paragraphs (a)(5) and (7) of this Item with respect to such company may be incorporated by reference from its latest annual report on Form 10-K or Form 10-KSB.

PART II
INFORMATION NOT REQUIRED IN PROSPECTUS

Item 20. Indemnification of Directors and Officers.

Furnish the information required by Item 702 of Regulation S-K (§229.702 of this chapter).

Item 21. Exhibits and Financial Statement Schedules.

(a) Subject to the rules regarding incorporation by reference, furnish the exhibits as required by Item 601 of Regulation S-K (§229.601 of this chapter).

(b) Furnish the financial statement schedules required by Regulation S-X and Item 14(e), Item 17(a) or Item 17(b)(9) of this Form. These schedules should be lettered or numbered in the manner described for exhibits in paragraph (a) of this Item.

(c) If information is provided pursuant to Item 4(b) of this Form, furnish the report, opinion or appraisal as an exhibit hereto, unless it is furnished as part of the prospectus.

Item 22. Undertakings.

(a) Furnish the undertakings required by Item 512 of Regulation S-K (§229.512 of this chapter).

(b) Furnish the following undertaking:

The undersigned registrant hereby undertakes to respond to requests for information that is incorporated by reference into the prospectus pursuant to Items 4, 10(b), 11, or 13 of this Form, within one business day of receipt of such request, and to send the incorporated documents by first class mail or other equally prompt means. This includes information contained in documents filed subsequent to the effective date of the registration statement through the date of responding to the request.

(c) Furnish the following undertaking:

The undersigned registrant hereby undertakes to supply by means of a post-effective amendment all information concerning a transaction, and the company being acquired involved therein, that was not the subject of and included in the registration statement when it became effective.

SIGNATURES

Pursuant to the requirements of the Securities Act, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of _____State of , _____on _____, 20_____ .

_____

(Registrant)

By _____

_____

(Signature and Title)

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed by the following persons in the capacities and on the dates indicated.

_____

(Signature)

_____

(Title)

_____

(Date)

Instructions.

1. The registration statement shall be signed by the registrant, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and by at least a majority of the board of directors or persons performing similar functions. If the registrant is a foreign person, the registration statement shall also be signed by its authorized representative in the United States. Where the registrant is a limited partnership, the registration statement shall be signed by a majority of the board of directors of any corporate general partner signing the registration statement.

2. The name of each person who signs the registration statement shall be typed or printed beneath his signature. Any person who occupies more than one of the specified positions shall indicate each capacity in which he signs the registration statement. Attention is directed to Rule 402 (§230.402 of his chapter) concerning manual signatures and Item 601 concerning signatures pursuant to powers of attorney.

3. If the securities to be offered are those of a corporation not yet in existence at the time the registration statement is filed which will be a party to a consolidation involving two or more existing corporations, then each such existing corporation shall be deemed a registrant and shall be so designated on the cover page of this Form, and the registration statement shall be signed by each such existing corporation and by the officers and directors of each such existing corporation as if each such existing corporation were the registrant.

CHAPTER 9 SECURITIES EXCHANGE ACT OF 1934

[*See* Principally Chapters 4, 13, and 16-21 of Business Planning for Mergers and Acquisitions]

A. *§ 1. Short title*

This subchapter may be cited at the Securities Exchange Act of 1934. * * *

B. *§ 3. Definitions and application*

* * *

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited. * * *

(12)(A) The term "exempted security" or "exempted securities" includes:

(i) government securities, as defined in paragraph (42) of this subsection;

(ii) municipal securities, as defined in paragraph (29) of this subsection; * * *

C. *§ 10 Manipulative and deceptive devices*

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— * * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, * * * any manipulative or deceptive device or contrivance in contravention of such rules [see Rule 10b-5] and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

D. *§ 12. Registration requirements for securities*

(a) *General requirement of registration*. It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this chapter and the rules and regulations thereunder.

(b) *Procedure for registration; information*. A security may be registered on a national securities exchange by the issuer filing an application with the exchange (and filing with the Commission such duplicate originals thereof as the Commission may require), which application shall contain:

(1) Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer, and any guarantor of the security as to principal or interest or both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following:

(A) the organization, financial structure, and nature of the business;

(B) the terms, position, rights, and privileges of the different classes of securities

outstanding;

(C) the terms on which their securities are to be, and during the preceding three years have been, offered to the public or otherwise;

(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 per centum of any class of any equity security of the issuer (other than an exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer; * * *

(g) *Registration of securities by issuer; exemptions*. (1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall:

(A) within one hundred and twenty days after the last day of its first fiscal year ended after July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons, register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 18 of this title. Any issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph. * * *

E. *§ 13. Periodical and other reports*

(a) *Reports by issuer of security; contents*. Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security:

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12 of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) *Form of report; books, records, and internal accounting; directives*. (1) The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earning statement, and the methods to be followed in the preparation of reports * * *.

(d) *Reports by persons acquiring more than five per centum of certain classes of securities*.

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq*.] or any equity security issued by a Native Corporation pursuant to section 1629(d)(6) of Title 43, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send

to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and filed with the Commission, a statement containing such of the following information, and such additional information, as the Commission may be rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors:

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to:

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing

the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) *Purchase of securities by issuer*.

(1) It shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of this title, or which is a closed-end investment company registered under the Investment Company Act of 1940, to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or for the protection of investors, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. Such rules and regulations may require such issuer to provide holders of equity securities of such class with such information relating to the reasons for such purchase, the source of funds, the number of shares to be purchased, the price to be paid for such securities, the method of purchase, and such additional information, as the Commission deems necessary or appropriate in the public interest or for the protection of investors, or which the Commission deems to be material to a determination whether such security should be sold.

(2) For the purpose of this subsection, a purchase by or for the issuer or any person controlling, controlled by, or under common control with the issuer, or a purchase subject to control of the issuer or any such person, shall be deemed to be a purchase by the issuer. The Commission shall have power to make rules and regulations implementing this paragraph in the public interest and for the protection of investors, including exemptive rules and regulations covering situations in which the Commission deems it unnecessary or inappropriate that a purchase of the type described in this paragraph shall be deemed to be a purchase by the issuer for purposes of some or all of the provisions of paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to paragraph (1) of this subsection, the person making the filing shall pay to the Commission a fee of 1/50 of 1 per centum of the value of securities proposed to be purchased. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to any securities issued in connection with the proposed transaction under section 77f(b) of this title, or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this paragraph.

(f) *Reports by institutional investment managers*. * * *

F. *§ 14. Proxies*

(a) *Solicitation of proxies in violation of rules and regulations*. It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.

(b) *Giving or refraining from giving proxy in respect of any security carried for account of customer; disclosure of beneficial owners*.

(1) It shall be unlawful for any member of a national securities exchange, or any broker or dealer registered under this chapter, or any bank, association, or other entity that exercises fiduciary powers, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to give, or to refrain from giving a proxy, consent, authorization, or information statement in respect of any security registered pursuant to section 12 of this title, or any security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq*.], and carried for the account of a customer.

(2) With respect to banks, the rules and regulations prescribed by the Commission under paragraph (1) shall not require the disclosure of the names of beneficial owners of securities in an account held by the bank on December 28, 1985, unless the beneficial owner consents to the disclosure. The provisions of this paragraph shall not apply in the case of a bank which the Commission finds has not made a good faith effort to obtain such consent from such beneficial owners.

(c) *Information to holders of record prior to annual or other meeting*. Unless proxies, consents, or authorizations in respect of a security registered pursuant to section 12 of this title, or a security issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 *et seq*.], are solicited by or on behalf of the management of the issuer from the holders of record of such security in accordance

with the rules and regulations prescribed under subsection (a) of this section, prior to any annual or other meeting of the holders of such security, such issuer shall, in accordance with rules and regulations prescribed by the Commission, file with the Commission and transmit to all holders of record of such security information substantially equivalent to the information which would be required to be transmitted if a solicitation were made, but no information shall be required to be filed or transmitted pursuant to this subsection before July 1, 1964.

(d) *Tender offer by owner of more than five per centum of class of securities; exceptions*. .

(1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 12 of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 13(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for

tenders of, any security:

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

(e) *Untrue statement of material fact or omission of fact with respect to tender offer*. It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

(f) *Election or designation of majority of directors of issuer by owner of more than five per centum of class of securities at other than meeting of security holders*. If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to subsection (d) of this section or subsection (d) of section 13 of this title, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, prior to the time any such person takes office as a director, and in accordance with rules and regulations prescribed by the Commission, the issuer shall file with the Commission, and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by subsection (a) or (c) of this section to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

(g) *Filing fees*.

(1) (A) At the time of filing such preliminary proxy solicitation material as the Commission may require by rule pursuant to subsection (a) of this section that concerns an acquisition, merger, consolidation, or proposed sale or other disposition of substantially all the assets of a company, the person making such filing, other than a company registered under the Investment Company Act of 1940, shall pay to the Commission the following fees:

(i) for preliminary proxy solicitation material involving an acquisition, merger, or consolidation, if there is a proposed payment of cash or transfer of securities or property to shareholders, a fee of 1/50 of 1 per centum of such proposed payment, or of the value of such securities or other property proposed to be transferred; and

(ii) for preliminary proxy solicitation material involving a proposed sale or other disposition of substantially all of the assets of a company, a fee of 1/50 of 1 per centum of the cash or of the value of any securities or other property proposed to be received upon such sale or disposition.

(B) The fee imposed under subparagraph (A) shall be reduced with respect to securities in an amount equal to any fee paid to the Commission with respect to such securities in connection with the proposed transaction under section 77f(b) of this title, or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection. Where two or more companies involved in an acquisition, merger, consolidation, sale, or other disposition of substantially all the assets of a company must file such proxy material with the Commission, each shall pay a proportionate share of such fee.

(2) At the time of filing such preliminary information statement as the Commission may require by rule pursuant to subsection (c) of this section, the issuer shall pay to the Commission the same fee as required for preliminary proxy solicitation material under paragraph (1) of this subsection.

(3) At the time of filing such statement as the Commission may require by rule pursuant to subsection (d)(1) of this section, the person making the filing shall pay to the Commission a fee of 1/50 of 1 per centum of the aggregate amount of cash or of the value of securities or other property proposed to be offered. The fee shall be reduced with respect to securities in an amount equal to any fee paid with respect to such securities in connection with the proposed transaction under section 77f(b) of this title, or the fee paid under that section shall be reduced in an amount equal to the fee paid to the Commission in connection with such transaction under this subsection.

(4) Notwithstanding any other provision of law, the Commission may impose fees, charges, or prices for matters not involving any acquisition, merger, consolidation sale, or other disposition of assets described in this subsection, as authorized by section 9701 of Title 31 or otherwise. * * *

G. *§ 14A. Shareholder Approval of Executive Compensation*

(a) Separate resolution required

(1) In general

Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to section 229.402 of title 17, Code of Federal Regulations, or any successor thereto.

(2) Frequency of vote

Not less frequently than once every 6 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.

(3) Effective date

The proxy or consent or authorization for the first annual or other meeting of the shareholders occurring after the end of the 6-month period beginning on July 21, 2010, shall include—

(A)the resolution described in paragraph (1); and

(B)a separate resolution subject to shareholder vote to determine whether votes on the resolutions required under paragraph (1) will occur every 1, 2, or 3 years.

(b) Shareholder approval of golden parachute compensation

(1) Disclosure

In any proxy or consent solicitation material (the solicitation of which is subject to the rules of the Commission pursuant to subsection (a)) for a meeting of the shareholders occurring after the end of the 6-month period beginning on July 21, 2010, at which shareholders are asked to approve an acquisition, merger, consolidation, or proposed sale or other disposition of all or substantially all the assets of an issuer, the person making such solicitation shall disclose in the proxy or consent solicitation material, in a clear and simple form in accordance with regulations to be promulgated by the Commission, any agreements or understandings that such person has with any named executive officers of such issuer (or of the acquiring issuer, if such issuer is not the acquiring issuer) concerning any type of compensation (whether present, deferred, or contingent) that is based on or otherwise relates to the acquisition, merger, consolidation, sale, or other disposition of all or substantially all of the assets of the issuer and the aggregate total of all such compensation that may (and the conditions upon which it may) be paid or become payable to or on behalf of such executive officer.

(2) Shareholder approval

Any proxy or consent or authorization relating to the proxy or consent solicitation material containing the disclosure required by paragraph (1) shall include a separate resolution subject to shareholder vote to approve such agreements or understandings and compensation as disclosed, unless such agreements or understandings have been subject to a shareholder vote under subsection (a).

(c) Rule of construction

The shareholder vote referred to in subsections (a) and (b) shall not be binding on the issuer or the board of directors of an issuer, and may not be construed—

(1)as overruling a decision by such issuer or board of directors;

(2)to create or imply any change to the fiduciary duties of such issuer or board of directors;

(3)to create or imply any additional fiduciary duties for such issuer or board of directors; or

(4)to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

(d) Disclosure of votes

Every institutional investment manager subject to section 78m(f) of this title shall report at least annually how it voted on any shareholder vote pursuant to subsections (a) and (b), unless such vote is otherwise required to be reported publicly by rule or regulation of the Commission.

(e) Exemption

(1) In general

The Commission may, by rule or order, exempt any other issuer or class of issuers from the requirement under subsection (a) or (b). In determining whether to make an exemption under this subsection, the Commission shall take

into account, among other considerations, whether the requirements under subsections (a) and (b) disproportionately burdens [1] small issuers.

(2) Treatment of emerging growth companies

(A) In general

An emerging growth company shall be exempt from the requirements of subsections (a) and (b).

(B) Compliance after termination of emerging growth company treatment

An issuer that was an emerging growth company but is no longer an emerging growth company shall include the first separate resolution described under subsection (a)(1) not later than the end of—

(i)in the case of an issuer that was an emerging growth company for less than 2 years after the date of first sale of common equity securities of the issuer pursuant to an effective registration statement under the Securities Act of 1933 [15 U.S.C. 77a et seq.], the 3-year period beginning on such date; and

(ii)in the case of any other issuer, the 1-year period beginning on the date the issuer is no longer an emerging growth company.

H. *§ 16. Directors, officers, and principal stockholders*

(a) *Filing of statement of all ownership of securities of issuer by owner of more than ten per centum of any class of security*.

Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

(b) *Profits from purchase and sale of security within six months*. For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection. * * *

I. *§ 18. Liability for misleading statements*

(a) *Persons liable; persons entitled to recover; defense of good faith; suit at law or in equity; costs, etc*. Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have

purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) *Contribution*. Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) *Period of limitations*. No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued. * * *

J. § 20. Liabilities of Controlling Persons and Persons Who Aid and Abet Violations

(a) Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. * * *

K. § 21E. Application of Safe Harbor for Forward-Looking Statements.

[Similar to Section 20A of the 33 Act.]

CHAPTER 10 RULES & REGS UNDER SEC. EXCHANGE ACT OF 1934

[*See* Principally Chapters 4, 13, and 16-21 of Business Planning for Mergers and Acquisitions]

A. *Rule 10b-5. Employment of manipulative and deceptive devices.*

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security. * * *

B. *Rule 13a-1. Requirements of annual reports.*

Every issuer having securities registered pursuant to section 12 of the Act shall file an annual report on the appropriate form authorized or prescribed therefor for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Annual reports shall be filed within the period specified in the appropriate form.

C. *Rule 13a-11. Current reports on Form 8-K.*

(a) Except as provided in paragraph (b) of this section, every registrant subject to Rule 13a-1 shall file a current report on Form 8-K within the period specified in that form unless substantially the same information as that required by Form 8-K has been previously reported by the registrant.

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K pursuant to Rule 13a-16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file reports pursuant to Rule 30b-1-1 under the Investment Company Act of 1940.

D. *Rule 13a-13. Quarterly reports on Form 10-Q and Form 10-QSB.*

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer that has securities registered pursuant to section 12 of the Act and is required to file annual reports pursuant to section 13 of the Act, and has filed or intends to file such reports on Form 10-K and Form 10-KSB or U5S shall file a quarterly report on Form 10-Q and Form 10-KSB within the period specified in General Instruction A.1. to that form for each of the first three quarters of each fiscal year of the issuer, commencing with the first fiscal quarter following the most recent fiscal year for which full financial statements were included in the registration statement, or, if the registration statement included financial statements for an interim period subsequent to the most recent fiscal year end meeting the requirements of Article 10 of Regulation S-X, for the first fiscal quarter subsequent to the quarter reported upon in the registration statement. The first quarterly report of the issuer shall be filed either within 45 days after the effective date of the registration statement or on or before the date on which such report would have been required to be filed if the issuer has been required to file reports on Form 10-Q and Form 10-QSB as of its last fiscal quarter, whichever is later.

E. Rule 13d-1. Filing of Schedules 13D and 13G.

a. Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the Commission, a statement containing the information required by Schedule 13D.

b. 1. A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D may, in lieu thereof, file with the Commission, a short-form statement on Schedule 13G, Provided, That:

i. Such person has acquired such securities in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b); and

ii. Such person is:

A. A broker or dealer registered under section 15 of the Act;

B. A bank as defined in section 3(a)(6) of the Act;

C. An insurance company as defined in section 3(a)(19) of the Act;

D. An investment company registered under section 8 of the Investment Company Act of 1940;

E. Any person registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940 or under the laws of any state;

F. An employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 et seq. ("ERISA") that is subject to the provisions of ERISA, or any such plan that is not subject to ERISA that is maintained primarily for the benefit of the employees of a state or local government or instrumentality, or an endowment fund;

G. A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in Rule 13d- 1(b)(1)(ii)(A) through (I), does not exceed one percent of the securities of the subject class;

H. A savings association as defined in Section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813);

I. A church plan that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940; and

J. A group, provided that all the members are persons specified in Rule 13d-1(b)(1)(ii)(A) through (I); and

iii. Such person has promptly notified any other person (or group within the meaning of section 13(d)(3) of the Act) on whose behalf it holds, on a discretionary basis, securities exceeding five percent of the class, of any acquisition or transaction on behalf of such other person which might be reportable by that person under section 13(d) of the Act. This paragraph only requires notice to the account owner of information which the filing person reasonably should be expected to know and which would advise the account owner of an obligation he may have to file a statement pursuant to section 13(d) of the Act or an amendment thereto.

2. The Schedule 13G filed pursuant to paragraph (b)(1) of this section shall be filed within 45 days after the end of the calendar year in which the person became obligated under paragraph (b)(1) of this section to report the person's beneficial ownership as of the last day of the calendar year, Provided, That it shall not be necessary to file a Schedule 13G unless the percentage of the class of equity security specified in paragraph (i) of this section beneficially owned as of the end of the calendar year is more than five percent; However, if the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities prior to the end of the calendar year, the initial Schedule 13G shall be filed within 10 days after the end of the first month in which the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities, computed as of the last day of the month.

c. A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D may, in lieu thereof, file with the Commission, within 10 days after an acquisition described in

paragraph (a) of this section, a short-form statement on Schedule 13G. Provided, That the person:

1. Has not acquired the securities with any purpose, or with the effect of, changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to Rule 13d-3(b);

2. Is not a person reporting pursuant to paragraph (b)(1) of this section; and

3. Is not directly or indirectly the beneficial owner of 20 percent or more of the class.

d. Any person who, as of the end of any calendar year, is or becomes directly or indirectly the beneficial owner of more than five percent of any equity security of a class specified in paragraph (i) of this section and who is not required to file a statement under paragraph (a) of this section by virtue of the exemption provided by Section 13(d)(6)(A) or (B) of the Act, or because the beneficial ownership was acquired prior to December 22, 1970, or because the person otherwise (except for the exemption provided by Section 13(d)(6)(C) of the Act) is not required to file a statement, shall file with the Commission, within 45 days after the end of the calendar year in which the person became obligated to report under this paragraph (d), a statement containing the information required by Schedule 13G.

e. 1. Notwithstanding paragraphs (b) and (c) of this section and Rule 13d-2(b), a person that has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G pursuant to paragraph (b) or (c) of this section, or is required to report the acquisition but has not yet filed the schedule, shall immediately become subject to Rule 13d-1(a) and Rule 13d-2(a) and shall file a statement on Schedule 13D within 10 days if, and shall remain subject to those requirements for so long as, the person:

i. Has acquired or holds the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect, including any transaction subject to Rule 13d-3(b); and

ii. Is at that time the beneficial owner of more than five percent of a class of equity securities described in Rule 13d-1(i).

2. From the time the person has acquired or holds the securities with a purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect until the expiration of the tenth day from the date of the filing of the Schedule 13D pursuant to this section, that person shall not:

i. Vote or direct the voting of the securities described therein; or

ii. Acquire an additional beneficial ownership interest in any equity securities of the issuer of the securities, nor of any person controlling the issuer.

f. 1. Notwithstanding paragraph (c) of this section and Rule 13d-2(b), persons reporting on Schedule 13G pursuant to paragraph (c) of this section shall immediately become subject to Rule 13d-1(a) and Rule 13d- 2(a) and shall remain subject to those requirements for so long as, and shall file a statement on Schedule 13D within 10 days of the date on which, the person's beneficial ownership equals or exceeds 20 percent of the class of equity securities.

2. From the time of the acquisition of 20 percent or more of the class of equity securities until the expiration of the tenth day from the date of the filing of the Schedule 13D pursuant to this section, the person shall not:

i. Vote or direct the voting of the securities described therein,

ii. Acquire an additional beneficial ownership interest in any equity securities of the issuer of the securities, nor of any person controlling the issuer.

g. Any person who has reported an acquisition of securities in a statement on Schedule 13G pursuant to paragraph (b) of this section, or has become obligated to report on the Schedule 13G but has not yet filed the Schedule, and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section or determines that it no longer has acquired or holds the securities in the ordinary course of business shall immediately become subject to Rule 13d-1(a) or Rule 13d-1(c) (if the person satisfies the requirements specified in Rule 13d-1(c)), and Rule 13d-2 (a), (b) or (d), and shall file, within 10 days thereafter, a statement on Schedule 13D or amendment to Schedule 13G, as applicable, if the person is a beneficial owner at that time of more than five percent of the class of equity securities.

h. Any person who has filed a Schedule 13D pursuant to paragraph (e), (f) or (g) of this section may again report its beneficial ownership on Schedule 13G pursuant to paragraphs (b) or (c) of this section provided the person qualifies thereunder, as applicable, by filing a Schedule 13G once the person determines that the provisions of paragraph (e), (f) or (g) of this section no longer apply.

i. For the purpose of this regulation, the term "equity security" means any equity security of a class which is registered pursuant to section 12 of that Act, or any equity security of any insurance company which would have

been required to be so registered except for the exemption contained in section 12(g) (2) (G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940: Provided, such term shall not include securities of a class of non-voting securities.

j. For the purpose of sections 13(d) and 13(g), any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless he knows or has reason to believe that the information contained therein is inaccurate.

k. 1. Whenever two or more persons are required to file a statement containing the information required by Schedule 13D or Schedule 13G with respect to the same securities, only one statement need be filed: Provided, That:

i. Each person on whose behalf the statement is filed is individually eligible to use the Schedule on which the information is filed;

ii. Each person on whose behalf the statement is filed is responsible for the timely filing of such statement and any amendments thereto, and for the completeness and accuracy of the information concerning such person contained therein; such person is not responsible for the completeness or accuracy of the information concerning the other persons making the filing, unless such person knows or has reason to believe that such information is inaccurate; and

iii. Such statement identifies all such persons, contains the required information with regard to each such person, indicates that such statement is filed on behalf of all such persons, and includes, as an exhibit, their agreement in writing that such a statement is filed on behalf of each of them.

2. A group's filing obligation may be satisfied either by a single joint filing or by each of the group's members making an individual filing. If the group's members elect to make their own filings, each such filing should identify all members of the group but the information provided concerning the other persons making the filing need only reflect information which the filing person knows or has reason to know.

F. *Rule 13d-2. Filing of amendments to Schedules 13D or 13G.*

a. If any material change occurs in the facts set forth in the Schedule 13D required by Rule 13d-1(a), including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement shall promptly file or cause to be filed with the Commission an amendment disclosing that change. An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed "material" for purposes of this section; acquisitions or dispositions of less than those amounts may be material, depending upon the facts and circumstances.

b. Notwithstanding paragraph (a) of this section, and provided that the person filing a Schedule 13G pursuant to Rule 13d-1(b) or Rule 13d-1(c) continues to meet the requirements set forth therein, any person who has filed a Schedule 13G pursuant to Rule 13d-1(b), Rule 13d-1(c) or Rule 13d-1(d) shall amend the statement within forty-five days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing on that Schedule:

Provided, however, That an amendment need not be filed with respect to a change in the percent of class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required unless the person thereafter becomes the beneficial owner of more than five percent of the class and is required to file pursuant to Rule 13d-1.

c. Any person relying on Rule 13d-1(b) that has filed its initial Schedule 13G pursuant to that paragraph shall, in addition to filing any amendments pursuant to Rule 13d-2(b), file an amendment on Schedule 13G within 10 days after the end of the first month in which the person's direct or indirect beneficial ownership, computed as of the last day of the month, exceeds 10 percent of the class of equity securities. Thereafter, that person shall, in addition to filing any amendments pursuant to Rule 13d-2(b), file an amendment on Schedule 13G within 10 days after the end of the first month in which the person's direct or indirect beneficial ownership, computed as of the last day of the month, increases or decreases by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (c).

d. Any person relying on Rule 13d-1(c) and has filed its initial Schedule 13G pursuant to that paragraph shall, in addition to filing any amendments pursuant to Rule 13d-2(b), file an amendment on Schedule 13G promptly upon acquiring, directly or indirectly, greater than 10 percent of a class of equity securities specified in Rule

13d-1(d), and thereafter promptly upon increasing or decreasing its beneficial ownership by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (d).

e. The first electronic amendment to a paper format Schedule 13D or Schedule 13G shall restate the entire text of the Schedule 13D or 13G, but previously filed paper exhibits to such Schedules are not required to be restated electronically. See Rule 102 of Regulation S-T regarding amendments to exhibits previously filed in paper format. Notwithstanding the foregoing, if the sole purpose of filing the first electronic Schedule 13D or 13G amendment is to report a change in beneficial ownership that would terminate the filer's obligation to report, the amendment need not include a restatement of the entire text of the Schedule being amended.

Note to Rule 13d-2: For persons filing a short form statement pursuant to Rule 13d-1(b), See also Rule 13d-1(b)(2) (3), and (4).

G. Rule 13d-3. Determination of beneficial owner.

(a) For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

(1) *Voting power* which includes the power to vote, or to direct the voting of, such security; and/or,

(2) *Investment power* which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of sections 13(d) or 13(g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

(c) All securities of the same class beneficially owned by a person, regardless of the form which such beneficial ownership takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this rule:

(1)(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) within sixty days, including but not limited to any right to acquire: (A) Through the exercise of any option, warrant or right; (B) Through the conversion of a security; (C) Pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or (D) Pursuant to the automatic termination of a trust, discretionary account or similar arrangement; provided, however, any person who acquires a security or power specified in paragraphs (A), (B) or (C), above, with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the beneficial owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class by any other person.

(ii) Paragraph (d)(1)(i) remains applicable for the purpose of determining the obligation to file with respect to the underlying security even though the option, warrant, right or convertible security is of a class of equity security, as defined in Rule 13d-1(i), and may therefore give rise to a separate obligation to file.

(2) A member of a national securities exchange shall not be deemed to be a beneficial owner of securities held directly or indirectly by it on behalf of another person solely because such member is the record holder of such securities and, pursuant to the rules of such exchange, may direct the vote of such securities, without instruction, on other than contested matters or matters that may affect substantially the

rights or privileges of the holders of the securities to be voted, but is otherwise precluded by the rules of such exchange from voting without instruction.

(3) A person who in the ordinary course of his business is a pledgee of securities under a written pledge agreement as to which there has been a default shall not be deemed to be the beneficial owner of such pledged securities until the pledgee has taken all formal steps necessary which are required to declare such default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised: *Provided*, that:

(i) The pledgee agreement is bona fide and was not entered into with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b);

(ii) The pledgee is a person specified in Rule 13d-1(b)(ii), including persons meeting the conditions set forth in paragraph (G) thereof; and

(iii) The pledgee agreement, prior to default, does not grant to the pledgee;

(A) The power to vote or to direct the vote of the pledged securities; or

(B) The power to dispose or direct the disposition of the pledged securities, other than the grant of such power(s) pursuant to a pledge agreement under which credit is extended subject to regulation T (12 CFR 220.1 to 220.8) and in which the pledgee is a broker or dealer registered under section 15 of the act.

(4) A person engaged in business as an underwriter of securities who acquires securities through his participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933 shall not be deemed to be the beneficial owner of such securities until the expiration of forty days after the date of such acquisition.

H. *Rule 13d-4. Disclaimer of beneficial ownership.*

Any person may expressly declare in any statement filed that the filing of such statement shall not be construed as an admission that such person is, for the purposes of sections 13(d) or 13(g) of the Act, the beneficial owner of any securities covered by the statement.

I. *Rule 13d-5. Acquisition of securities.*

(a) A person who becomes a beneficial owner of securities shall be deemed to have acquired such securities for purposes of section 13(d)(1) of the Act, whether such acquisition was through purchase or otherwise. However, executors or administrators of a decedent's estate generally will be presumed not to have acquired beneficial ownership of the securities in the decedent's estate until such time as such executors or administrators are qualified under local law to perform their duties.

(b)(1) When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and 13(g) of the Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons.

(2) Notwithstanding the previous paragraph, a group shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group solely by virtue of their concerted actions relating to the purchase of equity securities directly from an issuer in a transaction not involving a public offering: *Provided*, that:

(i) All the members of the group are persons specified in Rule 13d-1(b)(1)(ii);

(ii) The purchase is in the ordinary course of each member's business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to Rule 13d-3(b);

(iii) There is no agreement among, or between any members of the group to act together with respect to the issuer or its securities except for the purpose of facilitating the specific purchase involved; and

(iv) The only actions among or between any members of the group with respect to the issuer or its securities subsequent to the closing date of the non- public offering are those which are necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities.

J. *Rule 13d-6. Exemption of certain acquisitions.*

The acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the outstanding securities of the same class as those acquired shall be exempt from section 13(d) of the Act: Provided, That:

(a) The acquisition is made pursuant to preemptive subscription rights in an offering made to all holders of

securities of the class to which the preemptive subscription rights pertain;

(b) Such person does not acquire additional securities except through the exercise of his pro rata share of the preemptive subscription rights; and

(c) The acquisition is duly reported, if required, pursuant to section 16(a) of the Act and the rules and regulations thereunder.

K. Rule 13d-7. Fees for Filing Schedules 13D or 13G. ***

One copy of the Schedule filed pursuant to Rule 13d-1 and Rule 13d-2 shall be sent to the issuer of the security at its principal executive office, by registered or certified mail. A copy of Schedules filed pursuant to Rule 13d- 1(a) and Rule 13d-2(a) shall also be sent to each national securities exchange where the security is traded.

L. Schedule 13D. Information to be included in statements filed pursuant to Rule 13d-1(a) and amendments thereto filed pursuant to Rule 13d-2(a).

SECURITIES AND EXCHANGE COMMISSION,

Washington, D.C. 20549

SCHEDULE 13D

Under the Securities Exchange Act of 1934

(Amendment No. __)

(Name of Issuer)

(Title of Class of Securities)

(CUSIP Number)

(Name Address and Telephone Number of Person Authorized to Receive Notice and Communications)

(Date of Event Which Requires Filing of This Statement)

If the filing person has previously filed a statement on Schedule 13G to report the acquisition which is the subject of this Schedule 13D, and is filing this schedule because of Rule 13d-1(b)(3) or (4), check the following box. ☐

Note: Schedules filed in paper format shall include a signed original and five copies of the schedule, including all exhibits. See Rule 13d-7(b) for other parties to whom copies are to be sent.

CUSIP No.

(1) Names of reporting persons

The remainder of this shall be filled out for a reporting person's initial filing on this form with respect to the subject class of securities, and for any subsequent amendment containing information which would alter disclosures provided in a prior cover page.

The information required on the remainder of this cover page shall not be deemed to be "filed" for the purpose of Section 18 of the Securities Exchange Act of 1934 ("Act") or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act (however, see the Notes).

S.S. or I.R.S. Identification Nos. of above persons

(2) Check the appropriate box if a member of a group (see instructions)

(a) ☐ (b) ☐

(3) SEC use only

(4) Source of funds (see instructions)

(5) Check if disclosure of legal proceedings is required pursuant to Items 2(d) or 2(e). ☐

(6) Citizenship or place of organization

Number of shares beneficially owned by each reporting person with:

(7) Sole voting power

(8) Shared voting power

(9) Sole dispositive power

(10) Shared dispositive power

(11) Aggregate amount beneficially owned by each reporting person.

(12) Check if the aggregate amount in Row (11) excludes certain shares. ☐
(see instructions).

(13) Percent of class represented by amount in Row (11)

(14) Type of reporting person (see instructions)

Instructions for Cover Page

(1) *Names and Social Security Numbers of Reporting Persons*. Furnish the full legal name of each person for whom the report is filed--*i.e.*, each person required to sign the schedule itself--including each member of a group. Do not include the name of a person required to be identified in the report but who is not a reporting person. Reporting persons are also requested to furnish their Social Security or I.R.S. identification numbers, although disclosure of such numbers is voluntary, not mandatory (see "SPECIAL INSTRUCTIONS FOR COMPLYING WITH SCHEDULE 13-D" below).

(2) If any of the shares beneficially owned by a reporting person are held as a member of a group and such membership is expressly affirmed, please check row 2(a). If the membership in a group is disclaimed or the reporting person describes a relationship with other persons but does not affirm the existence of a group, please check row 2(b) [unless a joint filing pursuant to Rule 13d- 1(f)(1) in which case it may not be necessary to check row 2(b)].

(3) The 3rd row is for SEC internal use; please leave blank.

(4) Classify the source of funds or other consideration used or to be used in making the purchases as required to be disclosed pursuant to Item 3 of Schedule 13D and insert the appropriate symbol (or symbols if more than one is necessary) in row (4):

Category of Source	**Symbol**
Subject company (Company whose securities are being acquired)..	SC

Bank	BK
Affiliate (of reporting person)	AF
Working Capital (of reporting person)	WC
Personal Funds (of reporting person)	PF
Other	OO

(5) If disclosure of legal proceedings or actions is required pursuant to either Items 2(d) or 2(e) of Schedule 13D, row 5 should be checked.

(6) *Citizenship or Place of Organization*. Furnish citizenship if the named reporting person is a natural person. Otherwise, Furnish place of organization. (*See* Item 2 of Schedule 13D).

(7) to (11), (13) *Aggregate Amount Beneficially Owned by Each Reporting Person, etc.* Rows (7) through (11), inclusive, and (13) are to be completed in accordance with the provisions of Item 5 of Schedule 13D. All percentages are to be rounded off to nearest tenth (one place after decimal point).

(12) Check if the aggregate amount reported as beneficially owned in row (11) does not include shares which the reporting person discloses in the report but as to which beneficial ownership is disclaimed pursuant to Rule 13d-4 [17 CFR 240.13d-4] under the Securities Exchange Act of 1934.

(14) *Type of Reporting Person*. Please classify each "reporting person" according to the following breakdown and place the appropriate symbol (or symbols, *i.e.*, if more than one is applicable, insert all applicable symbols) on the form:

Category	**Symbol**
Broker Dealer	BD
Bank	BK
Insurance Company	IC
Investment Company	IV
Investment Adviser	IA
Employee Benefit Plan, Pension Fund or Endowment Fund	EP
Parent Holding Company	HC
Savings Association	SA
Church Plan	CP
Corporation	CO
Partnership	PN
Individual	IN
Other	OO

NOTE: Attach additional pages if needed.

NOTES: Attach as many copies of the second part of the cover page as are needed, one reporting person per page.

Filing persons may, in order to avoid unnecessary duplication, answer items on the schedules (Schedule 13D, 13G, or 14D-1) by appropriate cross references to an item or items on the cover page(s). This approach may only be used where the cover page item or items provide all the disclosure required by the schedule item. Moreover, such a use of a cover page item will result in the item becoming a part of the schedule and accordingly being considered as "filed" for purposes of Section 18 of the Securities Exchange Act or otherwise subject to the liabilities

of that section of the Act.

Reporting persons may comply with their cover page filing requirements by filing either completed copies of the blank forms available from the Commission, printed or typed facsimiles, or computer printed facsimiles, provided the documents filed have identical formats to the forms prescribed in the Commission's regulations and meet existing Securities Exchange Act rules as to such matters as clarity and size (Securities Exchange Act Rule 12b-12).

SPECIAL INSTRUCTIONS FOR COMPLYING WITH SCHEDULE 13D

Under sections 13(d) and 23 of the Securities Exchange Act of 1934 and the rules and regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this schedule by certain security holders of certain issuers.

Disclosure of the information specified in this schedule is mandatory, except for Social Security or I.R.S. identification numbers, disclosure of which is voluntary. The information will be used for the primary purpose of determining and disclosing the holdings of certain beneficial owners of certain equity securities. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.

Because of the public nature of the information, the Commission can utilize it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the Federal securities laws or other civil, criminal or regulatory statements or provisions. Social Security or I.R.S. identification numbers, if furnished, will assist the Commission in identifying security holders and, therefore, in promptly processing statements of beneficial ownership of securities.

Failure to disclose the information requested by this schedule, except for Social Security or I.R.S. identification numbers, may result in civil or criminal action against the persons involved for violation of the Federal securities law and rules promulgated thereunder.

GENERAL INSTRUCTIONS

A. The item numbers and captions of the items shall be included but the text of the items is to be omitted. The answers to the items shall be so prepared as to indicate clearly the coverage of the items without referring to the text of the items. Answer every item. If an item is inapplicable or the answer is in the negative, so state.

B. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item or sub-item of the statement unless it would render such answer misleading, incomplete, unclear or confusing. Material incorporated by reference shall be clearly identified in the reference by page, paragraph, caption or otherwise. An express statement that the specified matter is incorporated by reference shall be made at the particular place in the statement where the information is required. A copy of any information or a copy of the pertinent pages of a document containing such information which is incorporated by reference shall be submitted with this statement as an exhibit and shall be deemed to be filed with the Commission for all purposes of the Act.

C. If the statement is filed by a general or limited partnership, syndicate, or other group, the information called for by Items 2-6, inclusive, shall be given with respect to (i) each partner of such general partnership; (ii) each partner who is denominated as a general partner or who functions as a general partner of such limited partnership; (iii) each member of such syndicate or group; and (iv) each person controlling such partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii), or (iv) of this Instruction is a corporation, the information called for by the above mentioned items shall be given with respect to (a) each executive officer and director of such corporation; (b) each person controlling such corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of such corporation.

Item 1. Security and Issuer.

State the title of the class of equity securities to which this statement relates and the name and address of the principal executive offices of the issuer of such securities.

Item 2. Identity and Background.

If the person filing this statement or any person enumerated in Instruction C of this statement is a corporation, general partnership, limited partnership, syndicate or other group of persons, state its name, the state or other place of its organization, its principal business, the address of its principal office and the information required by (d) and (e) of this Item. If the person filing this statement or any person enumerated in Instruction C is a natural person, provide the information specified in (a) through (f) of this Item with respect to such person(s).

(a) Name;

(b) Residence or business address;

(c) Present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is conducted;

(d) Whether or not, during the last five years, such person has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give the dates, nature of conviction, name and location of court, any penalty imposed, or other disposition of the case;

(e) Whether or not, during the last five years, such person was a party to a civil proceeding of a judicial or administrative body of competent jurisdiction and as a result of such proceeding was or is subject to a judgment, decree or final order enjoining future violations of, or prohibiting or mandating activities subject to, federal or state securities laws or finding any violation with respect to such laws; and, if so, identify and describe such proceedings and summarize the terms of such judgment, decree or final order; and

(f) Citizenship.

Item 3. Source and Amount of Funds or Other Consideration.

State the source and the amount of funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is or will be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, trading or voting the securities, a description of the transaction and the names of the parties thereto. Where material, such information should also be provided with respect to prior acquisitions not previously reported pursuant to this regulation. If the source of all or any part of the funds is a loan made in the ordinary course of business by a bank, as defined in section 3(a)(6) of the Act, the name of the bank shall not be made available to the public if the person at the time of filing the statement so requests in writing and files such request, naming such bank, with the Secretary of the Commission. If the securities were acquired other than by purchase, describe the method of acquisition.

Item 4. Purpose of Transaction.

State the purpose or purposes of the acquisition of securities of the issuer. Describe any plans or proposals which the reporting persons may have which relate to or would result in:

(a) The acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer;

(b) An extraordinary corporate transaction, such as a merger, reorganization or liquidation, involving the issuer or any of its subsidiaries;

(c) A sale or transfer of a material amount of assets of the issuer or any of its subsidiaries;

(d) Any change in the present board of directors or management of the issuer, including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board;

(e) Any material change in the present capitalization or dividend policy of the issuer;

(f) Any other material change in the issuer's business or corporate structure, including but not limited to, if the issuer is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote is required by section 13 of the Investment Company Act of 1940;

(g) Changes in the issuer's charter, bylaws or instruments corresponding thereto or other actions which may impede the acquisition of control of the issuer by any person;

(h) Causing a class of securities of the issuer to be delisted from a national securities exchange or to cease to be authorized to be quoted in an inter- dealer quotation system of a registered national securities association;

(i) A class of equity securities of the issuer becoming eligible for termination of registration pursuant to section 12(g)(4) of the Act; or

(j) Any action similar to any of those enumerated above.

Item 5. Interest in Securities of the Issuer.

(a) State the aggregate number and percentage of the class of securities identified pursuant to Item 1 (which may be based on the number of securities outstanding as contained in the most recently available filing with the Commission by the issuer unless the filing person has reason to believe such information is not current) beneficially owned (identifying those shares which there is a right to acquire) by each person named in Item 2. The above mentioned information should also be furnished with respect to persons who, together with any of the persons named in Item 2, comprise a group within the meaning of section 13(d)(3) of the Act;

(b) For each person named in response to paragraph (a), indicate the number of shares as to which there is sole power to vote or to direct the vote, sole power to dispose or to direct the disposition, or shared power to dispose or to direct the disposition. Provide the applicable information required by Item 2 with respect to each person with whom the power to vote or to direct the vote or to dispose or direct the disposition is shared;

(c) Describe any transactions in the class of securities reported on that were effected during the past sixty days or since the most recent filing of Schedule 13D (Rule 13d-101), whichever is less, by the persons named in response to paragraph (a).

Instruction. The description of a transaction required by Item 5(c) shall include, but not necessarily be limited to: (1) The identity of the person covered by Item 5(c) who effected the transaction; (2) the date of transaction; (3) the amount of securities involved; (4) the price per share or unit; and (5) where and how the transaction was effected.

(d) If any other person is known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities, a statement to that effect should be included in response to this item and, if such interest relates to more than five percent of the class, such person should be identified. A listing of the shareholders of an investment company registered under the Investment Company Act of 1940 or the beneficiaries of an employee benefit plan, pension fund or endowment fund is not required.

(e) If applicable, state the date on which the reporting person ceased to be the beneficial owner of more than five percent of the class of securities.

Instruction. For computations regarding securities which represent a right to acquire an underlying security, see Rule 13d-3(d)(1) and the note thereto.

Item 6. Contracts, Arrangements, Understandings or Relationships with Respect to Securities of the Issuer.

Describe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 and between such persons and any person with respect to any securities of the issuer, including but not limited to transfer or voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, puts or calls, guarantees of profits, division of profits or loss, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, understandings or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

Item 7. Material to be Filed as Exhibits.

The following shall be filed as exhibits: Copies of written agreements relating to the filing of joint acquisition statements as required by Rule 13d-1(f) and copies of all written agreements, contracts, arrangements, understanding, plans or proposals relating to: (1) The borrowing of funds to finance the acquisition as disclosed in Item 3; (2) the acquisition of issuer control, liquidation, sale of assets, merger, or change in business or corporate structure, or any other matter as described in Item 4; and (3) the transfer or voting of the securities, finder's fees, joint ventures, options, puts, calls, guarantees of loans, guarantees against loss or of profit, or the giving or

withholding of any proxy as disclosed in Item 6.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

Date

Signature

Name/Title

The original statement shall be signed by each person on whose behalf the statement is filed or his authorized representative. If the statement is signed on behalf of a person by his authorized representative (other than an executive officer or general partner of the filing person), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement: Provided, however, That a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath his signature.

ATTENTION: Intentional misstatements or omissions of fact constitute Federal criminal violations (See 18 U.S.C. 1001). Rule 13d-102 Schedule 13G Information to be included in statements filed pursuant to Rule 13d-1(b) and amendments thereto filed pursuant to Rule 13d-2(b).

M. Rule 13e-1. Purchase of Securities by the Issuer During a Third-Party Tender Offer

An issuer that has received notice that it is the subject of a tender offer made under Section 14(d)(1) of the Act, that has commenced under Rule 14d-2 must not purchase any of its equity securities during the tender offer unless the issuer first:

a. Files a statement with the Commission containing the following information:

1. The title and number of securities to be purchased;
2. The names of the persons or classes of persons from whom the issuer will purchase the securities;
3. The name of any exchange, inter-dealer quotation system or any other market on or through which the securities will be purchased;
4. The purpose of the purchase;
5. Whether the issuer will retire the securities, hold the securities in its treasury, or dispose of the securities. If the issuer intends to dispose of the securities, describe how it intends to do so; and
6. The source and amount of funds or other consideration to be used to make the purchase. If the issuer borrows any funds or other consideration to make the purchase or enters any agreement for the purpose of acquiring, holding, or trading the securities, describe the transaction and agreement and identify the parties; and

b. Pays the fee required by Rule 0-11 when it files the initial statement.

c. This section does not apply to periodic repurchases in connection with an employee benefit plan or other similar plan of the issuer so long as the purchases are made in the ordinary course and not in response to the tender offer.

Instruction to Rule 13e-1:

File eight copies if paper filing is permitted.

N. Rule 13e-3. Going Private Transactions by Certain Issuers or Their Affiliates

a. *Definitions.* Unless indicated otherwise or the context otherwise requires, all terms used in this section and in Schedule 13E-3 shall have the same meaning as in the Act or elsewhere in the General Rules and Regulations thereunder. In addition, the following definitions apply:

1. An affiliate of an issuer is a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with such issuer. For the purposes of this section only, a person who is not an affiliate of an issuer at the commencement of such person's tender offer for a class of equity securities of such issuer will not be deemed an affiliate of such issuer prior to the stated termination of such tender offer and any extensions thereof;

2. The term *purchase* means any acquisition for value including, but not limited to,

i. any acquisition pursuant to the dissolution of an issuer subsequent to the sale or other disposition of substantially all the assets of such issuer to its affiliate,

ii. any acquisition pursuant to a merger,

iii. any acquisition of fractional interests in connection with a reverse stock split, and

iv. any acquisition subject to the control of an issuer or an affiliate of such issuer;

3. A *Rule 13e-3 transaction* is any transaction or series of transactions involving one or more of the transactions described in paragraph (a)3(i) of this section which has either a reasonable likelihood or a purpose of producing, either directly or indirectly, any of the effects described in paragraph (a)(3)(ii) of this section;

i. The transactions referred to in paragraph (a)3 of this section are:

A. A purchase of any equity security by the issuer of such security or by an affiliate of such issuer;

B. A tender offer for or request or invitation for tenders of any equity security made by the issuer of such class of securities or by an affiliate of such issuer; or

C. A solicitation subject to Regulation 14A of any proxy, consent or authorization of, or a distribution subject to Regulation 14C of information statements to, any equity security holder by the issuer of the class of securities or by an affiliate of such issuer, in connection with: a merger, consolidation, reclassification, recapitalization, reorganization or similar corporate transaction of an issuer or between an issuer (or its subsidiaries) and its affiliate; a sale of substantially all the assets of an issuer to its affiliate or group of affiliates; or a reverse stock split of any class of equity securities of the issuer involving the purchase of fractional interests.

ii. The effects referred to in paragraph (a)3 of this section are:

A. Causing any class of equity securities of the issuer which is subject to section 12(g) or section 15(d) of the Act to be held of record by less than 300 persons; or

B. Causing any class of equity securities of the issuer which is either listed on a national securities exchange or authorized to be quoted in an inter-dealer quotation system of a registered national securities association to be neither listed on any national securities exchange nor authorized to be quoted on an inter-dealer quotation system of any registered national securities association.

4. An *unaffiliated security holder* is any security holder of an equity security subject to a Rule 13e-3 transaction who is not an affiliate of the issuer of such security.

b. Application of section to an issuer (or an affiliate of such issuer) subject to section 12 of the Act.

1. It shall be a fraudulent, deceptive or manipulative act or practice, in connection with a Rule 13e-3 transaction, for an issuer which has a class of equity securities registered pursuant to section 12 of the Act or which is a closed-end investment company registered under the Investment Company Act of 1940, or an affiliate of such issuer, directly or indirectly

i. To employ any device, scheme or artifice to defraud any person;

ii. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

iii. To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

2. As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with any Rule 13e-3 transaction, it shall be unlawful for an issuer which has a class of equity securities registered pursuant to section 12 of the Act, or an affiliate of such issuer, to engage,

directly or indirectly, in a Rule 13e-3 transaction unless:

i. Such issuer or affiliate complies with the requirements of paragraphs (d), (e) and (f) of this section; and

ii. The Rule 13e-3 transaction is not in violation of paragraph (b)1 of this section.

c. Application of section to an issuer (or an affiliate of such issuer) subject to section 15(d) of the Act.

1. It shall be unlawful as a fraudulent, deceptive or manipulative act or practice for an issuer which is required to file periodic reports pursuant to Section 15(d) of the Act, or an affiliate of such issuer, to engage, directly or indirectly, in a Rule 13e-3 transaction unless such issuer or affiliate complies with the requirements of paragraphs (d), (e) and (f) of this section.

2. An issuer or affiliate which is subject to paragraph (c)1 of this section and which is soliciting proxies or distributing information statements in connection with a transaction described in paragraph (a)(3)(i)(A) of this section may elect to use the timing procedures for conducting a solicitation subject to Regulation 14A or a distribution subject to Regulation 14C in complying with paragraphs (d), (e) and (f) of this section, provided that if an election is made, such solicitation or distribution is conducted in accordance with the requirements of the respective regulations, including the filing of preliminary copies of soliciting materials or an information statement at the time specified in Regulation 14A or 14C, respectively.

d. *Material required to be filed*. The issuer or affiliate engaging in a Rule 13e-3 transaction must file with the Commission:

1. A Schedule 13E-3 (Rule 13e-100), including all exhibits;

2. An amendment to Schedule 13E-3 reporting promptly any material changes in the information set forth in the schedule previously filed; and

3. A final amendment to Schedule 13E-3 reporting promptly the results of the Rule 13e-3 transaction.

e. Disclosure of information to security holders.

1. In addition to disclosing the information required by any other applicable rule or regulation under the federal securities laws, the issuer or affiliate engaging in a Rule 13e-3 transaction must disclose to security holders of the class that is the subject of the transaction, as specified in paragraph (f) of this section, the following:

i. The information required by Item 1 of Schedule 13E-3 (Rule 13e- 100) (Summary Term Sheet);

ii. The information required by Items 7, 8 and 9 of Schedule 13E-3, which must be prominently disclosed in a "Special Factors" section in the front of the disclosure document;

iii. A prominent legend on the outside front cover page that indicates that neither the Securities and Exchange Commission nor any state securities commission has: approved or disapproved of the transaction; passed upon the merits or fairness of the transaction; or passed upon the adequacy or accuracy of the disclosure in the document. The legend also must make it clear that any representation to the contrary is a criminal offense;

iv. The information concerning appraisal rights required by Item 1016(f) of this chapter; and

v. The information required by the remaining items of Schedule 13E-3, except for Item 1016 of this chapter (exhibits), or a fair and adequate summary of the information.

Instructions to paragraph (e)(1):

1. If the Rule 13e-3 transaction also is subject to Regulation 14A (Rule 14a-1 through Rule 14b-2) or 14C (Rule 14c-1 through Rule 14c-101), the registration provisions and rules of the Securities Act of 1933, Regulation 14D or Rule 13e-4, the information required by paragraph (e)(1) of this section must be combined with the proxy statement, information statement, prospectus or tender offer material sent or given to security holders.
2. If the Rule 13e-3 transaction involves a registered securities offering, the legend required by Item 501(b)(7) of this chapter must be combined with the legend required by paragraph (e)(1)(iii) of this section.
3. The required legend must be written in clear, plain language.

f. *Dissemination of information to security holders.*

1. If the Rule 13e-3 transaction involves a purchase as described in paragraph (a)(3)(i)(A) of this section or a vote, consent, authorization, or distribution of information statements as described in paragraph (a)(3)(i)(C) of this section, the issuer or affiliate engaging in the Rule 13e-3 transaction shall:

i. Provide the information required by paragraph (e) of this section:

A. In accordance with the provisions of any applicable Federal or State law, but in no event later than 20 days prior to: any such purchase; any such vote, consent or authorization; or with respect to the distribution of information statements, the meeting date, or if corporate action is to be taken by means of the written authorization or consent of security holders, the earliest date on which corporate action may be taken: *Provided, however,* That if the purchase subject to this section is pursuant to a tender offer excepted from Rule 13e-4 by paragraph (g)(5) of Rule 13e-4, the information required by paragraph (e) of this section shall be disseminated in accordance with paragraph (e) of Rule 13e-4 no later than 10 business days prior to any purchase pursuant to such tender offer,

B. to each person who is a record holder of a class of equity securities subject to the Rule 13e-3 transaction as of a date not more than 20 days prior to the date of dissemination of such information.

ii. If the issuer or affiliate knows that securities of the class of securities subject to the Rule 13e-3 transaction are held of record by a broker, dealer, bank or voting trustee or their nominees, such issuer or affiliate shall (unless Rule 14a-13(a) or 14c-7 is applicable) furnish the number of copies of the information required by paragraph (e) of this section that are requested by such persons (pursuant to inquiries by or on behalf of the issuer or affiliate), instruct such persons to forward such information to the beneficial owners of such securities in a timely manner and undertake to pay the reasonable expenses incurred by such persons in forwarding such information; and

iii. Promptly disseminate disclosure of material changes to the information required by paragraph (d) of this section in a manner reasonably calculated to inform security holders.

2. If the Rule 13e-3 transaction is a tender offer or a request or invitation for tenders of equity securities which is subject to Regulation 14D or Rule 13e-4, the tender offer containing the information required by paragraph (e) of this section, and any material change with respect thereto, shall be published, sent or given in accordance with Regulation 14D or Rule 13e-4, respectively, to security holders of the class of securities being sought by the issuer or affiliate.

g. *Exceptions*. This section shall not apply to:

1. Any Rule 13e-3 transaction by or on behalf of a person which occurs within one year of the date of termination of a tender offer in which such person was the bidder and became an affiliate of the issuer as a result of such tender offer: *Provided,* That the consideration offered to unaffiliated security holders in such Rule 13e-3 transaction is at least equal to the highest consideration offered during such tender offer and *Provided further,* That:

i. If such tender offer was made for any or all securities of a class of the issuer;

A. Such tender offer fully disclosed such person's intention to engage in a Rule 13e-3 transaction, the form and effect of such transaction and, to the extent known, the proposed terms thereof; and

B. Such Rule 13e-3 transaction is substantially similar to that described in such tender offer; or

ii. If such tender offer was made for less than all the securities of a class of the issuer:

A. Such tender offer fully disclosed a plan of merger, a plan of liquidation or a similar binding agreement between such person and the issuer with respect to a Rule 13e-3 transaction; and

B. Such Rule 13e-3 transaction occurs pursuant to the plan of merger, plan of liquidation or similar binding agreement disclosed in the bidder's tender offer.

2. Any Rule 13e-3 transaction in which the security holders are offered or receive only an equity security *Provided,* That:

i. Such equity security has substantially the same rights as the equity security which is the subject of the Rule 13e-3 transaction including, but not limited to, voting, dividends, redemption and liquidation rights except that this requirement shall be deemed to be satisfied if unaffiliated security holders are offered common stock;

ii. Such equity security is registered pursuant to section 12 of the Act or reports are required to be filed by the issuer thereof pursuant to section 15(d) of the Act; and

iii. If the security which is the subject of the Rule 13e-3 transaction was either listed on a national securities exchange or authorized to be quoted in an interdealer quotation system of a registered national securities association, such equity security is either listed on a national securities exchange or authorized to be quoted in an inter-dealer quotation system of a registered national securities association.

3. Transactions by a holding company registered under the Public Utility Holding Company Act of 1935 in compliance with the provisions of that Act;

4. Redemptions, calls or similar purchases of an equity security by an issuer pursuant to specific provisions set forth in the instrument(s) creating or governing that class of equity securities; or

5. Any solicitation by an issuer with respect to a plan of reorganization under Chapter XI of the Bankruptcy Act, as amended, if made after the entry of an order approving such plan pursuant to section 1125(b) of that Act and after, or concurrently with, the transmittal of information concerning such plan as required by section 1125(b) of that Act.

6. Any tender offer or business combination made in compliance with Rule 802, Rule 13e-4(h)(8) or Rule 14d-1(c).

O. Schedule 13E-3. Transaction statement under section 13(e) of the Securities Exchange Act of 1934 and Rule 13e-3 thereunder.

SECURITIES AND EXCHANGE COMMISSION,

Washington, D.C. 20549

SCHEDULE 13E-3 TRANSACTION STATEMENT

(Under Section 13(e) the Securities Exchange Act of 1934)

(Amendment No. ___)

(Name of the Issuer)

(Name of Person(s) Filing Statement)

(Title of Class of Securities)

(CUSIP Number)

(Name, Address and Telephone Number of Person Authorized to Receive Notices and Communications on Behalf of Person(s) Filing Statement)

This statement is filed in connection with (check the appropriate box):

a. ☐ The filing of solicitation materials or an information statement subject to Regulation 14A, Regulation 14C or Rule 13e-3(c) under the Securities Exchange Act of 1934.

b. ☐ The filing of a registration statement under the Securities Act of 1933.

c. ☐ A tender offer.

d. ☐ None of the above.

Check the following box if the soliciting materials or information statement referred to in checking box (a) are preliminary copies: ☐

Check the following box if the filing is a final amendment reporting the results of the transaction: ☐

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

CALCULATION OF FILING FEE

Transaction valuation	Amount of filing fee

☐ Check box if any part of the fee is offset as provided by Rule 0-11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid:

Form or Registration No.:

Filing Party:

Date Filed:

General Instructions

A. File eight copies of the statement, including all exhibits, with the Commission if paper filing is permitted.

B. This filing must be accompanied by a fee payable to the Commission as required by Rule 0-11(b).

C. If the statement is filed by a general or limited partnership, syndicate or other group, the information called for by Items 3, 5, 6, 10 and 11 must be given with respect to: (i) Each partner of the general partnership; (ii) each partner who is, or functions as, a general partner of the limited partnership; (iii) each member of the syndicate or group; and (iv) each person controlling the partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the items specified above must be given with respect to: (a) Each executive officer and director of the corporation; (b) each person controlling the corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of the corporation.

D. Depending on the type of Rule 13e-3 transaction, this statement must be filed with the Commission:

1. At the same time as filing preliminary or definitive soliciting materials or an information statement under Regulations 14A or 14C of the Act;

2. At the same time as filing a registration statement under the Securities Act of 1933;

3. As soon as practicable on the date a tender offer is first published, sent or given to security

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Set forth the amount on which the filing fee is calculated and state how it was determined.

holders; or

4. At least 30 days before any purchase of securities of the class of securities subject to the Rule 13e-3 transaction, if the transaction does not involve a solicitation, an information statement, the registration of securities or a tender offer, as described in paragraphs 1, 2 or 3 of this Instruction; and

5. If the Rule 13e-3 transaction involves a series of transactions, the issuer or affiliate must file this statement at the time indicated in paragraphs 1 through 4 of this Instruction for the first transaction and must amend the schedule promptly with respect to each subsequent transaction.

E. If an item is inapplicable or the answer is in the negative, so state. The statement published, sent or given to security holders may omit negative and not applicable responses, except that responses to Items 7, 8 and 9 of this schedule must be provided in full. If the schedule includes any information that is not published, sent or given to security holders, provide that information or specifically incorporate it by reference under the appropriate item number and heading in the schedule. Do not recite the text of disclosure requirements in the schedule or any document published, sent or given to security holders. Indicate clearly the coverage of the requirements without referring to the text of the items.

F. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item unless it would render the answer misleading, incomplete, unclear or confusing. A copy of any information that is incorporated by reference or a copy of the pertinent pages of a document containing the information must be submitted with this statement as an exhibit, unless it was previously filed with the Commission electronically on EDGAR. If an exhibit contains information responding to more than one item in the schedule, all information in that exhibit may be incorporated by reference once in response to the several items in the schedule for which it provides an answer. Information incorporated by reference is deemed filed with the Commission for all purposes of the Act.

G. If the Rule 13e-3 transaction also involves a transaction subject to Regulation 14A (Rule 14a-1 through Rule 14b-2) or 14C (Rule 14c-1 through Rule 14c-101) of the Act, the registration of securities under the Securities Act of 1933 and the General Rules and Regulations of that Act, or a tender offer subject to Regulation 14D (Rule 14d-1 through Rule 14d-101) or Rule 13e- 4, this statement must incorporate by reference the information contained in the proxy, information, registration or tender offer statement in answer to the items of this statement.

H. The information required by the items of this statement is intended to be in addition to any disclosure requirements of any other form or schedule that may be filed with the Commission in connection with the Rule 13e-3 transaction. If those forms or schedules require less information on any topic than this statement, the requirements of this statement control.

I. If the Rule 13e-3 transaction involves a tender offer, then a combined statement on Schedules 13E-3 and TO may be filed with the Commission under cover of Schedule TO. See Instruction J of Schedule TO.

J. Amendments disclosing a material change in the information set forth in this statement may omit any information previously disclosed in this statement.

Item 1. Summary Term Sheet

Furnish the information required by Item 1001 of Regulation M-A unless information is disclosed to security holders in a prospectus that meets the requirements of Rule 421(d).

Item 2. Subject Company Information

Furnish the information required by Item 1002 of Regulation M-A.

Item 3. Identity and Background of Filing Person

Furnish the information required by Item 1003(a) through (c) of Regulation M- A.

Item 4. Terms of the Transaction

Furnish the information required by Item 1004(a) and (c) through (f) of Regulation M-A.

Item 5. Past Contacts, Transactions, Negotiations and Agreements

Furnish the information required by Item 1005(a) through (c) and (e) of Regulation M-A.

Item 6. Purposes of the Transaction and Plans or Proposals

Furnish the information required by Item 1006(b) and (c)(1) through (8) of Regulation M-A.

Instruction to Item 6:

In providing the information specified in Item 1006(c) for this item, discuss any activities or transactions that would occur after the Rule 13e-3 transaction.

Item 7. Purposes, Alternatives, Reasons and Effects

Furnish the information required by Item 1013 of Regulation M-A.

Item 8. Fairness of the Transaction

Furnish the information required by Item 1014 of Regulation M-A.

Item 9. Reports, Opinions, Appraisals and Negotiations

Furnish the information required by Item 1015 of Regulation M-A.

Item 10. Source and Amounts of Funds or Other Consideration

Furnish the information required by Item 1007 of Regulation M-A.

Item 11. Interest in Securities of the Subject Company

Furnish the information required by Item 1008 of Regulation M-A.

Item 12. The Solicitation or Recommendation

Furnish the information required by Item 1012(d) and (e) of Regulation M-A.

Item 13. Financial Statements

Furnish the information required by Item 1010(a) through (b) of Regulation M- A for the issuer of the subject class of securities.

Instructions to Item 13:

1. The disclosure materials disseminated to security holders may contain the summarized financial information required by Item 1010(c) of Regulation M-A instead of the financial information required by Item 1010(a) and (b). In that case, the financial information required by Item 1010(a) and (b) of Regulation M-A must be disclosed directly or incorporated by reference in the statement. If summarized financial information is disseminated to security holders, include appropriate instructions on how more complete financial information can be obtained. If the summarized financial information is prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, the summarized financial information must be accompanied by a reconciliation as described in Instruction 2.
2. If the financial statements required by this Item are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F.
3. The filing person may incorporate by reference financial statements contained in

any document filed with the Commission, solely for the purposes of this schedule, if: (a) The financial statements substantially meet the requirements of this Item; (b) an express statement is made that the financial statements are incorporated by reference; (c) the matter incorporated by reference is clearly identified by page, paragraph, caption or otherwise; and (d) if the matter incorporated by reference is not filed with this Schedule, an indication is made where the information may be inspected and copies obtained. Financial statements that are required to be presented in comparative form for two or more fiscal years or periods may not be incorporated by reference unless the material incorporated by reference includes the entire period for which the comparative data is required to be given. See General Instruction F to this Schedule.

Item 14. Persons/Assets, Retained, Employed, Compensated or Used

Furnish the information required by Item 1009 of Regulation M-A.

Item 15. Additional Information

Furnish the information required by Item 1011(b) of Regulation M-A.

Item 16. Exhibits

File as an exhibit to the Schedule all documents specified in Item 1016(a) through (d), (f) and (g) of Regulation M-A.

Signature

After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

_____ (Signature)
_____ (Name and Title)
_____ (Date)

Instruction to Signature:

The statement must be signed by the filing person or that person's authorized representative. If the statement is signed on behalf of a person by an authorized representative (other than an executive officer of a corporation or general partner of a partnership), evidence of the representative's authority to sign on behalf of the person must be filed with the statement. The name and any title of each person who signs the statement must be typed or printed beneath the signature. See Rule 12b-11 with respect to signature requirements.

P. Rule 13e-4. Tender offers by issuers.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section and in Schedule TO (§240.14d–100) shall have the same meaning as in the Act or elsewhere in the General Rules and Regulations thereunder. In addition, the following definitions shall apply:

(1) The term *issuer* means any issuer which has a class of equity security registered pursuant to section 12 of the Act, or which is required to file periodic reports pursuant to section 15(d) of the Act, or which is a closed-end investment company registered under the Investment Company Act of 1940.

(2) The term *issuer tender offer* refers to a tender offer for, or a request or invitation for tenders of, any class of equity security, made by the issuer of such class of equity security or by an affiliate of such issuer.

(3) As used in this section and in Schedule TO (§240.14d–100), the term *business day* means any day, other than Saturday, Sunday, or a Federal holiday, and shall consist of the time period from 12:01 a.m. through 12:00 midnight Eastern Time. In computing any time period under this Rule or Schedule 13E–4, the date of the event that begins the running of such time period shall be included *except that* if such event occurs on other than a business day such period shall begin to run on and shall include the first business day thereafter.

(4) The term *commencement* means 12:01 a.m. on the date that the issuer or affiliate has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

(5) The term *termination* means the date after which securities may not be tendered pursuant to an issuer tender offer.

(6) The term *security holders* means holders of record and beneficial owners of securities of the class of equity security which is the subject of an issuer tender offer.

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

(b) *Filing, disclosure and dissemination.* As soon as practicable on the date of commencement of the issuer tender offer, the issuer or affiliate making the issuer tender offer must comply with:

(1) The filing requirements of paragraph (c)(2) of this section;

(2) The disclosure requirements of paragraph (d)(1) of this section; and

(3) The dissemination requirements of paragraph (e) of this section.

(c) *Material required to be filed.* The issuer or affiliate making the issuer tender offer must file with the Commission:

(1) All written communications made by the issuer or affiliate relating to the issuer tender offer, from and including the first public announcement, as soon as practicable on the date of the communication;

(2) A Schedule TO (§240.14d–100), including all exhibits;

(3) An amendment to Schedule TO (§240.14d–100) reporting promptly any material changes in the information set forth in the schedule previously filed; and

(4) A final amendment to Schedule TO (§240.14d–100) reporting promptly the results of the issuer tender offer.

Instructions to § 240.13e–4(c)

1. Pre-commencement communications must be filed under cover of Schedule TO (§240.14d–100) and the box on the cover page of the schedule must be marked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under §230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it is available because it contains important information. The legend also must advise investors that they can get the tender offer statement and other filed documents for free at the Commission's web site and explain which documents are free from the issuer.

4. See §§230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

5. "Public announcement" is any oral or written communication by the issuer, affiliate or any person authorized to act on their behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the issuer tender offer.

(d) *Disclosure of tender offer information to security holders.*

(1) The issuer or affiliate making the issuer tender offer must disclose, in a manner prescribed by paragraph (e)(1) of this section, the following:

(i) The information required by Item 1 of Schedule TO (§240.14d–100) (summary term sheet); and

(ii) The information required by the remaining items of Schedule TO for issuer tender offers, except for Item 12 (exhibits), or a fair and adequate summary of the information.

(2) If there are any material changes in the information previously disclosed to security holders, the

issuer or affiliate must disclose the changes promptly to security holders in a manner specified in paragraph (e)(3) of this section.

(3) If the issuer or affiliate disseminates the issuer tender offer by means of summary publication as described in paragraph (e)(1)(iii) of this section, the summary advertisement must not include a transmittal letter that would permit security holders to tender securities sought in the offer and must disclose at least the following information:

(i) The identity of the issuer or affiliate making the issuer tender offer;

(ii) The information required by §229.1004(a)(1) and §229.1006(a) of this chapter;

(iii) Instructions on how security holders can obtain promptly a copy of the statement required by paragraph (d)(1) of this section, at the issuer or affiliate's expense; and

(iv) A statement that the information contained in the statement required by paragraph (d)(1) of this section is incorporated by reference.

(e) *Dissemination of tender offers to security holders.* An issuer tender offer will be deemed to be published, sent or given to security holders if the issuer or affiliate making the issuer tender offer complies fully with one or more of the methods described in this section.

(1) For issuer tender offers in which the consideration offered consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 (15 U.S.C. 77c):

(i) Dissemination of cash issuer tender offers by long-form publication: By making adequate publication of the information required by paragraph (d)(1) of this section in a newspaper or newspapers, on the date of commencement of the issuer tender offer.

(ii) Dissemination of any issuer tender offer by use of stockholder and other lists:

(A) By mailing or otherwise furnishing promptly a statement containing the information required by paragraph (d)(1) of this section to each security holder whose name appears on the most recent stockholder list of the issuer;

(B) By contacting each participant on the most recent security position listing of any clearing agency within the possession or access of the issuer or affiliate making the issuer tender offer, and making inquiry of each participant as to the approximate number of beneficial owners of the securities sought in the offer that are held by the participant;

(C) By furnishing to each participant a sufficient number of copies of the statement required by paragraph (d)(1) of this section for transmittal to the beneficial owners; and

(D) By agreeing to reimburse each participant promptly for its reasonable expenses incurred in forwarding the statement to beneficial owners.

(iii) Dissemination of certain cash issuer tender offers by summary publication:

(A) If the issuer tender offer is not subject to §240.13e–3, by making adequate publication of a summary advertisement containing the information required by paragraph (d)(3) of this section in a newspaper or newspapers, on the date of commencement of the issuer tender offer; and

(B) By mailing or otherwise furnishing promptly the statement required by paragraph (d)(1) of this section and a transmittal letter to any security holder who requests a copy of the statement or transmittal letter.

Instruction to paragraph (e)(1):

For purposes of paragraphs (e)(1)(i) and (e)(1)(iii) of this section, adequate publication of the issuer tender offer may require publication in a newspaper with a national circulation, a newspaper with metropolitan or regional circulation, or a combination of the two, depending upon the facts and circumstances involved.

(2) For tender offers in which the consideration consists solely or partially of securities registered under the Securities Act of 1933, a registration statement containing all of the required information, including pricing information, has been filed and a preliminary prospectus or a prospectus that meets the requirements of Section 10(a) of the Securities Act (15 U.S.C. (15 U.S.C. 77j(a)), including a letter of transmittal, is delivered to security holders. However, for going-private transactions (as defined by §240.13e–3) and roll-up transactions (as described by Item 901 of Regulation S-K (§229.901 of this chapter)), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of Section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

Instructions to paragraph (e)(2):

1. If the prospectus is being delivered by mail, mailing on the date of commencement is sufficient.

2. A preliminary prospectus used under this section may not omit information under § 230.430 or § 230.430A of this chapter.

3. If a preliminary prospectus is used under this section and the issuer must disseminate material changes, the tender offer must remain open for the period specified in paragraph (e)(3) of this section.

4. If a preliminary prospectus is used under this section, tenders may be requested in accordance with § 230.162(a) of this chapter.

(3) If a material change occurs in the information published, sent or given to security holders, the issuer or affiliate must disseminate promptly disclosure of the change in a manner reasonably calculated to inform security holders of the change. In a registered securities offer where the issuer or affiliate disseminates the preliminary prospectus as permitted by paragraph (e)(2) of this section, the offer must remain open from the date that material changes to the tender offer materials are disseminated to security holders, as follows:

(i) Five business days for a prospectus supplement containing a material change other than price or share levels;

(ii) Ten business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change;

(iii) Ten business days for a prospectus supplement included as part of a post effective amendment; and

(iv) Twenty business days for a revised prospectus when the initial prospectus was materially deficient.

(f) *Manner of making tender offer.*

(1) The issuer tender offer, unless withdrawn, shall remain open until the expiration of:

(i) At least twenty business days from its commencement; and

(ii) At least ten business days from the date that notice of an increase or decrease in the percentage of the class of securities being sought or the consideration offered or the dealer's soliciting fee to be given is first published, sent or given to security holders. Provided, however, that, for purposes of this paragraph, the acceptance for payment by the issuer or affiliate of an additional amount of securities not to exceed two percent of the class of securities that is the subject of the tender offer shall not be deemed to be an increase. For purposes of this paragraph, the percentage of a class of securities shall be calculated in accordance with section 14(d)(3) of the Act.

(2) The issuer or affiliate making the issuer tender offer shall permit securities tendered pursuant to the issuer tender offer to be withdrawn:

(i) At any time during the period such issuer tender offer remains open; and

(ii) If not yet accepted for payment, after the expiration of forty business days from the commencement of the issuer tender offer.

(3) If the issuer or affiliate makes a tender offer for less than all of the outstanding equity securities of a class, and if a greater number of securities is tendered pursuant thereto than the issuer or affiliate is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities tendered by each security holder during the period such offer remains open; Provided, however, that this provision shall not prohibit the issuer or affiliate making the issuer tender offer from:

(i) Accepting all securities tendered by persons who own, beneficially or of record, an aggregate of not more than a specified number which is less than one hundred shares of such security and who tender all their securities, before prorating securities tendered by others; or

(ii) Accepting by lot securities tendered by security holders who tender all securities held by them and who, when tendering their securities, elect to have either all or none or at least a minimum amount or none accepted, if the issuer or affiliate first accepts all securities tendered by security holders who do not so elect;

(4) In the event the issuer or affiliate making the issuer tender increases the consideration offered after the issuer tender offer has commenced, such issuer or affiliate shall pay such increased consideration to all security holders whose tendered securities are accepted for payment by such issuer or affiliate.

(5) The issuer or affiliate making the tender offer shall either pay the consideration offered, or

return the tendered securities, promptly after the termination or withdrawal of the tender offer.

(6) Until the expiration of at least ten business days after the date of termination of the issuer tender offer, neither the issuer nor any affiliate shall make any purchases, otherwise than pursuant to the tender offer, of:

(i) Any security which is the subject of the issuer tender offer, or any security of the same class and series, or any right to purchase any such securities; and

(ii) In the case of an issuer tender offer which is an exchange offer, any security being offered pursuant to such exchange offer, or any security of the same class and series, or any right to purchase any such security.

(7) The time periods for the minimum offering periods pursuant to this section shall be computed on a concurrent as opposed to a consecutive basis.

(8) No issuer or affiliate shall make a tender offer unless:

(i) The tender offer is open to all security holders of the class of securities subject to the tender offer; and

(ii) The consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.

(9) Paragraph (f)(8)(i) of this section shall not:

(i) Affect dissemination under paragraph (e) of this section; or

(ii) Prohibit an issuer or affiliate from making a tender offer excluding all security holders in a state where the issuer or affiliate is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the issuer or affiliate to comply with such statute.

(10) Paragraph (f)(8)(ii) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, provided that:

(i) Security holders are afforded equal right to elect among each of the types of consideration offered; and

(ii) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(11) If the offer and sale of securities constituting consideration offered in an issuer tender offer is prohibited by the appropriate authority of a state after a good faith effort by the issuer or affiliate to register or qualify the offer and sale of such securities in such state:

(i) The issuer or affiliate may offer security holders in such state an alternative form of consideration; and

(ii) Paragraph (f)(10) of this section shall not operate to require the issuer or affiliate to offer or pay the alternative form of consideration to security holders in any other state.

(12) (i) Paragraph (f)(8)(ii) of this section shall not prohibit the negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement, or payments made or to be made or benefits granted or to be granted according to such an arrangement, with respect to any security holder of the issuer, where the amount payable under the arrangement:

(A) Is being paid or granted as compensation for past services performed, future services to be performed, or future services to be refrained from performing, by the security holder (and matters incidental thereto); and

(B) Is not calculated based on the number of securities tendered or to be tendered in the tender offer by the security holder.

(ii) The provisions of paragraph (f)(12)(i) of this section shall be satisfied and, therefore, pursuant to this non-exclusive safe harbor, the negotiation, execution or amendment of an arrangement and any payments made or to be made or benefits granted or to be granted according to that arrangement shall not be prohibited by paragraph (f)(8)(ii) of this section, if the arrangement is approved as an employment compensation, severance or other employee benefit arrangement solely by independent directors as follows:

(A) The compensation committee or a committee of the board of directors that performs functions similar to a compensation committee of the issuer approves the arrangement, regardless of whether the issuer is a party to the arrangement, or, if an affiliate is a party to the arrangement, the compensation committee or a committee of the board of directors that performs functions similar to a compensation committee of the affiliate approves the arrangement; or

(B) If the issuer's or affiliate's board of directors, as applicable, does not have a compensation committee or a committee of the board of directors that performs functions similar to a compensation committee or if none of the members of the issuer's or affiliate's compensation committee or committee that performs functions similar to a compensation committee is independent, a special committee of the board of directors formed to consider and approve the arrangement approves the arrangement; or

(C) If the issuer or affiliate, as applicable, is a foreign private issuer, any or all members of the board of directors or any committee of the board of directors authorized to approve employment compensation, severance or other employee benefit arrangements under the laws or regulations of the home country approves the arrangement.

Instructions to paragraph (f)(12)(ii*):* For purposes of determining whether the members of the committee approving an arrangement in accordance with the provisions of paragraph (f)(12)(ii) of this section are independent, the following provisions shall apply:

1. If the issuer or affiliate, as applicable, is a listed issuer (as defined in §240.10A–3 of this chapter) whose securities are listed either on a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a)) or in an inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o–3(a)) that has independence requirements for compensation committee members that have been approved by the Commission (as those requirements may be modified or supplemented), apply the issuer's or affiliate's definition of independence that it uses for determining that the members of the compensation committee are independent in compliance with the listing standards applicable to compensation committee members of the listed issuer.
2. If the issuer or affiliate, as applicable, is not a listed issuer (as defined in §240.10A–3 of this chapter), apply the independence requirements for compensation committee members of a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a)) or an inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o–3(a)) that have been approved by the Commission (as those requirements may be modified or supplemented). Whatever definition the issuer or affiliate, as applicable, chooses, it must apply that definition consistently to all members of the committee approving the arrangement.
3. Notwithstanding Instructions 1 and 2 to paragraph (f)(12)(ii), if the issuer or affiliate, as applicable, is a closed-end investment company registered under the Investment Company Act of 1940, a director is considered to be independent if the director is not, other than in his or her capacity as a member of the board of directors or any board committee, an "interested person" of the investment company, as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).
4. If the issuer or affiliate, as applicable, is a foreign private issuer, apply either the independence standards set forth in Instructions 1 and 2 to paragraph (f)(12)(ii) or the independence requirements of the laws, regulations, codes or standards of the home country of the issuer or affiliate, as applicable, for members of the board of directors or the committee of the board of directors approving the arrangement.
5. A determination by the issuer's or affiliate's board of directors, as applicable, that the members of the board of directors or the committee of the board of directors, as applicable, approving an arrangement in accordance with the provisions of paragraph (f)(12)(ii) are independent in accordance with the provisions of this instruction to paragraph (f)(12)(ii) shall satisfy the independence requirements of paragraph (f)(12)(ii).

Instruction to paragraph (f)(12): The fact that the provisions of paragraph (f)(12) of this section extend only to employment compensation, severance and other employee benefit arrangements and not to other arrangements, such as commercial arrangements, does not raise any inference that a payment under any such other arrangement constitutes consideration paid for securities in a tender offer.

(13) *Electronic filings.* If the issuer or affiliate is an electronic filer, the minimum offering periods set forth in paragraph (f)(1) of this section shall be tolled for any period during which it fails to file in

electronic format, absent a hardship exemption (§§232.201 and 232.202 of this chapter), the Schedule TO (§240.14d–100), the tender offer material specified in Item 1016(a)(1) of Regulation M-A (§229.1016(a)(1) of this chapter), and any amendments thereto. If such documents were filed in paper pursuant to a hardship exemption (*see* §232.201 and §232.202 of this chapter), the minimum offering periods shall be tolled for any period during which a required confirming electronic copy of such Schedule and tender offer material is delinquent.

(g) The requirements of section 13(e) (1) of the Act and Rule 13e–4 and Schedule TO (§240.14d–100) thereunder shall be deemed satisfied with respect to any issuer tender offer, including any exchange offer, where the issuer is incorporated or organized under the laws of Canada or any Canadian province or territory, is a foreign private issuer, and is not an investment company registered or required to be registered under the Investment Company Act of 1940, if less than 40 percent of the class of securities that is the subject of the tender offer is held by U. S. holders, and the tender offer is subject to, and the issuer complies with, the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the offer (unless the issuer has received an exemption(s) from, and the issuer tender offer does not comply with, requirements that otherwise would be prescribed by this section), *provided that:*

(1) Where the consideration for an issuer tender offer subject to this paragraph consists solely of cash, the entire disclosure document or documents required to be furnished to holders of the class of securities to be acquired shall be filed with the Commission on Schedule 13E–4F (§240.13e–102) and disseminated to shareholders residing in the United States in accordance with such Canadian laws, regulations and policies; or

(2) Where the consideration for an issuer tender offer subject to this paragraph includes securities to be issued pursuant to the offer, any registration statement and/or prospectus relating thereto shall be filed with the Commission along with the Schedule 13E–4F referred to in paragraph (g)(1) of this section, and shall be disseminated, together with the home jurisdiction document(s) accompanying such Schedule, to shareholders of the issuer residing in the United States in accordance with such Canadian laws, regulations and policies.

Note: Notwithstanding the grant of an exemption from one or more of the applicable Canadian regulatory provisions imposing requirements that otherwise would be prescribed by this section, the issuer tender offer will be eligible to proceed in accordance with the requirements of this section if the Commission by order determines that the applicable Canadian regulatory provisions are adequate to protect the interest of investors.

(h) This section shall not apply to:

(1) Calls or redemptions of any security in accordance with the terms and conditions of its governing instruments;

(2) Offers to purchase securities evidenced by a scrip certificate, order form or similar document which represents a fractional interest in a share of stock or similar security;

(3) Offers to purchase securities pursuant to a statutory procedure for the purchase of dissenting security holders' securities;

(4) Any tender offer which is subject to section 14(d) of the Act;

(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 a plan as that term is defined in §242.100 of this chapter, 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;

(6) An issuer tender offer made solely to effect a rescission offer: *Provided, however,* That the offer is registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), and the consideration is equal to the price paid by each security holder, plus legal interest if the issuer elects to or is required to pay legal interest;

(7) Offers by closed-end management investment companies to repurchase equity securities pursuant to §270.23c–3 of this chapter;

(8) *Cross-border tender offers (Tier I).* Any issuer tender offer (including any exchange offer) where the issuer is a foreign private issuer as defined in §240.3b–4 if the following conditions are satisfied.

(i) Except in the case of an issuer tender offer which is commenced during the pendency of a tender offer made by a third party in reliance on §240.14d–1(c), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraph (h)(8) and paragraph (i) of this section); and

(ii) The issuer or affiliate must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the offer; however:

(A) *Registered exchange offers.* If the issuer or affiliate offers securities registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the issuer or affiliate need not extend the offer to security holders in those states or jurisdictions that prohibit the offer or sale of the securities after the issuer or affiliate has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the issuer or affiliate must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(B) *Exempt exchange offers.* If the issuer or affiliate offers securities exempt from registration under §230.802 of this chapter, the issuer or affiliate need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer or affiliate must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

(C) *Cash only consideration.* The issuer or affiliate may offer U.S. holders cash only consideration for the tender of the subject securities, notwithstanding the fact that the issuer or affiliate is offering security holders outside the United States a consideration that consists in whole or in part of securities of the issuer or affiliate, if the issuer or affiliate has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders, and either of the following conditions are satisfied:

(1) The offered security is a "margin security" within the meaning of Regulation T (12 CFR 220.2) and the issuer or affiliate undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

(2) If the offered security is not a "margin security" within the meaning of Regulation T (12 CFR 220.2), the issuer or affiliate undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that the cash consideration offered to U.S. holders is substantially equivalent to the value of the consideration offered security holders outside the United States.

(D) *Disparate tax treatment.* If the issuer or affiliate offers "loan notes" solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders.

(iii) *Informational documents.*

(A) If the issuer or affiliate publishes or otherwise disseminates an informational document to the holders of the securities in connection with the issuer tender offer (including any exchange offer), the issuer or affiliate must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB (§249.480 of this chapter) by the first business day after publication or dissemination. If the issuer or affiliate is a foreign company, it must also file a Form F-X (§239.42 of this chapter) with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

(B) The issuer or affiliate must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

(C) If the issuer or affiliate disseminates by publication in its home jurisdiction,

the issuer or affiliate must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

(iv) An investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company, may not use this paragraph (h)(8); or

(9) Any other transaction or transactions, if the Commission, upon written request or upon its own motion, exempts such transaction or transactions, either unconditionally, or on specified terms and conditions, as not constituting a fraudulent, deceptive or manipulative act or practice comprehended within the purpose of this section.

(i) *Cross-border tender offers (Tier II).* Any issuer tender offer (including any exchange offer) that meets the conditions in paragraph (i)(1) of this section shall be entitled to the exemptive relief specified in paragraph (i)(2) of this section provided that such issuer tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (i)(2) of this section:

(1) *Conditions*

(i) The issuer is a foreign private issuer as defined in §240.3b–4 and is not an investment company registered or required to be registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), other than a registered closed-end investment company; and

(ii) Except in the case of an issuer tender offer which is commenced during the pendency of a tender offer made by a third party in reliance on §240.14d–1(d), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraphs (h)(8) and (i) of this section).

(2) *Exemptions.* The issuer tender offer shall comply with all requirements of this section other than the following:

(i) *Equal treatment—loan notes.* If the issuer or affiliate offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act (15 U.S.C. 77a *et seq.*), the loan notes need not be offered to U.S. holders, notwithstanding paragraph (f)(8) and (h)(9) of this section.

(ii) *Equal treatment—separate U.S. and foreign offers.* Notwithstanding the provisions of paragraph (f)(8) of this section, an issuer or affiliate conducting an issuer tender offer meeting the conditions of paragraph (i)(1) of this section may separate the offer into two offers: One offer made only to U.S. holders and another offer made only to non-U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer.

(iii) *Notice of extensions.* Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of §240.14e–1(d).

(iv) *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of §240.14e–1(c).

Instructions to paragraph (h)(8) and (i) of this section:

1. *Home jurisdiction* means both the jurisdiction of the issuer's incorporation, organization or chartering and the principal foreign market where the issuer's securities are listed or quoted.

2. *U.S. holder* means any security holder resident in the United States. To determine the percentage of outstanding securities held by U.S. holders:

i. Calculate the U.S. ownership as of 30 days before the commencement of the issuer tender offer;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities;

iii. Use the method of calculating record ownership in §240.12g3–2(a), except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States,

your jurisdiction of incorporation, and the jurisdiction that is the primary trading market for the subject securities, if different than your jurisdiction of incorporation;

iv. If, after reasonable inquiry, you are unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

v. Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

3. *United States. United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

4. The exemptions provided by paragraphs (h)(8) and (i) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (h)(8) or (i) of this section but are part of a plan or scheme to evade the provisions of this section.

(j) (1) It shall be a fraudulent, deceptive or manipulative act or practice, in connection with an issuer tender offer, for an issuer or an affiliate of such issuer, in connection with an issuer tender offer:

(i) To employ any device, scheme or artifice to defraud any person;

(ii) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

(iii) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

(2) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with any issuer tender offer, it shall be unlawful for an issuer or an affiliate of such issuer to make an issuer tender offer unless: (i) Such issuer or affiliate complies with the requirements of paragraphs (b), (c), (d), (e) and (f) of this section; and

(ii) The issuer tender offer is not in violation of paragraph (j)(1) of this section.

Q. Rule 13f-1. Reporting by institutional investment managers of information with respect to accounts over which they exercise investment discretion.

* * *

R. Regulation 14A: Solicitation of Proxies

1. Rule 14a-1. Definitions.

Unless the context otherwise requires, all terms used in this regulation have the same meanings as in the Act or elsewhere in the general rules and regulations thereunder. In addition, the following definitions apply unless the context otherwise requires:

(a) *Associate*. The term "associate," used to indicate a relationship with any person, means: (1) Any corporation or organization (other than the registrant or a majority owned subsidiary of the registrant) of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of 10 percent or more of any class of equity securities; (2) Any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity; and (3) Any relative or spouse of such person, or any relative of such spouse, who has the same home as such person or who is a director or officer of the registrant or any of its parents or subsidiaries. * * *

(f) *Proxy*. The term "proxy" includes every proxy, consent or authorization within the meaning of section 14(a) of the Act. The consent or authorization may take the form of failure to object or to dissent.

(g) *Proxy statement*. The term "proxy statement" means the statement required by Rule 14a-3(a) whether or not contained in a single document.

(h) *Record date*. The term "record date" means the date as of which the record holders of securities entitled to vote at a meeting or by written consent or authorization shall be determined.

(i) *Record holder*. For purposes of Rules 14a-13, 14b-1 and 14b-2, the term "record holder" means any broker, dealer, voting trustee, bank, association or other entity that exercises fiduciary powers which

holds securities of record in nominee name or otherwise or as a participant in a clearing agency registered pursuant to section 17A of the Act.

(j) *Registrant*. The term "registrant" means the issuer of the securities in respect of which proxies are to be solicited. * * *

(l) *Solicitation*. (1) The terms "solicit" and "solicitation" include:

(i) Any request for a proxy whether or not accompanied by or included in a form of proxy;

(ii) Any request to execute or not to execute, or to revoke, a proxy; or

(iii) The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

(2) The terms do not apply, however, to:

(i) The furnishing of a form of proxy to a security holder upon the unsolicited request of such security holder;

(ii) The performance by the registrant of acts required by Rule 14a-7;

(iii) The performance by any person of ministerial acts on behalf of a person soliciting a proxy; or

(iv) A communication by a security holder who does not otherwise engage in a proxy solicitation (other than a solicitation exempt under Rule 14a-2) stating how the security holder intends to vote and the reasons therefor, provided that the communication:

(A) Is made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, or newspaper, magazine or other bona fide publication disseminated on a regular basis,

(B) Is directed to persons to whom the security holder owes a fiduciary duty in connection with the voting of securities of a registrant held by the security holder, or

(C) Is made in response to unsolicited requests for additional information with respect to a prior communication by the security holder made pursuant to this paragraph (l)(2)(iv).

2. Rule 14a-2. Solicitations to which Rules 14a-3 to 14a-15 apply.

Sections 14a-3 to 14a-15, except as specified, apply to every solicitation of a proxy with respect to securities registered pursuant to Section 12 of the Act, whether or not trading in such securities has been suspended. To the extent specified below, certain of these sections also apply to roll-up transactions that do not involve an entity with securities registered pursuant to Section 12 of the Act.

(a) Sections 14a-3 to 14a-15 do not apply to the following:

(1) Any solicitation by a person in respect to securities carried in his name or in the name of his nominee (otherwise than as voting trustee) or held in his custody, if such person--

(i) Receives no commission or remuneration for such solicitation, directly or indirectly, other than reimbursement of reasonable expenses,

(ii) Furnishes promptly to the person solicited (or such person's household in accordance with Rule 14a-3(e)(1)) a copy of all soliciting material with respect to the same subject matter or meeting received from all persons who shall furnish copies thereof for such purpose and who shall, if requested, defray the reasonable expenses to be incurred in forwarding such material, and

(iii) In addition, does no more than impartially instruct the person solicited to forward a proxy to the person, if any, to whom the person solicited desires to give a proxy, or impartially request from the person solicited instructions as to the authority to be conferred by the proxy and state that a proxy will be given if no instructions are received by a certain date.

(2) Any solicitation by a person in respect of securities of which he is the beneficial owner;

(3) Any solicitation involved in the offer and sale of securities registered under the Securities Act of 1933: Provided, That this paragraph shall not apply to securities to be issued in any transaction of the character specified in paragraph (a) of Rule 145 under that Act; * * *

(6) Any solicitation through the medium of a newspaper advertisement which informs security holders of a source from which they may obtain copies of a proxy statement, form of proxy and any other soliciting material and does no more than:

(i) name the registrant,

(ii) state the reason for the advertisement, and

(iii) identify the proposal or proposals to be acted upon by security holders.

(b) Rules 14a-3 to 14a-6 (other than 14a-6(g)), 14a-8, and 14a-10 to 14a-15 do not apply to the following:

(1) Any solicitation by or on behalf of any person who does not, at any time during such solicitation, seek directly or indirectly, either on its own or another's behalf, the power to act as proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization. Provided, however, That the exemption set forth in this paragraph shall not apply to:

(i) The registrant or an affiliate or associate of the registrant (other than an officer or director or any person serving in a similar capacity);

(ii) An officer or director of the registrant or any person serving in a similar capacity engaging in a solicitation financed directly or indirectly by the registrant;

(iii) An officer, director, affiliate or associate of a person that is ineligible to rely on the exemption set forth in this paragraph (other than persons specified in paragraph (b)(1)(i) of this section), or any person serving in a similar capacity;

(iv) Any nominee for whose election as a director proxies are solicited;

(v) Any person soliciting in opposition to a merger, recapitalization, reorganization, sale of assets or other extraordinary transaction recommended or approved by the board of directors of the registrant who is proposing or intends to propose an alternative transaction to which such person or one of its affiliates is a party;

(vi) Any person who is required to report beneficial ownership of the registrant's equity securities on a Schedule 13D, unless such person has filed a Schedule 13D and has not disclosed pursuant to Item 4 thereto an intent, or reserved the right, to engage in a control transaction, or any contested solicitation for the election of directors;

(vii) Any person who receives compensation from an ineligible person directly related to the solicitation of proxies, other than pursuant to Rule 14a-13;

(viii) Where the registrant is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), an "interested person" of that investment company, as that term is defined in section 2(a)(19) of the Investment Company Act (15 U.S.C. 80a-2);

(ix) Any person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities, other than a benefit arising from the person's employment with the registrant; and

(x) Any person acting on behalf of any of the foregoing.

(2) Any solicitation made otherwise than on behalf of the registrant where the total number of persons solicited is not more than ten;

(3) The furnishing of proxy voting advice by any person (the "advisor") to any other person with whom the advisor has a business relationship, if:

(i) The advisor renders financial advice in the ordinary course of his business;

(ii) The advisor discloses to the recipient of the advice any significant relationship with the registrant or any of its affiliates, or a security holder proponent of the matter on which advice is given, as well as any material interests of the advisor in such matter.

(iii) The advisor receives no special commission or remuneration for furnishing the proxy voting advice from any person other than a recipient of the advice and other persons who receive similar advice under this subsection; and

(iv) The proxy voting advice is not furnished on behalf of any person soliciting proxies or on behalf of a participant in an election subject to the provisions of Rule 14a-11;

(5) Publication or distribution by a broker or a dealer of a research report in accordance with Rule 138 (§230.138 of this chapter) or Rule 139 (§230.139 of this chapter) during a transaction in which the broker or dealer or its affiliate participates or acts in an advisory role. * * *

3. Rule 14a-3. Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a publicly-filed preliminary or definitive written proxy statement containing the information specified in Schedule 14A or with a preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 or Form N-14 and containing the information specified in such Form.

(b) If the solicitation is made on behalf of the registrant, other than an investment company registered under the Investment Company Act of 1940, and relates to an annual (or special meeting in lieu of the annual) meeting of security holders, or written consent in lieu of such meeting, at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to security holders as follows * * *.

(c) Seven copies of the report sent to security holders pursuant to this rule shall be mailed to the Commission, solely for its information, not later than the date on which such report is first sent or given to security holders or the date on which preliminary copies, or definitive copies, if preliminary filing was not required, of solicitation material are filed with the Commission pursuant to Rule 14a-6, which ever date is later. The report is not deemed to be "soliciting material" or to be "filed" with the Commission or subject to this regulation otherwise than as provided in this Rule, or to the liabilities of section 18 of the Act, except to the extent that the registrant specifically requests that it be treated as a part of the proxy soliciting material or incorporates it in the proxy statement or other filed report by reference.

(d) An annual report to security holders prepared on an integrated basis pursuant to General Instruction H to Form 10-K and Form 10-KSB may also be submitted in satisfaction of this rule. When filed as the annual report on Form 10-K and Form 10-KSB, responses to the Items of that form are subject to section 18 of the Act notwithstanding paragraph (c) of this section.

(e) Notwithstanding paragraphs (a) and (b) of this section:

1. i. A registrant will be considered to have delivered an annual report or proxy statement to all security holders of record who share an address if:

A. The registrant delivers one annual report or proxy statement, as applicable, to the shared address;

B. The registrant addresses the annual report or proxy statement, as applicable, to the security holders as a group (for example, "ABC Fund [or Corporation] Security Holders," "Jane Doe and Household," "The Smith Family"), to each of the security holders individually (for example, "John Doe and Richard Jones") or to the security holders in a form to which each of the security holders has consented in writing;

Note to paragraph (e)(1)(i)(B): Unless the company addresses the annual report or proxy statement to the security holders as a group or to each of the security holders individually, it must obtain, from each security holder to be included in the householded group, a separate affirmative written consent to the specific form of address the company will use.

C. The security holders consent, in accordance with paragraph (e)(1)(ii) of this section, to delivery of one annual report or proxy statement, as applicable;

D. With respect to delivery of the proxy statement, the registrant delivers, together with or subsequent to delivery of the proxy statement, a separate proxy card for each security holder at the shared address; and

E. The registrant includes an undertaking in the proxy statement to deliver promptly upon written or oral request a separate copy of the annual report or proxy statement, as applicable, to a security holder at a shared address to which a single copy of the document was delivered.

ii. *Consent.* * * *

f. The provisions of paragraph (a) of this section shall not apply to a communication made by means of speeches in public forums, press releases, published or broadcast opinions, statements, or advertisements appearing in a broadcast media, newspaper, magazine or other bona fide publication disseminated on a regular basis, provided that:

1. No form of proxy, consent or authorization or means to execute the same is provided to a

security holder in connection with the communication; and

2. At the time the communication is made, a definitive proxy statement is on file with the Commission pursuant to Rule 14a-6(b).

4. Rule 14a-4. Requirements as to proxy.

(a) The form of proxy (1) Shall indicate in bold-face type whether or not the proxy is solicited on behalf of the registrant's board of directors or, if provided other than by a majority of the board of directors, shall indicate in bold-face type on whose behalf the solicitation is made; (2) Shall provide a specifically designated blank space for dating the proxy card; and (3) Shall identify clearly and impartially each separate matter intended to be acted upon, whether or not related to or conditioned on the approval of other matters, and whether proposed by the registrant or by security holders. No reference need be made, however, to proposals as to which discretionary authority is conferred pursuant to paragraph (c) of this section. * * *

(b)(1) Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office. A proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case.

(2) A form of proxy which provides for the election of directors shall set forth the names of persons nominated for election as directors. * * *

(e) The proxy statement or form of proxy shall provide, subject to reasonable specified conditions, that the shares represented by the proxy will be voted and that where the person solicited specifies by means of a ballot provided pursuant to paragraph (b) of this section a choice with respect to any matter to be acted upon, the shares will be voted in accordance with the specifications so made.

(f) No person conducting a solicitation subject to this regulation shall deliver a form of proxy, consent or authorization to any security holder unless the security holder concurrently receives, or has previously received, a definitive proxy statement that has been filed with, or mailed for filing to, the Commission pursuant to Rule 14a-6(b).

5. Rule 14a-5. Presentation of information in proxy statement.

(a) The information included in the proxy statement shall be clearly presented and the statements made shall be divided into groups according to subject matter and the various groups of statements shall be preceded by appropriate headings. The order of items and sub-items in the schedule need not be followed. Where practicable and appropriate, the information shall be presented in tabular form. All amounts shall be stated in figures. Information required by more than one applicable item need not be repeated. No statement need be made in response to any item or sub-item which is inapplicable. * * *

6. Rule 14a-6. Filing requirements.

(a) *Preliminary proxy statement*. Five preliminary copies of the proxy statement and form of proxy shall be filed with the Commission at least 10 calendar days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause thereunder. A registrant, however, shall not file with the Commission a preliminary proxy statement, form of proxy or other soliciting material to be furnished to security holders concurrently therewith if the solicitation relates to an annual (or special meeting in lieu of the annual) meeting, or for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company, if the solicitation relates to any meeting of security holders at which the only matters to be acted upon are:

(1) The election of directors;

(2) The election, approval or ratification of accountant(s);

(3) A security holder proposal included pursuant to Rule 14a-8; * * *

This exclusion from filing preliminary proxy material does not apply if the registrant comments upon or

refers to a solicitation in opposition in connection with the meeting in its proxy material.

Note 3. Solicitation in Opposition. For purposes of the exclusion from filing preliminary proxy material, a "solicitation in opposition" includes: (a) Any solicitation opposing a proposal supported by the registrant; and (b) any solicitation supporting a proposal that the registrant does not expressly support, other than a security holder proposal included in the registrant's proxy material pursuant to Rule 14a-8. The inclusion of a security holder proposal in the registrant's proxy material pursuant to Rule 14a-8 does not constitute a "solicitation in opposition," even if the registrant opposes the proposal and/or includes a statement in opposition to the proposal. * * *

(b) *Definitive Proxy Statement and Other Soliciting Materials*. Eight definitive copies of the proxy statement, form of proxy and all other soliciting material, in the form in which such material is furnished to security holders, shall be filed with, or mailed for filing to, the Commission not later than the date such material is first sent or given to any security holders. Three copies of such material shall at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered.

(c) *Personal Solicitation Materials*. If part or all of the solicitation involves personal solicitation, then eight copies of all written instructions or other materials that discuss, review or comment on the merits of any matter to be acted on, that are furnished to persons making the actual solicitation for their use directly or indirectly in connection with the solicitation, must be filed with the Commission no later than the date the materials are first sent or given to these persons.

(d) *Release dates*. All preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be accompanied by a statement of the date on which definitive copies thereof filed pursuant to paragraph (b) of this section are intended to be released to security holders. All definitive material filed pursuant to paragraph (b) of this section shall be accompanied by a statement of the date on which copies of such material were released to security holders, or, if not released, the date on which copies thereof are intended to be released. All material filed pursuant to paragraph (c) of this section shall be accompanied by a statement of the date on which copies thereof were released to the individual who will make the actual solicitation or if not released, the date on which copies thereof are intended to be released.

(e)(1) *Public Availability of Information*. All copies of preliminary proxy statements and forms of proxy filed pursuant to paragraph (a) of this section shall be clearly marked "Preliminary Copies," and shall be deemed immediately available for public inspection unless confidential treatment is obtained pursuant to paragraph (e)(2) of this section.

(2) *Confidential Treatment*. If action will be taken on any matter specified in Item 14 of Schedule 14A, all copies of the preliminary proxy statement and form of proxy filed under paragraph (a) of this section will be for the information of the Commission only and will not be deemed available for public inspection until filed with the Commission in definitive form so long as:

(i) The proxy statement does not relate to a matter or proposal subject to Rule 13e-3 or a roll-up transaction as defined in Item 901(c) of Regulation S-K; and

(ii) Neither the parties to the transaction nor any persons authorized to act on their behalf have made any public communications relating to the transaction except for statements where the content is limited to the information specified in Rule 135 of this chapter; and

(iii) The materials are filed in paper and marked "Confidential, For Use of the Commission Only."

In all cases, the materials may be disclosed to any department or agency of the United States Government and to the Congress, and the Commission may make any inquiries or investigation into the materials as may be necessary to conduct an adequate review by the Commission.

Instruction to paragraph (e)(2): If communications are made publicly that go beyond the information specified in Rule 135, the preliminary proxy materials must be re-filed promptly with the Commission as public materials.

(f) *Communications not required to be filed*. Copies of replies to inquiries from security holders requesting further information and copies of communications which do no more than request that forms of proxy theretofore solicited be signed and returned need not be filed pursuant to this section.

(g) *Solicitations subject to Rule 14a-2(b)(1).* (1) Any person who:

(i) Engages in a solicitation pursuant to Rule 14a-2(b)(1), and

(ii) At the commencement of that solicitation owns beneficially securities of the class which is the subject of the solicitation with a market value of over $5 million,

shall furnish or mail to the Commission, not later than three days after the date the written solicitation is first sent or given to any security holder, five copies of a statement containing the information specified in the Notice of Exempt

Solicitation (Rule 14a-103) which statement shall attach as an exhibit all written soliciting materials. Five copies of an amendment to such statement shall be furnished or mailed to the Commission, in connection with dissemination of any additional communications, not later than three days after the date the additional material is first sent or given to any security holder. Three copies of the Notice of Exempt Solicitation and amendments thereto shall, at the same time the materials are furnished or mailed to the Commission, be furnished or mailed to each national securities exchange upon which any class of securities of the registrant is listed and registered.

(2) Notwithstanding paragraph (g)(1) of this section, no such submission need be made with respect to oral solicitations (other than with respect to scripts used in connection with such oral solicitations), speeches delivered in a public forum, press releases, published or broadcast opinions, statements, and advertisements appearing in a broadcast media, or a newspaper, magazine or other bona fide publication disseminated on a regular basis.

(h) *Revised material*. Where any proxy statement, form of proxy or other material filed pursuant to this section is amended or revised, two of the copies of such amended or revised material filed pursuant to this section (or in the case of investment companies registered under the Investment Company Act of 1940, three of such copies) shall be marked to indicate clearly and precisely the changes effected therein. If the amendment or revision alters the text of the material the changes in such text shall be indicated by means of underscoring or in some other appropriate manner.

(i) *Fees*. At the time of filing the proxy solicitation material, the persons upon whose behalf the solicitation is made, other than investment companies registered under the Investment Company Act of 1940, shall pay to the Commission the following applicable fee:

(1) For preliminary proxy material involving acquisitions, mergers, spinoffs, consolidations or proposed sales or other dispositions of substantially all the assets of the company, a fee established in accordance with Rules 0-11 shall be paid. No refund shall be given.

(2) For all other proxy submissions and submissions made pursuant to Rule 14a-6(g), no fee shall be required.

j. *Merger proxy materials.*

(1) Any proxy statement, form of proxy or other soliciting material required to be filed by this section that also is either

(i) Included in a registration statement filed under the Securities Act of 1933 on Forms S-4, F-4 or N-14; or

(ii) Filed under Rule 424, Rule 425 or Rule 497 is required to be filed only under the Securities Act, and is deemed filed under this section.

(2) Under paragraph (j)(1) of this section, the fee required by paragraph (i) of this section need not be paid.

(k) *Computing time periods*. In computing time periods beginning with the filing date specified in Regulation 14A, the filing date shall be counted as the first day of the time period and midnight of the last day shall constitute the end of the specified time period. * * *

(m) *Cover page*. Proxy materials filed with the Commission shall include a cover page in the form set forth in Schedule 14A (Rule 14a-101 of this chapter). The cover page required by this paragraph need not be distributed to security holders.

(n) *Solicitations subject to Rule 14a-2(b)(4)*. Any person who:

(1) Engages in a solicitation pursuant to Rule 14a-2(b)(4); and

(2) At the commencement of that solicitation both owns five percent (5%) or more of the outstanding securities of a class that is the subject of the proposed roll-up transaction, and engages in the business of buying and selling limited partnership interests in the secondary market, shall furnish or mail to the Commission, not later than three days after the date an oral or written solicitation by that person is first made, sent or provided to any security holder, five copies of a statement containing the information specified in the Notice of Exempt Preliminary Roll-up Communication (Rule 14a-104). Five copies of any amendment to such statement shall be furnished or mailed to the Commission not later than three days after a communication containing revised material is first made, sent or provided to any security holder.

(o) *Solicitations before furnishing a definitive proxy statement.* Solicitations that are published, sent or given to security holders before they have been furnished a definitive proxy statement must be made in accordance with Rule 14a-12 unless there is an exemption available under Rule 14a-2.

7. Rule 14a-7. Obligations of registrants to provide a list of, or mail soliciting material to, security holders.

(a) If the registrant has made or intends to make a proxy solicitation in connection with a security holder meeting or action by consent or authorization, upon the written request by any record or beneficial holder of securities of the class entitled to vote at the meeting or to execute a consent or authorization to provide a list of security holders or to mail the requesting security holder's materials, regardless of whether the request references this section, the registrant shall:

(1) Deliver to the requesting security holder within five business days after receipt of the request:

(i) Notification as to whether the registrant has elected to mail the security holder's soliciting materials or provide a security holder list if the election under paragraph (b) of this section is to be made by the registrant;

(ii) A statement of the approximate number of record holders and beneficial holders, separated by type of holder and class, owning securities in the same class or classes as holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the registrant's or its transfer agent's security holder data systems; and

(iii) The estimated cost of mailing a proxy statement, form of proxy or other communication to such holders, including to the extent known or reasonably available, the estimated costs of any bank, broker, and similar person through whom the registrant has solicited or intends to solicit beneficial owners in connection with the security holder meeting or action;

(2) Perform the acts set forth in either paragraphs (a)(2)(i) or (a)(2)(ii) of this section, at the registrant's or requesting security holder's option, as specified in paragraph (b) of this section:

i) Mail copies of any proxy statement, form of proxy or other soliciting material furnished by the security holder to the record holders, including banks, brokers, and similar entities, designated by the security holder. A sufficient number of copies must be mailed to the banks, brokers, and similar entities for distribution to all beneficial owners designated by the security holder. If the registrant has received affirmative written or implied consent to deliver a single proxy statement to security holders at a shared address in accordance with the procedures in Rule 14a-3(e)(1), a single copy of the proxy statement furnished by the security holder shall be mailed to that address. The registrant shall mail the security holder material with reasonable promptness after tender of the material to be mailed, envelopes or other containers therefor, postage or payment for postage and other reasonable expenses of effecting such mailing. The registrant shall not be responsible for the content of the material; or

(ii) Deliver the following information to the requesting security holder within five business days of receipt of the request: a reasonably current list of the names, addresses and security positions of the record holders, including banks, brokers and similar entities holding securities in the same class or classes as holders which have been or are to be solicited on management's behalf, or any more limited group of such holders designated by the security holder if available or retrievable under the registrant's or its transfer agent's security holder data systems; the most recent list of names, addresses and security positions of beneficial owners as specified in Rule 14a-13(b), in the possession, or which subsequently comes into the possession, of the registrant; and the names of security holders at a shared address that have consented to delivery of a single copy of proxy materials to a shared address, if the registrant has received written or implied consent in accordance with Rule 14a-3(e)(1). All security holder list information shall be in the form requested by the security holder to the extent that such form is available to the registrant without undue burden or expense. The registrant shall furnish the security holder with updated record holder information on a daily basis or, if not available on a daily basis, at the shortest reasonable intervals, provided, however, the registrant need not provide beneficial or record holder information more current than the record date for the meeting or action.

(b) (1) The requesting security holder shall have the options set forth in paragraph (a)(2) of this section, and the registrant shall have corresponding obligations, if the registrant or general partner or sponsor is soliciting or intends to solicit with respect to:

(i) A proposal that is subject to Rule 13e-3; * * *

8. Rule 14a-8. Proposals of security holders.

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and- answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal. * * *

i. *Question 9*: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?

1. *Improper under state law:* If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

Not[e] to paragraph (i)(1):

Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise. * * *

9. Rule 14a-9. False or misleading statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

NOTE: The following are some examples of what, depending upon particular facts and circumstances, may be misleading within the meaning of this section.

(a) Predictions as to specific future market values.

(b) Material which directly or indirectly impugns character, integrity or personal reputation, or directly or indirectly makes charges concerning improper, illegal or immoral conduct or associations, without factual foundation.

c) Failure to so identify a proxy statement, other soliciting material as to clearly distinguish it from the soliciting material of any other person or persons soliciting for the same meeting or subject matter.

(d) Claims made prior to a meeting regarding the results of a solicitation.

10. Rule 14a-10. Prohibition of certain solicitations.

No person making a solicitation which is subject to Rules 14a-1 to 14a-10 shall solicit:

(a) Any undated or postdated proxy; or

(b) Any proxy which provides that it shall be deemed to be dated as of any date subsequent to the date on which it is signed by the security holder.

11. Rule 14a-11 Special provisions applicable to election contests.

[Deleted]

12. Rule 14a-12. Solicitation prior to furnishing a proxy statement.

a. Notwithstanding the provisions of Rule 14a-3(a), a solicitation may be made before furnishing security holders with a proxy statement meeting the requirements of Rule 14a-3(a) if:

1. Each written communication includes:

i. The identity of the participants in the solicitation (as defined in Instruction 3 to Item 4 of Schedule 14A (Rule 14a-101)) and a description of their direct or indirect interests, by security holdings or otherwise, or a prominent legend in clear, plain language advising security holders where they can obtain that information; and

ii. A prominent legend in clear, plain language advising security holders to read the proxy statement when it is available because it contains important information. The legend also must explain to investors that they can get the proxy statement, and any other relevant documents, for free at the Commission's web site and describe which documents are available free from the participants; and

2. A definitive proxy statement meeting the requirements of Rule 14a-3(a) is sent or given to security holders solicited in reliance on this section before or at the same time as the forms of proxy, consent or authorization are furnished to or requested from security holders.

b. Any soliciting material published, sent or given to security holders in accordance with paragraph (a) of this section must be filed with the Commission no later than the date the material is first published, sent or given to security holders. Three copies of the material must at the same time be filed with, or mailed for filing to, each national securities exchange upon which any class of securities of the registrant is listed and registered. The soliciting material must include a cover page in the form set forth in Schedule 14A (Rule 14a-101) and the appropriate box on the cover page must be marked. Soliciting material in connection with a registered offering is required to be filed only under Rule 424 or Rule 425,and will be deemed filed under this section.

c. Solicitations by any person or group of persons for the purpose of opposing a solicitation subject to this regulation by any other person or group of persons with respect to the election or removal of directors at any annual or special meeting of security holders also are subject to the following provisions:

1. *Application of this rule to annual report.* Notwithstanding the provisions of Rule 14a-3 (b) and (c), any portion of the annual report referred to in Rule 14a-3(b) that comments upon or refers to any solicitation subject to this rule, or to any participant in the solicitation, other than the solicitation by the management, must be filed with the Commission as proxy material subject to this regulation. This must be filed in electronic format unless an exemption is available under Rules 201 or 202 of Regulation S-T.

2. *Use of reprints or reproductions.* In any solicitation subject to this Rule 14a-12(c), soliciting material that includes, in whole or part, any reprints or reproductions of any previously published material must:

i. State the name of the author and publication, the date of prior publication, and identify any person who is quoted without being named in the previously published material.

ii. Except in the case of a public or official document or statement, state whether or not the consent of the author and publication has been obtained to the use of the previously published material as proxy soliciting material.

iii. If any participant using the previously published material, or anyone on his or her behalf, paid, directly or indirectly, for the preparation or prior publication of the previously published material, or has made or proposes to make any payments or give any other consideration in connection with the publication or republication of the material, state the circumstances.

Instructions to Rule 14a-12

1. If paper filing is permitted, file eight copies of the soliciting material with the Commission, except that only three copies of the material specified by Rule 14a-12(c)(1) need be filed.
2. Any communications made under this section after the definitive proxy statement

is on file but before it is disseminated also must specify that the proxy statement is publicly available and the anticipated date of dissemination.

13. Rule 14a-13. Obligations of registrants in communicating with beneficial owners.

(a) If the registrant knows that securities of any class entitled to vote at a meeting (or by written consents or authorizations if no meeting is held) with respect to which the registrant intends to solicit proxies, consents or authorizations are held of record by a broker, dealer, voting trustee, bank, association, or other entity that exercises fiduciary powers in nominee name or otherwise, the registrant shall: * * *

(4) Supply, in a timely manner, each record holder and respondent bank of whom the inquiries required by paragraphs (a)(1) and (a)(2) of this section are made with copies of the proxy, other proxy soliciting material, and/or the annual report to security holders, in such quantities, assembled in such form and at such place(s), as the record holder or respondent bank may reasonably request in order to send such material to each beneficial owner of securities who is to be furnished with such material by the record holder or respondent bank; * * *.

14. Rule 14a-14. Modified or superseded documents.

(a) Any statement contained in a document incorporated or deemed to be incorporated by reference shall be deemed to be modified or superseded, for purposes of the proxy statement, to the extent that a statement contained in the proxy statement or in any other subsequently filed document that also is or is deemed to be incorporated by reference modifies or replaces such statement. * * *

15. Rule 14a-15. Shareholder approval of executive compensation, frequency of votes for approval of executive compensation and shareholder approval of golden parachute compensation.

(a) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011, or for the first annual or other meeting of shareholders on or after January 21, 2013 if the registrant is a smaller reporting company, and thereafter no later than the annual or other meeting of shareholders held in the third calendar year after the immediately preceding vote under this subsection, include a separate resolution subject to shareholder advisory vote to approve the compensation of its named executive officers, as disclosed pursuant to Item 402 of Regulation S-K.

Instruction to paragraph (a):

The registrant's resolution shall indicate that the shareholder advisory vote under this subsection is to approve the compensation of the registrant's named executive officers as disclosed pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter). The following is a non-exclusive example of a resolution that would satisfy the requirements of this subsection: "RESOLVED, that the compensation paid to the company's named executive officers, as disclosed pursuant to Item 402 of Regulation S-K, including the Compensation Discussion and Analysis, compensation tables and narrative discussion is hereby APPROVED."

(b) If a solicitation is made by a registrant and the solicitation relates to an annual or other meeting of shareholders at which directors will be elected and for which the rules of the Commission require executive compensation disclosure pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter), the registrant shall, for the first annual or other meeting of shareholders on or after January 21, 2011, or for the first annual or other meeting

of shareholders on or after January 21, 2013 if the registrant is a smaller reporting company, and thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding vote under this subsection, include a separate resolution subject to shareholder advisory vote as to whether the shareholder vote required by paragraph (a) of this section should occur every 1, 2 or 3 years. Registrants required to provide a separate shareholder vote pursuant to § 240.14a-20 of this chapter shall include the separate resolution required by this section for the first annual or other meeting of shareholders after the registrant has repaid all obligations arising from financial assistance provided under the TARP, as defined in section 3(8) of the Emergency Economic Stabilization Act of 2008 (12 U.S.C. 5202(8)), and thereafter no later than the annual or other meeting of shareholders held in the sixth calendar year after the immediately preceding vote under this subsection.

(c) If a solicitation is made by a registrant for a meeting of shareholders at which shareholders are asked to approve an acquisition, merger, consolidation or proposed sale or other disposition of all or substantially all the assets of the registrant, the registrant shall include a separate resolution subject to shareholder advisory vote to approve any agreements or understandings and compensation disclosed pursuant to Item 402(t) of Regulation S-K (§ 229.402(t) of this chapter), unless such agreements or understandings have been subject to a shareholder advisory vote under paragraph (a) of this section. Consistent with section 14A(b) of the Exchange Act (15 U.S.C. 78n-1(b)), any agreements or understandings between an acquiring company and the named executive officers of the registrant, where the registrant is not the acquiring company, are not required to be subject to the separate shareholder advisory vote under this paragraph.

Instructions to § 240.14a-21:

1. Disclosure relating to the compensation of directors required by Item 402(k) (§ 229.402(k) of this chapter) and Item 402(r) of Regulation S-K (§ 229.402(r) of this chapter) is not subject to the shareholder vote required by paragraph (a) of this section. If a registrant includes disclosure pursuant to Item 402(s) of Regulation S-K (§ 229.402(s) of this chapter) about the registrant's compensation policies and practices as they relate to risk management and risk-taking incentives, these policies and practices would not be subject to the shareholder vote required by paragraph (a) of this section. To the extent that risk considerations are a material aspect of the registrant's compensation policies or decisions for named executive officers, the registrant is required to discuss them as part of its Compensation Discussion and Analysis under § 229.402(b) of this chapter, and therefore such disclosure would be considered by shareholders when voting on executive compensation.
2. If a registrant includes disclosure of golden parachute compensation arrangements pursuant to Item 402(t) (§ 229.402(t) of this chapter) in an annual meeting proxy statement, such disclosure would be subject to the shareholder advisory vote required by paragraph (a) of this section.
3. Registrants that are smaller reporting companies entitled to provide scaled disclosure in accordance with Item 402(l) of Regulation S-K (§ 229.402(l) of this chapter) are not required to include a Compensation Discussion and Analysis in their proxy statements in order to comply with this section. For smaller reporting companies, the vote required by paragraph (a) of this section must be to approve the compensation of the named executive officers as disclosed pursuant to Item 402(m) through (q) of Regulation S-K (§ 229.402(m) through (q) of this chapter).

16. Schedule 14A. Information required in proxy statement.

Schedule 14A Information

Proxy Statement Pursuant to Section 14(a)
of the Securities Exchange Act of 1934

(Amendment No.__)

Filed by the Registrant ☐

Filed by a party other than the Registrant ☐

Check the appropriate box:

☐ Preliminary Proxy Statement

☐ Confidential, for Use of the Commission Only (as permitted by Rule 14a-6(e)(2))

☐ Definitive Proxy Statement

☐ Definitive Additional Materials

☐ Soliciting Material Pursuant to Rule 14a-11(c) or Rule 14a-12

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

☐ No fee required

☐ Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11

(1) Title of each class of securities to which transaction applies:

(2) Aggregate number of securities to which transaction applies:

(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

(4) Proposed maximum aggregate value of transaction:

(5) Total fee paid:

☐ Fee paid previously with preliminary materials.

☐ Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for

which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

(1) Amount Previously Paid:

(2) Form, Schedule or Registration Statement No.:

(3) Filing Party:

(4) Date Filed

NOTES: A. Where any item calls for information with respect to any matter to be acted upon and such matter involves other matters with respect to which information is called for by other items of this schedule, the information called for by such other items also shall be given. For example, where a solicitation of security holders is for the purpose of approving the authorization of additional securities which are to be used to acquire another specified company, and the registrants' security holders will not have a separate opportunity to vote upon the transaction, the solicitation to authorize the securities is also a solicitation with respect to the acquisition. Under those facts, information required by Items 11, 13 and 14 shall be furnished.

B. Where any item calls for information with respect to any matter to be acted upon at the meeting, such item need be answered in the registrant's soliciting material only with respect to proposals to be made by or on behalf of the registrant.

C. Except as otherwise specifically provided, where any item calls for information for a specified period with regard to directors, executive officers, officers or other persons holding specified positions or relationships, the information shall be given with regard to any person who held any of the specified positions or relationship at any time during the period. Information, other than information required by Item 404 of Regulation S–B (§228.404 of this chapter) or Item 404 of Regulation S–K (§229.404 of this chapter), need not be included for any portion of the period during which such person did not hold any such position or relationship, provided a statement to that effect is made.

D. Information may be incorporated by reference only in the manner and to the extent specifically permitted in the items of this schedule. Where incorporation by reference is used, the following shall apply:

1. Any incorporation by reference of information pursuant to the provisions of this schedule shall be subject to the provisions of § 228.10(f) and § 229.10(d) of this chapter restricting incorporation by reference of documents which incorporate by reference other information. A registrant incorporating any documents, or portions of documents, shall include a statement on the last page(s) of the proxy statement as to which documents, or portions of documents, are incorporated by reference. Information shall not be incorporated by reference in any case where such incorporation would render the statement incomplete, unclear or confusing.

2. If a document is incorporated by reference but not delivered to security holders, include an undertaking to provide, without charge, to each person to whom a proxy statement is delivered, upon written or oral request of such person and by first class mail or other equally prompt means within one business day of receipt of such request, a copy of any and all of the information that has been incorporated by reference in the proxy statement (not including exhibits to the information that is incorporated by reference unless such exhibits are specifically incorporated by reference into the information that the proxy statement incorporates), and the address (including title or department) and telephone numbers to which such a request is to be directed. This includes information contained in documents filed subsequent to the date on which definitive copies of the proxy statement are sent or given to security holders, up to the date of responding to the request.

3. If a document or portion of a document other than an annual report sent to security holders pursuant to the requirements of Rule 14a-3 with respect to the same meeting or solicitation of consents or authorizations as that to which the proxy statement relates is incorporated by reference in the manner permitted by Item 13(b) or 14(b) of this schedule, the proxy statement must be sent to security holders no

later than 20 business days prior to the date on which the meeting of such security holders is held or, if no meeting is held, at least 20 business days prior to the date the votes, consents or authorizations may be used to effect the corporate action.

4. *Electronic filings*. If any of the information required by Items 13 or 14 of this Schedule is incorporated by reference from an annual or quarterly report to security holders, such report, or any portion thereof incorporated by reference, shall be filed in electronic format with the proxy statement.

E. In Items [sic] 13 of this Schedule, the reference to "meets the requirements of Form S-2" shall refer to a registrant which meets the requirements for use of Form S-2 and the reference to "meets the requirement of Form S-3" shall refer to a registrant which meets the following requirements:

(1) The registrant or other person meets the requirements of General Instruction I.A. of Form S-3; and

(2) One of the following is met:

(i) The registrant or other person meets the aggregate market value requirement of General Instruction I.B.1 of Form S-3; or

(ii) Action is to be taken as described in Items 11, 12 and 14 of this schedule which concerns non-convertible debt or preferred securities which are "investment grade securities" as defined in General Instruction I.B.2 of Form S-3, except that the time by which the rating must be assigned shall be the date on which definitive copies of the proxy statement are first sent or given to security holders; or * * *

Item 1. Date, time and place information.

(a) State the date, time and place of the meeting of security holders, and the complete mailing address, including ZIP Code, of the principal executive offices of the registrant, unless such information is otherwise disclosed in material furnished to security holders with or preceding the proxy statement. If action is to be taken by written consent, state the date by which consents are to be submitted if state law requires that such a date be specified or if the person soliciting intends to set a date.

(b) On the first page of the proxy statement, as delivered to security holders, state the approximate date on which the proxy statement and form of proxy are first sent or given to security holders.

(c) Furnish the information required to be in the proxy statement by Rule 14a- 5(e) (Rule 14a-5(e) of this chapter).

Item 2. Revocability of proxy.

State whether or not the person giving the proxy has the power to revoke it. If the right of revocation before the proxy is exercised is limited or is subject to compliance with any formal procedure, briefly describe such limitation or procedure.

Item 3. Dissenters' right of appraisal.

Outline briefly the rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights. Where such rights may be exercised only within a limited time after the date of adoption of a proposal, the filing of a charter amendment or other similar act, state whether the persons solicited will be notified of such date.

Instructions. 1. Indicate whether a security holder's failure to vote against a proposal will constitute a waiver of his appraisal or similar rights and whether a vote against a proposal will be deemed to satisfy any notice requirements under State law with respect to appraisal rights. If the State law is unclear, state what position will be taken in regard to these matters.

2. Open-end investment companies registered under the Investment Company Act of 1940 are not required to respond to this item.

Item 4. Persons Making the Solicitation

(a) *Solicitations not subject to Rule 14a-12(c)*

1. If the solicitation is made by the registrant, so state. Give the name of any director of the registrant who has informed the registrant in writing that he intends to oppose any action intended to be

taken by the registrant and indicate the action which he intends to oppose.

2. If the solicitation is made otherwise than by the registrant, so state and give the names of the participants in the solicitation, as defined in paragraphs (a)(iii), (iv), (v) and (vi) of Instruction 3 to this Item.

3. If the solicitation is to be made otherwise than by the use of the mails, describe the methods to be employed. If the solicitation is to be made by specially, engaged employees or paid solicitors, state

i. the material features of any contract or arrangement for such solicitation and identify the parties, and

ii. the cost or anticipated cost thereof.

4. State the names of the persons by whom the cost of solicitation has been or will be borne, directly or indirectly.

b. *Solicitations subject to Rule 14a-12(c)*

1. State by whom the solicitation is made and describe the methods employed and to be employed to solicit security holders.

2. If regular employees of the registrant or any other participant in a solicitation have been or are to be employed to solicit security holders, describe the class or classes of employees to be so employed, and the manner and nature of their employment for such purpose.

3. If specially engaged employees, representatives or other persons have been or are to be employed to solicit security holders, state

i. the material features of any contract or arrangement for such solicitation and the identity of the parties,

ii. the cost or anticipated cost thereof and

iii. the approximate number of such employees of employees or any other person (naming such other person) who will solicit security holders).

4. State the total amount estimated to be spent and the total expenditures to date for, in furtherance of, or in connection with the solicitation of security holders.

5. State by whom the cost of the solicitation will be borne. If such cost is to be borne initially by any person other than the registrant, state whether reimbursement will be sought from the registrant, and, if so, whether the question of such reimbursement will be submitted to a vote of security holders.

6. If any such solicitation is terminated pursuant to a settlement between the registrant and any other participant in such solicitation, describe the terms of such settlement, including the cost or anticipated cost thereof to the registrant.

Instructions.

1. With respect to solicitations subject to Rule 14a-12(c), costs and expenditures within the meaning of this Item 4 shall include fees for attorneys, accountants, public relations or financial advisers, solicitors, advertising, printing, transportation, litigation and other costs incidental to the solicitation, except that the registrant may exclude the amount of such costs represented by the amount normally expended for a solicitation for an election of directors in the absence of a contest, and costs represented by salaries and wages of regular employees and officers, provided a statement to that effect is included in the proxy statement.

2. The information required pursuant to paragraph (b)(6) of this Item should be included in any amended or revised proxy statement or other soliciting materials relating to the same meeting or subject matter furnished to security holders by the registrant subsequent to the date of settlement.

3. For purposes of this Item 4 and Item 5 of this Schedule 14A:

a. The terms "participant" and "participant in a solicitation" include the following:

i. The registrant;

ii. Any director of the registrant, and any nominee for whose election as a director proxies are solicited;

iii. Any committee or group which solicits proxies, any member of such committee or group, and any person whether or not named as a member who, acting alone or with one or more other persons, directly or indirectly takes the initiative, or engages, in organizing, directing, or arranging for the financing of any such committee or group;

iv. Any person who finances or joins with another to finance the solicitation of proxies, except persons who contribute not more than $500 and who are not otherwise participants;

v. Any person who lends money or furnishes credit or enters into any other arrangements,

pursuant to any contract or understanding with a participant, for the purpose of financing or otherwise inducing the purchase, sale, holding or voting of securities of the registrant by any participant or other persons, in support of or in opposition to a participant; except that such terms do not include a bank, broker or dealer who, in the ordinary course of business, lends money or executes orders for the purchase or sale of securities and who is not otherwise a participant; and

vi. Any person who solicits proxies.

b. The terms "participant" and "participant in a solicitation" do not include:

i. Any person or organization retained or employed by a participant to solicit security holders and whose activities are limited to the duties required to be performed in the course of such employment;

ii. Any person who merely transmits proxy soliciting material or performs other ministerial or clerical duties;

iii. Any person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or financial adviser, and whose activities are limited to the duties required to be performed in the course of such employment;

iv. Any person regularly employed as an officer or employee of the registrant or any of its subsidiaries who is not otherwise a participant; or

v. Any officer or director of, or any person regularly employed by, any other participant, if such officer, director or employee is not otherwise a participant.

Item 5. Interest of Certain Persons in Matters to Be Acted Upon

(a) *Solicitations not subject to Rule 14a-12(c).*

Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each of the following persons in any matter to be acted upon, other than elections to office:

1. If the solicitation is made on behalf of the registrant, each person who has been a director or executive officer of the registrant at any time since the beginning of the last fiscal year.

2. If the solicitation is made otherwise than on behalf of the registrant, each participant in the solicitation, as defined in paragraphs (a)(iii), (iv), and (v) and (vi) of Instruction 3 to Item 4 of this Schedule 14A.

3. Each nominee for election as a director of the registrant.

4. Each associate of any of the foregoing persons.

Instruction.

Except in the case of a solicitation subject to this regulation made in opposition to another solicitation subject to this regulation, this sub-item (a) shall not apply to any interest arising from the ownership of securities of the registrant where the security holder receives no extra or special benefit not shared on a pro rata basis by all other holders of the same class.

(b) Solicitation subject to Rule 14a-12(c).

With respect to any solicitation subject to Rule 14a-12(c):

1. Describe briefly any substantial interest, direct or indirect, by security holdings or otherwise, of each participant as defined in paragraphs (a)(ii), (iii), (iv), (v) and (vi) of Instruction 3 to Item 4 of this Schedule 14A, in any matter to be acted upon at the meeting, and include with respect to each participant the following information, or a fair and accurate summary thereof:

i. Name and business address of the participant.

ii. The participant's present principal occupation or employment and the name, principal business and address of any corporation or other organization in which such employment is carried on.

iii. State whether or not, during the past ten years, the participant has been convicted in a criminal proceeding (excluding traffic violations or similar misdemeanors) and, if so, give dates, nature of conviction, name and location of court, and penalty imposed or other disposition of the case. A negative answer need not be included in the proxy statement or other soliciting material.

iv. State the amount of each class of securities of the registrant which the participant owns beneficially, directly or indirectly.

v. State the amount of each class of securities of the registrant which the participant owns of record but not beneficially.

vi. State with respect to all securities of the registrant purchased or sold within the past two years, the dates on which they were purchased or sold and the amount purchased or sold on each such date.

vii. If any part of the purchase price or market value of any of the shares specified in paragraph (b)(1)(vi) of this Item is represented by funds borrowed or otherwise obtained for the purpose of acquiring or holding such securities, so state and indicate the amount of the indebtedness as of the latest practicable date. If such funds were borrowed or obtained otherwise than pursuant to a margin account or bank loan in the regular course of business of a bank, broker or dealer, briefly describe the transaction, and state the names of the parties.

viii. State whether or not the participant is, or was within the past year, a party to any contract, arrangements or understandings with any person with respect to any securities of the registrant, including, but not limited to joint ventures, loan or option arrangements, puts or calls, guarantees against loss or guarantees of profit, division of losses or profits, or the giving or withholding of proxies. If so, name the parties to such contracts, arrangements or understandings and give the details thereof.

ix. State the amount of securities of the registrant owned beneficially, directly or indirectly, by each of the participant's associates and the name and address of each such associate.

x. State the amount of each class of securities of any parent or subsidiary of the registrant which the participant owns beneficially, directly or indirectly.

xi. Furnish for the participant and associates of the participant the information required by Item 404(a) of Regulation S-K.

xii. State whether or not the participant or any associates of the participant have any arrangement or understanding with any person-

A. with respect to any future employment by the registrant or its affiliates; or

B. with respect to any future transactions to which the registrant or any of its affiliates will or may be a party.

If so, describe such arrangement or understanding and state the names of the parties thereto.

2. With respect to any person, other than a director or executive officer of the registrant acting solely in that capacity, who is a party to an arrangement or understanding pursuant to which a nominee for election as director is proposed to be elected, describe any substantial interest, direct or indirect, by security holdings or otherwise, that such person has in any matter to be acted upon at the meeting, and furnish the information called for by paragraphs (b)(1)(xi) and (xii) of this Item.

Instruction:

For purposes of this Item 5, beneficial ownership shall be determined in accordance with Rule 13d-3 under the Act.

Item 6. Voting Securities and Principal Holders Thereof

(a) As to each class of voting securities of the registrant entitled to be voted at the meeting (or by written consents or authorizations if no meeting is held), state the number of shares outstanding and the number of votes to which each class is entitled.

(b) State the record date, if any, with respect to this solicitation. If the right to vote or give consent is not to be determined, in whole or in part, by reference to a record date, indicate the criteria for the determination of security holders entitled to vote or give consent.

(c) If action is to be taken with respect to the election of directors and if the persons solicited have cumulative voting rights:

1. Make a statement that they have such rights,
2. briefly describe such rights,
3. state briefly the conditions precedent to the exercise thereof, and
4. if discretionary authority to cumulate votes is solicited, so indicate.

(d) Furnish the information required by Item 403 of Regulation S-K to the extent known by the persons on whose behalf the solicitation is made.

(e) If, to the knowledge of the persons on whose behalf the solicitation is made, a change in control of the registrant has occurred since the beginning of its last fiscal year, state the name of the person(s) who acquired such control, the amount and the source of the consideration used by such person or persons; the basis of the control, the date and a description of the transaction(s) which resulted in the change of control and the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control; and the identity of the person(s) from whom control was assumed. If the source of all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act, the identity of such bank shall be omitted provided a request for confidentiality has been made pursuant to section 13(d)(1)(B) of the Act by the person(s) who acquired control. In lieu thereof, the material shall indicate that the identity of the bank has been so omitted and filed separately with the Commission.

Instruction.

1. State the terms of any loans or pledges obtained by the new control group for the purpose of acquiring control, and the names of the lenders or pledgees.
2. Any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters should be described. * * *

Item 7. Directors and executive officers.

If action is to be taken with respect to the election of directors, furnish the following information in tabular form to the extent practicable. If, however, the solicitation is made on behalf of persons other than the registrant, the information required need be furnished only as to nominees of the persons making the solicitation.

(a) The information required by instruction 4 to Item 103 of Regulation S-K (§229.103 of this chapter) with respect to directors and executive officers.

(b) The information required by Items 401, 404(a) and (b), 405 and 407(d)(4) and (d)(5) of Regulation S–K (§229.401, §229.404(a) and (b), §229.405 and §229.407(d)(4) and (d)(5) of this chapter).

(c) The information required by Item 407(a) of Regulation S–K (§229.407 of this chapter).

(d) The information required by Item 407(b), (c)(1), (c)(2), (d)(1), (d)(2), (d)(3), (e)(1), (e)(2), (e)(3) and (f) of Regulation S–K (§229.407(b), (c)(1), (c)(2), (d)(1), (d)(2), (d)(3), (e)(1), (e)(2), (e)(3) and (f) of this chapter).

(e) In lieu of the information required by this Item 7, investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a) must furnish the information required by Item 22(b) of this Schedule 14A.

(f) State the total number of meetings of the board of directors (including regularly scheduled and special meetings) which were held during the last full fiscal year. Name each incumbent director who during the last full fiscal year attended fewer than 75 percent of the aggregate of (1) the total number of meetings of the board of directors (held during the period for which he has been a director) and (2) the total number of meetings held by all committees of the board on which he served (during the periods that he served).

(g) If a director has resigned or declined to stand for re-election to the board of directors since the date of the last annual meeting of security holders because of a disagreement with the registrant on any matter relating to the registrant's operations, policies or practices, and if the director has furnished the registrant with a letter describing such disagreement and requesting that the matter be disclosed, the registrant shall state the date of resignation or declination to stand for re-election and summarize the director's description of the disagreement.

If the registrant believes that the description provided by the director is incorrect or incomplete, it may include a brief statement presenting its view of the disagreement.

(h)(1) State whether or not the registrant's board of directors provides a process for security holders to send communications to the board of directors and, if the registrant does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of directors that it is

appropriate for the registrant not to have such a process;

(2) If the registrant has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the registrant's process for determining which communications will be relayed to board members; and

Instruction to paragraph (h)(2)(ii): For purposes of the disclosure required by this paragraph, a registrant's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed provided that the registrant's process is approved by a majority of the independent directors or, in the case of a registrant that is an investment company, a majority of the directors who are not "interested persons" of the investment company as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).

(3) Describe the registrant's policy, if any, with regard to board members' attendance at annual meetings and state the number of board members who attended the prior year's annual meeting.

Instruction to paragraphs (h)(2) and (h)(3): In lieu of providing the information required by paragraphs (h)(2) and (h)(3) in the proxy statement, the registrant may instead provide the registrant's Website address where such information appears.

Instructions to paragraph (h):

1. For purposes of this paragraph, communications from an officer or director of the registrant will not be viewed as "security holder communications." Communications from an employee or agent of the registrant will be viewed as "security holder communications" for purposes of this paragraph only if those communications are made solely in such employee's or agent's capacity as a security holder.

2. For purposes of this paragraph, security holder proposals submitted pursuant to §240.14a–8, and communications made in connection with such proposals, will not be viewed as "security holder communications."

Item 8. Compensation of directors and executive officers.

Furnish the information required by Item 402 of Regulation S–K (§229.402 of this chapter) and paragraphs (e)(4) and (e)(5) of Item 407 of Regulation S–K (§229.407(e)(4) and (e)(5) of this chapter) if action is to be taken with regard to:

(a) The election of directors;

(b) Any bonus, profit sharing or other compensation plan, contract or arrangement in which any director, nominee for election as a director, or executive officer of the registrant will participate;

(c) Any pension or retirement plan in which any such person will participate; or

(d) The granting or extension to any such person of any options, warrants or rights to purchase any securities, other than warrants or rights issued to security holders as such, on a pro rata basis.

However, if the solicitation is made on behalf of persons other than the registrant, the information required need be furnished only as to nominees of the persons making the solicitation and associates of such nominees. In the case of investment companies registered under the Investment Company Act of 1940 (15 U.S.C. 80a), furnish the information required by Item 22(b)(13) of this Schedule 14A.

Instruction. If an otherwise reportable compensation plan became subject to such requirements because of an

acquisition or merger and, within one year of the acquisition or merger, such plan was terminated for purposes of prospective eligibility, the registrant may furnish a description of its obligation to the designated individuals pursuant to the compensation plan. Such description may be furnished in lieu of a description of the compensation plan in the proxy statement.

Item 14. Mergers, consolidations, acquisitions and similar matters.

(*See* Notes A and D at the beginning of this Schedule.)

Instructions to Item 14.

1. In transactions in which the consideration offered to security holders consists wholly or in part of securities registered under the Securities Act of 1933, furnish the information required by Form S-4 (§239.25 of this chapter), Form F-4 (§239.34 of this chapter), or Form N-14 (§239.23 of this chapter), as applicable, instead of this Item. Only a Form S-4, Form F-4, or Form N-14 must be filed in accordance with 6(j).
2. (a) In transactions in which the consideration offered to security holders consists wholly of cash, the information required by paragraph (c)(1) of this Item for the acquiring company need not be provided unless the information is material to an informed voting decision (e.g., the security holders of the target company are voting and financing is not assured).
   (b) Additionally, if only the security holders of the target company are voting:
      i. The financial information in paragraphs (b)(8) - (11) of this Item for the acquiring company and the target need not be provided; and
      ii. The information in paragraph (c)(2) of this Item for the target company need not be provided.
      If, however, the transaction is a going-private transaction (as defined by §240.13e-3), then the information required by paragraph (c)(2) of this Item must be provided and to the extent that the going-private rules require the information specified in paragraph (b)(8) - (b)(11) of this Item, that information must be provided as well.
3. In transactions in which the consideration offered to security holders consists wholly of securities exempt from registration under the Securities Act of 1933 or a combination of exempt securities and cash, information about the acquiring company required by paragraph (c)(1) of this Item need not be provided if only the security holders of the acquiring company are voting, unless the information is material to an informed voting decision. If only the security holders of the target company are voting, information about the target company in paragraph (c)(2) of this Item need not be provided. However, the information required by paragraph (c)(2) of this Item must be provided if the transaction is a going-private (as defined by Rule 13e-3) or roll-up (as described by Item 901 of Regulation S-K transaction.
4. The information required by paragraphs (b)(8) - (11) and (c) need not be provided if the plan being voted on involves only the acquiring company and one or more of its totally held subsidiaries and does not involve a liquidation or a spin-off.
5. To facilitate compliance with Rule 2-02(a) of Regulation S-X (§210.2-02(a) of this chapter) (technical requirements relating to accountants' reports), one copy of the definitive proxy statement filed with the Commission must include a signed copy of the accountant's report. If the financial statements are incorporated by reference, a signed copy of the accountant's report must be filed with the definitive proxy statement. Signatures may be typed if the document is filed electronically on EDGAR. See Rule 302 of Regulation S-T.
6. Notwithstanding the provisions of Regulation S-X, no schedules other than those prepared in accordance with Rule 12-15, Rule 12-28 and Rule 12-29 of this chapter (or, for management investment companies, §§210.12-12 through 210.12-14 of this chapter) of that regulation need be furnished in the proxy statement.
7. If the preliminary proxy material incorporates by reference financial statements required by this Item, a draft of the financial statements must be furnished to the Commission staff upon request if the document from which they are incorporated has not been filed with or furnished to the Commission.
   (a) *Applicability*. If action is to be taken with respect to any of the following transactions, provide the information required by this Item:
      (1) A merger or consolidation;
      (2) An acquisition of securities of another person;
      (3) An acquisition of any other going business or the assets of a going business;

(4) A sale or other transfer of all or any substantial part of assets; or

(5) A liquidation or dissolution.

(b) *Transaction information.* Provide the following information for each of the parties to the transaction unless otherwise specified:

(1) *Summary term sheet.* The information required by Item 1001 of Regulation M-A (§229.1001 of this chapter).

(2) *Contact information.* The name, complete mailing address and telephone number of the principal executive offices.

(3) *Business conducted.* A brief description of the general nature of the business conducted.

(4) *Terms of the transaction.* The information required by Item 1004(a)(2) of Regulation M-A.

(5) *Regulatory approvals.* A statement as to whether any federal or state regulatory requirements must be complied with or approval must be obtained in connection with the transaction and, if so, the status of the compliance or approval.

(6) *Reports, opinions, appraisals.* If a report, opinion or appraisal materially relating to the transaction has been received from an outside party, and is referred to in the proxy statement, furnish the information required by Item 1015(b) of Regulation M-A (§229.1015 of this chapter).

(7) *Past contacts, transactions or negotiations.* The information required by Items 1005(b) and 1011(a)(1) of Regulation M-A, for the parties to the transaction and their affiliates during the periods for which financial statements are presented or incorporated by reference under this Item.

(8) *Selected financial data.* The selected financial data required by Item 301 of Regulation S-K (§229.301 of this chapter).

(9) *Pro forma selected financial data.* If material, the information required by Item 301 of Regulation S-K.

(10) *Pro forma information.* In a table designed to facilitate comparison, historical and pro forma per share data of the acquiring company and historical and equivalent pro forma per share data of the target company for the following Items:

(i) Book value per share as of the date financial data is presented pursuant to Item 301 of Regulation S-K;

(ii) Cash dividends declared per share for the periods for which financial data is presented pursuant to Item 301 of Regulation S-K; and

(iii) Income (loss) per share from continuing operations for the periods for which financial data is presented pursuant to Item 301 of Regulation S-K.

Instructions to paragraphs (b)(8), (b)(9) and (b)(10):

1. For a business combination accounted for as a purchase, present the financial information required by paragraphs (b)(9) and (b)(10) only for the most recent fiscal year and interim period. For a business combination accounted for as a pooling, present the financial information required by paragraphs (b)(9) and (b)(10) (except for information with regard to book value) for the most recent three fiscal years and interim period. For purposes of these paragraphs, book value information need only be provided for the most recent balance sheet date.

2. Calculate the equivalent pro forma per share amounts for one share of the company being acquired by multiplying the exchange ratio times each of:

(i) The pro forma income (loss) per share before non-recurring charges or credits directly attributable to the transaction;

(ii) The pro forma book value per share; and

(iii) The pro forma dividends per share of the acquiring company.

3. Unless registered on a national securities exchange or otherwise required to furnish such information, registered

investment companies need not furnish the information required by paragraphs (b)(8) and (b)(9) of this Item.

(11) *Financial information.* If material, financial information required by Article 11 of Regulation S-X (§§210.10-01 through 229.11-03 of this chapter) with respect to this transaction.

Instructions to paragraph (b)(11):

1. Present any Article 11 information required with respect to transactions other than those being voted upon (where not incorporated by reference) together with the pro forma information relating to the transaction being voted upon. In presenting this information, you must clearly distinguish between the transaction being voted upon and any other transaction.
2. If current pro forma financial information with respect to all other transactions is incorporated by reference, you need only present the pro forma effect of this transaction.

(c) *Information about the parties to the transaction.*

(1) *Acquiring company.* Furnish the information required by Part B (Registrant Information) of Form S-4 (§239.25 of this chapter) or Form F-4 (§239.34 of this chapter), as applicable, for the acquiring company. However, financial statements need only be presented for the latest two fiscal years and interim periods.

(2) *Acquired company.* Furnish the information required by Part C (Information with Respect to the Company Being Acquired) of Form S-4 (§239.25 of this chapter) or Form F-4 (§239.34 of this chapter), as applicable.

(d) *Information about parties to the transaction: registered investment companies and business development companies.* If the acquiring company or the acquired company is an investment company registered under the Investment Company Act of 1940 or a business development company as defined by Section 2(a)(48) of the Investment Company Act of 1940, provide the following information for that company instead of the information specified by paragraph (c) of this Item:

(1) Information required by Item 101 of Regulation S-K, description of business;
(2) Information required by Item 102 of Regulation S-K, description of property;
(3) Information required by Item 103 of Regulation S-K, legal proceedings;
(4) Information required by Item 201 of Regulation S-K, market price of and dividends on the registrant's common equity and related stockholder matters;
(5) Financial statements meeting the requirements of Regulation S-X, including financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that as to which action is to be taken as described in this proxy statement;
(6) Information required by Item 301 of Regulation S-K, selected financial data;
(7) Information required by Item 302 of Regulation S-K, supplementary financial information;
(8) Information required by Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations; and
(9) Information required by Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure.

Instruction to paragraph (d) of Item 14:

Unless registered on a national securities exchange or otherwise required to furnish such information, registered investment companies need not furnish the information required by paragraphs (d)(6), (d)(7) and (d)(8) of this Item.

(e) *Incorporation by reference.*
(1) The information required by paragraph (c) of this section may be incorporated by reference into the proxy statement to the same extent as would be permitted by Form S-4 or Form F-4, as applicable.
(2) Alternatively, the registrant may incorporate by reference into the proxy statement the information required by paragraph (c) of this Item if it is contained in an annual report sent to security holders in accordance with Rule 14a-3 of this chapter with respect to the same meeting or solicitation of consents or authorizations that the proxy statement relates to and the information substantially meets the disclosure requirements of Item 14 or Item 17 of Form S-4 or Form F-4, as applicable.

Item 15. Acquisition or disposition of property.

If action is to be taken with respect to the acquisition or disposition of any property, furnish the following information:

(a) Describe briefly the general character and location of the property.
(b) State the nature and amount of consideration to be paid or received by the registrant or any subsidiary. To the extent practicable, outline briefly the facts bearing upon the question of the fairness of the consideration.
(c) State the name and address of the transferer or transferee, as the case may be and the nature of any material relationship of such person to the registrant or any affiliate of the registrant.
(d) Outline briefly any other material features of the contract or transaction. * * *

Item 19. Amendment of Charter, Bylaws or Other Documents

If action is to be taken with respect to any amendment of the registrant's charter, bylaws or other documents as to which information is not required above, state briefly the reasons for and the general effect of such amendment. Instructions.

1. Where the matter to be acted upon is the classification of directors, state whether vacancies

which occur during the year may be filled by the board of directors to serve only until the next annual meeting or may be so filled for the remainder of the full term.

2. Attention is directed to the discussion of disclosure regarding anti-takeover and similar proposals in Release No. 34-15230

S. *REGULATION 14C--DISTRIBUTION OF INFORMATION PURSUANT TO SECTION 14(c)*

* * *

1. Rule 14c-2. Distribution of information statement.

(a) In connection with every annual or other meeting of the holders of the class of securities registered pursuant to section 12 of the Act or of a class of securities issued by an investment company registered under the Investment Company Act of 1940 that has made a public offering of securities, including the taking of corporate action by the written authorization or consent of security holders, the registrant shall transmit a written information statement containing the information specified in Schedule 14C (Rule 14c-101) or written information statements included in registration statements filed under the Securities Act of 1933 on Form S-4 or F-4 (§ 239.25 or § 239.34 of this chapter) or Form N-14 (§ 239.23 of this chapter), and containing the information specified in such form, to every security holder of the class that is entitled to vote or give an authorization or consent in regard to any matter to be acted upon and from whom proxy authorization or consent is not solicited on behalf of the registrant pursuant to Section 14(a) of the Act, *provided however*, that: (1) in the case of a class of securities in unregistered or bearer form, such statements need be transmitted only to those security holders whose names are known to the registrant, and (2) No such statements need to be transmitted to a security holder if a registrant would be excused from delivery of an annual report or a proxy statement under Rule 14a-3(e)(2) if such section were applicable.

(b) The information statement shall be sent or given at least 20 calendar days prior to the meeting date or, in the case of corporate action taken pursuant to the consents or authorizations of security holders, at least 20 calendar days prior to the earliest date on which the corporate action may be taken.* * *

2. Rule 14c-4. Presentation of information in information statement.

(a) The information included in the information statement shall be clearly presented and the statements made shall be divided into groups according to subject matter and the various groups of statements shall be preceded by appropriate headings. * * *

3. Rule 14c-6. False or misleading statements.

(a) No information statement shall contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the same meeting or subject matter which has become false or misleading.

(b) The fact that an information statement has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made. * * *

T. *REGULATION 14D*

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

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

(b) The requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act, Regulation 14D and Schedules 14D-1 and 14D-9 thereunder, and Rule 14e-1 of Regulation 14E under the Act, shall be deemed satisfied with respect to any tender offer, including any exchange offer, for the securities of an issuer incorporated or organized under the laws of Canada or any Canadian province or territory, if such issuer is a foreign private issuer and is not an investment company registered or required to be registered under the Investment Company Act of 1940, if less than 40 percent of the class of securities outstanding that is the subject of the tender offer is held by U.S. holders, and the tender offer is subject to, and the bidder complies with, the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the offer (unless the bidder has received an exemption(s) from, and the tender offer does not comply with, requirements that otherwise would be prescribed by Regulation 14D or 14E), provided that:

(1) In the case of tender offers subject to section 14(d)(1) of the Act, where the consideration for a tender offer subject to this section consists solely of cash, the entire disclosure document or documents required to be furnished to holders of the class of securities to be acquired shall be filed with the Commission on Schedule 14D-1F and disseminated to shareholders of the subject company residing in the United States in accordance with such Canadian laws, regulations and policies; or

(2) Where the consideration for a tender offer subject to this section includes securities of the bidder to be issued pursuant to the offer, any registration statement and/or prospectus relating thereto shall be filed with the Commission along with the Schedule 14D-1F referred to in paragraph (b)(1) of this section, and shall be disseminated, together with the home jurisdiction document(s) accompanying such Schedule, to shareholders of the subject company residing in the United States in accordance with such Canadian laws, regulations and policies.

NOTE 1. For purposes of any tender offer, including any exchange offer, otherwise eligible to proceed in accordance with Rule 14d-1(b) under the Act, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold less than 40 percent of such outstanding securities, unless (a) the aggregate trading volume of that class on national securities exchanges in the United States and on NASDAQ exceeded its aggregate trading volume on securities exchanges in Canada and on the Canadian Dealing Network, Inc. ("CDN") over the 12 calendar month period prior to commencement of this offer, or if commenced in response to a prior offer, over the 12 calendar month period prior to the commencement of the initial offer (based on volume figures published by such exchanges and NASDAQ and CDN); (b) the most recent annual report or annual information form filed or submitted by the issuer with securities regulators of Ontario, Quebec, British Columbia or Alberta (or, if the issuer of the subject securities is not a reporting issuer in any of such provinces, with any other Canadian securities regulator) or with the Commission indicates that U.S. holders hold 40 percent or more of the outstanding subject class of securities; or (c) the offeror has actual knowledge that the level of U.S. ownership equals or exceeds 40 percent of such securities.

NOTE 2. Notwithstanding the grant of an exemption from one or more of the applicable Canadian regulatory provisions imposing requirements that otherwise would be prescribed by Regulation 14D or 14E, the tender offer will be eligible to proceed in accordance with the requirements of this section if the Commission by order determines that the applicable Canadian regulatory provisions are adequate to protect the interest of investors.

c. *Tier I.* Any tender offer for the securities of a foreign private issuer as defined in Rule 3b-4 is exempt from the requirements of sections 14(d)(1) through 14(d)(7) of the Act, Regulation 14D (Rule 14d-1 through Rule 14d-10) and Schedules TO and 14D-9 thereunder, and Rule 14e-1 and Rule 14e-2 of Regulation 14E under the Act if the following conditions are satisfied:

1. *U.S. ownership limitation.* Except in the case of a tender offer which is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or Rule 13e-4(h)(8), U.S. holders do not hold more than 10 percent of the class of securities sought in the offer (as determined under Instruction 2 to paragraphs (c) and (d) of this section).

2. *Equal treatment.* The bidder must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offer; however:

i. *Registered exchange offers.* If the bidder offers securities registered under the Securities Act of 1933, the bidder need not extend the offer to security holders in those states or jurisdictions that prohibit the offer or sale of the securities after the bidder has made a good faith effort to register or qualify the offer and sale of securities in that state or jurisdiction, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

ii. *Exempt exchange offers.* If the bidder offers securities exempt from registration under Rule 802 of this chapter, the bidder need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the bidder must offer the same cash alternative to security holders in any such state or jurisdiction that it has offered to security holders in any other state or jurisdiction.

iii. *Cash only consideration.* The bidder may offer U.S. holders only a cash consideration for the tender of the subject securities, notwithstanding the fact that the bidder is offering security holders outside the United States a consideration that consists in whole or in part of securities of the bidder, so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non- U.S. holders, and either of the following conditions are satisfied:

A. The offered security is a "margin security" within the meaning of Regulation T (12 CFR 220.2) and the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, the closing price and daily trading volume of the security on the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter; or

B. If the offered security is not a "margin security" within the meaning of Regulation T (12 CFR 220.2) the issuer undertakes to provide, upon the request of any U.S. holder or the Commission staff, an opinion of an independent expert stating that the cash consideration offered to U.S. holders is substantially equivalent to the value of the consideration offered security holders outside the United States.

iv. *Disparate tax treatment.* If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933, the loan notes need not be offered to U.S. holders.

3. *Informational documents.*

i. The bidder must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction.

ii. If the bidder disseminates by publication in its home jurisdiction, the bidder must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer.

iii. In the case of tender offers for securities described in section 14(d)(1) of the Act, if the bidder publishes or otherwise disseminates an informational document to the holders of the securities in connection with the tender offer, the bidder must furnish that informational document, including any amendments thereto, in English, to the Commission on Form CB by the first business day after publication or dissemination. If the bidder is a foreign company, it must also file a Form F-X with the Commission at the same time as the submission of Form CB to appoint an agent for service in the United States.

4. *Investment companies.* The issuer of the securities that are the subject of the tender offer is not an investment company registered or required to be registered under the Investment Company Act of 1940, other than a registered closed-end investment company.

d. *Tier II.* A person conducting a tender offer (including any exchange offer) that meets the conditions in paragraph (d)(1) of this section shall be entitled to the exemptive relief specified in paragraph (d)(2) of this section provided that such tender offer complies with all the requirements of this section other than those for which an exemption has been specifically provided in paragraph (d)(2) of this section:

1. *Conditions.*

i. The subject company is a foreign private issuer as defined in Rule 3b-4 and is not an investment company registered or required to be registered under the Investment Company Act of

1940, other than a registered closed-end investment company;

ii. Except in the case of a tender offer which is commenced during the pendency of a tender offer made by a prior bidder in reliance on this paragraph or Rule 13e-4(i), U.S. holders do not hold more than 40 percent of the class of securities sought in the offer (as determined under instruction 2 to paragraphs (c) and (d) of this section); and

iii. The bidder complies with all applicable U.S. tender offer laws and regulations, other than those for which an exemption has been provided for in paragraph (d)(2) of this section.

2. *Exemptions.*

i. *Equal treatment--loan notes.* If the bidder offers loan notes solely to offer sellers tax advantages not available in the United States and these notes are neither listed on any organized securities market nor registered under the Securities Act of 1933, the loan notes need not be offered to U.S. holders, notwithstanding Rule 14d-10.

ii. *Equal treatment--separate U.S. and foreign offers.* Notwithstanding the provisions of Rule 14d-10, a bidder conducting a tender offer meeting the conditions of paragraph (d)(1) of this section may separate the offer into two offers: one offer made only to U.S. holders and another offer made only to non- U.S. holders. The offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the same class of securities that is the subject of the tender offers.

iii. *Notice of extensions.* Notice of extensions made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of Rule 14e-1(d).

iv. *Prompt payment.* Payment made in accordance with the requirements of the home jurisdiction law or practice will satisfy the requirements of Rule 14e-1(c).

v. *Subsequent offering period/Withdrawal rights.* A bidder will satisfy the announcement and prompt payment requirements of Rule 14d-11(d), if the bidder announces the results of the tender offer, including the approximate number of securities deposited to date, and pays for tendered securities in accordance with the requirements of the home jurisdiction law or practice and the subsequent offering period commences immediately following such announcement. Notwithstanding section 14(d)(5) of the Act, the bidder need not extend withdrawal rights following the close of the offer and prior to the commencement of the subsequent offering period.

Instructions to paragraphs (c) and (d):

1. Home jurisdiction means both the jurisdiction of the subject company's incorporation, organization or chartering and the principal foreign market where the subject company's securities are listed or quoted.

2. U.S. holder means any security holder resident in the United States. Except as otherwise provided in Instruction 3 below, to determine the percentage of outstanding securities held by U.S. holders:

i. Calculate the U.S. ownership as of 30 days before the commencement of the tender offer;

ii. Include securities underlying American Depositary Shares convertible or exchangeable into the securities that are the subject of the tender offer when calculating the number of subject securities outstanding, as well as the number held by U.S. holders. Exclude from the calculations other types of securities that are convertible or exchangeable into the securities that are the subject of the tender offer, such as warrants, options and convertible securities. Exclude from those calculations securities held by persons who hold more than 10 percent of the subject securities, or that are held by the bidder;

iii. Use the method of calculating record ownership in Rule 12g3-2(a) under the Act, except that your inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company's jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different than the subject company's jurisdiction of incorporation;

iv. If, after reasonable inquiry, you are unable to obtain information about the

amount of securities represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business; and

v. Count securities as beneficially owned by residents of the United States as reported on reports of beneficial ownership that are provided to you or publicly filed and based on information otherwise provided to you.

3. In a tender offer by a bidder other than an affiliate of the issuer of the subject securities, the issuer of the subject securities will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less (40 percent or less in the case of 14d-1(d)) of such outstanding securities, unless:

i. The tender offer is made pursuant to an agreement with the issuer of the subject securities;

ii. The aggregate trading volume of the subject class of securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market, as reported to the NASD, over the 12-calendar-month period ending 30 days before commencement of the offer, exceeds 10 percent (40 percent in the case of 14d-1(d)) of the worldwide aggregate trading volume of that class of securities over the same period;

iii. The most recent annual report or annual information filed or submitted by the issuer with securities regulators of the home jurisdiction or with the Commission indicates that U.S. holders hold more than 10 percent (40 percent in the case of 14d-1(d)) of the outstanding subject class of securities; or

iv. The bidder knows or has reason to know that the level of U.S. ownership exceeds 10 percent (40 percent in the case of 14d-1(d)) of such securities.

4. *United States.* United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

5. The exemptions provided by paragraphs (c) and (d) of this section are not available for any securities transaction or series of transactions that technically complies with paragraph (c) or (d) of this section but are part of a plan or scheme to evade the provisions of Regulations 14D or 14E.

e. Notwithstanding paragraph (a) of this section, the requirements imposed by sections 14(d)(1) through 14(d)(7) of the Act, Regulation 14D promulgated thereunder (Rule 14d-1 through Rule 14d- 10), and Rule 14e-1 and Rule 14e-2 shall not apply by virtue of the fact that a bidder for the securities of a foreign private issuer, as defined in Rule 3b-4, the subject company of such a tender offer, their representatives, or any other person specified in Rule 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, 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. If the bidder intends to extend the 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.

f. For the purpose of paragraph (c), a bidder may presume that a target company qualifies as a foreign private issuer if the target company is a foreign issuer and files registration statements or reports on the disclosure forms specifically designated for foreign private issuers, claims the exemption from registration under the Act pursuant to Rule 12g3-2(b), or is not reporting in the United States.

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

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

Rule 13d-3(d)(1);

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

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

4. The term initial offering period means the period from the time the offer commences until all minimum time periods, including extensions, required by Regulations 14D and 14E have been satisfied and all conditions to the offer have been satisfied or waived within these time periods.

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

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

7. The term "subject company" means any issuer of securities which are sought by a bidder pursuant to a tender offer;

8. The term subsequent offering period means the period immediately following the initial offering period meeting the conditions specified in Rule 14d-11.

9. The term "tender offer material" means:

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

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

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

h. *Signature.* Where the Act or the rules, forms, reports or schedules thereunder require a document filed with or furnished to the Commission to be signed, such document shall be manually signed, or signed using either typed signatures or duplicated or facsimile versions of manual signatures. Where typed, duplicated or facsimile signatures are used, each signatory to the filing shall manually sign a signature page or other document authenticating, acknowledging or otherwise adopting his or her signature that appears in the filing. Such document shall be executed before or at the time the filing is made and shall be retained by the filer for a period of five years. Upon request, the filer shall furnish to the Commission or its staff a copy of any or all documents retained pursuant to this section.

2. Rule 14d-2. Date of commencement of a tender offer.

a. *Date of commencement.* A bidder will have commenced its tender offer for purposes of section 14(d) of the Act and the rules under that section at 12:01 a.m. on the date when the bidder has first published, sent or given the means to tender to security holders. For purposes of this section, the means to tender includes the transmittal form or a statement regarding how the transmittal form may be obtained.

b. *Pre-commencement communications.* A communication by the bidder will not be deemed to constitute commencement of a tender offer if:

1. It does not include the means for security holders to tender their shares into the offer; and

2. All written communications relating to the tender offer, from and including the first public announcement, are filed under cover of Schedule TO with the Commission no later than the date of the communication. The bidder also must deliver to the subject company and any other bidder for the same class of securities the first communication relating to the transaction that is filed, or required to be filed,

with the Commission.

Instructions to paragraph (b)(2)

1. The box on the front of Schedule TO indicating that the filing contains pre-commencement communications must be checked.
2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under Rule 425 and will be deemed filed under this section.
3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it is available because it contains important information. The legend also must advise investors that they can get the tender offer statement and other filed documents for free at the Commission's web site and explain which documents are free from the offeror.
4. See Rule 135, Rule 165 and Rule 166 for pre-commencement communications made in connection with registered exchange offers.
5. "Public announcement" is any oral or written communication by the bidder, or any person authorized to act on the bidder's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer.

c. *Filing and other obligations triggered by commencement.* As soon as practicable on the date of commencement, a bidder must comply with the filing requirements of Rule 14d-3(a), the dissemination requirements of Rule 14d-4(a) or (b), and the disclosure requirements of Rule 14d-6(a).

3. Rule 14d-3. Filing and transmission of tender offer statement.

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

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

(2) Delivers a copy of such Schedule TO, including all exhibits thereto:

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

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

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

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

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

(b) *Post-Commencement amendments and additional materials*. The bidder making the bid must file with the Commission:

1. An amendment to Schedule TO reporting promptly any material changes in the information set forth in the schedule previously filed and including copies of any additional tender offer materials as exhibits; and

2. A final amendment to Schedule TO reporting promptly the results of the tender offer.

Instruction to paragraph (b):

A copy of any additional tender offer materials or amendment filed under this section must be sent promptly to the subject company and to any exchange and/or NASD, as required by paragraph (a) of this section, but in no event later than the date the materials are first published, sent or given to security holders.

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

4. Rule 14d-4. Dissemination of certain tender offers.

As soon as practicable on the date of commencement of a tender offer, the bidder must publish, send or give the disclosure required by Rule 14d-6 to security holders of the class of securities that is the subject of the offer, by complying with all of the requirements of any of the following:

a. *Cash tender offers and exempt securities offers.* For tender offers in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933:
   1. *Long-form publication.* The bidder makes adequate publication in a newspaper or newspapers of long-form publication of the tender offer.
   2. *Summary publication.*
      i. If the tender offer is not subject to Rule 13e-3, the bidder makes adequate publication in a newspaper or newspapers of a summary advertisement of the tender offer; and
      ii. Mails by first class mail or otherwise furnishes with reasonable promptness the bidder's tender offer materials to any security holder who requests such tender offer materials pursuant to the summary advertisement or otherwise.
   3. *Use of stockholder lists and security position listings.* Any bidder using stockholder lists and security position listings under Rule 14d-5 must comply with paragraph (a)(1) or (2) of this section on or before the date of the bidder's request under Rule 14d-5(a).

Instruction to paragraph (a):

Tender offers may be published or sent or given to security holders by other methods, but with respect to summary publication and the use of stockholder lists and security position listings under Rule 14d- 5, paragraphs (a)(2) and (a)(3) of this section are exclusive.

b. *Registered securities offers.* For tender offers in which the consideration consists solely or partially of securities registered under the Securities Act of 1933, a registration statement containing all of the required information, including pricing information, has been filed and a preliminary prospectus or a prospectus that meets the requirements of section 10(a) of the Securities Act, including a letter of transmittal, is delivered to security holders. However, for going-private transactions (as defined by Rule 13e-3) and roll-up transactions (as described by Item 901 of Regulation S-K), a registration statement registering the securities to be offered must have become effective and only a prospectus that meets the requirements of section 10(a) of the Securities Act may be delivered to security holders on the date of commencement.

Instructions to paragraph (b)

1. If the prospectus is being delivered by mail, mailing on the date of commencement is sufficient.
2. A preliminary prospectus used under this section may not omit information

under Rule 430 or Rule 430A of this chapter.
3. If a preliminary prospectus is used under this section and the bidder must disseminate material changes, the tender offer must remain open for the period specified in paragraph (d)(2) of this section.
4. If a preliminary prospectus is used under this section, tenders may be requested in accordance with Rule 162(a) of this chapter.

c. *Adequate publication.* Depending on the facts and circumstances involved, adequate publication of a tender offer pursuant to this section may require publication in a newspaper with a national circulation or may only require publication in a newspaper with metropolitan or regional circulation or may require publication in a combination thereof: Provided, however, that publication in all editions of a daily newspaper with a national circulation shall be deemed to constitute adequate publication.

d. *Publication of changes and extension of the offer.*

1. If a tender offer has been published or sent or given to security holders by one or more of the methods enumerated in paragraph (a) of this section, a material change in the information published or sent or given to security holders shall be promptly disseminated to security holders in a manner reasonably designed to inform security holders of such change; *Provided, however,* That if the bidder has elected pursuant to Rule 14d-5 (f)(1) of this section to require the subject company to disseminate amendments disclosing material changes to the tender offer materials pursuant to Rule 14d-5, the bidder shall disseminate material changes in the information published or sent or given to security holders at least pursuant to Rule 14d-5.
2. In a registered securities offer where the bidder disseminates the preliminary prospectus as permitted by paragraph (b) of this section, the offer must remain open from the date that material changes to the tender offer materials are disseminated to security holders, as follows:
   i. Five business days for a prospectus supplement containing a material change other than price or share levels;
   ii. Ten business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change;
   iii. Ten business days for a prospectus supplement included as part of a post-effective amendment; and
   iv. Twenty business days for a revised prospectus when the initial prospectus was materially deficient.

5. Rule 14d-5. Dissemination of certain tender offers by the use of stockholder lists and security position listings.

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

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

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

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

(4) No later than the second business day after the date of the bidder's request, the subject

company shall orally notify the bidder, which notification shall be confirmed in writing, of the subject company's election made pursuant to paragraph (a)(3) of this section. Such notification shall indicate (i) the approximate number of security holders of the class of securities being sought by the bidder and, (ii) if the subject company elects to comply with paragraph (b) of this section, appropriate information concerning the location for delivery of the bidder's tender offer materials and the approximate direct costs incidental to the mailing to security holders of the bidder's tender offer materials computed in accordance with paragraph (g)(2) of this section.

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

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

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

(3) No later than the third business day after the delivery of the bidder's tender offer materials pursuant to paragraph (g)(1) of this section, the subject company shall begin to transmit or cause to be transmitted a sufficient number of sets of the bidder's tender offer materials to the participants named on the security position listings described in paragraph (b)(1) of this section. The subject company shall use its best efforts to complete the transmittal in a timely manner but in no event shall such transmittal be completed in a substantially greater period of time than the subject company would complete a transmittal to such participants pursuant to security position listings of clearing agencies of its own material relating to the tender offer.

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

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

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

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

(8) Promptly following the termination of the tender offer, the subject company shall reimburse the bidder the excess, if any, of the amounts advanced pursuant to paragraph (f)(3)(iii) over the direct costs incidental to compliance by the subject company and its agents in performing the acts required by this section computed in accordance with paragraph (g)(2) of this section.

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

(1) No later than the third business day after the date of the bidder's request, the subject company

shall furnish to the bidder at the subject company's principal executive office a copy of the names and addresses of the record holders on the most recent stockholder list referred to in paragraph (a)(2) of this section and a copy of the names and addresses of participants identified on the most recent security position listing of any clearing agency which is within the access of the subject company; and the most recent list of names, addresses and security positions of beneficial owners as specified in Rule 14a-13(b), in the possession of the subject company, or that subsequently comes into its possession. All security holder list information must be in the format requested by the bidder to the extent the format is available to the subject company without undue burden or expense.

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

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

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

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

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

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

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

(1) The identity of the bidder;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) The bidder shall mail by means of first class mail, at its own expense, a copy of its tender offer materials to each person whose identity appears on the stockholder list as furnished and updated by the subject company pursuant to paragraphs (c)(1) and (c)(2) of this section;

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

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

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

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

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

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

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

NOTE to Rule 14d-5. Reasonably prompt methods of distribution to security holders may be used instead of mailing. If alternative methods are chosen, the approximate direct costs of distribution shall be computed by adding the estimated direct costs of preparing the document for distribution through the chosen medium (including updating of shareholder lists) plus the estimated reasonable cost of distribution through that medium. Direct costs incidental to the distribution of tender offer materials and amendments thereto may include all reasonable charges paid by the subject company to third parties for supplies or services, including costs attendant to preparing shareholder lists, handling the bidder's materials, and contacting participants named on security position listings, but shall not include indirect costs, such as employee time which is devoted to either contesting or supporting the tender offer on behalf of the subject company.

6. Rule 14d-6. Disclosure of Tender Offer Information to Security Holders

a. Information required on date of commencement.--

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

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

i. The summary advertisement must contain at least the information required by paragraph (d)(2) of this section; and

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

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

i. The summary advertisement must contain at least the information required by paragraph (d)(2) of this section; and

ii. The tender offer materials transmitted to security holders pursuant to such lists and security position listings and furnished by the bidder upon the request of any security holder must include the information required by paragraph (d)(1) of this section.

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

b. Information required in other tender offer materials published after commencement. Except for tender offer materials described in paragraphs (a)(2)(ii) and (a)(3)(ii) of this section, additional tender offer materials published, sent or given to security holders after commencement must include:

1. The identities of the bidder and subject company;

2. The amount and class of securities being sought;

3. The type and amount of consideration being offered; and

4. The scheduled expiration date of the tender offer, whether the tender offer may be extended and, if so, the procedures for extension of the tender offer.

Instruction to paragraph (b):

If the additional tender offer materials are summary advertisements, they also must include the information required by paragraphs (d)(2)(v) of this section.

c. Material changes. A material change in the information published or sent or given to security holders must be promptly disclosed to security holders in additional tender offer materials.

d. Information to be included.--

1. *Tender offer materials other than summary publication.* The following information is required by paragraphs (a)(1), (a)(2)(ii), (a)(3)(ii) and (a)(4) of this section:

i. The information required by Item 1 of Schedule TO (Rule 14d-100) (Summary Term Sheet); and

ii. The information required by the remaining items of Schedule TO (Rule 14d- 100) for third-party tender offers, except for Item 12 (exhibits) of Schedule TO (Rule 14d-100), or a fair and adequate summary of the information.

2. *Summary Publication.* The following information is required in a summary advertisement under paragraphs (a)(2)(i) and (a)(3)(i) of this section:

i. The identity of the bidder and the subject company;

ii. The information required by Item 1004(a)(1) of Regulation M-A;

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

iv. A statement that the information required by paragraph (d)(1) of this section is incorporated by reference into the summary advertisement;

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

vi. In a tender offer published or sent or given to security holders by use of stockholder lists and security position listings under Rule 14d-4(a)(3), a statement that a request is being made for such lists and listings. The summary publication also must state that tender offer materials will be mailed to record holders and will be furnished to brokers, banks and similar persons whose name appears or whose nominee appears on the list of security holders or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal to beneficial owners of such securities. If the list furnished to the bidder also included beneficial owners pursuant to Rule 14d-5(c)(1) and tender offer materials will be mailed directly to beneficial holders, include a statement to that effect.

3. *No transmittal letter.* Neither the initial summary advertisement nor any subsequent summary advertisement may include a transmittal letter (the letter furnished to security holders for transmission of securities sought in the tender offer) or any amendment to the transmittal letter.

7. Rule 14d-7. Additional withdrawal rights.

(a) 1. *Rights*. In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the period such offer request or invitation remains open.

2. *Exemption during subsequent offering period.* Notwithstanding the provisions of section 14(d)(5) of the Act and paragraph (a) of this section, the bidder need not offer withdrawal rights during a subsequent offering period.

(b) *Notice of withdrawal*. Notice of withdrawal pursuant to this section shall be deemed to be timely upon the receipt by the bidder's depositary of a written notice of withdrawal specifying the name(s) of the tendering stockholder(s), the number or amount of the securities to be withdrawn and the name(s) in which the certificate(s) is (are) registered, if different from that of the tendering security holder(s). A bidder may impose other reasonable requirements, including certificate numbers and a signed request for withdrawal accompanied by a signature guarantee, as conditions precedent to the physical release of withdrawn securities.

8. Rule 14d-8. Exemption from statutory pro rata requirements.

Notwithstanding the pro rata provisions of section 14(d)(6) of the Act, if any person makes a tender offer or request or invitation for tenders, for less than all of the outstanding equity securities of a class, and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor during the period such offer, request or invitation remains open.

9. Rule 14d-9. Recommendation or Solicitation by the Subject Company and Others

a. *Pre-commencement communications.* A communication by a person described in paragraph (e) of this section with respect to a tender offer will not be deemed to constitute a recommendation or solicitation under this section if:

1. The tender offer has not commenced under Rule 14d-2; and
2. The communication is filed under cover of Schedule 14D-9 with the Commission no later than the date of the communication.

Instructions to paragraph (a)(2):

1. The box on the front of Schedule 14D-9 indicating that the filing contains pre-commencement communications must be checked.
2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under Rule 425 and will be deemed filed under this section.
3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the company's solicitation/recommendation statement when it is available because it contains important information. The legend also must advise investors that they can get the recommendation and other filed documents for free at the Commission's web site and explain which documents are free from the filer.
4. See Rule 135, Rule 165 and Rule 166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

b. *Post-commencement communications.* After commencement by a bidder under Rule 14d-2, no solicitation or recommendation to security holders may be made by any person described in paragraph (e) of this section with respect to a tender offer for such securities unless as soon as practicable on the date such solicitation or recommendation is first published or sent or given to security holders such person complies with the following:

1. Such person shall file with the Commission a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9, including all exhibits thereto; and
2. If such person is either the subject company or an affiliate of the subject company,
   i. Such person shall hand deliver a copy of the Schedule 14D-9 to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule TO filed with the Commission; and
   ii. Such person shall give telephonic notice (which notice to the extent possible shall be given prior to the opening of the market) of the information required by Items 1003(d) and 1012(a) of Regulation M-A and shall mail a copy of the Schedule to each national securities exchange where the class of securities is registered and listed for trading and, if the class is authorized for quotation in the NASDAQ interdealer quotation system, to the National Association of Securities Dealers, Inc. ("NASD").
3. If such person is neither the subject company nor an affiliate of the subject company,
   i. Such person shall mail a copy of the schedule to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule TO; and
   2. Such person shall mail a copy of the Schedule to the subject company at its principal office.

c. *Amendments.* If any material change occurs in the information set forth in the Schedule 14D-9 required by this section, the person who filed such Schedule 14D-9 shall:

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

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

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

d. *Information required in solicitation or recommendation.* Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1 through 8 of Schedule 14D-9 or a fair and adequate summary thereof: Provided, however, That such solicitation or recommendation may omit any of such information previously furnished to security holders of such class of securities by such person with respect to such tender offer.

e. *Applicability.*

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

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

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

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

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

i. A bidder who has filed a Schedule TO pursuant to Rule 14d-3 ;

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

iii. Any person specified in paragraph (e)(1) of this section if:

A. The subject company is the subject of a tender offer conducted under Rule 14d-1(c);

B. Any person specified in paragraph (e)(1) of this section furnishes to the Commission on Form CB the entire informational document it publishes or otherwise disseminates to holders of the class of securities in connection with the tender offer no later than the next business day after publication or dissemination;

C. Any person specified in paragraph (e)(1) of this section disseminates any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the issuer's home jurisdiction; and

D. Any person specified in paragraph (e)(1) of this section disseminates by publication in its home jurisdiction, such person must publish the information in the United States in a manner reasonably calculated to inform U.S. security holders of the offer.

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

1. Identifies the tender offer by the bidder;

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

3. States that on or before a specified date (which shall be no later than 10 business days from the

date of commencement of such tender offer) the subject company will advise such security holders of

i. whether the subject company recommends acceptance or rejection of such tender offer; expresses no opinion and remains neutral toward such tender offer; or is unable to take a position with respect to such tender offer and

ii. the reason(s) for the position taken by the subject company with respect to the tender offer (including the inability to take a position); and

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

g. *Statement of management's position.* A statement by the subject company's of its position with respect to a tender offer which is required to be published or sent or given to security holders pursuant to Rule 14e-2 shall be deemed to constitute a solicitation or recommendation within the meaning of this section and section 14(d)(1) of the Act.

10. Rule 14d-10. Equal treatment of security holder.

(a) No bidder shall make a tender offer unless:

(1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and

(2) The consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.

(b) Paragraph (a)(1) of this section shall not:

(1) Affect dissemination under Rule 14d–4 (§240.14d–4); or

(2) Prohibit a bidder from making a tender offer excluding all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.

(c) Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided,* That:

(1) Security holders are afforded equal right to elect among each of the types of consideration offered; and

(2) The highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

(d) (1) Paragraph (a)(2) of this section shall not prohibit the negotiation, execution or amendment of an employment compensation, severance or other employee benefit arrangement, or payments made or to be made or benefits granted or to be granted according to such an arrangement, with respect to any security holder of the subject company, where the amount payable under the arrangement:

(i) Is being paid or granted as compensation for past services performed, future services to be performed, or future services to be refrained from performing, by the security holder (and matters incidental thereto); and

(ii) Is not calculated based on the number of securities tendered or to be tendered in the tender offer by the security holder.

(2) The provisions of paragraph (d)(1) of this section shall be satisfied and, therefore, pursuant to this non-exclusive safe harbor, the negotiation, execution or amendment of an arrangement and any payments made or to be made or benefits granted or to be granted according to that arrangement shall not be prohibited by paragraph (a)(2) of this section, if the arrangement is approved as an employment compensation, severance or other employee benefit arrangement solely by independent directors as follows:

(i) The compensation committee or a committee of the board of directors that performs functions similar to a compensation committee of the subject company approves the arrangement, regardless of whether the subject company is a party to the arrangement, or, if the bidder is a party to the arrangement, the compensation committee or a committee of the board of directors that performs functions similar to a compensation committee of the bidder approves the arrangement; or

(ii) If the subject company's or bidder's board of directors, as applicable, does not have a compensation committee or a committee of the board of directors that performs functions similar

to a compensation committee or if none of the members of the subject company's or bidder's compensation committee or committee that performs functions similar to a compensation committee is independent, a special committee of the board of directors formed to consider and approve the arrangement approves the arrangement; or

(iii) If the subject company or bidder, as applicable, is a foreign private issuer, any or all members of the board of directors or any committee of the board of directors authorized to approve employment compensation, severance or other employee benefit arrangements under the laws or regulations of the home country approves the arrangement.

Instructions to paragraph (d)(2):

For purposes of determining whether the members of the committee approving an arrangement in accordance with the provisions of paragraph (d)(2) of this section are independent, the following provisions shall apply:

1. If the bidder or subject company, as applicable, is a listed issuer (as defined in § 240.10A–3 of this chapter) whose securities are listed either on a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a)) or in an inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o–3(a)) that has independence requirements for compensation committee members that have been approved by the Commission (as those requirements may be modified or supplemented), apply the bidder's or subject company's definition of independence that it uses for determining that the members of the compensation committee are independent in compliance with the listing standards applicable to compensation committee members of the listed issuer.
2. If the bidder or subject company, as applicable, is not a listed issuer (as defined in § 240.10A–3 of this chapter), apply the independence requirements for compensation committee members of a national securities exchange registered pursuant to section 6(a) of the Exchange Act (15 U.S.C. 78f(a)) or an inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act (15 U.S.C. 78o–3(a)) that have been approved by the Commission (as those requirements may be modified or supplemented). Whatever definition the bidder or subject company, as applicable, chooses, it must apply that definition consistently to all members of the committee approving the arrangement.
3. Notwithstanding Instructions 1 and 2 to paragraph (d)(2), if the bidder or subject company, as applicable, is a closed-end investment company registered under the Investment Company Act of 1940, a director is considered to be independent if the director is not, other than in his or her capacity as a member of the board of directors or any board committee, an "interested person" of the investment company, as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).
4. If the bidder or the subject company, as applicable, is a foreign private issuer, apply either the independence standards set forth in Instructions 1 and 2 to paragraph (d)(2) or the independence requirements of the laws, regulations, codes or standards of the home country of the bidder or subject company, as applicable, for members of the board of directors or the committee of the board of directors approving the arrangement.
5. A determination by the bidder's or the subject company's board of directors, as applicable, that the members of the board of directors or the committee of the board of directors, as applicable, approving an arrangement in accordance with the provisions of paragraph (d)(2) are independent in accordance with the provisions of this instruction to paragraph (d)(2) shall satisfy the independence requirements of paragraph (d)(2).

Instruction to paragraph (d):

The fact that the provisions of paragraph (d) of this section extend only to employment compensation, severance and other employee benefit arrangements and not to other arrangements, such as commercial arrangements, does not raise any inference that a payment under any such other arrangement constitutes consideration paid for securities in a tender offer.

(e) If the offer and sale of securities constituting consideration offered in a tender offer is prohibited by the appropriate authority of a state after a good faith effort by the bidder to register or qualify the offer and sale of such

securities in such state:

(1) The bidder may offer security holders in such state an alternative form of consideration; and

(2) Paragraph (c) of this section shall not operate to require the bidder to offer or pay the alternative form of consideration to security holders in any other state.

(f) This section shall not apply to any tender offer with respect to which the Commission, upon written request or upon its own motion, either unconditionally or on specified terms and conditions, determines that compliance with this section is not necessary or appropriate in the public interest or for the protection of investors.

11. Rule 14d-11. Subsequent Offering Period

A bidder may elect to provide a subsequent offering period of three business days to 20 business days during which tenders will be accepted if:

(a) The initial offering period of at least 20 business days has expired;

(b) The offer is for all outstanding securities of the class that is the subject of the tender offer, and if the bidder is offering security holders a choice of different forms of consideration, there is no ceiling on any form of consideration offered;

(c) The bidder immediately accepts and promptly pays for all securities tendered during the initial offering period;

(d) The bidder announces the results of the tender offer, including the approximate number and percentage of securities deposited to date, no later than 9:00 a.m.

Eastern time on the next business day after the expiration date of the initial offering period and immediately begins the subsequent offering period;

(e) The bidder immediately accepts and promptly pays for all securities as they are tendered during the subsequent offering period; and

(f) The bidder offers the same form and amount of consideration to security holders in both the initial and the subsequent offering period.

Note Rule 14d-11:

No withdrawal rights apply during the subsequent offering period in accordance with Rule 14d-7(a)(2).

12. Schedule TO. Tender offer statement under section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934.

Securities Exchange Act of 1934
Rules and Regulations – Schedule 14D-100

Securities and Exchange Commission,

Washington, D.C. 20549

Schedule TO

Tender Offer Statement under Section 14(d)(1) or 13(e)(1) of the Securities Exchange Act of 1934

(Amendment No. ___)*

(Name of Subject Company (issuer))

(Names of Filing Persons (identifying status as offeror, issuer or other person))

(Title of Class of Securities)

(CUSIP Number of Class of Securities)

(Name, address, and telephone numbers of person authorized to
receive notices and communications on behalf of filing persons)

Calculation of Filing Fee

Transaction valuation*	Amount of filing fee

*Set forth the amount on which the filing fee is calculated and state how it was determined.
…….....

[] Check the box if any part of the fee is offset as provided by Rule 0-11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid:_____
Form or Registration No.: _____
Filing Party:_____
Date Filed:_____

[] Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes below to designate any transactions to which the statement relates:

[] third-party tender offer subject to Rule 14d-1.

[] issuer tender offer subject to Rule 13e-4.

[] going-private transaction subject to Rule 13e-3.

[] amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer: []
If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

[] Rule 13e-4(i) (Cross-Border Issuer Tender Offer)

[] Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)

General Instructions:

A. File eight copies of the statement, including all exhibits, with the Commission if paper filing is permitted.
B. This filing must be accompanied by a fee payable to the Commission as required by § 240.0-11.
C. If the statement is filed by a general or limited partnership, syndicate or other group, the information called for by Items 3 and 5-8 for a third-party tender offer and Items 5-8 for an issuer tender offer must be given with respect to: (i) Each partner of the general partnership; (ii) each partner who is, or functions as, a general partner of the limited partnership; (iii) each member of the syndicate or group; and (iv) each person controlling the partner or member. If the statement is filed by a corporation or if a person referred to in (i), (ii), (iii) or (iv) of this Instruction is a corporation, the information called for by the items specified above must be given with respect to: (a) Each executive officer and director of the corporation; (b) each person controlling the corporation; and (c) each executive officer and director of any corporation or other person ultimately in control of the corporation.
D. If the filing contains only preliminary communications made before the commencement of a tender offer, no signature or filing fee is required. The filer need not respond to the items in the schedule. Any pre-commencement communications that are filed under cover of this schedule need not be incorporated by reference into the schedule.
E. If an item is inapplicable or the answer is in the negative, so state. The statement published, sent or given to security holders may omit negative and not applicable responses. If the schedule includes any information that is not published, sent or given to security holders, provide that information or specifically incorporate it by reference under the appropriate item number and heading in the schedule. Do not recite the text of disclosure requirements in the schedule or any document published, sent or given to security holders. Indicate clearly the coverage of the requirements without referring to the text of the items.
F. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item unless it would render the answer misleading, incomplete, unclear or confusing. A copy of any information that is incorporated by reference or a copy of the pertinent pages of a document containing the information must be submitted with this statement as an exhibit, unless it was previously filed with the Commission electronically on EDGAR. If an exhibit contains information responding to more than one item in the schedule, all information in that exhibit may be incorporated by reference once in response to the several items in the schedule for which it provides an answer. Information incorporated by reference is deemed filed with the Commission for all purposes of the Act.
G. A filing person may amend its previously filed Schedule 13D (§ 240.13d-101) on Schedule TO (§ 240.14d-100) if the appropriate box on the cover page is checked to indicate a combined filing and the information called for by the fourteen disclosure items on the cover page of Schedule 13D (§ 240.13d-101) is provided on the cover page of the combined filing with respect to each filing person.
H. The final amendment required by § 240.14d-3(b)(2) and § 240.13e-4(c)(4) will satisfy the reporting requirements of section 13(d) of the Act with respect to all securities acquired by the offeror in the tender offer.
I. Amendments disclosing a material change in the information set forth in this statement may omit any information previously disclosed in this statement.
J. If the tender offer disclosed on this statement involves a going-private transaction, a combined Schedule TO (§ 240.14d-100) and Schedule 13E-3 (§ 240.13e-100) may be filed with the Commission under cover of Schedule TO. The Rule 13e-3 box on the cover page of the Schedule TO must be checked to indicate a combined filing. All information called for by both schedules must be provided except that Items 1-3, 5, 8 and 9 of Schedule TO may be omitted to the extent those items call for information that duplicates the item requirements in Schedule 13E-3.
K. For purposes of this statement, the following definitions apply:
(1) The term offeror means any person who makes a tender offer or on whose behalf a tender offer is made;
(2) The term issuer tender offer has the same meaning as in Rule 13e-4(a)(2); and
(3) The term third-party tender offer means a tender offer that is not an issuer tender offer.

Special Instructions for Complying With Schedule TO

Under Sections 13(e), 14(d) and 23 of the Act and the rules and regulations of the Act, the Commission is authorized to solicit the information required to be supplied by this schedule.
Disclosure of the information specified in this schedule is mandatory. The information will be used for the primary purpose of disclosing tender offer and going-private transactions. This statement will be made a matter of public record. Therefore, any information given will be available for inspection by any member of the public.
Because of the public nature of the information, the Commission can use it for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigatory purposes or in connection with litigation involving the federal securities laws or other civil, criminal or regulatory statutes or provisions.

Failure to disclose the information required by this schedule may result in civil or criminal action against the persons involved for violation of the federal securities laws and rules.

Item 1. Summary Term Sheet

Furnish the information required by Item 1001 of Regulation M-A (§ 229.1001 of this chapter) unless information is disclosed to security holders in a prospectus that meets the requirements of § 230.421(d) of this chapter.

Item 2. Subject Company Information

Furnish the information required by Item 1002(a) through (c) of Regulation M-A (§ 229.1002 of this chapter).

Item 3. Identity and Background of Filing Person

Furnish the information required by Item 1003(a) through (c) of Regulation M-A (§ 229.1003 of this chapter) for a third-party tender offer and the information required by Item 1003(a) of Regulation M-A (§ 229.1003 of this chapter) for an issuer tender offer.

Item 4. Terms of the Transaction

Furnish the information required by Item 1004(a) of Regulation M-A (§ 229.1004 of this chapter) for a third-party tender offer and the information required by Item 1004(a) through (b) of Regulation M-A (§ 229.1004 of this chapter) for an issuer tender offer.

Item 5. Past Contacts, Transactions, Negotiations and Agreements

Furnish the information required by Item 1005(a) and (b) of Regulation M-A (§ 229.1005 of this chapter) for a third-party tender offer and the information required by Item 1005(e) of Regulation M-A (§ 229.1005) for an issuer tender offer.

Item 6. Purposes of the Transaction and Plans or Proposals

Furnish the information required by Item 1006(a) and (c)(1) through (7) of Regulation M-A (§ 229.1006 of this chapter) for a third-party tender offer and the information required by Item 1006(a) through (c) of Regulation M-A (§ 229.1006 of this chapter) for an issuer tender offer.

Item 7. Source and Amount of Funds or Other Consideration

Furnish the information required by Item 1007(a), (b) and (d) of Regulation M-A (§ 229.1007 of this chapter).

Item 8. Interest in Securities of the Subject Company

Furnish the information required by Item 1008 of Regulation M-A (§ 229.1008 of this chapter).

Item 9. Persons/Assets, Retained, Employed, Compensated or Used

Furnish the information required by Item 1009(a) of Regulation M-A (§ 229.1009 of this chapter).

Item 10. Financial Statements

If material, furnish the information required by Item 1010(a) and (b) of Regulation M-A (§ 229.1010 of this chapter) for the issuer in an issuer tender offer and for the offeror in a third-party tender offer.
Instructions to Item 10:
1. Financial statements must be provided when the offeror's financial condition is material to security holder's decision whether to sell, tender or hold the securities sought. The facts and circumstances of a tender offer, particularly the terms of the tender offer, may influence a determination as to whether financial statements are material, and thus required to be disclosed.
2. Financial statements are not considered material when: (a) The consideration offered consists solely of cash; (b) the offer is not subject to any financing condition; and either: (c) the offeror is a public reporting company under Section 13(a) or 15(d) of the Act that files reports electronically on EDGAR, or (d) the offer is for all outstanding securities of the subject class. Financial information may be required, however, in a two-tier transaction. See Instruction 5 below.

3. The filing person may incorporate by reference financial statements contained in any document filed with the Commission, solely for the purposes of this schedule, if: (a) The financial statements substantially meet the requirements of this item; (b) an express statement is made that the financial statements are incorporated by reference; (c) the information incorporated by reference is clearly identified by page, paragraph, caption or otherwise; and (d) if the information incorporated by reference is not filed with this schedule, an indication is made where the information may be inspected and copies obtained. Financial statements that are required to be presented in comparative form for two or more fiscal years or periods may not be incorporated by reference unless the material incorporated by reference includes the entire period for which the comparative data is required to be given. See General Instruction F to this schedule.
4. If the offeror in a third-party tender offer is a natural person, and such person's financial information is material, disclose the net worth of the offeror. If the offeror's net worth is derived from material amounts of assets that are not readily marketable or there are material guarantees and contingencies, disclose the nature and approximate amount of the individual's net worth that consists of illiquid assets and the magnitude of any guarantees or contingencies that may negatively affect the natural person's net worth.
5. Pro forma financial information is required in a negotiated third-party cash tender offer when securities are intended to be offered in a subsequent merger or other transaction in which remaining target securities are acquired and the acquisition of the subject company is significant to the offeror under § 210.11-01(b)(1) of this chapter. The offeror must disclose the financial information specified in Item 3(f) and Item 5 of Form S-4 (§ 239.25 of this chapter) in the schedule filed with the Commission, but may furnish only the summary financial information specified in Item 3(d), (e) and (f) of Form S-4 in the disclosure document sent to security holders. If pro forma financial information is required by this instruction, the historical financial statements specified in Item 1010 of Regulation M-A (§ 229.1010 of this chapter) are required for the bidder.
6. The disclosure materials disseminated to security holders may contain the summarized financial information specified by Item 1010(c) of Regulation M-A (§ 229.1010 of this chapter) instead of the financial information required by Item 1010(a) and (b). In that case, the financial information required by Item 1010(a) and (b) of Regulation M-A must be disclosed in the statement. If summarized financial information is disseminated to security holders, include appropriate instructions on how more complete financial information can be obtained. If the summarized financial information is prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, the summarized financial information must be accompanied by a reconciliation as described in Instruction 8 of this Item.
7. If the offeror is not subject to the periodic reporting requirements of the Act, the financial statements required by this Item need not be audited if audited financial statements are not available or obtainable without unreasonable cost or expense. Make a statement to that effect and the reasons for their unavailability.
8. If the financial statements required by this Item are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F (§ 249.220f of this chapter), unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, however, when financial statements are prepared on a basis other than U.S. GAAP, a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. must be presented.

Item 11. Additional Information.

Furnish the information required by Item 1011(a) and (c) of Regulation M-A (§ 229.1011 of this chapter).

Item 12. Exhibits

File as an exhibit to the Schedule all documents specified by Item 1016 (a), (b), (d), (g) and (h) of Regulation M-A (§ 229.1016 of this chapter).

Item 13. Information Required by Schedule 13E-3

If the Schedule TO is combined with Schedule 13E-3 (§ 240.13e-100), set forth the information required by Schedule 13E-3 that is not included or covered by the items in Schedule TO.
Signature. After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

(Signature)

(Name and title)

(Date)

Instruction to Signature: The statement must be signed by the filing person or that person's authorized representative. If the statement is signed on behalf of a person by an authorized representative (other than an executive officer of a corporation or general partner of a partnership), evidence of the representative's authority to sign on behalf of the person must be filed with the statement. The name and any title of each person who signs the statement must be typed or printed beneath the signature. See §§ 240.12b-11 and 240.14d-1(h) with respect to signature requirements.
[64 FR 61462, Nov. 10, 1999, as amended at 72 FR 45112, Aug. 10, 2007; 73 FR 17814, Apr. 1, 2008; 73 FR 60093, Oct.9,2008;76FR6046,Feb.2,2011]

13.Schedule 14D-9. Solicitation/Recommendation Statement under Section 14(d)(4) of the Securities Exchange Act of 1934

Securities and Exchange Commission,

Washington, D.C. 20549

Schedule 14D-9

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

(Amendment No. ___)

(Name of Subject Company)

(Names of Persons Filing Statement)

(Title of Class of Securities)

(CUSIP Number of Class of Securities)

(Name, address, and telephone numbers of person authorized to
receive notices and communications on behalf of the persons filing statement)

[] Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

General Instructions:

A. File eight copies of the statement, including all exhibits, with the Commission if paper filing is permitted.
B. If the filing contains only preliminary communications made before the commencement of a tender offer, no signature is required. The filer need not respond to the items in the schedule. Any pre-commencement communications that are filed under cover of this schedule need not be incorporated by reference into the schedule.
C. If an item is inapplicable or the answer is in the negative, so state. The statement published, sent or given to security holders may omit negative and not applicable responses. If the schedule includes any information that is not published, sent or given to security holders, provide that information or specifically incorporate it by reference under the appropriate item number and heading in the schedule. Do not recite the text of disclosure requirements in the schedule or any document published, sent or given to security holders. Indicate clearly the coverage of the requirements without referring to the text of the items.
D. Information contained in exhibits to the statement may be incorporated by reference in answer or partial answer to any item unless it would render the answer misleading, incomplete, unclear or confusing. A copy of any information that is incorporated by reference or a copy of the pertinent pages of a document containing the information must be submitted with this statement as an exhibit, unless it was previously filed with the Commission electronically on EDGAR. If an exhibit contains information responding to more than one item in the schedule, all information in that exhibit may be incorporated by reference once in response to the several items in the schedule for which it provides an answer. Information incorporated by reference is deemed filed with the Commission for all purposes of the Act.
E. Amendments disclosing a material change in the information set forth in this statement may omit any information previously disclosed in this statement.

Item 1. Subject Company Information

Furnish the information required by Item 1002(a) and (b) of Regulation M-A (§ 229.1002 of this chapter).

Item 2. Identity and Background of Filing Person

Furnish the information required by Item 1003(a) and (d) of Regulation M-A (§ 229.1003 of this chapter).

Item 3. Past Contacts, Transactions, Negotiations and Agreements

Furnish the information required by Item 1005(d) of Regulation M-A (§ 229.1005 of this chapter).

Item 4. The Solicitation or Recommendation

Furnish the information required by Item 1012(a) through (c) of Regulation M-A (§ 229.1012 of this chapter).

Item 5. Person/Assets, Retained, Employed, Compensated or Used

Furnish the information required by Item 1009(a) of Regulation M-A (§ 229.1009 of this chapter).

Item 6. Interest in Securities of the Subject Company

Furnish the information required by Item 1008(b) of Regulation M-A (§ 229.1008 of this chapter).

Item 7. Purposes of the Transaction and Plans or Proposals

Furnish the information required by Item 1006(d) of Regulation M-A (§ 229.1006 of this chapter).

Item 8. Additional Information

Furnish the information required by Item 1011(b) and (c) of Regulation M-A (§ 229.1011 of this chapter).

Item 9. Exhibits

File as an exhibit to the Schedule all documents specified by Item 1016(a), (e) and (g) of Regulation M-A (§ 229.1016 of this chapter).

Signature. After due inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

(Signature)

(Name and title)

(Date)

Instruction to Signature: The statement must be signed by the filing person or that person's authorized representative. If the statement is signed on behalf of a person by an authorized representative (other than an executive officer of a corporation or general partner of a partnership), evidence of the representative's authority to sign on behalf of the person must be filed with the statement. The name and any title of each person who signs the statement must be typed or printed beneath the signature. See § 240.14d-1(h) with respect to signature requirements.
[64 FR 61464, Nov. 10, 1999, as amended at 73 FR 17814, Apr. 1, 2008; 76 FR 6046, Feb. 2, 2011]

REGULATION 14E

14.Rule 14e-1. Unlawful tender offer practices.

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

(a) Hold such tender offer open for less than twenty business days from the date such tender offer is first published or sent to security holders; provided, however, that if the tender offer involves a roll-up transaction as defined in Item 901(c) of Regulation S-K and the securities being offered are registered (or authorized to be registered) on Form S-4 or Form F-4, the offer shall not be open for less than sixty calendar days from the date the tender offer is first published or sent to security holders;

(b) Increase or decrease the percentage of the class of securities being sought or the consideration

offered or the dealer's soliciting fee to be given in a tender offer unless such tender offer remains open for at least ten business days from the date that notice of such increase or decrease is first published or sent or given to security holders.

Provided, however, That, for purposes of this paragraph, the acceptance for payment of an additional amount of securities not to exceed two percent of the class of securities that is the subject of the tender offer shall not be deemed to be an increase. For purposes of this paragraph, the percentage of a class of securities shall be calculated in accordance with section 14(d)(3) of the Act.

(c) Fail to pay the consideration offered or return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer. This paragraph does not prohibit a bidder electing to offer a subsequent offering period under Rule 14d-11 from paying for securities during the subsequent offering period in accordance with that section.

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

(e) The periods of time required by paragraphs (a) and (b) of this section shall be tolled for any period during which the bidder has failed to file in electronic format, absent a hardship exemption (Rule 201 and Rule 202 of this chapter), the Schedule 14D-1 Tender Offer Statement, any tender offer material specified in paragraph (a) of Item 11 of that Schedule, and any amendments thereto. If such documents were filed in paper pursuant to a hardship exemption (see Rule 201 and Rule 202(d) of this chapter), the minimum offering periods shall be tolled for any period during which a required confirming electronic copy of such Schedule and tender offer material is delinquent.

15. Rule 14e-2. Position of subject company with respect to a tender offer.

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

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

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

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

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

(c) Any issuer, a class of the securities of which is the subject of a tender offer filed with the Commission on Schedule 14D-1F and conducted in reliance upon and in conformity with Rule 14d-1(b) under the Act, and any director or officer of such issuer where so required by the laws, regulations and policies of Canada and/or any of its provinces or territories, in lieu of the statements called for by paragraph (a) of this section and Rule 14d-9 under the Act, shall file with the Commission on Schedule 14D-9F the entire disclosure document(s) required to be furnished to holders of securities of the subject issuer by the laws, regulations and policies of Canada and/or any of its provinces or territories governing the conduct of the tender offer, and shall disseminate such document(s) in the United States in accordance with such laws, regulations and policies.

(d) *Exemption for cross-border tender offers.* The subject company shall be exempt from this section with respect to a tender offer conducted under Rule 14d-1(c).

16. Rule 14e-3. Transactions in securities on the basis of material, nonpublic information in the context of tender offers.

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the

"offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from: (1) The offering person, (2) The issuer of the securities sought or to be sought by such tender offer, or (3) Any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

(b) A person other than a natural person shall not violate paragraph (a) of this section if such person shows that:

(1) The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) of this section or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and

(2) Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making investment decision(s) would not violate paragraph (a) of this section, which policies and procedures may include, but are not limited to, (i) those which restrict any purchase, sale and causing any purchase and sale of any such security or (ii) those which prevent such individual(s) from knowing such information.

(c) Notwithstanding anything in paragraph (a) of this section to contrary, the following transactions shall not be violations of paragraph (a) of this section:

(1) Purchase(s) of any security described in paragraph (a) of this section by a broker or by another agent on behalf of an offering person; or

(2) Sale(s) by any person of any security described in paragraph (a) of this section to the offering person.

(d)(1) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section except that this paragraph shall not apply to a communication made in good faith,

(i) To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

(2) The persons referred to in paragraph (d)(1) of this section are:

(i) The offering person or its officers, directors, partners, employees or advisors;

(ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;

(iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i) of this section or the issuer or persons in paragraph (d)(2)(ii) of this section; and

(iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

17. Rule 14e-4. Prohibited transactions in connection with partial tender offers.

(a) *Definitions*. For purposes of this section:

(1) The amount of a person's "net long position" in a subject security shall equal the excess, if any, of such person's "long position" over such person's "short position." For the purposes of determining the

net long position as of the end of the proration period and for tendering concurrently to two or more partial tender offers, securities that have been tendered in accordance with the rule and not withdrawn are deemed to be part of the person's long position.

(i) Such person's "long position," is the amount of subject securities that such person:

(A) Or his agent has title to or would have title to but for having lent such securities; or

(B) Has purchased, or has entered into an unconditional contract, binding on both parties thereto, to purchase but has not yet received; or

(C) Has exercised a standardized call option for; or

(D) Has converted, exchanged, or exercised an equivalent security for; or

(E) Is entitled to receive upon conversion, exchange, or exercise of an equivalent security.

(ii) Such person's "short position," is the amount of subject securities or subject securities underlying equivalent securities that such person:

(A) Has sold, or has entered into an unconditional contract, binding on both parties thereto, to sell; or

(B) Has borrowed; or

(C) Has written a non-standardized call option, or granted any other right pursuant to which his shares may be tendered by another person; or

(D) Is obligated to deliver upon exercise of a standardized call option sold on or after the date that a tender offer is first publicly announced or otherwise made known by the bidder to holders of the security to be acquired, if the exercise price of such option is lower than the highest tender offer price or stated amount of the consideration offered for the subject security. For the purpose of this paragraph, if one or more tender offers for the same security are ongoing on such date, the announcement date shall be that of the first announced offer.

(2) The term "equivalent security" means:

(i) Any security (including any option, warrant, or other right to purchase the subject security), issued by the person whose securities are the subject of the offer, that is immediately convertible into, or exchangeable or exercisable for, a subject security, or

(ii) Any other right or option (other than a standardized call option) that entitles the holder thereof to acquire a subject security, but only if the holder thereof reasonably believes that the maker or writer of the right or option has title to and possession of the subject security and upon exercise will promptly deliver the subject security.

(3) The term "subject security" means a security that is the subject of any tender offer or request or invitation for tenders.

(4) For purposes of this rule, a person shall be deemed to "tender" a security if he:

(i) Delivers a subject security pursuant to an offer,

(ii) Causes such delivery to be made,

(iii) Guarantees delivery of a subject security pursuant to a tender offer,

(iv) Causes a guarantee of such delivery to be given by another person, or

(v) Uses any other method by which acceptance of a tender offer may be made.

(5) The term partial tender offer means a tender offer or request or invitation for tenders for less than all of the outstanding securities subject to the offer in which tenders are accepted either by lot or on a pro rata basis for a specified period, or a tender offer for all of the outstanding shares that offers a choice of consideration in which tenders for different forms of consideration may be accepted either by lot or on a pro rata basis for a specified period.

(6) The term "standardized call option" means any call option that is traded on an exchange, or for which quotation information is disseminated in an electronic interdealer quotation system of a registered national securities association.

(b) It shall be unlawful for any person acting alone or in concert with others, directly or indirectly, to tender any subject security in a partial tender offer:

(1) For his own account unless at the time of tender, and at the end of the proration period or period during which securities are accepted by lot (including any extensions thereof), he has a net long position equal to or greater than the amount tendered in:

(i) The subject security and will deliver or cause to be delivered such security for the purpose of tender to the person making the offer within the period specified in the offer; or

(ii) An equivalent security and, upon the acceptance of his tender will acquire the subject

security by conversion, exchange, or exercise of such equivalent security to the extent required by the terms of the offer, and will deliver or cause to be delivered the subject security so acquired for the purpose of tender to the person making the offer within the period specified in the offer; or

(2) For the account of another person unless the person making the tender:

(i) Possesses the subject security or an equivalent security, or

(ii) Has a reasonable belief that, upon information furnished by the person on whose behalf the tender is made, such person owns the subject security or an equivalent security and will promptly deliver the subject security or such equivalent security for the purpose of tender to the person making the tender.

(c) This rule shall not prohibit any transaction or transactions which the Commission, upon written request or upon its own motion, exempts, either unconditionally or on specified terms and conditions.

18. Rule 14e-5. Prohibiting purchases outside of a tender offer.

(a) *Unlawful activity.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with a tender offer for equity securities, no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer. This prohibition applies from the time of public announcement of the tender offer until the tender offer expires. This prohibition does not apply to any purchases or arrangements to purchase made during the time of any subsequent offering period as provided for in Rule 14d-11 if the consideration paid or to be paid for the purchases or arrangements to purchase is the same in form and amount as the consideration offered in the tender offer.

(b) *Excepted activity.* The following transactions in subject securities or related securities are not prohibited by paragraph (a) of this section:

(1) *Exercises of securities.* Transactions by covered persons to convert, exchange, or exercise related securities into subject securities, if the covered person owned the related securities before public announcement;

(2) *Purchases for plans.* Purchases or arrangements to purchase by or for a plan that are made by an agent independent of the issuer;

(3) *Purchases during odd-lot offers.* Purchases or arrangements to purchase if the tender offer is excepted under §240.13e-4(h)(5);

(4) *Purchases as intermediary.* Purchases by or through a dealer-manager or its affiliates that are made in the ordinary course of business and made either:

(i) On an agency basis not for a covered person; or

(ii) As principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;

(5) *Basket transactions*. Purchases or arrangements to purchase a basket of securities containing a subject security or a related security if the following conditions are satisfied:

(i) The purchase or arrangement to purchase is made in the ordinary course of business and not to facilitate the tender offer;

(ii) The basket contains 20 or more securities; and

(iii) Covered securities and related securities do not comprise more than 5% of the value of the basket;

(6) *Covering transactions.* Purchases or arrangements to purchase that are made to satisfy an obligation to deliver a subject security or a related security arising from a short sale or from the exercise of an option by a non-covered person if:

(i) The short sale or option transaction was made in the ordinary course of business and not to facilitate the offer;

(ii) In the case of a short sale, the short sale was entered into before public announcement of the tender offer; and

(iii) In the case of an exercise of an option, the covered person wrote the option before public announcement of the tender offer;

(7) *Purchases pursuant to contractual obligations.* Purchases or arrangements to purchase pursuant to a contract if the following conditions are satisfied:

(i) The contract was entered into before public announcement of the tender offer;

(ii) The contract is unconditional and binding on both parties; and

(iii) The existence of the contract and all material terms including quantity, price and parties are disclosed in the offering materials;

(8) *Purchases or arrangements to purchase by an affiliate of the dealer-manager.* Purchases or arrangements to purchase by an affiliate of a dealer-manager if the following conditions are satisfied:

(i) The dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of the federal securities laws and regulations;

(ii) The dealer-manager is registered as a broker or dealer under Section 15(a) of the Act;

(iii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the dealer-manager that direct, effect, or recommend transactions in securities; and

(iv) The purchases or arrangements to purchase are not made to facilitate the tender offer;

(9) *Purchases by connected exempt market makers or connected exempt principal traders.* Purchases or arrangements to purchase if the following conditions are satisfied:

(i) The issuer of the subject security is a foreign private issuer, as defined in §240.3b-4(c);

(ii) The tender offer is subject to the United Kingdom's City Code on Takeovers and Mergers;

(iii) The purchase or arrangement to purchase is effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the United Kingdom's City Code on Takeovers and Mergers;

(iv) The connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the United Kingdom's City Code on Takeovers and Mergers; and

(v) The tender offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose, or describe how U.S. security holders can obtain, information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom; and

(10) *Purchases during cross-border tender offers.* Purchases or arrangements to purchase if the following conditions are satisfied:

(i) The tender offer is excepted under §240.13e-4(h)(8) or §240.14d-1(c);

(ii) The offering documents furnished to U.S. holders prominently disclose the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases;

(iii) The offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed;

(iv) The offeror discloses information in the United States about any such purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction, as defined in §240.13e-4(i)(3); and

(v) The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.

(c) *Definitions.* For purposes of this section, the term:

(1) Affiliate has the same meaning as in §240.12b-2;

(2) Agent independent of the issuer has the same meaning as in §242.100(b) of this chapter;

(3) Covered person means:

(i) The offeror and its affiliates;

(ii) The offeror's dealer-manager and its affiliates;

(iii) Any advisor to any of the persons specified in paragraph (c)(3)(i) and (ii) of this section, whose compensation is dependent on the completion of the offer; and

(iv) Any person acting, directly or indirectly, in concert with any of the persons specified in this paragraph (c)(3) in connection with any purchase or arrangement to purchase any subject securities or any related securities;

(4) Plan has the same meaning as in §242.100(b) of this chapter;

(5) Public announcement is any oral or written communication by the offeror or any person authorized to act on the offeror's behalf that is reasonably designed to, or has the effect of, informing the

public or security holders in general about the tender offer;

(6) Related securities means securities that are immediately convertible into, exchangeable for, or exercisable for subject securities; and

(7) Subject securities has the same meaning as in §229.1000 of this chapter.

(d) *Exemptive authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms or conditions, to any transaction or class of transactions or any security or class of security, or any person or class of persons.

19. Rule 14e-6. Repurchase offers by certain closed-end registered investment companies. * * *

20. Rule 14e-7. Unlawful tender offer practices in connection with roll-ups. * * *

21. Rule 14e-8. Prohibited conduct in connection with pre-commencement communications.

It is a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act (15 U.S.C. 78n) for any person to publicly announce that the person (or a party on whose behalf the person is acting) plans to make a tender offer that has not yet been commenced, if the person:

(a) Is making the announcement of a potential tender offer without the intention to commence the offer within a reasonable time and complete the offer;

(b) Intends, directly or indirectly, for the announcement to manipulate the market price of the stock of the bidder or subject company; or

(c) Does not have the reasonable belief that the person will have the means to purchase securities to complete the offer.

U. *Rule 14f-1. Change in majority of directors.*

If, pursuant to any arrangement or understanding with the person or persons acquiring securities in a transaction subject to sections 13(d) or 14(d) of the Act, any persons are to be elected or designated as directors of the issuer, otherwise than at a meeting of security holders, and the persons so elected or designated will constitute a majority of the directors of the issuer, then, not less than 10 days prior to the date any such person take office as a director, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause therefor, the issuer shall file with the Commission and transmit to all holders of record of securities of the issuer who would be entitled to vote at a meeting for election of directors, information substantially equivalent to the information which would be required by Items 6(a), (d) and (e), 7 and 8 of Schedule 14A of Regulation 14A to be transmitted if such person or persons were nominees for election as directors at a meeting of such security holders.

Eight copies of such information shall be filed with the Commission. * * *

V. *Rule 16b-7. Mergers, reclassifications, and consolidations.*

(a) The following transactions shall be exempt from the provisions of section 16(b) of the Act:

(1) The acquisition of a security of a company, pursuant to a merger or consolidation, in exchange for a security of a company which, prior to the merger or consolidation, owned 85 percent or more of either

(i) The equity securities of all other companies involved in the merger or consolidation, or in the case of a consolidation, the resulting company; or

(ii) The combined assets of all the companies involved in the merger or consolidation, computed according to their book values prior to the merger or consolidation as determined by

reference to their most recent available financial statements for a 12 month period prior to the merger or consolidation, or such shorter time as the company has been in existence.

(2) The disposition of a security, pursuant to a merger or consolidation, of a company which, prior to the merger or consolidation, owned 85 percent or more of either

(i) The equity securities of all other companies involved in the merger or consolidation or, in the case of a consolidation, the resulting company; or

(ii) The combined assets of all the companies undergoing merger or consolidation, computed according to their book values prior to the merger or consolidation as determined by reference to their most recent available financial statements for a 12 month period prior to the merger or consolidation.

(b) A merger within the meaning of this section shall include the sale or purchase of substantially all the assets of one company by another in exchange for equity securities which are then distributed to the security holders of the company that sold its assets.

(c) Notwithstanding the foregoing, if a person subject to section 16 of the Act makes any non-exempt purchase of a security in any company involved in the merger or consolidation and any non-exempt sale of a security in any company involved in the merger or consolidation within any period of less than six months during which the merger or consolidation took place, the exemption provided by this Rule shall be unavailable to the extent of such purchase and sale. * * *

W. REGULATION FD

1. Rule 100. General Rule Regarding Selective Disclosure

(a) Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any person described in paragraph (b)(1) of this section, the issuer shall make public disclosure of that information as provided in §243.101(e):

(1) Simultaneously, in the case of an intentional disclosure; and

(2) Promptly, in the case of a non-intentional disclosure.

(b) (1) Except as provided in paragraph (b)(2) of this section, paragraph (a) of this section shall apply to a disclosure made to any person outside the issuer:

(i) Who is a broker or dealer, or a person associated with a broker or dealer, as those terms are defined in Section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a));

(ii) Who is an investment adviser, as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(11)); an institutional investment manager, as that term is defined in Section 13(f)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(f)(5)), that filed a report on Form 13F (17 CFR 249.325) with the Commission for the most recent quarter ended prior to the date of the disclosure; or a person associated with either of the foregoing. For purposes of this paragraph, a "person associated with an investment adviser or institutional investment manager" has the meaning set forth in Section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)), assuming for these purposes that an institutional investment manager is an investment adviser;

(iii) Who is an investment company, as defined in Section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), or who would be an investment company but for Section 3(c)(1) (15 U.S.C. 80a–3(c)(1)) or Section 3(c)(7) (15 U.S.C. 80a–3(c)(7)) thereof, or an affiliated person of either of the foregoing. For purposes of this paragraph, "affiliated person" means only those persons described in Section 2(a)(3)(C), (D), (E), and (F) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3)(C), (D), (E), and (F)), assuming for these purposes that a person who would be an investment company but for Section 3(c)(1) (15 U.S.C. 80a–3(c)(1)) or Section 3(c)(7) (15 U.S.C. 80a–3(c)(7)) of the Investment Company Act of 1940 is an investment company; or

(iv) Who is a holder of the issuer's securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the issuer's securities on the basis of the information.

(2) Paragraph (a) of this section shall not apply to a disclosure made:

(i) To a person who owes a duty of trust or confidence to the issuer (such as an attorney, investment banker, or accountant);

(ii) To a person who expressly agrees to maintain the disclosed information in confidence;

(iii) To an entity whose primary business is the issuance of credit ratings, provided the information is disclosed solely for the purpose of developing a credit rating and the entity's ratings are publicly available; or

(iv) In connection with a securities offering registered under the Securities Act, other than an offering of the type described in any of Rule 415(a)(1)(i) through (vi) under the Securities Act (§230.415(a)(1)(i) through (vi) of this chapter) (except an offering of the type described in Rule 415(a)(1)(i) under the Securities Act (§230.415(a)(1)(i) of this chapter) also involving a registered offering, whether or not underwritten, for capital formation purposes for the account of the issuer (unless the issuer's offering is being registered for the purpose of evading the requirements of this section)), if the disclosure is by any of the following means:

(A) A registration statement filed under the Securities Act, including a prospectus contained therein;

(B) A free writing prospectus used after filing of the registration statement for the offering or a communication falling within the exception to the definition of prospectus contained in clause (a) of section 2(a)(10) of the Securities Act;

(C) Any other Section 10(b) prospectus;

(D) A notice permitted by Rule 135 under the Securities Act (§230.135 of this chapter);

(E) A communication permitted by Rule 134 under the Securities Act (§230.134 of this chapter); or

(F) An oral communication made in connection with the registered securities offering after filing of the registration statement for the offering under the Securities Act.

2. Rule 101. Definitions

This section defines certain terms as used in Regulation FD (Rule 100 through Rule 103).

a. *Intentional.* A selective disclosure of material nonpublic information is "intentional" when the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic.

b. *Issuer*. An "issuer" subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934, including any closed-end investment company (as defined in Section 5(a)(2) of the Investment Company Act of 1940), but not including any other investment company or any foreign government or foreign private issuer, as those terms are defined in Rule 405 under the Securities Act.

c. *Person acting on behalf of an issuer*. "Person acting on behalf of an issuer" means any senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer's investment adviser), or any other officer, employee, or agent of an issuer who regularly communicates with any person described in Rule 100(b)(1)(i), (ii), or (iii), or with holders of the issuer's securities. An officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer.

d. *Promptly*. "Promptly" means as soon as reasonably practicable (but in no event after the later of 24 hours or the commencement of the next day's trading on the New York Stock Exchange) after a senior official of the issuer (or, in the case of a closed-end investment company, a senior official of the issuer's investment adviser) learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer of information that the senior official knows, or is reckless in not knowing, is both material and nonpublic.

e. *Public disclosure*.

1. Except as provided in paragraph (e)(2) of this section, an issuer shall make the "public

disclosure" of information required by Rule 100(a) by furnishing to or filing with the Commission a Form 8-K disclosing that information.

2. An issuer shall be exempt from the requirement to furnish or file a Form 8-K if it instead disseminates the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of the information to the public.

f. *Senior official*. "Senior official" means any director, executive officer (as defined in Rule 3b-7 of this chapter), investor relations or public relations officer, or other person with similar functions.

g. *Securities offering*. For purposes of Rule 100(b)(2)(iv):

1. *Underwritten offerings*. A securities offering that is underwritten commences when the issuer reaches an understanding with the broker-dealer that is to act as managing underwriter and continues until the later of the end of the period during which a dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated);

2. *Non-underwritten offerings*. A securities offering that is not underwritten:

i. If covered by Rule 415(a)(1)(x), commences when the issuer makes its first bona fide offer in a takedown of securities and continues until the later of the end of the period during which each dealer must deliver a prospectus or the sale of the securities in that takedown (unless the takedown is sooner terminated);

ii. If a business combination as defined in Rule 165(f)(1), commences when the first public announcement of the transaction is made and continues until the completion of the vote or the expiration of the tender offer, as applicable (unless the transaction is sooner terminated);

iii. If an offering other than those specified in paragraphs (a) and (b) of this section, commences when the issuer files a registration statement and continues until the later of the end of the period during which each dealer must deliver a prospectus or the sale of the securities (unless the offering is sooner terminated). * * *

3. Rule 103. No Effect on Exchange Act Reporting Status

A failure to make a public disclosure required solely by Rule 100 shall not affect whether:

a. For purposes of Forms S-2, S-3 and S-8 under the Securities Act, an issuer is deemed to have filed all the material required to be filed pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 or, where applicable, has made those filings in a timely manner; or

b. There is adequate current public information about the issuer for purposes of Rule 144(c).

CHAPTER 11 SELECTED FORMS UNDER THE 34 ACT: 8-K, 10-K, AND 10-Q

[*See* Principally Chapters 4, 13, and 16-21 of Business Planning for Mergers and Acquisitions]

A. Form 8-K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 OR 15(d) of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported) _____

(Exact name of registrant as specified in its charter)

(State or other jurisdiction incorporation)	(Commission File Number)	(IRS Employer of Identification No.)

(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code _____

(Former name or former address, if changed since last report.)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

[ ] Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

[ ] Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

[ ] Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

[ ] Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

GENERAL INSTRUCTIONS

A. Rule as to Use of Form 8-K.

1. Form 8-K shall be used for current reports under Section 13 or 15(d) of the Securities Exchange Act of 1934, filed pursuant to Rule 13a-11 or Rule 15d-11 and for reports of nonpublic information required to be disclosed by Regulation FD (17 CFR 243.100 and 243.101).

2. Form 8-K may be used by a registrant to satisfy its filing obligations pursuant to Rule 425 under the Securities Act, regarding written communications related to business combination transactions, or Rules 14a-12(b) or Rule 14d-2(b) under the Exchange Act, relating to soliciting materials and pre-commencement communications

pursuant to tender offers, respectively, provided that the Form 8-K filing satisfies all the substantive requirements of those rules (other than the Rule 425(c) requirement to include certain specified information in any prospectus filed pursuant to such rule). Such filing is also deemed to be filed pursuant to any rule for which the box is checked. A registrant is not required to check the box in connection with Rule 14a-12(b) or Rule 14d-2(b) if the communication is filed pursuant to Rule 425. Communications filed pursuant to Rule 425 are deemed filed under the other applicable sections. See Note 2 to Rule 425, Rule 14a-12(b) and Instruction 2 to Rule 14d-2(b)(2).

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B. Events to be Reported and Time for Filing of Reports.

1. A report on this form is required to be filed or furnished, as applicable, upon the occurrence of any one or more of the events specified in the items in Sections 1 - 6 and 9 of this form. Unless otherwise specified, a report is to be filed or furnished within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include, the first business day thereafter. A registrant either furnishing a report on this form under Item 7.01 (Regulation FD Disclosure) or electing to file a report on this form under Item 8.01 (Other Events) solely to satisfy its obligations under Regulation FD (17 CFR 243.100 and 243.101) must furnish such report or make such filing, as applicable, in accordance with the requirements of Rule 100(a) of Regulation FD (17 CFR 243.100(a)), including the deadline for furnishing or filing such report.

2. The information in a report furnished pursuant to Item 2.02 (Results of Operations and Financial Condition) or Item 7.01 (Regulation FD Disclosure) shall not be deemed to be "filed" for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that section, unless the registrant specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. If a report on Form 8-K contains disclosures under Item 2.02 or Item 7.01, whether or not the report contains disclosures regarding other items, all exhibits to such report relating to Item 2.02 or Item 7.01 will be deemed furnished, and not filed, unless the registrant specifies, under Item 9.01 (Financial Statements and Exhibits), which exhibits, or portions of exhibits, are intended to be deemed filed rather than furnished pursuant to this instruction.

3. If the registrant previously has reported substantially the same information as required by this form, the registrant need not make an additional report of the information on this form. To the extent that an item calls for disclosure of developments concerning a previously reported event or transaction, any information required in the new report or amendment about the previously reported event or transaction may be provided by incorporation by reference to the previously filed report. The term previously reported is defined in Rule 12b-2 (17 CFR 240.12b-2).

4. Copies of agreements, amendments or other documents or instruments required to be filed pursuant to Form 8-K are not required to be filed or furnished as exhibits to the Form 8-K unless specifically required to be filed or furnished by the applicable Item. This instruction does not affect the requirement to otherwise file such agreements, amendments or other documents or instruments, including as exhibits to registration statements and periodic reports pursuant to the requirements of Item 601 of Regulation S-K or Item 601 of Regulation S-B, as applicable.

5. When considering current reporting on this form, particularly of other events of material importance pursuant to Item 7.01 (Regulation FD Disclosure) and Item 8.01(Other Events), registrants should have due regard for the accuracy, completeness and currency of the information in registration statements filed under the Securities Act which incorporate by reference information in reports filed pursuant to the Exchange Act, including reports on this form.

6. A registrant's report under Item 7.01 (Regulation FD Disclosure) or Item 8.01 (Other Events) will not be deemed an admission as to the materiality of any information in the report that is required to be disclosed solely by Regulation FD.

C. Application of General Rules and Regulations.

1. The General Rules and Regulations under the Act (17 CFR Part 240) contain certain general requirements which are applicable to reports on any form. These general requirements should be carefully read and observed in the preparation and filing of reports on this form. * * *

F. Incorporation by Reference.

If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a press release or other document or statement containing information meeting some or all of the requirements of this form, the information called for may be incorporated by reference to such published document or statement, in answer or partial answer to any item or items of this form, provided copies thereof are filed as an exhibit to the report on this form. * * *

INFORMATION TO BE INCLUDED IN THE REPORT

Section 1 - Registrant's Business and Operations

Item 1.01 Entry into a Material Definitive Agreement.

(a) If the registrant has entered into a material definitive agreement not made in the ordinary course of business of the registrant, or into any amendment of such agreement that is material to the registrant, disclose the following information:

(1) the date on which the agreement was entered into or amended, the identity of the parties to the agreement or amendment and a brief description of any material relationship between the registrant or its affiliates and any of the parties, other than in respect of the material definitive agreement or amendment; and

(2) a brief description of the terms and conditions of the agreement or amendment that are material to the registrant.

(b) For purposes of this Item 1.01, a material definitive agreement means an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more other parties to the agreement, in each case whether or not subject to conditions.

Instructions.

1. Any material definitive agreement of the registrant not made in the ordinary course of the registrant's business must be disclosed under this Item 1.01. An agreement is deemed to be not made in the ordinary course of a registrant's business even if the agreement is such as ordinarily accompanies the kind of business conducted by the registrant if it involves the subject matter identified in Item 601(b)(10)(ii)(A) - (D) of Regulation S-K (17 CFR 229.601(b)(10)(ii)(A) - (D)). An agreement involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) also must be disclosed unless Item 601(b)(10)(iii)(C) would not require the registrant to file a material agreement involving the same subject matter as an exhibit. An agreement involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) need not be disclosed under this Item.

2. A registrant must provide disclosure under this Item 1.01 if the registrant succeeds as a party to the agreement or amendment to the agreement by assumption or assignment (other than in connection with a merger or acquisition or similar transaction). * * *

Item 1.02 Termination of a Material Definitive Agreement.

(a) If a material definitive agreement which was not made in the ordinary course of business of the registrant and to which the registrant is a party is terminated otherwise than by expiration of the agreement on its stated termination date, or as a result of all parties completing their obligations under such agreement, and such termination of the agreement is material to the registrant, disclose the following information:

(1) the date of the termination of the material definitive agreement, the identity of the parties to the agreement and a brief description of any material relationship between the registrant or its affiliates and any of the parties other than in respect of the material definitive agreement;

(2) a brief description of the terms and conditions of the agreement that are material to the registrant;

(3) a brief description of the material circumstances surrounding the termination; and

(4) any material early termination penalties incurred by the registrant.

(b) For purposes of this Item 1.02, the term material definitive agreement shall have the same meaning as set forth in Item 1.01(b).

Instructions.

1. No disclosure is required solely by reason of this Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated.

2. No disclosure is required solely by reason of this Item 1.02 if the registrant believes in good faith that the material definitive agreement has not been terminated, unless the registrant has received a notice of termination pursuant to the terms of agreement. * * *

Item 1.03 Bankruptcy or Receivership. * * *

Section 2 - Financial Information

Item 2.01 Completion of Acquisition or Disposition of Assets.

If the registrant or any of its majority-owned subsidiaries has completed the acquisition or disposition of a significant amount of assets, otherwise than in the ordinary course of business, disclose the following information:

(a) the date of completion of the transaction;

(b) a brief description of the assets involved;

(c) the identity of the person(s) from whom the assets were acquired or to whom they were sold and the nature of any material relationship, other than in respect of the transaction, between such person(s) and the registrant or any of its affiliates, or any director or officer of the registrant, or any associate of any such director or officer;

(d) the nature and amount of consideration given or received for the assets and, if any material relationship is disclosed pursuant to paragraph (c) of this Item 2.01, the formula or principle followed in determining the amount of such consideration;

(e) if the transaction being reported is an acquisition and if a material relationship exists between the registrant or any of its affiliates and the source(s) of the funds used in the acquisition, the identity of the source(s) of the funds unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank

as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the registrant:

(1) has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Act; and

(2) states in the report that the identity of the bank has been so omitted and filed separately with the Commission; and

(f) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the transaction, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 or Form 10-SB (17 CFR 249.210 or 17 CFR 249.210b), as applicable, under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction, with such information reflecting the registrant and its securities upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 2.01(f) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

Instructions.

1. No information need be given as to:

(i) any transaction between any person and any wholly-owned subsidiary of such person;

(ii) any transaction between two or more wholly-owned subsidiaries of any person; or

(iii) the redemption or other acquisition of securities from the public, or the sale or other disposition of securities to the public, by the issuer of such securities or by a wholly-owned subsidiary of that issuer.

2. The term acquisition includes every purchase, acquisition by lease, exchange, merger, consolidation, succession or other acquisition, except that the term does not include the construction or development of property by or for the registrant or its subsidiaries or the acquisition of materials for such purpose. The term disposition includes every sale, disposition by lease, exchange, merger, consolidation, mortgage, assignment or hypothecation of assets, whether for the benefit of creditors or otherwise, abandonment, destruction, or other disposition.

3. The information called for by this Item 2.01 is to be given as to each transaction or series of related transactions of the size indicated. The acquisition or disposition of securities is deemed the indirect acquisition or disposition of the assets represented by such securities if it results in the acquisition or disposition of control of such assets.

4. An acquisition or disposition shall be deemed to involve a significant amount of assets:

(i) if the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10% of the total assets of the registrant and its consolidated subsidiaries; or

(ii) if it involved a business (see 17 CFR 210.11-01(d)) that is significant (see 17 CFR 210.11-01(b)).

Acquisitions of individually insignificant businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses (see 17 CFR 210.3-05(a)(3)) and are significant in the aggregate.

5. Attention is directed to the requirements in Item 9.01 (Financial Statements and Exhibits) with respect to the filing of:

(i) financial statements of businesses acquired;

(ii) pro forma financial information; and

(iii) copies of the plans of acquisition or disposition as exhibits to the report.

Item 2.02 Results of Operations and Financial Condition.

(a) If a registrant, or any person acting on its behalf, makes any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the registrant's results of operations or financial condition for a completed quarterly or annual fiscal period, the registrant shall disclose the date of the announcement or release, briefly identify the announcement or release and include the text of that announcement or release as an exhibit. * * *

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant. * * *

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement. * * *

Item 2.05 Costs Associated with Exit or Disposal Activities. * * *

Item 2.06 Material Impairments.

If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, concludes that a material charge for impairment to one or more of its assets, including, without limitation, impairments of securities or goodwill, is required under generally accepted accounting principles applicable to the registrant, disclose the following information:

(a) the date of the conclusion that a material charge is required and a description of the impaired asset or assets and the facts and circumstances leading to the conclusion that the charge for impairment is required;

(b) the registrant's estimate of the amount or range of amounts of the impairment charge; and

(c) the registrant's estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures, provided, however, that if the registrant determines that at the time of filing it is unable in good faith to make a determination of an estimate required by paragraphs (b) or (c) of this Item 2.06, no disclosure of such estimate shall be required; provided further, however, that in any such event, the registrant shall file an amended report on Form 8-K under this Item 2.06 within four business days after it makes a determination of such an estimate or range of estimates.

Instruction.

No filing is required under this Item 2.06 if the conclusion is made in connection with the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act, the periodic report is filed on a timely basis and such conclusion is disclosed in the report.

Section 3 - Securities and Trading Markets

Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing. * * *

Item 3.02 Unregistered Sales of Equity Securities.

(a) If the registrant sells equity securities in a transaction that is not registered under the Securities Act, furnish the information set forth in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K or Regulation S-B, as applicable (17 CFR 229.701(a) and (c) through (e) and 228.701(a) and (c) through (e), respectively). * * *

Item 3.03 Material Modification to Rights of Security Holders.

(a) If the constituent instruments defining the rights of the holders of any class of registered securities of the registrant have been materially modified, disclose the date of the modification, the title of the class of securities involved and briefly describe the general effect of such modification upon the rights of holders of such securities.

(b) If the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or modification of any other class of securities by the registrant, briefly disclose the date of the issuance or modification, the general effect of the issuance or modification of such other class of securities upon the rights of the holders of the registered securities.

Instruction.

Working capital restrictions and other limitations upon the payment of dividends must be reported pursuant to this Item 3.03.

Section 4 - Matters Related to Accountants and Financial Statements

Item 4.01 Changes in Registrant's Certifying Accountant. * * *
Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review. * * *

Section 5 - Corporate Governance and Management

Item 5.01 Changes in Control of Registrant.

(a) If, to the knowledge of the registrant's board of directors, a committee of the board of directors or authorized officer or officers of the registrant, a change in control of the registrant has occurred, furnish the following information:

(1) the identity of the person(s) who acquired such control;

(2) the date and a description of the transaction(s) which resulted in the change in control;

(3) the basis of the control, including the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control;

(4) the amount of the consideration used by such person(s);

(5) the source(s) of funds used by the person(s), unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the person who acquired control:

(i) has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Act; and

(ii) states in the report that the identity of the bank has been so omitted and filed separately with the Commission.

(6) the identity of the person(s) from whom control was assumed;

(7) any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters; and

(8) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the change in control, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 or Form 10-SB (17 CFR 249.210 or 17 CFR 249.210b), as applicable, under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the change in control, with such information reflecting the registrant and its securities upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 5.01(a)(8) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

(b) Furnish the information required by Item 403(c) of Regulation S-K (17 CFR 229.403(c)) or Item 403(c) of Regulation SB (17 CFR 228.403(c)), as applicable.

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers. * * *

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year. * * *

Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans. * * *

Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

(a) Briefly describe the date and nature of any amendment to a provision of the registrant's code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in Item 406(b) of Regulations S-K and S-B (17 CFR 229.406(b) and 228.406(b), respectively).

(b) If the registrant has granted a waiver, including an implicit waiver, from a provision of the code of ethics to an officer or person described in paragraph (a) of this Item 5.05, and the waiver relates to one or more of the elements of the code of ethics definition referred to in paragraph (a) of this Item 5.05, briefly describe the nature of the waiver, the name of the person to whom the waiver was granted, and the date of the waiver. * * *

Section 5.06 -Change in Shell Company Status. * * *

Section 6 -Asset-Backed Securities * * *

Section 7 - Regulation FD

Item 7.01 Regulation FD Disclosure.

Unless filed under Item 8.01, disclose under this item only information that the registrant elects to disclose through Form 8-K pursuant to Regulation FD (17 CFR 243.100 through 243.103).

Section 8 - Other Events

Item 8.01 Other Events.
The registrant may, at its option, disclose under this Item 8.01 any events, with respect to which information is not otherwise called for by this form, that the registrant deems of importance to security holders. The registrant may, at its option, file a report under this Item 8.01 disclosing the nonpublic information required to be disclosed by Regulation FD (17 CFR 243.100 through 243.103).

Section 9 - Financial Statements and Exhibits

Item 9.01 Financial Statements and Exhibits.

List below the financial statements, pro forma financial information and exhibits, if any, filed as a part of this report.

(a) Financial statements of businesses acquired.

(1) For any business acquisition required to be described in answer to Item 2.01 of this form, financial statements of the business acquired shall be filed for the periods specified in Rule 3-05(b) of Regulation S-X (17 CFR 210.3-05(b)).

(2) The financial statements shall be prepared pursuant to Regulation S-X except that supporting schedules need not be filed. A manually signed accountant's report should be provided pursuant to Rule 2-02 of Regulation S-X (17 CFR 210.2-02).

(3) With regard to the acquisition of one or more real estate properties, the financial statements and any additional information specified by Rule 3-14 of Regulation S-X (17 CFR 210.3-14) shall be filed.

(4) Financial statements required by this item may be filed with the initial report, or by amendment not later than 71 calendar days after the date that the initial report on Form 8-K must be filed. If the financial statements are not included in the initial report, the registrant should so indicate in the Form 8-K report and state when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8-K.

(b) Pro forma financial information.

(1) For any transaction required to be described in answer to Item 2.01 of this form, furnish any pro forma financial information that would be required pursuant to Article 11 of Regulation S-X (17 CFR 210).

(2) The provisions of paragraph (a)(4) of this Item 9.01 shall also apply to pro forma financial information relative to the acquired business. * * *

B. Form 10-K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS

A. Rule as to Use of Form 10-K.

(1) This Form shall be used for annual reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) (the "Act") for which no other form is prescribed. This Form also shall be used for transition reports filed pursuant to Section 13 or 15(d) of the Act.

(2) Annual reports on this Form shall be filed within the following period:

(a) For accelerated filers (as defined in 17 CFR 240.12b-2):

i. 90 days after the end of the fiscal year covered by the report for fiscal years ending on or after December 15, 2002 and before December 15, 2003;

ii. 75 days after the end of the fiscal year covered by the report for fiscal years ending on or after December 15, 2003 and before December 15, 2005; and

iii. 60 days after the end of the fiscal year covered by the report for fiscal years ending on or after December 15, 2005; and

(b) 90 days after the end of the fiscal year covered by the report for all other registrants. * * *

B. Application of General Rules and Regulations. * * *

C. Preparation of Report. * * *

D. Signature and Filing of Report. * * *

E. Disclosure With Respect to Foreign Subsidiaries. * * *

F. Information as to Employee Stock Purchase, Savings and Similar Plans. * * *

G. Information to be Incorporated by Reference.

(1) Attention is directed to Rule 12b-23 which provides for the incorporation by reference of information contained in certain documents in answer or partial answer to any item of a report. * * *

H. Integrated Reports to Security Holders. * * *

I. Omission of Information by Certain Wholly-Owned Subsidiaries. * * *

Selected 34 Act Forms
Form 10--K

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

[ ] ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended _____

* * *
(Exact name of registrant as specified in its charter)

(State or other jurisdiction incorporation)	(Commission File Number)	(IRS Employer of Identification No.)

(Address of principal executive offices) (Zip Code)
_____

Registrant's telephone number, including area code _____

Securities registered pursuant to Section 12(b) of the Act:

Title of each class Name of each exchange on which registered
_____ _____
Securities registered pursuant to section 12(g) of the Act:

_____
(Title of class)

_____
(Title of class)

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.

☐ Yes

☐ No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.

☐ Yes

☐ No

Note – Checking the box above will not relieve any registrant required to file reports pursuant to Section 13 or 15(d) of the Exchange Act from their obligations under those Sections.

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant

was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.
☐ Yes ☐ No * * *

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Act). ☐ Yes ☐ No * * *

(APPLICABLE ONLY TO CORPORATE REGISTRANTS)

Indicate the number of shares outstanding of each of the registrant's classes of common stock, as of the latest practicable date.

DOCUMENTS INCORPORATED BY REFERENCE

List hereunder the following documents if incorporated by reference and the Part of the Form 10-K (e.g., Part I, Part II, etc.) into which the document is incorporated: (1) Any annual report to security holders; (2) Any proxy or information statement; and (3) Any prospectus filed pursuant to Rule 424(b) or (c) under the Securities Act of 1933. The listed documents should be clearly described for identification purposes (e.g., annual report to security holders for fiscal year ended December 24, 1980).

PART I

[See General Instruction G(2)]

Item 1. Business.

Furnish the information required by Item 101 of Regulation S-K (§ 229.101 of this chapter) except that the discussion of the development of the registrant's business need only include developments since the beginning of the fiscal year for which this report is filed.

Item 1A. Risk Factors.

Set forth, under the caption "Risk Factors," where appropriate, the risk factors described in Item 503(c) of Regulation S-K (§229.503(c) of this chapter) applicable to the registrant. Provide any discussion of risk factors in plain English in accordance with Rule 421(d) of the Securities Act of 1933 (§230.421(d) of this chapter).

Item 1B. Unresolved Staff Comments. * * *

Item 2. Properties.

Furnish the information required by Item 102 of Regulation S-K (§ 229.102 of this chapter).

Item 3. Legal Proceedings. * * *

Item 4. Submission of Matters to a Vote of Security Holders.

If any matter was submitted during the fourth quarter of the fiscal year covered by this report to a vote of security holders, through the solicitation of proxies or otherwise, furnish the following information:

(a) The date of the meeting and whether it was an annual or special meeting.

(b) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(c) A brief description of each other matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office.

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Rule 14a-11 (17 CFR 240.14a-11) of Regulation 14A under the Act) terminating any solicitation subject to Rule 14a-11, including the cost or anticipated cost to the registrant.

Instructions:

1 .If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be furnished. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

2. Paragraph (a) need be answered only if paragraph (b) or (c) is required to be answered.

3. Paragraph (b) need not be answered if (i) proxies for the meeting were solicited pursuant to Regulation 14A under the Act, (ii) there was no solicitation in opposition to the management's nominees as listed in the proxy statement, and (iii) all of such nominees were elected. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto.

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

5. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (d), the paragraph may be answered by reference to the information contained in such material.

6. If the registrant has published a report containing all the information called for by this item, the item may be answered by a reference to the information contained in such report.

PART II

[(See General Instruction G(2)]

Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities.

(a) Furnish the information required by Item 201 of Regulation S-K (17 CFR 229.201) and Item 701 of Regulation S-K (17 CFR 229.701) as to all equity securities of the registrant sold by the registrant during the period covered by the report that were not registered under the Securities Act. If the Item 701 information previously has been included in a Quarterly Report on Form 10-Q or 10-QSB (17 CFR 249.308a or 249.308b), or in a Current Report on Form 8-K (17 CFR 249.308), it need not be furnished.

(b) If required pursuant to Rule 463 (17 CFR 230.463) of the Securities Act of 1933, furnish the information required by Item 701(f) of Regulation S-K (§229.701(f) of this chapter).

(c) Furnish the information required by Item 703 of Regulation S-K (§229.703 of this chapter) for any repurchase made in a month within the fourth quarter of the fiscal year covered by the report. Provide disclosures covering repurchases made on a monthly basis. For example, if the fourth quarter began on January 16 and ended on April 15, the chart would show repurchases for the months from January 16 through February 15, February 16 through March 15, and March 16 through April 15.

Item 6. Selected Financial Data.

Furnish the information required by Item 301 of Regulation S-K (§ 229.301 of this chapter).

Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operation.

Furnish the information required by Item 303 of Regulation S-K (§ 229.303 of this chapter).

Item 7A. Quantitative and Qualitative Disclosures About Market Risk.

Furnish the information required by Item 305 of Regulation S-K (§ 229.305 of this chapter).

Item 8. Financial Statements and Supplementary Data.

Furnish financial statements meeting the requirements of Regulation S-X (§ 210 of this chapter), except § 210.3-05 and Article 11 thereof, and the supplementary financial information required by Item 302 of Regulation S-K (§ 229.302 of this chapter). Financial statements of the registrant and its subsidiaries consolidated (as required by Rule 14a-3(b)) shall be filed under this item. Other financial statements and schedules required under Regulation S-X may be filed as "Financial Statement Schedules" pursuant to Item 15, Exhibits, Financial Statement Schedules, and Reports on Form 8-K, of this form. * * *

Item 9. Changes in and Disagreements With Accountants on Accounting and Financial Disclosure.

Furnish the information required by Item 304(b) of Regulation S-K (§ 229.304(b) of this chapter).

Item 9A. Controls and Procedures.

Furnish the information required by Item 307 and 308 of Regulation S-K (§229.307 and §229.308 of this chapter).

Item 9B. Other Information.

The registrant must disclose under this item any information required to be disclosed in a report on Form 8-K during the fourth quarter of the year covered by this Form 10-K, but not reported, whether or not otherwise required by this Form 10-K. If disclosure of such information is made under this item, it need not be repeated in a report on Form 8-K which would otherwise be required to be filed with respect to such information or in a subsequent report on Form 10-K.

PART III

[See General Instruction G(3)]

Item 10. Directors, Executive Officers and Corporate Governance.

Furnish the information required by Items 401, 405, 406, and 407(c)(3), (d)(4) and (d)(5) of Regulation S-K (§§229.401, 229.405, 229.406, and 229.407(c)(3), (d)(4) and (d)(5) of this chapter).

Instruction

Checking the box provided on the cover page of this Form to indicate that Item 405 disclosure of delinquent Form 3, 4, or 5 filers is not contained herein is intended to facilitate Form processing and review. Failure to provide such indication will not create liability for violation of the federal securities laws. The space should be checked only if there is no disclosure in this Form of reporting person delinquencies in response to Item 405 and the registrant, at the time of filing the Form 10-K, has reviewed the information necessary to ascertain, and has determined that, Item 405 disclosure is not expected to be contained in Part III of the Form 10-K or incorporated by reference.

* * * * *

Item 11. Executive Compensation.

Furnish the information required by Item 402 of Regulation S-K (§229.402 of this chapter) and paragraphs (e)(4) and (e)(5) of Item 407 of Regulation S-K (§229.407(e)(4) and (e)(5) of this chapter).

Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters.

Furnish the information required by Item 201(d) of Regulation S-K (§ 229.201(d) of this chapter) and Item 403 of Regulation S-K (§ 229.403 of this chapter).

Item 13. Certain Relationships and Related Transactions, and Director Independence.

Furnish the information required by Item 404 of Regulation S-K (§229.404 of this chapter) and Item 407(a) of Regulation S-K (§229.407(a) of this chapter).

Item 14. Principal Accounting Fees and Services. * * *

PART IV

Item 15. Exhibits, Financial Statement Schedules.

(a) List the following documents filed as a part of the report:

(1) All financial statements;

(2) Those financial statement schedules required to be filed by Item 8 of this form, and by paragraph (b) below.

(3) Those exhibits required by Item 601 of Regulation S-K (§ 229.601 of this chapter) and by paragraph (b) below. Identify in the list each management contract or compensatory plan or arrangement required to be filed as an exhibit to this form pursuant to Item 15(b) of this report.

(b) Registrants shall file, as exhibits to this form, the exhibits required by Item 601 of Regulation S-K (§ 229.601 of this chapter).

(c) Registrants shall file, as financial statement schedules to this form, the financial statements required by Regulation S-X (17 CFR 210) which are excluded from the annual report to shareholders by Rule 14a-3(b) including (1) separate financial statements of subsidiaries not consolidated and fifty percent or less owned persons; (2) separate financial statements of affiliates whose securities are pledged as collateral; and (3) schedules.

SIGNATURES

* * *

C. Form 10-Q

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

GENERAL INSTRUCTIONS

A. Rule as to Use of Form 1O-Q.

1. Form 10-Q shall be used for quarterly reports under Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), required to be filed pursuant to § 240.13a-13 or § 240.15d-13 of this chapter. A quarterly report on this form pursuant to § 240.13a-13 or § 240.15d-13 of this chapter shall be filed within the following period after the end of the first three fiscal quarters of each fiscal year, but no quarterly report need be filed for the fourth quarter of any fiscal year:

   a. For accelerated filers (as defined in § 240.12b-2 of this chapter):

      (i) 45 days after the end of the fiscal quarter for fiscal years ending on or after December 15, 2002 and before December 15, 2004;

      (ii) 40 days after the end of the fiscal quarter for fiscal years ending on or after December 15, 2004 and before December 15, 2006;and

      (iii) 35 days after the end of the fiscal quarter for fiscal years ending on or after December 15, 2006; and

   b. 45 days after the end of the fiscal quarter for all other registrants. * * *

B. Application of General Rules and Regulations. * * *

C. Preparation of Report. * * *

D. Incorporation by Reference.

1. If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a document or statement containing information meeting some or all of the requirements of Part I of this form, the information called for may be incorporated by reference from such published document or statement, in answer or partial answer to any item or items of Part I of this form, provided copies thereof are filed as an exhibit to Part I of the report on this form.

2. Other information may be incorporated by reference in answer or partial answer to any item or items of Part II of this form in accordance with the provisions of Rule 12b-23 (17 CFR 240.12b-23). * * *

E. Integrated Reports to Security Holders. * * *

F. Filed Status of Information Presented. * * *

G. Signature and Filing of Report. * * *

H. Omission of Information by Certain Wholly-Owned Subsidiaries. * * *

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

(Mark One)

[ ] QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended
_____

* * *

Commission File Number:
_____

_____
____(Exact name of registrant as specified in its charter)

_____
____
(State or other jurisdiction of incorporation or organization) (I.R.S. Employer Identification No.)

_____
_____
(Address of principal executive offices) (Zip Code)

_____
_____
(Registrant's telephone number, including area code)

_____
____
(Former name, former address and former fiscal year, if changed since last report)

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

☐ Yes ☐ No

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Exchange Act). ☐ Yes ☐ No

* * *

APPLICABLE ONLY TO CORPORATE ISSUERS:

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

PART I—FINANCIAL INFORMATION

Item 1. Financial Statements.

Provide the information required by Rule 10-01 of Regulation S-X (17 CFR Part 210).

Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations.

Furnish the information required by Item 303 of Regulation S-K (§ 229.303 of this chapter).

Item 3. Quantitative and Qualitative Disclosures About Market Risk.

Furnish the information required by Item 305 of Regulation S-K (§ 229.305 of this chapter).

Item 4. Controls and Procedures.

Furnish the information required by Item 307 of Regulation S-K (§ 229.307 of this chapter) and Item 308(c) of Regulation S-K (§229.308(c) of this chapter).

PART II—OTHER INFORMATION

Instruction. The report shall contain the item numbers and captions of all applicable items of Part II, but the text of such items may be omitted provided the responses clearly indicate the coverage of the item. Any item which is inapplicable or to which the answer is negative may be omitted and no reference thereto need be made in the report. If substantially the same information has been previously reported by the registrant, an additional report of the information on this form need not be made. The term "previously reported" is defined in Rule 12b-2 (17 CFR 240. 12b-2). A separate response need not be presented in Part II where information called for is already disclosed in the financial information provided in Part I and is incorporated by reference into Part II of the report by means of a statement to that effect in Part II which specifically identifies the incorporated information.

Item 1. Legal Proceedings.

Furnish the information required by Item 103 of Regulation S-K (§ 229.103 of this chapter). As to such proceedings which have been terminated during the period covered by the report, provide similar information, including the date of termination and a description of the disposition thereof with respect to the registrant and its subsidiaries.

Instruction. A legal proceeding need only be reported in the 10-Q filed for the quarter in which it first became a reportable event and in subsequent quarters in which there have been material developments. Subsequent Form 10-Q filings in the same fiscal year in which a legal proceeding or a material development is reported should reference any previous reports in that year.

Item 1A. Risk Factors.

Set forth any material changes from risk factors as previously disclosed in the registrant's Form 10-K (§249.310) in response to Item 1A. to Part I of Form 10-K.

Item 2. Unregistered Sales of Equity Securities and Use of Proceeds. * * *

Item 3. Defaults Upon Senior Securities. * * *

Item 4. Submission of Matters to a Vote of Security Holders.

If any matter has been submitted to a vote of security holders during the period covered by this report, through the solicitation of proxies or otherwise, furnish the following information:

(a) The date of the meeting and whether it was an annual or special meeting.

(b) If the meeting involved the election of directors, the name of each director elected at the meeting and the name of each other director whose term of office as a director continued after the meeting.

(c) A brief description of each matter voted upon at the meeting and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes, as to each such matter, including a separate tabulation with respect to each nominee for office.

(d) A description of the terms of any settlement between the registrant and any other participant (as defined in Rule 14a-11 (17 CFR 240.14a-11) of Regulation 14A under the Act) terminating any solicitation subject to Rule 14a-11, including the cost or anticipated cost to the registrant.

Instructions:

1. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be furnished. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

2. Paragraph (a) need be answered only if paragraph (b) or (c) is required to be answered.

3. Paragraph (b) need not be answered if (i) proxies for the meeting were solicited pursuant to Regulation 14 under the Act, (ii) there was no solicitation in opposition to the management's nominees as listed in the proxy statement, and (iii) all of such nominees were elected. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto.

4. Paragraph (c) must be answered for all matters voted upon at the meeting, including both contested and uncontested elections of directors.

5. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (d), the paragraph may be answered by reference to the information contained in such material.

6. If the registrant has published a report containing all of the information called for by this item, the item may be answered by a reference to the information contained in such report.

Item 5. Other Information. * * *

(b) Furnish the information required by Item 407(c)(3) of Regulation S-K (§229.407 of this chapter).

Item 6. Exhibits.

Furnish the exhibits required by Item 601 of Regulation S-K (§ 229.601 of this chapter).

SIGNATURES * * *

CHAPTER 12 PRE-MERGER NOTIFICATION UNDER HART-SCOTT-RODINO, SELECTED RULES

[*See* Chapter 9 of Business Planning for Mergers and Acquisitions]

A. *§ 801.1 Definitions.*

When used in the act and these rules—

(a) (1) *Person.* Except as provided in paragraphs (a) and (b) of §801.12, the term *person* means an ultimate parent entity and all entities which it controls directly or indirectly.

Examples:

1. In the case of corporations, "person" encompasses the entire corporate structure, including all parent corporations, subsidiaries and divisions (whether consolidated or unconsolidated, and whether incorporated or unincorporated), and all related corporations under common control with any of the foregoing. * * *

*Throughout the examples to the rules, persons are designated ("A", "B," etc.) with quotation marks, and entities are designated (A, B, etc.) without quotation marks.

3. Since a natural person is an entity (see §801.1(a)(2)), a natural person and a corporation which he or she controls are part of the same "person." If that natural person controls two otherwise separate corporations, both corporations and the natural person are all part of the same "person."

4. See the example to §801.2(a).

(2) *Entity.* The term *entity* means any natural person, corporation, company, partnership, joint venture, association, joint-stock company. * * *

(3) *Ultimate parent entity.* The term *ultimate parent entity* means an entity which is not controlled by any other entity.

Examples:

1. If corporation A holds 100 percent of the stock of subsidiary B, and B holds 75 percent of the stock of its subsidiary C, corporation A is the ultimate parent entity, since it controls subsidiary B directly and subsidiary C indirectly, and since it is the entity within the person which is not controlled by any other entity.

2. If corporation A is controlled by natural person D, natural person D is the ultimate parent entity.

3. P and Q are the ultimate parent entities within persons "P" and "Q." If P and Q each own 50 percent of the voting securities of R, then P and Q are both ultimate parents of R, and R is part of both persons "P" and "Q."

(b) *Control.* The term *control* (as used in the terms *control(s), controlling, controlled by* and *under common control with*) means:

(1) *Either,*

(i) Holding 50 percent or more of the outstanding voting securities of an issuer or

(ii) In the case of an unincorporated entity, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity; or

(2) Having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation, or in the case of trusts described in paragraphs (c)(3) through (5) of this section, the trustees of such a trust.

Examples:

1. Corporation A holds 100 percent of the stock of corporation B, 75 percent of the stock of corporation C, 50 percent of the stock of corporation D, and 30 percent of the stock of corporation E. Corporation A controls corporations B, C and D, but not corporation E. Corporation A is the ultimate parent entity of a person comprised of corporations A, B, C and D, and each of these corporations (but not corporation E) is "included within the person." * * *

2. A statutory limited partnership agreement provides as follows: The general partner "A" is entitled to 50 percent of the partnership profits, "B" is entitled to 40 percent of the profits and "C" is entitled to 10 percent of the profits. Upon dissolution, "B" is entitled to 75 percent of the partnership assets and "C" is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary course of business, any change in the nature of the business, and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by subparagraph (1)(ii) of this paragraph. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate "director" or "an individual exercising similar functions" as required by §801.1(f)(1) below. Thus control of a partnership is not determined on the basis of either subparagraph (1)(i) or (2) of this paragraph. Consequently, "A" is deemed to control the partnership because of its right to 50 percent of the partnership's profits. "B" is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution. * * *

4. "A" is entitled to 50 percent of the profits of partnership B and 50 percent of the profits of partnership C. B and C form a partnership E with "D" in which each entity has a right to one-third of the profits. When E acquires company X, "A" must report the transaction (assuming it is otherwise reportable). Pursuant to §801.1(b)(1)(ii), E is deemed to be controlled by "A," even though "A" ultimately will receive only one-third of the profits of E. Because B and C are considered as part of "A," the rules attribute all profits to which B and C are entitled (two-thirds of the profits of E in this example) to "A."

(c) *Hold.* (1) Subject to the provisions of paragraphs (c) (2) through (8) of this section, the term *hold* (as used in the terms *hold(s), holding, holder* and *held*) means beneficial ownership, whether direct, or indirect through fiduciaries, agents, controlled entities or other means. * * *

(d) (1) Affiliate. An entity is an affiliate of a person if it is controlled, directly or indirectly, by the ultimate parent entity of such person.
(2) Associate. For purposes of Items 6 and 7 of the Form, an associate of an acquiring person shall be an entity that is not an affiliate of such person but:
(A) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity"); or
(B) Has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or
(C) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or
(D) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.
Examples: 1. ABC Investment Group has organized a number of investment partnerships. Each of the partnerships is its own ultimate parent, but ABC makes the investment decisions for all of the partnerships. One of the partnerships intends to make a reportable acquisition. For purposes of Items 6(c) and 7, each of the other investment partnerships, and ABC Investment Group itself are associates of the partnership that is the acquiring person. In response to Item 6(c)(i), the acquiring person will disclose any of its 5 percent or greater minority holdings that generate revenues in any of the same NAICS codes as the acquired entity(s) in the reportable transaction. In Item 6(c)(ii) it would report any 5 percent or greater minority holdings of its associates in the acquired entity(s) and in any entities that generate revenues in any of the same NAICS codes as the acquired entity(s). In Item 7, the acquiring person will indicate whether there are any NAICS code overlaps between the acquired entity(s) in the reportable transaction, on the one hand, and the acquiring person and all of its associates, on the other. * * *

(h) *Notification threshold.* The term "notification threshold" means:

(1) An aggregate total amount of voting securities of the acquired person valued at greater than $50 million (as adjusted) but less than $100 million (as adjusted);

(2) An aggregate total amount of voting securities of the acquired person valued at $100 million (as adjusted) or greater but less than $500 million (as adjusted);

(3) An aggregate total amount of voting securities of the acquired person valued at $500 million (as adjusted) or greater;

(4) Twenty-five percent of the outstanding voting securities of an issuer if valued at greater than $1 billion (as adjusted); or

(5) Fifty percent of the outstanding voting securities of an issuer if valued at greater than $50 million (as adjusted).

(i) (1) *Solely for the purpose of investment.* Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.

Example: If a person holds stock "solely for the purpose of investment" and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held "solely for the purpose of investment."

B. § 801.2 Acquiring and acquired persons.

(a) Any person which, as a result of an acquisition, will hold voting securities or assets, either directly or

indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person, is an acquiring person.

Example: Assume that corporations A and B, which are each ultimate parent entitles of their respective "persons," created a joint venture, corporation V, and that each holds half of V's shares. Therefore, A and B each control V (see §801.1(b)), and V is included within two persons, "A" and "B." Under this section, if V is to acquire corporation X, both "A" and "B" are acquiring persons.

(b) Except as provided in paragraphs (a) and (b) of §801.12, the person(s) within which the entity whose assets or voting securities are being acquired is included, is an acquired person.

Examples:

1. Assume that person "Q" will acquire voting securities of corporation X held by "P" and that X is not included within person "P." Under this section, the acquired person is the person within which X is included, and is not "P."

2. In the example to paragraph (a) of this section, if V were to be acquired by X, then both "A" and "B" would be acquired persons.

(c) For purposes of the act and these rules, a person may be an acquiring person and an acquired person with respect to separate acquisitions which comprise a single transaction.

(d) (1) (i) Mergers and consolidations are transactions subject to the act and shall be treated as acquisitions of voting securities.

(ii) In a merger, the person which, after consummation, will include the corporation in existence prior to consummation which is designated as the surviving corporation in the plan, agreement, or certificate of merger required to be filed with State authorities to effectuate the transaction shall be deemed to have made an acquisition of voting securities.

(2) (i) Any person party to a merger or consolidation is an acquiring person if, as a result of the transaction, such person will hold any assets or voting securities which it did not hold prior to the transaction.

(ii) Any person party to a merger or consolidation is an acquired person if, as a result of the transaction, the assets or voting securities of any entity included within such person will be held by any other person.

(iii) All persons party to a transaction as a result of which all parties will lose their separate pre-acquisition identities or will become wholly owned subsidiaries of a newly formed entity shall be both acquiring and acquired persons. This includes any combination of corporations and unincorporated entities consolidating into any newly formed entity. In such transactions, each consolidating entity is deemed to be acquiring all of the voting securities (in the case of a corporation) or interests (in the case of an unincorporated entity) of each of the others. * * *

(e) Whenever voting securities or assets are to be acquired from an acquiring person in connection with an acquisition, the acquisition of voting securities or assets shall be separately subject to the act. * * *

C. *§ 801.4 Secondary acquisitions.*

(a) Whenever as the result of an acquisition (the "primary acquisition") an acquiring person controls an entity which holds voting securities of an issuer that entity does not control, then the acquiring person's acquisition of the issuer's voting securities is a secondary acquisition and is separately subject to the act and these rules.

(b) *Exemptions.*

(1) No secondary acquisition shall be exempt from the requirements of the act solely because the related primary acquisition is exempt from the requirements of the act.

(2) A secondary acquisition may itself be exempt from the requirements of the act under section 7A(c) or these rules.

Examples:

1. Assume that acquiring person "A" proposes to acquire all the voting securities of corporation B. This section provides that the acquisition of voting securities of issuers held but not controlled by B or by any entity which B controls are secondary acquisitions by "A." Thus, if B holds more than $50 million (as adjusted) of the voting securities of corporation X (but does not control X), and "A" and "X" satisfy Sections 7A (a)(1) and (a)(2), "A" must file notification separately with respect to its secondary acquisition of voting securities of X. "X" must file notification within fifteen days (or in the case of a cash tender offer, 10 days) after "A" files, pursuant to §801.30. * * *

D. *§ 801.30 Tender offers and acquisitions of voting securities from third parties.*

(a) This section applies to:

(1) Acquisitions on a national securities exchange or through an interdealer quotation system registered with the United States Securities and Exchange Commission;

(2) Acquisitions described by §801.31;

(3) Tender offers;

(4) Secondary acquisitions;

(5) All acquisitions (other than mergers and consolidations) in which voting securities are to be acquired from a holder or holders other than the issuer or an entity included within the same person as the issuer; * * *.

(b) For acquisitions described by paragraph (a) of this section:

(1) The waiting period required under the act shall commence upon the filing of notification by the acquiring person as provided in §803.10(a); and

(2) The acquired person shall file the notification required by the act, in accordance with these rules, no later than 5 p.m. Eastern Time on the 15th (or, in the case of cash tender offers, the 10th) calendar day following the date of receipt, as defined by §803.10(a), by the Federal Trade Commission and Assistant Attorney General of the notification filed by the acquiring person. * * *

Examples:

1. Acquiring person "A" proposes to acquire from corporation B the voting securities of B's wholly owned subsidiary, corporation S. Since "A" is acquiring the shares of S from its parent, this section does not apply, and the waiting period does not begin until both "A" and "B" file notification.

2. Acquiring person "A" proposes to acquire in excess of $50 million (as adjusted) of the voting securities of corporation X on a securities exchange. The waiting period begins when "A" files notification. "X" must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act.

3. Suppose that acquiring person "A" proposes to acquire 50 percent of the voting securities of corporation B which in turn owns 30 percent of the voting securities of corporation C. Thus "A's" acquisition of C's voting securities is a secondary acquisition (see §801.4) to which this section applies because "A" is acquiring C's voting securities from a third party (B). Therefore, the waiting period with respect to "A's" acquisition of C's voting securities begins when "A" files its separate Notification and Report Form with respect to C, and "C" must file within 15 days (or in the case of a cash tender offer, 10 days) thereafter. "A's" primary and secondary acquisitions of the voting securities of B and C are subject to separate waiting periods; see §801.4. * * *

E. *§ 801.40 Formation of joint venture or other corporations.*

(a) In the formation of a joint venture or other corporation (other than in connection with a merger or consolidation), even though the persons contributing to the formation of a joint venture or other corporation and the joint venture or other corporation itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of §801.2, the contributors shall be deemed acquiring persons only, and the joint venture or other corporation shall be deemed the acquired person only.
(b) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act.
(c) Unless exempted by the act or any of these rules, upon the formation of a joint venture or other corporation, in a transaction meeting the criteria of Section 7A(a)(1) and the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a merger or consolidation), an acquiring person shall be subject to the requirements of the act if:
(1)(i) The acquiring person has annual net sales or total assets of $100 million (as adjusted) or more;
(ii) The joint venture or other corporation will have total assets of $10 million (as adjusted) or more; and
(iii) At least one other acquiring person has annual net sales or total assets of $10 million (as adjusted) or more; or
(2)(i) The acquiring person has annual net sales or total assets of $10 million (as adjusted) or more;
(ii) The joint venture or other corporation will have total assets of $100 million (as adjusted) or more; and
(iii) At least one other acquiring person has annual net sales or total assets of $10 million (as adjusted) or more.
(d) For purposes of paragraphs (b) and (c) of this section and determining whether any exemptions provided by the act and these rules apply to its formation, the assets of the joint venture or other corporation shall include:
(1) All assets which any person contributing to the formation of the joint venture or other corporation has agreed to transfer or for which agreements have been secured for the joint venture or other corporation to obtain at any time, whether or not such person is subject to the requirements of the act; and
(2) Any amount of credit or any obligations of the joint venture or other corporation which any person contributing to the formation has agreed to extend or guarantee, at any time.
(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the activities of the joint venture or other corporation will be in or will affect commerce.
Examples: 1. Persons "A," "B," and "C" agree to create new corporation "N," a joint venture. "A," "B," and "C" will each hold one third of the shares of "N." "A" has more than $100 million (as adjusted) in annual net sales. "B" has more than $10 million (as adjusted) in total assets but less than $100 million (as adjusted) in annual net sales and total assets. Both "C's" total assets and its annual net sales are less than $10 million (as adjusted). "A," "B," and "C" are each engaged in commerce. "A," "B," and "C" have agreed to make an aggregate initial contribution to the new entity of $18 million in assets and each to make additional contributions of $21 million in each of the next three years. Under paragraph (d) of this section, the assets of the new corporation are $207 million. Under paragraph (c) of

this section, "A" and "B" must file notification. Note that "A" and "B" also meet the criterion of Section 7A(a)(2)(B)(i) since they will be acquiring one third of the voting securities of the new entity for in excess of $50 million (as adjusted). N need not file notification; see §802.41.
2. In the preceding example "A" has over $10 million (as adjusted) but less than $100 million (as adjusted) in sales and assets, "B" and "C" have less than $10 million (as adjusted) in sales and assets. "N" has total assets of $500 million. Assume that "A" will acquire 50 percent of the voting securities of "N" and "B" and "C" will each acquire 25 percent. Since "A" will acquire in excess of $200 million (as adjusted) in voting securities of "N", the size-of-person test in §801.40(c) is inapplicable and "A" is required to file notification.

F. *§ 801.50 Formation of unincorporated entities.*

(a) In the formation of an unincorporated entity (other than in connection with a consolidation), even though the persons contributing to the formation of the unincorporated entity and the unincorporated entity itself may, in the formation transaction, be both acquiring and acquired persons within the meaning of §801.2, the contributors shall be deemed acquiring persons only and the unincorporated entity shall be deemed the acquired person only.
(b) Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1) and 7A(a)(2)(A) (other than in connection with a consolidation), a person is subject to the requirements of the Act if it acquires control of the newly-formed entity. Unless exempted by the Act or any of these rules, upon the formation of an unincorporated entity, in a transaction meeting the criteria of Section 7A(a)(1), the criteria of Section 7A(a)(2)(B)(i) (other than in connection with a consolidation), a person is subject to the requirements of the Act if:
(1)(i) The acquiring person has annual net sales or total assets of $100 million (as adjusted) or more;
(ii) The newly-formed entity has total assets of $10 million (as adjusted) or more; and
(iii) The acquiring person acquires control of the newly-formed entity; or
(2)(i) The acquiring person has annual net sales or total assets of $10 million (as adjusted) or more;
(ii) The newly-formed entity has total assets of $100 million (as adjusted) or more; and
(iii) The acquiring person acquires control of the newly-formed entity.
(c) For purposes of paragraph (b) of this section, the total assets of the newly-formed entity is determined in accordance with §801.40(d).
(d) Any person acquiring control of the newly-formed entity determines the value of its acquisition in accordance with §801.10(d).
(e) The commerce criterion of Section 7A(a)(1) is satisfied if either the Activities of any acquiring person are in or affect commerce, or the person filing notification should reasonably believe that the Activities of the newly-formed entity will be in or will affect commerce.
Example: A and B form a new partnership (LP) in which each will acquire a 50 percent interest. A contributes a plant valued at $250 million and $100 million in cash. B contributes $350 million in cash. Because each is acquiring non-corporate interests, valued in excess of $50 million (as adjusted) which confer control of LP both A and B are acquiring persons in the formation. Each must now determine if the exemption in §802.4 is applicable to their acquisitions of non-corporate interests in LP. For A, LP's exempt assets consist of all of the cash contributed by A and B (pursuant to §801.21) and A's contribution of the plant (pursuant to §802.30(c)). Because all of the assets of LP are exempt with regard to A, A's acquisition of non-corporate interests in LP is exempt under §802.4. For B, LP's exempt assets include only the cash contributions by A and B. The plant contributed by A, valued at $250 million is not exempt under §802.30(c) with regard to B. Because LP has non-exempt assets in excess of $50 million (as adjusted) with regard to B, B's acquisition of non-corporate interests in LP is not exempt under §802.4. B must now value its acquisition of non-corporate interests pursuant to §801.10(d) and because the value of the non-corporate interests is the same as B's contribution to the formation ($350 million), the value exceeds $200 million (as adjusted) and B must file notification prior to acquiring non-corporate interests in LP. See additional examples following §802.30(c) and § 802.4. * * *

G. *§ 801.90 Transactions or devices for avoidance.*

Any transaction(s) or other device(s) entered into or employed for the purpose of avoiding the obligation to comply with the requirements of the act shall be disregarded, and the obligation to comply shall be determined by applying the act and these rules to the substance of the transaction. * * *

H. *§ 802.9 Acquisition solely for the purpose of investment.*

An acquisition of voting securities shall be exempt from the requirements of the act pursuant to section 7A(c)(9) if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of voting securities so acquired or held. * * *

I. *§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).*

(a) An acquisition of voting securities shall be exempt from the requirements of the act if:

(1) The acquiring person and all other persons required by the act and these rules to file notification filed notification with respect to an earlier acquisition of voting securities of the same issuer;

(2) The waiting period with respect to the earlier acquisition has expired, or been terminated pursuant to §803.11, and the acquisition will be consummated within 5 years of such expiration or termination; and

(3) The acquisition will not increase the holdings of the acquiring person to meet or exceed a notification threshold (as adjusted) greater than the greatest notification threshold met or exceeded in the earlier acquisition.

Examples:

1. In 2004, Corporation A acquired $53 million of the voting securities of corporation B and both "A" and "B" filed notification as required, indicating the $50 million threshold. Within five years of the expiration of the original waiting period, "A" acquires additional voting securities of B but not in an amount sufficient to meet or exceed $100 million (as adjusted) or 50 percent of the voting securities of B. No additional notification is required. * * *

J. *§ 802.41 Corporations or unincorporated entities at time of formation.*

Whenever any person(s) contributing to the formation of an entity are subject to the requirements of the Act by reason of §801.40 or §801.50 of this chapter, the new entity need not file the notification required by the Act and §803.1 of this chapter.

Examples: 1. Corporations A and B, each having sales of in excess of $100 million (as adjusted), each propose to contribute in excess of $50 million (as adjusted) in cash in exchange for 50 percent of the voting securities of a new corporation, N. Under this section, the new corporation need not file notification, although both "A" and "B" must do so and observe the waiting period prior to receiving any voting securities of N.

2. In addition to the facts in Example 1 of this section, A and B have agreed that upon creation N will purchase 100 percent of the voting securities of corporation C for in excess of $50 million (as adjusted). Because N's purchase of C is not a transaction in connection with N's formation, and because in any event C is not a contributor to the formation of N, "A," "B" and "C" must file with respect to the proposed acquisition of C and must observe the waiting period.

K. *§ 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.*

(a) Whenever one or more of the contributors in the formation of a joint venture or other corporation which otherwise would be subject to the requirements of the act by reason of §801.40 are exempt from these requirements under section 7A(c)(8), any other contributor in the formation which is subject to the act and not exempt under section 7A(c)(8) need not file a Notification and Report Form, provided that no less than 30 days prior to the date of

consummation any such contributor claiming this exemption has submitted an affidavit to the Federal Trade Commission and to the Assistant Attorney General stating its good faith intention to make the proposed acquisition and asserting the applicability of this exemption.
(b) Persons relieved of the requirement to file a Notification and Report Form pursuant to paragraph (a) of this section remain subject to all other provisions of the act and these rules. * * *

L. *§ 802.50 Acquisitions of foreign assets.*

(a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million (as adjusted) during the acquired person's most recent fiscal year.

(b) Where the foreign assets being acquired exceed the threshold in paragraph (a) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) are less than $110 million (as adjusted); and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A) [the $200M threshold].
Example to §802.50: 1. Assume that "A" and "B" are both U.S. persons. "A" proposes selling to "B" a manufacturing plant located abroad. Sales in or into the United States attributable to the plant totaled $13 million in the most recent fiscal year. The transaction is exempt under this paragraph (a) of this section. * * *

3. Assume that "A" and "B" are foreign persons with aggregate sales in or into the United States of in excess of $110 million (as adjusted). If "A" acquires only foreign assets of "B," and if those assets generated $50 million (as adjusted) or less in sales in or into the United States, the transaction is exempt.

4. Assume that "A" and "B" are foreign persons with aggregate sales in or into the United States and assets located in the United Sates of less than $110 million (as adjusted). If "A" acquires only foreign assets of "B," and those assets generated in excess of $50 million (as adjusted) in sales in or into the United States during the most recent fiscal year, the transaction is exempt from reporting if the assets are valued at $200 million (as adjusted) or less, but is reportable if valued at greater than $200 million (as adjusted).

M. *§ 802.51 Acquisitions of voting securities of a foreign issuer.*

(a) *By U.S. persons.* (1) The acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year. * * *

(b) *By foreign persons.* (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this

chapter) having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year. * * *

(c) Where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) of this section, the acquisition nevertheless shall be exempt where:

(1) Both acquiring and acquired persons are foreign;

(2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years;

(3) The aggregate total assets of the acquiring and acquired persons located in the United States (other than investment assets, voting or nonvoting securities of another person, and assets included pursuant to §801.40(d)(2) of this chapter) are less than $110 million (as adjusted); and

(4) The transaction does not meet the criteria of Section 7A(a)(2)(A) [the $200M threshold].

Example to §802.51 1. "A," a U.S. person, is to acquire the voting securities of C, a foreign issuer. C has no assets in the United States, but made aggregate sales into the United States of in excess of 50 million (as adjusted) in the most recent fiscal year. The transaction is not exempt under this section.

2. Assume that "A" and "B" are foreign persons with aggregate sales in or into the United States in excess of $110 million (as adjusted), and that "A" is acquiring 100% of the voting securities of "B." Included within "B" is U.S. issuer C, whose total U.S. assets are valued in excess of $50 million (as adjusted). Since "A" will be acquiring control of an issuer, C, with total U.S. assets of more than $50 million (as adjusted), and the parties' aggregate sales in or into the U.S. in the relevant time period exceed $110 million (as adjusted), the acquisition is not exempt under this section. * * *

N. *§ 803.1 Notification and Report Form.*

(a) The notification required by the act shall be the Notification and Report Form set forth in the appendix to this part (803), as amended from time to time. * * *

O. *§ 803.2 Instructions applicable to Notification and Report Form.*

(a) The notification required by the act shall be filed by the preacquisition ultimate parent entity, or by any entity included within the person authorized by such preacquisition ultimate parent entity to file notification on its behalf. In the case of a natural person required by the act to file notification, such notification may be filed by his or her legal representative * * *

(b) Except as provided in paragraph (b)(2) of this section and paragraph (c) of this section:

(1) Items 5–8 of the Notification and Report Form must be completed—

(i) By acquiring persons, with respect to all entities included within the acquiring person;

(ii) By acquired persons, in the case of an acquisition of assets, only with respect to the assets to be acquired;

(iii) By acquired persons, in the case of an acquisition of voting securities, with respect to only the issuer whose voting securities are being acquired, and all entities controlled by such issuer; and

(iv) By acquired persons, in the case of an acquisition of non-corporate interests, with respect to the unincorporated entity whose non-corporate interests are being acquired, and all

entities controlled by such unincorporated entity; and

(v) By persons which are both acquiring and acquired persons, separately in the manner that would be required of acquiring and acquired persons under this paragraph, if different.

(2) For purposes of items 7 and 8 of the Notification and Report Form, the acquiring person shall regard the acquired person in the manner described in paragraphs (b)(1) (ii) and (iii) of this section.

Example: Person "A" is comprised of entities separately engaged in grocery retailing, auto rental, and coal mining. Person "B" is comprised of entities separately engaged in wholesale magazine distribution, auto rental and book publishing. "A" proposes to purchase 100 percent of the voting securities of "B"s book publishing subsidiary. For purposes of item 5, under clause (b)(1)(i), "A" reports the activities of all its entities; under clause (b)(1)(iii), "B" reports only the operations of its book publishing subsidiary. For purposes of items 7 and 8, under paragraph (b)(2) of this section, "A" must regard "B" as consisting only of its book publishing subsidiary and must disregard the fact that "A" and "B" are both engaged in the auto rental business.

(c) In response to items 5, 7, and 8 of the Notification and Report Form—

(1) Information shall be supplied only with respect to operations conducted within the United States; and

(2) Information need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the requirements of the act.

(d) The term *dollar revenues,* as used in the Notification and Report Form, means value of shipments for manufacturing operations, and sales, receipts, revenues, or other appropriate dollar value measure for operations other than manufacturing, f.o.b. the plant or establishment less returns, after discounts and allowances and excluding freight charges and excise taxes. * * *

P. *§ 803.3 Statement of reasons for noncompliance.*

A complete response shall be supplied to each item on the Notification and Report Form and to any request for additional information pursuant to section 7A(e) and §803.20. Whenever the person filing notification is unable to supply a complete response, that person shall provide, for each item for which less than a complete response has been supplied, a statement of reasons for noncompliance. The statement of reasons for noncompliance shall contain all information upon which a person relies in explanation of its noncompliance and shall include at least the following:

(a) Why the person is unable to supply a complete response; * * *

Q. *§ 803.5 Affidavits required.*

(a) (1) *Section 801.30 acquisitions.* For acquisitions to which §801.30 applies, the notification required by the act from each acquiring person shall contain an affidavit, attached to the front of the notification, attesting that the issuer whose voting securities are to be acquired has received notice in writing by certified or registered mail, by wire or by hand delivery, at its principal executive offices, of:

(i) The identity of the acquiring person; * * *

R. *§ 803.10 Running of time.*

(a) *Beginning of waiting period.* The waiting period required by the act shall begin on the date of receipt of the notification required by the act, in the manner provided by these rules (or, if such notification is not

completed, the notification to the extent completed and a statement of the reasons for such noncompliance in accordance with §803.3) from:

(1) In the case of acquisitions to which §801.30 applies, the acquiring person;

(2) In the case of the formation of a corporation covered by Sec. 801.40 or an unincorporated entity covered by Sec. 801.50, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification;

(3) In the case of all other acquisitions, all persons required by the act and these rules to file notification.

(b) *Expiration of waiting period.*

(1) Subject to paragraph (b)(3) of this section, for purposes of Section 7A(b)(1)(B), the waiting period shall expire at 11:59 p.m. Eastern Time on the 30th (or in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), the 15th) calendar day (or if §802.23 applies, such other day as that section may provide) following the beginning of the waiting period as determined under paragraph (a) of this section, unless extended pursuant to Section 7A(e) and §803.20, or Section 7A(g)(2), or unless terminated pursuant to Section 7A(b)(2) and §803.11.

(2) Unless further extended pursuant to Section 7A(g)(2), or terminated pursuant to Section 7A(b)(2) and §803.11, any waiting period which has been extended pursuant to Section 7A(e)(2) and §803.20 shall, subject to paragraph (b)(3) of this section, expire at 11:59 p.m. Eastern Time—

(i) On the 30th (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), the 10th) day following the date of receipt of all additional information or documentary material requested from all persons to whom such requests have been directed (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such noncompliance in accordance with §803.3), by the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material, at the office designated in paragraph (c) of this section, or

(ii) As provided in paragraph (b)(1) of this section, whichever is later.

(3) If any waiting period would expire on a Saturday, Sunday, or legal public holiday (as defined in 5 U.S.C. 6103(a)) the waiting period shall be extended to 11:59 p.m. Eastern Time of the next regular business day. * * *

S. *§ 803.20 Requests for additional information or documentary material.*

(a) (1) *Persons and individuals subject to request.* Pursuant to section 7A(e)(1), the submission of additional information or documentary material relevant to the acquisition may be required from one or more persons required to file notification, and, with respect to each such person, from one or more entities included therein, or from one or more officers, directors, partners, agents, or employees thereof, if so required by the same request. * * *

(c) *Waiting period extended.*

(1) During the time period when a request for additional information or documentary material remains outstanding to any person other than either:

(i) In the case of a tender offer, the person whose voting securities are sought to be acquired by the tender offeror (or any officer, director, partner, agent or employee thereof), or * *

*, the waiting period shall remain in effect, even though the waiting period would have expired (see §803.10(b)) if no such request had been made. * * *

T. *§ 803.21 Additional information shall be supplied within reasonable time.*

All additional information or documentary material requested pursuant to section 7A(e) and §803.20 (or, if such request is not fully complied with, the information or documentary material submitted and a statement of the reasons for such noncompliance in accordance with §803.3) shall be supplied within a reasonable time.

CHAPTER 13 PRE-MERGER NOTIFICATION UNDER HART-SCOTT-RODINO, INSTRUCTIONS TO THE REPORT FORM

[*See* Chapter 9 of Business Planning for Mergers and Acquisitions]

Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions Instructions

GENERAL.

The Notification and Report Form ("the Form") is required to be submitted pursuant to §803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules").

These instructions specify the information which must be provided in response to the items on the Form. The completed Form, together with all documentary attachments, are to be filed with the Federal Trade Commission and the Department of Justice ("the Agencies"). * * *

North American Industry Classification System (NAICS) Data-The Form requests dollar revenues and lines of commerce for nonmanufactured and manufactured products with respect to operations conducted within the United States and for products manufactured outside of the United States and sold into the United States. Filing persons must submit data at the 6-digit NAICS national industry code level to reflect non-manufacturing revenues. To the extent that dollar revenues (see §803.2(d)) are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must submit data at the 10-digit NAICS product code levels. ***

Cash Tender Offer. Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer. [See Chapter 20]

Bankruptcy. Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or by a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11 USC §363). [See Chapter 30]

Early Termination-Put an X in the "yes" box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by §7A(b)(2) of the Clayton Act and on the FTC web site, www.ftc.gov. Note that if either party requests early termination, it may be granted and published.

Transactions Subject to International Antitrust Notification-If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority and the date or anticipate date of each such notification. Response to this item is voluntary.

ITEM 1 [Information regarding the parties]

Item 1(a)-Provide the name, headquarters address and website (if one exists) of the person filing notification. The name of the person filing is the name of the ultimate parent entity.

Item 1(b)-Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See § 801.2.) * * *

ITEM 2 [Establishing the reason the transaction is reportable]

Item 2(a)- Give the names of all ultimate parent entities of acquiring and acquired person that are parties to the acquisition, whether or not they are required to file notification. If not required to file, note as non-reportable. * * *

Item 2(c) [Notification Thresholds] (Acquiring person only) Put an X in the box to indicate the highest threshold for which notification is being filed (see §801.1(h)): $50 million (as adjusted), $100 million (as adjusted), $500 million (as adjusted), 25% (if value of voting securities to be held is greater than $1 billion, as adjusted), or 50%. The notification threshold selected should be based on voting securities only that will be held as a result of the acquisition.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities (e.g. an acquisition of 100% of the voting securities of an issuer, valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

Item 2(d)-[State the percentage and value of securities, non-corporate interests, and assets held before and after the acquisition. To be completed by both acquiring and acquired persons.] ***

ITEM 3 [Description of the transaction]

Item 3(a)- Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired.. * * *

Item 3(b)- Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose voting securities, non-corporate interests or assets are to be acquired. Also furnish Agreements Not to Compete. * * * If the parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement. * * *

ITEM 4 [Background information on the parties and the transaction]

Item 4(a)- Provide the names of all entities, including the UPE, within the person filing notification that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission. * * *

Item 4(b)-Provide the most recent annual reports and/or annual audit reports of the person filing notification and of each unconsolidated United States entity included within such person. * Alternatively, the person filing notification may incorporate a document by reference to an internet address directly linking to the document (see §803.2(e)(2)). *****

Item 4(c)- Provide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

NOTE: If the person filing notification withholds or redacts any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and §803.3(d). ***

Item 4(d)(i)- Provide all Confidential Information Memoranda [or document serving a similar function] prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) that specifically relate to the sale of the acquired entity(s) or assets. ***

Item 4(d)(ii)- Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity[.] * This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.**

Item 4(d)(iii)- Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. ***

ITEMS 5 THROUGH 7

For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be acquired[.] * * *

ITEM 5 [Information about the product markets]

This item requests information by NAICS code regarding nonmanufacturing and manufacturing dollar revenues. All persons must submit data on non-manufacturing revenues at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), data must be submitted at the 10-digit product code level (NAICS based codes). * * *

Item 5(a)- Provide 6-digit NAICS industry data concerning the aggregate operations of the person filing notification for the most recent year in NAICS Sectors other than 31-33 (non-manufacturing industries) in which the person engaged and 10-digit NAICS product code data for each product code within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged, including revenues for each product manufactured outside the U.S. but sold in or into the U.S. * * *

Item 5(b) [Information regarding joint ventures]- Supply the following information only if the acquisition is the formation of a joint venture corporation or unincorporated entity (see §§801.40 and 801.50). If the acquisition is not a formation, check the "Not Applicable" box.

Item 5(b)(i)- List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(b)(ii)-Describe fully the consideration which each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Item 5(b)(iii)-Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(b)(iv)-Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing, also specify each 10-digit NAICS product code in which it will derive dollar revenues.

ITEM 6 [Information about the geographic markets]

This item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. * * *

Item 6(a)- List the name and city and state/country of any U.S. entities and any foreign entities that have sales into the U.S. included within the person filing notification. Entities with total assets of less than $10 million may be omitted. ***

Item 6(b)-[List the name and headquarters mailing address of each person that holds five percent or more of the outstanding voting securities or non-corporate interests and the percentage held. For limited partnerships, only the general partners should be listed.] ***

Item 6(c)(i)-[List persons holding five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity and the percentage held.] ***

Item 6(c)(ii)- (Acquiring person only) For each associate (see §801.1(d)(2)) of the person filing notification holding five percent or more but less than fifty percent of the voting securities or non-corporate interests of the acquired entity(s) or five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year, list, based on the knowledge or belief of the acquiring person, the associate, the issuer or unincorporated entity and percentage held. ***

ITEM 7 [Information on product and geographic overlaps]

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see §801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year, or in which a joint venture corporation or unincorporated entity will derive dollar revenues (note that if the acquired entity is a joint venture the only overlaps will be between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture), then for each such 6-digit NAICS industry code:

Item 7(a)- Supply [1] the 6-digit NAICS industry code [in which both the acquiring person and the acquired person derived dollar revenues] and [2] description for the industry. ***

Item 7(b)(i)- List the name of each person that is a party to the acquisition that also derived dollar revenues in the 6-digit industry[.] * * * .

Item 7(b)(ii)- (Acquiring person only) List the name of each associate of the acquiring person that also derived dollar revenues in the 6-digit industry and, if different, the name of the entity(s) that actually derived those revenues. ***

Item 7(c)(i)- For each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a) above, list the states or, if desired, portions thereof in which, to the knowledge or belief of the person filing notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold. [Similar information is required for other industries as set out in subsequent sections.]

NOTE: Except in the case of those NAICS major industries in the Sectors and Subsectors mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

Item 7(d)- (Acquiring person only) Use the geographic markets listed in Items 7(c)(i) through 7(c)(vi) to respond to this item, providing the information for associates of the acquiring person. List separately responses for each associate of the acquiring person and, if different, the entity(s) that actually derived the revenues.

ITEM 8 [Information of certain prior acquisitions]

(Acquiring person only). Determine each 6-digit NAICS industry code listed in Item 7(a) above, in which the acquiring person derived dollar revenues of $1 million or more in the most recent year and in which either the acquired entity derived revenues of $1 million or more in the recent year (or in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive revenues of $1 million or more), or, in the case of acquired assets, to which revenues of $1 million or more were attributable in the most recent year. For each such 6-digit NAICS industry code, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 6-digit NAICS industry code. List only acquisitions of 50 percent or more of the voting securities of an issuer or 50 percent or more of non-corporate interests of an unincorporated entity that had annual

net sales or total assets greater than $10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

(a) the name of the entity from which the voting securities, noncorporate interests or assets were acquired;

(b) the headquarters address of that entity prior to the acquisition;

(c) whether voting securities, non-corporate interests or assets were acquired;

(d) the consummation date of the acquisition; and

(e) the 6-digit (NAICS code) industries by (number and description) identified above in which the acquired entity derived dollar revenues.

CERTIFICATION-(SEE §803.6)

CHAPTER 14 COMMITTEE ON FOREIGN INVESTMENT IN THE U.S. (CFIUS), REGULATIONS PERTAINING TO MERGERS, ACQUISITIONS, AND TAKEOVERS BY FOREIGN PERSONS

[*See* Chapter 26 of Business Planning for Mergers and Acquisitions. As indicated in Chapter 26, the Exon-Florio law was amended in 2007, and the new CFIUS Regulations set out below were adopted in 2008.]

31FR Part 800 Regulations Pertaining to Mergers Acquisitions, and Takeovers by Foreign Persons

A. *§ 800.101 Scope.*

The regulations in this part implement section 721 of title VII of the Defense Production Act of 1950 (50 U.S.C. App. 2170), as amended, hereinafter referred to as "section 721." The definitions in this part are applicable to section 721 and these regulations. The principal purpose of section 721 is to authorize the President to suspend or prohibit any covered transaction when, in the President's judgment, there is credible evidence to believe that the foreign person exercising control over a U.S. business might take action that threatens to impair the national security, and when provisions of law other than section 721 and the International Emergency Economic Powers Act (50 U.S.C. 1701-1706), do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President. It is also a purpose of section 721to authorize the Committee to mitigate any threat to the national security of the United States that arises as a result of a covered transaction.

B. *§ 800.102 Effect on other law.*

Nothing in this part shall be construed as altering or affecting any other authority, process, regulation, investigation, enforcement measure, or review provided by or established under any other provision of federal law, including the International Emergency Economic Powers Act, or any other authority of the President or the Congress under the Constitution of the United States.

C. *§ 800.103 Applicability rule; prospective application of certain provisions.*

(a) Except as provided in paragraph (b) of this section and otherwise in this part, the regulations in this part apply from the effective date (as defined in Section 800.210).

(b)Sections 800.204 (Control), 800.205 (Conversion), 800.206 (Convertible voting instrument), 800.211 (Entity), 800.212 (Foreign entity), 800.216 (Foreign person), 800.220 (Party or parties to a transaction), 800.223 (Solely for the purpose of passive investment), 800.224 (Transaction), 800.226 (U.S. business), and 800.228 (Voting interest), and the regulations in subpart C (Coverage) do not apply to any transaction for which the following has occurred before the effective date, in which case corresponding provisions of the regulations in this part that were in effect the day before the effective date will apply:

(1) The parties to the transaction have executed a written agreement or other document establishing the material terms of the transaction;

(2) A party has made a public offer to shareholders to buy shares of a U.S. business;

(3) A shareholder has solicited proxies in connection with an election of the board of directors of a U.S. business or has requested the conversion of convertible voting securities; or

(4) The parties have, in the Committee's view, otherwise made a commitment to engage in a transaction.

Note to § 800.103:

See subpart H of this part for specific applicability rules pertaining to that subpart.

D. *§ 800.104 Transactions or devices for avoidance.*

Any transaction or other device entered into or employed for the purpose of avoiding section 721 shall be disregarded, and section 721 and the regulations in this part shall be applied to the substance of the transaction.

E. *§ 800.201 Business day.*

The term business day means Monday through Friday, except the legal public holidays specified in 5 U.S.C. 6103 or any other day declared to be a holiday by federal statute or executive order.

F. *§ 800.202 Certification.*

(a) The term certification means a written statement signed by the chief executive officer or other duly authorized designee of a party to a transaction filing a notice or information, certifying that the notice or information filed:

(1) Fully complies with the requirements of section 721, the regulations in this part, and any agreement or condition entered into with the Committee or any member of the Committee, and

(2) Is accurate and complete in all material respects, as it relates to:

(i) The transaction, and

(ii) The party providing the certification, including its parents, subsidiaries, and any other related entities described in the notice or information.

(b) For purposes of this section, a duly authorized designee is:

(1) In the case of a partnership, any general partner thereof;

(2) In the case of a corporation, any officer or director thereof;

(3) In the case of any entity lacking officers, directors, or partners, any individual within the organization exercising executive functions similar to those of an officer or director of a corporation or a general partner of a partnership; and

(4) In the case of an individual, such individual or his or her legal representative.

(c) In each case described in paragraphs (b)(1) through (b)(4) of this section, such designee must possess actual authority to make the certification on behalf of the party to the transaction filing a notice or information.

Note to § 800.202:

A sample certification may be found at the Committee's section of the Department of the Treasury Web site at http://www.treas.gov/offices/international-affairs/cfius/index.shtml.

G. *§ 800.203 Committee; Chairperson of the Committee; Staff Chairperson.*

The term Committee means the Committee on Foreign Investment in the United States. The Chairperson of the Committee is the Secretary of the Treasury. The Staff Chairperson of the Committee is the Department of the Treasury official so designated by the Secretary of the Treasury or by the Secretary's designee.

H. *§ 800.204 Control.*

(a) The term control means the power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity; in particular, but without limitation, to determine, direct, take, reach, or cause decisions regarding the following matters, or any other similarly important matters affecting an entity:

(1) The sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business;

(2) The reorganization, merger, or dissolution of the entity;

(3) The closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity;

(4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity;

(5) The selection of new business lines or ventures that the entity will pursue;

(6) The entry into, termination, or non-fulfillment by the entity of significant contracts;

(7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity;

(8) The appointment or dismissal of officers or senior managers;

(9) The appointment or dismissal of employees with access to sensitive technology or classified U.S. Government information; or

(10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a)(1) through (9) of this section.

(b) In examining questions of control in situations where more than one foreign person has an ownership interest in an entity, consideration will be given to factors such as whether the foreign persons are related or have formal or informal arrangements to act in concert, whether they are agencies or instrumentalities of the national or subnational governments of a single foreign state, and whether a given foreign person and another person that has an ownership interest in the entity are both controlled by any of the national or subnational governments of a single foreign state.

(c) The following minority shareholder protections shall not in themselves be deemed to confer control over an entity:

(1) The power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation;

(2) The power to prevent an entity from entering into contracts with majority investors or their affiliates;

(3) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;

(4) The power to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issues additional instruments conveying interests in the entity;

(5) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such shares; and

(6) The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in paragraphs (c)(1) through (5) of this section.

(d) The Committee will consider, on a case-by-case basis, whether minority shareholder protections other than those listed in paragraph (c) of this section do not confer control over an entity.

(e) Any transaction in which a foreign person acquires an additional interest in a U.S. business that was previously the subject of a covered transaction for which the Committee concluded all action under section 721 shall not be deemed to be a transaction that could result in foreign control over that U.S. business (i.e., it is not a covered transaction). However, if a foreign person that did not acquire control of the U.S. business in the prior transaction is a party to the later transaction, the later transaction may be a covered transaction.

I. *§ 800.205 Conversion.*

The term conversion means the exercise of a right inherent in the ownership or holding of particular financial instruments to exchange any such instruments for voting instruments.

J. *§ 800.206 Convertible voting instrument.*

The term convertible voting instrument means a financial instrument that currently does not entitle its owner or holder to voting rights but is convertible into a voting instrument.

K. *§ 800.207 Covered transaction.*

The term covered transaction means any transaction that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person.

L. *§ 800.208 Critical infrastructure.*

The term critical infrastructure means, in the context of a particular covered transaction, a system or asset, whether physical or virtual, so vital to the United States that the incapacity or destruction of the particular system or asset of the entity over which control is acquired pursuant to that covered transaction would have a debilitating impact on national security.

M. *§ 800.209 Critical technologies.*

The term critical technologies means:

(a) Defense articles or defense services covered by the United States Munitions List (USML), which is set forth in the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130);

(b) Those items specified on the Commerce Control List (CCL) set forth in Supplement No. 1 to part 774 of the Export Administration Regulations (EAR) (15 CFR parts 730-774) that are controlled pursuant to multilateral regimes (i.e., for reasons of national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology), as well as those that are controlled for reasons of regional stability or surreptitious listening;

(c) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology specified in the Assistance to Foreign Atomic Energy Activities regulations (10 CFR part 810), and nuclear facilities, equipment, and material specified in the Export and Import of Nuclear Equipment and Material regulations (10 CFR part 110); and

(d) Select agents and toxins specified in the Select Agents and Toxins regulations (7 CFR part 331, 9 CFR part 121, and 42 CFR part 73).

N. *§ 800.210 Effective date.*

The term effective date means December 22, 2008.

O. *§ 800.211 Entity.*

The term entity means any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization (whether or not organized under the laws of any State or foreign state); assets (whether or not organized as a separate legal entity) operated by any one of the foregoing as a business undertaking in a particular location or for particular products or services; and any government (including a foreign national or subnational government, the United States Government, a subnational government within the United States, and any of their respective departments, agencies, or instrumentalities). (See examples following §§ 800.301(c) and 800.302(c).)

P. *§ 800.212 Foreign entity.*

(a) The term foreign entity means any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges.

(b) Notwithstanding paragraph (a) of this section, any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization that demonstrates that a majority of the equity interest in such entity is ultimately owned by U.S. nationals is not a foreign entity.

Q. *§ 800.213 Foreign government.*

The term foreign government means any government or body exercising governmental functions, other than the United States Government or a subnational government of the United States. The term includes, but is

not limited to, national and subnational governments, including their respective departments, agencies, and instrumentalities.

R. § 800.214 Foreign government-controlled transaction.

The term foreign government-controlled transaction means any covered transaction that could result in control of a U.S. business by a foreign government or a person controlled by or acting on behalf of a foreign government.

S. § 800.215 Foreign national.

The term foreign national means any individual other than a U.S. national.

T. § 800.216 Foreign person.

The term foreign person means:

(a) Any foreign national, foreign government, or foreign entity; or

(b) Any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity.

U. § 800.217 Hold.

The terms hold(s) and holding mean legal or beneficial ownership, whether direct or indirect, whether through fiduciaries, agents, or other means.

V. § 800.218 Lead agency.

The term lead agency means an agency designated by the Chairperson of the Committee to have primary responsibility, on behalf of the Committee, for the specific activity for which the Chairperson designates it as a lead agency, including all or a portion of a review, an investigation, or the negotiation or monitoring of a mitigation agreement or condition.

W. § 800.219 Parent.

(a) The term parent means a person who or which directly or indirectly:

(1) Holds or will hold at least 50 percent of the outstanding voting interest in an entity; or

(2) Holds or will hold the right to at least 50 percent of the profits of an entity, or has or will have the right in the event of the dissolution to at least 50 percent of the assets of that entity.

(b) Any entity that meets the conditions of paragraphs (a)(1) or (2) of this section with respect to another entity (i.e., the intermediate parent) is also a parent of any other entity of which the intermediate parent is a parent.

X. *§ 800.220 Party or parties to a transaction.*

The terms party to a transaction and parties to a transaction mean:

(a) In the case of an acquisition of an ownership interest in an entity, the person acquiring the ownership interest, and the person from which such ownership interest is acquired, without regard to any person providing brokerage or underwriting services for the transaction;

(b) In the case of a merger, the surviving entity, and the entity or entities that are merged into that entity as a result of the transaction;

(c) In the case of a consolidation, the entities being consolidated, and the new consolidated entity;

(d) In the case of a proxy solicitation, the person soliciting proxies, and the person who issued the voting interest;

(e) In the case of the acquisition or conversion of convertible voting instruments, the issuer and the person holding the convertible voting instruments; and

(f) In the case of any other type of transaction, any person who is in a role comparable to that of a person described in paragraphs (a) through (e) of this section.

Y. *§ 800.221 Person.*

The term person means any individual or entity.

Z. *§ 800.222 Section 721.*

The term section 721 means section 721 of title VII of the Defense Production Act of 1950, 50 U.S.C. App. 2170.

AA. *§ 800.223 Solely for the purpose of passive investment.*

Ownership interests are held or acquired solely for the purpose of passive investment if the person holding or acquiring such interests does not plan or intend to exercise control, does not possess or develop any purpose other than passive investment, and does not take any action inconsistent with holding or acquiring such interests solely for the purpose of passive investment. (See § 800.302(b).)

BB. *§ 800.224 Transaction.*

The term transaction means a proposed or completed merger, acquisition, or takeover. It includes:

(a) The acquisition of an ownership interest in an entity.

(b) The acquisition or conversion of convertible voting instruments of an entity.

(c) The acquisition of proxies from holders of a voting interest in an entity.

(d) A merger or consolidation.

(e) The formation of a joint venture.

(f) A long-term lease under which a lessee makes substantially all business decisions concerning the operation of a leased entity, as if it were the owner.

Note to § 800.224(b):

See § 800.304 regarding factors the Committee will consider in determining whether to include the rights to be acquired by a foreign person upon the conversion of convertible voting instruments as part of the Committee's assessment of whether a transaction that involves such instruments is a covered transaction.

CC. § 800.225 United States.

The term United States or U.S. means the United States of America, the States of the United States, the District of Columbia, and any commonwealth, territory, dependency, or possession of the United States, or any subdivision of the foregoing, and includes the Outer Continental Shelf, as defined in 43 U.S.C. 1331(a). For purposes of these regulations and their examples, an entity organized under the laws of the United States of America, one of the States, the District of Columbia, or a commonwealth, territory, dependency, or possession of the United States is an entity organized "in the United States."

DD. § 800.226 U.S. business.

The term U.S. business means any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce.

EE. § 800.227 U.S. national.

The term U.S. national means a citizen of the United States or an individual who, although not a citizen of the United States, owes permanent allegiance to the United States.

FF. § 800.228 Voting interest.

The term voting interest means any interest in an entity that entitles the owner or holder of that interest to vote for the election of directors of the entity (or, with respect to unincorporated entities, individuals exercising similar functions) or to vote on other matters affecting the entity.

GG. § 800.301 Transactions that are covered transactions.

Transactions that are covered transactions include, without limitation:
(a) A transaction which, irrespective of the actual arrangements for control provided for in the terms of the transaction, results or could result in control of a U.S. business by a foreign person. * * *

HH. § 800.302Transactions that are not covered transactions.

Transactions that are not covered transactions include, without limitation:

(a) A stock split or pro rata stock dividend that does not involve a change in control. * * *

II. *§ 800.303 Lending transactions.*

(a) The extension of a loan or a similar financing arrangement by a foreign person to a U.S. business, regardless of whether accompanied by the creation in the foreign person of a secured interest in securities or other assets of the U.S. business, shall not, by itself, constitute a covered transaction.

(1) The Committee will accept notices concerning a loan or a similar financing arrangement that does not, by itself, constitute a covered transaction only at the time that, because of imminent or actual default or other condition, there is a significant possibility that the foreign person may obtain control of a U.S. business as a result of the default or other condition.

(2) Where the Committee accepts a notice concerning a loan or a similar financing arrangement pursuant to paragraph (a)(1) of this section, and a party to the transaction is a foreign person that makes loans in the ordinary course of business, the Committee will take into account whether the foreign person has made any arrangements to transfer management decisions and day-to-day control over the U.S. business to U.S. nationals for purposes of determining whether such loan or financing arrangement constitutes a covered transaction.

(b) Notwithstanding paragraph (a) of this section, a loan or a similar financing arrangement through which a foreign person acquires an interest in profits of a U.S. business, the right to appoint members of the board of directors of the U.S. business, or other comparable financial or governance rights characteristic of an equity investment but not of a typical loan may constitute a covered transaction.

(c) An acquisition of voting interest or assets of a U.S. business by a foreign person upon default or other condition involving a loan or a similar financing arrangement does not constitute a covered transaction, provided that the loan was made by a syndicate of banks in a loan participation where the foreign lender (or lenders) in the syndicate:

(1) Needs the majority consent of the U.S. participants in the syndicate to take action, and cannot on its own initiate any action vis-à-vis the debtor; or

(2) Does not have a lead role in the syndicate, and is subject to a provision in the loan or financing documents limiting its ability to control the debtor such that control for purposes of § 800.204 could not be acquired.

JJ. *§ 800.304 Timing rule for convertible voting instruments.*

(a) For purposes of determining whether to include the rights that a holder of convertible voting instruments will acquire upon conversion of those instruments in the Committee's assessment of whether a notified transaction is a covered transaction, the Committee will consider factors that include:

(1) The imminence of conversion;

(2) Whether conversion depends on factors within the control of the acquiring party; and

(3) Whether the amount of voting interest and the rights that would be acquired upon conversion can be reasonably determined at the time of acquisition.

(b) When the Committee, applying paragraph (a) of this section, determines that the rights that the holder will acquire upon conversion will not be included in the Committee's assessment of whether a notified transaction is a covered transaction, the Committee will disregard the convertible voting instruments for purposes of that transaction except to the extent that they convey immediate rights to the holder with respect to the governance of the entity that issued the instruments.

KK. *§ 800.401 Procedures for notice.*

(a) A party or parties to a proposed or completed transaction may file a voluntary notice of the transaction with the Committee. Voluntary notice to the Committee is filed by sending:

> (1) One paper copy of the notice to the Staff Chairperson, Office of Investment Security, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, that includes, in English only, the information set out in § 800.402, including the certification required under paragraph (l) of that section; and
>
> (2) One electronic copy of the same information required in paragraph (a)(1) of this section. See the Committee's section of the Department of the Treasury Web site, at http://www.treas.gov/offices/international-affairs/cfius/ for electronic submission instructions.

(b) If the Committee determines that a transaction for which no voluntary notice has been filed under paragraph (a) of this section may be a covered transaction and may raise national security considerations, the Staff Chairperson, acting on the recommendation of the Committee, may request the parties to the transaction to provide to the Committee the information necessary to determine whether the transaction is a covered transaction, and if the Committee determines that the transaction is a covered transaction, to file a notice under paragraph (a) of such covered transaction.

(c) Any member of the Committee, or his designee at or above the Under Secretary or equivalent level, may file an agency notice to the Committee through the Staff Chairperson regarding a transaction for which no voluntary notice has been filed under paragraph (a) of this section if that member has reason to believe that the transaction is a covered transaction and may raise national security considerations. Notices filed under this paragraph are deemed accepted upon their receipt by the Staff Chairperson. No agency notice under this paragraph shall be made with respect to a transaction more than three years after the date of the completion of the transaction, unless the Chairperson of the Committee, in consultation with other members of the Committee, files such an agency notice.

(d) No communications other than those described in paragraphs (a) and (c) of this section shall constitute the filing or submitting of a notice for purposes of section 721.

(e) Upon receipt of the certification required by § 800.402(l) and an electronic copy of a notice filed under paragraph (a) of this section, the Staff Chairperson shall promptly inspect such notice for completeness.

(f) Parties to a transaction are encouraged to consult with the Committee in advance of filing a notice and, in appropriate cases, to file with the Committee a draft notice or other appropriate documents to aid the Committee's understanding of the transaction and to provide an opportunity for the Committee to request additional information to be included in the notice. Any such pre-notice consultation should take place, or any draft notice should be provided, at least five business days before the filing of a voluntary notice. All information and documentary material made available to the Committee pursuant to this paragraph shall be considered to have been filed with the President or the President's designee for purposes of section 721(c) and § 800.702.

(g) Information and other documentary material provided by the parties to the Committee after the filing of a voluntary notice under § 800.401 shall be part of the notice, and shall be subject to the certification requirements of § 800.402(l).

LL. § 800.402 Contents of voluntary notice.

(a) If the parties to a transaction file a voluntary notice, they shall provide in detail the information set out in this section, which must be accurate and complete with respect to all parties and to the transaction. (See also paragraph (l) of this section and § 800.701(d) regarding certification requirements.)

(b) In the case of a hostile takeover, if fewer than all the parties to a transaction file a voluntary notice, each notifying party shall provide the information set out in this section with respect to itself and, to the extent

known or reasonably available to it, with respect to each non-notifying party.

(c) A voluntary notice filed pursuant to § 800.401(a) shall describe or provide, as applicable:

(1) The transaction in question, including:

(i) A summary setting forth the essentials of the transaction, including a statement of the purpose of the transaction, and its scope, both within and outside of the United States;

(ii) The nature of the transaction, for example, whether the acquisition is by merger, consolidation, the purchase of voting interest, or otherwise;

(iii) The name, United States address (if any), Web site address (if any), nationality (for individuals) or place of incorporation or other legal organization (for entities), and address of the principal place of business of each foreign person that is a party to the transaction;

(iv) The name, address, website address (if any), principal place of business, and place of incorporation or other legal organization of the U.S. business that is the subject of the transaction;

(v) The name, address, and nationality (for individuals) or place of incorporation or other legal organization (for entities) of:

(A) The immediate parent, the ultimate parent, and each intermediate parent, if any, of the foreign person that is a party to the transaction;

(B) Where the ultimate parent is a private company, the ultimate owner(s) of such parent; and

(C) Where the ultimate parent is a public company, any shareholder with an interest of greater than five percent in such parent;

(vi) The name, address, website address (if any), and nationality (for individuals) or place of incorporation or other legal organization (for entities) of the person that will ultimately control the U.S. business being acquired;

(vii) The expected date for completion of the transaction, or the date it was completed;

(viii) A good faith approximation of the net value of the interest acquired in the U.S. business in U.S. dollars, as of the date of the notice; and

(ix) The name of any and all financial institutions involved in the transaction, including as advisors, underwriters, or a source of financing for the transaction;

(2) With respect to a transaction structured as an acquisition of assets of a U.S. business, a detailed description of the assets of the U.S. business being acquired, including the approximate value of those assets in U.S. dollars;

(3) With respect to the U.S. business that is the subject of the transaction and any entity of which that U.S. business is a parent (unless that entity is excluded from the scope of the transaction):

(i) Their respective business activities, as, for example, set forth in annual reports, and the product or service categories of each, including an estimate of U.S. market share for such product or service categories and the methodology used to determine market share, and a list of direct competitors for those primary product or service categories;

(ii) The street address (and mailing address, if different) within the United States and website address (if any) of each facility that is manufacturing classified or unclassified products or producing services described in paragraph (c)(3)(v) of this section, their respective Commercial and Government Entity Code (CAGE Code) assigned by the Department of Defense, their Dun and Bradstreet identification (DUNS) number, and their North American Industry Classification System (NAICS) Code, if any;

(iii) Each contract (identified by agency and number) that is currently in effect or was in effect within the past five years with any agency of the United States Government involving any information, technology, or data that is classified under Executive Order 12958, as amended, its estimated final completion date, and the name, office, and telephone number of the contracting official;

(iv) Any other contract (identified by agency and number) that is currently in effect or was in effect within the past three years with any United States Government agency or component with national defense, homeland security, or other national security responsibilities, including law enforcement responsibility as it relates to defense, homeland security, or national security, its estimated final completion date, and the name, office, and telephone number of the contracting official;

(v) Any products or services (including research and development):

(A) That it supplies, directly or indirectly, to any agency of the United States Government, including as a prime contractor or first tier subcontractor, a supplier to any such prime contractor or subcontractor, or, if known by the parties filing the notice, a subcontractor at any tier; and

(B) If known by the parties filing the notice, for which it is a single qualified source (i.e., other acceptable suppliers are readily available to be so qualified) or a sole source (i.e., no other supplier has needed technology, equipment, and manufacturing process capabilities) for any such agencies and whether there are other suppliers in the market that are available to be so qualified;

(vi) Any products or services (including research and development) that:

(A) It supplies to third parties and it knows are rebranded by the purchaser or incorporated into the products of another entity, and the names or brands under which such rebranded products or services are sold; and

(B) In the case of services, it provides on behalf of, or under the name of, another entity, and the name of any such entities;

(vii) For the prior three years—

(A) The number of priority rated contracts or orders under the Defense Priorities and Allocations System (DPAS) regulations (15 CFR part 700) that the U.S. business that is the subject of the transaction has received and the level of priority of such contracts or orders ("DX" or "DO"); and

(B) The number of such priority rated contracts or orders that the U.S. business has placed with other entities and the level of priority of such contracts or orders, and the acquiring party's plan to ensure that any new entity formed at the completion of the notified transaction (or the U.S. business, if no new entity is formed) complies with the DPAS regulations; and

(viii) A description and copy of the cyber security plan, if any, that will be used to protect against cyber-attacks on the operation, design, and development of the U.S. business's services, networks, systems, data storage, and facilities;

(4) Whether the U.S. business that is being acquired produces or trades in:

(i) Items that are subject to the EAR and, if so, a description (which may group similar items into general product categories) of the items and a list of the relevant commodity classifications set forth on the CCL (i.e., Export Control Classification Numbers (ECCNs) or EAR99 designation);

(ii) Defense articles and defense services, and related technical data covered by the USML in the ITAR, and, if so, the category of the USML; articles and services for which commodity jurisdiction requests (22 CFR 120.4) are pending; and articles and services (including those under development) that may be designated or determined in the future to be defense articles or defense services pursuant to 22 CFR 120.3;

(iii) Products and technology that are subject to export authorization administered by the Department of Energy (10 CFR part 810), or export licensing requirements administered by the Nuclear Regulatory Commission (10 CFR part 110); or

(iv) Select Agents and Toxins (7 CFR part 331, 9 CFR part 121, and 42 CFR part 73);

(5) Whether the U.S. business that is the subject of the transaction:

(i) Possesses any licenses, permits, or other authorizations other than those under the regulatory authorities listed in paragraph (c)(4) of this section that have been granted by an agency of the United States Government (if applicable, identification of the relevant licenses shall be provided); or

(ii) Has technology that has military applications (if so, an identification of such technology and a description of such military applications shall be included); and

(6) With respect to the foreign person engaged in the transaction and its parents:

(i) The business or businesses of the foreign person and its ultimate parent, as such businesses are described, for example, in annual reports, and the CAGE codes, NAICS codes, and DUNS numbers, if any, for such businesses;

(ii) The plans of the foreign person for the U.S. business with respect to:

(A) Reducing, eliminating, or selling research and development facilities;

(B) Changing product quality;

(C) Shutting down or moving outside of the United States facilities that are within the United States;

(D) Consolidating or selling product lines or technology;

(E) Modifying or terminating contracts referred to in paragraphs (c)(3)(iii) and (iv) of this section; or

(F) Eliminating domestic supply by selling products solely to non-domestic markets;

(iii) Whether the foreign person is controlled by or acting on behalf of a foreign government, including as an agent or representative, or in some similar capacity, and if so, the identity of the foreign government;

(iv) Whether a foreign government or a person controlled by or acting on behalf of a foreign government:

(A) Has or controls ownership interests, including convertible voting instruments, of the acquiring foreign person or any parent of the acquiring foreign person, and if so, the nature and amount of any such instruments, and with regard to convertible voting instruments, the terms and timing of their conversion;

(B) Has the right or power to appoint any of the principal officers or the members of the board of directors of the foreign person that is a party to the transaction or any parent of that foreign person;

(C) Holds any contingent interest (for example, such as might arise from a lending transaction) in the foreign acquiring party and, if so, the rights that are covered by this contingent interest, and the manner in which they would be enforced; or

(D) Has any other affirmative or negative rights or powers that could be relevant to the Committee's determination of whether the notified transaction is a foreign government-controlled transaction, and if there are any such rights or powers, their source (for example, a "golden share," shareholders agreement, contract, statute, or regulation) and the mechanics of their operation;

> (v) Any formal or informal arrangements among foreign persons that hold an ownership interest in the foreign person that is a party to the transaction or between such foreign person and other foreign persons to act in concert on particular matters affecting the U.S. business that is the subject of the transaction, and provide a copy of any documents that establish those rights or describe those arrangements;
>
> (vi) For each member of the board of directors or similar body (including external directors) and officers (including president, senior vice president, executive vice president, and other persons who perform duties normally associated with such titles) of the acquiring foreign person engaged in the transaction and its immediate, intermediate, and ultimate parents, and for any individual having an ownership interest of five percent or more in the acquiring foreign person engaged in the transaction and in the foreign person's ultimate parent, the following information:

(A) A curriculum vitae or similar professional synopsis, provided as part of the main notice, and

(B) The following "personal identifier information," which, for privacy reasons, and to ensure limited distribution, shall be set forth in a separate document, not in the main notice:

> (1) Full name (last, first, middle name);
>
> (2) All other names and aliases used;
>
> (3) Business address;
>
> (4) Country and city of residence;
>
> (5) Date of birth;
>
> (6) Place of birth;
>
> (7) U.S. Social Security number (where applicable);
>
> (8) National identity number, including nationality, date and place of issuance, and expiration date (where applicable);
>
> (9) U.S. or foreign passport number (if more than one, all must be fully disclosed), nationality, date and place of issuance, and expiration date and, if a U.S. visa holder, the

visa type and number, date and place of issuance, and expiration date; and

(10) Dates and nature of foreign government and foreign military service (where applicable), other than military service at a rank below the top two non-commissioned ranks of the relevant foreign country; and

(vii) The following "business identifier information" for the immediate, intermediate, and ultimate parents of the foreign person engaged in the transaction, including their main offices and branches:

(A) Business name, including all names under which the business is known to be or has been doing business;

(B) Business address;

(C) Business phone number, fax number, and e-mail address; and

(D) Employer identification number or other domestic tax or corporate identification number.

(d) The voluntary notice shall list any filings with, or reports to, agencies of the United States Government that have been or will be made with respect to the transaction prior to its closing, indicating the agencies concerned, the nature of the filing or report, the date on which it was filed or the estimated date by which it will be filed, and a relevant contact point and/or telephone number within the agency, if known.

MM. *§ 800.403 Deferral, rejection, or disposition of certain voluntary notices.*

(a) The Committee, acting through the Staff Chairperson, may:

(1) Reject any voluntary notice that does not comply with § 800.402 and so inform the parties promptly in writing;

(2) Reject any voluntary notice at any time, and so inform the parties promptly in writing, if, after the notice has been submitted and before action by the Committee or the President has been concluded:

(i) There is a material change in the transaction as to which notification has been made; or

(ii) Information comes to light that contradicts material information provided in the notice by the parties;

(3) Reject any voluntary notice at any time after the notice has been accepted, and so inform the parties promptly in writing, if the party or parties that have submitted the voluntary notice do not provide follow-up information requested by the Staff Chairperson within three business days of the request, or within a longer time frame if the parties so request in writing and the Staff Chairperson grants that request in writing; or

(4) Reject any voluntary notice before the conclusion of a review or investigation, and so inform the parties promptly in writing, if one of the parties submitting the voluntary notice has not submitted the final certification required by § 800.701(d).

(b) Notwithstanding the authority of the Staff Chairperson under paragraph (a) of this section to reject an incomplete notice, the Staff Chairperson may defer acceptance of the notice, and the beginning of the thirty-day review period, to obtain any information required under this section that has not been submitted by the notifying party or parties or other parties to the transaction. Where necessary to obtain such information, the Staff Chairperson may inform any non-notifying party or parties that notice has been filed with respect to a

proposed transaction involving the party, and request that certain information required under this section, as specified by the Staff Chairperson, be provided to the Committee within seven days after receipt of the Staff Chairperson's request.

(c) The Staff Chairperson shall notify the parties when the Committee has found that the transaction that is the subject of a voluntary notice is not a covered transaction.

NN. *§ 800.501 General.*

(a) The Committee's review or investigation (if necessary) shall examine, as appropriate, whether:

(1) The transaction is by or with any foreign person and could result in foreign control of a U.S. business;

(2) There is credible evidence to support a belief that any foreign person exercising control of that U.S. business might take action that threatens to impair the national security of the United States; and

(3) Provisions of law, other than section 721 and the International Emergency Economic Powers Act, provide adequate and appropriate authority to protect the national security of the United States.

(b) During the thirty-day review period or during an investigation, the Staff Chairperson may invite the parties to a notified transaction to attend a meeting with the Committee staff to discuss and clarify issues pertaining to the transaction. During an investigation, a party to the transaction under investigation may request a meeting with the Committee staff; such a request ordinarily will be granted.

(c) The Staff Chairperson shall be the point of contact for receiving material filed with the Committee, including notices.

(d) Where more than one lead agency is designated, communications on material matters between a party to the transaction and a lead agency shall include all lead agencies designated with regard to those matters.

OO. *§ 800.502 Beginning of thirty-day review period.*

(a) The Staff Chairperson of the Committee shall accept a voluntary notice the next business day after the Staff Chairperson has:

(1) Determined that the notice complies with § 800.402; and

(2) Disseminated the notice to all members of the Committee.

(b) A thirty-day period for review of a transaction shall commence on the date on which the voluntary notice has been accepted, agency notice has been received by the Staff Chairperson of the Committee, or the Chairperson of the Committee has requested a review pursuant to § 800.401(b). Such review shall end no later than the thirtieth day after it has commenced, or if the thirtieth day is not a business day, no later than the next business day after the thirtieth day.

(c) The Staff Chairperson shall promptly and in writing advise all parties to a transaction that have filed a voluntary notice of:

(1) The acceptance of the notice;

(2) The date on which the review begins; and

(3) The designation of any lead agency or agencies.

(d) Within two business days after receipt of an agency notice by the Staff Chairperson, the Staff Chairperson shall send written advice of such notice to the parties to a covered transaction. Such written advice shall identify the date on which the review began.

(e) The Staff Chairperson shall promptly circulate to all Committee members any draft pre-filing notice, any agency notice, any complete notice, and any subsequent information filed by the parties.

PP. *§ 800.503 Determination of whether to undertake an investigation.*

(a) After a review of a notified transaction under § 800.502, the Committee shall undertake an investigation of any transaction that it has determined to be a covered transaction if:

(1) A member of the Committee (other than a member designated as ex officio under section 721(k)) advises the Staff Chairperson that the member believes that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated; or

(2) The lead agency recommends, and the Committee concurs, that an investigation be undertaken.

(b) The Committee shall also undertake, after a review of a covered transaction under § 800.502, an investigation to determine the effects on national security of any covered transaction that:

(1) Is a foreign government-controlled transaction; or

(2) Would result in control by a foreign person of critical infrastructure of or within the United States, if the Committee determines that the transaction could impair the national security and such impairment has not been mitigated.

(c) The Committee shall undertake an investigation as described in paragraph (b) of this section unless the Chairperson of the Committee (or the Deputy Secretary of the Treasury) and the head of any lead agency (or his or her delegee at the deputy level or equivalent) designated by the Chairperson determine on the basis of the review that the covered transaction will not impair the national security of the United States.

QQ. *§ 800.504 Determination not to undertake an investigation.*

If the Committee determines, during the review period described in § 800.502, not to undertake an investigation of a notified covered transaction, action under section 721 shall be concluded. An official at the Department of the Treasury shall promptly send written advice to the parties to a covered transaction of a determination of the Committee not to undertake an investigation and to conclude action under section 721.

RR. *§ 800.505 Commencement of investigation.*

(a) If it is determined that an investigation should be undertaken, such investigation shall commence no later than the end of the thirty-day review period described in § 800.502.

(b) An official of the Department of the Treasury shall promptly send written advice to the parties to a covered transaction of the commencement of an investigation.

SS. *§ 800.506 Completion or termination of investigation and report to the President.*

(a) The Committee shall complete an investigation no later than the 45th day after the date the investigation

commences, or, if the 45th day is not a business day, no later than the next business day after the 45th day.

(b) Upon completion or termination of any investigation, the Committee shall send a report to the President requesting the President's decision if:

(1) The Committee recommends that the President suspend or prohibit the transaction;

(2) The members of the Committee (other than a member designated as ex officio under section 721(k)) are unable to reach a decision on whether to recommend that the President suspend or prohibit the transaction; or

(3) The Committee requests that the President make a determination with regard to the transaction.

(c) In circumstances when the Committee sends a report to the President requesting the President's decision with respect to a covered transaction, such report shall include information relevant to sections 721(d)(4)(A) and (B), and shall present the Committee's recommendation. If the Committee is unable to reach a decision to present a single recommendation to the President, the Chairperson of the Committee shall submit a report of the Committee to the President setting forth the differing views and presenting the issues for decision.

(d) Upon completion or termination of an investigation, if the Committee determines to conclude all deliberative action under section 721 with regard to a notified covered transaction without sending a report to the President, action under section 721 shall be concluded. An official at the Department of the Treasury shall promptly advise the parties to such a transaction in writing of a determination to conclude action.

TT. § 800.507 Withdrawal of notice.

(a) A party (or parties) to a transaction that has filed notice under § 800.401(a) may request in writing, at any time prior to conclusion of all action under section 721, that such notice be withdrawn. Such request shall be directed to the Staff Chairperson and shall state the reasons why the request is being made. Such requests will ordinarily be granted, unless otherwise determined by the Committee. An official of the Department of the Treasury will promptly advise the parties to the transaction in writing of the Committee's decision.

(b) Any request to withdraw an agency notice by the agency that filed it shall be in writing and shall be effective only upon approval by the Committee. An official of the Department of the Treasury shall advise the parties to the transaction in writing of the Committee's decision to approve the withdrawal request within two business days of the Committee's decision.

(c) In any case where a request to withdraw a notice is granted under paragraph (a) of this section:

(1) The Staff Chairperson, in consultation with the Committee, shall establish, as appropriate:

(i) A process for tracking actions that may be taken by any party to the covered transaction before notice is refiled under § 800.401; and

(ii) Interim protections to address specific national security concerns with the transaction identified during the review or investigation of the transaction.

(2) The Staff Chairperson shall specify a time frame, as appropriate, for the parties to resubmit a notice and shall advise the parties of that time frame in writing.

(d) A notice of a transaction that is submitted pursuant to paragraph (c)(2) of this section shall be deemed a new notice for purposes of the regulations in this part, including § 800.601.

UU. *§ 800.508 Role of the Secretary of Labor.*

In response to a request from the Chairperson of the Committee, the Secretary of Labor shall identify for the Committee any risk mitigation provisions proposed to or by the Committee that would violate U.S. employment laws or require a party to violate U.S. employment laws. The Secretary of Labor shall serve no policy role on the Committee.

VV. *§ 800.509 Materiality.*

The Committee generally will not consider as material minor inaccuracies, omissions, or changes relating to financial or commercial factors not having a bearing on national security.

WW. *§ 800.601 Finality of actions under section 721.*

(a) All authority available to the President or the Committee under section 721(d), including divestment authority, shall remain available at the discretion of the President with respect to covered transactions proposed or pending on or after August 23, 1988. Such authority shall not be exercised if:

(1) The Committee, through its Staff Chairperson, has advised a party (or the parties) in writing that a particular transaction with respect to which voluntary notice has been filed is not a covered transaction;

(2) The parties to the transaction have been advised in writing pursuant to § 800.504 or § 800.506(d) that the Committee has concluded all action under section 721 with respect to the covered transaction; or

(3) The President has previously announced, pursuant to section 721(d), his decision not to exercise his authority under section 721 with respect to the covered transaction.

(b) Divestment or other relief under section 721 shall not be available with respect to transactions that were completed prior to August 23, 1988.

XX. *§ 800.701 Obligation of parties to provide information.*

(a) Parties to a transaction that is notified under subpart D shall provide information to the Staff Chairperson that will enable the Committee to conduct a full review and/or investigation of the proposed transaction, and shall promptly advise the Staff Chairperson of any material changes in plans or information pursuant to § 800.402(h). If deemed necessary by the Committee, information may be obtained from parties to a transaction or other persons through subpoena or otherwise, pursuant to 50 U.S.C. App. 2155(a).

(b) Documentary materials or information required or requested to be filed with the Committee under this part shall be submitted in English. Supplementary materials, such as annual reports, written in a foreign language, shall be submitted in certified English translation.

(c) Any information filed with the Committee by a party to a covered transaction in connection with any action for which a report is required pursuant to section 721(l)(3)(B) with respect to the implementation of a mitigation agreement or condition described in section 721(l)(1)(A) shall be accompanied by a certification that complies with the requirements of section 721(n) and § 800.202. A sample certification may be found at the Committee's section of the Department of the Treasury Web site at http://www.treas.gov/offices/international-affairs/cfius/index.shtml.

(d) At the conclusion of a review or investigation, each party that has filed additional information subsequent to the original notice shall file a final certification. (See § 800.202.) A sample certification may be found at the Committee's section of the Department of the Treasury Web site at http://www.treas.gov/offices/international-affairs/cfius/index.shtml.

YY. *§ 800.702 Confidentiality.*

(a) Any information or documentary material filed with the Committee pursuant to this part, including information or documentary material filed pursuant to § 800.401(f), shall be exempt from disclosure under 5 U.S.C. 552 and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding. Nothing in this part shall be construed to prevent disclosure to either House of Congress or to any duly authorized committee or subcommittee of the Congress, in accordance with subsections (b)(3) and (g)(2)(A) of section 721.

(b) This section shall continue to apply with respect to information and documentary material filed with the Committee in any case where:

(1) Action has concluded under section 721 concerning a notified transaction;

(2) A request to withdraw notice is granted under § 800.507, or where notice has been rejected under § 800.403;

(3) The Committee determines that a notified transaction is not a covered transaction; or

(4) Such information or documentary material was filed pursuant to § 800.401(f) and the parties do not subsequently file a notice pursuant to § 800.401(a).

(c) Nothing in paragraph (a) of this section shall be interpreted to prohibit the public disclosure by a party of documentary material or information that it has filed with the Committee. Any such documentary material or information so disclosed may subsequently be reflected in the public statements of the Chairperson, who is authorized to communicate with the public and the Congress on behalf of the Committee, or of the Chairperson's designee.

(d) The provisions of 50 U.S.C. App. 2155(d) relating to fines and imprisonment shall apply with respect to the disclosure of information or documentary material filed with the Committee under these regulations.

ZZ. *§ 800.801 Penalties.*

(a) Any person who, after the effective date, intentionally or through gross negligence, submits a material misstatement or omission in a notice or makes a false certification under §§ 800.402(l) or 800.701(c) may be liable to the United States for a civil penalty not to exceed $250,000 per violation. The amount of the penalty assessed for a violation shall be based on the nature of the violation.

(b) Any person who, after the effective date, intentionally or through gross negligence, violates a material provision of a mitigation agreement entered into with, or a material condition imposed by, the United States under section 721(l) may be liable to the United States for a civil penalty not to exceed $250,000 per violation or the value of the transaction, whichever is greater. Any penalty assessed under this paragraph shall be based on the nature of the violation and shall be separate and apart from any damages sought pursuant to a mitigation agreement under section 721(l), or any action taken under section 721(b)(1)(D).

(c) A mitigation agreement entered into or amended under section 721(l) after the effective date may include a provision providing for liquidated or actual damages for breaches of the agreement by parties to the transaction. The Committee shall set the amount of any liquidated damages as a reasonable assessment of the harm to the national security that could result from a breach of the agreement. Any mitigation agreement containing a liquidated damages provision shall include a provision specifying that the Committee will consider the severity of the breach in deciding whether to seek a lesser amount than that stipulated in the contract.

(d) A determination to impose penalties under paragraph (a) or (b) of this section must be made by the named members of the Committee, except to the extent delegated by such official. Notice of the penalty, including a written explanation of the penalized conduct and the amount of the penalty, shall be sent to the penalized party by U.S. mail.

(e) Upon receiving notice of the imposition of a penalty under paragraph (a) or (b) of this section, the penalized party may, within 15 days of receipt of the notice of the penalty, submit a petition for reconsideration to the Staff Chairperson, including a defense, justification, or explanation for the penalized conduct. The Committee will review the petition and issue a final decision within 15 days of receipt of the petition.

(f) The penalties authorized in paragraphs (a) and (b) of this section may be recovered in a civil action brought by the United States in federal district court.

(g) The penalties available under this section are without prejudice to other penalties, civil or criminal, available under law

CHAPTER 15 DELAWARE REVISED UNIFORM LIMITED PARTNERSHIP ACT—SELECTED PROVISIONS

[*See* Section 27.7, Introduction to Joint Ventures of Business Planning for Mergers and Acquisitions]

Delaware Revised Uniform Limited Partnership Act, as amended and in effect on August 1, 1999

A. *§ 17-101. Definitions.*

As used in this chapter unless the context otherwise requires:

(1) "Certificate of limited partnership" means the certificate referred to in § 17-201 of this title, and the certificate as amended. * * *

B. *§ 17-102. Name set forth in certificate.*

The name of each limited partnership as set forth in its certificate of limited partnership:

(1) Shall contain the words "Limited Partnership" or the abbreviation "L.P." or the designation "LP"; * * *

C. *§ 17-106. Nature of business permitted; powers.*

(a) A limited partnership may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of granting policies of insurance, or assuming insurance risks or banking as defined in § 126 of Title 8.

(b) A limited partnership shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its partnership agreement, together with any powers incidental thereto, including such powers and privileges as are necessary or convenient to the conduct, promotion or attainment of the business, purposes or activities of the limited partnership.

D. *§ 17-107. Business transactions of partner with the partnership.*

Except as provided in the partnership agreement, a partner may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for, and transact other business with, the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

E. *§ 17-108. Indemnification.* * * *

Subject to such standards and restrictions, if any, as are set forth in its partnership agreement, a limited partnership may, and shall have the power to, indemnify and hold harmless any partner or other person from and against any and all claims and demands whatsoever. * * *

F. *§ 17-201. Certificate of limited partnership.*

(a) In order to form a limited partnership 1 or more persons (but not less than all of the general partners) must execute a certificate of limited partnership. The certificate of limited partnership shall be filed in the Office of the Secretary of State and set forth:

(1) The name of the limited partnership;

(2) The address of the registered office and the name and address of the registered agent for service of process required to be maintained by § 17-104 of this title;

(3) The name and the business, residence or mailing address of each general partner; and

(4) Any other matters the partners determine to include therein. * * *

G. § 17-301. Admission of limited partners.

(a) In connection with the formation of a limited partnership, a person is admitted as a limited partner of the limited partnership upon the later to occur of:

(1) The formation of the limited partnership; or

(2) The time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, when the person's admission is reflected in the records of the limited partnership.

(b) After the formation of a limited partnership, a person is admitted as a limited partner of the limited partnership:

(1) In the case of a person who is not an assignee of a partnership interest, including a person acquiring a partnership interest directly from the limited partnership and a person to be admitted as a limited partner of the limited partnership without acquiring a partnership interest in the limited partnership, at the time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the consent of all partners and when the person's admission is reflected in the records of the limited partnership;

(2) In the case of an assignee of a partnership interest, as provided in § 17-704(a) of this title and at the time provided in and upon compliance with the partnership agreement or, if the partnership agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited partnership; * * *

H. § 17-303. Liability to third parties.

(a) A limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business. However, if the limited partner does participate in the control of the business, he is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner. * * *

I. § 17-305. Access to and confidentiality of information; records.

(a) Each limited partner has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners, to obtain from the general partners from time to time upon reasonable demand for any purpose reasonably related to the limited partner's interest as a limited partner:

(1) True and full information regarding the status of the business and financial condition of the limited partnership;

(2) Promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year; * * *

J. *§ 17-401. Admission of general partners.*

(a) A person may be admitted to a limited partnership as a general partner of the limited partnership and may receive a partnership interest in the limited partnership without making a contribution or being obligated to make a contribution to the limited partnership. * * *

K. *§ 17-403. General powers and liabilities.*

(a) Except as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.

(b) Except as provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners. * * *

L. *§ 17-404. Contributions by a general partner.*

A general partner of a limited partnership may make contributions to the limited partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the rights and powers, and is subject to the restrictions, of a limited partner to the extent of his participation in the partnership as a limited partner.

M. *§ 17-501. Form of contribution.*

The contribution of a partner may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

N. *§ 17-502. Liability for contribution.*

(a) (1) Except as provided in the partnership agreement, a partner is obligated to the limited partnership to perform any promise to contribute cash or property or to perform services, even if he is unable to perform because of death, disability or any other reason. * * *

O. *§ 17-503. Allocation of profits and losses.*

The profits and losses of a limited partnership shall be allocated among the partners, and among classes or groups of partners, in the manner provided in the partnership agreement. * * *

P. *§ 17-504. Allocation of distributions.*

Distributions of cash or other assets of a limited partnership shall be allocated among the partners, and

among classes or groups of partners, in the manner provided in the partnership agreement. * * *

Q. ***§ 17-602. Withdrawal of general partner and assignment of general partner's partnership interest.***

(a) A general partner may withdraw from a limited partnership at the time or upon the happening of events specified in the partnership agreement and in accordance with the partnership agreement. * * *

R. ***§ 17-603. Withdrawal of limited partner.***

A limited partner may withdraw from a limited partnership only at the time or upon the happening of events specified in the partnership agreement and in accordance with the partnership agreement. * * *

S. ***§ 17-604. Distribution upon withdrawal.***

Except as provided in this subchapter, upon withdrawal any withdrawing partner is entitled to receive any distribution to which such partner is entitled under a partnership agreement and, if not otherwise provided in a partnership agreement, such partner is entitled to receive, within a reasonable time after withdrawal, the fair value of such partner's partnership interest in the limited partnership as of the date of withdrawal based upon such partner's right to share in distributions from the limited partnership.

T. ***§ 17-605. Distribution in kind.***

Except as provided in the partnership agreement, a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. * * *

U. ***§ 17-607. Limitations on distribution.***

(a) A limited partnership shall not make a distribution to a partner to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of the limited partnership, exceed the fair value of the assets of the limited partnership, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited partnership only to the extent that the fair value of that property exceeds that liability. * * *

V. ***§ 17-701. Nature of partnership interest.***

A partnership interest is personal property. A partner has no interest in specific limited partnership property.

W. ***§ 17-702. Assignment of partnership interest.***

(a) Unless otherwise provided in the partnership agreement:

(1) A partnership interest is assignable in whole or in part;

(2) An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights or powers of a partner;

(3) An assignment of a partnership interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or

credit or similar item to which the assignor was entitled, to the extent assigned; and

(4) A partner ceases to be a partner and to have the power to exercise any rights or powers of a partner upon assignment of all of his partnership interest. * * *

X. *§ 17-704. Right of assignee to become limited partner.*

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that:

(1) The partnership agreement so provides; or

(2) All partners consent. * * *

Y. *§ 17-801. Nonjudicial dissolution.*

A limited partnership is dissolved and its affairs shall be wound up upon the first to occur of the following:

(1) At the time or upon the happening of events specified in the partnership agreement, but if no such time or event is specified in the partnership agreement, then the limited partnership shall have a perpetual existence;

(2) Unless otherwise provided in a partnership agreement, upon the affirmative vote or written consent of (a) all general partners and (b) the limited partners of a limited partnership or, if there is more than one class or group of limited partners, then by each class or group of limited partners, in either case, by limited partners who own more than two-thirds of the then current percentage or other interest in the profits of the limited partnership owned by all of the limited partners or by the limited partners in each class or group, as appropriate;

(3) An event of withdrawal of a general partner unless at the time there is at least 1 other general partner and the partnership agreement permits the business of the limited partnership to be carried on by the remaining general partner and that partner does so * * *

Z. *§ 17-804. Distribution of assets.*

(a) Upon the winding up of a limited partnership, the assets shall be distributed as follows:

(1) To creditors, including partners who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited partnership (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to partners and former partners under § 17-601 or § 17-604 of this title;

(2) Unless otherwise provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under § 17-601 or § 17-604 of this title; and

(3) Unless otherwise provided in the partnership agreement, to partners first for the return of their contributions and second respecting their partnership interests, in the proportions in which the partners share in distributions. * * *

AA. *§ 17-901. Law governing.*

(a) Subject to the Constitution of the State of Delaware:

(1) The laws of the State, territory, possession, or other jurisdiction or country under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited

partners; * * *

SUBCHAPTER X-DERIVATIVE ACTIONS
* * *

BB. ***§ 17-1101. Construction and application of chapter and partnership agreement.*** * * *

(c) It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.

(d) To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited partnership or to another partner,

(1) any such partner or other person acting under a partnership agreement shall not be liable to the limited partnership or to any such other partner for the partner's or other person's good faith reliance on the provisions of such partnership agreement, and

(2) the partner's or other person's duties and liabilities may be expanded or restricted by provisions in a partnership agreement.

CC. ***§ 17-1105. Cases not provided for in this chapter.***

In any case not provided for in this chapter the Delaware Uniform Partnership Law (Chapter 15 of this title) and the rules of law and equity, including the Law Merchant, shall govern. * * *

CHAPTER 16 Delaware Limited Liability Company Act – Selected Provisions

[*See* Section 27.7, Introduction to Joint Ventures of Business Planning for Mergers and Acquisitions]

DELAWARE LIMITED LIABILITY COMPANY ACT AS AMENDED AND IN EFFECT ON AUGUST 1, 1999

A. *§ 18-101. Definitions.*

As used in this chapter unless the context otherwise requires: * * *

(2) "Certificate of formation" means the certificate referred to in § 18-201 of this chapter, and the certificate as amended. * * *

(7) "Limited liability company agreement" means any agreement, written or oral, of the member or members as to the affairs of a limited liability company and the conduct of its business. * * *

B. *§ 18-102. Name set forth in certificate.*

The name of each limited liability company as set forth in its certificate of formation:

(1) Shall contain the words "Limited Liability Company" or the abbreviation "L.L.C." or the designation "LLC"; * * *

(2) May contain the name of a member or manager; * * *

C. *§ 18-106. Nature of business permitted; powers.*

(a) A limited liability company may carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of granting policies of insurance, or assuming insurance risks or banking as defined in § 126 of Title 8.

(b) A limited liability company shall possess and may exercise all the powers and privileges granted by this chapter or by any other law or by its limited liability company agreement, together with any powers incidental thereto, including such powers and privileges as are necessary or convenient to the conduct, promotion or attainment of the business, purposes or activities of the limited liability company.

D. *§ 18-107. Business transactions of member or manager with the limited liability company.*

Except as provided in a limited liability company agreement, a member or manager may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more obligations of, provide collateral for, and transact other business with, a limited liability company and, subject to other applicable law, has the same rights and obligations with respect to any such matter as a person who is not a member or manager.

E. *§ 18-108. Indemnification.*

Subject to such standards and restrictions, if any, as are set forth in its limited liability company agreement, a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager

or other person from and against any and all claims and demands whatsoever. * * *

F. *§ 18-201. Certificate of formation.*

(a) In order to form a limited liability company, 1 or more authorized persons must execute a certificate of formation. The certificate of formation shall be filed in the Office of the Secretary of State and set forth:

(1) The name of the limited liability company;

(2) The address of the registered office and the name and address of the registered agent for service of process required to be maintained by § 18-104 of this chapter; and

(3) Any other matters the members determine to include therein. * * *

G. *§ 18-301. Admission of members.*

(a) In connection with the formation of a limited liability company, a person is admitted as a member of the limited liability company upon the later to occur of:

(1) The formation of the limited liability company; or

(2) The time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, when the person's admission is reflected in the records of the limited liability company.

(b) After the formation of a limited liability company, a person is admitted as a member of the limited liability company:

(1) In the case of a person who is not an assignee of a limited liability company interest, including a person acquiring a limited liability company interest directly from the limited liability company and a person to be admitted as a member of the limited liability company without acquiring a limited liability company interest in the limited liability company, at the time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company;

(2) In the case of an assignee of a limited liability company interest, as provided in § 18-704(a) of this chapter and at the time provided in and upon compliance with the limited liability company agreement or, if the limited liability company agreement does not so provide, when any such person's permitted admission is reflected in the records of the limited liability company; * * *

H. *§ 18-303. Liability to third parties.*

(a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company. * * *

I. *§ 18-305. Access to and confidentiality of information; records.*

(a) Each member of a limited liability company has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at

whose expense) as may be set forth in a limited liability company agreement or otherwise established by the manager or, if there is no manager, then by the members, to obtain from the limited liability company from time to time upon reasonable demand for any purpose reasonably related to the member's interest as a member of the limited liability company:

(1) True and full information regarding the status of the business and financial condition of the limited liability company;

(2) Promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year; * * *

J. *§ 18-401. Admission of managers.*

A person may be named or designated as a manager of the limited liability company as provided in § 18-101(10) of this chapter.

K. *§ 18-402. Management of limited liability company.*

Unless otherwise provided in a limited liability company agreement, the management of a limited liability company shall be vested in its members in proportion to the then current percentage or other interest of members in the profits of the limited liability company owned by all of the members, the decision of members owning more than 50 percent of the said percentage or other interest in the profits controlling; * * *

L. *§ 18-403. Contributions by a manager.*

A manager of a limited liability company may make contributions to the limited liability company and share in the profits and losses of, and in distributions from, the limited liability company as a member. * * *

M. *§ 18-501. Form of contribution.*

The contribution of a member to a limited liability company may be in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

N. *§ 18-502. Liability for contribution.*

(a) Except as provided in a limited liability company agreement, a member is obligated to a limited liability company to perform any promise to contribute cash or property or to perform services, even if he is unable to perform because of death, disability or any other reason. * * *

O. *§ 18-503. Allocation of profits and losses.*

The profits and losses of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement. * * *

P. *§ 18-504. Allocation of distributions.*

Distributions of cash or other assets of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement. * * *

Q. *§ 18-605. Distribution in kind.*

Except as provided in a limited liability company agreement, a member, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited liability company in any form other than cash. * * *

R. *§ 18-701. Nature of limited liability company interest.*

A limited liability company interest is personal property. A member has no interest in specific limited liability company property.

S. *§ 18-702. Assignment of limited liability company interest.*

(a) A limited liability company interest is assignable in whole or in part except as provided in a limited liability company agreement. The assignee of a member's limited liability company interest shall have no right to participate in the management of the business and affairs of a limited liability company except as provided in a limited liability company agreement and upon:

(1) The approval of all of the members of the limited liability company other than the member assigning his limited liability company interest; or

(2) Compliance with any procedure provided for in the limited liability company agreement.

(b) Unless otherwise provided in a limited liability company agreement:

(1) An assignment of a limited liability company interest does not entitle the assignee to become or to exercise any rights or powers of a member;

(2) An assignment of a limited liability company interest entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned; * * *

T. *§ 18-704. Right of assignee to become member.*

(a) An assignee of a limited liability company interest may become a member as provided in a limited liability company agreement and upon:

(1) The approval of all of the members of the limited liability company other than the member assigning his limited liability company interest; or

(2) Compliance with any procedure provided for in the limited liability company agreement. * * *

U. *§ 18-801. Dissolution.*

(a) A limited liability company is dissolved and its affairs shall be wound up upon the first to occur of the following:

(1) At the time specified in a limited liability company agreement, but if no such time is set forth in the limited liability company agreement, then the limited liability company shall have a perpetual existence;

(2) Upon the happening of events specified in a limited liability company agreement; * * *

V. *§ 18-804. Distribution of assets.*

(a) Upon the winding up of a limited liability company, the assets shall be distributed as follows:

(1) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members and former members under § 18-601 or § 18-604 of this chapter;

(2) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under § 18-601 or § 18-604 of this chapter; and

(3) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions. * * *

W. ***§ 18-1101. Construction and application of chapter and limited liability company agreement.***
* * *

(c) To the extent that, at law or in equity, a member or manager or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited liability company or to another member or manager, (1) any such member or manager or other person acting under a limited liability company agreement shall not be liable to the limited liability company or to any such other member or manager for the member's or manager's or other person's good faith reliance on the provisions of the limited liability company agreement, and (2) the member's or manager's or other person's duties and liabilities may be expanded or restricted by provisions in a limited liability company agreement. * * *

X. ***§ 18-1104. Cases not provided for in this chapter.***

In any case not provided for in this chapter, the rules of law and equity, including the law merchant, shall govern. * * *

CHAPTER 17 ETHICS – SELECTED AUTHORITIES

[*See* Chapter 28 of Business Planning for Mergers and Acquisitions]

A. *Authorities on Issue #1, Dual Representation*

1. *RULE 1.7 ABA MODEL RULES OF PROFESSIONAL CONDUCT*

CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

2. *RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS, § 121*

§ 121 THE BASIC PROHIBITION OF CONFLICTS OF INTEREST

Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

3. *RULE 1.18 ABA MODEL RULES OF PROFESSIONAL CONDUCT*

DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received

information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

4. RULE 1.8 ABA MODEL RULES OF PROFESSIONAL CONDUCT
CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

5. RULE 2.1 ABA MODEL RULES OF PROFESSIONAL CONDUCT
ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

6. RULE 5.1 ABA MODEL RULES OF PROFESSIONAL CONDUCT
RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

B. Authorities on Issue #2, Success Fees

1. RULE 1.5 ABA MODEL RULES OF PROFESSIONAL CONDUCT
FEES

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

2. RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS, § 35
§35 CONTINGENT-FEE ARRANGEMENTS

(1) A lawyer may contract with a client for a fee the size or payment of which is contingent on the outcome of a matter, unless the contract violates § 34 or another provision of this restatement or the size or payment of the fee is:

(a) contingent on success in prosecuting or defending a criminal proceeding; or

(b) contingent on a specified result in a divorce proceeding or a proceeding concerning custody of a child.

(2) Unless the contract construed in the circumstances indicates otherwise, when a lawyer has contracted for a contingent fee, the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment.

C. Authorities on Issue #3, Potential Breach of Fiduciary Duty by CEO "Up the Ladder" Rules

1. RULE 1.6 ABA MODEL RULES OF PROFESSIONAL CONDUCT
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the

client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

2. RULE 1.13 ABA MODEL RULES OF PROFESSIONAL CONDUCT
ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged
because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

3. RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS, § 96

§ 96 REPRESENTING AN ORGANIZATION AS CLIENT

(1) When a lawyer is employed or retained to represent an organization:

(a) the lawyer represents the interests of the organization as defined by its responsible agents acting pursuant to the organization's decision-making procedures; and

(b) subject to Subsection (2), the lawyer must follow instructions in the representation, as stated in § 21(2), given by persons authorized so to act on behalf of the organization.

(2) If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

(3) In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

4. 15 U.S.C. 7245 (SARBANES-OXLEY ACT §307)

§ 7245 RULES OF PROFESSIONAL RESPONSIBILITY FOR ATTORNEYS

Not later than 180 days after the date of enactment of this Act [enacted July 30, 2002], the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

(1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and

(2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

5. 17 CFR 205.1 (SEC "UP THE LADDER" RULES)

§ 205.1 PURPOSE AND SCOPE

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

6. 17 CFR 205.2 (SEC "UP THE LADDER" RULES)

§ 205.2 DEFINITIONS

For purposes of this part, the following definitions apply:

(a) Appearing and practicing before the Commission:

(1) Means:

(i) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder * * *

(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable Federal or State statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur. * * *

(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under § 205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in § 205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

7. 17 CFR 205.3 (SEC "UP THE LADDER" RULES)

§ 205.3 ISSUER AS CLIENT

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not

employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section. * * *

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under § 205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c). * * *

8. 17 CFR 205.4 (SEC "UP THE LADDER" RULES)
§ 205.4 RESPONSIBILITIES OF SUPERVISORY ATTORNEYS * * *

9. 17 CFR 205.5 (SEC "UP THE LADDER" RULES)
§205.5 RESPONSIBILITIES OF A SUBORDINATE ATTORNEY. * * *

10. 17 CFR 205.6 (SEC "UP THE LADDER" RULES)
§205.6 SANCTIONS AND DISCIPLINE. * * *

11. 17 CFR 205.7 (SEC "UP THE LADDER" RULES)
§205.7 NO PRIVATE RIGHT OF ACTION. * * *

12. 17 CFR 205.3(d) (SEC PROPOSED "NOISY WITHDRAWAL" RULES)
§ 205.3(d) - *PROPOSED*

(d) Notice to the Commission where there is no appropriate response within a reasonable time.

(1) Where an attorney who has reported evidence of a material violation under paragraph 3(b) of this section report of material violation to CLO and CEO rather than paragraph 3(c) report to a QLCC of this section does not receive an appropriate response, or has not received a response in a reasonable time, to his or her report, and the attorney reasonably believes that a material violation is ongoing or is about to occur and is likely to result in substantial injury to the financial interest or property of the issuer or of investors:

(i) An attorney retained by the issuer shall:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal is based on professional considerations;

(B) Within one business day of withdrawing, give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Promptly disaffirm to the Commission any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; * * *

(i) An attorney retained by the issuer may:

(A) Withdraw forthwith from representing the issuer, indicating that the withdrawal was based on professional considerations;

(B) Give written notice to the Commission of the attorney's withdrawal, indicating that the withdrawal was based on professional considerations; and

(C) Disaffirm to the Commission, in writing, any opinion, document, affirmation, representation, characterization, or the like in a document filed with or submitted to the Commission, or incorporated into such a document, that the attorney has prepared or assisted in preparing and that the attorney reasonably believes is or may be materially false or misleading; * * *

13. ALTERNATIVE PROPOSAL TO SEC PROPOSED "NOISY WITHDRAWAL" RULES
§ 205.3(d)-(f) – *ALTERNATIVELY PROPOSED*

(d) Actions required where there is no appropriate response within a reasonable time.

(1) Where an attorney who has reported evidence of a material violation under paragraph (b) report of material violation to CLO or CEO of this section rather than paragraph (c) report to a QLCC of this section (i) does not receive an appropriate response, or has not received an appropriate response in a reasonable time, and (ii) has followed the procedures set forth in paragraph (b)(3) of this section, and (iii) reasonably concludes that there is substantial evidence of a material violation that is ongoing or about to occur and is likely to cause substantial injury to the financial interest or property of the issuer or of investors:

(A) An attorney retained by the issuer shall withdraw from representing the issuer, and shall notify the issuer, in writing, that the withdrawal is based on professional considerations. * * *

(2) An attorney shall not be required to take any action pursuant to paragraph (d)(1)(A) or (B) of this section if the attorney would be prohibited from doing so by order or rule of any court, administrative body or other authority with jurisdiction over the attorney, after having sought leave to withdraw from representation or to cease participation or assistance in a matter. An attorney shall give notice to the issuer that, but for such prohibition, he or she would have taken such action pursuant to paragraph (d)(1)(A) or (B), and such notice shall be deemed the equivalent of such action for purposes of this part. * * *

D. Authorities on Issue #4, Defensive Tactics

1. RULE 1.7 ABA MODEL RULES OF PROFESSIONAL CONDUCT
CONFLICT OF INTEREST: CURRENT CLIENTS

See Chapter 16.A, Authorities on Issue #1.

2. ***RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS, § 121***
§ 121 THE BASIC PROHIBITION OF CONFLICTS OF INTEREST

See Section Chapter 16.A, Authorities on Issue #1.

3. ***17 CFR 205.1 (SEC "UP THE LADDER" RULES)***
§ 205.1 PURPOSE AND SCOPE

See Chapter 16.C, Authorities on Issue #3.

4. ***17 CFR 205.2 (SEC "UP THE LADDER" RULES)***
§ 205.2 DEFINITIONS

See Chapter 16.C, Authorities on Issue #3.

5. ***17 CFR 205.3 (SEC "UP THE LADDER" RULES)***
§ 205.3 ISSUER AS CLIENT

See Chapter 16.C, Authorities on Issue #3.

6. ***17 CFR 205.3(d) (SEC PROPOSED "NOISY WITHDRAWAL" RULES)***
§ 205.3(d) - *PROPOSED*

See Chapter 16.C, Authorities on Issue #3.

7. ***ALTERNATIVE PROPOSAL TO SEC PROPOSED "NOISY WITHDRAWAL" RULES***
§ 205.3(d)-(f) – *ALTERNATIVELY PROPOSED*

See Chapter 16.C, Authorities on Issue #3.

E. *Authorities on Issue #5, Counsel for Company and Controlling Shareholder*

1. ***ALI'S PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDS., § 5.16***
§ 5.16 Disposition Of Voting Equity Securities By A Controlling Shareholder To Third Parties

A controlling shareholder [§ 1.10] has the same right to dispose of voting equity securities [§ 1.40] as any other shareholder, including the right to dispose of those securities for a price that is not made proportionally available to other shareholders, but the controlling shareholder does not satisfy the duty of fair dealing to the other shareholders if:

(a) The controlling shareholder does not make disclosure concerning the transaction [§ 1.14(b)] to other shareholders with whom the controlling shareholder deals in connection with the transaction; or

(b) It is apparent from the circumstances that the purchaser is likely to violate the duty of fair dealing under Part V in such a way as to obtain a significant financial benefit for the purchaser or an associate [§ 1.03].

2. ***RULE 1.7 ABA MODEL RULES OF PROFESSIONAL CONDUCT***
CONFLICT OF INTEREST: CURRENT CLIENTS

See Chapter 16.A, Authorities on Issue #1.

3. ***RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS, § 121***
§ 121 THE BASIC PROHIBITION OF CONFLICTS OF INTEREST

See Chapter 16.A, Authorities on Issue #1.

F. Authorities on Issue #6, Whistleblowing

1. SECTION 806 OF SARBANES OXLEY, TITLE 18, SECTION 1514

SEC. 806PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD

SEC. 806. PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES WHO PROVIDE EVIDENCE OF FRAUD.
(a) IN GENERAL.—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:
''§ 1514A. Civil action to protect against retaliation in fraud cases
''(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 8o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—
''(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—
''(A) a Federal regulatory or law enforcement agency;
''(B) any Member of Congress or any committee of Congress; or
''(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
''(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. * * *

2. SECTION 1107 OF SARBANES OXLEY, TITLE 18, SECTION 1513(E)

SEC. 1107 RETALIATION AGAINST INFORMANTS

SEC. 1107. RETALIATION AGAINST INFORMANTS.
(a) IN GENERAL.—Section 1513 of title 18, United States Code, is amended by adding at the end the following:
''(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.''.

CHAPTER 18 DOCUMENTARY APPENDICES

Appendices are numbered as follows: A-1, A-2; B-1, B-2; etc.

Documentary Appendix

A. Time-Warner Reverse Subsidiary Stock Merger Agreement
B. Time-Warner Reverse Subsidiary Stock Merger S-4
C. Valuation of Warner
D. JP Morgan Chase-Bank One Direct Stock Merger Agreement
E. JP Morgan Chase-Bank One Direct Stock Merger S-4
F. Toys Reverse Subsidiary Cash Merger Agreement
G. Toys Reverse Subsidiary Cash Merger Proxy Statement
H. Oracle-Siebel Horizontal Double Dummy Form 8-K and Merger Agreement
I. Whirlpool-Maytag Antitrust Provisions
J. Description of the MCI Poison Pill
K. MCI-Verizon Deal Protection Devices
L. Goldman-Kinder Morgan 13D
M. Oracle Tender Offer for PeopleSoft
N. Oracle-PeopleSoft Summary Advertisement
O. PeopleSoft 14D-9 Statement
P. Cox Communications Combined Tender Offer and Going Private Merger Agreement
Q. Cox Communications Going Private Tender Offer/Merger Offer Document
R. AT&T-Comcast Spin-Off and Merger
S. British Telecom-MCI Cross-Border Merger Agreement
T. Greenhill IPO
U. Annotated Sample Stock Purchase Agreement
V. Annotated Sample Asset Acquisitions Agreement
W. Goldman Certificate of Incorporation
X. Goldman Bylaws
Y. TWA Bankruptcy Sale to American
Z. TXU LBO, Go Shop; Breakup and Reverse Breakup Fees; Financing; Reg. Approvals
AA. Partnership Joint Venture Agreement for Sprint Spectrum
BB. Limited Liability Company Joint Venture Agreement
CC. Confidentiality Agreement, Koch-Georgia Pacific
DD. Acquiror's Due Diligence Checklist for Target
EE. Letter of Intent, Perfectdatasona
FF. Exclusivity Agreement between Citicorp and Wachovia
GG. Excerpts From Schedule 13E-3 And Proxy Statement For LNR's Freezeout Merger/MBO
HH. Documents Relating to Air Products 2010 Proxy Contest to Elect Directors to the Boardof Airgas
II. Documents Relating To The Tender Offer By Mallinckrodt PLC For The Stock Of Candice Pursuant To A Merger Agreement With A Section 251(h) Second Step Merger Provision
JJ. Combination Tender Offer/Merger Agreement With A Top-Up Option—Wild Oats
KK.. Joint Announcment Of A Firm Intention By Wallmart To Make An Offer To Aquire 51% of South Africa's Massmart
LL. Shareholder Circular For Walmart's Acquisition of 51% of Shares of south Africa's Massmart
MM. Joint Announcement Of Possible Voluntary Conditional Offer By Coca-Cola For China's Huiyuan Juice Group
NN. Stock Purchase Agreement Pursuant To Which A Singaporean Subsidiary Of H.B. Fuller Aquires China's Tonsan

DOCUMENTARY APPENDIX A, TIME-WARNER REVERSE SUBSIDIARY STOCK MERGER AGREEMENT

[*See* Principally Chapters 2 and 15 of Business Planning for Mergers and Acquisitions]

AGREEMENT AND PLAN OF MERGER dated as of March 3, 1989, as amended and restated as of May 19, 1989, among TIME INCORPORATED, a Delaware corporation (Time), TW SUB Inc, a Delaware corporation and a wholly owned subsidiary of Time (Sub), and WARNER COMMUNICATIONS INC., a Delaware corporation (WCI).

WHEREAS the respective Boards of Directors of Time, Sub and WCI have approved the merger of WCI and SUB;

WHEREAS, to effect such transaction, the respective Boards of Directors of Time, Sub and WCI, and Time acting as the sole stockholder of Sub, have approved the merger of WCI and Sub (the Merger), pursuant and subject to the terms and conditions of this Agreement, whereby each issued and outstanding share of Common Stock, par value $1 per share, of WCI (WCI Common Stock) not owned directly or through a wholly-owned Subsidiary by Time or directly by WCI will be converted into the right to receive Common Stock, par value $1.00 per share, of Time (Time Common Stock) and each issued and outstanding share of Preferred Stock, par value $1 per share, of WCI (WCI Preferred Stock) not owned directly or through a wholly-owned Subsidiary by Time or WCI will be converted into the right to receive Preferred Stock, par value $1.00 per share, of Time all as provided herein;

WHEREAS Time, Sub and WCI desire to make certain representations, warranties and agreements in connection with the Merger and also to prescribe various condition to the Merger;

* * *

NOW, THEREFORE, pursuant to Section 7.3 of the March Agreement and in consideration of the premises and the representations, warranties and agreements herein contained, the March Agreement, as amended by Amendment No. 1, is hereby amended and restated in its entirety to read as follows:

ARTICLE I
THE MERGER

[*See* Chapters 2 and 15]

1.1 *Effective Time of the Merger*. Subject to the provisions of this Agreement, a certificate of merger (the Certificate of Merger) shall be duly prepared, executed and acknowledged by the Surviving Corporation (as defined in Section 1.3) and thereafter delivered to the Secretary of State of the State of Delaware, for filing, as provided in the Delaware General Corporation Law (the DGCL), as soon as practicable on or after the Closing Date (as defined in Section 1.2). The Merger shall become effective upon the filing of the Certificate of Merger with the Secretary of State of the State of Delaware or at such time thereafter as is provided in the Certificate of Merger (the Effective Time).

* * *

1.2 *Closing*. The closing of the Merger (the Closing) will take place at 10:00 a.m. on a date to be specified by the parties, which shall be no later than the second business day after satisfaction of the latest to occur of [certain specified] conditions * * *.

COMMENT

The closing conditions are set forth in Article VI of this Agreement. (*See* Chapter 15)

* * *

1.3 *Effects of the Merger*. (a) At the Effective Time, (i) the separate existence of Sub shall cease and Sub shall be

merged with and into WCI (Sub and WCI are sometimes referred to herein as the "Constituent Corporations" and WCI is sometimes referred to herein as the "Surviving Corporation), (ii) the Certificate of Incorporation of WCI shall be amended so that Article FOURTH of such Certificate of Incorporation reads in its entirety as follows: "The total number of shares of all classes of stock which the Corporation shall have authority to issue is 1,000, all of which shall consist of Common Stock, par value $1 per share.", and, as so amended, such Certificate shall be the Certificate of Incorporation of the Surviving Corporation and (iii) the By-laws of WCI as in effect immediately prior to the Effective Time shall be the By-laws of the Surviving Corporation.

COMMENT

This section describes the reverse subsidiary merger of Sub into WCI. (*See* Chapter 2) The amendment of WCI's certificate to reduce the number of its authorized shares reduces the amount of franchise tax WCI has to pay the state of Delaware.

* * *

(b) At and after the Effective Time, the Surviving Corporation shall possess all the rights, privileges, powers and franchises of a public as well as of a private nature, and be subject to all the restrictions, disabilities and duties of each of the Constituent Corporations; and all and singular rights, privileges, powers and franchises of each of the Constituent Corporations, and all property, real, personal and mixed, and all debts due to either of the Constituent Corporations on whatever account, as well as for stock subscriptions and all other things in action or belonging to each of the Constituent Corporations, shall be vested in the Surviving Corporations; *** * ***.

COMMENT

This section, which is legally not required, sets out the effect of the merger as provided in Section 259(a) of the Delaware General Corporation Law. (*See* Chapter 2)

* * *

ARTICLE II
EFFECT OF THE MERGER ON THE CAPITAL STOCK OF THE CONSTITUENT CORPORATIONS; EXCHANGE OF CERTIFICATES

[*See* Chapter 2]

2.1 *Effect on Capital Stock.* As of the Effective Time, by virtue of the Merger and without any action on the part of the holder of any shares of WCI Common Stock, WCI Preferred stock or capital stock of Sub:

(a) *Capital Stock of Sub.* Each issued and outstanding share of the capital stock of Sub shall be converted into and become one fully paid and nonassessable share of Common Stock, par value $1 per share, of the Surviving Corporation.

(b) *Cancellation of Treasury Stock and Time-Owned Stock*. *** * ***

(c) *Exchange Ratio for WCI Common Stock.* Subject to Section 2.2(e), each issued and outstanding share of WCI Common Stock (other than shares to be canceled in accordance with Section 2.1(b) shall be converted into the right to receive, .465, subject to adjustment in accordance with Section 2.1(f) (the Conversion Number), of a fully paid and nonassessable share of Time Common Stock including the corresponding percentage of a right (the Right) to purchase shares of Series A Participating Preferred Stock of Time (the Time Series A Preferred) pursuant to the Rights Agreement dated as of April 29, 1986, between Time and Morgan Shareholder Services Trust Company of New York, as Rights Agent *** * *** (the Rights Agreement). Prior to the Distribution Date (as defined in the Rights Agreement) all references in this Agreement to the Time Common Stock to be received pursuant to the Merger shall be deemed to include the Rights. All such shares of WCI Common Stock shall no longer be outstanding and shall automatically be canceled and retired and shall cease to exist, and each holder of a certificate representing any such shares shall cease to have any rights with respect thereto, except the right to receive the shares of Time Common Stock to be issued in consideration therefor upon the surrender of such

certificate in accordance with Section 2.2, without interest.

(d) *Exchange of Preferred Stock.* * * *

(e) *Shares of Dissenting Holders.* Any issued and outstanding shares of WCI Series B Preferred held by a Dissenting Holder shall not be converted as described in Section 2.1(d) but shall from and after the Effective Time represent only the right to receive such consideration as may be determined to be due to such Dissenting Holder pursuant to the DGCL; * * *.

* * *

2.2 *Exchange of Certificates.* (a) *Exchange Agent.* As of the Effective Time, Time shall deposit with Manufacturers Hanover Trust Company or such other bank or trust company designated by Time (and reasonably acceptable to WCI) (the Exchange Agent), for the benefit of the holders of shares of WCI Common Stock and WCI Series B Preferred, for exchange in accordance with this Article II, through the Exchange Agent, certificates representing the shares of Time Common Stock and Time Series BB Preferred (such share of Time Common Stock and Time Series BB Preferred, together with any dividends or distributions with respect thereto, being hereinafter referred to as the "Exchange Fund) issuable pursuant to Section 2.1 in exchange for outstanding shares of WCI Common Stock and WCI Series B Preferred. * * *

COMMENT

The above section specifies what happens to the outstanding Warner shares as a result of the reverse subsidiary merger. Pursuant to Section 2.1(a), Time has its stock in Sub converted into stock in Warner and Time thereby becomes the sole shareholder of Warner. Pursuant to Section 2.1(c) and (d), the Warner common and preferred shareholders have their shares converted to Time common and preferred shares, respectively; and pursuant to Section 2.1(e), the shares of the dissenting preferred shareholders are cancelled. (*See* Chapter 2) The transaction qualifies as a reverse subsidiary merger reorganization under Section 368(a)(2)(E). (*See* Chapter 5) The Warner common shareholders have no dissenters' rights. (*See* Chapter 2) Sometimes a limit is put on the number of dissenting shareholders to preserve cash or to preserve continuity of interest for a tax-free reorganization (*see* Chapter 5).

The exchange ratio for common shares was set at .465 shares of Time for each share of Warner. Some merger agreements put limits on the exchange ratio to account for unexpected price movements in the stock of the parties between the date of signing and the date of closing. (*See* Chapter 15)

* * *

ARTICLE III
REPRESENTATIONS AND WARRANTIES

[*See* Chapter 15]

3.1 *Representations and Warranties of WCI.* WCI represents and warrants to Time and Sub as follows:

(a) *Organization, Standing and Power.* Each of WCI and its Significant Subsidiaries is a corporation or partnership duly organized, validly existing and in good standing under the laws of its state of incorporation or organization, has all requisite power and authority to own, lease and operate its properties and to carry on its business as now being conducted, and is duly qualified and in good standing to do business in each jurisdiction in which the nature of its business or the ownership or leasing of its properties makes such qualification necessary other than in such jurisdictions where the failure so to qualify would not have a material adverse effect on WCI and its Subsidiaries taken as a whole. * * *

COMMENT

This is a standard representation and warranty. Note the no "material adverse effect" qualification. For an illustration of a merger agreement with a definition of "Material Adverse Effect," see Appendix F, Section 1.01.

* * *

(b) *Capital Structure.* As of the date hereof, the authorized capital stock of WCI consists of 500,000,000 shares of WCI Common Stock and 50,000,000 shares of WCI Preferred Stock. At the close of business on February 17, 1989, (i) 143,750,284 share of WCI Common Stock were outstanding. * * *

All outstanding shares of WCI capital stock are, and any shares of WCI Common Stock issued pursuant to the Share Exchange Agreement dated as of March 3, 1989, as amended, by and between Time and WCI (the Share Exchange Agreement) will be validly issued, fully paid and nonassessable and not subject to preemptive rights. * * *

COMMENT

It is important for both parties to understand precisely the capital structure of the target corporation.

* * *

(c) *Authority*. WCI has all requisite corporate power and authority to enter into this Agreement and the Share Exchange Agreement and, subject to approval of this Agreement by the stockholders of WCI, to consummate the transactions contemplated hereby and thereby. The execution and delivery of this Agreement and the Share Exchange Agreement and the consummation of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of WCI, subject to such approval of this Agreement by the stockholders of WCI. This Agreement and the Share Exchange Agreement have been duly executed and delivered by WCI and, subject to such approval of this Agreement by the stockholders of WCI, each constitutes a valid and binding obligation of WCI enforceable in accordance with its terms. The execution and delivery of this Agreement and the Share Exchange Agreement do not, and the consummation of the transactions contemplated hereby and thereby will not, conflict with, or result in any violation of, or default (with or without notice or lapse of time, or both) under, or give rise to a right of termination, cancellation or acceleration of any obligation or the loss of any material benefit under * * * the Certificate of Incorporation or By-laws of WCI or any subsidiary of WCI * * *. * * *

COMMENT

It is important for the acquiror to know that the target has full authority to enter the transaction and that the transaction does not violate any material agreements to which the target is a party.

* * *

(d) *SEC Documents.* WCI has made available to Time a true and complete copy of each report, schedule, registration statement and definitive proxy statement filed by WCI with the SEC since January 1, 1986 (as such documents have since the time of their filing been amended, the "WCI SEC Documents) which are all the documents (other than preliminary material) that WCI was required to file with the SEC since such date. As of their respective dates, the WCI SEC Documents complied in all material respects with the requirements of the Securities Act of 1933, as amended (the Securities Act), or the Exchange Act, as the case may be, and the rules and regulations of the SEC thereunder applicable to such WCI SEC Documents * * * and none of the WCI SEC Documents contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. The financial statements of WCI included in the WCI SEC Documents comply as to form in all material respects with applicable accounting requirements and with the published rules and regulations of the SEC with respect thereto, have been prepared in accordance with generally accepted accounting principles applied on a consistent basis during the periods involved (except as may be indicated in the notes thereto or, in the case of the unaudited statements, as permitted by Form 10-Q of the SEC) and fairly present (subject, in the case of the unaudited statements, to normal, recurring audit adjustments) the consolidated financial position of WCI and its consolidated Subsidiaries (other than Lorimar) as at the dates thereof and the consolidated results of their operations and cash flows * * * for the periods then ended. To the best of WCI's knowledge, the inclusion of Lorimar in the financial statements referred to in the preceding sentence would not cause the representations contained in this Section 3.1(d) to be false.

COMMENT

It is standard to have a representation and warranty that restates Rule 10b-5 as above. Also, it is standard to receive a representation and warranty to the effect that the financial statements comply as to form in "all material respects" with applicable accounting requirements.

* * *

(e) *Information Supplied.* None of the information supplied or to be supplied by WCI for inclusion or incorporation by reference in (i) the registration statement on Form S-4 to be filed with the SEC by Time in connection with the issuance of shares of Time Common Stock and Time Series BB Preferred in the Merger (the S-4) will, at the time the S-4 is filed with the SEC and at the time it becomes effective under the Securities Act, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading, and (ii) the Proxy Statement will, at the date mailed to stockholders and at the times of the meetings of stockholders to be held in connection with the Merger, contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not misleading. The Proxy Statement will comply as to form in all material respects with the provisions of the Exchange Act and the rules and regulations thereunder.

COMMENT

This representation refers to action to be taken by Warner after the signing of the agreement and, therefore, is in effect a covenant rather than a statement of fact as in the case of most representations and warranties. The S-4 registration statement and the proxy rules are explored in Chapter 13.

* * *

(f) *Compliance with applicable Laws.* WCI and its Subsidiaries hold all permits, licenses, variances, exemptions, orders and approvals of all Governmental Entities which are material to the operation of the businesses of WCI and its Subsidiaries, taken as a whole (the WCI Permits). Subsidiaries are in compliance with the terms of the WCI Permits, except where the failure so to comply would not have a material adverse effect on WCI and its Subsidiaries taken as a whole. * * *

COMMENT

This representation has appropriate materiality qualifications. (*See* Chapter 15) For an illustration of a representation and warranty that the company has complied with the Sarbanes-Oxley Act, see Appendix F, Section 4.11.

* * *

(g) *Litigation.* As of the date of this Agreement, except as disclosed in the WCI SEC Documents filed prior to the date of this Agreement or in Schedule 3.1(g) hereto, there is no suit, action or proceeding pending, of, to the knowledge of WCI, threatened against or affecting WCI or any Subsidiary of WCI which is reasonably likely to have a material adverse effect on WCI and its Subsidiaries taken as a whole, nor is there any judgment, decree, injunction, rule or order of any Governmental Entity or arbitrator outstanding against WCI or any Subsidiary of WCI having, or which, insofar as reasonably can be foreseen, in the future could have, any such effect.

COMMENT

It is standard for the litigation representation of a large publicly held corporation like Warner to be qualified by the above "reasonably likely to have a material adverse effect" standard. (*See* Chapter 15)

* * *

(h). *Taxes.* To the best of WCI's knowledge, WCI and each of its Subsidiaries has filed all tax returns required to be filed by any of them and has paid * * * or has set up an adequate reserve for the payment of, all taxes required to be paid as shown on such returns and the most recent financial statements contained in the WCI SEC Documents reflect an adequate

reserve for all taxes payable by WCI and its Subsidiaries accrued through the date of such financial statements. No material deficiencies for any taxes aggregating in excess of $300,000,000 have been proposed, asserted or assessed against WCI or any of its Subsidiaries. Except with respect to claims for refund, the Federal income tax returns of WCI and each of its Subsidiaries consolidated in such returns have been examined by and settled with the United States Internal Revenue Service (the IRS), or the statute of limitations with respect to such years has expired, for all years through 1976. The Federal income tax returns of WCI and each of its Subsidiaries consolidated in such returns for the 1977-84 are currently under examination by the IRS. For the purpose of this Agreement, the term "tax" (including, with correlative meaning, the terms "taxes" and "taxable) shall include all Federal, state, local and foreign income, profits, franchise, gross receipts, payroll, sales, employment, use, property, withholding, excise and other taxes, duties or assessments of any nature whatsoever, together with all interest, penalties and additions imposed with respect to such amounts.

COMMENT

This representation is subject to a "knowledge" qualification. It deals with, among other things, (1) the "filing" of all returns, (2) the "payment" of, or adequate "reserve" for, all taxes shown on the returns, and (3) the "reserve" for all taxes otherwise accrued. For an illustration of a merger agreement with a definition of "Knowledge," see Appendix F, Section 1.01.

* * *

(j) *Benefit Plans.* (i) With respect to each employee benefit plan (including, without limitations, any "employee benefit plan", as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA)) (all the foregoing being herein called "Benefit Plans), maintained or contributed to by WCI or any of its Subsidiaries, WCI has made available to Time a true and correct copy of (a) the most recent annual report (Form 5500) filed with the IRS, (b) such Benefit Plan, (c) each trust agreement and group annuity contract, if any, relating to such Benefit Plan and (d) the most recent actuarial report or valuation relating to a Benefit Plan subject to Title IV of ERISA.

(ii) With respect to the Benefit Plans, individually and in the aggregate, no event has occurred, and to the knowledge of WCI or any of its Subsidiaries, there exists no condition or set of circumstances in connection with which WCI or any of its Subsidiaries could be subject to any liability that is reasonably likely to have a material adverse effect on WCI and its Subsidiaries, taken as a whole (except liability for benefits claims and funding obligations payable in the ordinary course) under ERISA, the Internal Revenue Code of 1986, as amended (the Code), or any other applicable law.

(iii) Except as set forth in Schedule 3.1(j), with respect to the Benefit Plans, individually and in the aggregate, there are no funded benefit obligations for which contributions have not been made or properly accrued and there are no unfunded benefit obligation which have not been accounted for by reserves, or otherwise properly footnoted in accordance with generally accepted accounting principles, on the financial statements of WCI or any of its Subsidiaries, which obligations are reasonably likely to have a material adverse effect on WCI and its Subsidiaries, taken as a whole.

COMMENT

If any significant employee benefit issues are presented, counsel should consult with an expert in such matters.

* * *

(k) *Patents, Trademarks, etc.* WCI and its Subsidiaries have all patents, trademarks, trade names, service marks, trade secrets, copyrights and other proprietary intellectual property rights as are material in connection with the businesses of WCI and its Subsidiaries, taken as a whole.

* * *

(m) *Absence of Certain Changes or Events.* Except as disclosed in the WCI SEC Documents filed prior to the date of this Agreement or in the audited consolidated balance sheet of WCI and its subsidiaries at December 31, 1988, and the related consolidated statements of operations, cash flows and changes in shareholders' equity (the WCI 1988 Financials), true and correct copies of which have been delivered to Time, or except as contemplated by this Agreement and the Share Exchange Agreement, since the date of the WCI 1988 Financials, WCI and its Subsidiaries have conducted their respective

businesses only in the ordinary and usual course, and, as of the date of this Agreement, there has not been (i) any damage, destruction or loss, whether covered by insurance or not, which has or insofar as reasonably can be foreseen in the future is reasonably likely to have, a material adverse effect on WCI and its Subsidiaries taken as a whole; (ii) any declaration, setting aside or payment of any dividend or other distribution (whether in cash, stock or property) with respect to any of WCI's capital stock, except for regular quarterly cash dividends of $.17 per share on WCI Common Stock and regular quarterly cash dividends on WCI Series B Preferred, in each case with usual record and payment dates for such dividends; or (iii) any transaction, commitment, dispute or other event or condition (financial or otherwise) of any character (whether or not in the ordinary course of business) individually or in the aggregate having or which, insofar as reasonably can be foreseen, in the future is reasonably likely to have, a material adverse effect on WCI and its Subsidiaries taken as a whole.

COMMENT

This representation and warranty covers the period between the date of the latest financials and the date of the signing of the agreement. (*See* Chapter 15)

* * *

(n) *Opinion of Financial Advisor.* WCI has received the opinions of Lazard Freres & Co. dated the date hereof and May 19, 1989, to the effect that, as of such dates, the consideration to be received in the Merger by WCI's stockholders is fair to WCI's stockholders from a financial point of view, copies of which opinions have been delivered to Time.

(o) *Article SEVENTH of WCI Certificate of Incorporation and Section 203 of the DGCL Not Applicable.* Neither the provisions of Article SEVENTH of WCI's Certificate of Incorporation nor the provisions of Section 203 of the DGCL will, prior to the termination of this Agreement, * * * apply to this Agreement, the Share Exchange Agreement, the Merger or to the transactions contemplated hereby and thereby.

COMMENT

Section 203 is discussed in Chapter 22.

* * *

(p) *Vote Required.* The affirmative vote of a majority of the votes that holders of the outstanding shares of WCI Common Stock and WCI Series B Preferred, voting together as a class, are entitled to cast is the only vote of the holders of any class or series of WCI capital stock necessary to approve this Agreement and the transactions contemplated hereby * * *.

COMMENT

Chapter 2 deals with the voting requirements for a merger under Delaware law, and Section 2.15.A. contains the *Warner Communications, Inc. v. Chris-Craft* case, which dealt with the issue of whether a class vote was required in this merger.

* * *

3.2 *Representations and Warranties of Time and Sub.* Time and Sub represent and warrant to WCI as follows: [The representations and Warranties set forth here are similar to those set forth by WCI in Section 3.1.]

* * *

ARTICLE IV
COVENANTS RELATING TO CONDUCT OF BUSINESS

4.1 *Covenants of WCI and Time.* During the period from the date of this Agreement and continuing until the Effective Time, WCI and Time each agree as to itself and its Subsidiaries that (except as expressly contemplated or permitted by this agreement, the Share Exchange Agreement, or to the extent that the other party shall otherwise consent in writing * * *):

(a) *Ordinary Course.* Each party and their respective Subsidiaries shall carry on their respective businesses in the usual, regular and ordinary course in substantially the same manner as heretofore conducted and use all reasonable efforts to preserve intact their present business organizations, keep available the services of the present officers and employees and preserve their relationships with customers, suppliers and others * * * to the end that their goodwill and ongoing businesses shall not be impaired in any material respect at the Effective Time.

COMMENT

Both parties here want assurances that the other party will operate its business in the normal and ordinary course between the date of signing the Merger Agreement and the date of closing. (*See* Chapter 15)

* * *

(b) *Dividends; Changes in Stock.* No party shall, nor shall any party permit any of its Subsidiaries to, nor shall any party propose to, (i) declare or pay any dividends on or make other distributions in respect of any of its capital stock, except as provided in Section 5.16 * * *. * * *

(c) *Issuance of Securities.* No party shall, nor shall any party permit any of its Subsidiaries to, issue, deliver or sell, or authorize or propose the issuance, delivery or sale of, any shares of its capital stock of any class, any Voting Debt or any securities convertible into, or any rights, warrants or options to acquire, any such shares, Voting Debt or convertible securities, other than * * * . * * *

(d) *Governing Documents.* No party shall amend or propose to amend its Certificate of Incorporation or By-laws nor shall Time amend the Rights Agreement in any way adverse to WCI * * * . * * *

(e) *No Solicitations.* (*See* Appendix K for a "window shop" in Section 6.5 and Appendix Z for a "go shop" in Section 6.2.)

* * *

(f) *No Acquisitions.* Other than [as otherwise permitted,] no party shall, nor shall any party permit any of its Subsidiaries to, acquire or agree to acquire by merging or consolidating with, or by purchasing a substantial equity interest in or a substantial portion of the assets of, or by any other manner, any business or any corporation, partnership, association or other business organization or division thereof or otherwise acquire or agree to acquire any assets in each case which are material, individually or in the aggregate, to such party and its Subsidiaries taken as a whole.

(g) *No Dispositions.* Other than [as otherwise permitted] no party shall, nor shall any party permit any of its Subsidiaries to, sell, lease, encumber or otherwise dispose of, or agree to sell, lease, encumber or otherwise dispose of, any of its assets, which are material, individually or in the aggregate, to such party and its Subsidiaries taken as a whole. * * *

ARTICLE V
ADDITIONAL AGREEMENTS

5.1 *Preparation of S-4 and the Proxy Statement.* Time and WCI shall promptly prepare and file with the SEC the Proxy Statement and Time shall prepare and file with the SEC the S-4 in which the Proxy Statement will be included as a prospectus. Each of Time and WCI shall use its best efforts to have the S-4 declared effective under the Securities Act as promptly as practicable after such filing. Time shall also take any action * * * required to be taken under any applicable state securities laws in connection with the issuance of Time Common Stock and Time Series BB Preferred in the Merger * * *.

COMMENT

The S-4 registration statement and the proxy rules are discussed Chapter 13.

* * *

5.2. *Letter of WCI's Accountants.* WCI shall use its best efforts to cause to be delivered to Time a letter of Arthur Young & Company, WCI's independent auditors, dated a date within two business days before the date on which the S-4 shall become effective and addressed to Time, in form and substance reasonably satisfactory to Time and customary in scope and substance for letters delivered by independent public accountants in connection with any such action.

5.3. *Letter of Time's Accountants.* * * *

COMMENT

It is standard for each company's accountant to provide a comfort letter stating that the accountant has not become aware of any material errors in the company's financials.

* * *

5.4 *Access to Information.* Upon reasonable notice, WCI and Time shall each (and shall cause each of their Subsidiaries to) afford to the officers, employees, accountants, counsel and other representative of the other access during normal business hours during the period prior to the Effective Time, to all its properties, books, contracts, commitments and records and during such period each of WCI and Time shall (and Shall cause each of their respective Subsidiaries to) furnish promptly to the other (a) a copy of each report, schedule, registration statement and other document filed or received by it during such period pursuant to the requirements of Federal securities laws and (b) all other information concerning its business, properties and personnel as such other party may reasonably request. Unless otherwise required by law, the parties will hold any such information which is nonpublic in confidence until such time as such information otherwise becomes publicly available through no wrongful act of either party, and in the event of termination of this Agreement for any reason each party shall promptly return all nonpublic documents obtained from any other party, and any copies made of such documents, to such other party.

COMMENT

This covenant obligates each company to cooperate with the other company's due diligence. (*See* Chapter 15) Also, the covenant requires that all information be treated confidentially. Chapter 10 deals generally with confidentiality agreements.

* * *

5.5 *Stockholder Meetings.* WCI and Time each shall call a meeting of its respective stockholders to be held as promptly as practicable for the purpose of voting upon this Agreement and related matters in the case of WCI and the Time Vote Matter and the New Time Stock Plan in the case of Time. WCI and Time will, through their respective Boards of Directors, recommend to their respective stockholders approval of such matters. WCI and Time shall coordinate and cooperate with respect to the timing of such meetings and shall use their best efforts to hold such meetings on the same day and as soon as practicable after the date hereof.

COMMENT

Under Delaware law, the Warner shareholders have a right to vote but the Time shareholders do not because it is the parent in a reverse subsidiary merger. (*See* Chapter 2) However, under the New York Stock Exchange rules, Time's shareholders have a right to vote because more than 20% of the corporation's outstanding stock will be used as consideration in the merger. (*See* Chapter 2)

* * *

5.6. *Legal Conditions to Merger.* Each of WCI, Time and Sub will take all reasonable actions necessary to comply promptly with all legal requirements which may be imposed on itself with respect to the Merger or the Share Exchange Agreement (including furnishing all information required under the HSR Act, in connection with the FCC Approvals and the Local Approvals and in connection with approvals of or filings with any other Governmental Entity) and will promptly

cooperate with and furnish information to each other in connection with any such requirements imposed upon any of them or any of their Subsidiaries in connection with the Merger. * * *

5.7. *Affiliates.* Prior to the Closing Date WCI shall deliver to Time a letter identifying all persons who are, at the time this Agreement is submitted for approval to the stockholders of WCI "affiliates" of WCI for purposes of Rule 145 under the Securities Act. WCI shall use its best efforts to cause each person to deliver to Time on or prior to the Closing Date a written agreement, substantially in the form attached as Exhibit 5.7 hereto.

COMMENT

The affiliate letters are needed for purposes of Rule 145. (*See* Chapter 13)

* * *

5.8. *Stock Exchange Listing.* Each of Time and WCI shall use all reasonable efforts to cause shares of its common stock to be issued pursuant to the Share Exchange Agreement to be approved for listing on the NYSE and Pacific Stock Exchange upon official notice of issuance. * * *

5.9. *Employee Benefit Plans.* Time and WCI agree that the Benefit Plans of WCI and its Subsidiaries in effect at the date of this Agreement shall, to the extent practicable, remain in effect * * *.* * *

5.10. *Stock Options.* (a) At the Effective Time, each outstanding option to purchase shares of WCI Common Stock * * * [pursuant to certain employee stock option plans], shall be assumed by Time. * * *

COMMENT

The treatment of stock options in a merger can present significant legal issues, particularly under the tax and securities laws. In most cases it is necessary to consult with an expert in such matters.

* * *

5.11. *Expenses.* Whether or not the Merger is consummated, all costs and expenses incurred in connection with this Agreement, the Share Exchange Agreement and the transactions contemplated hereby and thereby shall be paid by the party incurring such expense, * * *.* * *

5.12 *Brokers or Finders.* Each of Time and WCI represents, as to itself, its Subsidiaries and its affiliates, that no agent, broker, investment banker, financial advisor or other firm or person is or will be entitled to any broker's or finder's fee or any other commission or similar fee in connection with any of the transactions contemplated by this Agreement, except Lazard Freres & Co. and Alpine Capital Group, each of whose fees and expenses will be paid by WCI in accordance with WCI's agreement with such firm (copies of which have been delivered by WCI to Time prior to the date of this Agreement), and Shearson Lehman Hutton Inc. and Wasserstein Perella & Co., Inc., whose fees and expenses will be paid by Time in accordance with Time's agreements with such firms (copies of which have been delivered by Time to WCI prior to the date of this Agreement), and each of Time and WCI respectively agree to indemnify and hold the other harmless from and against any and all claims, liabilities or obligations with respect to any other fees, commissions or expenses asserted by any person on the basis of any act or statement alleged to have been made by such party or its affiliate.

5.13. *Time Board of Directors.* Time's Board of Directors will take action to cause the number of directors comprising the full Board of Directors of Time * * * to be 24 persons, 12 of whom shall be designated by Time * * * and 12 of whom shall be designated by WCI * * *.* * *

5.14. *Employment Agreements.* WCI and Time shall, as of or prior to the Effective Time, enter into employment contracts with the persons set forth on Exhibit 5.14(x) on substantially the terms set forth in Exhibit 5.14(y) hereto.

5.15. *Indemnification; Directors' and Officers' Insurance. * * **

5.16. *Dividend Adjustment.* * * *

5.17. *Additional Agreements; Reasonable Efforts.* Subject to the terms and conditions of this Agreement, each of the parties hereto agrees to use all reasonable efforts to take, or cause to be taken, all action and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement and the Share Exchange Agreement, subject to the appropriate vote of stockholders of Time and WCI described in Section 6.1(a), including cooperating fully with the other party, including by provision of information and making of all necessary filings in connection with among other things, the FCC Approvals and the Local Approvals and under the HSR Act * * *. * * *

ARTICLE VI
CONDITIONS PRECEDENT

6.1 *Conditions to Each Party's Obligation To Effect the Merger.* The respective obligation of each party to effect the Merger shall be subject to the satisfaction prior to the Closing Date of the following conditions:

(a) *Stockholder Approval.* This Agreement shall have been approved and adopted by the affirmative vote of a majority of the votes that the holders of the outstanding shares of WCI Common Stock and WCI Series B Preferred, voting together as a class, are entitled to cast, and the Time Vote Matter shall have been approved by the affirmative vote of the holders of a majority of the outstanding shares of Time Common Stock.

(b) *NYSE Listing.* The shares of Time Common Stock issuable to WCI stockholders pursuant to this Agreement and such other shares required to be reserved for issuance in connections with the Merger shall have been authorized for listing on the NYSE upon official notice of issuance.

(c) *Other Approvals.* [A]ll authorizations, consents, orders or approvals of, or declarations or filing with, or expirations of waiting periods imposed by, any Governmental Entity the failure to obtain which would have a material adverse effect on Time or the Surviving Corporation, taken as a whole, shall have been filed, occurred or been obtained. * * *

(d) *S-4.* The S-4 shall have become effective under the Securities Act and shall not be the subject of any stop order or proceedings seeking a stop order.

(e) *No Injunctions or Restraints.* No temporary restraining order, preliminary or permanent injunction or other order issued by any court of competent jurisdiction or other legal restraint or prohibition (an Injunction) preventing the consummation of the Merger shall be in effect.

6.2. *Conditions of Obligations of Time and Sub.* The obligations of Time and Sub to effect the Merger are subject to the satisfaction of the following conditions unless waived by Time and Sub:

(a) *Representations and Warranties.* The representations and warranties of WCI set forth in this Agreement shall be true and correct in all material respects as of the date of this Agreement and (except to the extent such representations and warranties speak as of an earlier date) as of the Closing Date as though made on and as of the Closing Date, except as otherwise contemplated by this Agreement, and Time shall have received a certificate signed on behalf of WCI by the chief executive officer or a member of the Office of the President and by the chief financial officer of WCI to such effect.

COMMENT

This condition has an "all material respects" qualifier, which is standard. (*See* Chapter 15) Also, this condition has a "bring down" which, in essence, brings the statements made in the representations and warranties on the signing of the Merger Agreement down to the closing. (*See* Chapter 15) For an illustration of a more specific condition relating to the representations and warranties with a defined "no Material Adverse Effect" qualifier, see Appendix F, Section 7.02(a).

* * *

(b) *Performance of Obligations of WCI.* WCI shall have performed in all material respects all obligations required to be performed by it under this Agreement and the Share Exchange Agreement at or prior to the Closing Date, and Time shall have received a certificate signed on behalf of WCI by the chief executive officer or a member of the Office of the President and by the chief financial officer of WCI to such effect.

(c) *Letters from WCI Affiliates.* Time shall have received from each person named in the letter referred to in Section 5.7 an executed copy of an agreement substantially in the form of exhibit 5.7 hereto.

(d) *Tax Opinion.* The opinion of Cravath, Swaine & Moore, counsel to Time to the effect that the Merger will be treated for Federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code, and that Time, Sub and WCI will each be a party to that reorganization within the meaning of Section 368(b) of the Code, dated on or about the date that is two business days prior to the date the Proxy Statement is first mailed to stockholders of WCI and Time, shall not have been withdrawn or modified in any material respect.

COMMENT

This transaction was designed to be a tax-free reorganization under Section 368(a)(2)(E) of the Code. (*See* Chapter 5)

* * *

(e) *Consents Under Agreements.* WCI shall have obtained the consent or approval of each person *** * *** whose consent or approval shall be required in order to permit the succession by the Surviving Corporation pursuant to the Merger to any obligation, right or interest of WCI or any Subsidiary of WCI under any loan or credit agreement, note, mortgage, indenture, lease or other agreement or instrument, except those for which failure to obtain such consents and approvals would not, in the reasonable opinion of Time, individually or in the aggregate, have a material adverse effect (x) on WCI and its Subsidiaries taken as a whole or (y) on the Surviving Corporation and its Subsidiaries taken as a whole upon the consummation of the transactions contemplated hereby.

* * *

COMMENT

This is a standard provision requiring that Warner obtain all required consents other than those which could not have a "material adverse affect." (*See* Chapter 15)

* * *

6.3. *Conditions of Obligations of WCI.* The obligation of WCI to effect the Merger is subject to the satisfaction of the following conditions unless waived by WCI: [The conditions set forth here are similar to the conditions set forth in Section 6.2.]

ARTICLE VII
TERMINATION AND AMENDMENT

7.1 *Termination.* This Agreement may be terminated at any time prior to the Effective Time, whether before or after approval of the matters presented in connection with the Merger by the stockholders of WCI or Time:

(a) by mutual consent of Time and WCI;

(b) by either Time or WCI if there has been a material breach of any representation, warranty, covenant or agreement on the part of the other set forth in this Agreement or the Share Exchange Agreement which breach has not been

cured within 5 business days following receipt by the breaching party of notice of such breach, or is any permanent injunction or other order of a court or other competent authority preventing the consummation of the Merger shall have become final and non-appealable;

COMMENT

This provision gives each of Time and Warner the right to walk away from the transaction if there is a material breach of any representation, warranty, covenant, or other agreement by the other party. (*See* Chapter 15 and Appendix K)

* * *

(c) by either Time or WCI if, but for the provisions of Section 4.1(l), such party would have the right to terminate this Agreement pursuant to Section 7.1(b); *provided, however,* that prior to any such termination Time and WCI shall, and shall cause their respective financial and legal advisors to, negotiate in good faith and for a reasonable period of time to make such adjustments in the terms an conditions of the Merger as would enable the party seeking termination to proceed with the transaction;

(d) by either Time or WCI if the Merger shall not have been consummated before February 28, 1990; or

(e) by either party if any required approval of the stockholders of WCI or of Time (only in the case of the Time Vote Matter) shall not have been obtained by reason of the failure to obtain the required vote upon a vote held at a duly held meeting of stockholders or at any adjournment thereof.

7.2. *Effect of Termination.* In the event of termination of this Agreement by either WCI or Time as provided in Section 7.1, this Agreement shall forthwith become void and there shall be no liability or obligation on the part of Time, Sub or WCI or their respective officers or directors except (x) with respect to the last sentence of Section 5.4, and Sections 5.11 and 5.12, (y) with respect to the representations and warranties contained in Sections 3.1 and 3.2 insofar as such representations and warranties relate to the Share Exchange Agreement and (z) to the extent that such termination results from the willful breach by a party hereto of any of its representations, warranties, covenants or agreements set forth in this Agreement except as provided in Section 8.7.

COMMENT

This provision makes it clear that, in general, if the Merger Agreement is terminated, no party has any liability. This termination only gives rise to walk rights. (*See* Chapter 15) For illustrations of merger agreements with termination fees, see Appendix K, Section 8.2 and Appendix Z, Section 8.5.

* * *

7.3. *Amendment.* * * *

7.4. *Extension; Waiver.* * * *

ARTICLE VIII
GENERAL PROVISIONS

8.1 *Nonsurvival of Representation, Warranties and Agreements.* None of the representations, warranties and agreements in this Agreement or in any instrument delivered pursuant to this Agreement shall survive the Effective Time, except for the agreements contained in Sections 2.1, [relating to capital stock], 2.2 [relating to exchange of certificates], 5.9 through 5.17 [relating to certain additional agreements], the last sentence of Section 7.3 [relating to amendments], and Article VIII [relating to termination], and the agreements of the "affiliates" of WCI delivered pursuant to Section 5.7 [relating to restrictions on sales of stock by affiliates.]

COMMENT

Since the representations, warranties and other agreements do not survive the merger, Time has no recourse against the Warner shareholders. In acquisitions of closely-held corporations, the representations and warranties typically survive the acquisition and in many cases the selling shareholders provide the acquiror with a separate indemnification. (*See* Chapter 15 and Appendix U, Sections 6.1 and 6.2.)

* * *

8.2 *Notices.* * * *

8.3 *Interpretation.* * * *

8.4 *Counterparts.* * * *

8.5. *Entire Agreements; No Third Party Beneficiaries; Rights of Ownership.* This Agreement (including the documents and the instruments referred to herein, including the Share Exchange Agreement) (a) constitutes the entire agreement and supersedes all prior agreements * * * and understandings, both written and oral, among the parties with respect to the subject matter hereof, (b) except as provided in Section 5.15, is not intended to confer upon any person other than the parties hereto any rights or remedies hereunder. * * *

8.6. *Governing Law.* This Agreement shall be governed and construed in accordance with the laws of the State of Delaware.

* * *

8.8. *Publicity.* Except as otherwise required by law or the rules of the NYSE, so long as this Agreement is in effect, neither WCI or Time shall, or shall permit any of its Subsidiaries to, issue or cause the publication of any press release or other public announcement with respect to the transactions contemplated by this Agreement without the consent of the other party, which consent shall not be unreasonably withheld.

8.9. *Assignment.* * * *

IN WITNESS WHEREOF, Time, Sub and WCI have caused this Agreement, as amended and restated, to be signed by their respective officer thereunto duly authorized, all as of May 19, 1989. * * *

DOCUMENTARY APPENDIX B, TIME-WARNER REVERSE SUBSIDIARY STOCK MERGER S-4

[*See* Principally Chapters 2 and 13 of Business Planning for Mergers and Acquisitions]

TIME INCORPORATED
and
WARNER COMMUNICATIONS INC.

JOINT PROXY STATEMENT

TIME INCORPORATED PROSPECTUS

[INTRODUCTION]

This Proxy Statement/Prospectus is being furnished to holders of common stock, par value $1.00 per share (Time Common Stock), of Time Incorporated, a Delaware corporation (Time), in connection with the solicitation of proxies by the Time Board of Directors for use at the Annual Meeting of Time stockholders (the Time Annual Meeting) to be held on Friday, June 23, 1989, at the Time & Life Building, Rockefeller Center, New York, N.Y. 10020, commencing at 10:00 a.m., local time, and at any adjournment or postponement thereof.

This Proxy Statement/Prospectus is also being furnished to holders of common stock, par value $1 per share (WCI Common Stock), and preferred stock, par value $1 per share (WCI Preferred Stock), of Warner Communications Inc., a Delaware corporation (WCI), in connection with the solicitation of proxies by the WCI Board of Directors for use at the Special Meeting of WCI stockholders (the WCI Special Meeting) to be held on Friday, June 23, 1989, in the Imperial Ballroom of the Sheraton Centre Hotel & Towers, Seventh Avenue at 52nd Street, New York, N.Y. 10019, commencing at 10:00 a.m., local time, and at any adjournment or postponement thereof.

* * *

[1] General

This Proxy Statement/Prospectus constitutes a prospectus of Time with respect to the shares of Time Warner Common Stock and Series BB Preferred to be issued pursuant to the Merger. All information contained in this Proxy Statement/Prospectus relating to Time has been supplied by Time, and all information relating to WCI has been supplied by WCI.

This Proxy Statement/Prospectus and the accompanying forms of proxy are first being mailed to stockholders of Time and WCI on or about May 24, 1989.

THE SECURITIES TO BE ISSUED PURSUANT TO THIS PROXY STATEMENT/PROSPECTUS HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROXY STATEMENT PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

* * *

[2] AVAILABLE INFORMATION

Time and WCI are subject to the informational requirements of the Securities Exchange Act of 1934, as amended (the Exchange Act), and in accordance therewith file reports, proxy statements and other information with the Securities and Exchange Commission (the Commission). * * *

Time has filed with the Commission a registration Statement on Form S-4 (together with any amendments thereto,

the Registration Statement) under the Securities Act of 1933, as amended (the Securities Act), with respect to the securities to be issued pursuant to or as contemplated by the Merger Agreement. This Proxy Statement/Prospectus does not contain all the information set forth in the Registration Statement. Such additional information may be obtained from the Commissions' principal office in Washington, D.C. Statements contained in this Proxy Statement/Prospectus or in any document incorporated in this Proxy Statement/Prospectus by reference as to the contents of any contract or other document referred to herein or therein are not necessarily complete, and in each instance reference is made to the copy of such contract or other document filed as an exhibit to the Registration Statement or such other document, each such statement being qualified in all respects by such reference.

[3] INCORPORATION OF CERTAIN DOCUMENTS BY REFERENCE

The following documents filed with the Commission by Time and WCI pursuant to the Exchange Act are incorporated by reference in this Proxy Statement/Prospectus:

1. Time's Annual Report on Form 10-K for the year ended December 31, 1988, as amended by amendment on Form 8 dated April 28, 1989 (Time's Annual Report); * * *

4. Time's Current Report on Form 8-K dated March 8, 1989;

5. Time's Quarterly Report on Form 10-Q for the three months ended March 31, 1989 (Time's First Quarter 10-Q); * * *

All documents and reports subsequently filed by Time and WCI pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act after the date of this Proxy Statement/Prospectus and prior to the date of the Meetings shall be deemed to be incorporated by reference in this Proxy Statement/Prospectus and to be a part hereof from the date of filing of such documents or reports. * * *

[4] SUMMARY

The following is a summary of certain information contained elsewhere in this Proxy Statement/Prospectus. * * *

[5] THE COMPANIES

* * *

Time Warner Inc. Effective upon consummation of the Merger, Time will change its name to Time Warner Inc. * * *

[6] THE MEETINGS

* * *

Record Date, Shares Entitled to Vote: * * *

Time. The purpose of the Time Annual Meeting is to consider and vote upon (i) a proposal (the Time Proposal) to approve and adopt (A) the Merger Agreement and (B) amendments to Time's Restated Certificate of Incorporation * * *. * * *

WCI. The purpose of the WCI Special Meeting is to consider and vote upon (i) a proposal to approve and adopt the Merger Agreement; and (ii) such other matters as may properly be brought before the meeting.

[7] Votes Required

Time. The approval and adoption by Time stockholders of the Time Proposal will require the affirmative vote of a majority of the outstanding shares of Time Common Stock. * * *

WCI. The approval and adoption by WCI stockholders of the Merger Agreement will require the affirmative vote of a majority of the votes that holders of the outstanding shares of WCI Common Stock and WCI Series B Preferred, voting together as a single class, are entitled to cast at the WCI Special Meeting.

[8] The Merger

Effect of Merger. Upon consummation of the Merger, pursuant to the Merger Agreement, (a) Sub will be merged with and into WCI, which will be the surviving corporation, (b) each issued and outstanding share of WCI Common Stock will be converted into the right to receive .465 (subject to possible downward adjustment in certain circumstances which Time and WCI believe are unlikely to occur) of a share of Time Warner Common Stock and (c) each issued and outstanding share of WCI series B Preferred (other than shares held by Dissenting Holders) will be converted into the right to receive one share of Series BB Preferred, other than, in each case, any share of WCI Common Stock or WCI series B Preferred owned by WCI as treasury stock or by Time or any wholly-owned subsidiary of Time, all of which will be cancelled. Fractional shares of Time Warner Common Stock will not be issuable in connection with the Merger. WCI stockholders otherwise entitled to a fractional share will be paid the value of such fraction in cash * * *.* * *

Based upon the capitalization of WCI and Time as of May 1, 1989, and the .465 Exchange Ratio, the stockholders of WCI immediately prior to the consummation of the Merger will own securities representing approximately 62% of the outstanding voting power of Time Warner following consummation of the Merger.

[9] REASONS FOR THE MERGER

Time. The Board of Directors of Time believes that the terms of the Merger are fair to and in the best interests of Time and its stockholders. Accordingly, the Board of Directors of Time has approved the Time Proposal, declared it advisable and recommended its approval and adoption by Time's stockholders.* * *

WCI. The Board of Directors of WCI believes that the terms of the Merger are fair to, and in the best interests of, WCI and its stockholders. Accordingly, the Board of Directors of WCI has approved the Merger Agreement and recommended its approval and adoption by WCI's stockholders.* * *

[10] OPINIONS OF FINANCIAL ADVISORS

Time. Each of Wasserstein Perella & Co., Inc. and Shearson Lehman Hutton Inc. has delivered its written opinions to Time's Board of Directors to the effect that, as of March 3, 1989, May 16, 1989 and May 22, 1989, the financial terms of the Merger are fair to Time and its stockholders from a financial point of view.

WCI. Lazard Frères & Co. has delivered its written opinions to WCI's Board of Directors to the effect that, as of March 3, 1989, May 19, 1989 and May 22, 1989, the consideration to be received in the Merger by WCI's stockholders is fair to WCI's stockholders from a financial point of view.

* * *

COMMENT

These fairness opinions are examined in Chapter 7.

* * *

[11] CONDITIONS TO THE MERGER:
TERMINATION OF THE MERGER AGREEMENT

The obligations of Time and WCI to consummate the Merger are subject to the satisfaction of certain conditions, including obtaining requisite stockholder, regulatory and other third party approvals, approval for listing on the NYSE, subject to official notice of issuance, of the Time Warner Common Stock to be issued and reserved for issuance in connection with the Merger, and the absence of any injunction prohibiting consummation of the Merger. * * *

[12] APPRAISAL RIGHTS

Holders of WCI Common Stock are not entitled to dissenters' appraisal rights under the DGCL in connection with the Merger because the WCI Common Stock is listed on a national securities exchange and the shares of Time Warner Common Stock to be issued pursuant to the Merger will be listed on a national securities exchange as of the Effective Time of the Merger. Holders of Time Common Stock are not entitled to dissenters' appraisal rights under the DGCL in connection with the Merger because Time is not a constituent corporation in the Merger.

Under Delaware law, record holders of WCI Series B Preferred who, prior to the WCI stockholder vote on the Merger, properly demand appraisal and vote against or abstain from voting with respect to the Merger (such holders being referred to in this Proxy Statement/Prospectus as Dissenting Holders) have the right to obtain a cash payment for the fair value" of their shares (excluding any element of value arising from the accomplishment or expectation of the Merger). In order to exercise such rights, Dissenting Holders must comply with the procedural requirements of Section 262 of the DGCL, a description of which is provided in "The Merger--Appraisal Rights" and the full text of which is attached to this Proxy Statement/Prospectus as Annex I. Such "fair value" would be determined in judicial proceedings, the result of which cannot be predicted. Failure to take any of the steps required under Section 262 on a timely basis may result in the loss of appraisal rights. Because all shares of WCI Series C Preferred not converted into shares of WCI Common Stock will be redeemed on May 31, 1989, the holders of such shares will not be entitled to appraisal for such shares.

COMMENT

See Appraisal Rights below. Appraisal rights are addressed generally in Chapter 2.

* * *

[13] CERTAIN FEDERAL INCOME TAX CONSEQUENCES

The Merger is intended to be a tax-free reorganization so that no gain or loss would be recognized by Time or WCI, and no gain or loss would be recognized by WCI's stockholders, except in respect of cash received in lieu of fractional shares and except for Dissenting Holders who receive cash payments. Each of Time and WCI has received an opinion of counsel to the effect that the Merger will constitute a reorganization within the meaning of Section 368(a) of the Internal Revenue Code of 1986, as amended (the Code). Consummation of the Merger is conditioned upon such opinions not having been withdrawn or modified in any material respect.

COMMENT

The federal income tax treatment of this transaction is addressed in Chapter 5.

* * *

[14] ANTICIPATED ACCOUNTING TREATMENT

COMMENT

As indicated in Chapter 6, all mergers and acquisitions are now accounted for as purchases; the pooling of interest method is no longer available. (*See* Chapter 6)

* * *

[15] CERTAIN RELATED TRANSACTIONS
SHARE EXCHANGE AGREEMENT

As part of the plan of combination, Time and WCI entered into a Share Exchange Agreement which * * * provides for the issuance by WCI to Time of 17,292,747 shares of WCI Common Stock, and for the issuance by Time to WCI of 7,080,016 shares of Time Common Stock (plus an additional 961,111 shares under certain circumstances). * * *

[16] MATTERS RELATING TO TIME WARNER

Amendments to Restated Certificate of Incorporation. As provided in the Merger Agreement and as part of the Time Proposal, Time stockholders will consider and vote upon a proposal to amend the Restated Certificate of Incorporation of Time to (a) change Time's name to "Time Warner Inc."; (b) increase its authorized capital stock to 600,000,000 shares of Time Warner Stock and 50,000,000 shares of Time Warner Preferred Stock * * *.* * *

[17] DESCRIPTION OF SERIES BB PREFERRED

The terms of the Series BB Preferred to be issued in the Merger have rights, privileges, preferences and terms substantially identical to those of the WCI Series B Preferred, except that adjustments have been made in certain terms as appropriate to reflect the Exchange Ratio. * * *

[18] REGULATORY APPROVALS

Antitrust. Under the HSR Act and the rules promulgated thereunder by the Federal Trade Commission (the FTC), the Merger may not be consummated until notifications have been given and certain information has been furnished to the FTC and the Antitrust Division of the Department of Justice (the Antitrust Division) and specified waiting period requirements have been satisfied. Time and WCI filed notification and report forms under the HSR Act with the FTC and the Antitrust Division on March 7, 1989. The required waiting period under the HSR Act expired on April 6, 1989. In addition, on March 10, 1989, Time and WCI each voluntarily furnished copies of its HSR notification and report forms to the Attorney General of the State of New York as the appropriate officer of the "liaison state" under the Voluntary Pre-Merger Disclosure Compact of the National Association of Attorneys General (the Compact). * * *

COMMENT

The substantive antitrust aspects of mergers and acquisitions are addressed in Chapter 8, and the Hart-Scott-Rodino pre-merger notification aspects are covered in Chapter 9.

* * *

[19] FEDERAL SECURITIES LAW CONSEQUENCES

All shares of Time Warner Common Stock and Series BB Preferred received by WCI stockholders in the Merger will be freely transferable, except that shares of Time Warner Common Stock or Series BB Preferred, as the case may be, received by persons who are deemed to be "affiliates' (as such term is defined under the Securities Act) of WCI prior to the

Merger may be resold by them only in transactions permitted by the resale provisions of Rule 145 promulgated under the Securities Act (or Rule 144 in the case of such persons who become affiliates of Time Warner) or as other wise permitted under the Securities Act. Persons who may be deemed to be affiliates of WCI, Time or Time Warner generally include individuals or entities that control, are controlled by, or are under common control with, such party and may include certain officers and directors of such party as well as principal stockholders of such party. The Merger Agreement requires WCI to use its best efforts to cause each of its affiliates to execute a written agreement to the effect that (i) such person will not offer or sell or otherwise dispose of any of the shares of Time Warner Common Stock or Series BB Preferred, as the case may be, issued to such person in or pursuant to the Merger in violation of the Securities Act or the rules and regulations promulgated by the Commission thereunder; and, (ii) such person will not transfer such shares prior to the date that Time Warner publishes financial statements which reflect 30 days of operation of Time Warner (which agreement in clause (ii) relates to the ability of Time Warner to account for the merger as a pooling-of-interests).

COMMENT

Chapter 13 discusses the impact of Rule 145 on resales of securities received in a merger.

* * *

[20] APPRAISAL RIGHTS

Holders of WCI Common Stock [and Time Common Stock] are not entitled to dissenters' appraisal rights *** * ***.

Holders of WCI Series B Preferred are entitled to appraisal rights under Section 262 of the DGCL. *** * ***

Failure to follow the steps required by Section 262 of the DGCL for perfecting appraisal rights may result in the loss of such rights (in which event a stockholder will be entitled to receive one share of Series BB Preferred for each share of WCI Series B Preferred owned by him).

* * *

[21] TIME STOCKHOLDER RIGHTS PLAN AND TIME SERIES A PREFERRED

[See Appendix J for a discussion of MCI's shareholder rights, or poison pill plan. These plans are discussed in Chapters 3 and 23.]

DOCUMENTARY APPENDIX C, VALUATION OF WARNER

[*See* Principally Chapter 7 of Business Planning for Mergers and Acquisitions]

Excerpts from Joint Presentation
by Wasserstein Perella & Co., Inc. and
Shearson Lehman Hutton, Inc. to Time's Board:
Exhibit (b)(5) to Schedule 13E - 3

[This Appendix C is examined in
Chapter 7, *Modern Valuation*
Techniques in Mergers and Acquisitions]

CONFIDENTIAL

PROJECT TANGO

Materials Prepared for the
Time Incorporated
Board of Directors

June 15, 1989

Wasserstein Perella & Co., Inc. **Shearson Lehman Hutton Inc.**

WONDER - FILMED ENTERTAINMENT
Discounted Cash Flow Analysis
- - - - - - - - - - - - - - - - - - -
($MM)

	ACTUAL		PROJECTED													
	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Sales	$848.5	$1,090.0	$1,201.0	$1,251.3	$1,355.7	$1,571.0	$1,961.4	$2,157.5	$2,351.7	$2,563.4	$2,794.1	$3,045.6	$3,319.7	$3,618.4	$3,944.1	$4,299.1
Operating Expenses	739.2	939.7	1,040.8	1,079.1	1,179.2	1,363.5	1,706.4	1,882.1	2,046.0	2,230.1	2,430.9	2,649.6	2,888.1	3,148.0	3,431.4	3,740.2
Operating Profit (1)	109.3	150.4	160.2	172.2	176.4	207.5	255	275.5	305.7	333.2	363.2	395.9	431.6	470.4	512.7	558.9
Taxes (2)	50.3	69.2	73.7	79.2	81.2	83	96.9	104.7	116.2	126.6	138	150.5	164	178.8	194.8	212.4
UNLEVERED NET INCOME	59.0	81.2	86.5	93.0	95.3	124.5	158.1	170.8	189.5	206.6	225.2	245.5	267.6	291.6	317.9	346.5
PLUS:																
Depreciation & Amort	2.3	2.6	2.6	3.6	4.3	4.8	5.0	7.0	9.0	10.5	11.0	11.0	11.0	11.0	11.0	11.0
Deferred Taxes	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
LESS:																
Capital Expenditures	3.4	7.0	5.6	4.9	6.7	23.0	20.0	20.0	20.0	10.0	10.0	10.0	10.0	10.0	10.0	10.0
Incr in Film Inventory	1.2	54.2	(1.6)	73.2	57.8	31	39	39.2	38.8	42.3	46.1	50.3	54.8	59.8	65.1	71
Incr in Wrkng Invstmt	0.0	0.0	0.0	0.0	(10.3)	44.2	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
UNLEVERED FREE CASH FLOW	56.8	22.6	85.1	18.5	45.3	31.1	104	118.6	139.7	164.8	180.1	196.2	213.7	232.9	253.8	276.5

ASSUMPTIONS

Documentary Appendix C
Valuation of Warner

	ACTUAL		PROJECTED													
	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
Sales Growth	NA	28.5	10.20%	4.20%	8.30%	15.90%	24.90%	10.00%	9.00%	9.00%	9.00%	9.00%	9.00%	9.00%	9.00%	9.00%
Operating Margin	12.9%	13.8%	13.3%	13.8%	13.0%	13.2%	13.0%	12.8%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%
Tax Rate (1)	46.0%	46.0%	46.0%	46.0%	46.0%	40.0%	38.0%	38.0%	38.0%	38.0%	38.0%	38.0%	38.0%	38.0%	38.0%	38.0%
Unlev'd NI Margin	7.0%	7.4%	7.2%	7.4%	7.0%	7.9%	8.1%	7.9%	8.1%	8.1%	8.1%	8.1%	8.1%	8.1%	8.1%	8.1%
Unlev'd NI Growth	NA	3760.0%	6.5%	7.5%	2.4%	30.7%	27.0%	8.0%	11.0%	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%
Deprec as % of Sales	0.3%	0.2%	0.2%	0.3%	0.3%	0.3%	0.3%	0.3%	0.4%	0.4%	0.4%	0.4%	0.3%	0.3%	0.3%	0.3%
Def'd Taxes as % Taxes	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Cap Exp as % of Sales	0.4%	0.6%	0.5%	0.4%	0.5%	1.5%	1.0%	0.9%	0.9%	0.4%	0.4%	0.3%	0.3%	0.3%	0.3%	0.2%
Change in Film Inventory	1.2	54.2	(1.6)	73.2	57.8	31	39	39.2	38.8	42.3	46.1	50.3	54.8	59.8	65.1	71
as % of Incr in Sales	NA	22.4%	-1.4%	145.4%	55.4%	14.4%	10.0%	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%	20.0%
Ch in WC % Ch in Sales					-9.9%	20.5%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Film Cash Flow	110.4	98.8	164.4	102.6	122.8	181.3	220.9	243.3	275.9	301.4	328.1	356.6	387.7	421.6	458.6	498.9
Film Cash Flow Margin	13.0%	9.1%	13.7%	8.2%	9.1%	11.5%	11.3%	11.3%	11.7%	11.8%	11.7%	11.7%	11.7%	11.7%	11.6%	11.6%
Film Cash Flow Growth		-10.6%	66.4%	-37.6%	19.7%	47.6%	21.9%	10.1%	13.4%	9.3%	8.9%	8.7%	8.7%	8.7%	8.8%	8.8%

- - - - - - - - - - - - - - - - - -

(1) Excludes Cinamerica - $1.25 MM of Equity Income in 1989E.
(2) Historical taxes are estimated.

WONDER - FILMED ENTERTAINMENT
Discounted Cash Flow Analysis
($MM except per share amounts)

Terminal Value Cash Flow Multiples

Discount Rate	10.00 x	11.00 x	12.00 x	13.00 x	
10.0%	$ 1,117.2	$ 1,117.2	$ 1,117.2	$ 1,117.2	Present Value of Cash Flow
	1,923.4	2,115.8	2,308.1	2,500.4	Present Value of Terminal Cash Flow
	3,040.6	3,232.9	3,425.3	3,617.6	PRESENT VALUE OF SEGMENT
11.0%	$ 1,067.3	$ 1,067.3	$1.067.3	$ 1,067.3	Present Value of Cash Flow
	1,757.0	1,932.7	2,108.4	2,284.1	Present Value of Terminal Cash Flow
	2,824.3	3,000.0	3,175.7	3,351.4	PRESENT VALUE OF SEGMENT
12.0%	$ 1,020.7	$ 1,020.7	$ 1,020.7	$ 1,020.7	Present Value of Cash Flow
	1,606.3	1,766.9	1,927.5	2,088.2	Present Value of Terminal Cash Flow

- - - - -	- - - - -	- - - - -	- - - - -	
2,626.9	2,787.6	2,948.2	3,108.8	PRESENT VALUE OF SEGMENT

WONDER

Comparable Transaction Acquisition Analysis

Filmed Entertainment*

($MM)

	Summary Multiples Matrix**									1989 Filmed	Implied Asset Value Range			
	#Trans.	Mean		Median		High		Low		Entertainment	Mean	Median	High	Low
Net Sales	12	2.1	x	1.9	x	3.5	x	1.2	x	$1,961.4	$4,118.9	$3,726.7	$6,864.9	$2,353.7
EBIT	7	16.9		20.5		27.2		8		255.0	4,309.5	5,227.5	6,936.0	2,040.0

***

* This chart is explained in Section 7.12.F.
** This represents a multiple of total firm value. See Section 7.12.D.

WONDER

Comparable Company Valuation Analysis

Filmed Entertainment***

($MM)

Unlevered Market Value as a Multiple of LTM:	# of Cos. Incl.	Mean		Median		High		Low	1989 Filmed Entertainment	Implied Asset Value Range Mean	Median	High	Low	Acquisition Value @ 50% Premium Mean	Median	High	Low
Net Sales	6.0	2.1	x	1.8	x	3.1	x	1.6	$1,961.4	$4,118.9	$3,530.5	$6,080.3	$3,138.2	$6,178.4	$5,295.8	$9,120.4	$4,707.3
EBIT	4.0	12.7		13.7		15.0		8.6	255.0	3,238.5	3,493.5	3,825.0	2,193.0	4,857.8	5,240.2	5,737.5	3,289.5

* * * *

*** This chart is explained in Section 7.12.

Documentary Appendix C
Valuation of Warner

WONDER

Pretax Segment Valuation

($MM)

Segment	DCF	Comparable Acquisitions	Comparable Companies	Value Range
Filmed Entertainment	$2,500 - $2,700	$3,700 - $5,200	$5,250 - $6,150	$3,000 - $3,500
Music/Music Publishing	5,500 - 5,900	4,250 - 8,630	NA - NA	5,000 - 5,500
Cable	3,400 - 3,800	2,900 - 3,700	5,140 - 6,000	3,705 - 4,210
Publishing	150 - 160	210 - 300	225 - 390	175 - 200
MARS	1,200 - 1,400	1,200 - 1,400	1,200 - 1,400	1,200 - 1,400
	$12,750 -$13,960	$12,260 -$19,230	NA - NA	$13,080 -$14,810

Documentary Appendix C
Valuation of Warner

WONDER

Pretax Segment Valuation
($MM except per share)

	1989E						Multiple of 1989E											
	Asset Value			*Sales*	*EBITD(1)*	*Operating Income*	*Subs (MM)*	*Sales*			*EBITD(1)*			*Operating Income*			*Subscribers*	
Filmed Entertainment Records	$3,000	-	$3,500	$1,961.4 2,656.2	$220.9 496.0	$255.0 425.0		1.5 1.9	x	1.8 2.1	x 13.6 10.1	x	15.8 11.1	x 11.8 11.8	x	13.7 12.9	x	
Cable TV (2)	3,705	-	4,210	577.5	226.8	100.7	1.684	6.4		7.3	16.3		18.6	36.8		41.8	$2,200	-$2,500
Publishing	175	-	200	165.3	21.8	16.2		1.1		1.2	8		9.2	10.8		12.3		
MARS (3)	1,200	-	1,400	516.3	39.6	29.5		2.3		2.7	30.3		35.4	40.7		47.5		
Segment Subtotal	$13,080	-	$14,810															
Corporate Adjustments																		
Add:																		
Cash and cash equivalents (4)	$256.6																	
Option proceeds (5)	207.0																	
Cinamerica Investment (6)	86.6																	
Viacom Investment (7)	51.0																	
Hasbro Investment (8)	154.0																	
Atari Investment (9)	120.7																	
Franklin Mint Investment (10)	68.0																	
TBS Investment (11)	94.2																	

CVN Companies (12)	10.6			
Excess Real Estate (13)	50.0			
Pittsburgh TV Stations Note (14)	32.0		Low	High
QUICS Cable (15)	24.0			
Brooklyn/Queens Cable (16)	76.0	*EQUITY VALUE*	$13,577	$15,307
Movietime Investments (17)	4.8			
Venture Capital Investments (18)	50.0	*Per Share (24)*	$68.40	$77.12
Misc. Operating Affiliates (19)	10.5			
Overfunded Pension (20)	26.3			
NOL's and ITC's (21)	164.3			
Interest in BHC (22)	400.0			
Less:				
Short-term debt (4)	30.9			
Long-term debt (2)(4)	1195.5			
Corporate Overhead (23)	163.2			
Total Adjustments	$497.0			

WASSERSTEIN PERELLA & CO., INC. - SHEARSON LEHMAN HUTTON INC.

Leveraged Acquisition Analysis — Date: 6/15/89
Project WONDER — Time: 10:25 AM
Pro Forma Income Statement — $70 Leveraged Acquisition (all Cash)

($ Millions)	Forecasted									
	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Sales	$12,822.9	$13,420.1	$13,822.9	$15,092.6	$16,464.6	$17,925.7	$19,582.1	$21,257.0	$23,152.6	$25,220.5
Baseline Cash Operating Expenses	(10,495.0)	(10,869.3)	(11,314.2)	(12,336.2)	(13,448.8)	(14,607.0)	(15,958.6)	(17,302.5)	(18,836.0)	(20,504.1)
Cost Savings	50.0	100.0	105.0	110.3	115.8	121.6	127.6	134.0	140.7	147.7
Benefit Reductions (ESOP Give-Backs)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Adjusted Operating Cash Flow (EBITD)	$2,377.9	$2,650.7	$2,613.7	$2,866.6	$3,131.6	$3,440.3	$3,751.1	$4,088.5	$4,457.3	$4,864.2
Book Depreciation & Amortization	418.3	415.2	282.3	277.2	288.4	316.7	342.2	370.1	400.6	438.1
EBIT	$1,959.6	$2,235.5	$2,331.4	$2,589.5	$2,843.2	$3,123.6	$3,408.9	$3,718.5	$4,056.7	$4,426.1
Interest Expense										
Net Cash Interest Expense (Excl. ESOP)	1,919.4	1,708.2	1,083.0	1,463.3	1,405.1	1,324.7	1,220.9	1,088.7	924.1	754.3
Non-Cash Interest Expense	305.0	351.5	405.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0
ESOP Contributions	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Preferred Dividends - ESOP	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Total Interest Expense (Incl. ESOP)	$2,224.4	$2,059.7	$1,488.1	$1,463.3	$1,405.1	$1,324.7	$1,220.9	$1,088.7	$924.1	$754.3
Transaction Costs	190.0	90.0	90.0	90.0	90.0	90.0	90.0	90.0	90.0	90.0
Other Expenses (Income)	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Total Interest and Other Expenses	$2,414.4	$2,149.7	$1,578.1	$1,553.3	$1,495.1	$1,414.7	$1,310.9	$1,178.7	$1,014.1	$844.3
Earnings Before Tax	($454.9)	$85.8	$753.2	$1,036.2	$1,348.2	$1,708.9	$2,098.1	$2,539.8	$3,042.6	$3,581.7
Book Taxes	75.0	75.0	409.0	459.4	597.8	757.7	930.3	1126.1	1349.1	1588.1

Income from Consolidated Operations	($529.9)	$10.8	$344.3	$576.7	$750.4	$951.2	$1,167.8	$1,413.7	$1,693.5	$1,993.6
Minority Interests	(20.3)	(30.5)	(40.8)	(51.7)	(64.3)	(77.9)	(81.8)	(85.9)	(90.2)	(94.7)
Equity in Earnings of Unconsolidated Affiliates	20.4	33.0	50.5	84.5	110.2	115.7	121.5	127.6	133.9	140.6
Amortization of Goodwill	(297.9)	(286.5)	(179.7)	(179.7)	(179.7)	(179.7)	(179.7)	(179.7)	(179.7)	(179.7)
Net Income from Continuing Operations	($827.7)	($273.1)	$174.3	$429.8	$616.6	$809.3	$1,027.8	$1,275.6	$1,557.6	$1,859.9
Gain/(Loss) on Divestitures	212.6	2,707.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Net Income	($615.0)	$2,434.7	$174.3	$429.8	$616.6	$809.3	$1,027.8	$1,275.6	$1,557.6	$1,859.9
Preferred Dividends (Excluding ESOP)	0	0	0	0	0	0	0	0	0	0
Net Earnings to Common	($615.0)	$2,434.7	$174.3	$429.8	$616.6	$809.3	$1,027.8	$1,275.6	$1,557.6	$1,859.9
Primary EPS	($10.79)	$42.71	$3.06	$7.54	$10.82	$14.20	$18.03	$22.38	$27.33	$32.63
Primary EPS before gain or divestitures	(14.52)	(4.79)	$3.06	$7.54	$10.82	$14.20	$18.03	$22.38	$27.33	$32.63
Stand Alone	$7.25	$8.98	$11.50	$13.92	$16.13	$17.45	$18.87	$20.39	$22.02	$23.76
Pickup/(Dilution) - Primary EPS	-248.8%	375.7%	-73.4%	-45.8%	-32.9%	-18.6%	-4.4%	9.8%	24.1%	37.3%
Pickup/(Dilution) - Before Gain on divestitures	-300.3%	-153.4%	-73.4%	-45.8%	-32.9%	-18.6%	-4.4%	9.8%	24.1%	37.3%

DOCUMENTARY APPENDIX D, JP MORGAN CHASE-BANK ONE DIRECT STOCK MERGER AGREEMENT

[*See* Principally Chapters 2 and 15 of Business Planning for Mergers and Acquisitions]

AGREEMENT AND PLAN OF MERGER dated as of January 14, 2004 (this *"Agreement"*) between J.P. MORGAN CHASE & CO., a Delaware corporation (*"JPMorgan Chase"*), and BANK ONE CORPORATION, a Delaware corporation (*"Bank One"*).

WHEREAS, the Boards of Directors of JPMorgan Chase and Bank One have approved, and deem it advisable and in the best interests of their respective stockholders to consummate, the business combination transaction provided for herein in which Bank One would merge with and into JPMorgan Chase (the *"Merger"*);

WHEREAS, the Boards of Directors of JPMorgan Chase and Bank One have each determined that the Merger and the other transactions contemplated hereby are consistent with, and in furtherance of, their respective business strategies and goals;

WHEREAS, concurrently with the execution and delivery of this Agreement, (i) as a condition and inducement to JPMorgan Chase's willingness to enter into this Agreement and the JPMorgan Chase Stock Option Agreement referred to below, JPMorgan Chase and Bank One are entering into a Stock Option Agreement dated as of the date hereof in the form of Exhibit 1.1(a) (the *"Bank One Stock Option Agreement"*) pursuant to which Bank One is granting to JPMorgan Chase an option to purchase shares of Common Stock, par value $0.01 per share, of Bank One (the *"Bank One Common Stock"*); and (ii) as a condition and inducement to Bank One's willingness to enter into this Agreement and the Bank One Stock Option Agreement, Bank One and JPMorgan Chase are entering into a Stock Option Agreement dated as of the date hereof in the form of Exhibit 1.1(b) (the *"JPMorgan Chase Stock Option Agreement"* ; and collectively with the Bank One Stock Option Agreement, the *"Option Agreements"*), pursuant to which JPMorgan Chase is granting to Bank One an option to purchase shares of Common Stock, par value $1.00 per share, of JPMorgan Chase (the *"JPMorgan Chase Common Stock"*);

WHEREAS, JPMorgan Chase and Bank One desire to make certain representations, warranties and agreements in connection with the Merger and also to prescribe various conditions to the Merger; and

WHEREAS, for Federal income tax purposes, it is intended that the Merger shall qualify as a reorganization under the provisions of Section 368(a) of the Internal Revenue Code of 1986, as amended (the *"Code"*), and the parties intend, by executing this Agreement, to adopt a plan of reorganization within the meaning of Treasury Regulation Section 1.368-2(g);

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth herein and in the Option Agreements, the parties hereto agree as follows:

ARTICLE I
THE MERGER

1.1. *Effective Time of the Merger.* Subject to the provisions of this Agreement, a certificate of merger (the *"Certificate of Merger"*) shall be duly prepared, executed by JPMorgan Chase as the Surviving Corporation (as defined in Section 1.3) and thereafter delivered to the Secretary of State of the State of Delaware for filing, as provided in the Delaware General Corporation Law (the *"DGCL"*), on the Closing Date (as defined in Section 1.2). The Merger shall become effective upon the filing of the Certificate of Merger with the Secretary of State of the State of Delaware or at such time thereafter as is provided in the Certificate of Merger (the "Effective Time").

1.2. *Closing.* The closing of the Merger (the *"Closing"*) will take place at 10:00 a.m. on the date (the *"Closing Date"*) that is the second business day after the satisfaction or waiver (subject to applicable law) of the conditions set forth in Article VI (excluding conditions that, by their terms, are to be satisfied on the Closing Date), unless another time or date is agreed to in writing by the parties hereto. The Closing shall be held at the offices of Simpson Thacher & Bartlett LLP, 425 Lexington Avenue, New York, New York 10017, unless another place is agreed to in writing by the parties hereto.

1.3. *Effects of the Merger.* At the Effective Time, Bank One shall be merged with and into JPMorgan Chase and the separate existence of Bank One shall cease. The Merger will have the effects set forth in the DGCL. As used in this Agreement, *"Constituent Corporations"* shall mean each of JPMorgan Chase and Bank One, and *"Surviving Corporation"* shall mean JPMorgan Chase, at and after the Effective Time, as the surviving corporation in the Merger.

COMMENT

This is a direct merger of the target, Bank One, into the acquiror, JPMorgan Chase. (*See* Chapter 2) Both Bank One and JPMorgan Chase are financial holding companies with many subsidiaries. (*See* Chapter 27)

1.4. *Certificate of Incorporation and By-Laws.* The Certificate of Incorporation of JPMorgan Chase as in effect immediately prior to the Effective Time, as amended as set forth in Exhibit 1.4(a), shall be the Certificate of Incorporation of the Surviving Corporation. The By-laws of JPMorgan Chase as in effect immediately prior to the Effective Time, as amended as set forth in Exhibit 1.4(b), shall be the By-laws of the Surviving Corporation.

1.5. *Alternative Transaction Structures.* The parties agree that JPMorgan Chase may change the method of effecting the business combination with Bank One, including, without limitation, by merging Bank One into a wholly-owned direct Subsidiary (as defined in Section 3.1(a)) of JPMorgan Chase or by merging a wholly-owned direct Subsidiary of JPMorgan Chase into Bank One, and Bank One shall cooperate in such efforts, including by entering into an appropriate amendment to this Agreement (to the extent such amendment only changes the method of effecting the business combination and does not substantively affect this Agreement or the rights and obligations of the parties or their respective stockholders hereunder); *provided, however* , that any such Subsidiary shall become a party to, and shall agree to be bound by, the terms of this Agreement and that any actions taken pursuant to this Section 1.5 shall not (i) alter or change the kind or amount of consideration to be issued to holders of Bank One Common Stock or the treatment of Bank One Stock Options, Bank One SARs, Bank One Units, Other Bank One Equity Rights or Bank One Restricted Shares as provided for in this Agreement, (ii) adversely affect the tax consequences of the transaction to the holders of Bank One Common Stock, (iii) materially delay receipt of any Requisite Regulatory Approval (as defined in Section 6.1(c)), or (iv) otherwise cause any closing condition not to be capable of being fulfilled (unless duly waived by the party entitled to the benefits thereof).

COMMENT

JPMorgan Chase has reserved the right to convert the transaction into a forward or reverse subsidiary merger.

ARTICLE II
EFFECT OF THE MERGER ON THE CAPITAL STOCK OF THE CONSTITUENT CORPORATIONS; EXCHANGE OF CERTIFICATES

2.1. *Effect on Capital Stock.* As of the Effective Time, by virtue of the Merger and without any action on the part of the holder of any shares of Bank One Common Stock:

(a) *Cancellation of Treasury Stock and JPMorgan Chase-Owned Stock, etc.* All shares of Bank One Common Stock that are owned by Bank One as treasury stock and all shares of Bank One Common Stock that are owned by Bank One or JPMorgan Chase (other than, for the avoidance of doubt, trading account shares, trust shares and DPC shares, as each such term is defined in Section 3.1(b)) shall be cancelled and retired and shall cease to exist and no stock of JPMorgan Chase or other consideration shall be delivered in exchange therefor. All shares of JPMorgan Chase Common Stock and Preferred Stock, par value $1.00 per share, of JPMorgan Chase (*"JPMorgan Chase Preferred Stock"*) that are owned by Bank One shall become treasury stock, except as otherwise provided in JPMorgan Chase's Certificate of Incorporation.

(b) *Conversion of Bank One Common Stock.* Subject to Section 2.2(e), each share of Bank One Common Stock issued and outstanding immediately prior to the Effective Time (other than shares to be cancelled in accordance with Section 2.1(a)) shall be converted into 1.32 (the "*Exchange Ratio*") fully paid and nonassessable shares of JPMorgan Chase Common Stock. All such shares of Bank One Common Stock shall no longer be outstanding and shall automatically be cancelled and retired and shall cease to exist, and each certificate previously representing any such shares shall thereafter represent the shares of JPMorgan Chase Common Stock into which such Bank One Common Stock has been converted. Certificates previously representing shares of Bank One

Common Stock shall be exchanged for certificates representing whole shares of JPMorgan Chase Common Stock issued in consideration therefor upon the surrender of such certificates in accordance with Section 2.2, without interest.

(c) *JPMorgan Chase Capital Stock*. Each share of JPMorgan Chase Common Stock and each share of JPMorgan Chase Preferred Stock (other than Dissenting Shares (as defined in Section 2.1(d)) shall remain outstanding following the Effective Time as shares of the Surviving Corporation.

(d) *Appraisal Rights*. Notwithstanding anything in this Agreement to the contrary, shares of 6.63% Cumulative Preferred Stock, Series H, and Fixed/Adjustable Noncumulative Preferred Stock of JPMorgan Chase that are issued and outstanding immediately prior to the Effective Time and that are owned by stockholders that have properly perfected their right of appraisal within the meaning of Section 262 of the DGCL (the "*Dissenting Shares*") shall not remain outstanding, and the holders thereof shall be entitled to payment of the appraised value of such Dissenting Shares in accordance with Section 262 of the DGCL. If any such holder shall have failed to perfect or shall have effectively withdrawn or lost such right of appraisal, each share of such JPMorgan Chase Preferred Stock held by such stockholder shall remain outstanding in accordance with Section 2.1(c).

2.2. *Exchange of Certificates.* * * *

COMMENT

The merger qualifies as a direct merger reorganization under Section 368 (a)(1)(A). (*See* Chapter 5)

DOCUMENTARY APPENDIX E, JP MORGAN CHASE-BANK ONE DIRECT STOCK MERGER S-4

[*See* Principally Chapters 2 and 15 of Business Planning for Mergers and Acquisitions]

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Amendment No. 3
to
FORM S-4

REGISTRATION STATEMENT

Under
THE SECURITIES ACT OF 1933

J.P. MORGAN CHASE & CO.

* * *

SUMMARY

This summary highlights selected information in this document and may not contain all of the information that is important to you. You should carefully read this entire document and the other documents we refer you to for a more complete understanding of the matters being considered at the annual meetings. In addition, we incorporate by reference important business and financial information about JPMorgan Chase and Bank One into this document. You may obtain the information incorporated by reference into this document without charge by following the instructions in the section entitled "Where You Can Find More Information" beginning on page 173 of this document.

THE MERGER

Bank One Common Stockholders to Receive 1.32 Shares of JPMorgan Chase Common Stock for Each Bank One Common Share; JPMorgan Chase Stockholders to Keep Their Shares (see page 34)

Bank One common stockholders will receive 1.32 shares of common stock of JPMorgan Chase for each share of Bank One common stock they own.

JPMorgan Chase stockholders will keep their shares, which will remain outstanding and unchanged as shares of JPMorgan Chase following the merger.

Bank One Will Merge With and Into JPMorgan Chase (see page 34 and page 97)

Subject to the terms and conditions of the merger agreement, and in accordance with Delaware law, at the completion of the merger Bank One will merge with and into JPMorgan Chase. JPMorgan Chase will be the surviving corporation. Because JPMorgan Chase does not currently have a sufficient number of authorized but unissued and unreserved shares to complete the merger and related transactions, the merger agreement also provides that, as part of the merger, JPMorgan Chase's certificate of incorporation will be amended to increase the authorized shares of its common stock from 4,500,000,000 to 9,000,000,000 and, as amended, will be the certificate of incorporation of the combined company. This amendment will not be effected unless the merger is approved by stockholders and completed. JPMorgan Chase's by-laws, which will be amended to provide for the agreed-upon succession and governance matters described under "The Merger — Amendments to JPMorgan Chase By-Laws" beginning on page 89, will be the by-laws of the combined company.

Assuming the number of shares of Bank One common stock outstanding at the time of the merger equaled the number of shares outstanding on December 31, 2003 and that the value of JPMorgan Chase common stock at the time of the merger equaled $39.02 per share (the average price from two days prior to two days following the announcement of the

merger), the aggregate purchase price for those Bank One shares would be $57.2 billion. Taking into account the additional fair value of vested options that will be converted into JPMorgan Chase stock options upon completion of the merger ($1.1 billion), the aggregate estimated purchase price to complete the proposed merger would be $58.3 billion. As noted below, however, the total value of the shares and options issued upon completion of the merger will fluctuate based on the share price of the JPMorgan Chase common stock and the number of shares of Bank One common stock and options outstanding on the date of the merger.

Exchange Ratio is Fixed and Will Not Be Adjusted in Response to Changes in Our Stock Prices (see page 22)

Because the exchange ratio is fixed in the merger agreement and neither JPMorgan Chase nor Bank One has the right to terminate the merger agreement based on changes in either party's stock price, **the market value of the JPMorgan Chase common stock that Bank One stockholders receive in the merger may vary significantly from its current value. * * ***

Merger Generally Tax-Free to Bank One Stockholders (see page 71)

The merger has been structured to qualify as a reorganization for federal income tax purposes, and it is a condition to our respective obligations to complete the merger that JPMorgan Chase and Bank One each receive a legal opinion to the effect that the merger will so qualify. In addition, in connection with the filing of the registration statement of which this document is a part, JPMorgan Chase and Bank One will each receive a legal opinion to the same effect. Accordingly, holders of Bank One common stock generally will not recognize any gain or loss for federal income tax purposes on the exchange of their Bank One common stock for JPMorgan Chase common stock in the merger, except for any gain or loss that may result from the receipt of cash instead of a fractional share of JPMorgan Chase common stock. * * *

Our Boards of Directors Recommend that JPMorgan Chase and Bank One Stockholders Approve the Merger (see pages 37 and 42)

JPMorgan Chase Stockholders. The JPMorgan Chase board of directors has determined that the merger agreement and related agreements are advisable and in the best interests of JPMorgan Chase and its stockholders and unanimously recommends that the JPMorgan Chase stockholders vote FOR the adoption of the merger agreement.

Bank One Stockholders. The Bank One board of directors has determined that the merger agreement and related agreements are advisable and in the best interests of Bank One and its stockholders and unanimously recommends that the Bank One stockholders vote FOR the adoption of the merger agreement.

Factors Considered by Our Boards. In determining whether to approve the merger, our boards of directors each consulted with our respective senior managements and legal and financial advisors and considered the respective strategic, financial and other considerations referred to under "The Merger — JPMorgan Chase's Reasons for the Merger; Recommendation of the Merger by the JPMorgan Chase Board of Directors" beginning on page 37 and "The Merger — Bank One's Reasons for the Merger; Recommendation of the Merger by the Bank One Board of Directors" beginning on page 42.

We Have Received Opinions From Our Financial Advisors that the Merger is Fair (see page 45)

Opinion of JPMorgan Chase's Financial Advisor. JPMorgan Chase's financial advisor, J.P. Morgan Securities Inc., has provided its opinion to the JPMorgan Chase board of directors dated as of January 14, 2004 that, as of that date, and subject to and based on the qualifications and assumptions set forth in its opinion, the exchange ratio in the merger was fair, from a financial point of view, to JPMorgan Chase. The full text of JPMorgan Securities' opinion is attached as Annex D to this document. JPMorgan Chase urges its stockholders to read that opinion in its entirety. The opinion of JPMorgan Securities will not reflect any developments that may occur or may have occurred after the date of its opinion and prior to the completion of the merger. JPMorgan Chase does not currently expect that it will request an updated opinion from JPMorgan Securities.

JPMorgan Chase has agreed to allocate a fee of $40 million to JPMorgan Securities in consideration for its services as financial advisor.

Opinion of Bank One's Financial Advisor. Bank One's financial advisor, Lazard Frères & Co. LLC, has provided its opinion to the Bank One board of directors dated as of January 14, 2004 that, as of that date, and subject to and based

on the considerations referred to in its opinion, the exchange ratio in the merger was fair, from a financial point of view, to Bank One's common stockholders. The full text of Lazard's opinion is attached as Annex E to this document. Bank One urges its stockholders to read that opinion in its entirety. The opinion of Lazard will not reflect any developments that may occur or may have occurred after the date of its opinion and prior to the completion of the merger. Bank One does not currently expect that it will request an updated opinion from Lazard.

Bank One has agreed to pay a fee of $20 million to Lazard in consideration for its services as financial advisor, a portion of which is payable upon completion of the merger.

***JPMorgan Chase's Financial Advisor is an Affiliate of JPMorgan Chase and May be Deemed to Have Conflicts of Interest.* * * ***

Appraisal Rights for Some JPMorgan Chase Preferred Stockholders But Not for Common Stockholders (see page 78)

Under Delaware law, the common stockholders of JPMorgan Chase and Bank One are not entitled to appraisal rights in connection with the merger. Holders of JPMorgan Chase's 6.63% Cumulative Preferred Stock, Series H, and Fixed/ Adjustable Noncumulative Preferred Stock who submit a written demand for appraisal of their shares and who perfect their appraisal rights by complying with the applicable statutory procedures required by Delaware law will be entitled to receive payment in cash for the fair value of their shares as determined by the Delaware Chancery Court. Holders of other series of preferred stock of JPMorgan Chase are not entitled to appraisal rights in connection with the merger.

Financial Interests of Our Directors and Executive Officers in the Merger (see page 66) * * *

Directors and Management Following the Merger (see page 70)

Following the merger, the board of directors of JPMorgan Chase will consist of sixteen directors. The board will include Mr. Harrison, currently the Chairman and Chief Executive Officer of JPMorgan Chase, and seven other directors to be designated by JPMorgan Chase. It will also include Mr. Dimon, currently the Chairman and Chief Executive Officer of Bank One, and seven other directors to be designated by Bank One. Other than Messrs. Harrison and Dimon, none of the directors to be designated by JPMorgan Chase or Bank One will be employees of the combined company. *** * ***

Regulatory Approvals We Must Obtain for the Merger (see page 74)

To complete the merger, we must obtain the approval of the Board of Governors of the Federal Reserve System. In addition, we need to obtain approvals or consents from, or make filings with, a number of U.S. federal and state bank, insurance and other regulatory authorities as well as regulatory authorities in various foreign jurisdictions.

Conditions to Completion of the Merger (see page 80)

We may not complete the merger unless the following conditions are satisfied or, where permitted, waived:

- the merger agreement must be adopted by the common stockholders of both JPMorgan Chase and Bank One;
- the JPMorgan Chase common stock to be issued in, or in connection with, the merger must be approved for listing on the New York Stock Exchange;
- we must obtain all necessary regulatory approvals of the merger from domestic and foreign governmental authorities, and none of those approvals may contain a condition or restriction that would have a material adverse effect on JPMorgan Chase after the merger;
- the registration statement of which this document is part must be declared effective by the Securities and Exchange Commission and not be subject to a stop order or proceedings seeking a stop order;
- no legal prohibition to completion of the merger may be in effect;

- our respective representations and warranties in the merger agreement must be true and correct, subject to exceptions that would not have a material adverse effect on JPMorgan Chase or Bank One, as the case may be, or on the combined company following the completion of the merger;

- we must each be in compliance in all material respects with our respective covenants in the merger agreement;

- we must each receive an opinion of our respective tax counsel that the merger will qualify as a tax-free reorganization; and

- in the case of Bank One's obligation to complete the merger, JPMorgan Chase's by-laws must have been amended to provide for the agreed-upon structure of the board of directors and Chief Executive Officer succession arrangements after the merger.

Termination of the Merger Agreement; Fees Payable (see page 84) [*See* also Appendix K]

We may jointly agree to terminate the merger agreement at any time. Either of us may also terminate the merger agreement if:

- a governmental authority that must grant a material regulatory approval denies approval of the merger, or a governmental authority permanently restrains or prohibits the merger, and
in either case that denial or action is final and nonappealable (although this termination right is not available to a party whose failure to comply with the merger agreement resulted in those actions by a governmental authority);

- the merger is not completed on or before January 14, 2005 (although this termination right is not available to a party whose failure to comply with the merger agreement resulted in the failure to complete the merger by that date);

- the other party's board of directors adversely changes its recommendation that its stockholders vote in favor of the merger or takes any other action inconsistent with such recommendation, or the other party breaches its obligation to hold its stockholders' meeting to vote on adoption of the merger agreement;

- the other party is in breach of its representations, warranties, covenants or agreements set forth in the merger agreement and the breach rises to a level that would excuse the terminating party's obligation to complete the merger and is either incurable or is not cured within 60 days; or

- the stockholders of either party do not approve the merger at their respective stockholders' meeting.

The merger agreement provides that in several circumstances described more fully beginning on page 84 involving a change in recommendation in favor of the merger agreement or failure to hold a stockholders' meeting to vote on the merger or a third party acquisition proposal, either of us may be required to pay termination fees to the other of up to $2.30 billion. The termination fees and the stock option agreements described below could discourage other companies from seeking to acquire or merge with either JPMorgan Chase or Bank One.

JPMorgan Chase and Bank One Granted Stock Options to Each Other (see page 90)

Each of us has issued to the other an option to purchase up to 19.9% of our respective outstanding shares of common stock. The exercise price of the option issued by Bank One is $44.61 per Bank One share, which represented the closing price of Bank One common stock on January 13, 2004, the trading day prior to the announcement of the merger. The exercise price of the option issued by JPMorgan Chase is $38.90 per JPMorgan Chase share, which represented the closing price of JPMorgan Chase common stock on that same day.

Each option becomes exercisable only if one of the following events occurs:

- prior to termination of the merger agreement, without the consent of the option holder, the option issuer enters into an agreement with any person relating to a competing acquisition proposal as described in the stock option agreement;

- prior to termination of the merger agreement, any person other than the option holder acquires beneficial ownership

of, or a right to acquire beneficial ownership of, voting securities representing 20% or more of the voting power of the option issuer or any of its significant subsidiaries; or

- the full $2.30 billion termination fee under the merger agreement, as described above, becomes payable by the option issuer.

Under the circumstances described in the stock option agreements, the option holder may require the option issuer to repurchase the option and any shares purchased under the option for a price specified in the stock option agreement.

The option holder's profit under the applicable stock option agreement, together with any termination fees paid under the merger agreement, may not exceed $2.87 billion.

THE ANNUAL MEETINGS

JPMorgan Chase Annual Meeting (see page 27)

The JPMorgan Chase annual meeting will be held at the auditorium of J.P. Morgan Chase & Co., One Chase Manhattan Plaza, New York, New York on May 25, 2004, starting at 9:00 a.m., New York time. At the JPMorgan Chase meeting, JPMorgan Chase's common stockholders will be asked to vote on the following matters:

- adoption of the merger agreement;
- election of directors; * * *

Bank One Annual Meeting (see page 31)

The Bank One annual meeting will be held at the auditorium of Bank One Corporation, 1 Bank One Plaza, Chicago, Illinois on May 25, 2004, starting at 9:30 a.m., Chicago time. At the

Bank One meeting, Bank One's common stockholders will be asked to vote on the following matters:

- adoption of the merger agreement;
- election of directors; * * *

RISK FACTORS

In addition to the other information contained in or incorporated by reference into this document, you should carefully consider the following risk factors relating to the merger in deciding whether to vote for adoption of the merger agreement.

Because the market price of JPMorgan Chase common stock may fluctuate, you cannot be sure of the market value of the common stock issued in the merger. * * *

JPMorgan Chase and Bank One have not obtained updated fairness opinions from JPMorgan Securities and Lazard, respectively, reflecting changes in circumstances that may have occurred since the signing of the merger agreement. * * *

If we fail to realize the anticipated cost savings and other benefits of the merger, the merger could be dilutive to JPMorgan Chase's earnings per share or otherwise adverse to our stockholders. * * *

INFORMATION REGARDING FORWARD-LOOKING STATEMENTS

This document contains "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. These statements may be made directly in this document or they may be made a part of this document by appearing in other documents filed with the Securities and Exchange Commission by JPMorgan Chase and Bank One and incorporated by reference in this document. These statements may include statements regarding the period following

completion of the merger.

Words such as "anticipate," "estimate," "expect," "project," "intend," "plan," "believe," "target," "objective," "goal" and words and terms of similar substance used in connection with any discussion of future operating or financial performance of JPMorgan Chase, Bank One, the surviving company or the merger identify forward-looking statements. All forward-looking statements are management's present expectations or forecasts of future events and are subject to a number of factors and uncertainties that could cause actual results to differ materially from those described in the forward-looking statements. In addition to the factors relating to the merger discussed under the caption "Risk Factors" beginning on page 22, the following risks related to the businesses of JPMorgan Chase and Bank One could cause actual results to differ materially from those described in the forward-looking statements:

- the risk of adverse movements or volatility in domestic or foreign debt and equity securities markets or in interest or foreign exchange rates or indices;
- the risk of adverse impact from an economic downturn or other downturn in trading conditions or markets;
- the risks associated with increased competition; *** * ***

We caution you not to place undue reliance on the forward-looking statements, which speak only as of the date of this document in the case of forward-looking statements contained in this document, or the dates of the documents incorporated by reference in this document in the case of forward-looking statements made in those incorporated documents. Neither JPMorgan Chase nor Bank One has any obligation to update these forward-looking statements. *** * ***

We expressly qualify in their entirety all forward-looking statements attributable to either of us or any person acting on our behalf by the cautionary statements contained or referred to in this section.

*** * ***

DOCUMENTARY APPENDIX F, TOYS REVERSE SUBSIDIARY CASH MERGER AGREEMENT

[*See* Principally Chapters 2 and 15 of Business Planning for Mergers and Acquisitions]

AGREEMENT AND PLAN OF MERGER dated as of March 17, 2005 (this " **Agreement** ") among Global Toys Acquisition, LLC, a Delaware limited liability company (" **Parent** "), Global Toys Acquisition Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Parent (" **Acquisition Sub** ") and Toys "R" Us, Inc., a Delaware corporation (the " **Company** ").

W I T N E S S E T H:

WHEREAS, the Board of Directors of the Company (the " **Board of Directors** ") has (i) determined that it is in the best interests of the Company and the stockholders of the Company, and declared it advisable, to enter into this Agreement with Parent and Acquisition Sub providing for the merger (the " **Merger** ") of Acquisition Sub with and into the Company in accordance with the General Corporation Law of the State of Delaware (the " **DGCL** "), upon the terms and subject to the conditions set forth herein, (ii) approved this Agreement in accordance with the DGCL, upon the terms and conditions contained herein, and (iii) resolved to recommend adoption of this Agreement by the stockholders of the Company; and

WHEREAS, the Boards of Directors of Parent and Acquisition Sub have approved, and the board of directors of Acquisition Sub has declared it advisable for Acquisition Sub to enter into, this Agreement providing for the Merger in accordance with the DGCL, upon the terms and conditions contained herein.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements herein contained, and intending to be legally bound hereby, Parent, Acquisition Sub and the Company hereby agree as follows:

ARTICLE I

DEFINITIONS

1.01. *Certain Defined Terms*. As used in this Agreement, the following terms have the following meanings: *** * ***

" **Knowledge** " means (i) with respect to Parent, the actual knowledge (without independent inquiry or investigation) of the executive officers of Parent and (ii) with respect to the Company, the actual knowledge (without independent inquiry or investigation) of the officers of the Company listed on Schedule I hereto. *** * ***

" **Material Adverse Effect** " means any change, circumstance, event or effect that would be materially adverse to the assets, liabilities, business, financial condition or results of operations of the Company and the Company Subsidiaries taken as a whole, other than any change circumstance, event or effect resulting from (i) changes in general economic conditions, (ii) the announcement of this Agreement and the transactions contemplated hereby, (iii) general changes or developments in the industries in which the Company and the Company Subsidiaries operate, (iv) any actions required under this Agreement to obtain any approval or authorization under applicable antitrust or competition laws for the consummation of the transactions contemplated by this Agreement or (v) changes in any Laws or applicable accounting regulations or principles, unless, in the case of the foregoing clauses (i) and (iii), such changes or developments referred to therein would reasonably be expected to have a materially disproportionate impact on the business, financial condition or results of operations of the Company and the Company Subsidiaries taken as a whole relative to other industry participants. *** * ***

ARTICLE II

MERGER

2.01. *The Merger*. Upon the terms and subject to the conditions of this Agreement and in accordance with the DGCL, at the Effective Time (as defined below), Acquisition Sub shall be merged with and into the Company. As a result of the Merger, the separate corporate existence of Acquisition Sub shall cease and the Company shall continue as the

surviving corporation of the Merger (the " **Surviving Corporation** ").

2.02. *Closing; Effective Time*. Subject to the provisions of Article VII, the closing of the Merger (the " **Closing** ") shall take place at the offices of Latham & Watkins, LLP, 885 Third Avenue, Suite 1000, New York, New York at 10:00 a.m., New York City time, as soon as practicable, but in no event later than the second Business Day after the satisfaction or waiver of the conditions set forth in Article VII (excluding conditions that, by their terms, cannot be satisfied until the Closing, but the Closing shall be subject to the satisfaction or waiver of those conditions), or at such other place or at such other date as Parent and the Company may mutually agree. The date on which the Closing actually occurs is hereinafter referred to as the " **Closing Date** ". At the Closing, the parties hereto shall cause the Merger to be consummated by filing a certificate of merger (the " **Certificate of Merger** ") with the Secretary of State of the State of Delaware, in such form as required by, and executed in accordance with, the relevant provisions of the DGCL (the date and time of the filing of the Certificate of Merger with the Secretary of State of the State of Delaware, or such later time as is specified in the Certificate of Merger and as is agreed to by Parent and the Company, being the " **Effective Time** ") and shall make all other filings or recordings required under the DGCL in connection with the Merger.

2.03. *Effects of the Merger*. The Merger shall have the effects set forth in the applicable provisions of the DGCL. Without limiting the generality of the foregoing and subject thereto, at the Effective Time, all the property, rights, privileges, immunities, powers and franchises of the Company and Acquisition Sub shall vest in the Surviving Corporation and all debts, liabilities and duties of the Company and Acquisition Sub shall become the debts, liabilities and duties of the Surviving Corporation.

2.04. *Certificate of Incorporation; By-Laws*.

(a) At the Effective Time, the certificate of incorporation of the Company shall be amended so as to read in its entirety in the form annexed hereto as Exhibit A, and, as so amended, shall be the certificate of incorporation of the Surviving Corporation until thereafter amended in accordance with its terms and applicable Law.

(b) At the Effective Time, the by-laws of the Company shall be amended so as to read in its entirety in the form attached hereto as Exhibit B, and, as so amended shall be the by-laws of the Surviving Corporation until thereafter amended in accordance with their terms, the certificate of incorporation of the Surviving Corporation and applicable Law.

2.05. *Directors and Officers*. The directors of the Company immediately prior to the Effective Time shall submit their resignations to be effective as of the Effective Time. Immediately after the Effective Time, Parent shall take the necessary actions to cause the directors of Acquisition Sub immediately prior to the Effective Time to be the directors of the Surviving Corporation, each to hold office in accordance with the certificate of incorporation and by-laws of the Surviving Corporation. The officers of the Company immediately prior to the Effective Time shall be the officers of the Surviving Corporation, each to hold office until the earlier of his or her resignation or removal.

ARTICLE III

EFFECT OF THE MERGER ON CAPITAL STOCK OF THE CONSTITUENT CORPORATIONS

3.01. *Effect on Capital Stock*. At the Effective Time, by virtue of the Merger and without any action on the part of Parent, Acquisition Sub, the Company or the holders of any of the following securities:

(a) Each share of Common Stock, par value $0.10 per share, of the Company (the " **Company Common Stock** ") issued and outstanding immediately prior to the Effective Time (other than any shares of Company Common Stock (" **Shares** ") to be canceled pursuant to Section 3.1(b) (any Shares to be so cancelled, " **Excluded Shares** ") and any Dissenting Shares (as defined in Section 3.4)) shall be converted into the right to receive $26.75 in cash, without interest (the " **Per Share Merger Consideration** ").

(b) Each Share held in the treasury of the Company, or owned by Parent, Acquisition Sub or owned by any wholly owned direct or indirect Subsidiary of the Company, Parent or Acquisition Sub, in each case immediately prior to the Effective Time, shall be canceled without any conversion thereof and no consideration shall be paid with respect thereto.

(c) Each share of common stock of Acquisition Sub issued and outstanding immediately prior to the Effective Time shall be converted into one share of common stock of the Surviving Corporation.

3.02. *Treatment of Options and Other Equity Awards*. *** * ***

3.04. *Dissenting Shares*.

(a) Shares that are issued and outstanding immediately prior to the Effective Time and which are held by holders of Shares who have not voted in favor of or consented to the Merger and who have properly demanded and perfected their rights to be paid the fair value of such Shares in accordance with Section 262 of the DGCL (the " **Dissenting Shares** ") shall not be converted into the right to receive the Per Share Merger Consideration, and the holders thereof shall be entitled to only such rights as are granted by Section 262 of the DGCL; *provided* , *however* , that if any such stockholder of the Company shall fail to perfect or shall effectively waive, withdraw or lose such stockholder's rights under Section 262 of the DGCL, such stockholder's Shares in respect of which the stockholder would otherwise be entitled to receive fair value under Section 262 of the DGCL shall thereupon be deemed to have been converted, at the Effective Time, into the right to receive the Per Share Merger Consideration without any interest thereon.

(b) The Company shall give Parent (i) prompt notice of any notice received by the Company of intent to demand the fair value of any Shares, withdrawals of such notices and any other instruments served pursuant to Section 262 of the DGCL and received by the Company and (ii) the opportunity to direct all negotiations and proceedings with respect to the exercise of dissenters' rights under Section 262 of the DGCL. The Company shall not, except with the prior written consent of Parent or as otherwise required by an order, decree, ruling or injunction of a court of competent jurisdiction, make any payment with respect to any such exercise of dissenters' rights or offer to settle or settle any such rights. *** * ***

COMMENT

This merger is a taxable reverse subsidiary merger. (*See* Chapter 5)

ARTICLE IV

REPRESENTATIONS AND WARRANTIES OF THE COMPANY

*** * ***

4.11. *Compliance with Law and Reporting Requirements.*

(a) The Company and the Company Subsidiaries are not (and have not been since October 30, 2004) in violation of any Law, and have not received any written notice of any violation of Law, in each case except for any violation or possible violation that would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect [*see* the definition in Article I]. The Company and the Company Subsidiaries have, and are (and have been since October 30, 2004) in compliance with, all permits, licenses, authorizations, exemptions, orders, consents, approvals and franchises from Governmental Authorities required to conduct their respective businesses as now being conducted, except for any such permit, license, authorization, exemption, order, consent, approval or franchise the absence of, or the non-compliance, with which would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect.

(b) Since the enactment of the Sarbanes-Oxley Act of 2002, the Company has been and is in compliance in all material respects with (i) the applicable provisions of the Sarbanes-Oxley Act of 2002 and (ii) the applicable listing and corporate governance rules and regulations of the NYSE.

(c) The Company has designed disclosure controls and procedures to ensure that material information relating to the Company, including its consolidated Company Subsidiaries, is made known to the chief executive officer and the chief financial officer of the Company by others within those entities.

(d) The Company has disclosed, based on its most recent evaluation prior to the date hereof, to the Company's auditors and the audit committee of the Board of Directors of the Company (i) any significant deficiencies and material weaknesses in the design or operation of internal controls over financial reporting which are reasonably likely to adversely affect in any material respect the Company's ability to record, process, summarize and report financial information and (ii) any fraud or allegation of fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal controls over financial reporting.

(e) As of the date hereof, to the Company's Knowledge [*see* the definition in Article I], the Company has not identified any material weaknesses in the design or operation of internal controls over financial reporting other than as disclosed in Section 4.11 of the Company Disclosure Letter. To the Company's Knowledge, there is no reason to believe that its auditors and its chief executive officer and chief financial officer will not be able to give the certifications and attestations required pursuant to the rules and regulations adopted pursuant to Section 404 of the Sarbanes-Oxley Act of 2002 when next due. * * *

ARTICLE VII

CONDITIONS OF MERGER

* * *

7.02. *Conditions to Obligations of Parent and Acquisition Sub*. The obligations of Parent and Acquisition Sub to consummate the Merger shall be further subject to the satisfaction or waiver at or prior to the Effective Time, of each of the following conditions:

(a) (i) The representations and warranties of the Company set forth in Sections 4.2 [Authority; Enforceability], 4.5(b) [Capitalization of the Company, no preemptive rights or contracts relating to stock], 4.6 (solely with respect to material Company Subsidiaries) [Company Subsidiaries], 4.22 [Brokers] and 4.24 [Fairness Opinion] shall be true and correct in all material respects as of the Closing Date as though made on and as of such date (unless any such representation or warranty is made only as of a specific date, in which event such representation and warranty shall be true and correct as of such specified date), (ii) the representations and warranties of the Company set forth in Section 4.5(a) [Capitalization of the Company, authorized and outstanding shares and other securities] shall be true and correct as of the Closing Date as though made on and as of such date (unless any such representation or warranty is made only as of a specific date, in which event such representation and warranty shall be true and correct as of such specified date), except in the case of this clause (ii) where the failure of any such representations and warranties to be so true and correct, in the aggregate, has not resulted in and would not reasonably be expected to result in, liability to the Company or to the Surviving Corporation in excess of $25,000,000 and (iii) the other representations and warranties contained in this Agreement (disregarding any Material Adverse Effect, materiality or similar qualifiers therein) shall be true and correct as of the Closing Date as though made on and as of such date (unless any such representation or warranty is made only as of a specific date, in which event such representation and warranty shall be true and correct as of such specified date), except in the case of this clause (iii) where the failure of any such representations and warranties to be so true and correct, in the aggregate, has not had and would not reasonably be expected to have a Material Adverse Effect [*see* the definition in Article I];

(b) The Company shall have performed in all material respects the obligations, and complied in all material respects with the agreements and covenants, required to be performed by or complied with by it under this Agreement at or prior to the Closing Date; *provided*, that the Company's failure to comply with the notification requirements in Section 6.13, individually, shall not cause the condition set forth in this Section 7.2(b) to fail; * * *

COMMENT

For an illustration of other conditions to a merger, see Appendix A.

DOCUMENTARY APPENDIX G, TOYS REVERSE SUBSIDIARY CASH MERGER PROXY STATEMENT

[*See* Principally Chapters 13 and 14 of Business Planning for Mergers and Acquisitions]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14A

Proxy Statement Pursuant to Section 14(a) of
the Securities Exchange Act of 1934
*** * ***

TOYS "R" US, INC.

*** * ***
SUMMARY

The following summary highlights selected information from this proxy statement and may not contain all of the information that may be important to you. Accordingly, we encourage you to read carefully this entire proxy statement, its annexes and the documents referred to or incorporated by reference in this proxy statement. Each item in this summary includes a page reference directing you to a more complete description of that item.

The Parties to the Merger (Page 11)

Toys "R" Us, Inc. is a worldwide specialty retailer of toys, baby products and children's apparel. *** * ***

Parent is a Delaware limited liability company owned in equal parts by investment funds affiliated with the Sponsors. Parent was formed solely for the purpose of entering into the merger agreement and consummating the transactions contemplated by the merger agreement. *** * ***

Acquisition Sub is a Delaware corporation and a wholly owned subsidiary of Parent. Acquisition Sub was organized solely for the purpose of entering into the merger agreement and consummating the transactions contemplated by the merger agreement. It has not conducted any activities to date other than activities incidental to its formation and in connection with the transactions contemplated by the merger agreement.

The Special Meeting * * *

Purpose (Page 11)

You will be asked to consider and vote upon adoption of the merger agreement. The merger agreement provides that Acquisition Sub will be merged with and into the Company, and each outstanding share of the Company's common stock (other than shares held in the treasury of the Company or owned by Acquisition Sub, Parent or any wholly owned subsidiary of Parent or the Company and other than shares held by a stockholder who properly demands statutory appraisal rights) will be converted into the right to receive $26.75 in cash, without interest. *** * ***

Vote Required (Page 12)

For us to complete the merger, stockholders holding at least a majority of the shares of our common stock outstanding at the close of business on the record date must vote "FOR" the adoption of the merger agreement. A failure to vote your shares of the Company's common stock or an abstention will have the same effect as a vote against the merger. [*See* Chapter 2] *** * ***

When the Merger Will be Completed (Page 47)

We are working to complete the merger as soon as possible. We anticipate completing the merger by the end of July 2005, subject to adoption of the merger agreement by the Company's stockholders and the satisfaction of the other closing conditions.

Board Recommendation (Page 22)

After careful consideration, our board of directors, by the unanimous vote of the directors:

- has determined that the merger, the merger agreement and the transactions contemplated by the merger agreement are advisable, fair to and in the best interests of the Company and its stockholders;
- has approved the merger agreement, the merger and the transactions contemplated by the merger agreement; and
- recommends that the Company's stockholders vote "FOR" the adoption of the merger agreement.

Opinions of the Company's Financial Advisors (Page 22 and Annex B and Annex C)

Credit Suisse First Boston delivered its opinion to the Company's board of directors that, as of the date of its opinion and based upon and subject to the factors and assumptions set forth therein, the merger consideration of $26.75 in cash per share, to be received by the Company's stockholders pursuant to the merger agreement was fair from a financial point of view to the Company's stockholders. In addition, Duff & Phelps, LLC ("Duff & Phelps") delivered its opinion to the Company's board of directors that, as of the date of its opinion and based upon and subject to the factors and assumptions set forth therein, the merger consideration of $26.75 in cash per share to be received by the Company's stockholders pursuant to the merger agreement was fair from a financial point of view to the Company's stockholders. *** * ***

Financing (Page 36)

In connection with the execution and delivery of the merger agreement, Parent obtained commitments to provide approximately $6.2 billion in debt financing, not all of which is expected to be drawn at the completion of the merger, consisting of (1) a $2.85 billion U.S. asset-based debt facility, (2) a $2.0 billion bridge facility, (3) a $1.0 billion European bridge facility and (4) a $350 million European working capital facility. Parent has agreed to use its reasonable best efforts to arrange the debt financing on the terms and conditions described in the commitments. In addition, Parent has obtained an aggregate of $1.2 billion in equity commitments from affiliates of the Sponsors. *** * ***

Material United States Federal Income Tax Consequences (Page 43)

If you are a U.S. holder of our common stock, the merger will be a taxable transaction to you. For U.S. federal income tax purposes, your receipt of cash in exchange for your shares of the Company's common stock generally will cause you to recognize a gain or loss measured by the difference, if any, between the cash you receive in the merger and your adjusted tax basis in your shares. If you are a non-U.S. holder of our common stock, the merger will generally not be a taxable transaction to you under U.S. federal income tax laws unless you have certain connections to the United States. You should consult your own tax advisor for a full understanding of how the merger will affect your taxes. *** * ***

No Solicitation of Transactions (Page 53) [*See also* Appendix K]

The merger agreement contains restrictions on our ability to solicit or engage in discussions or negotiations with a third party regarding specified transactions involving the Company. Notwithstanding these restrictions, under certain circumstances, our board of directors may respond to an unsolicited written bona fide proposal for an alternative acquisition or terminate the merger agreement and enter into an agreement with respect to a superior proposal.

Conditions to the Merger (Page 57)

Before we can complete the merger, a number of conditions must be satisfied. These include:

- the receipt of Company stockholder approval;
- the absence of governmental orders that have the effect of making the merger illegal or that otherwise prohibit the closing;
- the absence of actions or suits instituted by a governmental authority seeking to prohibit or challenging the completion of the merger;
- clearance under antitrust and competition laws;
- absence of a material adverse effect; and
- the receipt by us, Parent or Acquisition Sub of the proceeds from the debt financing.

Termination of the Merger Agreement (Page 58) [*See also* Appendix K]

Toys, Parent and Acquisition Sub may agree in writing to terminate the merger agreement at any time without completing the merger, even after the stockholders of Toys have adopted the merger agreement. The merger agreement may also be terminated at any time prior to the effective time of the merger in certain other circumstances, including:

- by either Parent or the Company if:
  - the closing has not occurred on or before September 15, 2005 (in certain specified circumstances such date may be extended by either Parent or us until October 31, 2005);
  - a final, non-appealable governmental order prohibits the merger;
  - the Company stockholders do not adopt the merger agreement at the special meeting or any postponement or adjournment thereof;
  - there is a material breach by the non-terminating party of its representations, warranties, covenants or agreements in the merger agreement such that the closing conditions would not be satisfied;
- by Parent, if our board of directors withdraws, modifies or changes its recommendation or approval of the transactions contemplated by the merger agreement in a manner adverse to Parent or recommends or approves an acquisition proposal other than the transactions contemplated by the merger agreement; or
- by the Company, prior to the special meeting, if we receive a superior proposal in accordance with the terms of the merger agreement, but only after we have provided Parent a three business day period to revise the terms and conditions of the merger agreement and paid the termination fee described below.

Termination Fees and Expenses (Page 59) [*See also* Appendix K]

Under certain circumstances, in connection with the termination of the merger agreement, the Company will be required to pay Parent up to **$** 247.5 million in termination fees and expenses. *** * ***

DOCUMENTARY APPENDIX H, ORACLE-SIEBEL HORIZONTAL DOUBLE DUMMY FORM 8-K AND MERGER AGREEMENT

[*See* Principally Chapters 2, 5, and 15 of Business Planning for Mergers and Acquisitions]

Item 1.01. Entry into a Material Definitive Agreement.

Agreement and Plan of Merger

On September 12, 2005, Oracle Corporation ("Oracle") entered into a definitive Agreement and Plan of Merger (the "Merger Agreement") with Siebel Systems, Inc. ("Siebel"). The Merger Agreement provides that, upon the terms and subject to the conditions set forth in the Merger Agreement, Sierra Merger Sub Inc., a wholly owned subsidiary of Ozark Holding Inc. (the "Holding Company"), will merge with and into Siebel, with Siebel as the surviving corporation of such merger and Ozark Merger Sub Inc., a wholly owned subsidiary of the Holding Company, will merge with and into Oracle, with Oracle as the surviving corporation of such merger (the "Merger"). As a result of the Merger: (i) Siebel and Oracle will each become a wholly owned subsidiary of the Holding Company; and (ii) Siebel stockholders will receive $10.66 per share in cash for each Siebel share held, unless they elect to receive Oracle common stock, but no more than 30% of Siebel's common shares may be exchanged for Oracle common stock. In the event that Siebel stockholders holding more than 30% of Siebel common stock elect to receive Oracle common stock, the equity consideration will be pro-rated. Consummation of the Merger is subject to customary closing conditions, including antitrust approvals and approval by the stockholders of Siebel. Thomas M. Siebel, who holds approximately 7% of the outstanding common stock of Siebel has entered into an agreement requiring him to vote in favor of the Merger. *** * ***

AGREEMENT AND PLAN OF MERGER

AGREEMENT AND PLAN OF MERGER dated as of September 12, 2005 (this " **Agreement** ") among Oracle Corporation, a Delaware corporation (" **Oracle** "), Siebel Systems, Inc., a Delaware corporation (" **Siebel** "), Ozark Holding Inc., a Delaware corporation and a wholly owned subsidiary of Oracle (" **Parent** "), Ozark Merger Sub Inc., a Delaware corporation and a wholly owned subsidiary of Parent (" **Ozark Merger Sub** "), and Sierra Merger Sub Inc., a Delaware corporation and a wholly owned subsidiary of Parent (" **Sierra Merger Sub** " and, together with Ozark Merger Sub, the " **Merger Subs** ").

WHEREAS, the Boards of Directors of each of Oracle, Siebel, Parent, Ozark Merger Sub and Sierra Merger Sub have approved this Agreement and deem it advisable and in the best interests of their respective stockholders to consummate the transactions contemplated hereby on the terms and conditions set forth herein;

WHEREAS, concurrently with the execution and delivery of this Agreement, in consideration of Oracle entering into this Agreement and incurring certain related fees and expenses, certain stockholders of Siebel are executing a voting agreement dated as of the date hereof (the " **Voting Agreement** ") relating to Siebel Stock (as defined below) beneficially owned by such stockholders; and

WHEREAS, it is intended that, for United States federal income tax purposes, the Mergers (as defined below) shall qualify as exchanges described in Section 351 of the Internal Revenue Code of 1986, as amended (the " **Code** ") and the regulations promulgated thereunder.

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth below, the parties hereto agree as follows: *** * ***

ARTICLE 2

THE MERGERS

Section 2.01 . *The Oracle Merger.*

(a) At the Initial Effective Time, Ozark Merger Sub shall be merged with and into Oracle (the " **Oracle Merger** ") in accordance with the DGCL, and upon the terms set forth in this Agreement, whereupon the separate existence of Ozark Merger Sub shall cease and Oracle shall be the surviving corporation (the " **Oracle Surviving Corporation** ").

(b) As soon as practicable (and, in any event, within five Business Days) after satisfaction or, to the extent permitted hereunder, waiver of all conditions to the Mergers set forth in Article 8 other than conditions that by their nature are to be satisfied at the Closing and will in fact be satisfied or waived at the Closing, Oracle shall file a certificate of merger, certified by the Secretary of Oracle in accordance with Section 251(g) of the DGCL (the " **Oracle Merger Filing** "), with the Delaware Secretary of State and make all other filings or recordings required by the DGCL in connection with the Oracle Merger. The Oracle Merger shall become effective at the Initial Effective Time. As used herein, the term " **Initial Effective Time** " means the time at which the certificate of merger is filed (or at any other time indicated therein and mutually agreed to by Oracle and Siebel).

(c) From and after the Initial Effective Time, the Oracle Surviving Corporation shall possess all the rights, powers,

privileges and franchises and be subject to all of the obligations, liabilities, restrictions and disabilities of Oracle and Ozark Merger Sub, all as provided under the DGCL.

Section 2.02 . *The Siebel Merger.*

(a) At the Effective Time, Sierra Merger Sub shall be merged with and into Siebel (the " **Siebel Merger** " and, together with the Oracle Merger, the " **Mergers** ") in accordance with the DGCL, and upon the terms set forth in this Agreement, whereupon the separate existence of Sierra Merger Sub shall cease and Siebel shall be the surviving corporation (the " **Siebel Surviving Corporation** " and, together with the Oracle Surviving Corporation, the " **Surviving Corporations** ").

(b) Immediately following the Initial Effective Time, Siebel and Sierra Merger Sub shall file a certificate of merger (the " **Siebel Certificate of Merger** " and, together with the Oracle Merger Filing, the " **Merger Filings** ") with the Delaware Secretary of State and make all other filings or recordings required by the DGCL in connection with the Siebel Merger. The Siebel Merger shall become effective at the Effective Time. As used herein, the term " **Effective Time** " means the time one minute following the Initial Effective Time.

(c) From and after the Effective Time, the Siebel Surviving Corporation shall possess all the rights, powers, privileges and franchises and be subject to all of the obligations, liabilities, restrictions and disabilities of Siebel and Sierra Merger Sub, all as provided under the DGCL.

Section 2.03 . *Closing.* Upon the terms and subject to the conditions set forth herein, the closing of the Mergers (the " **Closing** ") will take place on the date on which the Initial Effective Time and the Effective Time occurs, unless this Agreement has been theretofore terminated pursuant to its terms or unless another time or date is agreed to in writing by the parties hereto. The Closing shall be held at the offices of Davis Polk & Wardwell, 1600 El Camino Real, Menlo Park, CA 94025, unless another place is agreed to in writing by the parties hereto.

Section 2.04 . *Certificates of Incorporation and Bylaws.*

(a) At the Effective Time, the certificate of incorporation of Siebel shall be the certificate of incorporation of the Siebel Surviving Corporation, until thereafter changed or amended as provided therein or by applicable law.

(b) At the Initial Effective Time, the certificate of incorporation of Oracle shall be the certificate of incorporation of the Oracle Surviving Corporation, until thereafter changed or amended as provided therein or by applicable law; provided that the certificate of incorporation of Oracle Surviving Corporation shall be amended at the Initial Effective Time as required or permitted by Section 251(g) of the DGCL to reflect the changes on Exhibit E hereto.

(c) At the Effective Time, the bylaws of Siebel shall be the bylaws of the Siebel Surviving Corporation, and at the Initial Effective Time, the bylaws of Oracle shall be the bylaws of the Oracle Surviving Corporation.

(d) The certificate of incorporation and bylaws of Parent in effect immediately after the Initial Effective Time will contain provisions identical to the certificate of incorporation and bylaws of Oracle in effect immediately before the Initial Effective Time, in each case other than as required or permitted by Section 251(g) of the DGCL, and the name of Parent immediately after the Initial Effective Time shall be Oracle Corporation. *** * ***

Section 2.06 . *Transaction Structure.* (a) The parties may, with the approval of their respective boards of directors, at any time prior to the mailing of the Proxy Statement, change the method of effecting the combination of Siebel and Oracle contemplated hereby (including, without limitation, the provisions of this Article 2). This Agreement and any related documents will be appropriately amended in order to reflect any such revised transaction.

(b) Notwithstanding anything to the contrary in this Agreement, in the event that the total number of Stock Electing Siebel Shares are less than 6% of Siebel Stock outstanding immediately after the Election Deadline, then this Agreement shall be automatically converted into an agreement of Oracle to acquire Siebel pursuant to a reverse triangular merger in which the Siebel Merger Consideration shall be the Cash Election Price and the provisions of this Agreement shall be equitably modified to obtain such result.

Section 2.07 . *Parent Rights Plan.* Prior to the Effective Time, Parent shall adopt a shareholder rights plan, effective as of the Initial Effective Time, having terms and conditions substantially identical to the terms and conditions set forth in the Oracle Rights Agreement.

ARTICLE 3

CONVERSION OF SECURITIES

Section 3.01 . *Oracle and Ozark Merger Sub.* At the Initial Effective Time, by virtue of the Oracle Merger and without any action on the part of Oracle, Parent, Ozark Merger Sub or any holder of any shares of Oracle Stock:

(a) All shares of Oracle Stock that are held by Oracle as treasury stock or that are owned by Oracle, Ozark Merger Sub or any other Subsidiary of Oracle immediately prior to the Initial Effective Time shall cease to be outstanding and shall be cancelled and retired and shall cease to exist and no consideration shall be delivered in exchange therefor.

(b) Subject to Section 3.01(a) and Section 3.09(b), each outstanding share of Oracle Stock issued and outstanding immediately prior to the Initial Effective Time shall be converted into the right to receive from Parent one fully paid and

nonassessable share of Parent Stock (the " **Oracle Merger Consideration** "). All shares of Parent Stock issued pursuant to this Section 3.01(b) shall be duly authorized and validly issued and free of preemptive rights, with no personal liability attaching to the ownership thereof.

(c) Each share of Ozark Merger Sub common stock issued and outstanding immediately prior to the Effective Time shall be converted into one share of common stock of the Oracle Surviving Corporation.

Section 3.02 . *Siebel and Sierra Merger Sub.* At the Effective Time, by virtue of the Siebel Merger and without any action on the part of Siebel, Parent, Sierra Merger Sub or any holder of any shares of Siebel Stock:

(a) All shares of Siebel Stock that are held by Siebel as treasury stock or that are owned by Siebel, Sierra Merger Sub or any Subsidiary of Siebel immediately prior to the Effective Time shall cease to be outstanding and shall be cancelled and retired and shall cease to exist and no consideration shall be delivered in exchange therefor.

(b) Subject to Sections 3.02(a), 3.04, 3.05, 3.06, Section 3.08(b) and 3.11, each share of Siebel Stock issued and outstanding immediately prior to the Effective Time shall be converted into the right to receive from Parent either the Stock Election Price or the Cash Election Price (the Stock Election Price or Cash Election Price, as applicable, the " **Siebel Merger Consideration** ") with the form of Siebel Merger Consideration determined as follows:

(i) each share of Siebel Stock with respect to which an election to receive stock has been made and not revoked or converted into the right to receive the Cash Election Price pursuant to Section 3.04(b) (each, a " **Stock Electing Siebel Share** ") shall be converted into the right to receive the number of shares of Parent Stock (the " **Stock Election Price** ") equal to $10.66 divided by the Average Oracle Stock Price (the " **Exchange Ratio** "); and

(ii) each other share of Siebel Stock shall be converted into the right to receive an amount equal to $10.66 in cash without interest (the " **Cash Election Price** ").

(c) Each share of Sierra Merger Sub common stock issued and outstanding immediately prior to the Effective Time shall be converted into one share of common stock of the Siebel Surviving Corporation.

Section 3.03 . *Elections.* (a) Each Person (other than Parent, Siebel, Sierra Merger Sub or any other Subsidiary of Siebel) who, as of a date to be mutually agreed by Oracle and Siebel and which shall be no fewer than 20 Business Days prior to the Election Deadline (the " **Election Record Date** "), is a record holder of Siebel Stock will be entitled, with respect to all (but not less than all) of such shares of Siebel Stock, to make an election (a " **Stock Election** "), on or prior to the Election Deadline, to receive the Stock Election Price on the basis hereinafter set forth.

(b) Prior to the Election Record Date, Parent shall prepare a form, in form and substance reasonably acceptable to Siebel (an " **Election Form** "), pursuant to which a holder of record of shares of Siebel Stock may make a Stock Election with respect to all (but not less than all) of the shares of Siebel Stock owned by such holder. Parent shall cause the Exchange Agent to mail an Election Form, as promptly as practicable following the Election Record Date, to each holder of record of shares of Siebel Stock as of the close of business on the Election Record Date.

(c) Subject to Section 2.06(b), a Stock Election shall be effective only if the Exchange Agent shall have received no later than 5:00 p.m., New York time, on a date selected by Oracle (which date shall be not earlier than 20 Business Days, and not later than two Business Days, prior to the Effective Time) (the " **Election Deadline** ") an Election Form covering the shares of Siebel Stock to which such Stock Election applies, executed and completed in accordance with the instructions set forth in such Election Form. Any share of Siebel Stock with respect to which the Exchange Agent has not received an effective Stock Election meeting the requirements of this Section 3.03(c) by the Election Deadline shall be deemed not to be a Stock Electing Siebel Share. A Stock Election may be revoked or changed only by delivering to the Exchange Agent, prior to the Election Deadline, a written notice of revocation or, in the case of a change, a properly completed revised Election Form that identifies the shares of Siebel Stock to which such revised Election Form applies. Delivery to the Exchange Agent prior to the Election Deadline of a revised Election Form with respect to any shares of Siebel Stock shall result in the revocation of all prior Election Forms with respect to all such shares of Siebel Stock. Any termination of this Agreement in accordance with Article 9 shall result in the revocation of all Election Forms delivered to the Exchange Agent on or prior to the date of such termination.

(d) Oracle shall have the right to make rules, not inconsistent with the terms of this Agreement, governing the validity and effectiveness of Election Form and the manner and extent to which Stock Elections are to be taken into account in making the determinations required by this Article.

Section 3.04 . *Proration of Election Price.* (a) The number of shares of Siebel Stock eligible to be converted into the right to receive the Stock Election Price at the Effective Time shall not exceed the number of shares of Siebel Stock which is equal to 30% of the shares of Siebel Stock outstanding immediately prior to the Effective Time (excluding any shares of Siebel Stock to be canceled pursuant to Section 3.02(a)) (the " **Stock Election Number** ").

(b) If the number of Stock Electing Siebel Shares exceeds the Stock Election Number, then such Stock Electing Siebel Shares shall be treated in the following manner:

(i) A stock proration factor (the " **Stock Proration Factor** ") shall be determined by dividing the Stock Election Number by the total number of Stock Electing Siebel Shares.

(ii) A number of Stock Electing Siebel Shares covered by each stockholder's Stock Election equal to the product of (x) the Stock Proration Factor and (y) the total number of Stock Electing Siebel Shares covered by such Stock Election shall be converted into the right to receive the Stock Election Price.

(iii) Each Stock Electing Siebel Share, other than those shares of Siebel Stock converted into the right to receive the Stock Election Price in accordance with Section 3.04(b)(ii), shall be converted into the right to receive the Cash Election Price as if such Shares of Siebel Stock were not Stock Electing Siebel Shares.

(c) If the number of Stock Electing Siebel Shares is less than or equal to the Stock Election Number, then each Stock Electing Siebel Share shall be converted into the right to receive the Stock Election Price and each other share of Siebel Stock (other than shares of Siebel Stock to be canceled pursuant to Section 3.02(a)) shall be converted into the right to receive the Cash Election Price.

Section 3.05 . *Dissenting Shares.* *** * ***

Section 3.07 . *Effect on Parent Stock.* Immediately following the Effective Time, shares of the capital stock of Parent owned by the Oracle Surviving Corporation shall be cancelled by Parent without payment therefor. *** * ***

Section 3.10 . *Surrender and Payment.* *** * ***

COMMENT

Both the Oracle Merger and the Siebel Merger are reverse subsidiary mergers. The consideration paid in the Oracle Merger is stock of the new Oracle Holding Company and the consideration paid in the Siebel Merger is both stock of the new Oracle Holding Company and cash. The Oracle Merger qualifies as a reverse subsidiary merger reorganization under Section 368(a)(2)(E) (*see* Chapter 5), but the Siebel Merger does not, because only 30% of the consideration is stock of Oracle Holding Company. However, the two mergers combined qualify under Section 351 so that the 30% stock consideration paid in the Siebel Merger can qualify for tax-free treatment. (*See* Chapter 5)

DOCUMENTARY APPENDIX I, WHIRLPOOL-MAYTAG ANTITRUST PROVISIONS

[*See* Chapters 8, 9, and 15 of Business Planning for Mergers and Acquisitions]

ANTITRUST PROVISIONS OF THE 2005 WHIRLPOOL-MAYTAG MERGER AGREEMENT

Excerpts Whirlpool SEC Form 8-K and Whirlpool-Maytag Merger Agreement Relating to the Merger, August 22, 2005

ITEM 1.01 ENTRY INTO A MATERIAL DEFINITIVE AGREEMENT.

On August 22, 2005, Whirlpool Corporation ("Whirlpool") entered into a definitive Agreement and Plan of Merger (the "Merger Agreement") with Whirlpool Acquisition Co. ("Merger Sub") and Maytag Corporation ("Maytag"). Subject to the terms and conditions of the Merger Agreement, Whirlpool will acquire all outstanding shares of Maytag in a cash and stock merger. * * *

Pursuant to the Merger Agreement (1) Whirlpool will pay to Maytag a "reverse break-up fee" [*i.e*., the acquiror will pay a break-up fee to the target] of $120 million if the transaction cannot be closed due to an inability to obtain antitrust regulatory approval. [This is 6.7% of the aggregate purchase price of $1.79 billion.] * * *

AGREEMENT AND PLAN OF MERGER dated as of August 22, 2005,
among WHIRLPOOL CORPORATION, a Delaware corporation ("Parent") [the acquiror], WHIRLPOOL ACQUISITION CO., a Delaware corporation and a wholly owned subsidiary of Parent ("Sub"), and MAYTAG CORPORATION, a Delaware corporation (the "Company") [the target]. * * *

ARTICLE VI
ADDITIONAL AGREEMENTS

SECTION 6.03 Reasonable Best Efforts; Notification.

(a) [**Agreement to Seek Antitrust Clearance**.] Upon the terms and subject to the conditions set forth in this Agreement (including, without limitation, those contained in Sections 6.03(b) and (c)), each of the parties shall use its reasonable best efforts to take, or cause to be taken, all actions, and to do, or cause to be done, and to assist and cooperate with the other parties in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the Merger and the other Transactions, including

(i) the obtaining of all necessary actions or nonactions, waivers, consents and approvals from Governmental Entities and the making of all necessary registrations and filings (including filings with Governmental Entities, if any) and the taking of all reasonable steps as may be necessary to obtain an approval or waiver from, or to avoid an action or proceeding by, any Governmental Entity, * * *

(ii) promptly inform each other of any communication (or other correspondence or memoranda) received from, or given to, the U.S. Department of Justice, the U.S. Federal Trade Commission, or any other Governmental Antitrust Entity and

(iii) furnish each other with copies of all correspondence, filings and written communications between them or their subsidiaries or affiliates, on the one hand, and any Governmental Entity or its respective staff, on the other hand, with respect to this Agreement and the Merger. The Company and Parent shall, to the extent practicable, provide the other party and its counsel with advance notice of and the opportunity to participate in any discussion, telephone call or meeting with any Governmental Entity in respect of any filing, investigation or other inquiry in connection with the Merger or the other Transactions and to participate in the preparation for such discussion, telephone call or meeting. The Company and Parent may, as each deems advisable and necessary, reasonably designate any competitively sensitive material provided to the other under this Section 6.03 as "Antitrust

Counsel Only Material" (as defined in the Confidentiality Agreement). [**This will prevent the merger parties from "jumping the gun" on the acquisition and thereby violating HSR.]**

(b) (i) [**Agreement to File all Required Pre-Merger Notifications**.] Without limiting the generality of the undertakings pursuant to this Section 6.03, the parties hereto shall provide or cause to be provided as promptly as practicable to Governmental Entities with regulatory jurisdiction over enforcement of any applicable federal, state, local or foreign antitrust, competition, pre-merger notification or trade regulation law, regulation or order ("Antitrust Laws" and each such Governmental Entity, a "Governmental Antitrust Entity") information and documents requested by any Governmental Antitrust Entity or necessary, proper or advisable to permit consummation of the Transactions, including preparing and filing any notification and report form and related material required under the HSR Act and any additional Consents and filings under any Antitrust Laws as promptly as practicable following the date of this Agreement (but in no event more than five business days from the date hereof) and thereafter to respond as promptly as practicable to any request for additional information or documentary material that may be made under the HSR Act and any additional Consents and filings under any Antitrust Laws;

(ii) the parties shall use their best efforts to take such actions as are necessary or advisable to obtain prompt approval of consummation of the Transactions by any Governmental Antitrust Entity; and

(iii) the parties shall use their best efforts to resolve any objections and challenges, including by contest through litigation on the merits, negotiation or other action, that may be asserted by any Governmental Antitrust Entity with respect to the transaction contemplated by this Agreement under the HSR Act and any Antitrust Laws. * * *

(ii) [**Divestitures Not Required**] Notwithstanding anything in this Agreement to the contrary, in no event will Parent or Sub be obligated to propose or agree to accept any undertaking or condition, to enter into any consent decree, to make any divestiture, to accept any operational restriction, or take any other action that, in the reasonable judgment of Parent, could be expected to limit the right of Parent or the Surviving Corporation to own or operate all or any portion of their respective businesses or assets. With regard to any Governmental Antitrust Entity, neither the Company nor any Company Subsidiary (or any of their respective affiliates) shall, without Parent's prior written consent in Parent's sole discretion, discuss or commit to any divestiture transaction, or discuss or commit to alter their businesses or commercial practices in any way, or otherwise take or commit to take any action that limits the Parent's freedom of action with respect to, or the Parent's ability to retain any of the businesses, product lines or assets of, the Surviving Corporation or otherwise receive the full benefits of this Agreement. * * *

SECTION 6.07 Fees and Expenses.

(a) [**The acquiror will pay the HSR filing fee.**] Except as provided in this Section 6.07, all fees and expenses incurred in connection with the Merger and the other Transactions shall be paid by the party incurring such fees or expenses, whether or not the Merger is consummated, except for * * *

(ii) all fees paid in respect of filings made by the Company and Parent pursuant to the HSR Act in connection with the Merger, with the expenses and fees referred to in [clause (ii)] * * * to be borne by Parent. * * *

[**Acquiror's Reverse Break-up Fee**] In the event that either the Company or Parent is entitled to terminate, and terminates, this Agreement pursuant to Section * * * 8.01(b)(ii)(A) [relating to a final nonappealable antitrust challenge to the transaction] and at the time of such termination

(ii) all of the conditions set forth in Sections 7.02(a) [accuracy of representations and warranties], 7.02(b) [performance by company of all conditions] and 7.02(c) [absence of Company Material Adverse Effect] have been satisfied or waived * * *,

(ii) neither the Company nor Parent is entitled to terminate this Agreement pursuant to Section 8.01(b)(ii)(B) [relating to a final nonappealable non-antitrust challenge to the transaction], and

(ii) if a vote to obtain the Company Stockholder Approval has been taken at a Company Stockholder Meeting, Company Stockholder Approval has been obtained [*i.e.*, all conditions to the merger have been satisfied except the antitrust clearance provision], then Parent shall pay a termination fee equal to $120,000,000 (the "Nonclearance Termination Fee") [about 6.7% of the aggregate purchase price of $1.79 billion] on or before the fifth business day following such termination by wire transfer of same day funds to an account designated in writing to Parent by the Company at least two business days after such termination.

ARTICLE VII
CONDITIONS PRECEDENT

SECTION 7.01 Conditions to Each Party's Obligation to Effect the Merger.

The respective obligation of each party to effect the Merger is subject to the satisfaction or waiver on or prior to the Closing Date of the following conditions: * * *

(b) Antitrust. Any waiting period (and any extension thereof) applicable to the Merger under the HSR Act shall have been terminated or shall have expired. Any Consents and filings required prior to the Closing under any Antitrust Law, the absence of which would reasonably be expected to

(ii) have a Company Material Adverse Effect,

(ii) have a Parent Material Adverse Effect or

(ii) result in a criminal violation, shall have been obtained or made. * * *

ARTICLE VIII
TERMINATION, AMENDMENT AND WAIVER

SECTION 8.01 Termination.

This Agreement may be terminated at any time prior to the Effective Time, whether before or after receipt of the Company Stockholder Approval:

(a) by mutual written consent of Parent, Sub and the Company;

(ii) by either Parent or the Company: * * *

(ii) if any Governmental Entity issues an order, decree or ruling or takes any other action permanently enjoining, restraining or otherwise prohibiting the Merger (A) as violative of any Antitrust Law or (B) for any reason other than as contemplated by Section 8.01(b)(ii)(A), and, in either case, such order, decree, ruling or other action shall have become final and non-appealable * * *

DOCUMENTARY APPENDIX J, DESCRIPTION OF THE MCI POISON PILL

[*See* Chapters 3 and 23]

Description of MCI's Poison Pill, SEC Form 8-K, April 21, 2004

Adoption of Stockholder Rights Plan

On April 20, 2004, the Board of Directors of MCI, Inc., a Delaware corporation (the "Company"), declared a dividend distribution of one Common Stock Purchase Right (a "Right") for each outstanding share of common stock, par value $0.01 per share (the "Common Stock"), of the Company. [**The board acted unilaterally; there was not requirement of a shareholder to distribute the pill**.] The distribution is made payable as of April 30, 2004 to stockholders of record on that date (the "Record Date"). Each Right, once exercisable, entitles the registered holder to purchase from the Company one share of Common Stock at a price of $75.00 per share (the "Exercise Price"), subject to certain adjustments. [**This exercise price is significantly higher than the trading value of the MCI shares, which at the time of the adoption of the pill was below $20 per share.**] The description and terms of the Rights are set forth in a Rights Agreement, dated as of April 20, 2004 (the "Rights Agreement"), by and between the Company and The Bank of New York, as Rights Agent (the "Rights Agent").

As discussed below, initially the Rights will not be exercisable, certificates will not be sent to stockholders and the Rights will automatically trade with the Common Stock.

The Rights, unless earlier redeemed by the Board of Directors, become exercisable upon the close of business on the day (the "Distribution Date") which is the earlier of (i) the tenth day following a public announcement that a person or group of affiliated or associated persons, with certain exceptions set forth below, has acquired beneficial ownership of 15% or more **[15% trigger]** of the outstanding voting stock of the Company (an "Acquiring Person") and (ii) the tenth business day (or such later date as may be determined by the Board of Directors prior to such time as any person or group of affiliated or associated persons becomes an Acquiring Person) after the date of the commencement by any person of a tender or exchange offer **[tender offer trigger; note the board can delay this trigger]**, the consummation of which would result in such person or group of affiliated or associated persons becoming an Acquiring Person.

An Acquiring Person does not include (i) an Exempt Person; (ii) any Person who or which, together with all Affiliates and Associates of such Person, would be an Acquiring Person solely by reason of (A) being the Beneficial Owner of shares of Common Stock, the Beneficial Ownership of which was acquired by such Person (together with all Affiliates and Associates of such Person) pursuant to any action or transaction or series of related actions or transactions approved by the Board before such Person (together with all Affiliates and Associates of such Person) otherwise became an Acquiring Person **[MCI board approved transactions are not subject to pill]** * * *; or (iv) any Person who or which, together with all Affiliates and Associates of such Person, would be an Acquiring Person solely by reason of such Person's acceptance for purchase of and purchase of shares of Common Stock pursuant to a Qualifying Tender Offer **[Qualifying Tender Offers defined below are not subject to the pill. This type of provision is said to make the pill "chewable", that is, the acquiror can make the offer and avoid the pill under certain specified conditions.]**. * * *

A Qualifying Tender Offer is an offer for all outstanding shares of Common Stock of the Company (other than shares of the Common Stock of the Company held by (i) the offeror and its Affiliates and Associates, (ii) the Company in its treasury and (iii) any of the Company's Subsidiaries) which meets all of the following requirements:

(i) the consideration offered is all cash or a combination of cash and securities listed on a national securities exchange or a national automated quotation system, provided that the aggregate market value of the class of securities offered that is held by non-affiliates of the offeror is in excess of $5 billion [***i.e.*, if stock is offered, the acquiror has $5 billion of outstanding stock**] as of the most recently filed periodic report made under the Exchange Act;

(ii) the offer must be in compliance with all applicable laws (the "Applicable Laws"), including , without limitation, the Exchange Act, state or foreign laws relating to takeovers, state securities or blue sky laws, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the Delaware General Corporation Law;

(iii) the Person making the offer must beneficially own, immediately after consummating the offer, a majority of the then outstanding shares of Common Stock of the Company on a fully diluted basis (or, to the extent that Applicable Law requires any greater vote to effect the transactions pursuant to paragraph (vi) below, such greater amount);

(iv) the consideration per share being offered pursuant to the offer must have: (a) on the date of the commencement of the offer a value equal to or greater than the Minimum Value (as defined in the next succeeding sentence); or (b) been accepted by holders of a majority of the outstanding shares of Common Stock, excluding the shares beneficially owned by the Person(s) making such offer and the shares beneficially owned by such Person(s)' Affiliates and Associates. For the purposes of sub-clause (a) of this clause (iv), the term Minimum Value shall mean at least a 25% premium over the greater of (i) the average of the closing sales prices (or, as set forth in the next succeeding sentence, the last asked prices) of one share of Common Stock for the ten Trading Days ending on the tenth Trading Day prior to the date on which such offer is first announced and (ii) the average of the closing sales prices (or, as set forth in the next succeeding sentence, the last asked prices) of one share of Common Stock for the sixty Trading Days ending on the tenth Trading Day prior to the date on which such offer is first announced; provided , however , that notwithstanding the foregoing, until the first anniversary of the date of this Agreement, the Minimum Value shall in no event be less that $31.25. [**This was a significant premium to the trading value of the shares.]** For purposes of determining the Minimum Value, the closing sales prices shall be as reported on the national securities exchange or automated quotation system on which the Common Stock is traded, or if the Common Stock is not traded on a national securities exchange or automated quotation system, in lieu of closing sales prices, last asked prices shall be used. * * *;

(v) the Person making the offer must (a) have obtained customary firm written financing commitments containing only conditions to funding typical for transactions of this type from recognized financing sources and/or have on hand cash or cash equivalents, which will be available at the time of the purchase of the Common Stock pursuant to the offer in an amount sufficient to fund the cash portion of the offer and pay all related expenses (including amounts necessary to repurchase or pay any indebtedness of the Company or its Subsidiaries which will become due upon or as a result of consummation of the tender offer) and (b) set forth a copy of the financing commitments and/or evidence of the cash or cash equivalents on hand in the offer materials that are sent to holders of the Common Stock pursuant to the rules of the Securities and Exchange Commission [**funds must be available to complete the offer**]; and

(vi) prior to the Commencement Date, the Person making the offer must have made an irrevocable written commitment to the Company (x) to consummate a merger promptly upon the completion of the offer, whereby all outstanding shares of Common Stock not purchased in the offer (other than shares beneficially owned by the Person(s) making the offer and the shares beneficially owned by such Person(s)' Affiliates and Associates) will be converted into the right to receive per share consideration equal in form and value to the consideration paid in the offer * * * [**there must be a commitment to do a freezeout merger of any shares not purchased in the tender offer at the tender offer price**] * * *

Prior to the Distribution Date [***i.e.*, the 15% trigger or the tender offer trigger**], the Rights will not be exercisable, will not be represented by separate certificates and will not be transferable apart from the Common Stock, but will instead be evidenced, with respect to any of the Common Stock certificates outstanding as of the Record Date, by such Common Stock certificate (or in the case of uncertificated shares of Common Stock, by the book entry account that evidences record ownership of such shares). [**Thus, essentially nothing happens until a Distribution Date**.] Until the Distribution Date (or earlier redemption or expiration of the Rights), new Common Stock certificates issued after the Record Date will contain a legend incorporating the Rights Agreement by reference. * * * As soon as practicable following the Distribution Date, separate certificates evidencing the Rights ("Right Certificates") will be mailed to holders of record of the Common Stock as of the close of business on the Distribution Date, and such separate certificates alone will evidence the Rights from and after the Distribution Date.

The Rights are not exercisable until the Distribution Date. The Rights expire on the date of the 2007 annual meeting of stockholders of the Company (the "Final Expiration Date"), unless the continuation of the Rights is approved by the stockholders of the Company by a vote of the majority of the shares present and entitled to vote at the 2007 annual meeting. If the stockholders approve the continuation of the Rights at the 2007 annual meeting, the Final Expiration Date will be the fifth anniversary of the date of the adoption of the Rights Agreement.

The Exercise Price of the Rights and the number of shares of Common Stock issuable upon exercise of the Rights are subject to certain adjustments from time to time in the event of a stock dividend on, or a subdivision or

combination of, the Common Stock. The Exercise Price for the Rights also is subject to adjustment in the event of extraordinary distributions of cash or other property to holders of Common Stock.

Unless the Rights are earlier redeemed, in the event that a person or group becomes an Acquiring Person, the Rights Agreement provides that proper provisions will be made so that each holder of record of a Right (other than Rights beneficially owned by an Acquiring Person and certain affiliates, associates and transferees thereof, whose Rights will thereupon become null and void), will thereafter have the right to receive, upon payment of the Exercise Price [***i.e.*, $75.00**], that number of shares of the Common Stock having a fair market value determined in accordance with the Rights Agreement at the time of the transaction equal to two times the Exercise Price [***i.e.*, $150.00**] (such value to be determined with reference to the fair market value of the Company's Common Stock as provided in the Rights Agreement). **[This is a "flip in" provision giving the shareholders of MCI, other than the hostile acquiror, the right to buy $150.00 of stock of MCI for $75.00, thus diluting the interest of the hostile acquiror.]**

In addition, unless the Rights are earlier redeemed, in the event that, after the time that a person or group becomes an Acquiring Person, the Company were to be acquired in a merger or other business combination (in which any shares of Common Stock are changed into or exchanged for cash or other securities or assets) or more than 50% of the assets or earning power of the Company and its subsidiaries (taken as a whole) were to be sold or transferred in one or a series of related transactions, the Rights Agreement provides that proper provision will be made so that each holder of record of a Right (other than Rights beneficially owned by an Acquiring Person and certain affiliates, associates and transferees thereof, whose Rights will thereupon become null and void) will from and after such date have the right to receive, upon payment of the Exercise Price [***i.e.*, $75.00**], that number of shares of common stock of the acquiring company having a fair market value at the time of such transaction determined in accordance with the Rights Agreement equal to two times the Exercise Price [***i.e.*, $150.00**]. **[This is a "flip over" provision giving shareholders of MCI the right to buy $150.00 of stock of Acquiror stock for $75.00, thus diluting the interest of the hostile acquiror's shareholders.]** Notwithstanding the foregoing, the Rights will not be adjusted in accordance with the preceding sentence if (i) such transaction is a merger consummated with a Person or Persons (or a wholly owned Subsidiary of any such Person or Persons) who acquired shares of Common Stock of the Company pursuant to a Qualifying Tender Offer and (ii) the per share consideration (in both amount and form) payable in such merger is the same as the per share consideration (in both amount and form) payable to all holders of shares of Common Stock whose shares were purchased pursuant to such Qualifying Tender Offer. [**Thus, a freeze-out merger after a Qualifying Tender Offer is not subject to the flip over provision**.] Upon the consummation of such merger, the Rights will expire. * * *

The Board may, at its option, at any time prior to the earlier of (i) the close of business on the tenth business day (or such specified or unspecified later date as may be determined by the Board before the Rights cease being redeemable) following the first date of public announcement by the Company or an Acquiring Person that an Acquiring Person has become such (the "Stock Acquisition Date") (or, if the Stock Acquisition Date shall have occurred prior to the record date, the close of business on the tenth business day following the record date) or (ii) the Final Expiration Date, direct the Company to, and if directed, the Company shall, redeem all but not less than all of the then outstanding Rights at a redemption price of $.00l per Right, as such amount may be appropriately adjusted to reflect any stock split, stock dividend or similar transaction occurring after the date hereof (such redemption price being hereinafter referred to as the "Redemption Price"). **[MCI's board retains the right to redeem the rights.]**

For as long as the Rights are then redeemable, the Company may amend the Rights Agreement in any manner; provided , however , that the Board may not (i) extend the Final Expiration Date without the approval by the stockholders of the Company by a vote of the majority of the shares present and entitled to vote at a meeting duly called and held to consider such matter or (ii) change the Redemption Price. **[MCI board could make the pill not applicable to an offer by an acquiror. This is known as the permitted offer exception.]**

Until a Right is exercised, the holder, as such, will have no rights as a stockholder of the Company, including, without limitation, the right to vote or to receive dividends.

The form of Rights Agreement between the Corporation and the Rights Agent, specifying the terms of the Rights, which includes as Exhibit A the form of Right Certificate are attached hereto as exhibits and incorporated herein by reference. The foregoing description of the Rights is qualified by reference to such exhibits.

DOCUMENTARY APPENDIX K, MCI-VERIZON DEAL PROTECTION DEVICES

[*See* Principally Chapters 3, 13 and 15 of Business Planning for Mergers and Acquisitions]

DEAL PROTECTION DEVICES IN THE MCI-VERIZON DEAL

Description of the Deal in MCI's Form 8-K Announcing the Deal, February 14, 2005

On February 14, 2005, Verizon Communications Inc., a Delaware corporation (" **Verizon** "), MCI, Inc., a Delaware corporation (" **MCI** ") and Eli Acquisition, LLC, a wholly owned subsidiary of Verizon and a Delaware limited liability company (" **Merger Sub** ") entered into an Agreement and Plan of Merger (the " **Merger Agreement** "). The Merger Agreement provides that, upon the terms and subject to the conditions set forth in the Merger Agreement, MCI will merge with and into Merger Sub (the " **Merger** "), with Merger Sub continuing as the surviving person. . . .

At the effective time and as a result of the Merger, (i) MCI will become a wholly owned subsidiary of Verizon and (ii) each share of MCI common stock will be converted into the right to receive (x) 0.4062 shares of Verizon common stock and (y) cash in the amount of $1.50 per share. . .

The Merger Agreement contains certain termination rights for both MCI and Verizon, and further provides that, upon termination of the Merger Agreement under specified circumstances, MCI may be required to pay Verizon a termination fee of $200 million. [This $200 million fee was approximately 2.9% of the $6.75 billion value of the Verizon offer.] . . .

Deal Protection Provisions of the MCI-Verizon Merger Agreement

The deal protection provisions of a merger agreement are generally found in (1) the "Additional Agreements," section of the agreement, which sets out certain covenants or undertakings by the parties between the signing and closing of the deal, and (2) the termination provisions of the agreement, which specify the conditions under which the agreement may be terminated and the consequences of a termination, such as the obligation to pay a termination fee. *See* Chapter 15, which deals with the drafting of acquisition agreements. In many public company deals the deal protection devices apply to both the target and the acquiror, especially in mergers of equals or near equals. In other deals, the provisions apply only to the target, especially if the target is significantly smaller than the acquiror, as in the case of MCI. The MCI-Verizon merger agreement follows the standard model with the deal protection provisions applying only to MCI. These provisions are set out below.

AGREEMENT AND PLAN OF MERGER

This AGREEMENT AND PLAN OF MERGER, dated as of February 14, 2005 (this "Agreement"), is among VERIZON COMMUNICATIONS INC., a Delaware corporation ("Parent"), ELI ACQUISITION, LLC, a Delaware limited liability company and a direct, wholly owned subsidiary of Parent ("Merger Sub"), and MCI, INC., a Delaware corporation (the "Company" and, collectively with Parent and Merger Sub, the "parties").

RECITALS . . .

WHEREAS, . . . the respective Boards of Directors of the Company [MCI], Parent [Verizon] and Merger Sub have approved and declared advisable this Agreement and the merger of the Company with and into Merger Sub (the "Merger") in accordance with the applicable provisions of the Delaware General Corporation Law (the "DGCL"), and the Delaware Limited Liability Company Act (the "LLC Act") and upon the terms and subject to the conditions set forth in this Agreement; and . . .

ARTICLE VI

ADDITIONAL AGREEMENTS

* * *

Section 6.5 No Solicitation.

(a) [**Absolute No Solicitation**] The Company [MCI] shall not, nor shall it authorize or permit any of the Company Subsidiaries to, and the Company shall use its commercially reasonable efforts to cause its and its Subsidiaries' respective Representatives not to, directly or indirectly (i) initiate or solicit or knowingly facilitate or encourage any inquiry or the making of any proposal that constitutes a Takeover Proposal (as defined in Section 6.5(e) [see below]), (ii) enter into any letter of intent, memorandum of understanding, merger agreement or other agreement, arrangement or understanding relating to any Takeover Proposal, or (iii) continue or otherwise participate in any discussions or negotiations regarding, furnish to any Person any information or data with respect to, or otherwise cooperate with or take any other action to facilitate any proposal that (A) constitutes any Takeover Proposal or (B) requires the Company to abandon, terminate or fail to consummate the Merger or any other transactions contemplated by this Agreement.

[**Qualified Response to Unsolicited Third Party Offers**] Notwithstanding the foregoing, prior to the receipt of the Company Stockholder Approval [approval by MCI's shareholders], the Company may, in response to a bona fide written Takeover Proposal that was unsolicited and did not otherwise result from a breach of this Section 6.5(a), and subject to compliance with Section 6.5(c):

(x) [**Can Provide Info to Third Party**] furnish information with respect to the Company and the Company Subsidiaries to the Person making such Takeover Proposal and its Representatives pursuant to and in accordance with a confidentiality agreement containing terms and conditions no less restrictive than those contained in the Confidentiality Agreement [between Verizon and MCI], provided that such confidentiality agreement shall not be required to contain standstill provisions [provisions prohibiting the person from making a hostile acquisition] and shall not contain any provisions that would prevent the Company from complying with its obligation to provide the required disclosure to Parent [Verizon] pursuant to Section 6.5(b), and provided further that all such information provided to such Person has previously been provided to Parent or is provided to Parent prior to or concurrently with the time it is provided to such Person; and

(y) [**Can Actually Negotiate with Third Party**] participate in discussions or negotiations with such Person or its Representatives regarding such Takeover Proposal; provided, in each case, that the Board of Directors of the Company determines in good faith after consultation with its outside legal counsel and a financial advisor of nationally recognized reputation, that (i) the failure to furnish such information or participate in such discussions or negotiations could be reasonably expected to result in a breach of its fiduciary duties to the stockholders of the Company under applicable Law and (ii) such Takeover Proposal could reasonably be expected to lead to a Superior Proposal (as defined in Section 6.5(e) [see below]). [This is a common provision; "no talk" unless both a fiduciary requirement to do so and a "superior proposal."] The Company shall (A) immediately cease and cause to be terminated any existing activities, discussions or negotiations with any Persons or their Representatives conducted prior to the date of this Agreement with respect to any Takeover Proposal and will request the prompt return of any confidential information previously furnished to such Persons in connection therewith, and (B) use its commercially reasonable efforts promptly to inform its Representatives of the obligations undertaken in this Section 6.5. Without limiting the foregoing, any violation of the restrictions set forth in this Section 6.5 by any Representative of the Company or any of its Subsidiaries shall be deemed to be a breach of this Section 6.5 by the Company.

(b) [**Notice of Receipt of a Takeover Proposal**] As promptly as practicable after the receipt by the Company of any Takeover Proposal or any inquiry with respect to, or that could reasonably be expected to lead to, any Takeover Proposal, and in any case within 24 hours after the receipt thereof, the Company shall provide oral and written notice to Parent of (i) such Takeover Proposal or inquiry, (ii) the identity of the Person making any such Takeover Proposal or inquiry, and (iii) the material terms and conditions of any such Takeover Proposal or inquiry (including any amendments or modifications thereto). The Company shall keep Parent fully informed on a current basis of the status of any such Takeover Proposal, including, without limitation, any changes to the terms and conditions thereof, and promptly provide Parent with copies of all Takeover Proposals (and modifications thereof) and related agreements, draft agreements and modifications thereof.

(c) [**No Change in Recommendation to Shareholders Unless Receipt of a Superior Proposal; "Window Shop" Provision**] Neither the Board of Directors of the Company nor any committee thereof shall, directly or indirectly, (i) effect a Change in the Company Recommendation or (ii) approve any letter of intent, memorandum of understanding, merger agreement or other agreement, arrangement or understanding relating to any Takeover Proposal. Notwithstanding the foregoing, at any time prior to the Company Stockholder Approval, the Board of Directors of the Company may, in response to a Superior Proposal or an Intervening Event [*see* Section 6.5(e) below, *i.e*., an event requiring a change in recommendation to avoid fiduciary breach], effect a Change in the Company Recommendation, provided that the Board of Directors of the Company determines in good faith, after consultation with its outside legal counsel and a financial advisor of nationally recognized reputation, that the failure to do so would be reasonably expected to result in a breach of its fiduciary duties to the stockholders of the Company under applicable Law, and provided, further, that the Board of Directors of the Company may not effect such a Change in the Company Recommendation unless

(i) [**Notice of Change to Parent**] the Board of Directors shall have first provided prior written notice to Parent that it is prepared to effect a Change in the Company Recommendation in response to a Superior Proposal or an Intervening Event, which notice shall, in the case of a Superior Proposal, attach the most current version of any written agreement relating to the transaction that constitutes such Superior Proposal, and, in the case of an Intervening Event, attach information describing such Intervening Event in reasonable detail, and

(ii) [**Verizon's Right to Match the Superior Proposal**] Parent does not make, within five Business Days after the receipt of such notice (or, in the event of a Takeover Proposal that has been materially revised or modified, within two Business Days of such modification, if later), a proposal that the Board of Directors determines in good faith, after consultation with a financial advisor of nationally recognized reputation, is at least as favorable to the stockholders of the Company as such Superior Proposal or obviates the need for a Change in the Company Recommendation as a result of the Intervening Event, as the case may be.

[**Obligation to Negotiate with Parent**] The Company agrees that, during the five Business Day period prior to its effecting a Change in the Company Recommendation, the Company and its Representatives shall negotiate in good faith with Parent and its Representatives regarding any revisions to the terms of the transaction contemplated by this Agreement proposed by Parent.

[**Force the Vote Provision Under Section 146 of the DGCL**, **see Section 3._____**] Notwithstanding any Change in the Company Recommendation as a result of an Intervening Event, Parent shall have the option, exercisable within five Business Days after such Change in the Company Recommendation, to cause the Board of Directors to submit this Agreement to the stockholders of the Company for the purpose of adopting this Agreement and approving the Merger. If Parent exercises such option, Parent shall not be entitled to terminate this Agreement pursuant to Section 8.1(c)(iii) [*see* below]. If Parent fails to exercise such option, the Company may terminate this Agreement pursuant to and in accordance with Section 8.1(d)(ii).

(d) [**MCI Can Satisfy Disclosure Obligations**] Nothing contained in this Section 6.5 shall prohibit the Company from complying with Rule 14d-9 and Rule 14e-2 [provisions of the tender offer rules requiring the target's board to advise the target's shareholders of the board's position on the transaction, *see* Chapter 20.] promulgated under the Exchange Act in respect of any Takeover Proposal or making any disclosure to the stockholders of the Company if the Board of Directors determines in good faith, after consultation with its outside counsel, that the failure to make such disclosure could be reasonably expected to result in a of breach its fiduciary duties to the stockholders of the Company under applicable Law, provided, however that neither the Board of Directors of the Company nor any committee thereof shall, except as expressly permitted by Section 6.5(c), effect a Change in Company Recommendation or approve or recommend, or publicly propose to approve or recommend, a Takeover Proposal.

(e) For purposes of this Agreement:

"**Intervening Event**" shall mean an event, unknown to the Board of Directors of the Company as of the date hereof, which becomes known prior to the Company Stockholder Approval and which causes the Board of Directors to conclude in good faith, after consultation with its outside legal counsel and a financial advisor of nationally recognized reputation, that its failure to effect a Change in the Company Recommendation would be reasonably likely to result in a breach of its fiduciary duties to the stockholders of the Company under applicable Law.

"**Takeover Proposal**" means any proposal or offer in respect of (i) a merger, consolidation, business combination, share exchange, reorganization, recapitalization, liquidation, dissolution, or similar transaction involving (x) the Company or (y) any of the Company Subsidiaries which represent, individually or in the aggregate, 15% or more of the Company's consolidated assets (any of the foregoing, a "Business Combination Transaction") with any Person other than Parent, Merger Sub or any Affiliate thereof (a "Third Party") in which such Third Party or the shareholders of the Third Party immediately prior to consummation of such Business Combination Transaction will own more than 15% of the Company's outstanding capital stock immediately following such Business Combination Transaction, including the issuance by the Company of more than 15% of any class of its voting equity securities as consideration for assets or securities of a Third Party, or (ii) any direct or indirect acquisition, whether by tender or exchange offer or otherwise, by any Third Party of 15% or more of any class of capital stock of the Company or of 15% or more of the consolidated assets of the Company and the Company Subsidiaries, in a single transaction or a series of related transactions.

"**Superior Proposal**" means any bona fide written proposal or offer made by a Third Party in respect of a Business Combination Transaction involving, or any transaction involving the purchase or acquisition of, (i) all or substantially all of the voting power of the Company's capital stock or (ii) all or substantially all of the consolidated assets of the Company and the Company Subsidiaries, which transaction the Board of Directors determines in good faith, after consultation with its outside counsel and a financial advisor of nationally recognized reputation, (x) would be, if consummated, more favorable to the stockholders of the Company than the Merger and the Special Cash Dividend, taking into account all of the terms and conditions of such proposal and of this Agreement (including any proposal by Parent to amend the terms of this Agreement) as well as any other factors deemed relevant by the Board of Directors, and (y) is reasonably capable of being consummated on the terms so proposed, taking into account all financial, regulatory, legal and other aspects of such proposal. * * *

ARTICLE VIII

TERMINATION AND AMENDMENT

Section 8.1 **Termination.** This Agreement may be terminated and the transactions contemplated hereby may be abandoned at any time prior to the Effective Time, whether before or after receipt of the Company Stockholder Approval:

(a) by mutual written consent of Parent and the Company;

(b) by either Parent or the Company, if:

(i) the Merger shall not have been consummated by February 14, 2006 [**Drop Dead Date**] . . .

(ii) any Governmental Entity of competent jurisdiction issues a final, non-appealable order, judgment, decision, opinion, decree or ruling, which prevents the fulfillment of the condition set forth in Section 7.1(d) [**No Injunctions or Restraints, Illegality**]; . . .

(iii) the Company Stockholder Approval shall not have been obtained at the Company Stockholders Meeting or any adjournment or postponement thereof; provided that the right to terminate the Agreement pursuant to this Section 8.1(b)(iii) shall not be available to the Company if it has not complied with its obligations under Section 6.5 [**No Solicitation**].

(c) by Parent, if: . . .

(i) the Company shall have breached or failed to perform in any material respect any of its representations, warranties or covenants contained in this Agreement, which breach or failure to perform (A) is incapable of being cured by the Company prior to the Outside Date or is not cured by the earlier of (x) 30 Business Days following written notice to the Company by Parent of such breach or (y) the Outside Date, and (B) would result in a failure of any condition set forth in Sections 7.2(a) [**MCI's Representations and Warranties**] or (b) [**Performance of Obligations of MCI**];

(ii) the Company or any of the Company Subsidiaries or their respective Representatives shall have breached in any respect their respective obligations under Section 6.5 [**No Solicitation**]; or

(iii) subject to the penultimate sentence of Section 6.5(c), the Board of Directors [of MCI] shall (A) fail to authorize, approve or recommend the Merger, or (B) effect a Change in the Company Recommendation or, in the case of a Takeover Proposal made by way of a tender offer or exchange offer, fail to recommend that the Company's stockholders reject such tender offer or exchange offer within the ten Business Day period specified in Section 14e-2(a) under the Exchange Act; . . .

(d) by the Company: . . .

(ii) pursuant to the last sentence of Section 6.5(c) or if the Board of Directors of the Company authorizes the Company, subject to complying with the Section 6.5(c), to enter into a definitive agreement providing for the implementation of a Superior Proposal, and, in either case, the Company, prior to the termination of this Agreement, pays the Termination Fee (as defined in Section 8.3(a)) to Parent. . . .

Section 8.2 **Effect of Termination**. In the event of any termination of this Agreement as provided in Section 8.1, the obligations of the parties hereunder shall terminate and there shall be no liability on the part of any party hereto with respect thereto, except for the confidentiality provisions of Section 6.3 and the provisions of this Section 8.2, Section 8.3 [termination fee] and Article IX, each of which shall remain in full force and effect; provided, however, that no party hereto shall be relieved or released from any liability or damages arising from a willful breach of any provision of this Agreement.

Section 8.3 **Termination Fee**.

(a) If this Agreement is terminated pursuant to any of the following provisions, the Company shall pay to Parent a fee equal to $200,000,000 (the "Termination Fee") [approximately 2.9% of the $6.75 billion value of the Verizon offer], which Termination Fee shall be Parent's sole remedy in respect of termination of this Agreement except in the case of any willful breach of this Agreement by the Company:

(i) Sections 8.1(c)(ii) [breach by MCI of No Solicit] or (iii) [MCI's board backs away] [see above];

(ii) Section 8.1(d)(ii) [MCI terminates because of superior proposal, see above];

(iii) Section 8.1(b)(iii) [MCI's shareholders reject the merger, *see* above], provided that (A) after the date of this Agreement, any Person makes a Takeover Proposal or amends or reasserts a Takeover Proposal made prior to the date of this Agreement and such Takeover Proposal becomes publicly known prior to the Company Stockholders Meeting (and such Takeover Proposal shall not have been withdrawn at the time of the Company Stockholders Meeting), and (B) within twelve months after the date of such termination, the Company enters into a definitive agreement to consummate, or consummates, the transactions contemplated by a Takeover Proposal; and provided, further, that, solely for purposes of this Section 8.3(a)(iii), the term "Takeover Proposal" shall have the meaning ascribed thereto in Section 6.5(e), except that all references to 15% shall be changed to 40%; or

(iv) Section 8.1(c)(i) [MCI breaches agreement, *see* above], provided, that such termination is based on a material breach of Section 6.2 [stockholder meeting and company recommendation].

(b) [**When Fee is Payable**] If the Company is required to pay Parent a Termination Fee, such Termination Fee shall be payable immediately prior to termination of this Agreement in the event of termination by the Company, and not later than one Business Day after the receipt by the Company of a notice of termination from Parent in the event of termination by Parent, in each case by wire transfer of immediately available funds to an account designated by Parent (except that, in the case of termination pursuant to Section 8.1(b)(iii), such payment shall be made on the date of the first to occur of the events referred to in clause (B) of Section 8.3(a)(iii)).

(c) [**Attorneys Fees and Costs**] The parties each agree that the agreements contained in this Section 8.3 are an integral part of the transaction contemplated by this Agreement, and that, without these agreements, Parent would not enter into this Agreement; accordingly, if the Company fails promptly to pay any amounts due under this Section 8.3 and, in order to obtain such payment, Parent commences a suit that results in a judgment against the Company for such amounts, the Company shall pay interest on such amounts from the date payment of such amounts were due to the date of actual

payment at the prime rate of Citibank, N.A. in effect on the date such payment was due, together with the costs and expenses of Parent (including reasonable legal fees and expenses) in connection with such suit. * * *

DOCUMENTARY APPENDIX L, GOLDMAN-KINDER MORGAN 13D

[*See* Principally Chapters 17 and 18 of Business Planning for Mergers and Acquisitions]

Common Stock CUSIP No. 49455P101

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

SCHEDULE 13D
UNDER THE SECURITIES EXCHANGE ACT OF 1934
(AMENDMENT NO. _____)* **KINDER MORGAN, INC.**
(NAME OF ISSUER)

COMMON STOCK, PAR VALUE $5 PER SHARE

* * *

1 NAME OF REPORTING PERSONS
The Goldman Sachs Group, Inc.

---

2 CHECK THE APPROPRIATE BOX IF A MEMBER OF A GROUP a) / / (b) /X/

---

3 SEC USE ONLY

---

4 SOURCE OF FUNDS AF

---

5 CHECK BOX IF DISCLOSURE OF LEGAL PROCEEDINGS IS REQUIRED PURSUANT
TO ITEM 2(D) OR 2(E) / /
6 CITIZENSHIP OR PLACE OF ORGANIZATION

* * *

11 AGGREGATE AMOUNT BENEFICIALLY OWNED BY EACH REPORTING PERSON
229,237

* * *

ITEM 1. SECURITY AND ISSUER.

This statement on Schedule 13D (this "Schedule 13D") relates to the common stock, par value $5.00 per share (the "Common Stock"), of Kinder Morgan, Inc. (the "Issuer"). The principal executive offices of the Issuer are located at 500 Dallas Street, Suite 1000, Houston, Texas 77002.

ITEM 2. IDENTITY AND BACKGROUND.

This statement is being filed by The Goldman Sachs Group, Inc. ("GS Group"), Goldman, Sachs & Co. ("Goldman Sachs"), GSCP V Advisors, L.L.C. ("GSCP Advisors"), GSCP V Offshore Advisors, L.L.C. ("GSCP Offshore Advisors"), * * *

GS Group is a Delaware corporation and holding company that (directly and indirectly through subsidiaries or affiliated companies or both) is a leading investment banking organization. * * *

ITEM 3. SOURCE AND AMOUNT OF FUNDS OR OTHER CONSIDERATION.

It is anticipated that funding for the Proposal (as defined in Item 4 below) will be in the form of (1) cash contributed to the acquisition vehicle formed by the Investors (as defined in Item 4 below) and (2) debt financing. In addition, it is anticipated that the shares of Common Stock, par value $5.00 per share (the "Common Stock"), currently held by Richard D. Kinder, the Chairman of the Board of Directors and Chief Executive Officer of the Issuer, will be contributed to the acquisition vehicle. Members of the Issuer's senior management team are also expected to contribute shares of Common Stock to the acquisition vehicle. [*See* Chapter 14 for a discussion of the tax treatment of these "roll over" shares.] The description of the Proposal set forth in Item 4 below is incorporated by reference in its entirety into this Item 3.

The Investors (as defined in Item 4 below) have obtained a "highly confident" letter regarding the debt financing, as described in the Proposal Letter (as defined in Item 4 below). A copy of the "highly confident" letter is filed as Exhibit 7.02 to this Schedule 13D, and is incorporated by reference into this Item 3.

ITEM 4. PURPOSE OF TRANSACTIONS.

On May 28, 2006, Mr. Kinder and GS Capital Partners V Fund, L.P., AIG Global Asset Management Holdings Corp., Carlyle Partners IV, L.P., Carlyle/Riverstone Energy Partners III, L.P. (collectively, the "Investors") delivered a letter (the "Proposal Letter") to the Board of Directors of the Issuer in which it was proposed that Mr. Kinder, together with members of senior management, KMI co-founder Bill Morgan, KMI Board members Fayez Sarofim and Mike Morgan, and GS Capital, American International Group, Inc., The Carlyle Group and Riverstone Holdings LLC would offer to acquire by merger, for a purchase price of $100.00 in cash per share, all of the outstanding shares of the Issuer's Common Stock, other than any shares held by any of the Investors and shares held by members of the Issuer's senior management team that are to be invested in the transaction (the "Proposal"). The Proposal Letter states that no binding obligation on the part of any Reporting Person, any Investor or the Issuer will arise with respect to the Proposal or any transaction unless and until a definitive merger agreement and other transaction documentation satisfactory to the Investors and recommended by the Special Committee and approved by the Issuer's Board of Directors is executed and delivered. No guarantees can be given that the proposed merger will be consummated.

The Board of Directors has established a special committee of independent directors authorized to retain independent financial and legal advisors (the "Special Committee") to consider the Proposal.

The Proposal could result in one or more of the actions specified in clauses (a)-(j) of Item 4 of Schedule 13D, including the acquisition or disposition of additional securities of the Issuer, a merger or other extraordinary transaction involving the Issuer, a change to the present board of directors of the Issuer, a change to the present capitalization or dividend policy of the Issuer, the delisting of the Issuer's securities from the New York Stock Exchange, and the causing of a class of equity securities of the Issuer to become eligible for termination of registration pursuant to Section 12(g)(4) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). One or more of the Reporting Persons are expected to take actions in furtherance of the Proposal or any amendment thereof.

The Reporting Persons may at any time, or from time to time, acquire additional shares of Common Stock or dispose of their shares of Common Stock, propose, pursue, or choose not to pursue the Proposal; change the terms of the Proposal Letter, including the price, conditions, or scope of the transaction; take any action in or out of the ordinary course of business to facilitate or increase the likelihood of consummation of the transaction described in the Proposal Letter; otherwise seek control or seek to influence the management and policies of the Issuer; or change their intentions with respect to any such matters. In connection with the proposed transaction, the Reporting Persons are considering other transactions with respect to the Issuer and its assets, including without limitation financing transactions, partnerships with third parties, or sales of assets to the Issuer's affiliated master limited partnership or third parties.

A copy of the Proposal Letter is filed as Exhibit 7.03 to this Schedule 13D, and is incorporated by reference into this Item 4.

ITEM 5. INTEREST IN SECURITIES OF THE ISSUER.

(a) As of May 28, 2006, both GS Group and Goldman Sachs, or another wholly-owned broker or dealer subsidiary of GS Group, may be deemed to beneficially own 79,425 shares of Common Stock, which were acquired in ordinary course trading activities. In addition, both GS Group and Goldman Sachs, or another wholly-owned subsidiary of GS Group, may be deemed to beneficially own 149,812 shares of Common Stock that are held in managed accounts on behalf of clients, for which both GS Group and Goldman Sachs, or such other subsidiary, or their respective employees, have investment discretion. Accordingly, as of May 28, 2006, both GS Group and Goldman Sachs may each be deemed to beneficially own an aggregate of 229,237 shares of Common Stock, over all of which shares they share dispositive power and over 79,425 of such shares they share voting power. Such 229,237 shares of Common Stock constitute 0.2% of the outstanding shares of Common Stock, based on the Reported Shares Outstanding. GS Group and Goldman Sachs disclaim beneficial ownership of shares of Common Stock held in managed accounts.

Other than as described in the following paragraph, none of GSCP Advisors, GSCP Offshore Advisors, GS Advisors, GS GmbH or any of the Funds beneficially owns any securities of the Issuer.

As a result of the matters described in Item 4 above, the Reporting Persons may be deemed to constitute a "group", within the meaning of Section 13(d)(3) of the Exchange Act, with, among others, Mr. Kinder. The Reporting Persons do not have affirmative information about any shares that may be beneficially owned by such other persons, other than the 23,994,577 shares of Common Stock reported as beneficially owned by Mr. Kinder in his Schedule 13D, filed with the SEC on May 30, 2006. Each Reporting Person hereby disclaims membership in any "group" with any person other than the Reporting Persons, and disclaims beneficial ownership of any shares of Common Stock that may be or are beneficially owned by, among others, Mr. Kinder.

In accordance with Securities and Exchange Commission Release No. 34-395538 (January 12, 1998) (the "Release"), this filing reflects the securities beneficially owned by certain operating units (collectively, the "Goldman Sachs Reporting Units") of GS Group and its subsidiaries and affiliates (collectively, "GSG"). * * *

(b) The description set forth in Item 5(a) above is incorporated by reference in its entirety into this Item 5(b).

(c) In the past 60 days, the Reporting Persons have effected the transactions in the Issuer's Common Stock set forth on Schedule IV hereto.

(d) Except for clients of Goldman Sachs who may have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, any shares of Common Stock held in managed accounts, no other person is known by any Reporting Person to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, any shares of Common Stock.

(e) Not applicable.

ITEM 6. CONTRACTS, ARRANGEMENTS, UNDERSTANDINGS OR RELATIONSHIPS WITH RESPECT TO SECURITIES OF THE ISSUER

The description of the Proposal set forth in Item 4 above is incorporated by reference in its entirety into this Item 6.

ITEM 7. MATERIAL TO BE FILED AS EXHIBITS

EXHIBIT DESCRIPTION

7.01. Joint Filing Agreement, dated as of June 7, 2006, by and among The Goldman Sachs Group, Inc., Goldman, Sachs & Co., GSCP V Advisors, L.L.C., * * *

7.02. Debt Financing Highly Confident Letter, dated May 28, 2006.

7.03. Proposal Letter, dated May 28, 2006. * * *

DOCUMENTARY APPENDIX M, ORACLE TENDER OFFER FOR PEOPLESOFT

[*See* Principally Chapters 17 and 20 of Business Planning for Mergers and Acquisitions]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE TO
(RULE 14d-100)

Tender Offer Statement Pursuant to Section 14(d)(1) or 13(e)(1) of
the Securities Exchange Act of 1934

PEOPLESOFT, INC.
(Name of Subject Company)

PEPPER ACQUISITION CORP.
ORACLE CORPORATION
(Names of Filing Persons—Offeror)

COMMON STOCK, PAR VALUE $0.01 PER SHARE
(Title of Class of Securities)

* * *

Offer to Purchase for Cash
All Outstanding Shares of Common Stock
(Including the Associated Preferred Stock Purchase Rights)
of
PeopleSoft, Inc.
at
$16.00 Net Per Share
by
Pepper Acquisition Corp.
A Wholly Owned Subsidiary of
Oracle Corporation

THE OFFER AND WITHDRAWAL RIGHTS EXPIRE AT 12:00 MIDNIGHT, NEW YORK CITY TIME, ON MONDAY, JULY 7, 2003, UNLESS THE OFFER IS EXTENDED.

THE OFFER IS CONDITIONED UPON, AMONG OTHER THINGS, (I) THERE BEING VALIDLY TENDERED AND NOT WITHDRAWN BEFORE THE EXPIRATION OF THE OFFER A NUMBER OF SHARES OF COMMON STOCK, PAR VALUE $0.01 PER SHARE, WITH THE ASSOCIATED PREFERRED STOCK PURCHASE RIGHTS (TOGETHER, THE "SHARES"), OF PEOPLESOFT, INC. (THE "COMPANY"), WHICH, TOGETHER WITH THE SHARES THEN OWNED BY ORACLE CORPORATION ("PARENT") AND ITS SUBSIDIARIES (INCLUDING PEPPER ACQUISITION CORP. (THE "PURCHASER")), REPRESENTS AT LEAST A MAJORITY OF THE TOTAL NUMBER OF SHARES OUTSTANDING ON A FULLY DILUTED BASIS, (II) THERE BEING NO AMENDMENT OF THE AGREEMENT AND PLAN OF MERGER, DATED JUNE 1, 2003, BY AND AMONG THE COMPANY, J.D. EDWARDS & COMPANY AND JERSEY ACQUISITION CORPORATION WITHOUT THE CONSENT OF THE PURCHASER (A TERMINATION OF SUCH AGREEMENT IN ACCORDANCE WITH ITS

TERMS SHALL NOT CONSTITUTE AN AMENDMENT FOR THIS PURPOSE), (III) THE COMPANY'S BOARD OF DIRECTORS REDEEMING THE ASSOCIATED PREFERRED STOCK PURCHASE RIGHTS OR THE PURCHASER BEING SATISFIED, IN ITS SOLE DISCRETION, THAT THE RIGHTS HAVE BEEN INVALIDATED OR ARE OTHERWISE INAPPLICABLE TO THE OFFER AND THE MERGER OF THE COMPANY AND THE PURCHASER (OR ONE OF ITS SUBSIDIARIES) AS DESCRIBED HEREIN AND (IV) THE PURCHASER BEING SATISFIED, IN ITS SOLE DISCRETION, THAT SECTION 203 OF THE DELAWARE GENERAL CORPORATION LAW IS INAPPLICABLE TO THE MERGER OF THE COMPANY AND THE PURCHASER (OR ONE OF ITS SUBSIDIARIES) AS DESCRIBED HEREIN.

PARENT AND THE PURCHASER ARE SEEKING TO NEGOTIATE A BUSINESS COMBINATION WITH THE COMPANY. SUBJECT TO APPLICABLE LAW, THE PURCHASER RESERVES THE RIGHT TO AMEND THE OFFER (INCLUDING AMENDING THE NUMBER OF SHARES TO BE PURCHASED, THE OFFER PRICE AND THE CONSIDERATION TO BE OFFERED IN THE PROPOSED MERGER) UPON ENTERING INTO A MERGER AGREEMENT WITH THE COMPANY, OR TO NEGOTIATE A MERGER AGREEMENT WITH THE COMPANY NOT INVOLVING A TENDER OFFER PURSUANT TO WHICH THE PURCHASER WOULD TERMINATE THE OFFER AND THE SHARES WOULD, UPON CONSUMMATION OF SUCH MERGER, BE CONVERTED INTO THE CONSIDERATION NEGOTIATED BY PARENT, THE PURCHASER AND THE COMPANY.

IMPORTANT

Any stockholder of the Company desiring to tender Shares in the Offer should either (i) complete and sign the Letter of Transmittal or a facsimile thereof in accordance with the instructions in the Letter of Transmittal, and mail or deliver the Letter of Transmittal together with the certificates representing tendered Shares and all other required documents to American Stock Transfer & Trust Company, the Depositary for the Offer, or tender such Shares pursuant to the procedure for book-entry transfer set forth in "The Offer—Section 3—Book-Entry Delivery" or (ii) request such stockholder's broker, dealer, commercial bank, trust company or other nominee to effect the transaction for such stockholder. Stockholders whose Shares are registered in the name of a broker, dealer, commercial bank, trust company or other nominee must contact such person if they desire to tender their Shares. * * *

THIS OFFER TO PURCHASE AND THE RELATED LETTER OF TRANSMITTAL CONTAIN IMPORTANT INFORMATION, AND YOU SHOULD CAREFULLY READ BOTH IN THEIR ENTIRETY BEFORE MAKING A DECISION WITH RESPECT TO THE OFFER.

The Dealer Manager for the Offer is:

CREDIT SUISSE | FIRST BOSTON

* * *

SUMMARY TERM SHEET

Pepper Acquisition Corp., a wholly owned subsidiary of Oracle Corporation, is offering to purchase all outstanding shares of common stock, par value $0.01 per share, of PeopleSoft, Inc. (together with the associated preferred stock purchase rights) for $16.00 net per share in cash, upon the terms and subject to the conditions set forth in this Offer to Purchase and the related Letter of Transmittal. The following are some of the questions you, as a PeopleSoft, Inc. stockholder, may have and answers to those questions. * * *

Who is offering to buy my securities?

Our name is Pepper Acquisition Corp. We are a Delaware corporation formed for the purpose of making this tender offer for all of the common stock of PeopleSoft, Inc. We are a wholly owned subsidiary of Oracle Corporation, a Delaware corporation. See "The Offer—Section 9".

What securities are you offering to purchase?

We are offering to purchase all of the outstanding common stock, par value $0.01 per share, and the associated preferred stock purchase rights, of PeopleSoft, Inc. We refer to one share of PeopleSoft, Inc. common stock, together with and the associated stock purchase right, as a "share" or "Share". See "Introduction".

How much are you offering to pay for my securities and what is the form of payment?

We are offering to pay you $16.00 per share in cash without brokerage fees, commissions or, except in certain circumstances, transfer taxes. See "Introduction".

Do you have the financial resources to pay for the shares?

We will need approximately $5.1 billion to purchase all shares pursuant to the offer and to pay related fees and expenses. As of February 28, 2003, Oracle Corporation had cash and cash equivalents and short-term investments in the amount of $6.0 billion. In addition, Oracle Corporation has obtained a commitment from Credit Suisse First Boston to provide a revolving credit facility to Oracle Corporation in the aggregate amount of $5.0 billion. Oracle Corporation expects to contribute or otherwise advance funds to enable us to consummate the offer. Oracle Corporation expects, based upon the combination of internally available cash and borrowings under the revolving credit facility, to have sufficient cash on hand at the expiration of the offer to pay the offer price for all shares in the offer. The offer is not conditioned upon any financing arrangements. See "The Offer—Section 10".

Is your financial condition relevant to my decision to tender in the offer?

Because the form of payment consists solely of cash and is not conditioned upon any financing arrangements, we do not think our financial condition is material to your decision whether to tender in the offer. * * *

What does the Board of Directors of PeopleSoft, Inc. think of the offer?

PeopleSoft, Inc.'s Board of Directors has not approved this offer or otherwise commented on it as of the date of this Offer to Purchase. Within 10 business days after the date of this Offer to Purchase, PeopleSoft, Inc. is required by law to publish, send or give to you (and file with the Securities and Exchange Commission) a statement as to whether it recommends acceptance or rejection of the offer, that it has no opinion with respect to the offer or that it is unable to take a position with respect to the offer.

How long do I have to decide whether to tender in the offer?

You have until the expiration date of the offer to tender. The offer currently is scheduled to expire at 12:00 midnight, New York City time, on Monday, July 7, 2003. We currently expect that the offer will be extended until the principal conditions to the offer, which are described below, are satisfied. If the offer is extended, we will issue a press release announcing the extension at or before 9:00 A.M. New York City time on the next business day after the date the offer was scheduled to expire. See "The Offer—Section 1".

We may elect to provide a "subsequent offering period" for the offer. A subsequent offering period, if one is included, will be an additional period of time beginning after we have purchased shares tendered during the offer, during which stockholders may tender, but not withdraw, their shares and receive the offer consideration. We do not currently intend to include a subsequent offering period, although we reserve the right to do so. See "The Offer—Section 1". * * *

Until what time can I withdraw tendered shares?

You can withdraw tendered shares at any time until the offer has expired, and, if we have not by August 7, 2003, agreed to accept your shares for payment, you can withdraw them at any time after such time until we accept shares for payment. You may not, however, withdraw shares tendered during a subsequent offering period, if one is included. See "The Offer—Section 4".

How do I withdraw tendered shares?

To withdraw shares, you must deliver a written notice of withdrawal, or a facsimile of one, with the required information to American Stock Transfer & Trust Company while you have the right to withdraw the shares. See "The Offer—Section 4".

When and how will I be paid for my tendered shares?

Subject to the terms and conditions of the offer, we will pay for all validly tendered and not withdrawn shares promptly after the later of the date of expiration of the offer and the satisfaction or waiver of the conditions to the offer set forth in "The Offer—Section 14" relating to governmental or regulatory approvals. We do, however, reserve the right, in our sole discretion and subject to applicable law, to delay payment for shares until satisfaction of all conditions to the offer relating to governmental or regulatory approvals. See "The Offer—Section 2". * * *

Will the offer be followed by a merger if all the PeopleSoft, Inc. shares are not tendered in the offer?

If we accept for payment and pay for at least a majority of the outstanding shares on a fully diluted basis, Pepper Acquisition Corp. expects to be merged with and into PeopleSoft, Inc. If that merger takes place, Oracle Corporation will own all of the shares and all remaining stockholders (other than us, Oracle Corporation and stockholders properly exercising their appraisal rights) will receive the price per share paid in the offer. See "The Offer—Section 12—Purpose of the Offer; Plans for the Company".

If a majority of the shares are tendered and accepted for payment, will PeopleSoft, Inc. continue as a public company?

If the merger takes place, PeopleSoft, Inc. will no longer be publicly owned. Even if the merger does not take place, if we purchase all the tendered shares, there may be so few remaining stockholders and publicly held shares that the shares will no longer be eligible to be traded on a securities exchange, there may not be a public trading market for the shares, and PeopleSoft, Inc. may cease making filings with the Securities and Exchange Commission or otherwise cease being required to comply with the SEC rules relating to publicly held companies. See "The Offer—Section 7".

If I decide not to tender, how will the offer affect my shares?

If the offer is successful, Pepper Acquisition Corp. expects to conclude a merger transaction in which all shares of PeopleSoft, Inc. will be exchanged for an amount in cash per share equal to the price per share paid in the offer. If the proposed second-step merger takes place, stockholders who do not tender in the offer (other than those properly exercising their appraisal rights) will receive the same amount of cash per share that they would have received had they tendered their shares in the offer. Therefore, if such merger takes place, the only difference between tendering and not tendering shares in the offer is that tendering stockholders will be paid earlier. If, however, the merger does not take place and the offer is consummated, the number of stockholders and of shares that are still in the hands of the public may be so small that there will no longer be an active or liquid public trading market (or, possibly, any public trading market) for shares held by stockholders other than Pepper Acquisition Corp., which may affect prices at which shares trade. Also, as described above, PeopleSoft, Inc. may cease making filings with the Securities and Exchange Commission or being required to comply with the SEC rules relating to publicly held companies. See "The Offer—Section 7".

What is the market value of my shares as of a recent date? * * *

What are the federal income tax consequences of participating in the offer?

In general, your sale of shares pursuant to the offer will be a taxable transaction for U.S. federal income tax purposes and may also be a taxable transaction under applicable state, local or foreign income or other tax laws. You should consult your tax advisor about the tax consequences to you of participating in the offer in light of your particular circumstances. See "The Offer—Section 5".

Who can I talk to if I have questions about the offer?

You can call MacKenzie Partners, Inc., the information agent for the offer, at (212) 929-5500 (collect) or (800) 322-2885 (toll-free) or Credit Suisse First Boston LLC, the dealer manager for the offer, at (800) 881-8320 (toll-free). See the back cover of this Offer to Purchase. * * *

DOCUMENTARY APPENDIX N, ORACLE-PEOPLESOFT SUMMARY ADVERTISEMENT

[*See* Principally Chapters 17 and 20 of Business Planning for Mergers and Acquisitions]

This announcement is not an offer to purchase or a solicitation of an offer to sell Shares (as defined below). The Offer (as defined below) is made solely by the Offer to Purchase dated June 9, 2003 and the related Letter of Transmittal and any amendments or supplements thereto and is being made to all holders of Shares. The Offer is not being made to, nor will tenders be accepted from or on behalf of, holders of Shares in any jurisdiction in which the making of the Offer or acceptance thereof would not be in compliance with the laws of such jurisdiction. In those jurisdictions where the applicable laws require that the Offer be made by a licensed broker or dealer, the Offer shall be deemed to be made on behalf of Purchaser by Credit Suisse First Boston LLC ("Credit Suisse First Boston") or one or more registered brokers or dealers licensed under the laws of such jurisdiction.

Notice of Offer to Purchase for Cash
All Outstanding Shares of Common Stock
(including the Associated Preferred Stock Purchase Rights)

of

PeopleSoft, Inc.

at

$16.00 Net per Share

by

Pepper Acquisition Corp.

a wholly owned subsidiary of

Oracle Corporation

Pepper Acquisition Corp. (the "Purchaser"), a Delaware corporation and a wholly owned subsidiary of Oracle Corporation, a Delaware corporation ("Parent"), is offering to purchase all outstanding shares of common stock, $0.01 par value per share (the "Common Stock") of PeopleSoft, Inc., a Delaware corporation (the "Company"), including the associated preferred stock purchase rights (the "Rights") issued pursuant to the First Amended and Restated Preferred Shares Rights Agreement, dated as of December 16, 1997, between the Company and BankBoston, N.A. as Rights Agent (the Common Stock and the Rights together are referred to herein as the "Shares"), at $16.00 per Share, net to the seller in cash, upon the terms and subject to the conditions set forth in the Offer to Purchase dated June 9, 2003 (the "Offer to Purchase") and in the related Letter of Transmittal (which, together with any amendments or supplements thereto, collectively constitute the "Offer").

THE OFFER AND WITHDRAWAL RIGHTS EXPIRE AT 12:00 MIDNIGHT, NEW YORK CITY TIME, ON MONDAY, JULY 7, 2003, UNLESS THE OFFER IS EXTENDED.

The purpose of the Offer is to acquire control of, and the entire equity interest in, the Company. The Purchaser currently intends, as soon as practicable after consummation of the Offer, to seek maximum representation on the Company's Board of Directors and to seek to have the Company consummate a merger or other similar business combination with the Purchaser (or one of its subsidiaries). Pursuant to such merger or business combination, outstanding Shares not owned by Parent or its subsidiaries (including the Purchaser) would be converted into the right to receive cash in an amount equal to the price per Share provided pursuant to the Offer.

The Offer is conditioned upon, [*see* Appendix M]. * * *

After the expiration of the Offer, if all of the conditions to the Offer have been satisfied or waived, but not 100% of the Shares have been tendered, the Purchaser may, subject to certain conditions, include a subsequent offering period of between three and 20 business days to permit additional tenders of Shares. No withdrawal rights apply to Shares tendered in a subsequent offering period, and no withdrawal rights apply during a subsequent offering period with respect to Shares previously tendered in the Offer and accepted for payment. The Purchaser does not currently intend to include a subsequent offering period, although the Purchaser reserves the right to do so.

For purposes of the Offer, the Purchaser shall be deemed to have accepted for payment tendered Shares when, as and if the Purchaser gives oral or written notice to the Depositary of its acceptance for payment of the tenders of such Shares. * * *

Tenders of Shares made pursuant to the Offer may be withdrawn at any time prior to the expiration of the Offer. * * *

The information required to be disclosed by paragraph (d)(1) of Rule 14d-6 of the General Rules and Regulations under the Securities Exchange Act of 1934 is contained in the Offer to Purchase and the related Letter of Transmittal and is incorporated herein by reference.

A request is being made to the Company for the use of its stockholder list and security position listings for the purpose of disseminating the Offer to holders of Shares. The Offer to Purchase and the related Letter of Transmittal will be mailed to record holders of Shares and will be furnished to brokers, banks and similar persons whose names, or the names of whose nominees, appear on the stockholder list or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal to beneficial owners of Shares. * * *

Any questions or requests for assistance may be directed to the Information Agent or the Dealer Manager at the respective telephone numbers and addresses set forth below.

* * *

DOCUMENTARY APPENDIX O, PEOPLESOFT 14D-9 STATEMENT

[*See* Principally Chapters 17 and 20 of Business Planning for Mergers and Acquisitions]

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

Schedule 14D-9

SOLICITATION/ RECOMMENDATION STATEMENT

PURSUANT TO SECTION 14(d)(4) OF THE SECURITIES EXCHANGE ACT OF 1934

PeopleSoft, Inc.

(Name of Subject Company)

PeopleSoft, Inc.

(Name of Person Filing Statement)

Common Stock, Par Value $0.01 Per Share

(Title of Class of Securities)

712713106

* * *

INTRODUCTION

This Solicitation/ Recommendation Statement on Schedule 14D-9 (the **"Schedule 14D-9** ") relates to an offer by Pepper Acquisition Corp., a Delaware corporation (**"Oracle Sub"**) and a wholly owned subsidiary of Oracle Corporation, a Delaware corporation (**"Oracle"**), to purchase all outstanding shares of common stock, par value $0.01 per share, of PeopleSoft, Inc., a Delaware corporation (the **"Company"**), together with the associated Series A Participating Preferred Stock purchase rights issued as a dividend on the common stock on February 27, 1995 and governed by the First Amended and Restated Preferred Shares Rights Agreement, dated as of December 16, 1997 (the **"Rights Plan"**), by and between the Company and BankBoston, N.A., as rights agent. The common stock and the associated preferred stock purchase rights are referred to collectively in this Schedule 14D-9 as the **"Common Stock."**

Item 1. ***Subject Company Information.***

(a) The name of the subject company is PeopleSoft, Inc., a Delaware corporation (**"PeopleSoft,"** or the **"Company"**), and the address and telephone number of its principal executive offices is 4460 Hacienda Drive, Pleasanton, California 94588-8618, (925) 225-3000. * * *

Item 2. ***Identity and Background of Filing Person*** *** * ***

Item 3. ***Past Contacts, Transactions, Negotiations and Agreements***

Except as described in this Schedule 14D-9 or in the excerpts from the Company's Definitive Proxy Statement, dated April 28, 2003 (the " **2003 Proxy Statement"**), filed as *Exhibit (e)(1)* to this Schedule 14D-9, there are no agreements, arrangements, understandings, or any actual or potential conflicts of interest between the Company or its affiliates and (i) the Company or its executive officers, directors or affiliates or (b) Oracle or Oracle Sub or their respective executive officers, directors or affiliates. * * *

Cash Consideration Payable Pursuant to the Offer

If the directors and executive officers of the Company who own shares of Common Stock tender their shares for purchase pursuant to the Offer, they will receive the same cash consideration on the same terms and conditions as the other stockholders of the Company. * * *

Employment Agreements

* * *

Item 4. ***The Solicitation or Recommendation***

(a) *Solicitation/ Recommendation.*

The board of directors, at a meeting held on June 8, 2003, formed a committee of independent directors (the **"Transaction Committee"**), comprised of Frank J. Fanzilli, Jr., Steven D. Goldby, A. George Battle and Cyril J. Yansouni. The board of directors charged the members of the Transaction Committee with evaluating and assessing the terms of Oracle's tender offer, once announced, in consultation with the financial and legal advisors engaged by the board of directors to render financial advice in connection with, among other things, any tender offer commenced by Oracle. The Transaction Committee also was authorized to obtain all relevant and material facts and information, to direct the activities of such legal and financial advisors, to pursue such due diligence as the Transaction Committee deemed necessary, and to make a final recommendation to the full board of directors regarding any such tender offer.

After careful consideration, including a thorough review of the terms and conditions of the Offer with the board's financial and legal advisors, the Transaction Committee and the full board of directors unanimously determined at a meeting on June 11, 2003 that the Offer would undoubtedly face lengthy antitrust scrutiny, with a significant likelihood that the necessary approval would not be granted, that the delays and uncertainties created by Oracle's Offer, coupled with Oracle's stated intent to discontinue PeopleSoft's market-leading products, represent a substantial threat to stockholder value, and that the unsolicited and hostile nature of the Offer, combined with Oracle's statements, was designed to disrupt the Company's strong momentum at significant cost to the Company and its 5,100 customers. Therefore, the Transaction Committee determined that the Offer was not in the best interests of the stockholders and unanimously recommended to the board of directors that the full board of directors, in turn, recommend that the Company's stockholders reject the Offer and not tender their shares to Oracle for purchase.

Accordingly, the board of directors unanimously recommends that the Company stockholders reject the Offer and not tender shares for purchase pursuant to the Offer.

A form of letter to the Company's stockholders and a press release communicating the recommendation of the board of directors are filed as Exhibits (a)(1) and (a)(2) hereto respectively and are incorporated herein by this reference.

(b) *Background of the Offer; Reasons for Recommendation* * * *

Item 5. ***Person/Assets Retained, Employed, Compensated or Used***

* * *

Item 6. ***Interest in Securities of the Subject Company***

* * *

Item 7. ***Purposes of the Transaction and Plans or Proposals***

(a) The Company has not undertaken and is not engaged in any negotiations in response to the Offer which relate to: (i) a tender offer or other acquisition of the Company's securities by the Company, any of its subsidiaries or any other

person; (ii) an extraordinary transaction, such as a merger, reorganization or liquidation involving the Company or any of its subsidiaries; (iii) a purchase, sale or transfer of a material amount of assets of the Company or any of its subsidiaries; or (iv) any material change in the present dividend rate or policy, or indebtedness or capitalization of the Company.

(b) There is no transaction, board resolution, agreement in principle, or signed contract in response to the Offer which relates to or would result in one or more of the matters referred to in Item 7(a) immediately above.

Item 8. Additional Information

* * *

Item 9. Materials to Be Filed as Exhibits

* * *

DOCUMENTARY APPENDIX P, COX COMMUNICATIONS COMBINED TENDER OFFER AND GOING PRIVATE MERGER AGREEMENT

[*See* Principally Chapters 14, 17, and 20 of Business Planning for Mergers and Acquisitions]

AGREEMENT AND PLAN OF MERGER

THIS AGREEMENT AND PLAN OF MERGER (this *"Agreement"*), dated as of October 19, 2004, is entered into by and among Cox Enterprises, Inc., a Delaware corporation *("Parent")* , Cox Holdings, Inc., a Delaware corporation and a wholly-owned subsidiary of Parent *("Purchaser")* , CEI-M Corporation, a Delaware corporation and a wholly-owned subsidiary of Purchaser *("Merger Sub")* , and Cox Communications, Inc., a Delaware corporation (the *"Company"*).

WHEREAS, Purchaser beneficially owns 25,696,470 shares of the Class C Common Stock, par value $1.00 per share, of the Company (the *"Class C Stock"*), and 340,710,646 shares of the Class A Common Stock, par value $1.00 per share, of the Company (the *"Class A Stock"*), and Cox DNS, Inc., a Delaware corporation and a wholly-owned subsidiary of Parent ("DNS"), owns 1,901,322 shares of Class C Stock and 24,980,530 shares of Class A Stock, which together with the Class C Stock and Class A Stock owned by Purchaser, in the aggregate, represents approximately 62.05% of the outstanding shares of common stock of the Company and 72.74% of the voting power in the Company;

WHEREAS, subject to the terms and conditions provided herein, Purchaser and the Company hereby agree to commence a joint tender offer (the *"Offer"*) to acquire up to 100% of the issued and outstanding shares of Class A Stock (the *"Shares"*) not otherwise owned by Purchaser and DNS for an amount equal to $34.75 per Share (such amount being hereinafter referred to as the *"Offer Price"*), net to the stockholders who tender their Shares, in cash;

WHEREAS, subject to the terms and conditions provided herein, upon the purchase of Shares pursuant to the Offer, Parent intends to cause all shares of capital stock of the Company owned by Purchaser and DNS to be transferred to Merger Sub immediately prior to the Effective Time (as defined in Section 2.02 herein) and to merge Merger Sub with and into the Company pursuant to Delaware General Corporation Law *("DGCL")* Section 251 or Section 253, as applicable (the *"Merger"*);

WHEREAS, the Board of Directors of the Company, based on the recommendation of the special committee of independent directors of the Board of Directors of the Company (the *"Special Committee"*), has (i) determined that each of the Offer and the Merger (as hereinafter defined), is advisable, fair to and in the best interests of the stockholders of the Company (other than Parent and its subsidiaries), (ii) resolved to approve and adopt this Agreement and the transactions contemplated hereby, (iii) resolved to recommend acceptance of the Offer and approval and adoption of this Agreement and the Merger by such stockholders of the Company, subject to the terms and conditions set forth herein, (iv) approved the transactions contemplated by this Agreement as an exception to the Business Combination provisions of the Company's Certificate of Incorporation, as amended to the date hereof (the *"Company Charter"*) and (v) taken all necessary action to render the restrictions in Section 203 of the DGCL inapplicable to this Agreement, the transactions contemplated by this Agreement, Parent, Purchaser, DNS and Merger Sub.

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth in this Agreement, Parent, Purchaser, Merger Sub and the Company hereby agree as follows:

ARTICLE I

THE TENDER OFFER

SECTION 1.01 *The Tender Offer.*

(a) Subject to the provisions of this Agreement, the Company and Purchaser will commence the Offer, as promptly as practicable (but in no event earlier than November 1, 2004) after the public announcement (on the date hereof or the following business day) of the execution of this Agreement.

(b) The Offer shall expire at 12:00 midnight, New York City Time, twenty (20) business days following the commencement of the Offer (the *"Initial Expiration Date"* and together with any extension permitted hereunder, the *"Expiration Date"*), unless this Agreement is earlier terminated in accordance with Section 8.01 hereof.

(c) The obligation of Purchaser and the Company to commence the Offer and to accept for payment and pay for Shares tendered pursuant to the Offer shall be subject only to (i) the non-waivable condition that pursuant to the Offer, there shall have been validly tendered and not withdrawn before the Offer expires the number of Shares which constitutes at least a majority of the outstanding Shares not beneficially owned by Parent, Purchaser or DNS or their respective affiliates or the directors and executive officers of the Company immediately prior to the expiration of the Offer (the "MOM Condition") [this is a "majority of minority" condition] and (ii) the other conditions set forth in *Exhibit 1.01(c)* hereto. * * *

(d) As soon as reasonably practicable on the date the Offer is commenced, (i) Parent, Purchaser and the Company shall file with the SEC a single, joint Tender Offer Statement on Schedule TO (together with all amendments thereto, the *"Schedule TO"*) and a Schedule 13E-3 and (ii) the Company shall file a Solicitation/ Recommendation Statement on Schedule 14D-9 (the *"Schedule 14D-9"*) with respect to the Offer, each of which will comply in all material respects with the provisions of all applicable federal securities laws, and will contain (including as an exhibit) or incorporate by reference the Offer and forms of the related letter of transmittal and summary advertisement (which documents, together with any supplements or amendments thereto, are referred to collectively as the *"Offer Documents"*). The Company agrees that (A) the Schedule 14D-9 shall not be withdrawn or amended without the prior written consent of Parent; provided, however, that such recommendation may be withdrawn or modified by the Special Committee without the prior written consent of Parent to the extent that the Special Committee determines in good faith, after receiving the advice of outside counsel, that such recommendation would no longer be consistent with its fiduciary duties to the Company's stockholders under applicable law and (B) the Schedule 14D-9, on the date filed with the SEC and on the date first published, sent or given to the Company's stockholders, will not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, except that no representation is made by the Company with respect to written information supplied by Parent or Purchaser specifically for inclusion in the Schedule 14D-9. Each of Parent, Purchaser and the Company agree that the Schedule TO, Schedule 13E-3 and the Offer Documents, on the date filed with the SEC and on the date first published, sent or given to the Company's stockholders, will not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading, except that no representation is made by Parent or Purchaser with respect to written information supplied by the Company specifically for inclusion in the Schedule TO or the Offer Documents and no representation is made by the Company with respect to written information supplied by Parent or Purchaser specifically for inclusion in the Schedule TO or the Offer Document. * * *

SECTION 1.02 *Company Actions.* The Company hereby approves of and consents to the Offer. The Schedule 14D-9 will set forth, and the Company hereby represents to Parent, Purchaser and Merger Sub, that (a) each of the Special Committee and the Board of Directors of the Company (upon the recommendation of the Special Committee), at meetings duly called and held, has (i) determined that each of the Offer and the Merger is advisable, fair to and in the best interests of the Company's stockholders (other than Parent and its subsidiaries); (ii) approved this Agreement and the transactions contemplated hereby, including, without limitation the Offer and the Merger; and (iii) resolved to recommend that the Company's stockholders accept the Offer, tender their Shares pursuant thereto and approve and adopt this Agreement and the Merger; provided, however, that such recommendation may be withdrawn or modified to the extent that the Board of Directors of the Company, based on the recommendation of the Special Committee, determines in good faith, after receiving the advice of outside counsel, that such recommendation would no longer be consistent with its fiduciary duties to the Company's stockholders under applicable law; (b) the Special Committee has received the written opinion of Goldman, Sachs & Co., the financial advisor to the Special Committee ("Goldman Sachs"), dated the date of this Agreement (the *"Fairness Opinion"*) to the effect that, as of such date, $34.75 per Share in cash to be received by the stockholders of the Company (other than Parent and its affiliates) pursuant to the Offer and the Merger is fair from a financial point of view to such stockholders (it being acknowledged and agreed that the inclusion of the disclosure set forth in this clause (b) in the Company's Schedule 14D-9 shall be subject to consent of Goldman Sachs in accordance with its engagement letter with the Company); (c) the Special Committee, acting as the "Independent Directors" for purposes of Article IX of the Company Charter, has approved the transactions contemplated herein as exceptions to the Business Combination provisions in Article IX of the Company Charter; and (d) the Board of Directors of the Company and the Special Committee have taken all necessary action to render the restrictions in

Section 203 of the DGCL inapplicable to this Agreement, the transactions contemplated by this Agreement, Parent, Purchaser, DNS and Merger Sub.

SECTION 1.03 *The Purchase.* Subject to the terms of this Agreement and the satisfaction or, if permissible, waiver, of all of the conditions to the Offer, promptly after the expiration of the "initial offering period" (as such term is defined in Rule 14d-1(g)(4) under the Exchange Act) (the "Initial Period") and, if applicable, promptly, in accordance with Rule 14d-11 under the Exchange Act, during any Subsequent Period, (i) Parent will cause Purchaser to accept for payment and pay for, in accordance with the terms of the Offer, up to and including, but not more than 43,165,467 Shares in the aggregate, and (ii) the Company will accept for payment and pay for, in accordance with the terms of the Offer, all of the remaining Shares tendered pursuant to the Offer; provided, however, that if there shall have been validly tendered (and not withdrawn) pursuant to the Offer prior to 12:00 midnight, New York City Time, on the expiration of the Initial Period or, if applicable, during any Subsequent Period, that number of Shares which, when added to the Shares then owned by Parent, Purchaser and DNS (including, without limitation, any Shares purchased promptly after the expiration of the Initial Period) would represent 90% or more of the issued and outstanding Shares at the close of business on the business day immediately preceding such expiration, Parent, in its sole discretion, may instead elect to cause Purchaser to accept for payment and pay for all of the Shares validly tendered pursuant to the Offer and not yet accepted and paid for rather than have both the Company and Purchaser accept and pay for Shares, in accordance with the terms of the Offer.

SECTION 1.04. *Stockholder Lists.* * * *

ARTICLE II OF THE COX MERGER AGREEMENT

THE MERGER

SECTION 2.01 *The Merger.*

(a) Subject to the terms and conditions of this Agreement, Purchaser will, and Parent will cause Purchaser and DNS to each, contribute all shares of Class A Stock and all shares of Class C Stock owned by them (including any Shares purchased by Purchaser pursuant to the Offer) to Merger Sub immediately prior to the Effective Time (as defined in Section 2.02 herein).

(b) Subject to the terms and conditions of this Agreement, at the Effective Time (as defined in Section 2.02 herein), (i) the Company and Purchaser shall consummate the Merger pursuant to which Merger Sub shall be merged with and into the Company and the separate corporate existence of Merger Sub shall thereupon cease, (ii) the Company shall be the successor or surviving corporation in the Merger (the *"Surviving Corporation"*) and shall continue to be governed by the laws of the State of Delaware, and (iii) the separate corporate existence of the Company with all its rights, privileges, immunities, powers and franchises shall continue unaffected by the Merger.

SECTION 2.02 *Effective Time; Closing.* As soon as practicable after the satisfaction or, if permissible, waiver of the conditions set forth in Article VII, the parties hereto shall cause the Merger to be consummated by filing a certificate of merger in the case of a Long-Form Merger pursuant to Section 2.09 herein, or a certificate of ownership and merger, in the case of a Short-Form Merger pursuant to Section 2.08 herein, as applicable (in either case, the *"Certificate of Merger"*) with the Secretary of State of the State of Delaware and by making any related filings required under the DGCL in connection with the Merger. The Merger shall become effective at such time as the Certificate of Merger is duly filed with the Secretary of State of the State of Delaware or at such later time as is agreed to by the parties hereto and as is specified in the Certificate of Merger (the *"Effective Time"* or the *"Closing"*). Prior to such filing, a closing shall be held at the offices of Dow, Lohnes & Albertson, PLLC, One Ravinia Drive, Suite 1600, Atlanta, Georgia 30346, or such other place as the parties shall agree, for the purposes of confirming the satisfaction or waiver, as the case may be, of the conditions set forth in Article VII.

SECTION 2.03 *Effects of the Merger.* From and after the Effective Time, the Merger shall have the effects set forth in the DGCL (including, without limitation, Sections 259, 260 and 261 thereof).

SECTION 2.04 *Certificate of Incorporation and Bylaws.* At the Effective Time, the certificate of incorporation and the bylaws of the Company will be amended in their entireties to read as set forth in Exhibits 2.04(a) (in the case of the certificate of incorporation) and 2.04(b) (in the case of the bylaws), and as so amended shall be the certificate of incorporation and bylaws of the Surviving Corporation, until thereafter amended in accordance with their respective

terms and the DGCL.

SECTION 2.05 *Directors.* The directors of the Company immediately prior to the Effective Time shall be the initial directors of the Surviving Corporation until their respective successors are duly elected or appointed and qualified in the manner provided in the certificate of incorporation and bylaws of the Surviving Corporation, or until their earlier death, resignation or removal, or otherwise as provided by law.

SECTION 2.06 *Officers.* The officers of the Company immediately prior to the Effective Time shall be the initial officers of the Surviving Corporation until their respective successors are duly elected or appointed and qualified in the manner provided in the certificate of incorporation and bylaws of the Surviving Corporation, or until their earlier death, resignation or removal, or otherwise as provided by law.

SECTION 2.07 *Conversion of Shares.* At the Effective Time, by virtue of the Merger and without any action on the part of Parent, Purchaser, Merger Sub or the Company or any holder of Shares:

(a) Each Share issued and outstanding immediately prior to the Effective Time (other than Shares to be canceled pursuant to clause (b) below and any Dissenting Shares (as hereinafter defined)) shall be converted automatically as of the Effective Time into the right to receive, subject to compliance with the provisions of Section 3.02 hereof, an amount in cash per Share equal to the Offer Price (the "Merger Consideration"), without interest. Each certificate previously evidencing any such share shall, after the Effective Time, represent only such right to receive, subject to compliance with the provisions of Section 3.02 hereof, the Merger Consideration. The holders of such certificates previously evidencing such Shares outstanding immediately prior to the Effective Time shall cease to have any rights with respect to such Shares except as otherwise provided herein or by law.

(b) Each Share and each share of Class C Stock or other class or series of capital stock (i) held in the treasury of the Company or by any wholly-owned subsidiary of the Company or (ii) owned by Parent, Purchaser or Merger Sub, shall automatically be canceled, retired and cease to exist without any conversion thereof and no payment shall be made with respect thereto.

(c) Each share of common stock, par value $.01 per share, of Merger Sub outstanding immediately prior to the Effective Time shall be converted into and become one share of common stock of the Surviving Corporation and shall constitute the only outstanding shares of capital stock of the Surviving Corporation.

SECTION 2.08 *Short-Form Merger; Stockholders' Meeting Not Required.* [*See* Chapter 2] If, following the purchase of Shares pursuant to the Offer and its expiration on the Expiration Date and consummation of the completion of the Offer and the contribution of Shares contemplated by Section 2.01(a), Merger Sub owns in the aggregate at least 90% of the Shares outstanding, the parties hereto agree to take all necessary and appropriate action to cause the Merger to become effective as soon as practicable after the satisfaction or waiver of the conditions to the Merger set forth in Article VII without a meeting of stockholders of the Company, in accordance with Section 253 of the DGCL (a *"Short-Form Merger"*).

SECTION 2.09 *Long-Form Merger; Stockholders' Meeting Required.* [*See* Chapter 2]

(a) If, following the purchase of Shares pursuant to the Offer and its expiration on the Expiration Date and consummation of the completion of the Offer and the contribution of Shares contemplated by Section 2.01(a), Merger Sub owns in the aggregate less than 90% of the Shares outstanding, the parties hereto agree to take all necessary and appropriate action to cause the Merger to become effective as soon as practicable after the satisfaction or waiver of the conditions to the Merger set forth in Article VII, in accordance with Section 251 of the DGCL (a *"Long-Form Merger"*). In furtherance and not in limitation of the foregoing agreement, the Company agrees that it shall, acting through its Board of Directors in accordance with applicable law, take the following actions:

(i) duly call, give notice of, convene and hold a special meeting of its stockholders (the "Special Meeting") as soon as practicable following the acceptance for payment and purchase of Shares pursuant to the Offer to consider and vote upon the approval and adoption of this Agreement and the Merger;

(ii) prepare and file with the SEC a preliminary proxy statement relating to this Agreement and the Merger and

use its best efforts (A) after consultation with Parent and Purchaser, to respond promptly to any comments made by the staff of the SEC with respect to such preliminary proxy statement and cause a definitive proxy statement (together with any amendments or supplements thereto, the "Proxy Statement") to be mailed to its stockholders at the earliest practicable time, and (B) to obtain the necessary approvals of this Agreement and the Merger by its stockholders; and

(iii) include in the Proxy Statement the Fairness Opinion (subject to consent of Goldman Sachs in accordance with its engagement letter with the Company), and the recommendations of the Special Committee and the Company's Board of Directors that the stockholders of the Company vote in favor of the approval and adoption of this Agreement and the Merger; provided, however, that such recommendation may be withdrawn or modified by the Special Committee without the prior written consent of Parent to the extent that the Special Committee determines in good faith, after receiving the advice of outside counsel, that such recommendation would no longer be consistent with its fiduciary duties to the Company's stockholders under applicable law.

(b) Parent, Purchaser and Merger Sub will provide the Company with the information concerning Parent, Purchaser, Merger Sub and their respective subsidiaries and affiliates required under the Exchange Act to be included in the Proxy Statement.

(c) Each of Parent, Purchaser, Merger Sub and the Company covenants and agrees that the information supplied by it for inclusion in the Proxy Statement or related materials, at the time such Proxy Statement or any amendments or supplements thereto are filed with the SEC, and at the time of the first mailing and at the time of the Special Meeting, shall not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements made therein, in light of the circumstances under which they were made, not misleading.

(d) If a vote of the stockholders of the Company is necessary to effect the Merger, Purchaser will vote and Parent will cause DNS to vote all Shares and shares of Class C Stock owned by them and their subsidiaries in favor of the approval and adoption of this Agreement and the Merger and will agree not to dispose of Shares or shares of Class C Stock following the purchase of Shares in the Offer or to grant voting power to any person or entity prior to the earlier of the Effective Time or the termination of this Agreement, except as contemplated by Section 2.01(a).

ARTICLE III

DISSENTING SHARES; PAYMENT FOR SHARES * * *

COMMENT

The short-form or long-form merger is the second step in the transaction.

DOCUMENTARY APPENDIX Q, COX COMMUNICATIONS GOING PRIVATE TENDER OFFER/MERGER OFFER DOCUMENT

[*See* Principally Chapters 13, 14, and 20 of Business Planning for Mergers and Acquisitions]

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Schedule TO

TENDER OFFER STATEMENT UNDER SECTION 14(D)(1)
OR SECTION 13(E)(1) OF THE SECURITIES EXCHANGE ACT OF 1934

Cox Communications, Inc.

(Name of Subject Company (Issuer))
Cox Communications, Inc.
Cox Enterprises, Inc.
Cox Holdings, Inc.
(Names of Filing Persons (Offerors))

Class A Common Stock, Par Value $1.00 Per Share

(Title of Class of Securities)

* * *

This Tender Offer Statement on Schedule TO ("Schedule TO") relates to the joint tender offer by Cox Holdings, Inc., a Delaware corporation ("Holdings") and a wholly owned subsidiary of Cox Enterprises, Inc., a Delaware corporation ("Enterprises"), and Cox Communications, Inc., a Delaware corporation ("Cox"), to purchase all of the issued and outstanding shares of Class A common stock, par value $1.00 per share, of Cox (the "Shares") not owned by Cox DNS, Inc., a Delaware corporation and another wholly owned subsidiary of Enterprises, or Holdings, at a purchase price of $34.75 per Share, net to the holder in cash, without interest thereon, upon the terms and subject to the conditions set forth in the Offer to Purchase dated November 3, 2004 (the "Offer to Purchase"), a copy of which is attached hereto as Exhibit (a)(1)(A), and in the related Letter of Transmittal (the "Letter of Transmittal"), a copy of which is attached hereto as Exhibit (a)(1)(B) (which, together with the Offer to Purchase, as amended or supplemented from time to time, constitute the "Offer").

This Schedule TO, as amended (see Explanatory Note below), is intended to satisfy the requirements of Schedule 13E-3. [*See* Chapter 24] The information in the Offer to Purchase, including all schedules and annexes thereto, is hereby expressly incorporated herein by reference in response to all the items of this Schedule TO, and is supplemented by the information specifically provided therein.

* * *

Item 1. ***Summary Term Sheet.***

The information set forth in the SUMMARY TERM SHEET in the Offer to Purchase is incorporated herein by reference. * * *

Item 4. ***Terms of the Transaction.***

(a) The information set forth in the Offer to Purchase is incorporated herein by reference.

(b) The information set forth in SPECIAL FACTORS ("Transactions and Arrangements Concerning the Shares") of the Offer to Purchase is incorporated herein by reference. * * *

Item 13. ***Information Required by Schedule 13e-3.***

The information set forth in the INTRODUCTION, SPECIAL FACTORS ("Background of this Offer"), SPECIAL FACTORS ("Recommendation of the Special Committee and the Cox Board; Fairness of the Offer and the Merger"), * * * is incorporated herein by reference.

* * *

Offer To Purchase For Cash

All Outstanding Shares Of Class A Common Stock
of
Cox Communications, Inc.
at
$34.75 Net Per Share
by
Cox Holdings, Inc.
A Wholly Owned Subsidiary Of
Cox Enterprises, Inc.

and by

Cox Communications, Inc.

THE OFFER AND WITHDRAWAL RIGHTS WILL EXPIRE AT 12:00 MIDNIGHT, NEW YORK CITY TIME, ON DECEMBER 2, 2004, UNLESS THE OFFER IS EXTENDED.* * *

Holdings and DNS currently beneficially own approximately 60% of Cox's outstanding Class A common stock. After the tender offer is consummated and subject to the conditions to the merger, CEI-M Corporation, Inc. ("CEI-M"), a Delaware corporation and a newly-created and wholly owned subsidiary of Holdings, will merge with and into Cox (the "Merger") in accordance with the applicable provisions of the Delaware General Corporation Law (the "DGCL") with Cox as the surviving corporation. If after the purchase of Shares pursuant to the tender offer, Holdings and DNS own at least 90% of the outstanding Shares, CEI-M will merge with and into Cox in a short-form merger pursuant to Section 253 of the DGCL. If after the purchase of Shares pursuant to the tender offer, Holdings and DNS own less than 90% of the outstanding Shares, Cox will call a special meeting of Cox's stockholders, and Enterprises will cause Holdings and DNS to vote all Cox common stock owned by them in favor of, and thereby approve, the Merger. [Because Holdings and DNS own approximately 60% of Cox's stock, the transaction is a Rule 13e-3 transaction. *See* Chapter 24]

The Board of Directors of Cox (the "Cox Board"), based upon the unanimous recommendation of a special committee of independent directors of the Cox Board, (a) unanimously determined that each of the tender offer and the Merger is fair to and in the best interests of Cox's stockholders (other than Enterprises and its affiliates), (b) unanimously approved the tender offer and the Merger, and (c) unanimously recommends that Cox's stockholders accept the tender offer and tender their Shares pursuant to the tender offer. * * *

SUMMARY TERM SHEET

Holdings and Cox are jointly offering to purchase all the outstanding shares of Class A common stock, par value $1.00 per share, of Cox not otherwise owned by Holdings or DNS for $34.75 net per Share in cash without interest. * * *

How Much Are You Offering to Pay and What Is the Form of Payment?

We are offering to pay $34.75 per Share, net to you in cash without interest. This price represents a premium of approximately 26% over the closing price of Cox's Class A common stock on the New York Stock Exchange ("NYSE") on July 30, 2004, the last trading day prior to the date Enterprises announced its intention to make the tender offer. * * *

What Does Cox's Board of Directors Think of the Tender Offer?

The Cox Board formed a special committee of independent directors to review and consider the tender offer. Both the special committee and the Cox Board (i) unanimously determined that each of the tender offer and the Merger is fair to and in the best interests of Cox's stockholders (other than Enterprises and its affiliates), (ii) unanimously approved the tender offer and the Merger, and (iii) unanimously recommends that you accept the tender offer and tender your Shares in the tender offer. See "Special Factors — Recommendation Of The Special Committee; Fairness Of The Offer And The Merger." * * *

Will I Have the Right to Have My Shares of Cox Class A Common Stock Appraised?

If you tender your Shares in the tender offer, you will not be entitled to exercise statutory appraisal rights under the DGCL. If you do not tender your Shares in the tender offer and the Merger is consummated, you will have a statutory right to demand payment of the judicially appraised fair value of your Shares plus a fair rate of interest, if any, from the date of the Merger. This value may be more or less than or the same as the $34.75 net per Share cash consideration in the tender offer and the Merger. See "Special Factors — Appraisal Rights."

Will the Tender Offer Be Followed by a Merger If Not All the Publicly Traded Shares of Cox Communications Are Tendered in the Tender Offer?

The tender offer is subject to the non-waivable condition that there shall have been validly tendered and not withdrawn before the tender offer expires Shares which constitute at least a majority of the outstanding Shares not beneficially owned by Enterprises, Holdings, DNS or their respective affiliates or the directors and executive officers of Cox immediately prior to the expiration of the tender offer. [This is a "majority of minority" condition.] If this condition is not satisfied, all previously tendered Shares will be returned to tendering stockholders, and the Merger will not take place. If this condition is satisfied and Shares are purchased in the tender offer, then, subject to the conditions to the Merger set forth in the merger agreement, the Merger will take place. See "Special Factors — The Merger Agreement." * * *

INTRODUCTION

* * *

The Special Committee

The Cox Board created the Special Committee because the designees of Enterprises to the Cox Board have a conflict of interest in evaluating Enterprises' proposal on behalf of the stockholders of Cox (other than Enterprises and its subsidiaries). * * *

Recommendation of the Special Committee and the Cox Board

On October 18, 2004, the Special Committee unanimously:

- determined that the Offer, the Merger and the Merger Agreement are advisable, fair to and in the best interests of Cox and its stockholders (other than Enterprises and its affiliates);
- determined to recommend that the Cox Board approve and declare advisable the Offer, Merger and Merger Agreement; and

- resolved to recommend that stockholders accept the Offer, tender their Shares in the Offer and approve and adopt the Merger Agreement if it is submitted for their approval.

In connection with its determination that the Offer, Merger and Merger Agreement are advisable, fair to and in the best interests of Cox and its stockholders (other than Enterprises and its affiliates), the Special Committee also approved the Offer and Merger for purposes of the provisions of Section 203 of the DGCL and the "business combination" provisions of Cox's certificate of incorporation. [*See* Chapter 22] Absent this approval, completion of the Merger following the purchase of Shares pursuant to the Offer could have required approval by holders of Shares other than Enterprises and its subsidiaries. Instead, if Shares are purchased pursuant to the Offer, Enterprises and its subsidiaries will be able to approve the Merger regardless of the vote of other stockholders.

Following the meeting of the Special Committee and based upon the recommendation of the Special Committee, the Cox Board unanimously:

- determined that the Offer, the Merger and the Merger Agreement are advisable, fair to and in the best interests of Cox's stockholders (other than Enterprises and its affiliates);

- approved the Offer, the Merger and the Merger Agreement; and

- resolved to recommend that stockholders accept the Offer, tender their Shares in the Offer and approve and adopt the Merger Agreement if it is submitted for their approval. * * *

DOCUMENTARY APPENDIX R, AT&T-COMCAST SPIN-OFF AND MERGER

[*See* Principally Chapter 24 of Business Planning for Mergers and Acquisitions]

Excerpt from S-4 Prospectus and Proxy Statements
for AT&T Comcast Spinoff and Merger
(Filed May 14, 2002)

Comcast and AT&T have agreed to combine Comcast and AT&T's broadband business. As a result, AT&T shareholders will have shares of both AT&T and the new corporation -- AT&T Comcast. We are proposing the transaction because we believe the combination of Comcast and AT&T Broadband will create the world's premier broadband communications company. The new corporation will be named AT&T Comcast Corporation [it has subsequently been named Comcast Corporation] and will be headquartered in Philadelphia. * * *

SUMMARY * * *

The Companies. * * * **Comcast Corporation.** * * * Comcast is a Pennsylvania corporation incorporated in 1969. Comcast is involved in three principal lines of business: [Cable, Commerce, and Content]. * * *

AT&T Corp. * * * AT&T is a New York corporation incorporated in 1885. AT&T currently consists primarily of AT&T Broadband Group, AT&T Consumer Services Group and AT&T Business Services Group. These AT&T groups are not separate companies, but, rather, are parts of AT&T. The transactions proposed in this document would: separate and spin off AT&T Broadband into a separate company that immediately would be combined with and become a part of AT&T Comcast. * * *

AT&T Broadband Group. AT&T Broadband Group is one of the nation's largest broadband communications businesses, providing cable television, high-speed cable Internet services and communications services over one of the most extensive broadband networks in the country. * * *

AT&T Comcast Corporation. * * * AT&T Comcast is a newly formed Pennsylvania corporation that has not, to date, conducted any activities other than those incident to its formation, the financing and other matters contemplated by the merger agreement and the preparation of this document. Upon completion of the AT&T Comcast transaction, Comcast and AT&T Broadband will each become a wholly owned subsidiary of AT&T Comcast. [This will take place pursuant to two reverse subsidiary mergers as noted below] The business of AT&T Comcast will be the combined businesses currently conducted by Comcast and AT&T Broadband Group. * * *

The Structure Of The AT&T Comcast Transaction. The AT&T Comcast transaction will occur in several steps. First, AT&T will transfer the assets and liabilities of AT&T's broadband business to AT&T Broadband, a holding company formed for the purpose of effectuating the AT&T Comcast transaction. Second, AT&T will spin off AT&T Broadband to its shareholders. [This transfer to AT&T Broadband and the spin-off of its stock should qualify as a divisive (D) reorganization under §§ 368(a)(1)(D) and 355] Third, Comcast and AT&T Broadband will each merge with a different, wholly owned subsidiary of AT&T Comcast. In the AT&T Comcast transaction, Comcast and AT&T shareholders will receive the consideration described below. The merger agreement provides for all of the steps described above to occur on the closing date for the mergers. [This is permissible as a result of Rev. Rul. 98-27. As will be seen below the mergers are structured as reverse subsidiary mergers that are designed to qualify as a single § 351 transaction. This is the horizontal double dummy structure discussed in Chapter 5] * * *

What Comcast Shareholders Will Receive In The Comcast Merger. Comcast shareholders will receive one share of the corresponding class of AT&T Comcast common stock in exchange for each of their shares of Comcast common stock.

Upon completion of the AT&T Comcast transaction * * * Comcast shareholders will own approximately

- 40.0% of AT&T Comcast's economic interest and

- if the Preferred Structure is implemented, 34.4% of AT&T Comcast's voting power or, if the Alternative Structure is implemented, 38.5% of AT&T Comcast's voting power.

Upon completion of the AT&T Comcast transaction * * * Sural LLC, which is controlled by Brian L. Roberts, President of Comcast, and currently holds approximately 86.7% of Comcast's voting power, will hold approximately 33 1/3% of AT&T Comcast's voting power. * * *

What AT&T Shareholders Will Receive In The AT&T Comcast Transaction. * * * If the exchange ratio were determined as of the date of this document * * * AT&T shareholders will receive with respect to each of their shares of AT&T common stock:

- if the Preferred Structure is implemented, approximately 0.35 of a share of AT&T Comcast Class A common stock or

- if the Alternative Structure is implemented, approximately 0.35 of a share of AT&T Comcast Class C common stock.

Upon completion of the AT&T Comcast transaction * * * AT&T shareholders will own approximately:

- 54.8% of AT&T Comcast's economic interest and

- if the Preferred Structure is implemented, 60.6% of AT&T Comcast's voting power or, if the Alternative Structure is implemented, 56.6% of AT&T Comcast's voting power. * * *

[The balance of the stock of AT&T Comcast was to be owned by Microsoft]

Conditions To The Completion Of The AT&T Comcast Transaction. The completion of the AT&T Comcast transaction is subject to the satisfaction or waiver of several conditions, including: * * *

- receipt and continuing effectiveness of an Internal Revenue Service ruling or rulings, or an opinion from tax counsel acceptable to Comcast and AT&T, to the effect that, for U.S. federal income tax purposes, the AT&T Broadband spin-off will be tax-free to AT&T and its shareholders, the mergers will not cause the AT&T Broadband spin-off to fail to be qualified as a tax-free transaction. * * *

Material Federal Income Tax Consequences. It is a condition to the AT&T Broadband spin-off and to the mergers that AT&T receive a private letter ruling from the Internal Revenue Service, or an opinion of counsel, to the effect that AT&T, AT&T Broadband and holders of AT&T common stock who receive shares of AT&T Broadband common stock in the AT&T Broadband spin-off will not recognize gain or loss for U.S. federal income tax purposes in connection with the AT&T Broadband spin-off. AT&T has filed a private letter ruling request in respect of this matter with the IRS. It is a condition to the mergers that AT&T and Comcast each receive an opinion of counsel to the effect that AT&T Broadband, Comcast and their respective shareholders who exchange their shares for shares of AT&T Comcast common stock in the mergers will not recognize gain or loss for U.S. federal income tax purposes in connection with the mergers, except for gain or loss with respect to cash received instead of fractional shares. The receipt of this opinion by AT&T is also a condition to the AT&T Broadband spin-off.

Subject to the limitations and qualifications described in "The AT&T Comcast Transaction -- Material Federal Income Tax Consequences," it is the opinion of Wachtell, Lipton, Rosen & Katz, counsel to AT&T, that the AT&T Broadband spin-off will qualify as a tax-free reorganization. As a result, (1) no gain or loss will be recognized by AT&T or AT&T Broadband upon the separation and the AT&T Broadband spin-off * * * and (2) no gain or loss will be recognized by U.S. holders of AT&T common stock upon their receipt of shares of AT&T Broadband common stock in the AT&T Broadband spin-off.

Subject to the limitations and qualifications described in "The AT&T Comcast Transaction--Material Federal Income Tax Consequences," it is the opinion of Wachtell, Lipton, Rosen & Katz, counsel to AT&T, and Davis Polk & Wardwell, counsel to Comcast, that the mergers will constitute an exchange to which Section 351 of the Internal Revenue

Code applies. As a result, (1) no gain or loss will be recognized by Comcast, AT&T Broadband, the AT&T Broadband merger subsidiary, or the Comcast merger subsidiary upon the mergers and (2) except for gain or loss with respect to cash received instead of fractional shares, no gain or loss will be recognized by U.S. holders of AT&T Broadband common stock or Comcast common stock on the exchange of such stock for AT&T Comcast common stock. * * *

COMMENT

The transaction passed muster under Section 355(e) because the shareholders of the spun off company, AT&T Broadband, ended up with more than 50% of the stock of the acquiror, AT&T Comcast. This type of transaction is referred to as a "reverse *Morris Trust* transaction," because the shareholders of the spun off target end up controlling the acquiror, thus avoiding the potential impact of Section 355(e). (*See* Chapter 25)

DOCUMENTARY APPENDIX S, BRITISH TELECOM-MCI CROSS-BORDER MERGER AGREEMENT

[*See* Chapter 26 of Business Planning for Mergers and Acquisitions]

AGREEMENT AND PLAN OF MERGER, dated as of November 3, 1996 (this "Agreement"), among BRITISH TELECOMMUNICATIONS plc, a public limited company incorporated under the laws of England and Wales ("BT"), MCI COMMUNICATIONS CORPORATION, a Delaware corporation ("MCI"), and TADWORTH CORPORATION, a Delaware corporation and a wholly owned subsidiary of BT ("Merger Sub").

W I T N E S S E T H :

WHEREAS, the respective Boards of Directors of BT, MCI and Merger Sub have each determined that the Merger is in the best interests of their respective shareholders and have approved the Merger upon the terms and subject to the conditions set forth in this Agreement, whereby each issued and outstanding share of common stock, par value $.10 per share, of MCI ("MCI Common Stock"), other than shares owned directly or indirectly by BT or by MCI, will be converted into the right to receive ordinary shares of BT represented by American Depositary Shares of BT ("BT ADSs"), each representing ten ordinary shares of 25p each of BT ("BT Ordinary Shares") and evidenced by American Depositary Receipts ("BT ADRs") and cash;

WHEREAS, in order to effectuate the foregoing, MCI, upon the terms and subject to the conditions of this Agreement and in accordance with the General Corporation Law of the State of Delaware (the "DGCL"), will merge with and into Merger Sub (the "Merger") [This is a forward subsidiary merger.];

* * *

WHEREAS, for United States Federal income tax purposes, it is intended that the Merger shall qualify as a reorganization under the provisions of Section 368(a) of the Internal Revenue Code of 1986, as amended (the "Code") and that this Agreement constitute a plan of reorganization within the meaning of Section 1.368-2(g) of the income tax regulations promulgated under the Code. [This is a forward subsidiary merger reorganization under Section 368(a)(2)(D). *See* Chapter 5.]

NOW, THEREFORE, in consideration of the foregoing and the respective representations, warranties, covenants and agreements set forth herein, and intending to be legally bound hereby, the parties hereto agree as follows:

ARTICLE I

THE MERGER

1.1. *The Merger*. Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the DGCL, MCI shall be merged with and into Merger Sub at the Effective Time. Following the Merger, the separate corporate existence of MCI shall cease and Merger Sub shall continue as the surviving corporation (the "Surviving Corporation").

* * *

1.8. *Effect on Capital Stock*. As of the Effective Time, by virtue of the Merger and without any action on the part of the holders of (i) any shares of MCI Common Stock, (ii) any shares of Class A Common Stock, par value $.10 per share, of MCI ("MCI Class A Common Stock") or (iii) any shares of common stock, par value $.01 per share, of Merger Sub:

(a) *Cancellation of Treasury Stock and BT-Owned Stock*. * * *

(b) *Conversion of MCI Common Stock*. * * * [E]ach issued and outstanding share of MCI Common Stock (other than shares to be cancelled in accordance with Section 1.8(a)) together with the associated Right shall be converted into the right to receive 0.54 BT ADSs (the "Stock Consideration") and $6.00 in cash (the "Cash Consideration" and, collectively with the Stock Consideration, the "Merger Consideration").

* * *

ARTICLE II

EXCHANGE OF CERTIFICATES

* * *

COMMENT

In this transaction British Telecom, a foreign acquiror corporation, sets up Merger Sub, a U.S. corporation, and MCI, the U.S. target, merges into Merger Sub in a forward subsidiary merger reorganization under Section 368(a)(2)(D) (*see* Chapter 5) with the shareholders of MCI receiving either cash or BT ADS shares. The transaction could also be structured as

(1) a reverse subsidiary merger reorganization, under Section 368 (a)(2)(E), or
(2) a taxable reverse subsidiary merger. (*See* Chapter 5)

For the transaction to be tax-free under Section 368(a)(2)(D) or (E), the U.S. shareholders must not own more than 50% of the stock of British Telecom. (*See* Section 367 and the regulations, Section 26.6)

Acquisitions by foreign acquirors of public U.S. targets are generally structured as either

(1) a forward or reverse triangular reorganization under Section 368(a)(2)(D) or (E), or
(2) a taxable reverse subsidiary merger.

In each of these cases, the foreign acquiror sets up a U.S. subsidiary, which is the acquisition vehicle.

2.14. *Shares of Dissenting Stockholders*. [The MCI shareholders have dissenters' rights.]

ARTICLE V

ADDITIONAL AGREEMENTS

5.1. *Preparation of Disclosure Documents; MCI Stockholder and BT Shareholder Meetings*.

(a) As soon as practicable following the date of this Agreement, MCI and BT shall prepare the Proxy Statement/Prospectus. MCI shall, in cooperation with BT, file the Proxy Statement/Prospectus with the SEC as its preliminary Proxy Statement and BT shall, in cooperation with MCI, prepare and file with the SEC the Form F-4, in which the Proxy Statement/Prospectus will be included as BT's prospectus. If required under the Exchange Act, BT, Merger Sub

and MCI shall together prepare and file a Transaction Statement on Schedule 13E-3 (the "Schedule 13E-3") under the Exchange Act at the time of the filing of the preliminary Proxy Statement.

* * *

ARTICLE VI

CONDITIONS PRECEDENT

6.1. *Conditions to Each Party's Obligation to Effect the Merger*. The obligations of MCI, BT and Merger Sub to effect the Merger are subject to the satisfaction or waiver on or prior to the Closing Date of the following conditions: * * *

(b) *Stock Exchange Listings*. The LSE shall have agreed to admit to the Official List (subject to allotment) the new BT Ordinary Shares to be issued in connection with the Merger and such agreement shall not have been withdrawn, and the BT ADSs to be issued in the Merger shall have been authorized for listing on the NYSE, subject to official notice of issuance. * * *

(d) *FCC Order*. If then legally required, an FCC Order shall have been obtained, which has not been revoked or stayed as of the Closing Date.

(e) *Exon-Florio*. Review and investigation under *Exon-Florio* shall have been terminated and the President shall have taken no action authorized under *Exon-Florio*. [*See* Section 26.8]

(f) *Securities Law*. The Form F-4 filed by BT and the Form F-6 filed by the ADR Depositary shall have become effective under the Securities Act and no stop order suspending the effectiveness of such registration statements shall have been issued by the SEC and no proceeding for that purpose shall then be threatened by the SEC or shall have been initiated by the SEC and not concluded or withdrawn, and all state securities or "blue sky" authorizations necessary to carry out the transactions contemplated hereby shall have been obtained and be in full force and effect. * * *

(i) *EU Antitrust*. BT and MCI shall have received in respect of the Merger and any matters arising therefrom: (i) confirmation by way of a decision from the Commission of the European Communities under Regulation 4064/89 (with or without the initiation of proceedings under Article 6(1)(c) thereof) that the Merger and any matters arising therefrom are compatible with the common market; or (ii) confirmation either: (A) in writing from the office of Fair Trading that it is not the intention of the Secretary of State for Trade and Industry to refer the Merger and any matters arising therefrom to the Monopolies and Mergers Commission pursuant to part V of the Fair Trading Act 1973; or (B) following such a reference, that the Secretary of State for Trade and Industry has permitted the merger and any matters arising therefrom to take place; such confirmation being subject in each of Sections 6.1(i)(i) and 6.1(i)(ii)(A) and (B) above to the imposition of no conditions or undertakings or obligations or to the imposition only of conditions or undertakings or obligations which: (1) unless BT agrees otherwise, do not constitute a MCI Burdensome Condition; (2)unless MCI agrees otherwise, do not constitute a BT Burdensome Condition; (3) unless both BT and MCI agree otherwise, do not constitute a Combined Company Burdensome Condition. * * *

6.2. *Additional Conditions to Obligations of BT and Merger Sub*. The obligations of BT and Merger Sub to effect the Merger are subject to the satisfaction of, or waiver by BT, on or prior to the Closing Date of the following additional conditions: * * *

(c) *Tax Opinion*. BT shall have received the opinion of Shearman & Sterling, counsel to BT, to the effect that, on the basis of the facts, representations and assumptions set forth in such opinion (i) the Merger will be treated for United States Federal income tax purposes as a reorganization within the meaning of Section 368(a) of the Code, (ii) each of MCI, BT and Merger Sub will be a party to that reorganization within the meaning of Section 368(b) of the Code and (iii) no gain or loss will be recognized on the exchange of shares of MCI Common Stock for the Merger Consideration, except that gain, if any, shall be recognized to the extent of the Cash Consideration received, which opinion shall be dated on or about the date that is two Business Days prior to the date the Proxy Statement/Prospectus is first mailed to stockholders of MCI and which shall not have been withdrawn or modified in any material respect as of the Closing Date. The issuance of such opinion shall be

conditioned on receipt of representation letters from each of MCI and BT. The specific provisions of each such representation letter shall be in form and substance satisfactory to Shearman & Sterling and Simpson Thacher & Bartlett, and each such representation letter shall be dated on or before the date of such opinion and shall not have been withdrawn or modified in any material respect as of the Closing Date. * * *

DOCUMENTARY APPENDIX T, GREENHILL IPO

[*See* Chapter 4 of Business Planning for Mergers and Acquisitions]

Filed pursuant to Rule 424B4
Registration No. 333-113526
5,000,000 Shares
Greenhill
Greenhill & Co., Inc.
Common Stock
[*See* Form S-1, Items 1 and 2]

This is an initial public offering of shares of common stock of Greenhill & Co., Inc. All of the 5,000,000 shares of common stock are being sold by the company.
Prior to this offering, there has been no public market for the common stock. The common stock has been approved for listing on the New York Stock Exchange under the symbol "GHL".
See "Risk Factors" beginning on page 7 to read about factors you should consider before buying shares of the common stock.

Neither the Securities and Exchange Commission nor any other regulatory body has approved or disapproved of these securities or passed upon the accuracy or adequacy of this prospectus. Any representation to the contrary is a criminal offense.

	Per Share	Total
Initial public offering price	$ 17.500	$ 87,500,000
Underwriting discount	$ 1.225	$ 6,125,000
Proceeds, before expenses, to Greenhill & Co., Inc	$ 16.275	$ 81,375,000

To the extent that the underwriters sell more than 5,000,000 shares of common stock, the underwriters have the option to purchase up to an additional 750,000 shares from Greenhill & Co., Inc. at the initial public offering price less the underwriting discount.
Upon completion of this offering, our managing directors and their affiliated entities will collectively own 83.3% of the total shares of common stock outstanding (or 81.3% if the underwriters' option to purchase additional shares is exercised in full).
The underwriters expect to deliver the shares against payment in New York, New York on May 11, 2004.
Goldman, Sachs & Co.
Lehman Brothers
UBS Investment Bank

Keefe, Bruyette & Woods **Wachovia Securities**
Prospectus dated May 5, 2004.

PROSPECTUS SUMMARY
[*See* Form S-1, Item 3]
This summary highlights information contained elsewhere in this prospectus. This summary does not contain all of the information you should consider before investing in our common stock. You should read this entire prospectus carefully, especially the risks of investing in our common stock discussed under "Risk Factors" on pages 7 - 13.
Greenhill
We are an independent investment banking firm that (i) provides financial advice on significant mergers, acquisitions, restructurings and similar corporate finance matters and (ii) manages merchant banking funds and commits capital to those funds. Greenhill acts for clients located throughout the world from offices in New York, London and Frankfurt.

We were established in 1996 by Robert F. Greenhill, the former President of Morgan Stanley and former Chairman and Chief Executive of Smith Barney. Since our founding, we have grown steadily by (i) developing new client relationships, (ii) adding new areas of advisory expertise, such as restructuring, (iii) adding high-caliber senior professionals, each with strong client relationships as well as complementary areas of expertise or industry focus, and (iv) expanding our geographic focus by adding offices in London and Frankfurt.

We have demonstrated strong financial results, producing revenue and earnings growth in a variety of economic and market conditions, including a prolonged period in which global merger and acquisition activity declined significantly. * * *

Principal Sources of Revenue

We derive our revenue from two principal sources: (i) providing financial advisory services and (ii) managing and investing in merchant banking funds.

Financial Advisory

We provide a broad range of strategic and financial advice to U.S. and non-U.S. corporate clients in mergers, acquisitions, restructurings and similar corporate finance matters. Our focus is on providing high-quality advice to management and boards of directors of prominent large and mid-cap companies in transactions that typically are of the highest strategic and financial importance to those companies. In 2003, financial advisory services accounted for 95.8% of our revenues.

Merchant Banking Fund Management

Our merchant banking fund management activities currently consist primarily of management of Greenhill's merchant banking funds, collectively, Greenhill Capital Partners, or GCP, and principal investments by Greenhill in those funds. Merchant banking funds are private investment funds raised from contributions by qualified institutional investors and financially sophisticated individuals. The funds make substantial, sometimes controlling, investments, generally in non-public companies and typically with a view toward divesting within 3 to 5 years.

* * *

Competitive Strengths

- **Independence** – We are an independent firm owned and managed by our managing directors, free of many of the conflicts that can arise at larger, diversified financial institutions.

- **Focus on Advisory Activities** – We are focused on advising clients, particularly large and mid-size corporations, rather than on a broad range of securities businesses. We believe this focus has helped and will continue to help us attract clients and recruit financial advisory professionals who want to work in a firm where their activities are the central focus.

- **Breadth of Advisory Capabilities** – While our origin was as an advisor on mergers and acquisitions, we have developed considerable experience and capabilities in financial restructuring situations.

* * *

SUMMARY CONSOLIDATED FINANCIAL DATA

[*See* Form S-1, Item 11] * * *

THE OFFERING
[*See* Form S-1, Item 5]

Common stock offered	5,000,000 shares
Common stock to be outstanding after this offering	30,000,000 shares
Underwriters' option to purchase additional shares	750,000 shares

Voting rights	One vote per share.
Initial public offering price	$17.50. Prior to this offering, there has been no public market for the shares. The initial public offering price has been negotiated between Greenhill and Goldman, Sachs & Co., as representative of the underwriters. Among the factors considered in determining the initial public offering price of the shares, in addition to prevailing market conditions, were our historical performance, estimates of our business potential and earnings prospects, an assessment of our management and the consideration of the above factors in relation to market valuation of companies in related businesses. * * *

RISK FACTORS
[*See* Form S-1, Item 3] * * *

Our ability to retain our managing directors is critical to the success of our business * * *

SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS
[*See* the Be-speaks Caution doctrine discussed in Chapter 4]

We have made statements under the captions "Prospectus Summary", "Risk Factors", "Management's Discussion and Analysis of Financial Condition and Results of Operations" and "Business" and in other sections of this prospectus that are forward-looking statements. In some cases, you can identify these statements by forward-looking words such as "may", "might", "will", "should", "expect", "plan", "anticipate", "believe", "estimate", "predict", "potential" or "continue", the negative of these terms and other comparable terminology. These forward-looking statements, which are subject to risks, uncertainties and assumptions about us, may include projections of our future financial performance, based on our growth strategies and anticipated trends in our business. These statements are only predictions based on our current expectations and projections about future events. There are important factors that could cause our actual results, level of activity, performance or achievements to differ materially from the results, level of activity, performance or achievements expressed or implied by the forward-looking statements. In particular, you should consider the numerous risks outlined under "Risk Factors". * * *

USE OF PROCEEDS
[*See* Form S-1, Item 4]

We will receive net proceeds from this offering of approximately $76.9 million, or approximately $89.1 million if the underwriters exercise their option to purchase additional shares in full, after deducting underwriting discounts and commissions and estimated expenses payable in connection with this offering and the related transactions. We expect to use the net proceeds for general corporate purposes, including, but not limited to (i) the repayment of $16.0 million of debt incurred under our $16.0 million unsecured revolving credit facility, (ii) the funding of our existing $20.3 million of commitments to Greenhill Capital Partners, and (iii) the establishment of new merchant banking funds in which we, through our controlling interest in the general partner of the funds, expect to make certain principal investments. * * *

DIVIDEND POLICY
[*See* Form S-1, Item 9]
We currently intend to declare quarterly dividends on all outstanding shares of common stock and expect the quarterly dividend to be approximately $0.08 per share.

* * *

DILUTION
[*See* Form S-1, Item 6]

The pro forma net tangible book value of Greenhill as of December 31, 2003 was approximately $12.9 million, or approximately $0.52 per share of common stock. * * * After giving effect to the sale by Greenhill of the 5,000,000 shares of common stock in this offering at the initial public offering price of $17.50 per share, and after deducting the underwriting discounts and commissions and estimated expenses payable in connection with this offering and the related transactions and the receipt and application of the net proceeds, Greenhill's pro forma net tangible book value as of December 31, 2003 would have been approximately $89.8 million, or approximately $2.99 per share. This represents an immediate increase in pro forma net tangible book value to existing stockholders of $2.47 per share and an immediate dilution to new investors of $14.51 per share. * * *

CAPITALIZATION

* * *

UNAUDITED PRO FORMA CONSOLIDATED FINANCIAL INFORMATION* * *

[*See* Form S-1, Item 11(f)]

MANAGEMENT'S DISCUSSION AND ANALYSIS OF
FINANCIAL CONDITION AND RESULTS OF OPERATIONS
[*See* Form S-1, Item 11(h)]
The following discussion should be read in conjunction with our consolidated financial statements and the related notes that appear elsewhere in this prospectus. This discussion contains forward-looking statements reflecting our current expectations that involve risks and uncertainties. Actual results and the timing of events may differ significantly from those projected in such forward-looking statements due to a number of factors, including those set forth in the section entitled "Risk Factors" and elsewhere in this prospectus.
Greenhill is an independent investment banking firm that provides financial advisory and merchant banking fund management services. We act for clients located throughout the world and have offices in New York, London and Frankfurt. Our activities constitute a single business segment, with two principal sources of revenue:

- Financial Advisory, which includes advice on mergers, acquisitions, restructurings and similar corporate finance matters and accounted for 95.8% and 95.4% of our revenues in 2003 and 2002, respectively; and

- Merchant Banking Fund Management, which currently consists primarily of management of Greenhill's private equity funds, Greenhill Capital Partners, and principal investments by Greenhill in those funds.

The dominant source of our revenues is the Financial Advisory business and we expect it to remain so for the near to medium term. The main driver of the Financial Advisory business is overall mergers and acquisitions, or M&A, and restructuring volume, particularly in the industry sectors and geographic markets in which we focus. In addition, new managing director hires add incrementally to our revenue and income growth potential. * * *

Cash Flows
Greenhill's historical cash flows are primarily related to the timing of receipt of advisory fees and the timing of distributions of profits to the members. In general, Greenhill collects its accounts receivable within 60 days. In certain restructuring transactions, collections may take longer due to issues such as court-ordered holdbacks. We have not had

significant accounts receivable write-offs over our history. * * *

MARKET RISK
[*See* Form S-1, Item 11(j)]
Due to the nature of our business and the manner in which we conduct our operations, in particular our limitation of investment to short term cash investments, we believe that we do not face any material interest rate risk, foreign currency exchange rate risk, equity price risk or other market risk.

Critical Accounting Policies and Estimates * * *

BUSINESS
[*See* Form S-1, Item 11(a)]
Overview

Greenhill is an independent investment banking firm that (i) provides financial advice on significant mergers, acquisitions, restructurings and similar corporate finance matters and (ii) manages merchant banking funds and commits capital to those funds. * * *

Why We Are Going Public
We have decided to become a public company for five principal reasons:

- To enhance our profile and recognition as an investment bank;
- To expand our financial advisory business, including through the ability to create equity-based compensation plans to attract and retain talented people;
- To expand our merchant banking fund management activities, including through the creation of new funds in which we would expect to invest collectively as a firm as well as individually as managing directors of Greenhill;
- To extend equity ownership to substantially all of our employees; and
- To permit the realization over time of equity value by our principal owners without necessitating the sale of our business. * * *

Competition

The financial services industry is intensely competitive, and we expect it to remain so. Our competitors are other investment banking firms, merchant banks and financial advisory firms. We compete with some of our competitors globally and with some others on a regional, product or niche basis. We compete on the basis of a number of factors, including transaction execution skills, our range of products and services, innovation, reputation and price. * * *

Regulation
Our business, as well as the financial services industry generally, is subject to extensive regulation in the United States and elsewhere. As a matter of public policy, regulatory bodies in the United States and the rest of the world are charged with safeguarding the integrity of the securities and other financial markets and with protecting the interests of customers participating in those markets, not with protecting the interests of our shareholders or creditors. In the United States, the Securities and Exchange Commission, or SEC, is the federal agency responsible for the administration of the federal

securities laws. Greenhill & Co., LLC, a wholly-owned subsidiary of Greenhill through which we conduct our U.S. financial advisory business, is registered as a broker-dealer with the SEC and the National Association of Securities Dealers, Inc., or the NASD, and as a broker-dealer in all 50 states and the District of Columbia. Greenhill & Co., LLC is subject to regulation and oversight by the SEC. In addition, the NASD, a self-regulatory organization that is subject to oversight by the SEC, adopts and enforces rules governing the conduct, and examines the activities, of its member firms, including Greenhill & Co., LLC. State securities regulators also have regulatory or oversight authority over Greenhill & Co., LLC. Similarly, Greenhill & Co. International LLP, our controlled affiliated U.K. partnership, through which we conduct our international financial advisory business, is also subject to regulation by the Financial Services Authority in the United Kingdom. Our business may also be subject to regulation by non-U.S. governmental and regulatory bodies and self-regulatory authorities in other countries where Greenhill operates.

Broker-dealers are subject to regulations that cover all aspects of the securities business, including sales methods, trade practices among broker-dealers, use and safekeeping of customers' funds and securities, capital structure, record-keeping, the financing of customers' purchases and the conduct and qualifications of directors, officers and employees. Additional legislation, changes in rules promulgated by self-regulatory organizations or changes in the interpretation or enforcement of existing laws and rules, either in the United States or elsewhere, may directly affect the mode of operation and profitability of Greenhill. * * *

LEGAL PROCEEDINGS
[*See* Form S-1, Item 11(c)]

We have not historically been involved in material legal proceedings. * * *

PROPERTIES
[*See* Form S-1, Item 11(b)]

* * *

MANAGEMENT
[*See* Form S-1, Item 11(k)]

* * *

EXECUTIVE COMPENSATION
[*See* Form S-1, Item 11(l)]

Employment, Non-Competition and Pledge Agreements

We are entering into an employment, non-competition and pledge agreement with each of our U.S.-based managing directors other than our General Counsel and a non-competition and pledge agreement with each of our U.K.-based managing directors. * * *

Transfer Restrictions. Each managing director will agree, among other things, to:

- except as described below, not transfer, and to maintain sole beneficial ownership of, his or her covered shares for a period of five years after the consummation of this public offering, and
- comply with the transfer restrictions relating to the covered shares imposed by the lock-up provisions of the underwriting agreement with respect to this public offering. * * *

Sales in Compliance With Rule 144 Under the Securities Act of 1933. Consistent with the transfer restrictions described above, and other than in compliance with the exceptions described above, managing directors generally will not be permitted to transfer covered shares during the five year restriction period following the consummation of this offering through sales effected in compliance with Rule 144 under the Securities Act of 1933 or otherwise. * * *

PRINCIPAL STOCKHOLDERS
[*See* Form S-1, Item 11(m)]

The following table sets forth as of the date of this prospectus certain information regarding the beneficial ownership of our common stock: * * *

* * *

CERTAIN RELATIONSHIPS AND RELATED TRANSACTIONS
[*See* Form S-1, Item 11(n)]

The following are descriptions of the material provisions of the agreements and other documents discussed below. You should, however, refer to the exhibits that are a part of the registration statement for a copy of each agreement and document. See "Where You Can Find More Information". * * *

DESCRIPTION OF CAPITAL STOCK
[*See* Form S-1, Item 9]

* * *

Voting

The affirmative vote of a majority of the shares of our capital stock present, in person or by written proxy, at a meeting of stockholders and entitled to vote on the subject matter will be the act of the stockholders. * * *

Action by Written Consent

Any action required or permitted to be taken at any annual or special meeting of stockholders may be taken without a meeting, without prior notice and without a vote, if the consent to such action in writing is signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting.

Anti-Takeover Effects of Delaware Law [*See* Chapter 22]

Following consummation of this offering, Greenhill will be subject to the "business combination" provisions of Section 203 of the Delaware General Corporation Law. In general, such provisions prohibit a publicly held Delaware corporation from engaging in various "business combination" transactions with any interested stockholder for a period of three years after the date of the transaction in which the person became an interested stockholder, unless

- the transaction is approved by the board of directors prior to the date the interested stockholder obtained such status;

- upon consummation of the transaction which resulted in the stockholder becoming an interested stockholder, the stockholder owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced; or

- on or subsequent to such date, the business combination is approved by the board of directors and authorized at an annual or special meeting of stockholders by the affirmative vote of at least 66 2/3% of the outstanding voting stock which is not owned by the interested stockholder.

A "business combination" is defined to include mergers, asset sales and other transactions resulting in financial benefit to a stockholder. In general, an "interested stockholder" is a person who, together with affiliates and associates, owns (or within three years, did own) 15% or more of a corporation's voting stock. The statute could prohibit or delay mergers or other takeover or change in control attempts with respect to Greenhill and, accordingly, may discourage attempts to acquire Greenhill even though such a transaction may offer Greenhill's stockholders the opportunity to sell their stock at a price above the prevailing market price.

Limitation of Liability and Indemnification Matters

Our amended and restated certificate of incorporation provides that a director of Greenhill will not be liable to Greenhill or its shareholders for monetary damages for breach of fiduciary duty as a director, except in certain cases where liability is mandated by the Delaware General Corporation Law.

* * *

Listing

Our common stock has been approved for listing on the New York Stock Exchange under the symbol "GHL".
Transfer Agent and Registrar * * *

CERTAIN MATERIAL U.S. FEDERAL INCOME TAX CONSIDERATIONS
The following discussion describes certain material U.S. federal income tax consequences of the ownership and disposition of our common stock. This discussion applies only to holders that hold shares of our common stock as capital assets. * * *
Tax Consequences to U.S. Holders
As used herein, the term "U.S. holder" means a beneficial owner of our common stock that is for United States federal income tax purposes:

- a citizen or resident of the United States;
- a corporation, or other entity taxable as a corporation for U.S. federal income tax purposes, created or organized in or under the laws of the United States or of any political subdivision thereof; or
- an estate or trust the income of which is subject to United States federal income taxation regardless of its source.

Taxation of Distributions on Common Stock
Distributions paid on our common stock, other than certain pro rata distributions of common shares, will be treated as dividends to the extent paid out of current or accumulated earnings and profits (as determined under U.S. federal income tax principles) and will be includible in income by the U.S. holder and taxable as ordinary income when actually or constructively received. * * *
Sale or Other Disposition of Common Stock
Gain or loss realized by a U.S. holder on the sale or other disposition of our common stock will be capital gain or loss for U.S. federal income tax purposes, and will be long-term capital gain or loss if the U.S. holder held the common stock for more than one year. The amount of the U.S. holder's gain or loss will be equal to the difference between the U.S. holder's tax basis in the common stock disposed of and the amount realized on the disposition. * * *

SHARES ELIGIBLE FOR FUTURE SALE
Prior to this offering, there has been no public market for our common stock. Future sales of substantial amounts of common stock in the public market, or the perception that such sales may occur, could adversely affect the prevailing market price of the common stock. Furthermore, because only a limited number of shares will be available for sale shortly after this offering due to existing contractual and legal restrictions on resale as described below, there may be sales of substantial amounts of our common stock in the public market after the restrictions lapse.

* * *

The shares of common stock received by the persons who were members of Greenhill & Co. Holdings, LLC and Greenhill & Co. International LLP will constitute "restricted securities" for purposes of the Securities Act of 1933. As a result, absent registration under the Securities Act of 1933 or compliance with Rule 144 thereunder or an exemption therefrom, these shares of common stock will not be freely transferable to the public.
In general, under Rule 144 as currently in effect, a person (or persons whose shares are aggregated), including an affiliate, who beneficially owns "restricted securities" may not sell those securities until they have been beneficially owned for at least one year. Thereafter, the person would be entitled to sell within any three-month period a number of shares that does not exceed the greater of:

- 1% of the number of shares of common stock then outstanding (which will equal approximately 300,000 shares immediately after this offering); or
- the average weekly trading volume of the common stock on the New York Stock Exchange during the four calendar weeks preceding the filing with the SEC of a notice on the SEC's Form 144 with respect to such sale.

Sales under Rule 144 are also subject to certain other requirements regarding the manner of sale, notice and availability of current public information about Greenhill.
Under Rule 144(k), a person who is not, and has not been at any time during the 90 days preceding a sale, an affiliate of Greenhill and who has beneficially owned the shares proposed to be sold for at least two years (including the holding

period of any prior owner except an affiliate) is entitled to sell such shares without complying with the manner of sale, public information, volume limitation or notice provisions of Rule 144.

UNDERWRITING
[*See* Form S-1, Item 8]
The Company and the underwriters named below have entered into an underwriting agreement with respect to the shares being offered. Subject to certain conditions, each underwriter has severally agreed to purchase the number of shares indicated in the following table. Goldman, Sachs & Co. is the representative of the underwriters.

Underwriters	Number of Shares
Goldman, Sachs & Co.	1,600,000
Lehman Brothers Inc.	1,325,000
UBS Securities LLC	1,325,000
Keefe, Bruyette & Woods, Inc.	375,000
Wachovia Capital Markets, LLC	375,000
Total	**5,000,000**

The underwriters are committed to take and pay for all of the shares being offered, if any are taken, other than the shares covered by the option described below unless and until this option is exercised.
If the underwriters sell more shares than the total number set forth in the table above, the underwriters have an option to buy up to an additional 750,000 shares from the Company. They may exercise that option for 30 days. If any shares are purchased pursuant to this option, the underwriters will severally purchase shares in approximately the same proportion as set forth in the table above.
The following table shows the per share and total underwriting discounts and commissions to be paid to the underwriters by the Company. Such amounts are shown assuming both no exercise and full exercise of the underwriters' option to purchase 750,000 additional shares.

Paid by the Company	No Exercise	Full Exercise
Per Share	$ 1.225	$ 1.225
Total	$ 6,125,000	$ 7,043,750

Shares sold by the underwriters to the public will initially be offered at the initial public offering price set forth on the cover of this prospectus. Any shares sold by the underwriters to securities dealers may be sold at a discount of up to $0.735 per share from the initial public offering price. Any such securities dealers may resell any shares purchased from the underwriters to certain other brokers or dealers at a discount of up to $0.10 per share from the initial public offering price. If all the shares are not sold at the initial public offering price, the representative may change this offering price and the other selling terms.
Each of the Company, its directors and officers and all of its stockholders has agreed with the underwriters not to dispose of or hedge any of their common stock or securities convertible into or exchangeable for shares of common stock during the period from the date of this prospectus continuing through the date 200 days after the date of this prospectus, except with the prior written consent of Goldman, Sachs & Co. This agreement does not apply to the shares of common stock underlying any of the restricted stock units or accounts in the deferred equity plan, in each case received by non-managing director employees of the Company or our General Counsel. See "Shares Eligible for Future Sale" for a discussion of certain transfer restrictions.
Prior to this offering, there has been no public market for the shares. The initial public offering price has been negotiated between the Company and the representative. Among the factors considered in determining the initial public offering price of the shares, in addition to prevailing market conditions, were the Company's historical performance, estimates of

the business potential and earnings prospects of the Company, an assessment of the Company's management and the consideration of the above factors in relation to market valuation of companies in related businesses.
The common stock has been approved for listing on the New York Stock Exchange under the symbol "GHL". In order to meet one of the requirements for listing the common stock on the NYSE, the underwriters have undertaken to sell lots of 100 or more shares to a minimum of 2,000 beneficial holders.
In connection with this offering, the underwriters may purchase and sell shares of common stock in the open market. These transactions may include short sales, stabilizing transactions and purchases to cover positions created by short sales. * * *

VALIDITY OF COMMON STOCK
[See Form S-1, Item 10]
The validity of the shares of common stock offered hereby has been passed upon for Greenhill & Co., Inc. by Davis Polk & Wardwell, New York, New York.

* * *

EXPERTS
[See Form S-1, Item 10]
The consolidated financial statements of Greenhill as of December 31, 2002 and 2003 and for each of the three years in the period ended December 31, 2003 included in this prospectus have been audited by Ernst & Young LLP, independent accountants, as stated in their reports appearing herein, and have been so included in reliance on the reports of said firm, given on the authority of said firm as experts in auditing and accounting.

* * *

WHERE YOU CAN FIND MORE INFORMATION * * *

INDEX TO CONSOLIDATED FINANCIAL STATEMENTS * * *
[See Form S-1, Item 11(e)]

[BACK OF PROSPECTUS]
[*See* Form S-1, Item 2]
Through and including May 30, 2004 (the 25th day after the date of this prospectus), all dealers that effect transactions in these securities, whether or not participating in this offering, may be required to deliver a prospectus. This is in addition to the dealer's obligation to deliver a prospectus when acting as an underwriter and with respect to an unsold allotment or subscription.
5,000,000 Shares
Greenhill & Co., Inc.
Common Stock
Goldman, Sachs & Co.
Lehman Brothers
UBS Investment Bank
Keefe, Bruyette & Woods
Wachovia Securities

DOCUMENTARY APPENDIX U, ANNOTATED SAMPLE STOCK PURCHASE AGREEMENT

[*See* Chapters 11 and 15 of Business Planning for Mergers and Acquisitions]

SAMPLE STOCK PURCHASE AGREEMENT*

STOCK PURCHASE AGREEMENT, dated as of March 3, 1989 between Acquiring Corporation, Inc., a Delaware corporation (the Acquiring Corporation), and the individuals named in Exhibit 1 attached hereto (the Selling Shareholders), being all of the shareholders of Target Corporation, Inc., a Delaware Corporation (the Target Corporation).

W I T N E S S E T H

WHEREAS, the Selling Shareholders own the shares of common stock, [insert par value as stated in the Target Corporation's charter], of the Target Corporation (the Stock), as set forth in Exhibit 1, being all of the outstanding shares of such common stock;

WHEREAS, the Selling Shareholders desire to sell, and the Acquiring Corporation desires to purchase, the stock pursuant to this Agreement; and

WHEREAS, it is the intention of the parties hereto that, upon consummation of the purchase and sale of the Stock pursuant to this Agreement, the Acquiring Corporation shall own all of the outstanding shares of capital stock of the company;

NOW, THEREFORE, IT IS AGREED:

ARTICLE I
SALE OF STOCK AND CLOSING

§1.1 *Sale of Stock*. Subject to the terms and conditions herein stated, the Selling Shareholders agree to sell, assign, transfer and deliver to the Acquiring Corporation on the Closing Date, and the Acquiring Corporation agrees to purchase from each Selling Shareholder on the Closing Date, the number of shares of Stock set forth opposite the name of such Selling Shareholder on Exhibit 1 attached hereto. The certificates representing the Stock shall be duly endorsed in blank, or accompanied by stock powers duly executed in blank, by the Selling Shareholders transferring the same, with signatures guaranteed by a domestic commercial bank or trust company, with all necessary transfer tax and other revenue stamps, acquired at the Selling Stockholder's expense, affixed and cancelled. Each Selling Shareholder agrees to cure any deficiencies with respect to the endorsement of the certificates representing the Stock owned by such Selling Shareholder or with respect to the stock power accompanying any such certificate.

* *This agreement is here for illustrative purposes only and should not be used as a starting point for a real deal. The above agreement is a modification of the Stock Purchase Agreement set out in PLI, Acquiring and Selling the Privately-Held Company 1990, 483 (drafted by William F. Wynne., Jr.) (1990).*

§1.2 *Price*. In full consideration for the purchase by the Acquiring Corporation of the Stock, the Acquiring Corporation shall pay to the Selling Shareholders on the Closing Date an aggregate of $___, by official bank checks in New York funds payable to the order of each of the Selling Shareholders, such checks to be in the amounts set forth in Exhibit 1 attached hereto.

§1.2 *Closing*. (a) The sale referred to in Section 1.1 shall take place at 10:00 A.M. at the offices of [Name and Address of the Acquiring Corporation's counsel] on ____, 19 _, or at such other time and date (not later than _____, 19_) as the parties hereto shall by written instrument designate. Such time and date are herein referred to as the "Closing Date".

COMMENT

This paragraph may also specify each document to be delivered at the closing by the Selling Shareholders to the Acquiring Corporation and by the Acquiring Corporation to the Selling Shareholders.

* * *

ARTICLE II
REPRESENTATION AND WARRANTIES

§2. *Representations of the Selling Shareholders*. The Selling Stockholders represent, warrant and agree, jointly and severally except as otherwise indicated, as follows:

§2.1 (a) *Ownership of Stock*. Each Selling Shareholder is the lawful owner of the number of shares of Stock listed opposite the name of such Selling Shareholder in Exhibit 1 hereto, free and clear of all liens, encumbrances, restrictions and claims of every kind; each Selling Shareholder has full legal right, power and authority to enter into this Agreement and to sell, assign, transfer and convey the shares of Stock so owned by such Selling Shareholder pursuant to this Agreement; the delivery to the Acquiring Corporation of the Stock pursuant to the provisions of this Agreement will transfer to the Acquiring Corporation, valid title thereto, free and clear of all liens, encumbrances, restrictions and claims of every kind. Each Selling Shareholder is a resident or incorporated under the laws of the state set forth opposite such Selling Shareholder's name in Exhibit 1.

COMMENT

The Selling Shareholders will generally be required by the Acquiring Corporation to make certain representations about the status of the business and operation of the Target Corporation. These representations, although made by the Selling Shareholders, will be similar to the representations and warranties of Warner set out in Section 3.1 of the Time-Warner Merger Agreement, Appendix A.

In the acquisition of a closely-held firm, the representations relating to the Target Corporation are likely to be much more extensive than the representations in a public deal like the Time-Warner Merger. Set out below is a list of representations and warranties that might be found in such an acquisition agreement, followed by sample representations and warranties relating to (1) the absence of undisclosed liabilities of the Target Corporation, and (2) the completeness of disclosure, that is, the Selling Shareholder's Section 10b-5 representation.

Checklist of Selling Shareholders' Representations and Warranties

01. Corporate Existence
02. Corporate Power; Authorization
03. Capital Stock
04. Enforceable Obligations
05. No Interest in Other Entities
06. Validity of Contemplated Transactions, etc.
07. Completeness of Disclosure
08. No Third Party Options
09. Financial Statements

10. Accounts Receivable
11. Inventory
12. Absence of Undisclosed Liabilities
13. Tax and Other Returns and Reports
14. Books of Account
15. Existing Condition
16. Title to Properties
17. Condition of Tangible Assets
18. Compliance with Law; Authorizations
19. Transactions With Affiliates
20. Litigation
21. Insurance
22. Contracts and Commitments
23. Additional Information
24. Labor Matters
25. Employee Benefit Plans and Arrangements
26. Intellectual Property Matters
27. The Software
28. Environmental Matters
29. Real Property
30. Availability of Documents
31. Assets
32. Restrictions
33. Conditions Affecting Seller

* * *

§2.1 (b) *Absence of Undisclosed Liabilities*. The Target Corporation has no liabilities or obligations, either direct or indirect, matured or unmatured or absolute, contingent or otherwise, except:

(i) those liabilities or obligations set forth on the balance sheet of the Target Corporation for its last fiscal year and not herefore paid or discharged;

(ii) liabilities arising in the ordinary course of business under any agreement, contract, commitment, lease or plan specifically disclosed on the Disclosure Schedule or not required to be disclosed because of the term or amount involved; and

(iii) those liabilities or obligations incurred, consistently with past business practice, in or as a result of the normal and ordinary course of business since the end of the last fiscal year.

For purposes of this Agreement, the term "liabilities" shall include, without limitation, any direct or indirect indebtedness, guaranty, endorsement, claim, loss, damage, deficiency, cost, expense, obligation or responsibility, fixed or unfixed, known or unknown, asserted or unasserted, choate or inchoate, liquidated or unliquidated, secured or unsecured.

§2.1 (c) *Completeness of Disclosure*. No representation or warranty by the Selling Shareholders in this Agreement nor any certificate, schedule, statement, document or instrument furnished or to be furnished to the Acquiring Corporation pursuant hereto, or in connection with the negotiation, execution or performance of this Agreement, contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact required to be stated herein or therein or necessary to make any statement herein or therein not misleading.

§2.2 *Representations and Warranties of The Acquiring Corporation*.

COMMENT

The representations and warranties of the Acquiring Corporation will depend upon the type of consideration paid. If cash is paid, there may be simple representations relative to organization, standing and power as in Section 3.1(a) of the Time-Warner Merger Agreement, Appendix A, and authority as in Section 3.1(c). Also, the Acquiring Corporation will represent that it is buying the stock of the Target Corporation for investment and not with a view to distribution as defined in Section 2(a)(11) of the Securities Act of 1933. (*See* Chapter 4) If the Acquiring Corporation is issuing it securities so that the Selling Shareholders are making an investment in the Acquiring Corporation, more complete representations are appropriate.

* * *

ARTICLE III
COVENANTS RELATING TO CONDUCT OF BUSINESS

§3.1 *Covenants of The Selling Shareholders*

COMMENT

The covenants made here by the Selling Shareholders may relate to the operations of the Target Corporation and will be similar to the covenants contained in Article IV of the Time-Warner Merger Agreement, Appendix A.

* * *

§3.2 *Covenants of the Acquiring Corporation*.

COMMENT

Since the purchase is for cash, the Acquiring Corporation has no covenants here. If the Acquiring Corporation were issuing its securities, the Acquiring Corporation would normally undertake significant covenants as illustrated in Article IV of the Time-Warner Merger Agreement.

* * *

ARTICLE IV
ADDITIONAL AGREEMENTS

§4.1 *Additional Agreements of Selling Shareholders*.

COMMENT

Depending on the circumstances, the Selling Shareholders may agree to perform certain other actions between the signing and closing. (*See e.g.* Article V of The Time-Warner Merger Agreement, Appendix A.) The Selling Shareholders may also covenant not to cause the Target Corporation or its officers and directors to directly or indirectly solicit, initiate or encourage other acquisition proposals. *See Model Stock Purchase Agreement*, *supra*, Chapter 15, Scope, at 152-153. *See also* Chapter 13 for a discussion of "no shops."

* * *

§4.2 *Additional Agreements of Acquiring Corporations*.

COMMENT

Since the consideration is cash, the Acquiring Corporation may not have elaborate undertakings. However, the Acquiring Corporation should undertake to use all reasonable efforts to promptly comply with all legal requirements (*see* Section 5.6 of the Time-Warner Merger Agreement, Appendix A) and to use all reasonable efforts to properly consummate the transaction (*see* Section 5.17 of the Time-Warner Merger Agreement), such as complying with Hart-Scott-Rodino (*see* Chapter 9).

* * *

ARTICLE V
CONDITIONS TO ACQUIRING CORPORATION'S OBLIGATIONS

§5.1 *Conditions to Acquiring Corporation's Obligations*. The purchase of the Stock by the Acquiring Corporation on the Closing Date is conditioned upon satisfaction, on or prior to such date, of the following conditions:

§5.1(a) *Opinion of the Selling Shareholders' Counsel*. The Stockholders shall have furnished the Acquiring Corporation with a favorable opinion, dated the Closing Date, of _____, the counsel to the Selling Shareholders, in form and substance satisfactory to the Acquiring Corporation and its counsel, to the effect set forth in Exhibit 2 attached hereto.

COMMENT

Legal opinions are discussed in Chapter 15.

* * *

§5.1(b) *Good Standing and Other Certificates*. The Selling Shareholder shall have delivered to the Acquiring Corporation (a) copies of the Target Corporation's charter and the charter of each subsidiary listed in Exhibit 3 attached hereto, including all amendments thereto, in each case certified by the Secretary of State or other appropriate official of its jurisdiction of incorporation, (b) a certificate from the Secretary of State or other appropriate official of their respective jurisdictions of incorporation to the effect that each of the Target Corporation and its designated subsidiaries is in good standing in such jurisdiction and listing all charter documents of the Target Corporation and such subsidiaries on file, (c) a certificate from the Secretary of State or other appropriate official in each State in which the Target Corporation or any designated subsidiary is qualified to do business to the effect that the Target Corporation or such subsidiary is in good standing in such State. (d) a certificate as to the tax status of the Target Corporation and each designated subsidiary from the appropriate official in its jurisdiction of incorporation and each state in which the Target Corporation or such subsidiary is qualified to do business, and (e) a copy of the By Laws of the Target Corporation and each designated subsidiary, certified by the Secretary of the Target Corporation and each such subsidiary as being true and correct and in effect on the Closing Date.

§5.1(c) *No Material Adverse Change*. Prior to the Closing Date, there shall be no material adverse change in the assets or liabilities, the business or condition, financial or otherwise, the results of operations, or prospects of the Target Corporation and its subsidiaries, whether as a result of any legislative or regulatory change, revocation of any license or rights to do business, fire, explosion, accident, casualty, labor trouble, flood, drought, riot, storm, condemnation or act of God or other public force or otherwise, and the Selling Stockholders shall have delivered to the Acquiring Corporation a certificate, dated the Closing Date, to such effect.

§5.1(d) *No Litigation Threatened*. No action or proceedings shall have been instituted or, to the best knowledge, information and belief of the Selling Shareholders, threatened before a court or other government body or by any public authority to restrain or prohibit any of the transactions contemplated hereby, and the Selling Shareholders shall have delivered to the Acquiring Corporation a certificate, dated the Closing Date, to such effect.

COMMENT

Article VI of the Time-Warner Merger Agreement, Appendix A, contains other conditions.

* * *

ARTICLE VI
SURVIVAL OF REPRESENTATIONS; INDEMNITY; SET OFF

§6.1 *Survival of Representations*. The respective representations and warranties and other covenants and

agreements of the Selling Shareholders and the Acquiring Corporation contained in this Agreement or in any schedule attached hereto shall survive the purchase and sale of the Stock contemplated hereby.

§6.2 *Indemnification*. (a) The Selling Shareholders agree, jointly and severely, to indemnity and hold the Acquiring Corporation and its officers, directors and agents harmless from damages, losses or expenses (including, without limitation, reasonable counsel fees and expenses) in excess of $25,000 in the aggregate, suffered or paid, directly or indirectly, through application of the Target Corporation's or the Acquiring Corporation's assets, as a result of or arising out of the failure of any representation or warranty made by the Selling Shareholders in this Agreement or in any scheduled attached hereto to be true and correct in all respects as of the date of this Agreement and as of the Closing Date.

(b) The Acquiring Corporation agrees to indemnify and hold the Selling Shareholders harmless from damages, losses or expenses (including, without limitation, reasonable counsel fees and expenses) in excess of $25,000, in the aggregate, suffered or paid, directly or indirectly, as a result of or arising out of the failure of any representation or warranty made by the Acquiring Corporation in this Agreement to be true and correct in all respects as of the date of this Agreement and as of the Closing Date.

(c) The obligations to indemnify and hold harmless pursuant to this Section 6.1 shall survive the consummation of the transactions contemplated by this Agreement.

§6.3 *Other Rights and Remedies Not Affected*. The indemnification rights of the parties under this Article VI are independent of and in addition to such rights and remedies as the parties may have at law or in equity or otherwise for any misrepresentation, breach of warranty or failure to fulfill any agreement or covenant hereunder on the part of any party hereto, including without limitation the right to seek specific performance, rescission or restitution, none of which rights or remedies shall be affected or diminished hereby.

COMMENT

In stock acquisition agreements and other acquisition agreements in which closely-held corporations are the targets, it is common to provide that (1) the representations and warranties and other covenants and agreements of the selling party or parties will survive the acquisition as in Section 6.1, and (2) the selling party or parties will indemnify the purchaser as in Section 6.2 (*See* Chapter 15) Section 6.2 is a short form indemnification. In many acquisition agreements, the indemnification provisions are much more elaborate and will deal with such matters as (1) the methods of asserting claims, (2) control of litigation against third parties, (3) the grossing-up of indemnification payments to take account of the tax effect of the payment, (4) arbitration, and (5) a limitation on the period during which indemnification can be asserted. (*See* Chapter 15)

* * *

ARTICLE VII
TERMINATION AND AMENDMENT

[*See* Article VII of the Time-Warner Merger Agreement, Appendix A and Appendix K]

ARTICLE VIII
GENERAL PROVISIONS

[*See* Article IX of the Time-Warner Merger Agreement, Appendix A]

DOCUMENTARY APPENDIX V, ANNOTATED SAMPLE ASSET ACQUISITIONS AGREEMENT

[*See* Chapters 12 and 15 of Business Planning for Mergers and Acquisitions]

SAMPLE ASSET ACQUISITION AGREEMENT*

ASSETS ACQUISITION AGREEMENT, dated as of March 3, 1989 between Acquiring Corporation, Inc., a Delaware corporation (the Acquiring Corporation) and Selling Corporation, Inc., a Delaware corporation (the Selling Corporation).

W H E R E A S

A. The Selling Corporation is engaged in the business of manufacturing widgets.

B. Subject only to the limitations and exclusions contained in this Agreement and on the terms and conditions hereinafter set forth, the Acquiring Corporation will purchase certain assets of the Selling Corporation and will assume certain liabilities of the Selling Corporation.

NOW, THEREFORE, in consideration of the recitals and of the respective covenants, representations, warranties and agreements herein contained, and intending to be legally bound hereby, the parties hereto hereby agree as follows:

ARTICLE I
PURCHASE AND SALE AND CLOSING

§1.1 *Agreement to Sell*. At the Closing hereunder (as defined in Section 1.8 thereof) and except as otherwise specifically provided in this Section 1.1, the Selling Corporation shall grant, sell, convey, assign, transfer and deliver to the Acquiring Corporation, upon and subject to the terms and conditions of this Agreement, all right, title and interest of the Selling Corporation in and to (a) the assets specified in 1.2 (the Assets), and (b) the name "SELLING CORPORATION, INC." and all goodwill associated therewith, each free and clear of all mortgages, liens, pledges, security interests, charges, claims, restrictions and encumbrances of any nature whatsoever.

§1.2 *Included Assets*. The Assets shall include without limitation the following assets, properties and rights used directly or indirectly by the Selling Corporation in the conduct of its business, except as otherwise expressly set forth in Section 1.3 hereof:

(a) all the land, structures, improvements and fixtures and all water lines, rights of way, uses, licenses, easements, hereditament, tenements and appurtenances belonging or appertaining thereto;

(b) all machinery, equipment, tools, vehicles, furniture, furnishings, leasehold improvements, goods, and other tangible personal property;

(c) all cash or cash equivalents in transit, in hand or in bank accounts;

(d) all prepaid items, unbilled costs and fees, and accounts, notes and other receivables;

(e) all supplies and inventories and office and other supplies;

* This agreement is here for illustrative purposes only and should not be used as a starting point for a real deal. The above agreement is a modification of the Asset Purchase Agreement set out in PLI, *Acquiring and Selling the Privately Held Company*, 1990, 383 (drafted by Howard Shecter) (1990).

(f) to the extent permitted by applicable law, all rights under any written or oral contract, agreement, lease, plan, instrument, registration, license, certificate of occupancy, other permit or approval of any nature, or other document, commitment, arrangement, undertaking, practice or authorization;

(g) all rights under any patent, trademark, service mark, trade name or copyright, whether registered or unregistered, and any applications therefor;

(h) all technologies, methods, formulations, data bases, trade secrets, know-how, inventions and other intellectual property used in the Selling Corporation or under development;

(i) all computer software (including documentation and related object and source codes);

(j) all rights or choices in action arising out of occurrences before or after the Closing, including without limitation all rights under express or implied warranties relating to the Assets;

(k) all assets and properties reflected on the Closing Balance Sheet as defined in Section 1.7; and

(l) all information, files, records, data, plans, contracts and recorded knowledge, including customer and supplier lists, related to the foregoing.

§1.3 *Excluded Assets*. Notwithstanding the foregoing, the Assets shall not include any of the following:

(a) the corporate seals, certificates of incorporation, minute books, stock books, tax returns, books of account or other records having to do with corporate organization of the Selling Corporation;

(b) the rights which accrue or will accrue to the Selling Corporation under this Agreement;

(c) the rights to any of the Selling Corporation's claims for any federal, state, local, or foreign tax refunds; or

(d) the assets, properties or rights set forth on SCHEDULE 1.3.

§ 1.4 *Agreement to Purchase*. At the Closing hereunder, the Acquiring Corporation shall purchase the Assets from the Selling Corporation, upon and subject to the terms and conditions of this Agreement and in reliance on the representations, warranties and covenants of the Selling Corporation contained herein, in exchange for the Purchase Price (hereinafter defined in Section 1.5 hereof). In addition, the Acquiring Corporation shall assume at the Closing and agree to pay, discharge or perform, as appropriate, certain liabilities and obligations of the Selling Corporation only to the extent and as provided in Section 1.6 of this Agreement. Except as specifically provided in Section 1.6 hereof, Purchaser shall not assume or be responsible for any liabilities or obligations of the Selling Corporation.

§1.5 *The Purchase Price*.

(a) *Purchase Price*, The Purchase Price shall be an amount equal to:

(1) $_____ (the Base Amount);

(2) (i) less, the amount, if any, by which the Net Assets (hereinafter defined) on the Closing Date as reflected on the Closing Balance Sheet (hereinafter defined) is less than the Net Assets on the balance sheet for the period ending December 31, 1995 (the 1995 Balance Sheet);

(ii) *plus*, the amount, if any, by which the Net Assets on the Closing Date as reflected on the Closing Balance Sheet exceeds the Net Assets on the 1995 Balance Sheet (the amount determined under 1.5(a)(2) is referred to as the Adjustment Amount).

Net Assets as of a given date shall mean the net book value of all assets which would have been included in the Assets if the Closing had taken place on such date without regard to any other assets reflected on the balance sheet which would not be included in the Assets if the Closing had taken place on such date.

COMMENT

Under the adjustment provision in Section 1.5(a)(2) above, if the book value of the Selling Corporation on the Closing Date is less than the book value on the 1995 Balance Sheet, which was available at the signing, then the purchase price is reduced by the reduction in book value. On the other hand, if the book value on the Closing Date is more that the book value on the 1995 Balance Sheet, then the purchase price is increased by the increase in book value. This increase or decrease in the Purchase Price is referred to as the Adjustment Amount, and it is paid after the closing as provided in Section 1.5(b).

* * *

(b) *Payment of Purchase Price*. On the Closing Date the Acquiring Corporation shall pay the Selling Corporation the Base Amount payable by wire transfer of immediately available funds to such account as the Selling Corporation shall designate. Upon the determination of the Adjustment Amount either the Acquiring Corporation shall promptly pay to the Selling Corporation or the Selling Corporation shall promptly pay to the Acquiring Corporation, as the case may be, the Adjustment Amount payable by wire transfer of immediately available funds to such account as the payee shall designate. Pending resolution and payment of the Adjustment Amount, the Selling Corporation will not distribute any of the Base Amount to the shareholders as a liquidating distribution or otherwise.

(c) *Allocation of Purchase Price*. The Purchase Price and the liabilities assumed by the Acquiring Corporation in accordance with Section 1.6 hereof and any non-recourse liabilities to which any Assets is subject (together, the "Total Consideration) as finally determined shall be allocated among the Assets acquired hereunder as described on SCHEDULE 1.5.(c). hereof. The parties agree to follow the allocation in SCHEDULE 1.5(c) in any and all filings and reports, made and positions taken, with the Internal Revenue Service and any other taxing authority, including the reports required to be filed pursuant to Section 1060 of the Internal Revenue Code of 1986, as amended. The Selling Corporation and the Acquiring Corporation will collaborate in the preparation of IRS Form 8594 and will both timely file such form in a consistent manner. The Selling Corporation and the Acquiring Corporation each hereby further covenant and agree that it will not take a position on any income tax return, before any governmental agency charged with the collection of any income tax, or in any judicial proceeding that is in any way inconsistent with the terms of this Section 1.5.(c).

§1.6 *Assumption of Liabilities*.

(a) *Assumed Liabilities*. At the Closing hereunder and except as otherwise specifically provided in this Section 1.6, the Acquiring Corporation shall assume and agree to pay, discharge or perform, as appropriate, the following liabilities and obligations of the Selling Corporation:

(i) all liabilities and obligations of the Selling Corporation existing as of the 1995 Balance Sheet Date but only if and to the extent that the same are accrued or reserved for on the 1995 Balance Sheet and remain unpaid and undischarged on the Closing Date;

(ii) all liabilities and obligations of Selling Corporation arising in the regular and ordinary course of its business between (the 1995 Balance Sheet Date) and the Closing Date, to the extent that the same remain unpaid and undischarged on the Closing Date and are accrued or reserved for on the Closing Balance Sheet; and

(iii) all liabilities and obligations of the Selling Corporation in respect of the agreements contracts, commitments and leases which are specifically identified in any list called for by paragraphs of the representations and warranties, except that the Acquiring Corporation shall not assume or agree to pay, discharge or perform any:

(A) liabilities or obligations of the aforesaid character existing as of the 1995 Balance Sheet Date, and which under generally accepted accounting principles should have been accrued or reserved for on a balance sheet or the notes thereto as a liability or obligation, if and to the extent that the same were not accrued or reserved for on the 1995 Balance Sheet;

(B) liabilities or obligations of the aforesaid thereafter existing as of the Closing Date, and which under generally accepted accounting principles should have been accrued or reserved for on a balance sheet or the notes thereto as a liability or obligation, if and to the extent that the same were not accrued or reserved for on the Closing Balance Sheet; or

(C) liabilities or obligations arising out of any breach by the Selling Corporation of any provision of any agreement, contract, commitment or lease referred to in this paragraph (C), including but not limited to liabilities or obligations arising out of the Selling Corporation's failure to perform any agreement, contract, commitment or lease in accordance with its terms prior to the Closing, but excluding however any liability arising out of the assignment to the Acquiring Corporation of such agreements, contracts, commitments or lease in violation of the terms thereof to the extent that the agreement, contract, commitment or lease is listed on SCHEDULE _ hereof.

(b) *Retained Liabilities*. In no event, however, shall the Acquiring Corporation assume or incur any liability or obligation under this Section 1.6 or otherwise in respect of any of the following:

(i) any product liability or similar claim for injury to person or property, regardless of when made or asserted, which arises out of or is based upon any express or implied representation, warranty, agreement or guarantee made by the Selling Corporation, or alleged to have been made by the Selling Corporation, or which is imposed or asserted to be imposed by operation of law, in connection with any service performed or product sold or leased by or on behalf of the Selling Corporation on or prior to the Closing, including without limitation any claim relating to any product delivered in connection with the performance of such service and any claim seeking recovery for such service and any claim seeking recovery for consequential damage, lost revenue or income;

COMMENT

This provision is designed to make sure the Acquiring Corporation does not assume any liabilities of the Selling Corporation for a defective product sold or services provided before the closing. Notwithstanding this provision, the Acquiring Corporation may, under state successor liability laws, be liable to the injured party. (*See* Chapter 12)

* * *

(ii) any federal, state or local income or other tax (A) payable with respect to the business, assets, properties or operations of the Selling Corporation or the Shareholders of the Selling Corporation or any member of any affiliated group of which either is a member for any period prior to the Closing Date, or (B) incident to or arising as a consequence of the negotiation or consummation by the Selling Corporation or its shareholders or any member of any affiliated group of which either is a member of this Agreement and the transactions contemplated hereby;

COMMENT

In an asset acquisition, the target is responsible for its federal income tax liability. (*See* Chapter 5) However, state law may impose liability on the purchaser for unpaid state income, sales, and other state taxes of the seller. (*See* Chapter 15)

* * *

(iii) any liability or obligation under or in connection with the assets excluded from the Assets under Section 1.3.

(iv) any liability or obligation arising prior to or as a result of the Closing to any employees, agents or independent contractors of the Selling Corporation, whether or not employed by the Acquiring Corporation after the Closing,

or under any benefit arrangement with respect thereto; or

(v) any liability or obligation of the Selling Corporation or any of its shareholders arising or incurred in connection with the negotiation, preparation and execution of this Agreement and the transactions contemplated hereby and fees and expenses of counsel, accountants and other experts.

§1.7 *Closing Financial Statements*. Not later than 60 days after the Closing Date, the Selling Corporation shall cause to be prepared the balance sheet of its business at the Closing Date (the Closing Balance Sheet) and the related statement of income, changes in financial position, and notes of the business for the period from the 1995 Balance Sheet Date until the Closing Date, in accordance with generally accepted accounting principles consistently applied by the Selling Corporation in accordance with past practice for the financial statements described in Section _ of the representations and warranties. Such balance sheet shall specifically identify all assets reflected thereon which are not included in the Assets and all liabilities reflected thereon which are not assumed by the Acquiring Corporation hereunder.

The Selling Corporation shall cause _____, its independent accountants (Seller's Auditors), to review such financial statements in accordance with standard procedure of the accounting profession. Seller's Auditors and shall specify the Adjustment Amount. [The parties may elaborate on these procedures].

Any dispute which may arise between the Selling Corporation and the Acquiring Corporation as to such financial statements or the proper amount of the Adjustment Amount shall be resolved in the following manner. [The parties here will set out the dispute resolution mechanism.]

§1.8 *Closing*. The Closing (the Closing) of the sale and purchase of the Assets shall take place at 10:00 A.M., local time, on ____, 1996 at the offices of the attorneys for Acquiring Corporation or on such other date as may be mutually agreed upon in writing by the Acquiring Corporation and the Selling Corporation. The date of the Closing is sometimes herein referred to as the "Closing Date."

§1.9 *Items to be Delivered at Closing*. At the Closing, subject to the terms and conditions here in contained:

(a) The Selling Corporation shall deliver to the Acquiring Corporation the following:

(i) such bills of sale with covenants of warranty assignments, endorsements, and other good and sufficient instruments and documents of conveyance and transfer in form reasonably satisfactory to the Acquiring Corporation and its counsel as shall be necessary and effective to transfer and assign to, and vest in, the Acquiring Corporation all of the Selling Corporation's right, title and interest in and to the Assets, including without limitation, (A) good and valid title in and to all of the Assets owned by the Selling Corporation, (B) good and valid leasehold interests in and to all of the Assets leased by the Selling Corporation as leasee, and (C) all of the Selling Corporations rights under all agreements, contracts, commitments, leases, plans, bids, quotations, proposals, instruments and other documents included in the Assets to which Seller is a party or by which it has rights on the Closing Date; and

(ii) all of the agreements, contracts, commitments, leases, plans, bids, quotations, proposals, instruments, computer programs and software, databases whether in the form of computer tapes or otherwise, related object and source codes, manuals and guidebooks, price books and price lists, customer and subscriber lists, supplier lists, sales records, files, correspondences, legal opinions, rulings issued by governmental entities, and other documents, books, records, papers, files, office supplies and data belonging to the Selling Corporation which are part of the Assets.

Simultaneously with such delivery, all such steps will be taken as may be required to put the Acquiring Corporation in actual possession and operating control of the Assets.

(b) The Acquiring Corporation shall deliver to the Selling Corporation the following:

(i) The Purchase Price determined in accordance with Section 1.5 hereof; and

(ii) An undertaking whereby the Acquiring Corporation will assume and agree to pay, discharge or perform, as appropriate, the Selling Corporation's liabilities and obligations to the extent and as provided in Section 1.6 hereof in form reasonably satisfactory to the Selling Corporation and its counsel.

At or prior to the Closing, the parties hereto shall also deliver to each other the agreements, opinions, certificates and other documents and instruments referred to in Article V.

§1.10 *Third Party Consents*. To the extent that the Selling Corporation's rights under any agreement, contract, commitment, lease, or other Asset to be assigned to the Acquiring Corporation hereunder may not be assigned without the consent of another person which has not been obtained, this Agreement shall not constitute an agreement to assign the same if an attempted assignment would constitute a breach thereof or be unlawful, and the Selling Corporation, at its expense, shall use its best efforts to obtain any such required consent(s) as promptly as possible. If any such consent shall not be obtained or if any attempted assignment would be ineffective or would impair the Acquiring Corporation's rights under the Asset in question so that the Acquiring Corporation would not in effect acquire the benefit of all such rights, the Selling Corporation to the maximum extent permitted by law and the Asset, shall act after the Closing as the Acquiring Corporation's agent in order to obtain for it the benefits thereunder and shall cooperate, to the maximum extent permitted by law and the Asset, with the Acquiring Corporation in any other reasonable arrangement designed to provide such benefits to the Acquiring Corporation.

§1.11 *Change in Name*. On the Closing Date, the Selling Corporation and its shareholders shall deliver to the Acquiring Corporation all such executed documents as may be required to change the Selling Corporation's name on that date to another name bearing no similarity to Selling Corporation, Inc., including but not limited to a name change amendment with the Secretary of State of Delaware and an appropriate name change notice for each state where the Selling Corporation is qualified to do business. Each of the Selling Corporation and its shareholders hereby appoints the Acquiring Corporation as its attorney-in-fact to file all such documents on or after the Closing Date.

§1.12 *Further Assurances*. The Selling Corporation from time to time after the Closing, at the Acquiring Corporation's request, will execute, acknowledge and deliver to the Acquiring Corporation such other instruments of conveyance and transfer and will take such other actions and execute and deliver such other documents, certifications and further assurances as the Acquiring Corporation may reasonably require in order to vest ownership of the assets more effectively in the Acquiring Corporation at the Closing pursuant to Section 1.6 hereof. Each of the parties hereto will cooperate with the other and execute and deliver to the other party hereto such other instruments reasonably requested from time to time by any other party hereto as necessary to carry out evidence and confirm the intended purposes of this Agreement.

ARTICLE II
REPRESENTATION AND WARRANTIES

§2.1 *Representations and Warranties of the Selling Corporation*.

COMMENT

The representations and warranties of the Target Corporation in an asset acquisition will be similar to the representations and warranties of Warner, the target corporation, in the Time-Warner Merger Agreement, Appendix A, Section 3.1.

* * *

§2.2 *Representations and Warranties of the Acquiring Corporation*.

COMMENT

The representations and warranties of the Acquiring Corporation will be dependant upon the consideration being

paid. If cash is paid, there may be simple representations and warranties relating to organization, standing and power as in Section 3.1(a) of the Time-Warner Merger Agreement, Appendix A, and authority as in Section 3.1(c) of such Agreement. If the Acquiring Corporation issues its securities, so that the shareholders of the Selling Corporation are making an investment in the Acquiring Corporation, more complete representations will be required along the lines of Article III of the Time-Warner Merger Agreement, Appendix A.

* * *

ARTICLE III
COVENANTS RELATING TO CONDUCT OF BUSINESS

§3.1 *Covenants by the Selling Corporation*.

COMMENT

The covenants made here by the Selling Corporation relate to the operation of the Selling Corporation from the date of the signing of the acquisition agreement to the date of the closing, and will be similar to the covenants of Warner contained in Article IV of the Time-Warner Merger Agreement, Appendix A.

* * *

§3.2 *Covenants of Acquiring Corporation*.

COMMENT

Since the acquisition is for cash, the Acquiring Corporation generally will not make any covenants here. However, if the consideration were securities of the Acquiring Corporation, it would make covenants similar to those made by Time in Article IV of the Time-Warner Merger Agreement, Appendix A.

* * *

ARTICLE IV
ADDITIONAL AGREEMENTS

§4.1 *Additional Agreements of the Selling Corporation*.

COMMENT

Depending on the circumstances, the Selling Corporation would undertake to perform certain tasks similar to those undertaken by Warner in Section 4.1 of the Time-Warner Merger Agreement, Appendix A. The Selling Corporation may also enter into a "no shop." *See* Comment to Section 4.1 of the Sample Stock Purchase Agreement, Appendix U.

* * *

§4.2 *Additional Agreements of Acquiring Corporation*.

COMMENT

See Comment to Section 4.2 of the Sample Stock Purchase Agreement, Appendix U.

* * *

ARTICLE V

CONDITIONS TO ACQUIRING CORPORATION'S OBLIGATIONS

COMMENT

The conditions to closing for the Acquiring Corporation would be similar to the conditions to closing in both Article V of the Sample Stock Purchase Agreement, Appendix U, and Article VI of the Time-Warner Merger Agreement, Appendix A. Since the Acquiring Corporation is acquiring "substantially all" of the assets of the Selling Corporation, under state corporate law, the transaction is contingent upon the approval of the shareholders of the Selling Corporation (*see* Chapter 2), and this approval should be one of the conditions to closing.

* * *

ARTICLE VI

SURVIVAL OF REPRESENTATIONS; INDEMNITY; SET-OFF

COMMENT

In asset acquisition agreements for closely-held Selling Corporations, it is common for the representations, warranties and other agreements to survive the closing as specified in Section 6.1 of the Sample Stock Purchase Agreement, Appendix U, and if the Selling Corporation is liquidated it is common for the shareholders of the Selling Corporation to indemnify the Acquiring Corporation in a manner similar to the indemnity in Section 6.2 of the Sample Stock Purchase Agreement.

* * *

ARTICLE VII

TERMINATION

COMMENT

The termination provision in an asset acquisition agreement would normally be similar to the basic termination provisions in Section 7.1 of the Time-Warner Merger Agreement, Appendix A, that is, a right to terminate (1) with mutual consent (§ 7.1(a)), (2) upon material breach (§7.1(b)), and (3) if the transaction does not close before a drop dead date. The effect of a termination provision in an asset acquisition agreement may give the parties the right to recover damages, which is generally not the case in Section 7.2 of the Time-Warner Merger Agreement.

* * *

ARTICLE VIII

GENERAL PROVISIONS

COMMENT

The general provisions of an asset acquisition agreement would normally be similar to such provisions in Article VIII of the Time-Warner Merger Agreement, Appendix A.

* * *

DOCUMENTARY APPENDIX W, GOLDMAN CERTIFICATE OF INCORPORATION

[*See* Principally Chapter 2 of Business Planning for Mergers and Acquisitions]

GOLDMAN'S CERTIFICATE OF INCORPORATION

Restated
Certificate Of Incorporation
Of
The Goldman Sachs Group, Inc.

FIRST. [DGCL § 102(a)(1)] The name of the Corporation is The Goldman Sachs Group, Inc.

SECOND. [DGCL § 102(a)(2)] The address of the Corporation's registered office in the State of Delaware is Corporation Trust Center, 1209 Orange Street in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company. [The Corporation Trust Company, provides agency services.]

THIRD. [DGCL § 102(a)(3)] The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the Delaware General Corporation Law. * * * [DGCL §§ 121 and 122 set forth very broad powers.]

FOURTH. [DGCL § 102(a)(4)] The total number of shares of all classes of stock which the Corporation shall have authority to issue is 4,350,000,000, of which 4,000,000,000 shares of the par value of $0.01 per share shall be a separate class designated as Common Stock, 200,000,000 shares of the par value of $0.01 per share shall be a separate class designated as Nonvoting Common Stock and 150,000,000 shares of the par value of $0.01 per share shall be a separate class designated as Preferred Stock.

COMMON STOCK AND NONVOTING COMMON STOCK

Except as set forth in this Article FOURTH, the Common Stock and the Nonvoting Common Stock (together, the "Common Shares") shall have the same rights and privileges and shall rank equally, share ratably and be identical in all respects as to all matters. * * *

PREFERRED STOCK

Shares of Preferred Stock may be issued in one or more series from time to time as determined by the board of directors of the Corporation, and the board of directors of the Corporation is authorized to fix by resolution or resolutions the designations and the powers, preferences and rights, and the qualifications, limitations and restrictions thereof, of the shares of each series of Preferred Stock, including the following: * * *

OPTIONS, WARRANTS AND OTHER RIGHTS [DGCL § 157]

The board of directors of the Corporation is authorized to create and issue options, warrants and other rights from time to time entitling the holders thereof to purchase securities or other property of the Corporation or any other entity. * * * [This is additional authority for the board to issue poison pills, which are discussed in Chapter 3, dealing with director's duties.]

FIFTH. [DGCL § 102(b)(5)] The name and mailing address of the incorporator is Gregory K. Palm, 85 Broad Street, New York, New York 10004.

SIXTH. All corporate powers shall be exercised by the board of directors of the Corporation, except as otherwise specifically required by law or as otherwise provided in this Restated Certificate of Incorporation. [DGCL § 141] * * *

SEVENTH. Elections of directors need not be by written ballot except and to the extent provided in the by-laws of the Corporation.

EIGHTH. The number of directors of the Corporation shall be fixed only by resolution of the board of directors of the Corporation from time to time. * * * [*See* DGCL § 141] At each annual meeting of stockholders after the date of this Restated Certificate of Incorporation, directors elected at such annual meeting shall hold office until the next annual meeting of stockholders and until their successors have been duly elected and qualified.

Any director may be removed, with or without cause, with the affirmative vote of the holders of not less than 80% of the voting power of all outstanding shares of stock of the Corporation entitled to vote generally in the election of directors, considered for this purpose as a single class. [*See* DGCL § 141(k)] * * *

NINTH. [*See* Chapter 3, dealing with director's duties] In taking any action, including action that may involve or relate to a change or potential change in the control of the Corporation, a director of the Corporation may consider, among other things, both the long-term and short-term interests of the Corporation and its stockholders and the effects that the Corporation's actions may have in the short term or long term upon any one or more of the following matters:

(i) the prospects for potential growth, development, productivity and profitability of the Corporation;
(ii) the Corporation's current employees;
(iii) the retired former partners of The Goldman Sachs Group, L.P. ("GS Group") and the Corporation's employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the Corporation;
(iv) the Corporation's customers and creditors;
(v) the ability of the Corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business; and
(vi) such other additional factors as a director may consider appropriate in such circumstances.

Nothing in this Article NINTH shall create any duty owed by any director of the Corporation to any person or entity to consider, or afford any particular weight to, any of the foregoing matters or to limit his or her consideration to the foregoing matters. No such employee, retired former partner of GS Group, former employee, beneficiary, customer, creditor or community or member thereof shall have any rights against any director of the Corporation or the Corporation under this Article NINTH. [This paragraph is referred to as an "other constituency" charter provision. *See* Chapter 3 and 23.]

TENTH. [N]o action of stockholders of the Corporation required or permitted to be taken at any annual or special meeting of stockholders of the Corporation may be taken without a meeting of stockholders, without prior notice and without a vote, and the power of stockholders of the Corporation to consent [*see* DGCL § 228] in writing to the taking of any action without a meeting is specifically denied. * * *

ELEVENTH. No provision of Articles SIXTH, NINTH, TENTH or TWELFTH or of this Article ELEVENTH or of the second paragraph of Article EIGHTH shall be amended, modified or repealed, and no provision inconsistent with any such provision shall become part of this Restated Certificate of Incorporation, unless such matter is approved by the affirmative vote of the holders of not less than 80% of the voting power of all outstanding shares of Common Stock of the Corporation and all other outstanding shares of stock of the Corporation entitled to vote on such matter, with such outstanding shares of Common Stock and other stock considered for this purpose as a single class. * * *

TWELFTH. A director of the Corporation shall not be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director of the Corporation, except to the extent that such exemption from liability or limitation thereof is not permitted under the Delaware General Corporation Law as currently in effect or as the same may hereafter be amended. [*See* DGCL § 102(b)(7), which is discussed in Chapter 3, dealing with director's duties.]

DOCUMENTARY APPENDIX X, GOLDMAN BYLAWS

[*See* Chapter 2 of Business Planning for Mergers and Acquisitions]

AMENDED AND RESTATED
BY-LAWS
OF
THE GOLDMAN SACHS GROUP, INC.
As Of September 16, 2005

ARTICLE I
Stockholders
[*See* DGCL § 211]

Section 1.1. Annual Meetings. An annual meeting of stockholders shall be held for the election of directors at such date, time and place either within or without the State of Delaware as may be designated by the Board of Directors from time to time. Any other business properly brought before the meeting may be transacted at the annual meeting.

Section 1.2. Special Meetings. Special meetings of stockholders may be called at any time by, and only by, the Board of Directors, to be held at such date, time and place either within or without the State of Delaware as may be stated in the notice of the meeting. * * *

Section 1.5. Quorum. At each meeting of stockholders, except where otherwise required by law, the certificate of incorporation or these by-laws, the holders of a majority of the outstanding shares of stock entitled to vote on a matter at the meeting, present in person or represented by proxy, shall constitute a quorum. * * *

Section 1.8. Voting; Proxies. Unless otherwise provided in the certificate of incorporation, each stockholder entitled to vote at any meeting of stockholders shall be entitled to one vote for each share of stock held by such stockholder which has voting power upon the matter in question. * * * Each stockholder entitled to vote at a meeting of stockholders may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only as long as, it is coupled with an interest sufficient in law to support an irrevocable power, regardless of whether the interest with which it is coupled is an interest in the stock itself or an interest in the Corporation generally. A stockholder may revoke any proxy which is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or another duly executed proxy bearing a later date with a Secretary. * * *

Section 1.9. Fixing Date for Determination of Stockholders of Record. In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and which record date shall not be more than sixty nor less than ten days before the date of such meeting * * *

Section 1.10. List of Stockholders Entitled to Vote. A Secretary shall prepare and make, at least ten days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten days prior to the meeting * * *

ARTICLE II
Board of Directors
[*See* DGCL § 141]

Section 2.1. Powers; Number; Qualifications. The business and affairs of the

Corporation shall be managed by or under the direction of the Board of Directors, except as may be otherwise required by law or provided in the certificate of incorporation. [*See* DGCL § 141(a)] The number of directors of the Corporation shall be fixed only by resolution of the Board of Directors from time to time. If the holders of any class or classes of stock or series thereof are entitled by the certificate of incorporation to elect one or more directors, the preceding sentence shall not apply to such directors and the number of such directors shall be as provided in the terms of such stock. Directors need not be stockholders.

Section 2.2. Election; Term of Office; Resignation; Removal; Vacancies. * * * At each annual meeting of stockholders after the effective date of these Amended and Restated By-Laws, directors elected at such annual meeting shall hold office until the next annual meeting of stockholders, and until their successors are elected and qualified or until their earlier resignation or removal. Any director may resign at any time upon written notice to the Board of Directors. * * * No director may be removed except as provided in the certificate of incorporation. Vacancies and newly created directorships resulting from any increase in the authorized number of directors * * * or from any other cause shall be filled by, and only by, a majority of the directors then in office, although less than a quorum, or by the sole remaining director. * * * Any director elected or appointed to fill a vacancy or a newly created directorship shall hold office until the next annual meeting of stockholders, and until his or her successor is elected and qualified or until his or her earlier resignation or removal.

Section 2.3. Regular Meetings. Regular meetings of the Board of Directors may be held at such places within or without the State of Delaware and at such times as the Board may from time to time determine, and if so determined notice thereof need not be given.

Section 2.4. Special Meetings. Special meetings of the Board of Directors may be held at any time or place within or without the State of Delaware whenever called by the Board, by a Chairman of the Board, if any, by a Vice Chairman of the Board, if any, by a Chairperson of the Corporate Governance and Nominating Committee, if any, by a Chief Executive Officer, if any, by a President, if any, by a Chief Operating Officer, if any, or by any two directors. Reasonable notice thereof shall be given by the person or persons calling the meeting.

Section 2.5. Participation in Meetings by Conference Telephone Permitted. * * *

Section 2.6. Quorum; Vote Required for Action. At each meeting of the Board of Directors, one-half of the number of directors equal to (i) the total number of directors fixed by resolution of the board of directors (including any vacancies) plus (ii) the number of directors elected by a holder or holders of Preferred Stock voting separately as a class, as described in the fourth paragraph of Article EIGHTH of the certificate of incorporation (including any vacancies), shall constitute a quorum for the transaction of business. The vote of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board unless the certificate of incorporation or these bylaws shall require a vote of a greater number. * * *

Section 2.8. Action by Directors Without a Meeting. Unless otherwise restricted by the certificate of incorporation or these by-laws, any action required or permitted to be taken at any meeting of the Board of Directors, or of any committee thereof, may be taken without a meeting if all members of the Board or of such committee, as the case may be, then in office consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board or committee.

Section 2.9. Compensation of Directors. Unless otherwise restricted by the certificate of incorporation or these by-laws, the Board of Directors shall have the authority to fix the compensation of directors.

ARTICLE III
Committees
[*See* DGCL § 141(c)]

Section 3.1. Committees. The Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. * * *

ARTICLE IV

Officers
[*See* DGCL § 142]

Section 4.1. Officers; Election or Appointment. The Board of Directors shall take such action as may be necessary from time to time to ensure that the Corporation has such officers as are necessary, under Section 5.1 of these by-laws and the Delaware General Corporation Law as currently in effect or as the same may hereafter be amended, to enable it to sign stock certificates. In addition, the Board of Directors at any time and from time to time may elect (i) one or more Chairmen of the Board and/or one or more Vice Chairmen of the Board from among its members, (ii) one or more Chief Executive Officers, one or more Presidents and/or one or more Chief Operating Officers, (iii) one or more Vice Presidents, one or more Treasurers and/or one or more Secretaries and/or (iv) one or more other officers, in the case of each of (i), (ii), (iii) and (iv) if and to the extent the Board deems desirable. * * *

Section 4.2. Term of Office; Resignation; Removal; Vacancies. Unless otherwise provided in the resolution of the Board of Directors electing or authorizing the appointment of any officer, each officer shall hold office until his or her successor is elected or appointed and qualified or until his or her earlier resignation or removal. . . .

Section 4.3. Powers and Duties. The officers of the Corporation shall have such powers and duties in the management of the Corporation as shall be stated in these bylaws or in a resolution of the Board of Directors which is not inconsistent with these bylaws and, to the extent not so stated, as generally pertain to their respective offices, subject to the control of the Board. * * *

ARTICLE V
Stock
Section 5.1. Certificates; Uncertificated Shares. The shares of stock in the Corporation shall be represented by certificates, provided that the Board of Directors of the Corporation may provide by resolution or resolutions that some or all of any or all classes or series of its stock shall be uncertificated shares. * * *

Section 5.2. Lost, Stolen or Destroyed Stock Certificates; Issuance of New Certificates. * * *

ARTICLE VI
Miscellaneous

* * *

Section 6.4. Indemnification. [*See* DGCL §145, which is examined in Chapter 3 relating to director's duties.] The Corporation shall indemnify to the full extent permitted by law any person made or threatened to be made a party to any action, suit or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that such person or such person's testator or intestate is or was a director or officer of the Corporation, is or was a director, officer, trustee, member, stockholder, partner, incorporator or liquidator of a Subsidiary of the Corporation, is or was a member of the Shareholders' Committee acting pursuant to the Amended and Restated Shareholders' Agreement, dated as of May 7, 1999, and amended as of June 22, 2004, among the Corporation and the Covered Persons listed on Appendix A thereto, as amended from time to time, or serves or served at the request of the Corporation as a director, officer, trustee, member, stockholder, partner, incorporator or liquidator of or in any other capacity for any other enterprise. Expenses, including attorneys' fees, incurred by any such person in defending any such action, suit or proceeding shall be paid or reimbursed by the Corporation promptly upon demand by such person and, if any such demand is made in advance of the final disposition of any such action, suit or proceeding, promptly upon receipt by the Corporation of an undertaking of such person to repay such expenses if it shall ultimately be determined that such person is not entitled to be indemnified by the Corporation. The rights provided to any person by this by-law shall be enforceable against the Corporation by such person, who shall be presumed to have relied upon it in serving or continuing to serve as a director or officer or in such other capacity as provided above. In addition, the rights provided to any person by this by-law shall survive the termination of such person as any such director, officer, trustee, member, stockholder, partner, incorporator or liquidator and, insofar as such person served at the request of the Corporation as a director, officer, trustee, member, stockholder, partner, incorporator or liquidator of or in any other capacity for any other enterprise, shall survive the termination of such request as to service prior to termination of such request. No amendment of this by-law shall impair the rights of any person arising at any time with respect to events occurring prior to such amendment.
Notwithstanding anything contained in this Section 6.4, except for proceedings to enforce rights provided in this Section

6.4, the Corporation shall not be obligated under this Section 6.4 to provide any indemnification or any payment or reimbursement of expenses to any director, officer or other person in connection with a proceeding (or part thereof) initiated by such person (which shall not include counterclaims or crossclaims initiated by others) unless the Board of Directors has authorized or consented to such proceeding (or part thereof) in a resolution adopted by the Board. * * * Nothing in this Section 6.4 shall limit the power of the Corporation or the Board of Directors to provide rights of indemnification and to make payment and reimbursement of expenses, including attorneys' fees, to directors, officers, employees, agents and other persons otherwise than pursuant to this Section 6.4.

Section 6.5. Interested Directors; Quorum. [*See* DGCL §144, which is examined in Chapter 3 relating to director's duties.] No contract or transaction between the Corporation and one or more of its directors or officers, or between the Corporation and any other corporation, partnership, limited liability company, joint venture, trust, association or other unincorporated organization or other entity in which one or more of its directors or officers serve as directors, officers, trustees or in a similar capacity or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or committee thereof which authorizes the contract or transaction, or solely because his or her or their votes are counted for such purpose, if: (i) the material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; (ii) the material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by a vote of the stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified, by the Board, a committee thereof or the stockholders. Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee which authorizes the contract or transaction. * * *

Section 6.8. Amendment of By-Laws. These by-laws may be amended, modified or repealed, and new by-laws may be adopted at any time, by the Board of Directors.
Stockholders of the Corporation may adopt additional by-laws and amend, modify or repeal any by-law whether or not adopted by them, but only in accordance with Article SIXTH of the certificate of incorporation.

DOCUMENTARY APPENDIX Y, TWA BANKRUPTCY SALE TO AMERICAN

[*See* Chapter 27 of Business Planning for Mergers and Acquisitions]

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549
FORM 8-K
CURRENT REPORT
Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934
Date of Report (Date of earliest event reported): January 10, 2001
TRANS WORLD AIRLINES, INC.

Item 3.

On January 10, 2001, Trans World Airlines, Inc. ("TWA") and certain of its U.S. based subsidiaries filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware, In re: Trans World Airlines, Inc., et. al., Case Nos. 010056 through 010082 (Bankr. D. Del.) January 10, 2001. * * *

Item 5. Other Events.

On January 7, 2001, the American Stock Exchange halted trading of TWA's common stock.

On January 9, 2001, TWA entered into an Asset Purchase Agreement (the "Asset Purchase Agreement") with American Airlines, Inc. ("American") pursuant to which American will, upon the closing of such transaction, purchase substantially all of TWA's assets through a sale of assets consummated under Section 363 of the Bankruptcy Code. A copy of the Asset Purchase Agreement is attached hereto as an exhibit. It is anticipated that if the transactions currently contemplated by the Asset Purchase Agreement are consummated, all of the proceeds of the sale shall be distributed to TWA's secured and unsecured creditors and that none of the proceeds will be available to holders of TWA's equity securities.

In connection with its Chapter 11 filing, TWA obtained a commitment from American for up to $200 million in debtor-in-possession financing. * * *

EXHIBIT 2.1
EXECUTION COPY
ASSET PURCHASE AGREEMENT
between
American Airlines, Inc.,
as Purchaser,
and
Trans World Airlines, Inc.,
as Seller
January 9, 2001
[See the Asset Acquisition Agreement in Appendix V]

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this "Agreement") is made and entered into as of January 9, 2001, by and between American Airlines, Inc., a Delaware corporation ("Purchaser"), and Trans World Airlines, Inc., a Delaware corporation ("TWA").

RECITALS:

WHEREAS, TWA and its direct and indirect subsidiaries (other than Royal Ambassador Insurance Company, a Vermont insurance company) are referred to herein collectively as "Sellers," and each is referred to herein individually as a "Seller";

WHEREAS, TWA desires to sell to Purchaser, and to cause the other Sellers to sell to Purchaser, and Purchaser desires to purchase from Sellers, all assets, rights and properties of Sellers (subject to certain exceptions specified in this Agreement) and, in connection with such purchase and sale, Purchaser is willing to assume certain obligations and liabilities of Sellers, all on the terms and subject to the conditions set forth in this Agreement;

WHEREAS, TWA intends to file, and to cause each of the other Chapter 11 Sellers (as defined in Exhibit A) to file, voluntary petitions for reorganization pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. Sections 101 et seq. (the "Bankruptcy Code"), and in concert with such filings to seek the entry of an order of the United States Bankruptcy Court having jurisdiction over such chapter 11 cases (the "Bankruptcy Court") approving this Agreement and authorizing Sellers to consummate the transactions contemplated hereby;

WHEREAS, Sellers intend to distribute the proceeds of the transactions contemplated by this Agreement pursuant to a plan of liquidation under Chapter 11 of the Bankruptcy Code to be filed with the Bankruptcy Court, which proceeds will be distributed in accordance with the priorities established by the Bankruptcy Code; and

WHEREAS, Purchaser is providing TWA with a debtor-in-possession lending facility in connection with the Chapter 11 Cases providing for up to $200,000,000 in loans (the "DIP Facility").

NOW, THEREFORE, in consideration of the mutual covenants, representations, warranties and agreements herein contained, the parties hereto agree as follows: * * *

ARTICLE II
PURCHASE OF ASSETS

2.1 Purchase and Sale of Transferred Assets. On the terms and subject to the conditions set forth herein, at the Closing as described in Article V, TWA shall, and shall cause each other Seller to, sell, transfer, convey, assign and deliver, and Purchaser shall purchase and accept, all of each such Seller's right, title and interest in and to all such Seller's rights, properties and assets, wherever located, including, without limitation, (i) all personal and real property, (ii) all general intangibles and intangible property, including without limitation all Intellectual Property and goodwill, (iii) all equipment, furniture and fixtures, (iv) all accounts, accounts receivable and rights to payment, (v) claims and interests in litigation (including, without limitation, all Avoidance Actions), (vi) all existing and future instruments, chattel paper, documents of title, contracts, agreements, licenses, grants and rights, (vii) all securities, whether certificated or uncertificated, including, without limitation, either the capital stock of TWA Stock Holding, Inc. or the interests in Worldspan L.P., a Delaware limited partnership ("Worldspan") (at Purchaser's option), (viii) all security entitlements, securities accounts, commodity contracts and commodity accounts, (ix) any and all existing and assignable manufacturer or vendor warranties, service life policies, customer support agreements and similar items (or to the extent such items are not assignable, subrogation rights to such items), (x) all proceeds and products of the foregoing, and (xi) all books and records relating to the foregoing, in each case of clauses (i) through (xi) above, together with all substitutions therefor and all accessions, replacements and renewals thereof (collectively, the "Transferred Assets"), free and clear of all Liens except Permitted Liens.

2.2 Excluded Assets. Notwithstanding anything contained in this Agreement to the contrary, the rights, properties and assets identified on Schedule 2.2 hereto (collectively, the "Excluded Assets") shall not be included in the Transferred Assets.

ARTICLE III
ASSUMPTION OF LIABILITIES

3.1 Assumed Liabilities. As of the Closing, Purchaser shall assume and thereafter in due course pay and fully satisfy the following liabilities and obligations of Seller (the "Assumed Liabilities") and no other liabilities or obligations:

(a) all liabilities and obligations of any Seller arising from and after the Closing pursuant to the terms of the indebtedness of Sellers listed on Schedule 3.1(a) (the "Assumed Debt Obligations");

(b) all liabilities and obligations of any Seller arising from and after the Closing under any Assumed Contract (other than Retention Agreements, which are addressed in Section 3.1(d) below);

(c) all liabilities and obligations of any Seller arising at any time under the indebtedness of Sellers listed on Schedule 3.1(c); * * *

Except as set forth above, Purchaser shall not assume or be liable for any other obligations or liabilities of Sellers (including, without limitation, any cure amounts payable to other parties to the Assumed Contracts).

3.2 Retained Liabilities. Notwithstanding anything contained in this Agreement to the contrary, Purchaser does not assume or agree to pay, satisfy, discharge or perform, and shall not be deemed by virtue of the execution and delivery of this Agreement or any document delivered at the Closing pursuant to this Agreement, or as a result of the consummation of the transactions contemplated by this Agreement, to have assumed, or to have agreed to pay, satisfy, discharge or perform, any liability, obligation or indebtedness of any Seller, whether primary or secondary, direct or indirect, other than the Assumed Liabilities. Sellers shall retain and pay, satisfy, discharge and perform in accordance with the terms thereof, all liabilities and obligations other than the Assumed Liabilities to the extent specifically provided in Section 3.1, including without limitation those set forth below (all such liabilities and obligations retained by Seller being referred to herein as the "Retained Liabilities"):

(a) all obligations or liabilities of Sellers or any predecessor(s) or Affiliate(s) of Sellers that relate to any of the Excluded Assets;

(b) all obligations or liabilities of Sellers or any predecessor(s) or Affiliate(s) of Sellers relating to Taxes with respect to the Transferred Assets or otherwise, for all periods, or portions thereof, on or prior to the Closing Date;

(c) all obligations or liabilities for any legal, accounting, investment banking, brokerage or similar fees or expenses incurred by any Seller in connection with, resulting from or attributable to the transactions contemplated by this Agreement and the DIP Facility;

(d) liabilities and obligations for which Purchaser assumes no obligation or liability as described in Section 3.1(d);

(e) all obligations or liabilities for any borrowed money incurred by any Seller or any predecessor(s) or Affiliate(s) of Sellers; and

(f) all liabilities and obligations of Sellers or any predecessor(s) or Affiliate(s) of Sellers resulting from, caused by or arising out of, directly or indirectly, the conduct of their respective businesses or ownership or lease of any of their properties or assets or any properties or assets previously used by any Seller at any time prior to or on the Closing Date, including without limitation such of the foregoing (i) as constitute, may constitute or are alleged to constitute a tort, breach of contract or violation of requirement of any Law, or (ii) that relate to, result in or arise out of the existence or imposition of any liability or obligation to remediate or contribute or otherwise pay any amount under or in respect of any environmental, superfund or other environmental cleanup or remedial Laws, occupational safety and health Laws or other Laws.

ARTICLE IV
PURCHASE PRICE

4.1 Purchase Price. In consideration of the conveyance to Purchaser of each Seller's right, title and interest in and to the Transferred Assets and the other rights granted to Purchaser pursuant hereto, and subject to the conditions and in accordance with terms hereof, at Closing, Purchaser shall (i) assume the Assumed Liabilities and (ii) pay TWA an aggregate of $500,000,000 in cash, subject to adjustments as provided in Section 4.3 and Section 4.4 (the "Purchase Price") and any offsets to the Purchase Price pursuant to Section 4.7.

4.2 Allocation of Purchase Price. Purchaser shall, within 120 days after the Closing Date, prepare and deliver to TWA for its consent (which consent shall not be unreasonably withheld) a schedule allocating the Purchase Price among the Transferred Assets in accordance with Treasury Regulation 1.1060-1T (or any comparable provisions of state or local tax law) or any successor provision. * * *

4.3 Working Capital Adjustment. * * *

4.4 Other Adjustments to Purchase Price. * * *

ARTICLE V
CLOSING

* * *

5.4 Conditions Precedent to Obligations of Purchaser. The obligations of Purchaser under this Agreement to consummate the transactions contemplated hereby to be consummated at the Closing shall be subject to the satisfaction, at or prior to the Closing, of all of the following conditions, any one or more of which may be waived in writing at the option of Purchaser: * * *

(l) The Approval Order [defined in Section 8.11(d)] and the Sale Procedures Order [defined in Section 8.11(a)] shall have been entered, shall be in form and substance reasonably satisfactory to Purchaser, and shall have each become a Final Order, and the Approval Order, the Sale Procedures Order and any other orders of the Bankruptcy Court with respect to this Agreement and the DIP Facility shall be in form and substance reasonably satisfactory to Purchaser. * * *

ARTICLE VI
REPRESENTATIONS AND WARRANTIES OF SELLERS
* * *

ARTICLE VII
REPRESENTATIONS AND WARRANTIES OF PURCHASER
* * *

ARTICLE VIII
PRE-CLOSING COVENANTS
* * *

8.10 Acquisition Proposals; Recapitalization Transaction. From the date hereof until the earlier of (a) the termination hereof or (b) the filing of the Chapter 11 Cases (in which event the provisions of Section 8.11 shall govern), and except as expressly permitted by the following provisions of this Section 8.10, TWA shall not, nor shall it permit any of the other Sellers to, nor shall it authorize or permit any officer, director or employee of or any investment banker, attorney, accountant or other advisor or any representative of any Seller to, directly or indirectly, (i) solicit, initiate or encourage the submission of any Acquisition Proposal or (ii) participate in any discussions or negotiations regarding, or furnish to any person any information with respect to, any Acquisition Proposal; provided, however, that nothing contained in this Section 8.10 shall prohibit the Board of Directors of TWA from furnishing information to, or entering into discussions or negotiations with, any person that makes an unsolicited bona fide written Acquisition Proposal if, and only to the extent that, (A) such Acquisition Proposal constitutes a Superior Proposal, or (B) such Acquisition Proposal constitutes a Recapitalization Transaction and (C) prior to taking such action, TWA (x) provides reasonable notice to Purchaser to the effect that it is taking such action and (y) receives from such person an executed confidentiality agreement in reasonably customary form. Prior to providing any information to or entering into discussions or negotiations with any person in connection with an Acquisition Proposal by such person, TWA shall notify Purchaser of any Acquisition Proposal (including, without limitation, the material terms and conditions thereof and the identity of the person making it) as promptly as practicable after its receipt thereof, and shall provide Purchaser with a copy of any written Acquisition Proposal or amendments or supplements thereto, and shall thereafter inform Purchaser on a prompt basis of the status of any discussions or negotiations with such a third party, and any material changes to the terms and conditions of such Acquisition Proposal, and shall promptly give Purchaser a copy of any information delivered to such Person which has not previously been reviewed by Purchaser. Following the commencement of the Chapter 11 Cases, this Section 8.10 shall be of no further force and effect and the solicitation and acceptance of competing offers (including Acquisition Proposals) shall be governed by Section 8.11 and by order of the Bankruptcy Court**.**

8.11 Bankruptcy Court Approval.

(a) On or before two Business Days after the commencement of the Chapter 11 Cases, TWA shall, and shall cause the other Chapter 11 Sellers to, file a motion or motions with the Bankruptcy Court seeking entry of (i) the Approval Order (as defined in Section 8.11(d)) approving, inter alia, the sale of the Transferred Assets to Purchaser pursuant to sections 363 and 365 of the Bankruptcy Code, subject to higher and better offers and (ii) an order in substantially in the form attached hereto as Exhibit C (with such changes thereto as Purchaser shall approve or request in its sole discretion, the "Sale Procedures Order"), (A) approving the Termination Amount and the Bankruptcy Termination Amount and providing that, in the event the obligation of Seller to pay Purchaser either the Termination Amount or the Bankruptcy Termination Amount arises, such obligation shall constitute a superpriority administrative expense under sections 503(b) and 507(a)(1) of the Bankruptcy Code and shall be payable in accordance with the provisions of Section 12.1 or Section 12.2 without further order of the Bankruptcy Court, (B) establishing procedures and deadlines for the submission of competing offers, including, without limitation, that (1) a competing offer, whether a proposed Recapitalization

Transaction or a proposed purchase or other disposition of the Transferred Assets (collectively, a "Competing Offer"), shall not be considered to be a higher and better offer unless, at a minimum, such offer provides for aggregate consideration of at least $85,000,000 in excess of the Purchase Price (with respect to the initial round of bidding) and of at least $20,000,000 in excess of the aggregate consideration contained in such bidder's prior Competing Offer (with respect to each subsequent round of bidding, if any) and is otherwise a Superior Proposal, (2) a Competing Offer must be accompanied by a good faith cash deposit of at least $50,000,000, (3) Purchaser shall be entitled at its option to match such Competing Offer or make a revised offer following such Competing Offer and (4) Purchaser shall be entitled to credit bid the amount of the Bankruptcy Termination Amount against any revised offer Purchaser may make following such Competing Offer, and (C) scheduling a hearing to consider entry of the Approval Order and providing that notice of such hearing be given to all of Sellers' creditors and interest holders of record and published in the Wall Street Journal (National Edition). Purchaser and Sellers agree to make promptly any filings, to take all actions and to use their reasonable best efforts to obtain entry of the Sale Procedures Order, entry of the Approval Order and any and all other approvals and orders necessary or appropriate for the consummation of the transactions contemplated hereby.

(b) Prior to entry of the Approval Order, TWA and Purchaser shall, and TWA shall cause the other Chapter 11 Sellers to, accurately inform the Bankruptcy Court of all material facts of which they are aware relating to this Agreement and the transactions contemplated hereby.

(c) If the Approval Order, Sale Procedures Order or any other orders of the Bankruptcy Court relating to this Agreement shall be appealed by any Person (or a petition for certiorari or motion for rehearing or reargument shall be filed with respect thereto), TWA agrees to, and shall cause the other Chapter 11 Sellers to, take all steps as may be reasonable and appropriate to defend against such appeal, petition or motion, and Purchaser agrees to cooperate in such efforts, and each party hereto agrees to use its reasonable best efforts to obtain an expedited resolution of such appeal; provided, however, that nothing herein shall preclude the parties hereto from consummating the transactions contemplated herein if the Approval Order shall have been entered and has not been stayed and Purchaser, in its sole discretion, waives in writing the requirement that the Approval Order be a Final Order.

(d) Prior to Closing, the sale of the Transferred Assets to Purchaser pursuant to this Agreement and the other transactions contemplated by this Agreement shall have been approved by order of the Bankruptcy Court pursuant to sections 363 and 365 of the Bankruptcy Code, pursuant to an order in substantially the form attached hereto as Exhibit D (with such changes thereto as Purchaser shall approve or request in its sole discretion, the "Approval Order"), and the Approval Order shall have become a Final Order. Purchaser and TWA agree to use their reasonable best efforts to cause the Bankruptcy Court to enter an Approval Order which contains, among other provisions reasonably requested by Purchaser, the following provisions (it being understood that certain of such provisions may be contained in either the findings of fact or conclusions of law to be made by the Bankruptcy Court as part of the Approval Order): (i) the transfers of the Transferred Assets by Sellers to Purchaser (A) are or will be legal, valid and effective transfers of the Transferred Assets; (B) vest or will vest Purchaser with all right, title and interest of Sellers in and to the Transferred Assets free and clear of all Liens (other than Permitted Liens) and claims (as defined in section 101(5) of the Bankruptcy Code) pursuant to section 363(f) of the Bankruptcy Code (other than Liens created by Purchaser) whatsoever known or unknown including, but not limited to, any of Sellers' creditors, vendors, suppliers, employees or lessors and that Purchaser shall not be liable in any way (as successor entity or otherwise) for any claims that any of the foregoing or any other third party may have against any of the Sellers, the business of Sellers and the Transferred Assets and permanently enjoins and restrains the assertion and prosecution of any claims against Purchaser, Purchaser's Affiliates and the ownership, use and operation of the Transferred Assets, other than claims on the account of Assumed Liabilities; and (C) constitute transfers for reasonably equivalent value and fair consideration under the Bankruptcy Code and the laws of the States of New York and Delaware; (ii) all amounts to be paid to Purchaser pursuant to this Agreement constitute superpriority administrative expenses under sections 503(b) and 507(a)(1) of the Bankruptcy Code and are immediately payable if and when the obligations of Sellers arise under this Agreement, without any further order of the Bankruptcy Court; provided, however, that Sellers shall have the right to contest the validity and amount of such asserted claims; (iii) all Persons are enjoined from taking any action against Purchaser, Purchaser's Affiliates (as they existed immediately prior to the Closing) or the Sellers to recover any claim which such Person has solely against Sellers or any of Sellers' Affiliates (as they existed immediately following the Closing); (iv) the Bankruptcy Court retains exclusive jurisdiction through the Bankruptcy Resolution Date to interpret, construe and enforce the provisions of this Agreement, the Sale Procedures Order and the Approval Order in all respects; provided, however, that in the event the Bankruptcy Court abstains from exercising or declines to exercise jurisdiction with respect to any matter provided for in this clause (iv) or is without jurisdiction, such abstention, refusal or lack of jurisdiction shall have no effect upon and shall not control, prohibit or limit the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter; (v) the provisions of the

Approval Order are nonseverable and mutually dependent; (vi) the transactions contemplated by this Agreement are undertaken by Purchaser and Sellers at arm's length, without collusion and in good faith within the meaning of section 363(m) of the Bankruptcy Code, and such parties are entitled to the protections of section 363(m) of the Bankruptcy Code, (vii) not selling the Transferred Assets free and clear of liens and claims would impact adversely on Sellers' bankruptcy estates; (viii) a sale of the Transferred Assets other than one free and clear of liens and claims would be of substantially less benefit to the estate of the Sellers; (ix) Sellers may assign and transfer to Purchaser all of Sellers' right, title and interest (including common law rights) to all of their intangible property; (x) approves the Sellers' assignment of the Assumed Contracts pursuant to sections 363 and 365 of the Bankruptcy Code and orders Sellers to pay any cure amounts payable to the other parties to the Assumed Contracts from the Purchase Price proceeds; (xi) provides for the retention of jurisdiction by the Bankruptcy Court to resolve any and all disputes that may arise under this Agreement as between Sellers and Purchaser, and further to hear and determine any and all disputes between Sellers and/or Purchaser, as the case may be, and any non-Sellers party to, among other things, any Assumed Contracts, concerning inter alia, Sellers' assignment thereof to Purchaser under this Agreement and any non-Seller's claims arising under any agreements relating to Retained Liabilities; and (xii) pursuant to section 1146(c) of the Bankruptcy Code, provides for the exemption of the transactions contemplated herein from certain taxes, provides for the waiver of so-called "bulk-sale" laws in all necessary jurisdictions, and provides that the transactions contemplated herein are deemed to be under or in contemplation of a plan to be confirmed under section 1129 of the Bankruptcy Code.

(e) TWA shall, and shall cause the other Chapter 11 Sellers to, cooperate reasonably with Purchaser and its representatives in connection with the Approval Order, the Sale Procedures Order and the bankruptcy proceedings in connection therewith. * * *

ARTICLE IX
POST-CLOSING COVENANTS
* * *

ARTICLE X
EMPLOYEE MATTERS
* * *

ARTICLE XI
RISK OF LOSS

11.1 Risk of Loss on Sellers. TWA shall bear the risk of any loss or damage to any Transferred Assets at all times prior to the delivery of physical possession thereof to Purchaser in accordance with Section 5.3. * * *

ARTICLE XII
FURTHER AGREEMENTS AND TERMINATION

12.1 Termination Payment.

(a) In the event this Agreement is terminated pursuant to Section 12.3(c)(v), Section 12.3(d)(ii) or Section 12.3(d)(iii) of this Agreement, then in any such case TWA shall be obligated to pay Purchaser, in cash, the sum of $65,000,000 plus an amount (not to exceed $10,000,000) on account of the Purchaser Expenses.

(b) In the event that this Agreement is terminated pursuant to Section 12.3(c)(iii) (in a case in which any Seller is in material default or material breach of this Agreement, or where a representation or warranty made as of the date hereof is shown to have been inaccurate as of the date hereof, subject to the other terms and conditions of Section 12.3(c)(iii) regarding such inaccuracy), Section 12.3(c)(iv) or Section 12.3(c)(vi) of this Agreement or by TWA pursuant to Section 12.3(b)(iii) of this Agreement, then in any such case TWA shall be obligated to pay Purchaser, in cash, an amount (not to exceed $10,000,000) on account of the Purchaser Expenses.

(c) Any amount payable pursuant to this Section 12.1 shall be referred to as the "Termination Amount". The Termination Amount shall be paid immediately prior to the termination of this Agreement.

12.2 Bankruptcy Termination Payment. In the event this Agreement is terminated pursuant to Section 12.3(b)(i) of this Agreement, TWA shall be obligated to pay to Purchaser, in cash, the sum of $65,000,000 plus an amount (not to exceed $10,000,000) on account of the Purchaser Expenses (such sum being the "Section 12.3(b)(i) Termination Amount"), which amount shall be payable no later than the earlier of (i) the consummation of the Recapitalization Transaction or sale (whether in one transaction or a series of transactions) of either TWA or all or substantially all of the assets of TWA

or all or substantially all of the Transferred Assets to a Person or Persons other than Purchaser or an Affiliate of Purchaser, (ii) the effective date of any plan of reorganization (that is not a plan of liquidation) confirmed in the Chapter 11 Cases, (iii) the dismissal of the Chapter 11 Cases, and (iv) the conversion of the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code. In the event this Agreement is terminated pursuant to Section 12.3(c)(i) or Section 12.3(c)(ii) of this Agreement, then (i) TWA shall be obligated to pay Purchaser, immediately upon such termination of this Agreement, an amount (not to exceed $10,000,000) on account of the Purchaser Expenses, and (ii) if, (x) within twelve (12) months following such termination of this Agreement, TWA or the other Sellers consummate a Recapitalization Transaction or sale of either TWA or all or substantially all of the assets of TWA or all or substantially all of the Transferred Assets to a Person (or group of Persons) other than Purchaser or an Affiliate of Purchaser, or (y) within twenty-four (24) months following such termination of this Agreement, a chapter 11 plan for TWA or the other Sellers is confirmed, then TWA shall be obligated to pay to Purchaser, immediately upon the consummation of any such transaction, an amount equal to $65,000,000 (the sum of the amounts described in clauses (i) and (ii) above being the "Alternative Termination Amount," with the Section 12.3(b)(i) Termination Amount and the Alternative Termination Amount being referred to herein collectively as the "Bankruptcy Termination Amount").

12.3 Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned at any time prior to the Closing:

(a) by mutual consent of each of TWA and Purchaser;

(b) by either of TWA or Purchaser (provided that such party is not then in material breach of any provision of this Agreement or any agreement underlying the DIP Facility):

(i) if the Bankruptcy Court approves a Recapitalization Transaction or a sale of TWA or all or substantially all of the assets of TWA or any of the Transferred Assets to a Person (or group of Persons) other than Purchaser or an Affiliate of Purchaser, provided, that no termination under this Section 12.3(b)(i) shall be effective until the Section 12.3(b)(i) Termination Amount shall have been paid to Purchaser;

(ii) if a Governmental Authority shall have issued an order, decree or ruling or taken any other action (which order, decree or ruling the parties hereto shall use their reasonable best efforts to lift), in each case permanently restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement and such order, decree, ruling or other action shall have become final and nonappealable; or

(iii) if the Closing shall not have occurred on or before the Scheduled Closing Date.

(c) by Purchaser (provided that Purchaser is not then in material breach of any provision of this Agreement or any agreement underlying the DIP Facility):

(i) if the Sale Procedures Order shall not have been entered by the Bankruptcy Court within 20 days of the filing of the bankruptcy petition by Sellers and, as of the time of such termination of this Agreement, the Sale Procedures Order has not been entered by the Bankruptcy Court;

(ii) if the Approval Order has not been entered by the Bankruptcy Court within 50 days of the filing of the bankruptcy petition by Sellers and, as of the time of such termination of this Agreement, the Approval Order has not been entered by the Bankruptcy Court; or

(iii) if a material default or material breach shall be made by any Seller with respect to the due and timely performance of any of its covenants or agreements contained herein, or if its representations or warranties contained in the Agreement shall have become inaccurate (without giving effect to any materiality or Material Adverse Effect qualifications or exceptions contained therein) and such inaccuracy has had or would be reasonably likely to have a Material Adverse Effect, if such default, breach or inaccuracy has not been cured or waived within 30 days after written notice to such Seller specifying, in reasonable detail, such claimed default, breach or inaccuracy and demanding its cure or satisfaction;

(iv) if Purchaser is not satisfied in its sole discretion with the results of its due diligence review of the Transferred Assets (including, without limitation, as a result of review of any schedules provided after the execution of this Agreement) by the Non-Environmental Due Diligence Completion Date;

(v) if the Chapter 11 Cases are not commenced on or before the date that is one day following the date of this Agreement and, as of the time that the terminating party provides the other party with notice of such termination of this Agreement, the Chapter 11 Cases have not been commenced; or

(vi) if an event or events or circumstance shall have occurred since the date of this Agreement which, independently or together with any other event, events or circumstance that have occurred or are reasonably likely to occur, have or are reasonably likely to have a Material Adverse Effect.

(d) by TWA (provided that TWA is not then in material breach of any provision of this Agreement or any agreement underlying the DIP Facility): * * *

12.4 Procedure and Effect of Termination. This Agreement shall in no event terminate unless and until any and all amounts payable to Purchaser pursuant to Section 12.1 and Section 12.2 in connection with such proposed termination shall have been paid in full to Purchaser. In the event of termination and abandonment of the transactions contemplated hereby pursuant to Section 12.3, written notice thereof shall forthwith be given to the other parties to this Agreement and this Agreement shall terminate (subject to the provisions of this Section 12.4) and the transactions contemplated hereby shall be abandoned, without further action by any of the parties hereto. If this Agreement is terminated as provided herein:

(a) upon request therefor, each party shall redeliver all documents, work papers and other material of any other party relating to the transactions contemplated hereby, whether obtained before or after the execution hereof, to the party furnishing the same;

(b) no party hereto shall have any liability or further obligation to any other party to this Agreement resulting from such termination except (i) that the provisions of Section 12.1, Section 12.2, this Section 12.4 and Section 9.3 shall remain in full force and effect and (ii) no party waives any claim or right against a breaching party to the extent that such termination results from the breach by a party hereto of any of its representations, warranties, covenants or agreements set forth in this Agreement; provided, however, that in the event Purchaser is entitled to receive the Termination Amount or the Bankruptcy Termination Amount, the right of Purchaser to receive such amount shall constitute Purchaser's sole remedy for (and such amount shall constitute liquidated damages in respect of) any breach by any Seller of any of its representations, warranties, covenants or agreements set forth in this Agreement; and

(c) the DIP Facility shall be terminated or shall terminate in accordance with its terms.

ARTICLE XIII
MISCELLANEOUS PROVISIONS
* * *
IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.
AMERICAN AIRLINES, INC.
By:_____
Name:_____
Title:_____
TRANS WORLD AIRLINES, INC.
By:_____
Name:_____
Title:_____

* * *

EXHIBIT C

SALE PROCEDURES ORDER
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
TRANS WORLD AIRLINES, INC., et al. ,)		Case No. 01-0__(__)

) (Jointly Administered))
Debtors.)
ORDER (A) AUTHORIZING AND SCHEDULING A PUBLIC AUCTION AT
WHICH THE DEBTORS WILL SOLICIT BIDS FOR THE SALE OF SUBSTANTIALLY ALL OF THEIR ASSETS FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES; (B) APPROVING PROCEDURES FOR THE SUBMISSION OF COMPETING OFFERS; (C) APPROVING CERTAIN TERMINATION RIGHTS, EXPENSE REIMBURSEMENT AND OTHER BIDDING RIGHTS PROVISIONS; (D) SCHEDULING A HEARING TO CONSIDER APPROVAL OF SUCH SALE; AND (E) APPROVING THE FORM AND MANNER OF NOTICE OF THE SALE AND COMPETING OFFER PROCEDURES PURSUANT TO FED. R. BANKR. PROC. 2002 * * *

NOW, THEREFORE, IT IS HEREBY:

ORDERED that the Motion is approved; and it is

ORDERED that the following procedures relating to the submission and consideration of competing offers (an "Alternative Transaction") are hereby approved:

(1) The Debtors shall provide (a) notice of the Auction, the Sale Motion and competitive bidding procedures, together with a copy of the Agreement, to those persons who were contacted by the Debtors' financial advisor, Rothschild Inc. ("Rothschild"), or who contacted or were contacted by Rothschild or the Debtors during the prepetition marketing process with respect to a potential purchase of the Assets and (b) a copy of the Agreement to all other prospective offerors and parties in interest upon written request to the Debtors;

(2) Upon request by a prospective offeror to the Debtors, the Debtors shall, upon execution by such prospective offeror of a confidentiality agreement in form and substance reasonably satisfactory to the Debtors and delivery of such prospective offeror's certified financial statements for the preceding two years, (or of other evidence establishing to the Debtors' satisfaction such prospective offeror's financial capability to timely consummate its proposed Alternative Transaction), provide such person (a "Prospective Offeror") with access to all relevant business and financial information necessary to enable such person to evaluate the Debtors' assets and liabilities for the purpose of submitting a competing offer for an Alternative Transaction. The Debtors shall promptly provide Purchaser with the name of each such Prospective Offeror;

(3) To be considered, each competing offer for an Alternative Transaction shall remain open and be irrevocable in accordance with its terms through the Sale Hearing and, if it is identified as the Final Accepted Offer (as defined below) through the date on which all applicable regulatory approvals of its offer is obtained and shall:

(i) be made by a party satisfying the conditions described in the preceding paragraph (b) (a "Competing Bidder");

(ii) be submitted in writing and contain (A) a representation that the Competing Bidder will agree to all terms and conditions set forth in the Agreement other than matters relating to bidding provisions or (B) a mark-up of the Agreement indicating the specific changes to the Agreement that the Competing Bidder requires;

(iii) provide for the Debtors review only of the Competing Bidder's draft submissions relating to the approval of the Competing Bidder's purchase of the Transferred Assets by the Federal Trade Commission in accordance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, if required to consummate the transaction, (B) represent that the Competing Bidder is prepared to immediately initiate all actions necessary to obtain all other applicable regulatory approvals for the competing bid, and (C) provide its good faith estimate of the time within which such approvals will be obtained;

(iv) not be considered to be a higher or better offer unless, at a minimum, such offer (A) provides for aggregate consideration to the Debtors' estates of at least $85,000,000 in excess of the Purchase Price to be paid by Purchaser under the Agreement and is otherwise a Superior Proposal and (B) is not conditioned on the outcome of due diligence that is not completed by a date that is two business days prior to the date of the Auction. As set forth in the Agreement, a "Superior Proposal" means a proposal that the Debtors' Boards of Directors have determined in good faith, if accepted, is reasonably likely to be consummated taking into account all legal, financial, regulatory and other aspects of the proposal and the person making the proposal, and that the Debtors' Boards of Directors believe in good faith, would, if

consummated, result in a transaction more favorable from a financial point of view than the transaction proposed by the Agreement;

(v) include a good faith deposit of $50,000,000 in cash or in other form of immediately available U.S. funds (the "Initial Deposit") and a commitment to provide, in the event such offer ultimately is determined by the Debtors to be the Final Accepted Offer (as defined below), a further deposit in cash or in other form of immediately available U.S. funds in the amount sufficient to bring the total deposit up to the amount that is equal to 10% of the value of the offer (the "Remaining Deposit" and together with the Initial Deposit, the "Full Deposit") within one business day after the Debtors notifies the Competing Bidder that its offer has been determined by the Debtors to be the Final Accepted Offer (as defined below); and

(vi) be submitted on or before 4:00 o'clock p.m. E.S.T. on March 1, 2001, * * *

(6) On March 5, 2001 at 10:00 a.m. (Eastern Time), the Debtors shall conduct an auction at the offices of Kirkland & Ellis, 153 East 53rd Street, New York, NY 10022, on invitation to Purchaser and each Competing Bidder that has made a timely Conforming Competing Bid to determine whether the Initial Accepted Offer or a higher and better offer will be presented to the Court for approval at the Sale Hearing. * * *

(10) If there is competitive bidding at the Auction, overbids other than the Initial Overbid of $85,000,000 shall be in an amount of at least $20,000,000;

(11) Purchaser shall have the right at the Auction to match (but not exceed) the highest bid by any Competing Bidder, should it desire to do so, and thus be deemed a higher and better offer;

* * *

(15) Promptly following the conclusion of the Sale Hearing, the Debtors shall return to each unsuccessful Competing Bidder its Initial Deposit, together with any interest paid thereon, submitted by such unsuccessful Competing Bidder. * * *

EXHIBIT D

APPROVAL ORDER

IN THE UNITED STATES BANKRUPTCY
COURT FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
TRANS WORLD AIRLINES, INC., et al.,	)	Case No. 01-0___ (____)
	)	(Jointly Administered)
Debtors.	)	
	)	

ORDER PURSUANT TO SECTIONS 105(a), 363, 365, AND 1146(c)
OF THE BANKRUPTCY CODE (i) AUTHORIZING THE DEBTORS'
SALE OF SUBSTANTIALLY ALL OF THEIR ASSETS, FREE
AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES; (ii)
APPROVING AN ASSET PURCHASE AGREEMENT; AND (iii) APPROVING
THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES IN CONNECTION WITH SUCH SALE

A hearing having been held on January 9, 2001 (the "Hearing"), to consider the motion, dated January 9, 2001 (the "Motion") of the above captioned debtors and debtors in possession (collectively, the "Debtors") for an order pursuant to sections 105(a), 363, 365, and 1146(c) of title 11 of the United States Code (the "Bankruptcy Code") (i) authorizing the Debtors' sale of substantially all of their assets (the "Transferred Assets"), in accordance with the terms and conditions of that certain Asset Purchase Agreement, dated as of January, 2001, between the Debtors, as sellers ("Sellers"), and American Airlines, Inc., as purchaser ("Purchaser"), a copy of which is annexed to the Motion as Exhibit A (the "Agreement"), subject to higher and better offers, free and clear of all liens, claims and encumbrances other than the liens

created by Purchaser and attach to the proceeds of such sale, all as more fully set forth in the Motion; (ii) approving the Agreement; and (iii) approving the assumption and assignment of certain executory contracts and unexpired leases (the "Assumed Contracts") in connection with such sale; and the Court having entered an Order, dated January ___, 2001 (the "Sale Procedures Order"), authorizing the Debtors to conduct, and approving the terms and conditions of, an auction (the "Auction") to consider higher and better offers for the Transferred Assets (an "Alternative Transaction"), establishing dates for the Auction and the Hearing, and approving the procedures for the submission of competing offers, the form and manner of notice of the Auction, the Motion, and the Hearing, and the proposed Bankruptcy Termination Payment set forth in Article XII of the Agreement; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. (S)(S) 157(b)(2) and 1334; and consideration of the Motion, the relief requested therein, and the responses thereto, if any, being a core proceeding in accordance with 28 U.S.C. (S) 157(b); and the appearances of all interested parties and all responses and objections to the Motion, if any, having been duly noted in the record of the Hearing; and upon the record of the Hearing, the Motion, said responses and objections, if any; and after due deliberation and sufficient cause appearing therefor, the Court hereby FINDS, DETERMINES, AND CONCLUDES THAT: * * *

7. The Agreement represents the highest and best offer received by Sellers for the Transferred Assets.

8. The sale consideration to be realized by Sellers pursuant to the Agreement is fair and reasonable.

9. The transactions contemplated by the Agreement are undertaken by Sellers and Purchaser at arm's length, without collusion and in good faith within the meaning of section 363(m) of the Bankruptcy Code, and such parties are entitled to the protections of section 363(m) of the Bankruptcy Code.

10. A sale of the Transferred Assets other than one free and clear of Liens, claims, and encumbrances would impact adversely on Sellers' bankruptcy estates and would be of substantially less benefit to the estates of the Sellers.

11. The decision to assume and assign the Assumed Contracts is based on the reasonable exercise of the Debtors' business judgment and is in the best interests of the Debtors' estates.

12. Purchaser has demonstrated adequate assurance of future performance with respect to the Assumed Contracts. * * *

DOCUMENTARY APPENDIX Z, TXU LBO, GO SHOP; BREAKUP AND REVERSE BREAKUP FEES; FINANCING; REG. APPROVALS

[*See* Principally Chapters 3, 13, 14, 15, and 27 of Business Planning for Mergers and Acquisitions]

TXU LBO, FORM 8-K DESCRIPTION OF THE DEAL AND FOLLOWING PROVISIONS OF THE MERGER AGREEMENT: GO SHOP, TWO-TIER TERMINATION FEE, REVERSE BREAKUP FEE, FINANCING, AND REGULATORY APPROVALS

Description of the Deal in TXU's Form 8-K Announcing the Deal, February 25, 2007

Item 1.01 Entry into a Material Definitive Agreement.

On February 25, 2007, TXU Corp., a Texas corporation (the "Company"), entered into an Agreement and Plan of Merger (the "Merger Agreement") with Texas Energy Future Holdings Limited Partnership, a Delaware limited partnership ("Parent"), and Texas Energy Future Merger Sub Corp, a Texas corporation and a wholly-owned subsidiary of Parent ("Merger Sub"). Under the terms of the Merger Agreement, Merger Sub will be merged with and into the Company, with the Company continuing as the surviving corporation and becoming a wholly-owned subsidiary of Parent (the "Merger"). Parent is led by a consortium of private investment funds affiliated with Kohlberg Kravis Roberts & Co. and Texas Pacific Group.

Pursuant to the Merger Agreement, at the effective time of the Merger, each outstanding share of common stock, no par value, of the Company (the "Common Stock"), other than certain specified shares, will be cancelled and converted into the right to receive $69.25 in cash, without interest. [The aggregate purchase price is approximately $32 billion, plus the assumption of TXU's $13 billion of debt.]

The Merger Agreement contains a "go shop" provision pursuant to which the Company has the right to solicit and engage in discussions and negotiations with respect to competing proposals through April 16, 2007. After that date, the Company may continue discussions with certain persons who have made proposals prior to the end of the go-shop period. After this period, the Company is not permitted to solicit other proposals and may not share information or have discussions regarding alternative proposals, except in certain circumstances.

The Company may terminate the Merger Agreement under certain circumstances, including if its board of directors determines in good faith that it has received a superior proposal, and otherwise complies with certain terms of the Merger Agreement. In connection with such termination, the Company must pay a fee of $1 billion to Parent, unless such termination is in connection with a superior proposal submitted by certain persons who made such a proposal prior to the end of the go-shop period, in which case the fee will be $375 million. In certain other circumstances, the Merger Agreement provides for Parent to pay to the Company a fee of $1 billion upon termination of the Merger Agreement. [This is a reverse breakup fee.]

Parent has provided the Company with executed equity and debt financing commitments that provide for the necessary funds to consummate the transactions contemplated by the Merger Agreement. Consummation of the Merger is subject to various conditions, including approval of the Merger by a vote of two-thirds of the outstanding Common Stock, expiration or termination of applicable waiting periods under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, approval of the Federal Energy Regulatory Commission and the Nuclear Regulatory Commission and other customary closing conditions.

The foregoing summary of the Merger Agreement and the transactions contemplated thereby do not purport to be complete and are subject to, and qualified in its entirety by, the full text of the Merger Agreement attached as Exhibit 2.1 and incorporated herein by reference.

[Set out below are provisions of the merger agreement addressing the structure of the deal and the breakup and termination fee provisions.]

AGREEMENT AND PLAN OF MERGER
Among
TXU CORP.,
TEXAS ENERGY FUTURE HOLDINGS LIMITED PARTNERSHIP
and

TEXAS ENERGY FUTURE MERGER SUB CORP
Dated as of February 25, 2007
* * *

AGREEMENT AND PLAN OF MERGER (hereinafter called this "Agreement"), dated as of February 25, 2007, among TXU Corp., a Texas corporation (the "Company"), Texas Energy Future Holdings Limited Partnership, a Delaware limited partnership ("Parent"), and Texas Energy Future Merger Sub Corp, a Texas corporation and a wholly owned subsidiary of Parent ("Merger Sub," the Company and Merger Sub sometimes being hereinafter collectively referred to as the "Constituent Corporations").

RECITALS

WHEREAS, Parent, the board of directors of Merger Sub, and the board of directors of the Company, following the unanimous recommendation of the Strategic Transactions Committee of the board of directors of the Company (the "Transactions Committee"), have unanimously (by all directors voting) approved this Agreement and the merger of Merger Sub with and into the Company (the "Merger") upon the terms and subject to the conditions set forth in this Agreement and have authorized the execution hereof, and the board of directors of the Company has adopted a resolution unanimously (by all directors voting) recommending that this Agreement and the plan of merger set forth in this Agreement be approved by the shareholders of the Company.

WHEREAS, contemporaneously with the execution and delivery of this Agreement, and as a condition to the willingness of the Company to enter into this Agreement, each of KKR 2006 Fund L.P., TPG Partners V, L.P., Citigroup Global Markets Inc. and Morgan Stanley & Co. Incorporated (the "Guarantors") are each entering into a guarantee in favor of the Company in the form attached hereto as Exhibit A (the "Guarantee"), pursuant to which the Guarantors are severally guaranteeing certain obligations of Parent and Merger Sub in connection with this Agreement.

WHEREAS, the Company, Parent and Merger Sub desire to make certain representations, warranties, covenants and agreements in connection with this Agreement.

NOW, THEREFORE, in consideration of the premises, and of the representations, warranties, covenants and agreements contained herein, the parties hereto agree as follows: * * *

ARTICLE V

Representations and Warranties

5.1 Representations and Warranties of the Company. * * *

(d) Governmental Filings; No Violations; Certain Contracts. **[*See* Chapter 29]**

(i) Other than the filings and/or notices (A) pursuant to Section 1.3, (B) required as a result of facts and circumstances solely attributable to Parent or Merger Sub, (C) under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act") and the expiration or earlier termination of applicable waiting periods thereunder, (D) under the Exchange Act, (E) under rules promulgated by the NYSE and the Chicago Stock Exchange, (F) with the Federal Energy Regulatory Commission ("FERC") pursuant to Section 203 of the Federal Power Act and the approval of FERC thereunder (the "FERC Approval"), (G) with the Federal Communications Commission (the "FCC") for the transfer of radio licenses and point-to-point private microwave licenses held indirectly by the Company and the approval of the FCC for such transfer (the "FCC Approval") and (H) with the Nuclear Regulatory Commission (the "NRC") for approval of any indirect license transfer deemed to be created by the Merger and the approval of the NRC for such transfer (the "NRC Approval" and, together with the other approvals referred to in Subsections (C) through (G) of this Section 5.1(d)(i), the "Company Approvals"), no notices, reports or other filings are required to be made by the Company with, nor are any consents, registrations, approvals, permits or authorizations required to be obtained by the Company from, any federal, state or local, domestic or foreign governmental or regulatory authority, agency, commission, body, arbitrator, court, regional transmission organization, ERCOT, or any other legislative, executive or judicial governmental entity (each a "Governmental Entity"), in connection with the execution, delivery and performance of this Agreement by the Company and the consummation of the Merger and the other transactions contemplated hereby, except those, the failure to make or obtain which would not, individually or in the aggregate, reasonably be expected to have a Company Material Adverse Effect or prevent, materially delay or materially impair the consummation of the transactions contemplated by this Agreement. * * *

5.2 Representations and Warranties of Parent and Merger Sub. * * *

(e) Financing. **[Buyer's Representations Relating to the Financing of the Transaction, *see* Chapter 14]**

Section 5.2(e)(i) of the Parent Disclosure Letter sets forth a true and complete copy of the commitment letter, dated as of the date of this Agreement, among Citigroup Global Markets Inc., Goldman Sachs Credit Partners L.P., JPMorgan Chase Bank, N.A., J.P. Morgan Securities Inc., Lehman Brothers Inc., Lehman Brothers Commercial Bank, Lehman Commercial Paper Inc. and Morgan Stanley Senior Funding, Inc. (the "Debt Financing Commitment"), pursuant to which

lenders party thereto have committed, subject to the terms and conditions set forth therein, to lend the amounts set forth therein for the purposes of financing the transactions contemplated by this Agreement and related fees and expenses (the "Debt Financing"). Section 5.2(e)(ii) of the Parent Disclosure Letter sets forth true and complete copies of the equity commitment letters, dated as of the date of this Agreement, from (i) KKR 2006 Fund L.P., (ii) TPG Partners V, L.P., (iii) J.P. Morgan Ventures Corporation, (iv) Citigroup Global Markets Inc. and (v) Morgan Stanley & Co. Incorporated (collectively, the "Equity Financing Commitments" and together with the Debt Financing Commitment, the "Financing Commitments"), pursuant to which the investor parties thereto have committed, subject to the terms and conditions set forth therein, to invest the amounts set forth therein (the "Equity Financing" and together with the Debt Financing, the "Financing"). Prior to the date hereof, (i) none of the Financing Commitments has been amended or modified, (ii) no such amendment or modification is contemplated, and (iii) the respective commitments contained in the Financing Commitments have not been withdrawn or rescinded in any respect. Merger Sub has fully paid any and all commitment fees or other fees in connection with the Financing Commitments that are payable on or prior to the execution hereof. The Financing Commitments are in full force and effect as of the date hereof and are the legal, valid and binding obligations of Merger Sub and, to the knowledge of Parent, of the other parties thereto. Notwithstanding anything in this Agreement to the contrary, one or more Debt Financing Commitment may, in accordance with the provisions of this Agreement, be superseded at the option of Parent after the date of this Agreement but prior to the Effective Time by instruments (the "New Debt Financing Commitments") replacing existing Debt Financing Commitment, provided that the terms of the New Debt Financing Commitments shall not (a) expand upon the conditions precedent to the Financing as set forth in the Debt Financing Commitment or (b) otherwise delay the Closing. In such event, the term "Financing Commitments" as used herein shall be deemed to include the Financing Commitments that are not so superseded at the time in question and the New Debt Financing Commitments to the extent then in effect. There are no conditions precedent or other contingencies related to the funding of the full amount of the Financing, other than as set forth in or contemplated by the Financing Commitments. As of the date hereof, no event has occurred that, with or without notice, lapse of time or both, would constitute a default on the part of Parent or Merger Sub under any of the Financing Commitments. As of the date hereof, Parent has no reason to believe that any of the conditions to the Financing contemplated by the Financing Commitments will not be satisfied or that the Financing will not be made available to Parent on the Closing Date. Assuming the Financing Commitments are funded, Parent and Merger Sub will have at and after the Closing funds sufficient to pay the aggregate Per Share Merger Consideration (and any repayment or refinancing of debt contemplated by this Agreement or the Financing Commitments) and any other amounts required to be paid in connection with the consummation of the transactions contemplated hereby, and to pay all related fees and expenses. * * *

(j) Solvency. **[Buyer's Solvency Representation to Avoid Fraudulent Conveyance, see Chapter 14]** As of the Effective Time, assuming (i) satisfaction of the conditions to Parent's and Merger Sub's obligation to consummate the Merger, or waiver of such conditions, (ii) the accuracy of the representations and warranties of the Company set forth in Section 5.1 hereof (for such purposes, such representations and warranties shall be true and correct in all material respects without giving effect to any "knowledge", materiality or "Material Adverse Effect" qualification or exception) including, without limitation, the representations and warranties set forth in Section 5.1(e)(iii), and (iii) estimates, projections or forecasts provided by the Company to Parent prior to the date hereof have been prepared in good faith on assumptions that were and continue to be reasonable, and after giving effect to the transactions contemplated by this Agreement, including the Financing, and the payment of the aggregate Per Share Merger Consideration, any other repayment or refinancing of existing indebtedness contemplated in this Agreement or the Financing Commitments, payment of all amounts required to be paid in connection with the consummation of the transactions contemplated hereby, and payment of all related fees and expenses, each of Parent and the Surviving Corporation will be Solvent as of the Effective Time and immediately after the consummation of the transactions contemplated hereby. For the purposes of this Agreement, the term "Solvent" when used with respect to Parent and the Surviving Corporation, means that, as of any date of determination (a) the amount of the "fair saleable value" of the assets of Parent and the Surviving Corporation will, as of such date, exceed (i) the value of all "liabilities of Parent and the Surviving Corporation, including contingent and other liabilities," as of such date, as such quoted terms are generally determined in accordance with applicable federal Laws governing determinations of the insolvency of debtors, and (ii) the amount that will be required to pay the probable liabilities of Parent and the Surviving Corporation on their existing debts (including contingent and other liabilities) as such debts become absolute and mature, (b) Parent and the Surviving Corporation will not have, as of such date, an unreasonably small amount of capital for the operation of the businesses in which they intend to engage or propose to be engaged following the Closing Date, and (c) Parent and the Surviving Corporation will be able to pay their liabilities, including contingent and other liabilities, as they mature. For purposes of this definition, "not have an unreasonably small amount of capital for the operation of the businesses in which it is engaged or proposed to be engaged" and "able to pay its liabilities, including contingent and other liabilities, as they mature" means that Parent and the Surviving Corporation will be able to generate enough cash from operations, asset dispositions or refinancing, or a

combination thereof, to meet its obligations as they become due.

ARTICLE VI
Covenants
* * *

6.2 Acquisition Proposals. **[*See* Chapters 13 and 15]**

(a) [**The Go-Shop Period**] During the period beginning on the date of this Agreement and continuing until 12:01 a.m. (EST) on April 16, 2007 (the "No-Shop Period Start Date"), the Company and its Subsidiaries and their respective directors, officers, employees, investment bankers, attorneys, accountants and other advisors or representatives (collectively, "Representatives"), shall have the right to: (i) initiate, solicit and encourage Acquisition Proposals, including by way of providing access to non-public information to any Person pursuant to an Acceptable Confidentiality Agreement, provided that the Company shall promptly make available to Parent and Merger Sub any material non-public information concerning the Company or its Subsidiaries that is provided to any Person given such access which was not previously made available to Parent or Merger Sub; and (ii) enter into and maintain or continue discussions or negotiations with respect to Acquisition Proposals or otherwise cooperate with or assist or participate in, or facilitate any such inquiries, proposals, discussions or negotiations.

(b) [**The No-Shop Period**] Except as expressly permitted by this Section 6.2 and except as may relate to any Person [or in certain cases a group] * * * from whom the Company has received, after the date hereof and prior to the No-Shop Period Start Date, a written Acquisition Proposal that the board of directors of the Company or any committee thereof determines in good faith is bona fide and could reasonably be expected to result in a Superior Proposal (any such Person or group of related Persons, an "Excluded Party" * * *) [Excluded Parties are Persons who have made a potential Superior Proposal during the Go-Shop Period], the Company and its Subsidiaries and their respective officers and directors shall, and the Company shall use its reasonable best efforts to instruct and cause its and its Subsidiaries' other Representatives to, (i) on the No-Shop Period Start Date, immediately cease any discussions or negotiations with any Persons that may be ongoing with respect to an Acquisition Proposal; and (ii) from the No-Shop Period Start Date until the Effective Time or if earlier, the termination of this Agreement in accordance with Article VIII, not (A) initiate, solicit or knowingly encourage any inquiries or the making of any proposal or offer that constitutes, or may reasonably be expected to lead to, an Acquisition Proposal, (B) engage in, continue or otherwise participate in any discussions or negotiations regarding, or provide any non-public information or data to any Person relating to, any Acquisition Proposal, or (C) otherwise knowingly facilitate any effort or attempt by any Person to make an Acquisition Proposal. No later than the first business day following the No-Shop Period Start Date, the Company shall notify Parent in writing of the number of Excluded Parties, and promptly following the No-Shop Period Start Date shall identify in writing to Parent any Excluded Parties who are reasonably expected to make an Acquisition Proposal after the No-Shop Period Start Date.

(c) [**The Fiduciary Out and Superior Proposal Exceptions to the No-Shop**] Notwithstanding anything to the contrary contained in Section 6.2(b) but subject to the last sentence of this paragraph, at any time following the No-Shop Period Start Date and prior to the time, but not after, the Requisite Company Vote is obtained, the Company may (A) provide information in response to a request therefor by a Person who has made an unsolicited bona fide written Acquisition Proposal after the date of this Agreement if the Company receives from the Person so requesting such information an executed Acceptable Confidentiality Agreement, provided that the Company shall promptly make available to Parent and Merger Sub any material non-public information concerning the Company or its Subsidiaries that is provided to any Person making such Acquisition Proposal that is given such access and that was not previously made available to Parent, Merger Sub or their Representatives; (B) engage or participate in any discussions or negotiations with any Person who has made such an unsolicited bona fide written Acquisition Proposal; or (C) after having complied with Section 6.2(e), adopt, approve or recommend or propose to adopt, approve or recommend (publicly or otherwise) such an Acquisition Proposal, if and only to the extent that, (x) prior to taking any action described in clause (A), (B) or (C) above, the board of directors of the Company determines in good faith after consultation with outside legal counsel that failure to take such action could be inconsistent with the directors' fiduciary duties under applicable Law, and (y) in each such case referred to in clause (A) or (B) above, the board of directors of the Company has determined in good faith based on the information then available and after consultation with its financial advisor that such Acquisition Proposal either constitutes a Superior Proposal or could reasonably be expected to result in a Superior Proposal; and (z) in the case referred to in clause (C) above, the board of directors of the Company determines in good faith (after consultation with its financial advisor and outside legal counsel) that such Acquisition Proposal is a Superior Proposal. Notwithstanding the foregoing, the parties agree that, notwithstanding the commencement of the No-Shop Period Start Date, the Company may continue to engage in the activities described in Section 6.2(a) with respect to any Excluded Parties, including with respect to any amended proposal submitted by such Excluded Parties following the No-Shop Period Start Date, and the

restrictions in this Section 6.2(c) shall not apply with respect thereto, provided that to the extent applicable to an Excluded Party, the provisions of Section 6.2(e) shall apply.

(d) For purposes of this Agreement:

"Acceptable Confidentiality Agreement" means a confidentiality agreement that contains provisions that are no less favorable in the aggregate to the Company than those contained in the Confidentiality Agreement (it being understood that such confidentiality agreement need not prohibit the making or amendment of an Acquisition Proposal or the disclosure of such Acquisition Proposal, provided that such confidentiality agreement shall not prohibit compliance with the last two sentences of Section 6.2(e).

"Acquisition Proposal" means any inquiry, proposal or offer with respect to (i) a merger, joint venture, partnership, consolidation, dissolution, liquidation, tender offer, recapitalization, reorganization, share exchange, business combination or similar transaction or (ii) any other direct or indirect acquisition, in each case, under clauses (i) and (ii), involving 15% or more of the total voting power of any class of equity securities of the Company, or 15% or more of the consolidated total revenues or consolidated total assets (including equity securities of its Subsidiaries) of the Company, in each case other than the transactions contemplated by this Agreement, provided that an "Acquisition Proposal" shall not include a recapitalization of the Company or its Subsidiaries or a split-off or spin-off of one or more of the business units or Subsidiaries of the Company that is not a component of and a material condition to a third party Acquisition Proposal in which the consideration to holders of equity securities of the Company that is not funded by borrowings of the Company or its Subsidiaries is predominantly funded from such third party.

"Superior Proposal" means a bona fide Acquisition Proposal involving (A) assets that generate more than 50% of the consolidated total revenues, or (B) assets that constitute more than 50% of the consolidated total assets of the Company and its Subsidiaries or (C) more than 50% of the total voting power of the equity securities of the Company that the board of directors of the Company has determined in its good faith judgment, would, if consummated, result in a transaction more favorable to the Company's shareholders from a financial point of view than the transaction contemplated by this Agreement (x) after taking into account the likelihood and timing of consummation (as compared to the transactions contemplated hereby) and (y) after taking into account all material legal, financial (including the financing terms of any such proposal), regulatory or other aspects of such proposal.

"Excluded Party Superior Proposal" means any Superior Proposal made by any Excluded Party on or prior to the No-Shop Period Start Date and any subsequent Superior Proposal made prior to the tenth business day following the No-Shop Period Start Date by such Excluded Party.

(e) [**Change in Company Recommendation to Shareholders etc.**] Except as set forth in Section 6.2(e) or Section 6.2(f), the board of directors of the Company shall not:

(i) withhold, withdraw, qualify or modify (or publicly propose or resolve to withhold, withdraw, qualify or modify (except, in each case, in connection with taking any actions required by clauses (A) and (B) of this Section 6.2(e) or the proviso set forth in Section 8.3(a)), in a manner adverse to Parent, the Company Recommendation [**the TXU board's recommendation that the shareholders approve the transaction**] with respect to the Merger or adopt, approve or recommend or propose to adopt, approve or recommend (publicly or otherwise) an Acquisition Proposal (except, in the case only of any proposal to do so, in connection with taking any actions required by clauses (A) and (B) of this Section 6.2(e) or the proviso in Section 8.3(a)); or

(ii) except as expressly permitted by Section 8.3(a), cause or permit the Company to enter into any acquisition agreement, merger agreement or similar definitive agreement (other than a confidentiality agreement referred to in Section 6.2(a) or Section 6.2(c)) (an "Alternative Acquisition Agreement") relating to any Acquisition Proposal.

Notwithstanding anything to the contrary set forth in this Agreement, prior to the time, but not after, the Requisite Company Vote [the TXU shareholder vote] is obtained, the board of directors of the Company may withhold, withdraw, qualify or modify the Company Recommendation in response to a material change in circumstances or approve, recommend or otherwise declare advisable any Superior Proposal made after the date hereof, if the Board of Directors of the Company determines in good faith, after consultation with outside counsel, that failure to do so could be inconsistent with its fiduciary obligations under applicable Law (any of the foregoing, a "Change of Recommendation"), provided that in the case of any Change in Recommendation that is not the result of an Excluded Party Superior Proposal:

(A) the Company shall have provided prior written notice to Parent and Merger Sub, at least five calendar days in advance (the "Notice Period"), of its intention to effect a Change of Recommendation which notice shall specify the basis for such Change of Recommendation including, if in connection with a Superior Proposal, the identity of the party making the Superior Proposal and the material terms thereof; and

(B) [**Agreement to negotiate but no "match provision"**] prior to effecting such Change of Recommendation, the Company shall, and shall cause its financial and legal advisors to, during the Notice Period, negotiate with Parent and Merger Sub in good faith (to the extent Parent and Merger Sub desire to negotiate) to make such adjustments in the terms and conditions of this Agreement as would permit the Company not to effect a Change of Recommendation. * * *

(f) Nothing contained in this Section 6.2 shall be deemed to prohibit the Company or the board of directors of the Company from (i) complying with its disclosure obligations under U.S. federal or state Law with regard to an Acquisition Proposal, including taking and disclosing to its shareholders a position contemplated by Rule 14d-9 or Rule 14e-2(a) under the Exchange Act (or any similar communication to stockholders), provided that any such disclosure (other than a "stop, look and listen" communication or similar communication of the type contemplated by Rule 14d-9(f) under the Exchange Act) shall be deemed to be a Change of Recommendation unless the board of directors of the Company expressly publicly reaffirms at least two business days prior to the Shareholders Meeting its recommendation in favor of the approval of this Agreement, or (ii) making any "stop-look-and-listen" communication or similar communication of the type contemplated by Rule 14d-9(f) under the Exchange Act.

(g) From and after the No-Shop Period Start Date, the Company agrees that it will promptly (and, in any event, within 48 hours) notify Parent if any proposals or offers with respect to an Acquisition Proposal are received by, any non-public information is requested from, or any discussions or negotiations are sought to be initiated or continued with, it or any of its Representatives indicating, in connection with such notice, the identity of the Person or group of Persons making such offer or proposal, the material terms and conditions of any proposals or offers (including, if applicable, copies of any written requests, proposals or offers, including proposed agreements) and thereafter shall keep Parent reasonably informed, on a prompt basis, of the status and terms of any such proposals or offers (including any amendments thereto) and the status of any such discussions or negotiations, including any change in the Company's intentions as previously notified. * * *

6.5 Filings; Other Actions; Notification. **[*See* Chapter 29]**

(a) Cooperation. (i) * * * The Company and Parent shall use their respective commercially reasonable efforts to file with the FERC an application for the FERC Approval within 20 business days after the date hereof. * * *

(d) Regulatory Matters. Subject to the terms and conditions set forth in this Agreement, without limiting the generality of the other undertakings pursuant to this Section 6.5, each of the Company (in the case of Subsections 6.5(d)(i) and (iii) set forth below) and Parent (in all cases set forth below) agree to take or cause to be taken the following actions:

(i) the prompt provision to each and every federal, state, local or foreign court or Governmental Entity (including FERC) with jurisdiction over any Company Approvals or Parent Approvals of non-privileged information and documents reasonably requested by any such Governmental Entity or that are necessary, proper or advisable to permit consummation of the transactions contemplated by this Agreement;

(ii) with respect to the FERC Approval, the expiration or earlier termination of the waiting period applicable to the consummation of the Merger under the HSR Act, and any other approval or consent of a Governmental Entity arising due to a change in Law after the date of this Agreement, the prompt use of its best efforts to obtain all such necessary approvals and avoid the entry or enactment of any permanent, preliminary or temporary injunction or other order, decree, decision, determination, judgment or Law that would restrain, prevent, enjoin, materially delay or otherwise prohibit consummation of the transactions contemplated by this Agreement, including the proffer and agreement by Parent of its willingness to sell or otherwise dispose of, or hold separate pending such disposition, and promptly to effect the sale, disposal and holding separate of, such assets, categories of assets or businesses or other segments of the Company or Parent or either's respective Subsidiaries or Affiliates (and the entry into agreements with, and submission to orders of, the relevant Governmental Entity giving effect thereto) if such action should be reasonably necessary or advisable to avoid, prevent, eliminate or remove the actual, anticipated or threatened (x) commencement of any proceeding in any forum or (y) issuance, enactment or enforcement of any order, decree, decision, determination, judgment or Law that would delay, restrain, prevent, enjoin or otherwise prohibit consummation of the Merger by any Governmental Entity; and * * *

(e) NRC Approval. (i) The Company and Parent shall jointly prepare and cause TXU Generation Company LP to file as promptly following the date hereof as may be practicable (and in any event use reasonable best efforts to file within 25 business days after the date hereof) one or more applications (the "NRC Application") with the NRC for approval of the indirect transfer of the NRC license for Comanche Peak and, if and to the extent necessary, any conforming amendment of the NRC license to reflect such indirect transfer. Thereafter, the Company and Parent shall cooperate with one another to facilitate review of the NRC Application by the NRC staff, including but not limited to promptly providing the NRC staff with any and all documents or information that the NRC staff may reasonably request or require any of the parties to provide or generate.

(ii) The NRC Application shall identify TXU Generation Company LP, the Company and Parent as separate parties to the NRC Application, but the Company and Parent shall jointly direct and control the prosecution of the NRC Application. In the event the processing of the NRC Application by the NRC becomes subject to a hearing or other extraordinary procedure by the NRC (a "Contested Proceeding"), until the earlier of the time such Contested Proceeding becomes final and nonappealable and the Effective Time, the Company, on the one hand, and Parent, on the other hand,

shall separately appear therein by their own counsel, and shall continue to cooperate with each other to facilitate a favorable result.

(iii) The Company and Parent will bear their own costs of the preparation, submission and processing of the NRC Application, including any Contested Proceeding that may occur in respect thereof; provided, however, that Parent, on the one hand, and the Company, on the other hand, shall equally share the costs of all NRC staff fees payable in connection with the NRC Application and costs incurred by TXU Generation Company LP in filing and prosecuting the NRC Application. In the event that the Company and Parent agree upon the use of common counsel, they shall share equally the fees and expenses of such counsel.

(iv) Parent will conform to the restrictions on foreign ownership, control or domination contained in Sections 103d and 104d of the Atomic Energy Act, 42 U.S.C. §§ 2133(d) and 2134(d), as applicable, and the NRC's regulations in 10 C.F.R. § 50.38 and will, as promptly as practicable after the date of this Agreement, use best efforts to develop and implement in a manner satisfactory to the NRC a mitigation plan to address foreign ownership and control and any other concerns that may be raised by the NRC, including accepting any licensing conditions imposed by the NRC, provided that nothing in this Section 6.5(e)(iv) shall obligate Parent to proffer, agree or commit to (A) modify Parent's and its Subsidiaries (including the Company its Subsidiaries) anticipated capital structure (including levels of indebtedness) as set forth in the Financing Commitment in effect on the date hereof (or in any Financing Commitments thereafter having a capital structure reflecting at least as much equity financing as is reflected in the Financing Commitments in effect on the date hereof) in any material respect following the Closing; or (B) subject to Parent's representations in Sections 5.2(g) and 5.2(h) being true and correct in all material respects, any modification in the identity of the equityholders of Parent and its Affiliates or the amounts of their equity investment, in each case as set forth in the Equity Financing Commitments in effect on the date hereof.

(f) If, after the date of this Agreement, the legislature of the State of Texas passes a statute which is enacted into Law or any binding regulatory or administrative action is taken pursuant to authority granted by such new statute which, in either case, imposes a requirement that the Company or its Subsidiaries divest or submit to capacity auctions for baseload solid fuel generation capacity (a "Baseload Enactment"), then, unless within 30 days after the date either party notifies the other in writing of such Baseload Enactment (each such 30th day, a "Baseload Waiver Date"), Parent and Merger Sub notify the Company in writing either (i) that such Baseload Enactment is not, and does not impose, a Material Baseload Divestiture Requirement or (ii) that no changes or effects to the extent resulting from such Baseload Enactment shall constitute or be taken into account in determining whether there has been a Company Material Adverse Effect (each written notice referred to in clause (ii) being an "MAE Exclusion Agreement"), the Company shall have the right for 15 days after the Baseload Waiver Date to terminate this Agreement pursuant to Section 8.3(d). Each party agrees to notify the other promptly upon determining in good faith that a Baseload Enactment has been enacted or taken. * * *

6.15 Financing. **[*See* Chapter 14]** (a) Parent shall use its reasonable best efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary, proper or advisable to arrange the Debt Financing on the terms and conditions described in the Debt Financing Commitment (provided that Parent and Merger Sub may replace or amend the Debt Financing Commitment to add lenders, lead arrangers, bookrunners, syndication agents or similar entities which had not executed the Debt Financing Commitment as of the date hereof, or otherwise so long as the terms would not adversely impact the ability of Parent or Merger Sub to timely consummate the transactions contemplated hereby or the likelihood of consummation of the transactions contemplated hereby), including using reasonable best efforts to (i) maintain in effect the Debt Financing Commitment, (ii) negotiate definitive agreements with respect thereto on the terms and conditions contemplated by the Financing Commitments or, to the extent the financing contemplated by the Financing Commitments is not available to Parent, on other terms no less favorable to Parent and Merger Sub and (iii) satisfy on a timely basis all conditions in such Debt Financing Commitment applicable to Parent and Merger Sub that are within their control. In the event that all conditions to the Financing Commitments (other than in connection with the Debt Financing, the availability or funding of any of the Equity Financing) have been satisfied in Parent's good faith judgment, and subject in the case of bridge financing to the sixth sentence of this Section 6.15(a), Parent shall use its reasonable best efforts to cause the lenders and the other Persons providing such Financing to fund on the Closing Date the Financing required to consummate the Merger (including by taking enforcement action to cause such lenders and the other Persons providing such Financing to fund such Financing). If any portion of the Debt Financing becomes unavailable on the terms and conditions contemplated in the Debt Financing Commitment, Parent shall use its reasonable best efforts to arrange to obtain alternative financing from alternative sources on terms no less favorable to Parent (as determined in the reasonable judgment of Parent) as promptly as practicable following the occurrence of such event but no later than the final day of the Marketing Period [defined below] or, if earlier, the business day immediately prior to the Termination Date. Parent shall give the Company prompt notice of any material breach by any party to the Financing Commitments, of which Parent or Merger Sub becomes aware, or any termination of the Financing Commitments. Parent

shall keep the Company informed on a reasonably current basis of the status of its efforts to arrange the Debt Financing. For the avoidance of doubt, in the event that (x) all or any portion of the Debt Financing structured as high yield financing has not been consummated, (y) all closing conditions contained in Article VII (other than the delivery of the officers' certificates contemplated in Sections 7.2(a), 7.2(b), 7.3(a) and 7.3(b)) shall have been satisfied or waived and (z) the bridge facilities contemplated by the Debt Financing Commitment (or alternative bridge financing obtained in accordance with this Agreement) are available on the terms and conditions described in the Debt Financing Commitment (or replacements thereof on terms and conditions no less favorable to Parent and Merger Sub), then Parent shall cause the proceeds of such bridge financing to be used to replace such high yield financing no later than the final day of the Marketing Period or, if earlier, the business day immediately prior to the Termination Date. For purposes of this Agreement, "Marketing Period" shall mean the first period of 20 consecutive days after the date hereof throughout which (A) Parent shall have the Required Financial Information that the Company is required to provide to Parent pursuant to Section 6.15(b) and (B) the conditions set forth in Section 7.1 shall be satisfied and nothing has occurred and no condition exists that would cause any of the conditions set forth in Sections 7.2(a) or 7.2(b) to fail to be satisfied assuming the Closing were to be scheduled for any time during such 20 day period, provided that if the Marketing Period has not ended (i) on or prior to August 16, 2007, the Marketing Period shall commence no earlier than September 3, 2007 or (ii) on or prior to December 20, 2007, the Marketing Period shall commence no earlier than January 2, 2008; and provided, further, that the "Marketing Period" shall not be deemed to have commenced if, prior to the completion of the Marketing Period, Deloitte & Touche LLP shall have withdrawn its audit opinion with respect to any financial statements contained in the Company Reports. * * *

ARTICLE VII
Conditions

7.1 Conditions to Each Party's Obligation to Effect the Merger. The respective obligation of each party to effect the Merger is subject to the satisfaction or waiver at or prior to the Effective Time of each of the following conditions: * * *

(b) Regulatory Consents. **[*See* Chapter 29]** The waiting period applicable to the consummation of the Merger under the HSR Act shall have expired or been earlier terminated; each of the NRC Approval and the FERC Approval shall have been obtained and be in effect.

7.3 Conditions to Obligation of the Company. The obligation of the Company to effect the Merger is also subject to the satisfaction or waiver by the Company at or prior to the Effective Time of the following conditions: * * *

(c) Solvency Certificate. **[*See* Chapter 14]** Parent shall have delivered to the Company a solvency certificate substantially similar in form and substance to the solvency certificate to be delivered to the senior lenders pursuant to the Debt Financing Commitment or any agreements entered into in connection with the Debt Financing. * * *

ARTICLE VIII
Termination **[*See* Chapter 13 and 15]**

8.1 Termination by Mutual Consent. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, whether before or after the approval of this Agreement by the shareholders of the Company referred to in Section 7.1(a) [**conditions to closing**], by mutual written consent of the Company and Parent by action of their respective boards of directors.

8.2 Termination by Either Parent or the Company. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time by action of either Parent or the board of directors of the Company if (a) the Merger shall not have been consummated by March 15, 2008 [**first drop dead date**], whether such date is before or after the date of approval of this Agreement by the shareholders of the Company referred to in Section 7.1(a) (the "Termination Date"), provided that, if on March 15, 2008 the conditions to Closing shall not have been fulfilled but remain capable of fulfillment then either of Parent (in the event such failure of the conditions to be satisfied relates to a change in Law after the date hereof) or the Company may, by written notice to the other, extend the termination date from March 15, 2008 to June 15, 2008 [**second drop dead date**] (which shall then be the "Termination Date"); provided, further, that (x) if the Marketing Period has commenced on or before any such Termination Date, but not ended on or before any such Termination Date, such Termination Date shall automatically be extended by one month and (y) the Termination Date shall not occur sooner than three business days after the final day of the Marketing Period; provided, further, that in no event shall the Termination Date be later than July 10, 2008 [**third drop dead date**] (which extended date (as ultimately extended in the case of more than one extension) shall then be the "Termination Date"), provided that the right to terminate this Agreement pursuant to this Section 8.2(a) shall not be available to any party whose failure to fulfill any obligation under this Agreement has been the cause of or resulted in the failure of the Merger to occur on or before the Termination Date, (b) the adoption of this Agreement by the shareholders of the Company referred to in Section 7.1(a) shall not have been obtained at the Shareholders Meeting or at any adjournment or postponement thereof

or (c) any Order permanently restraining, enjoining, rendering illegal or otherwise prohibiting consummation of the Merger shall become final and non-appealable (whether before or after the approval of this Agreement by the shareholders of the Company referred to in Section 7.1(a)).

8.3 Termination by the Company. * * *

8.4 Termination by Parent. This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time by action of Parent:

(a) if the Board of Directors of the Company (i) shall have made a Change of Recommendation, (ii) shall have approved or recommended to the stockholders of the Company an Acquisition Proposal or (iii) the Company fails to include the recommendation of the approval of this Agreement in the Proxy Statement; or

(b) if there has been a breach in any material respect of any representation, warranty, covenant or agreement made by the Company in this Agreement, or any such representation and warranty shall have become untrue after the date of this Agreement, such that Sections 7.1, 7.2(a) or 7.2(b) would not be satisfied and such breach or condition is not curable prior to the Termination Date; provided, however, that Parent is not then in material breach of this Agreement so as to cause any of the conditions set forth in Section 7.1, 7.3(a) or 7.3(b) not to be satisfied.

8.5 Effect of Termination and Abandonment.

(a) In the event of termination of this Agreement and the abandonment of the Merger pursuant to this Article VIII, this Agreement shall become void and of no effect with no liability to any Person on the part of any party hereto (or of any of its Representatives or Affiliates); provided, however, and notwithstanding anything in the foregoing to the contrary, that (i) except as otherwise provided herein and subject to this Section 8.5 or Section 9.10(a), no such termination shall relieve any party hereto of any liability or damages to the other party hereto resulting from any willful breach of this Agreement and (ii) the provisions set forth in the second sentence of Section 9.1 shall survive the termination of this Agreement.

(b) In the event that:

(i) a bona fide Acquisition Proposal shall have been made to the Company or any of its Subsidiaries or any Person shall have publicly announced or publicly made known an intention (whether or not conditional) to make an Acquisition Proposal with respect to the Company or any of its Subsidiaries (and such Acquisition Proposal or publicly announced intention shall not have been publicly withdrawn without qualification at least (A) 30 days prior to, with respect to any termination pursuant to Section 8.2(a), the date of termination (provided that at such time the Requisite Company Vote has been obtained), and (B) 10 business days prior to, with respect to termination pursuant to Section 8.2(b), the date of the Shareholders Meeting at which the vote on the Merger is held) and thereafter this Agreement is terminated by either Parent or the Company pursuant to Section 8.2(a), 8.2(b) or 8.4(b) (if in the case of a termination pursuant to Section 8.4(b), at the time of such termination there is no state of facts or circumstances (other than a state of facts or circumstances caused by a breach of the Company's representations and warranties or covenants or other agreements hereunder) that would cause the conditions set forth in Section 7.1, 7.3(a) and 7.3(b) not to be satisfied on or prior to the Termination Date);

(ii) this Agreement is terminated by Parent pursuant to Section 8.4(a); or

(iii) this Agreement is terminated by the Company pursuant to Section 8.3(a);

then [**TXU's Termination Fee**] the Company shall concurrently with such termination pursuant to Section 8.3(a), and otherwise promptly, but in no event later than three business days after the date of such termination, pay as directed by Parent the Termination Fee (as defined below) less the amount of any Parent Expenses previously paid to Parent (if any), by wire transfer of same day funds; provided, however, that no Termination Fee shall be payable as directed by Parent pursuant to clause (i) of this paragraph (b) unless and until within 12 months of such termination the Company or any of its Subsidiaries shall have entered into an Alternate Acquisition Agreement with respect to, or shall have consummated or shall have approved or recommended to the Company's shareholders, an Acquisition Proposal (substituting "50%" for "15%" in the definition thereof). The Company's payment pursuant to clauses (ii) or (iii) of this Section 8.5(b) shall be the sole and exclusive monetary remedy of Parent, Merger Sub and their Affiliates for damages against the Company and any of its Subsidiaries and the Company's and its Subsidiaries' respective Representatives with respect to any breach of any covenant or agreement giving rise to or associated with such termination. "Termination Fee" shall mean an amount equal to $375 million if the Termination Fee becomes payable in connection with a transaction or Alternate Acquisition Agreement with an Excluded Party **[$375 million fee if termination attributable to a transaction arising during the Go-Shop Period, which is 1.2% of the total consideration paid for TXU's stock**] and shall mean an amount equal to $1,000,000,000 (one billion dollars) in all other circumstances **[$1 billion fee if termination attributable to a transaction arising during the No-Shop Period, which is 3.1% of the total consideration paid for TXUS stock**].

(c) [**Parent's Reverse Termination Fee**] In the event of termination of this Agreement pursuant to Section 8.3(b) [**termination by Company because of breach of Parent's or Merger Sub's representations and warranties or covenants**] (if at the time of such termination there is no state of facts or circumstances (other than a state of facts or

circumstances caused by a breach of Parent's or Merger Sub's representations and warranties or covenants or other agreements hereunder) that would cause the conditions set forth in Section 7.1, 7.2(a) and 7.2(b) not to be satisfied on or prior to the Termination Date) or Section 8.3(c), Parent shall pay or cause to be paid, to the Company as promptly as reasonably practicable (and, in any event, within three business days following such termination) an amount equal to $1,000,000,000 (one billion dollars) (the "Parent Fee") [**a reverse termination fee**].

(d) [**Parent's Expenses**] In the event of termination of this Agreement by either party pursuant to Section 8.2(b) [**drop dead date**] (or a termination by the Company pursuant to a different section of Section 8.2 at a time when this Agreement was terminable pursuant to Section 8.2(b)), the Company shall promptly, but in no event later than three business days after being notified of such by Parent, pay Parent all of the documented out-of-pocket expenses incurred by Parent or Merger Sub in connection with this Agreement and the transactions contemplated by this Agreement (including the Financing) up to a maximum amount of $50 million (the "Parent Expenses"), by wire transfer of same day funds.

(e) [**Cost and Expenses of Suit and Liability Limitation**] The parties acknowledge that the agreements contained in this Section 8.5 are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, the parties would not enter into this Agreement; accordingly, if the Company fails to promptly pay the amount due pursuant to Section 8.5(b) or 8.5(d) or Parent fails to promptly pay the amount due pursuant to Section 8.5(c), and, in order to obtain such payment, Parent or Merger Sub, on the one hand, or the Company, on the other hand, commences a suit that results in a judgment against the Company for the amount set forth in Section 8.5(b) or 8.5(d) or any portion thereof or a judgment against Parent for the amount set forth in Section 8.5(c) or any portion thereof, the Company shall pay to Parent or Merger Sub, on the one hand, or Parent shall pay to the Company, on the other hand, its costs and expenses (including attorneys' fees) in connection with such suit, together with interest on the amount of such amount or portion thereof at the prime rate of Citibank N.A. in effect on the date such payment was required to be made through the date of payment. Notwithstanding anything to the contrary in this Agreement, the Company's right to receive payment of the Parent Fee from Parent pursuant to this Section 8.5 and the reimbursement and indemnification obligations of Parent under Sections 6.15(b) and 6.16(d) hereof or the guarantee thereof pursuant to the Guarantees shall, subject to Section 9.10, be the sole and exclusive remedy of the Company and its Subsidiaries against Parent, Merger Sub, the Guarantors and any of their respective former, current, or future general or limited partners, stockholders, managers, members, directors, officers, Affiliates or agents for the loss suffered as a result of the failure of the Merger to be consummated, and upon payment of such amounts, none of Parent, Merger Sub, the Guarantors or any of their respective former, current, or future general or limited partners, stockholders, managers, members, directors, officers, Affiliates or agents shall have any further liability or obligation relating to or arising out of this Agreement or the transactions contemplated by this Agreement (except that Parent shall also be obligated with respect to the first sentence of this Section 8.5(e) and the indemnification and reimbursement obligations of Parent contained in the penultimate sentence of Section 6.15(b) and Section 6.16(d)). * * *

DOCUMENTARY APPENDIX AA, PARTNERSHIP JOINT VENTURE AGREEMENT FOR SPRINT SPECTRUM

[*See* Section 27.7 of Business Planning for Mergers and Acquisitions; *Compare* the Limited Liability Company Joint Venture Agreement, Appendix BB]

AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP
OF
MAJORCO, L.P.,
A DELAWARE LIMITED PARTNERSHIP

This AMENDED AND RESTATED AGREEMENT OF LIMITED PARTNERSHIP is entered into as of the 31st day of January, 1996, by and among Sprint Spectrum, L.P., a Delaware limited partnership ("Sprint "), TCI Network Services, a Delaware general partnership ("TCI"), Comcast Telephony Services, a Delaware general partnership ("Comcast"), and Cox Telephony Partnership, a Delaware general partnership ("Cox"), each as a General Partner and a Limited Partner, pursuant to the provisions of the Delaware Revised Uniform Limited Partnership Act, on the following terms and conditions:

WHEREAS, Sprint, TCI, Comcast and Cox entered into that certain Agreement of Limited Partnership of Majorco, L.P., dated as of March 28, 1995 (as amended by that certain First Amendment to Agreement of Limited Partnership dated as of August 31, 1995, the "Prior Partnership Agreement"), providing for the formation of the Partnership by the filing of a Certificate of Limited Partnership with the Secretary of State of Delaware;

WHEREAS, Sprint, TCI, Comcast and Cox wish to further amend the Prior Partnership Agreement and to restate the Prior Partnership Agreement, as so amended, in its entirety; and

WHEREAS, Sprint, TCI, Comcast and Cox wish to continue the Partnership upon the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the premises and mutual covenants and agreements contained herein, and in order to set forth the respective rights, obligations, and interests of the parties to one another, the parties, intending to be legally bound, hereby agree as follows:

SECTION 1. THE PARTNERSHIP

* * *

1.2 *Name.* * * *

1.3 *Purpose.*

(a) Subject to, and upon the terms and conditions of this Agreement, the purposes of the Partnership shall be to engage in the Wireless Business and in the provision of Non-Exclusive Services, either directly or through one or more Subsidiaries, and to perform such activities in the furtherance of such Wireless Business and provision of Non-Exclusive Services as may be approved from time to time by the Partnership Board. Without a Unanimous Partner Vote, the Partnership shall not engage in any other business, including any of the Excluded Businesses.* * *

(b) The Partnership shall have all the powers now or hereafter conferred by the laws of the State of Delaware on limited partnerships formed under the Act and, subject to the limitations of this Agreement, may do any and all lawful acts or things that are necessary, appropriate, incidental or convenient for the furtherance and accomplishment of the purposes of the Partnership. * * *

1.5 *Term.* * * *

1.7 *Title to Property.*

No Partner shall have any ownership interest in its individual name or right in any real or personal property owned, directly or indirectly, by the Partnership, and each Partner's Interest shall be personal property for all purposes. The Partnership shall hold all of its real and personal property in the name of the Partnership or its nominee and not in the name of any Partner. * * *

1.10 *Definitions.* * * *

SECTION 2. PARTNERS' CAPITAL CONTRIBUTIONS

2.1 *Percentage Interests: Preservation of Percentages of Interests Held as General Partners and as Limited Partners,*

The initial Percentage Interest of each Partner as of the date of this Agreement is set forth on Schedule 2.1 and represents the sum of the "General Partner Percentage Interest" and "Limited Partner Percentage Interest" of such Partner as set forth in such Schedule 2.1. Except as expressly provided in this Agreement, or as may result from a Transfer of Interests required or permitted by this Agreement, the Percentage Interest of a Partner shall not be subject to increase or decrease without such Partner's prior consent. * * *

2.2 *Partners' Original Capital Contributions.*

The Original Capital Contribution of each Partner consists of the contributions of cash and Property made by such Partner pursuant to the terms of the Prior Partnership Agreement prior to January 1, 1996. * * *

2.7 *Partner Loans: Other Borrowings.*

(a) *Partner Loans.* In order to satisfy the Partnership's financial needs, the Partnership may, if so approved by the requisite vote of the Partnership Board, borrow from (i) banks, lending institutions or other unrelated third parties, and may pledge Partnership properties or the production of income therefrom to secure and provide for the repayment of such loans and (ii) any Partner or an Affiliate of a Partner. * * *

SECTION 3. ALLOCATIONS

3.1 *Profits.*

After giving effect to the special allocations set forth in Sections 3.3 and 3.4, Profits for any Allocation Year shall be allocated in the following order and priority:

(a) First, one hundred percent (100%) to the Partners, in proportion to, and to the extent of, an amount equal to the excess, if any, of (i) the cumulative Losses allocated to each such Partner pursuant to Section 3.5 for all prior Allocation Years, over (ii) the cumulative Profits allocated to such Partner pursuant to this Section 3.1(a) for all prior Allocation Years; * * *

(d) The balance, if any, among the Partners in proportion to their Percentage Interests.

3.2 *Losses.*

After giving effect to the special allocations set forth in Sections 3,3 and 3.4, and subject to Section 3.5, Losses for any Allocation Year shall be allocated in the following order and priority:

(a) First, one hundred percent (100%) to the Partners, in proportion to, and to the extent of, the excess, if any, of (i) the cumulative Profits allocated to each such Partner pursuant to Section 3.1(d) for all prior Allocation Years, over (ii)

the cumulative Losses allocated to such Partner pursuant to this Section 3.2(a) for all prior Allocation Years; * * *

(c) The balance, if any, among the Partners in proportion to their Percentage Interests.

3.3 *Special Allocations.* [Relating to certain federal income tax requirements.]* * *

3.5 *Loss Limitation.*

The Losses allocated pursuant to Section 3.2 shall not exceed the maximum amount of Losses that can be so allocated without causing (or increasing the amount of) any Exclusive Limited Partner to have an Adjusted Capital Account Deficit at the end of any Allocation Year. All Losses in excess of such limitation shall be allocated to the Partners who are not Exclusive Limited Partners in proportion to their Percentage Interests.

SECTION 4. DISTRIBUTIONS

4.1 *Available Cash.*

From time to time the Partnership Board [the board that manages the partnership] by a Required Majority Vote may determine to distribute Available Cash to the Partners. * * *

4.2 *Tax Distributions*

(a) Subject to Section 4.2(b), Available Cash shall be distributed to the Partners in proportion to their Percentage Interests within one hundred thirty-five (135) days after the end of each Fiscal Year of the Partnership in an aggregate amount equal to the Hypothetical Federal Income Tax Amount for such Fiscal Year. * * *

SECTION 5. MANAGEMENT

5.1 *Authority of the Partnership Board.*

(a) *General Authority.* Subject to the limitations and restrictions set forth in this Agreement, the General Partners shall conduct the business and affairs of the Partnership, and all powers of the Partnership, except those specifically reserved to the Partners by the Act or this Agreement, are hereby granted to and vested in the General Partners, which shall conduct such business and exercise such powers through their Representatives on the Partnership Board. * * *

5.4 *Limitation of Agency.*

The Partners agree not to exercise any authority to act for or to assume any obligation or responsibility on behalf of the Partnership or any of its Subsidiaries except (i) as approved by the Partnership Board by Required Majority Vote, (ii) as approved by written agreement among the General Partners and (iii) as expressly provided herein. * * *

5.6 *Indemnification.*

Any Person asserting a right to indemnification under Section 5.4 or 5.5 shall so notify the Partnership or the other Partners, as the case may be, in writing.

* * *

5.8 *Deadlocks.*

(a) *Escalation Procedures.* Upon the occurrence of a Deadlock Event, the General Partners shall first use their good faith efforts to resolve such matter in a mutually satisfactory manner. If, after such efforts have continued for twenty (20) days, no mutually satisfactory solution has been reached, the General Partners shall resolve the Deadlock Event as provided herein:

(i) The General Partners shall (at the insistence of any of them) refer the matter to the chief executive officers of their respective Parents for resolution.

(ii) Should the chief executive officers of the Parents fail to resolve the matter within ten (10) days after it is referred to them, each General Partner (or any group of General Partners electing to act together) shall prepare a brief (a "Brief"), which includes a summary of the issue, its proposed resolution of the issue and considerations in support of such proposed resolution, not later than ten (10) days following the failure of the chief executive officers to resolve such dispute, and such Briefs shall be submitted to such reputable and experienced mediation service as is selected by the Partnership Board by Required Majority Vote or, failing such selection, by the Chief Executive Officer (the "Mediator"). During a period of twenty (20) days, the Mediator and the General Partners shall attempt to reach a resolution of the Deadlock Event.

(iii) In the event that after such twenty (20) day period (or such longer period as the Partnership Board may approve by Required majority Vote), the General Partners are still unable to reach resolution of the Deadlock Event (such resolution to be evidenced by the requisite vote of the Partnership Board with respect to the underlying matters), the Deadlock Event shall constitute a Liquidating Event as provided in Section (a)(iii) unless the Partnership Board determines by Required Majority Vote not to dissolve. * * *

(b) *Deadlock Event.* A "Deadlock Event" shall be deemed to have occurred it (i) after failing to approve a Proposed Budget or Proposed Business Plan for one Fiscal Year, the Partnership Board has failed to approve a Proposed Budget or Proposed Business Plan for the next succeeding Fiscal Year prior to the commencement of such succeeding Fiscal Year, or (ii) the position of Chief Executive Officer is vacant for a period of more than sixty (60) days after at least two Partners with an aggregate of at least thirty-three percent (33%) of the Voting Percentage Interests have proposed a candidate to fill such vacancy.

5.9 *Conversion to Corporate Form* * * *

SECTION 6. PARTNERSHIP OPPORTUNITIES; CONFIDENTIALITY

6.1 *Competitive Activities.*

(a) *In General.* For so long as any Person is a Partner, neither such Person nor any of its Controlled Affiliates shall engage in any Competitive Activity in the United States of America (including its territories and possessions other than Puerto Rico) except (i) through the Partnership and its Subsidiaries, (ii) subject to Section 6.1(d), as provided in Section 6.1(b) or 6.1(c), (iii) as permitted or contemplated under Section 6.3, or (iv) as permitted by Section 6.1(f), 6.3, 6.4 or 8.1. * * *

6.6 *Confidentiality.* * * *

SECTION 8 - TRANSACTIONS WITH PARTNERS; OTHER AGREEMENTS * * *

SECTION 10. ACCOUNTING, BOOKS AND RECORDS * * *

SECTION 11. ADVERSE ACT

11.1 *Remedies.*

(a) If an Adverse Act [*i.e.*, Partner's material breach of the partnership agreement] has occurred with respect to any Partner, (x) in the case of an Adverse Act specified in clause (vii) of the definition of such term in Section 1.10, any General Partner may elect or (y) in the case of any other Adverse Act, the Partnership Board (with the Representatives of the affected Partner abstaining) may elect:

(i) to cause the Partnership to commence the procedures specified in Section 11.2 for the purchase of the Adverse Partner's Interest; or

(ii) to cause the Partnership to seek to enjoin such Adverse Act or to obtain specific performance of the Adverse Partner's obligations or Damages (as defined and subject to the limitations specified below) in respect of such Adverse Act. * * *

SECTION 12. DISPOSITIONS OF INTERESTS

12.1 *Restriction on Dispositions.*

Except as otherwise permitted by this Agreement, no Partner shall Dispose of all or any portion of its Interest.

12.2 *Permitted Transfers.*

Subject to the conditions and restrictions set forth in Section 12.3, a Partner may at any time Transfer all or any portion of its Interest (a) to any Controlled Affiliate of such Partner * * *.

12.4 *Right of First Refusal.*

After March 1, 2000, a Partner may Transfer all or any portion of its Interest (the "Offered Interest") if (i) such Partner (the "Seller") first offers to sell the Offered Interest pursuant to the terms of this Section 12.4, and (ii) the Transfer of the Offered Interest to the Purchaser (as defined below) would not cause an Adverse Act under clause (vii) of the definition thereof. * * *

12.5 *Tagalong Rights.*

(a) *Direct Transfers.* In the event that (i) a Partner proposes to Transfer its Interest (as part of a single transaction or any series of related transactions) to any Person other than a Controlled Affiliate of such Partner after March 1, 2000, and such Transfer would cause the proposed transferee (a "Tagalong Purchaser") and its Controlled Affiliates to own more than fifty-five percent (55%) of the Percentage Interests (a "Tagalong Transaction") and (ii) the Firm Offer is not accepted in the manner provided in Section 12.4, the Tagalong Transaction shall not be permitted hereunder unless the Tagalong Purchaser offers to purchase the entire Interest of any other Partner that desires to sell its Interest to the Tagalong Purchaser at the same price per each one percent (1%) Percentage Interest and on the same terms and conditions as the Tagalong Purchaser has offered to the Partner proposing to make such Transfer (the "Transferring Partner"). * * *

SECTION 14. DISSOLUTION AND WINDING UP

14.1 *Liquidation Events.*

(a) *In General.* Subject to Section 14.1(b), the Partnership shall dissolve and commence winding up and liquidating upon the first to occur of any of the following ("Liquidating Events"):

(i) The sale of all or substantially all of the Property;

(ii) A Unanimous Vote of the Partnership Board to dissolve, wind up, and liquidate the Partnership in accordance with Section 5.1;

(iii) The failure of the General Partners to resolve a Deadlock Event as provided in Section 5.8(a)(iii) unless the Partnership Board determines by Required Majority Vote not to dissolve; and

(iv) The withdrawal of a General Partner, the assignment by a General Partner of its entire Interest or any other event that causes a General Partner to cease to be a general partner under the Act, provided that any such event shall not constitute a Liquidating Event if the Partnership is continued pursuant to this Section 14.1. * * *

14.2 *Winding Up.*

(a) Upon the occurrence of a Liquidating Event, the Partnership shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets, and satisfying the claims of its creditors and Partners and neither the Partnership Board nor any Partner shall take any action that is inconsistent with, or not appropriate for, the winding up of the Partnership's business and affairs. * * * The Partnership Board shall be responsible for overseeing the winding up and dissolution of the Partnership, shall take full account of the Partnership's liabilities and Property, shall cause the Partnership's Property to be liquidated as promptly as is consistent with obtaining the fair value thereof, and shall cause the proceeds therefrom, to the extent sufficient therefor, to be applied and distributed in the following order:

(i) First, to the payment of all of the Partnership's debts and liabilities (other than Partner Loans) to creditors other than the Partners and to the payment of the expenses of liquidation;

(ii) Second, to the payment of all Partner Loans and all of the Partnership's debts and liabilities to the Partners in the following order and priority:

(A) first, to the payment of all debts and liabilities owed to any Partner other than in respect of Partner Loans;

(B) second, to the payment of all accrued and unpaid interest on Partner Loans, such interest to be paid to each Partner and its Affiliates (considered as a group) pro rata in proportion to the interest owed to each such group; and

(C) third, to the payment of the unpaid principal amount of all Partner Loans, such principal to be paid to each Partner and its Affiliates (considered as a group) pro rata in proportion to the outstanding principal owed to each such group; and

(iii) The balance, if any, to the Partners in accordance with their Capital Accounts, after giving effect to all contributions, distributions, and allocations for all periods. * * *

DOCUMENTARY APPENDIX BB, LIMITED LIABILITY COMPANY JOINT VENTURE AGREEMENT

[*See* Section 27.7 of Business Planning for Mergers and Acquisitions; *Compare* the Partnership Joint Venture Agreement, Appendix AA]

Prepared by:
Stuart Levine
Baltimore, Maryland
ALI-ABA RESOURCE MATERIALS, PARTNERSHIPS, LLCS AND LLPS (13th ed.) 1998
Reprinted with Permission

ARTICLES OF ORGANIZATION
OF
SONS OF THE DESERT, LLC

The Undersigned, being duly authorized to execute and file these Articles of Organization for record with the Maryland State Department of Assessments and Taxation, hereby certifies that:

FIRST: The name of the limited liability company or hereinafter referred to as the "Company") is "Sons of the Desert, LLC."

SECOND: The purposes for which the Company is formed are:

(a) To engage in the business of the manufacture and sale, at retail and wholesale, of tents; and

(b) To have all of the powers permitted by Section 4A-203 of the Corporations and Associations Article of the Maryland Annotated Code, as amended from time to time.

THIRD: The address of the principal office of the Company in this state is * * *

FOURTH: The name and address of the resident agent of the Company are * * *

FIFTH: Pursuant to '4A-401(a)(3) of the Maryland Limited Liability Company Act, no member of the Company shall be an agent of the Company solely by virtue of being a member, and no member shall have authority to act for the Company solely by virtue of being a member.1

IN WITNESS WHEREOF, I have signed these Articles of Organization and acknowledged the same to be my act this 5th day of May, 1998. * * *

OPERATING AGREEMENT

OF

SONS OF THE DESERT, LLC * * *

SONS OF THE DESERT, LLC
OPERATING AGREEMENT

1 *This is an agency limitation statement which removes the presumption that all members are agents of the LLC.*

This Operating Agreement (this "Agreement") is entered into this ___ day of May, 1998, by and among Stanley Laurel and Oliver Hardy.

EXPLANATORY STATEMENT

The parties have agreed to organize and operate a limited liability company in accordance with the terms of and subject to the conditions set forth in, this Agreement.

NOW, THEREFORE, for good and valuable consideration, the parties, intending legally to be bound, agree as follows:

SECTION I
DEFINED TERMS

* * *

DOCUMENTARY APPENDIX CC, CONFIDENTIALITY AGREEMENT, KOCH-GEORGIA PACIFIC

[This confidentiality agreement is between Koch Industries, acquirer, and Georgia Pacific Corporation, target, and was entered into on October 2, 2006. It was attached as Exhibit 99(d)(2) to Koch's tender offer statement on form TO filed November 17, 2005. It is included here only as an illustration of how a confidentiality agreement might be drafted. As with any agreement, confidentiality agreements should be drafted to address the user's needs in the particular transaction. This appendix is a reprint of Appendix 3-A in Thompson, Mergers, Acquisitions and Tender Offers, supra Section 1.10.]

§ I Opening Paragraph; "Possible" Transaction

[See Book §§ 3.2.A.1; 3.2.B; 3.2.D; 3.2.Q]

October 12, 2005

Koch Industries, Inc.
4111 E. 37th Street North
Wichita, Kansas 67220
Attention: Steve Feilmeier

Re: Confidentiality Agreement

Dear Steve:

Koch Industries, Inc. ("Koch" or "you") now or in the future will be reviewing certain information provided to it by Georgia-Pacific Corporation ("GP") or its affiliates ("Provider") to assist Koch in evaluating making a possible purchase of certain stock or assets of GP (the "Project"). In order that Koch may determine the extent of its interest, certain oral and written information regarding the Project will be provided to Koch which is proprietary and confidential information of Provider.

§ II Defined Terms

As used herein, the term "Person" includes, without limitation, any corporation, company, entity, trust, group,

partnership, or individual. The term "Representative" means any Person acting on behalf of Provider or Koch, as the case may be, including without limitation, Koch's (or Provider's, as the case may be) directors, officers, partners, employees, agents, representatives, financial advisors, attorneys, accountants, and consultants. The term "Information" means any and all oral and written information, including information in documentary, handwritten, electronic form, or any other form, that is (i) furnished by Provider to you or any of your Representatives in connection with your evaluation of the Project or furnished to us in regard to the purchase by Koch from Provider of the two pulp and paper mills in May 2004, or (ii) prepared by you or your Representatives and containing, in whole or in part . . . any information described in clause (i) above.

In consideration of your being furnished with the Information by Provider, you agree that:

§ III Agreement to Keep "Information" Confidential

[See Book §§ 3.2.A; 3.2.C.1] Subject to Paragraph 6 below, the Information will be kept confidential and will not, without the prior written consent of Provider, be disclosed by you or your Representatives, in whole or in part. Moreover, you agree to disclose to your Representatives that you are evaluating the Project and to transmit Information to your Representatives, in both cases, only if and to the extent that such Representatives need to know the Information for the purpose of evaluating the Project and are informed by you of the confidential nature of the Information and agree (in writing in the case of third party Representatives) to be bound by the terms of this Agreement.

§ IV Nondisclosure of Negotiations

Except as otherwise permitted herein, without the prior written consent of Provider, you and your Representatives will not disclose to any other Person your participation in evaluating the Project, including that Information has been made available or the status of such process, except as required by law, regulation or legal process and then only with prior written notice to Provider.

§ V If No Agreement, Destroy or Return Information

[See Book § 3.2.F] If no transaction is consummated between us regarding the Project, upon our request, you will either destroy the Information (including all copies thereof) or, at your option, return the Information immediately to Provider, without retaining any copies or extracts thereof; provided.

§ VI Information that Becomes Public

[See Book § 3.2.G] The term "Information" does not include information which (i) is or becomes available to the public other than as a result of a disclosure by you or anyone to whom you or any of your Representatives transmit any information, (ii) is or becomes known or available to you on a basis not in contravention of applicable law from a source (other than Provider or one of its Representatives) which you reasonably believe is not prohibited from transmitting such information to you by any contractual, legal or fiduciary obligation to Provider, (iii) was in your possession prior to the time it was acquired hereunder, or (iv) was developed by or for you without reference to the Information.

§ VII No Representations; Anti-Reliance Clause

[See Book § 3.2.H] You (i) acknowledge that neither Provider nor any of its Representatives makes any representation or warranty (express or implied) as to the accuracy or completeness of the Information and (ii) agree, to the full extent permitted by law, that neither Provider nor any of its Representatives shall have any liability whatsoever to you or to any of your Representatives on any basis (including, without limitation, in contract, tort, under federal or state securities laws, or otherwise) as a result of your participation in the evaluation of the Project and the use of the Information by you or your Representatives. This Agreement sets forth all of your obligations with respect to Information except as may be otherwise provided in a subsequent written agreement between you and us. You agree that only those representations or warranties which are made in a final definitive agreement regarding the Project, when, as and if executed and delivered by the parties, and subject to such limitations and restrictions as may be specified therein, shall have any legal effect.

§ VIII Legal Compulsion to Disclose

[See Book § 3.2.I] Should any person seek to legally compel you or anyone to whom you transmit the Information

pursuant to this Agreement (by oral questions, interrogatories, requests for Information or documents, subpoena, civil investigative demands or otherwise) to disclose any of the Information, you will provide (if not otherwise prohibited from doing so) Provider with prompt written notice so that Provider may seek, at Provider's expense, a protective order or other appropriate remedy (including by participating in any proceeding to which Koch is a party, which at Provider's request you will use all reasonable efforts to permit Provider to do) and/or waive compliance with the provisions of this Agreement. You agree to provide reasonable cooperation to Provider, including making available witnesses to the extent they are under your control, in connection with its efforts pursuant to this paragraph. If, after complying with the preceding sentence, you are legally compelled to disclose any such Information, you may furnish that portion (but only that portion) of the Information which is legally required.

§ IX No Waiver

[See Book § 3.2.O] It is understood and agreed that no failure or delay by Provider or you in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise of any right, power or privilege hereunder.

§ X Successors and Assigns

This Agreement shall inure to the benefit of and be binding upon Provider and you and your respective successors and assigns, including any successor to Provider or you or to substantially all of its or your assets or business, by merger, consolidation, purchase of assets, purchase of stock or otherwise.

§ XI Remedies; Equitable Relief

You agree that Provider may be irreparably injured by a breach of this Agreement by you or your Representatives and that Provider would be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any breach of the provisions of this Agreement. Such remedies shall not be deemed to be the exclusive remedies for a breach of this Agreement by you or your Representatives, but shall be in addition to all other remedies available at law or equity.

§ XII No Binding Contract; No Offer to Sell Securities

[See Book §§ 3.2.J; 3.2.P.2] You agree that unless and until a final definitive agreement providing for a transaction has been executed and delivered by the Provider and you, none of the Provider, any of its shareholders, nor you is or will be under any legal obligation of any kind whatsoever with respect to such a transaction by virtue of any written or oral expression with respect to such a transaction by the Provider or any of its Representatives, by you or any of your Representatives or by virtue of this Agreement except for the matters specifically agreed to herein. You agree that until a final definitive agreement providing for a Transaction has been executed and delivered by the Provider and you, no document (including this Agreement and the Information) or other information or materials shall constitute an offer to sell securities of the Provider.

§ XIII Information Remains Property of Provider

[See Book § 3.2.K] You agree that the Information is and shall be and remain the property of the Provider or its subsidiaries, as applicable, and that the Provider has not, and its affiliate and subsidiaries have not, granted and will not grant you any license, copyright or similar right with respect to any of the Information or any other material made available to you by or on behalf of the Provider or its subsidiaries.

§ XIV Termination of Acquirer's Obligation: Sunset

[See Book § 3.2.L] Your obligations hereunder shall terminate two (2) years from the date of this Agreement.

§ XV Choice of Law

[See Book § 3.2.O] This Agreement shall be governed and construed in accordance with the laws of the State of Delaware applicable to agreements made and to be performed within such State and Provider and Koch hereby submit to the jurisdiction of the courts of such State.

§ XVI To Whom Request for Information Should be Directed

[See Book § 3.2.M] Unless otherwise agreed in writing, all communications from you or your Representatives regarding the Project or this Agreement, including without limitation requests for additional information, will be directed exclusively to any one of: A.D. Correll, Lee Thomas, Danny Huff, Tyler Woolson, Jim Kelley or Ken Khoury.

Very truly yours,

Georgia-Pacific Corporation

By: /s/ Danny W. Huff
Print Name: Danny W. Huff
Title: Chief Financial Officer

ACKNOWLEDGED AND AGREED

Koch Industries, Inc.

By: /s/ Steven J. Feilmeier
Print Name: Steven J. Feilmeier
Title Chief Financial Officer

DOCUMENTARY APPENDIX DD, ACQUIRER'S DUE DILIGENCE CHECKLIST FOR TARGET

[*See* Chapter 10 of Business Planning for Mergers and Acquisitions]

[This appendix is a reprint of Appendix 3-B in Thompson, Mergers, Acquisitions and Tender Offers, *supra* Section 1.10.]

§ I Purpose

[See Book § 3.3.B.1]

This appendix sets out a basic due diligence check-list that an acquirer may utilize as a first step in conducting due diligence on a target. The check-list should be adjusted as needed for the particular deal. It could also be adjusted by a target that is doing due diligence on an acquirer.

The check-list is constructed from the representations and warranties sections of acquisition agreements for the following transactions: (1) a public company stock merger, (2) a public company cash merger, (3) an asset acquisition agreement, and (4) a stock acquisition agreement. In the event due diligence leads to a deal, the matters addressed in the due diligence process are likely to end up in one way or another in the target's representations and warranties or in the disclosure schedule. In elaborating on the issues to be addressed under each topic set out below, the person conducting the due diligence should review the relevant section of the representations and warranties article of several acquisition agreements for similar deals.

§ II Items Related to the Fundamental Economics of the Deal

[See Book § 3.3.B.2.c]

A. Introduction

These items go to the valuation of the target, which as indicated in Chapter 11, will likely be based on at least the following three valuation techniques: discounted cash flow (DCF), comparable transactions, and comparable companies. The DCF technique requires the preparation of a statement of the target's free cash flows (FCFs), and this statement for past years can be used in projecting FCFs for future years. The statement for past years can be constructed from the firm's past income statements and cash flow statements (see Chapters 10 and 11). The cash flow statement is different from a FCF statement. The comparable companies and comparable transactions techniques will likely require a computation of the target's (1) earnings per share (EPS), (2) earnings before interest and taxes (EBIT), and (3) earnings before interest, taxes, depreciation, and amortization (EBITDA). Each of these can be computed from the firm's income statement for the past year. The items in Section II are designed to assist in ensuring that the projections of the target's FCFs, EPS, EBIT and EBITDA are based on reliable information.

B. Analysis of SEC Reports, Including Financial Statements, MD&A, and Internal Controls Report

[See Book §§ 3.3.B.1; 3.3.B.2.c]

C. Income Statement

1. Any Overstatements of Income?
2. Any Understatements of Costs?
3. Who Are the Major Customers?
4. Who Are the Major Vendors?

D. Asset Side of Balance Sheet

1. Cash
2. Accounts Receivables
a) Age of the Receivables
b) Is there a Proper Reserve for Uncollectible Receivables?
3. Plant and Equipment
a) Is Book Value Stated Accurately?
b) What is the Fair Market Value?
4. Intellectual Property
5. Inventory
a) What Inventory Methods Are Used?
b) What is the Fair Market Value?
6. Investments
a) What is the tax basis?
b) What is the Fair Market Value
c) What Is the After-Tax Value?

E. Liability and Shareholder Equity Side of the Balance Sheet

1. Current Liabilities
2. Long-Term Liabilities
3. Shareholders' Equity

F. Cash Flow Statement
1. Is it Consistent with the Income Statement and the Balance Sheet, the Source of the Information?
2. Are the Capital Investments, which Will Be Utilized in Constructing the Cash Flow Statement, Properly Stated?
3. Who Are the Major Customers?
4. Who Are the Major Vendors?
G. Absence of Certain Changes or Events since the Date of the Last Audited Financials

H. Proper Reporting of Transactions with Affiliates, Including Controlling Shareholder?
1. Consider reviewing "consolidating" financial statements, which set out separate financial statements for commonly controlled entities
I. Impact of Any Non-Compete Agreement

§ III Items Related to the Target's Disclosed and Undisclosed Liabilities
A. Disclosed Liabilities
B. Undisclosed Liabilities
C. Taxes
D. Environmental Matters
E. Potential Products Liability
F. Potential Liability under the Foreign Corrupt Practices Act, see Chapter 2

§ IV Items Related to the Target's Relationships with Its Employees
A. Labor and Employment Matters
B. Benefit Plans
C. ERISA
D. Transactions with Officers, Directors and Major Shareholders
E. Change of Control Provisions
F. Possible Applicability of the WARN Act, see Chapter 2

§ V Items Related to Legal Mechanics of Effectuating of the Deal: Mergers, Stock Acquisitions and Asset Acquisitions
A. Organization Standing and Power and Target and Its Material Subsidiaries
B. Capital Structure
C. Required Amendments to Rights Agreement
D. Authority to Enter the Agreement
E. Non-contravention of Other Agreements; Releases Required
F. Change of Control Provisions of Agreements
G. Board Approval Required for the Transaction, See Chapter 4
H. Fairness Opinion of Target's Financial Advisor
I. Fairness Opinion of Acquirer's Financial Advisor
J. Solvency Opinion in LBO Deal
K. Shareholder Vote Required for the Transaction, See Chapter 4
L. Antitrust Issues Related to the Completion of the Deal
M. Other Regulatory Issues Related to the Completion of the Deal: e.g., Approvals by FCC, FERC, FRB
N. Impact of SEC Disclosure Requirements in the S-4 of Proxy Statement for the Deal? See Chapter 7
O. Impact of State Takeover Statutes? See Chapter 8
P. Brokers or Finders

§ VI Items Related to Legal Risk in the Deal Not Otherwise Addressed
A. Legal Proceedings and Litigation
B. Insurance
C. Antitrust Issues Related to the Conduct of the Target's Business
D. Legal Issues Related to the Conduct of the Target's Foreign Operatiions
E. Obligations in Material Contracts
F. Review of Any Acquisition Agreements to Which the Target Was a Party
G. Status of Licenses

H. Impact of Any Non-Compete Agreement
I. Is There Proper Title to All Material Assets?
J. Product and Similar Liabilities
K. Warranties

§ VII Additional Issues Related to Asset Acquisitions
A. Acquirer's Title to Assets Acquired
B. Potential Successor Liability?
C. Consents Required for the Transfer of Assets
D. Assignment, if Any, of Bank Accounts and Transfer of Authorized Signatories
E. What Records Should Be Transferred to the Acquirer?

§ VIII Additional Issues Related to Stock Acquisitions
A. No Doubt on Who the Shareholders Are and That They Have Agreed to Transfer Their Stock
B. Assignment of Bank Accounts
C. Transfer of All Books and Records

DOCUMENTARY APPENDIX EE, LETTER OF INTENT, PERFECTDATA-SONA

[*See* Chapter 10 of Business Planning for Mergers and Acquisitions]

[This letter of intent is between PerfectData Corp., a publicly-held acquirer, and Sona Mobile, Inc., a privately-owned target, and was entered into on January 12, 2005. It was attached as Exhibit 10.1 to the acquirer's Form 8-K filed January 13, 2005. It is included here only as an illustration of how a letter of intent might be drafted. As with any agreement, letters of intent should be drafted to address the user's needs in the particular transaction. This appendix is a reprint of Appendix 3-C in Thompson, Mergers, Acquisitions and Tender Offers, supra Section 1.10.]

§ I Opening Paragraph; "Possible" Transaction

[See Book §§ 3.4.A; 3.4.B.2]

SONA MOBILE, INC.
Victoria Tower
44 Victoria Street
Toronto, Ontario M5C 1Y2
CANADA

January 11, 2005

PerfectData Corporation
1445 East Los Angeles Avenue, Suite 208
Simi Valley, CA 93065

Attn: Harris Shapiro, CEO

Dear Mr. Shapiro:

This Letter of Intent will confirm the following general terms upon which Sona Mobil, Inc., a corporation organized under the laws of the State of Washington ("Sona"), will merge (the "Merger") with and into a wholly-owned subsidiary to be incorporated (the "Merger Subsidiary") of PerfectData Corporation, a corporation organized under the laws of the State of Delaware ("PerfectData"). Except for the provisions of Paragraphs D [exclusive dealing] and E [break-up fee] hereof, none of the terms set forth in this Letter of Intent shall be binding on either party hereto. Immediately upon the execution and delivery of this Letter of Intent, the parties hereto, either directly or through their authorized representatives, shall begin preparing a Merger Agreement (the "Agreement"), which shall contain all of the definitive terms of the Merger, including such representations, warranties, covenants, agreements, conditions and contingencies and indemnities as are typically incorporated in such agreements.

§ II Basic Transaction

[See Book § 3.4.C]

(i) As set forth above, on the Closing Date (as defined below), Sona will merge with and into the Merger Subsidiary, which will be the surviving corporation.

(ii) In the Merger, the shareholders of Sona will receive shares of PerfectData's Series A Voting Convertible Preferred Stock (the "Series A Preferred Stock") in exchange for their Sona capital stock (common and preferred). In addition to any rights, privileges and preferences as may be described in this Letter of Intent, the Series A Preferred Stock shall have such terms and provisions as shall be agreed to by the parties.

(iii) The Series A Preferred Stock issued in the Merger shall (a) have a liquidation preference (the specific amount of which will be agreed to by the parties), (b) have the right to vote on an as converted basis on all matters submitted to shareholders and (c) be convertible into 80% of the issued and outstanding shares of the common stock of PerfectData on a fully-diluted basis on the Closing Date (as defined below); provided, however, the Series A Preferred Stock shall be convertible into 85% of the fully diluted issued and outstanding shares of the common stock of PerfectData as of the Closing Date pursuant to a formula to be set forth in the Merger Agreement.

(iv) As currently contemplated, the Transaction will qualify as a tax-free reorganization under Section 368(a)(2)(D) of the Internal Revenue Code of 1986, as amended.

§ III Conditions

[See Book § 3.4.C]

(i) PerfectData shall have obtained the approval of its Board of Directors to file and shall have filed a Certificate of Designation to its Certificate of Incorporation to designate the Series A Preferred Stock.

(ii) On the Closing Date, PerfectData shall have a tangible net worth of at least $1.1 million (as adjusted below, the "Minimum Net Worth"), after taking into account all expenses, fees and costs incurred in connection with the Merger and any commitments and contingencies that are not reflected on PerfectData's balance sheet; provided, however, if the Closing Date of the Merger has not occurred on or before April 15, 2005, the Minimum Net Worth shall be reduced by the cost to PerfectData of preparing and filing a Form 10-KSB forthe year ended March 31, 2005; provided further, however, that such costs will be "capped" at $75,000.

To the extent PerfectData's tangible net worth on the Closing Date is less than the Minimum Net Worth, the relative holdings of the Sona shareholders and the PerfectData shareholders as set forth in Paragraph A.(iii) above shall be adjusted proportionately. At any time prior to the Closing Date PerfectData may raise additional equity capital through the sale of its common stock; provided, however, that, without the prior written consent of Sona, which consent may not be unreasonable withheld, PerfectData may not sell any equity securities to any single person or group of persons in a

single transaction if such person or group of persons would, as a result, own 5% or more of the issued and outstanding shares of PerfectData' capital stock after the Merger unless such person or persons owned 5% or more of PerfectData's capital stock before the Merger. Notwithstanding anything contained herein to the contrary, in the event PerfectData's tangible net worth on the Closing Date is less than $750,000, PerfectData shall have been deemed the Terminating Party under Paragraph E.(i).

(iii) On the Closing Date PerfectData shall be current on all its filings under the Securities and Exchange Act of 1934 and its common stock shall be listed on the OTC Bulletin Board.

(iv) PerfectData shall have received confirmation from its auditors that it will be able to properly and timely file a Form 8-K with the United States Securities and Exchange Commission with respect to the Merger.

§ IV The Merger Agreement

[See Book § 3.4.C]

(i) Basic Transaction. The Merger Agreement shall provide for implementation of the basic transaction, as described herein.

(ii) Representations and Warranties. The Merger Agreement shall contain customary and usual representations, warranties, covenants and agreements by the parties, including representations and warranties relating to qualifications, due authorizations, non-contravention, consents and approvals, capitalization, financial condition, taxes, filings under the Securities and Exchange Act of 1934, material agreements, legal proceedings, legal and regulatory compliance and employees. The principal executive officer, the secretary and the chief financial officer of each of the parties shall certify the representations and warranties "to the best of his or her personal knowledge and information."

(iii) Closing Conditions and Indemnification. The Merger Agreement shall contain customary and usual conditions for Closing, including the delivery at Closing of favorable opinions of counsel for the corporate parties with respect to customary and usual matters of law, as well as usual and customary indemnification and hold harmless provisions.

§ V Exclusive Dealing, Bilateral No Shops with Fiduciary Outs

[See Book § 3.4.D]

A. General Rules

(i) Beginning on the date hereof Sona shall not, and shall not permit any of its officers, directors, employees, agents or representatives to, directly or indirectly (through any affiliates), solicit, initiate or accept any discussions, submissions of proposal or offers or negotiations with, or participate in any negotiations or discussions with, or provide any information or data of any nature whatsoever to, or otherwise cooperate in any other way with, or assist or participate in, facilitate or encourage any effort or attempt by, or enter into any agreement with, any person other than PerfectData concerning any merger, sale of substantially all of its assets, sale of shares of its capital stock or other equity securities, or any similar transaction, in each case, involving Sona (such transactions being hereinafter referred to as "Alternative Sona Transactions") or authorize or permit any of its respective officers, directors, employees, agents or representatives to take any such action with respect to an Alternative Sona Transaction.

(ii) Beginning on the date hereof, PerfectData shall not, and shall not permit any of its officers, directors, employees, agents or representatives to, directly or indirectly (through any affiliates), solicit, initiate or accept any discussions, submissions of proposal or offers or negotiations with, or participate in any negotiations or discussions with, or provide any information or data of any nature whatsoever to, or otherwise cooperate in any other way with, or assist or participate in, facilitate or encourage any effort or attempt by, or enter into any agreement with, any person other than Sona concerning any merger, sale of shares of its capital stock or other equity securities, or any similar transaction, in each case, involving PerfectData (such transactions being hereinafter referred to as "Alternative PerfectData Transactions") or authorize or permit any of their respective officers, directors, employees, agents or representatives to take any such action with respect to an Alternative PerfectData Transaction.

B. Fiduciary Out

[See Book § 3.5]

(iii) Notwithstanding anything to the contrary in this Paragraph, if, at any time prior to Closing, the Board of Directors of either party determines, based upon advice from outside legal counsel, that failure to act could reasonably be expected to be inconsistent with the Board's fiduciary duties under applicable law, such party may provide

information with respect to such party to another person or entity that has made an unsolicited proposal for an Alternative Transaction and participate in discussions and negotiations with such person or entity relating to such Alternative Transaction.

§ VI Break-up Fee

[See Book § 3.4.E]

A. Basic Provisions

(i) Except as otherwise provided in Paragraphs E.(ii) - (iv) below, in the event either party hereto (the "Terminating Party") shall notify the other party hereto (the "Non-Terminating Part") at any time prior to Closing that the Terminating Party is abandoning or terminating the Merger and within 12 months of such notice the Terminating Party enters into a merger agreement or other agreement relating to the sale or purchase of assets with another party, then the Terminating Party shall immediately pay to the Non-Terminating Party an amount equal to the sum of (i) the fees, costs and expenses (including attorneys fees) incurred by the Non-Terminating Party in connection with this letter of intent and the Merger and (ii) $250,0000.

(ii) Notwithstanding Paragraph E.(i) above, a Terminating Party shall have no liability to a Non-Terminating Party if the Non-Terminating Party has (a) materially breached a representation or warranty contained in the Merger Agreement or (b) if, during the course of its due diligence investigation, the Terminating Party reasonably concludes that the Non-Terminating Party will not be able to make a representation or warranty contemplated by the Merger Agreement without a material exception to such representation or warranty or (c) if the Non-Terminating Party fails to satisfy a material closing condition contained in the Merger Agreement.

(iii) Either party may terminate this Letter of Intent and abandon the Merger for any reason without any liability to the other party at any time before the Commitment Time (as defined in Paragraph E.(iv) below).

B. "Commitment Time"

(iv) On or about January 24, 2005, Sona shall deliver a draft of its audited consolidated financial statements for the years ended December 31, 2003 and 2004 to PerfectData. PerfectData shall then have approximately 48 hours to review such financial statements. In the event PerfectData determines that the information set forth in such financial statements is materially inconsistent with financial information previously supplied by Sona it shall have the right to terminate this Letter of Intent and abandon the Merger without incurring any penalty. In order to exercise this right, PerfectData must provide Sona with written notice thereof no later than 5:00 p.m. New York City time on the second business day following the receipt of such financial statements (the "Commitment Time").

§ VII Other

[See Book § 3.4.F]

A. Expenses

(i) Expenses. Each of PerfectData and Sona will bear their respective costs, and neither party shall have liability to any other party for any expense of the other party.

B. Conduct of Business Pending Closing

(ii) Conduct of Business Pending Closing. From the date hereof until the Closing or earlier termination of this letter of intent or abandonment of the Merger, (a) PerfectData will not engage in any business and none of its assets will be sold or disposed of, except for certain post-closing actions taken to complete the sale of its business operations to Spray Products Corporation, and it will not incur any liabilities except those in the ordinary cause of business (including legal and accounting expenses) or with the written consent of Sona, and (b) Sona will operate its business in the ordinary course and consistent with past practice.

C. Notices * * *

D. Finder's Fee

(iv) Any finder's fee or similar payments with respect to the Merger shall be paid by the party or parties agreeing to such fees or payment; in this respect. Sona has agreed to pay a finder's fee to Colebrooke Capital, Inc.

E. Choice of Law

(v) The transactions which are contemplated herein, to the extent permitted, shall be governed by and construed in accordance with the laws of the State of Delaware.

F. Due Diligence, Including Acquirer's Due Diligence Request

(vi) The parties agree to begin their due diligence investigation of the other immediately and to cooperate with

each other in connection with the conduct of such due diligence investigations. Each party and its agents, attorneys and representatives shall have full and free access to the properties, books and records of the other party (the confidentiality of which the investigating party agrees to retain) for purposes of conducting investigations of the other party. At the earlier of the date of the public announcement of the discussions of the transaction, the date of the public announcement of the transaction, or the date of the execution of the Agreement, each party to the transaction (and each employee, representative, or other agent of the taxpayer) may disclose to any and all persons, without limitations of any kind, the tax treatment and tax structure of the transactions and all materials of any kind (including opinions or other tax analyses) that are provided to the party relating to such tax treatment and tax structure. In addition, no party is subject to any restriction concerning its consulting with its tax adviser regarding the tax treatment or tax structure of the transaction at any time. Sona acknowledges that immediately following the execution of this Letter of Intent, PerfectData will deliver a preliminary due diligence request and that Sona will use its reasonable best efforts to respond to such request within seven (7) business days. Nothing herein shall preclude PerfectData from amending, modifying or supplementing such preliminary due diligence request.

G. Public Announcements

(vii) The substance of any public announcement with respect to the Merger, other than notices required by law, shall be approved in advance by all parties or their duly authorized representatives.

H. Board of Directors of Acquirer After the Deal

(viii) Four of the five current members of the Board of Directors and all of the current officers of PerfectData shall resign at Closing or as soon as practical thereafter and be replaced by those designated by the PerfectData stockholders and the newly constituted Board of Directors of PerfectData after the Closing.

I. Counterparts * * *

(ix) This Letter of Intent may be executed in any number of counterparts and each such counterpart shall be deemed to be an original instrument, but all of such counterparts together shall constitute but one agreement.

J. The Term Closing Date

(x) The term Closing Date shall refer to the calendar date on which the Merger is consummated. The term Closing refers to the actual consummation of the Merger.

§ VIII Closing Paragraphs; Merely an Expression of Intention

[See Book § 3.4.B.2]

Except as provided in Paragraphs D [exclusive dealing], E [break-up fee] and F.(iv) [finder's fee], this letter merely evidences the intention of the parties hereto and is not intended to be legally binding. With respect to Paragraph F.(iv), each of PerfectData and Sona hereby indemnifies and holds harmless the other party hereto and its affiliates, from any and all claims, liabilities, damages costs and judgments arising in connection with or relating to any agreements, written or oral, which it has or is deemed to have entered into, directly or indirectly, with any broker, finder or banker relating to the Merger.

If the foregoing correctly sets forth the substance of the understanding of the parties, please execute this letter in duplicate, retain one copy for your records, and return one to our counsel, Joel J. Goldschmidt, c/o Morse, Zelnick, Rose & Lander LLP, 405 Park Avenue, Suite 1401, New York, New York 10022; you may send one signed copy by facsimile transmission to 212-838-9190.

Very truly yours,

SONA MOBILE, INC.

By: /s/ John Bush
John Bush, President

PERFECTDATA CORPORATION

Accepted this 12th day of January, 2005.

By: /s/ Harris A. Shapiro
Harris Shapiro, Chief Executive Officer

DOCUMENTARY APPENDIX FF, EXCLUSIVITY AGREEMENT BETWEEN CITIGROUP AND WACHOVIA

[*See* Chapter 10 of Business Planning for Mergers and Acquisitions]

[This exclusivity agreement was entered into between Citigroup and Wachovia on September 29, 2008 and was to run until October 6, 2008. In the interim Wachovia entered into a merger agreement pursuant to which it was to be acquired by Wells Fargo. Citigroup claimed that Wachovia had violated its obligations under the exclusivity agreement and that Wells Fargo had tortiously interfered with Citi's contractual rights. This appendix is a reprint of Appendix 3-D in Thompson, Mergers, Acquisitions and Tender Offers, supra Section 1.10.]

Citigroup Inc.

September 29, 2008

Wachovia Corporation

Ladies and Gentlemen:

Citigroup Inc. ("Citigroup") and Wachovia Corporation ("Wachovia") are party to that non-binding term sheet dated September 29, 2008 (the **"Term Sheet''**) setting forth the terms and conditions of a proposed transaction between them (the **"Transaction"**). Citigroup and Wachovia will continue to proceed to negotiate definitive agreements (the **"Definitive Documentation"**) relating to the Transaction in form and substance satisfactory to each of them with a view to executing such Definitive Documentation October 6, 2008 (the **"Exclusivity Termination Date"**).

In consideration of the foregoing and other good and valuable consideration the receipt and adequacy of which are hereby acknowledged, Wachovia hereby agrees that, during the period commencing on the date hereof and ending on Exclusivity Termination Date, Wachovia shall not, and shall not permit any of its subsidiaries or any of its or their respective officers, directors, employees, investment bankers, attorneys, accountants. consultants or other agents or advisors (**'Representatives"**) to, directly or indirectly, (i) solicit, initiate or take any action to facilitate or encourage the submission of any Acquisition Proposal, (ii) enter into or participate in any discussions or negotiations with, furnish any information relating to Wachovia or any of its subsidiaries, assets or businesses or afford access to the business, properties, assets, books or records of Wachovia or any of its subsidiaries to. otherwise cooperate in any way with, or knowingly assist, participate in, facilitate or encourage any effort by, any third party that is seeking to make, or has made, an Acquisition Proposal, (iii) grant any waiver or release under any standstill or similar agreement with respect to any class of equity securities of Wachovia or (iv) enter into any agreement in principle, letter of intent, term sheet, merger agreement, acquisition agreement, option agreement or other similar instrument relating to an Acquisition Proposal. As of the date hereof, Wachovia will, and will cause its Representatives to, terminate any discussions or negotiations with respect to any Acquisition Proposal.

"Acquisition Proposal" means, other than the Transaction, any offer, proposal or inquiry relating to, or any third party indication of interest in, (i) any acquisition or purchase, direct or indirect. of 15% or more of the consolidated assets of Wachovia, or over 15% of any class of equity or voting securities of Wachovia or any of its subsidiaries whose assets, taken as a whole, constitute more than 15% of the consolidated assets of Wachovia, (ii) any tender offer (including a self-tender offer) or exchange offer that, if consummated, would result in such third party's beneficially owning 15% or more of any class of equity or voting securities of Wachovia or any of its subsidiaries whose assets, taken as a whole, constitute more than 15% of the consolidated assets of Wachovia, (iii) a merger, consolidation, share exchange, business combination, reorganization, recapitalization, liquidation, dissolution or other similar transaction involving Wachovia or any of its subsidiaries whose assets, individually or in the aggregate, constitute more than 15% of the consolidated assets of Wachovia or (iv) any other transaction the consummation of which could reasonably be expected to impede, interfere with, prevent or materially delay the Transaction or that could reasonably be expected to dilute materially the benefits to Citigroup of the Transaction.

The parties agree that in the event of any breach of this letter agreement, the parties would be irreparably

harmed and could not be made whole by monetary damages. Each patty accordingly agrees (i) not to assert by way of defense or otherwise that a remedy at law would be adequate and (ii) that the remedy of specific performance of this letter agreement is appropriate in any action in court, in addition to any other remedy to which such party may be entitled.

This agreement shall be governed by, and construed in accordance with, the laws of the State of New York. The parties hereby irrevocably and unconditionally submit to the exclusive jurisdiction of any state or federal court sitting in New York City, Borough of Manhattan, over any suit, action or proceeding arising out of or relating to this letter agreement. The parties hereby irrevocably and unconditionally waive any objection to the laying of venue of any such suit, action or proceeding brought in any such court and any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum. The parties hereby agree that a final judgment in any such suit, action or proceeding brought in any such court shall be conclusive and binding upon you and may be enforced in any other courts to whose jurisdiction the parties are or may be subject by suit upon such judgment.

This letter agreement may be executed in counterparts, either one of which need not contain the signature of more than one party, but both such counterparts taken together will constitute one and the same agreement.

If the foregoing accurately summarizes our understanding, we request that you approve this letter agreement and evidence such approval by causing a copy of this letter agreement to be executed and returned to the undersigned.

Very truly yours.

CITIGROUP INC.

B y: _____
Name:
Title:

Agreed and accepted:

WACHOVIA CORPORATION

By: _____
Name:
Title:

DOCUMENTARY APPENDIX GG, EXCERPTS FROM SCHEDULE 13E-3 AND PROXY STATEMENT FOR LNR'S FREEZEOUT MERGER/MBO

[*See* Chapter 14 of Business Planning for Mergers and Acquisitions]

§ I Excerpts from LNR Property Corporation Schedule 13e-3, Filed January 3, 2005

Introduction

This Amendment No. 4 (this "Amendment") to the Rule 13e-3 Transaction Statement on Schedule 13E-3 (as amended, the "Schedule 13E-3") is being filed by Riley Property Holdings LLC ("Parent"), Riley Acquisition Sub Corp. ("Acquisition"), Riley Mezzanine Corp. ("Mezzanine"), CB Riley Investor LLC, Cerberus Capital Management, L.P., Blackacre Institutional Capital Management LLC, Stuart A. Miller, Jeffrey P. Krasnoff, Ronald E. Schrager, Robert B. Cherry, David O. Team, Mark A. Griffith, Stuart A. Miller Irrevocable Trust U/A 10/6/94, MFA Limited Partnership and The Miller Charitable Fund, L.P. and LNR Property Corporation ("LNR" and together with the other filing persons, the "Filing Persons").

The transaction which is the subject of this Schedule 13E-3 is a proposed merger (the "Merger") of Acquisition with and into LNR, on the terms and subject to the conditions set forth in a Plan and Agreement of Merger, dated as of August 29,

2004, by and among LNR, Parent and Acquisition (the "Merger Agreement"), that will result in LNR's stockholders receiving $63.10 per share in cash and LNR's becoming indirectly wholly-owned by Parent.

Concurrently with the filing of this Schedule 13E-3, LNR is filing with the Securities and Exchange Commission pursuant to the requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), a definitive proxy statement (the "Proxy Statement") relating to a special meeting of LNR's stockholders at which the stockholders will be asked to vote on a proposal to adopt the Merger Agreement. The information set forth in the Proxy Statement, including all appendices thereto, is expressly incorporated by reference into this Schedule 13E-3 and the responses to each item in this Schedule 13E-3 are qualified in their entirety by the information contained in the Proxy Statement.

In filing this Schedule 13E-3, the Filing Persons do not concede that LNR is "controlled" by or under common "control" with Parent, Acquisition, Mezzanine, CB Riley Investor LLC, Cerberus Capital Management, L.P., Blackacre Institutional Capital Management LLC, Stuart A. Miller, Jeffrey P. Krasnoff, Ronald E. Schrager, Robert B. Cherry, David O. Team, Mark A. Griffith or Stuart A. Miller Irrevocable Trust U/A 10/6/94, MFA Limited Partnership and The Miller Charitable Fund, L.P. or that any of their respective affiliates is an "affiliate" of LNR within the meaning of Rule 13e-3 under the Exchange Act. The information contained in this Schedule 13E-3 and the Proxy Statement concerning each Filing Person was supplied by that Filing Person and no Filing Person takes responsibility for the accuracy of information relating to any other Filing Person.

ITEM 1. Summary Term Sheet.

The information provided in the Proxy Statement under the captions "Summary Term Sheet" and "Questions and Answers About the Transaction, Voting Procedures and Related Matters" is incorporated herein by reference. * * *

ITEM 7. Purposes, Alternatives, Reasons and Effects. [See Section II]

(a)—(d) Purposes; Alternatives, Reasons, Effects The information provided in the Proxy Statement under the captions "Questions and Answers About the Transaction, Voting Procedures and Related Matters", "Special Factors — Background of the Merger", "Special Factors — Purpose and Structure of the Merger", "Special Factors — Effects of the Merger", "Special Factors — Recommendation of the Special Committee and of the Board of Directors; Fairness of the Merger" and "Material U.S. Federal Income Tax Consequences" is incorporated herein by reference.

ITEM 8. Fairness of the Transaction. [See Section III]

(a)—(b) Fairness; Factors Considered in Determining Fairness The information provided in the Proxy Statement under the captions "Special Factors — Background of the Merger", "Special Factors — Recommendation of the Special Committee and of the Board of Directors; Fairness of the Merger", "Special Factors — Position of the Miller Family, the Management Investors and the Cerberus Entities as to the Fairness of the Merger", and "Special Factors — Opinion of Greenhill & Co., Inc." and in Appendix B is incorporated herein by reference.

(c) Approval of Security Holders The information provided in the Proxy Statement under the captions "Questions and Answers About the Transaction, Voting Procedures and Related Matters" and "The Special Meeting — Record Date; Voting Information" is incorporated herein by reference.

(d) Unaffiliated Representative The information provided in the Proxy Statement under the captions "Special Factors — Background of the Merger", "Special Factors — Recommendation of the Special Committee and of the Board of Directors; Fairness of the Merger", "Special Factors — Position of the Miller Family, the Management Investors and the Cerberus Entities as to the Fairness of the Merger", and "Special Factors — Opinion of Greenhill & Co., Inc." and in Appendix B is incorporated herein by reference.

(e) Approval of Directors The information provided in the Proxy Statement under the captions "Questions and Answers About the Transaction, Voting Procedures and Related Matters". "Special Factors — Background of the Merger" and "Special Factors — Recommendation of the Special Committee and of the Board of Directors; Fairness of the Merger" is incorporated herein by reference.

(f) Other Offers The information provided in the Proxy Statement under the caption "Special

Factors — Background of the Merger" is incorporated herein by reference.

§ II Disclosures in the Proxy Statement on Schedule 14A Relating to the Ability of the Miller Family and Management to Roll-Over Its Equity

[A letter from Cerberus to LNR re the proposed transaction said:]
If there is an interest on the part of LNR, we would be amenable to considering a structure under which Miller and perhaps other existing LNR stockholders could roll their equity interests into the successor company on a tax efficient basis, subject to our concerns that we would prefer avoiding having our acquisition vehicle be a public company upon closing.

An exhibit to the letter included the statement,
If desired by Miller, a portion of the purchase price could be in the form of a minority equity interest in the Purchaser or another instrument all on terms to be agreed.

§ III Disclosures in the Proxy Statement on Schedule 14A Relating Item 7, Purposes, Alternatives, Reasons and Effects, Qs and As.

A. What is the transaction?
A:
The transaction is a merger in which each outstanding share of LNR stock will be converted into the right to receive $63.10 in cash, and LNR will become an indirect wholly-owned subsidiary of Riley Holdings.
B. Why is the transaction in the form of a merger?
A:
A merger will make it possible for Riley Holdings to be sure that it will acquire (through Riley Mezzanine) all the outstanding shares of LNR.
C. What is the purpose of the merger?
A:
The purpose of the merger is to enable Riley Holdings, which will be majority-owned by a company to be owned by funds and accounts managed by Cerberus and other investors selected by Cerberus, to acquire us for cash. When the merger takes place, (a) each outstanding share of our common stock and our Class B common stock (other than shares held by people who exercise appraisal rights) will become the right to receive $63.10 per share in cash, and (b) Riley Holdings, through Riley Mezzanine, will become our sole stockholder.

D. What is the principal benefit of the merger to our stockholders?
A:
The principal benefit of the merger to our stockholders is that they will receive an amount in cash for their shares that exceeds the highest price at which our shares ever traded before we announced the signing of the merger agreement. * * * :
E. What are the principal detriments of the merger to our unaffiliated stockholders?
A:
Following the merger, our unaffiliated stockholders will no longer have the opportunity to participate in our future earnings and growth, if any. Also, most of them will have to pay U.S. federal income taxes on the gain that results from the merger consideration.
:
F. What are the principal benefits of the merger to LNR?
A:
As a publicly held company, we must try to achieve profitability every quarter and try to grow both in the short and longer term. This limits our ability to make investments that will generate medium or long term returns, but not short term returns. In addition, the three major debt rating agencies have told us that unless we adhere to strict limits on the ratio of our debt to our equity, they will lower our ratings, which will increase our borrowing costs. After the merger, we should be able to take steps to achieve profits or cash returns to investors that are not available to us as a publicly held company. These include profits or cash returns generated because this will permit us to increase the portion of our investments that are expected to generate significant medium and long term profits but may not be profitable in the short term. We will be able to pursue investments intended to generate medium and long term, but not short term, profits, and profits or returns

resulting from other steps that may reduce, or even eliminate, our net earnings for several years. Also, Riley Holdings will have access to sources of capital that are not available to us as a publicly traded company, and after the merger, we may, as a privately owned company, be able to implement tax saving strategies that we could not implement as a publicly traded company. These include dividing us into a real estate ownership and real estate investment management company, a real estate investment trust and an entity that is located, and invests, outside the United States, as described beginning on page 52 under the caption "Special Factors—Effects of the Merger—Expected Post-Merger Restructuring."

G. What are the principal benefits of the merger to Riley Holdings?
A.
Riley Holdings will acquire our assets, our management, our employees and our know-how. It will benefit from any profits or cash flows we can generate. Some of these, including profits resulting from the fact that the current market value of some of our properties exceeds their book values, and profits resulting from anticipated increases in our servicing fee revenue as an increased number of loans as to which we are the special servicer near their maturity, are available to us as a publicly held company. However, over time, Riley Holdings expects to achieve profits or cash returns to investors that are not available to us as a publicly held company. These include profits or cash returns generated because we will be able to pursue investments intended to generate medium and long term, but not short term, profits, and profits or returns resulting from other steps that may reduce, or even eliminate, our net earnings for several years. Also, Riley Holdings will have access to sources of capital that are not available to us as a publicly traded company, and we may, as a privately owned company, be able to implement tax saving strategies that we could not implement as a publicly traded company. * * *

H. What are the principal benefits of the merger to the Miller family?
A:
The Miller family owns approximately 31.0% of LNR's outstanding shares. They will receive a total of $586 million with regard to those shares as a result of the merger. Also, trusts for Mr. Miller's sister and brother own a total of 666,666 shares of Class B common stock, and will receive a total of $42.1 million as a result of the merger. This is based upon the same $63.10 to be received by all our stockholders. Mr. Miller holds options to purchase 199,855 shares of common stock for a total of $6.2 million. He will receive $6.4 million with regard to those options as a result of the merger. In addition, Stuart A. Miller will receive $4.0 million, before tax reimbursement, as a result of the merger under a change in control agreement entered into in April 2004. The tax reimbursement may be as high as $2.5 million.
The principal benefit to the Miller family is the merger consideration it will receive. Because of this, the Miller family's principal interest is to maximize the price that is paid for their shares. That is the same as what LNR believes is the principal interest of most of the LNR stockholders. However, in order to effect the merger on the terms contained in the merger agreement, Cerberus required the Miller family to invest $150 million to acquire a 20.4% interest in Riley Holdings at the same price that Cerberus and its associated funds and accounts are paying for interests in Riley Holdings. The $150 million Stuart Miller will pay for a 20.4% interest in Riley Holdings will be approximately 25.6% of the $586 million of merger consideration the Miller family will receive for the approximately 31.0% of our stock that they own. However, it is anticipated that subsidiaries of Riley Holdings will borrow a substantial portion of the approximately $2.04 billion of merger consideration that will be paid to our stockholders and with regard to options, conversion rights and other rights to acquire our stock, and that immediately following the effective time of the merger, Riley Holdings and its subsidiaries (including us) will have consolidated indebtedness for borrowed money totaling approximately $2.75 billion, compared with our indebtedness for borrowed money at August 31, 2004 of $1.68 billion. Riley Holdings' equity immediately following the merger will be only $734 million, which will be much lower than the $2.04 billion at which our equity is valued in the merger.

I. What are the principal benefits of the merger to the Management Investors?
A:
The Management Investors will also receive as a result of the merger a total of $72.6 million with regard to the shares they own or are entitled to receive under our 2003 Non-Qualified Deferred Compensation Plan, and $26.1 million with regard to the options and stock purchase agreements.
Also, they will receive a total of $19.3 million, before tax reimbursement, under change in control agreements entered into in April 2004. The tax reimbursement could be as high as $11.2 million.
As a condition to Cerberus' willingness to agree to the merger, Cerberus required the Management Investors to enter into five year employment agreements with Riley Holdings if and when the transaction takes place (currently they do not have employment agreements with us) and to purchase an aggregate of 4.6% of Riley Holdings for approximately $34 million. Each Management Investor may satisfy all or a portion of his investment commitment to Riley Holdings by exchanging

options or rights under stock purchase agreements with LNR for options to purchase restricted and non-restricted strips of membership interests, comprised 95% of preferred equity units and 5% of common equity units, in Riley Holdings. The common equity units will entitle the holders to vote, while the preferred units will not have any voting rights. Distributions payable to the equity holders will be paid first to the holders of the preferred units until they have received an amount equal to the amount they paid for the preferred units plus a 10% per annum return on their units, and thereafter to the holders of the common units. Riley Holdings may elect to redeem any or all of the preferred units at any time and from time to time, and the holders of the preferred units may require Riley Holdings to redeem all of the preferred units on the eleventh anniversary of the merger date, for a redemption price equal to the amount paid by the holders for those units plus any unpaid preferred return on them.
The Management Investors, which include Jeffrey P. Krasnoff, our President and Chief Executive Officer, (a) will be receiving significant payments under change in control agreements if the transaction (or another change in control transaction) takes place, (b) will be granted profit interest units entitling them to 10% of the operating profits and asset appreciation of Riley Holdings after repayment of all capital contributions and payment of a specified return on those contributions, and (c) will be granted profit interest units entitling them to an additional 4% to 7% of the operating profits and asset appreciation of Riley Holdings after repayment of all capital contributions and payment of a specified return on those contributions. Neither the total number of profit interest units, nor the number of profit interest units that will constitute a specified percentage of all the profit interest units, has been decided. There is no limit on the total amount that may be paid to holders of profit interest units or on the amount that may be paid to any individual holder of profit interest units.

J. Who is Riley Holdings?
A:
Riley Holdings was formed by Cerberus to acquire us. We expect that a company to be owned by funds and accounts managed by Cerberus and other investors selected by Cerberus will own approximately 75% of Riley Holdings. The Miller family will own approximately 20.4% of Riley Holdings and the Management Investors will own approximately 4.6% of Riley Holdings.

K. Does Riley Holdings have the financial resources to provide the merger consideration?
A:
Cerberus and its affiliates manage in excess of $14 billion of capital. Cerberus has committed on behalf of one or more of its affiliated funds or managed accounts to provide $550 million of equity to Riley Holdings. Stuart Miller and the Management Investors have committed to provide an additional $184 million of equity to Riley Holdings. Further, an affiliate of Cerberus has agreed to be liable to us for any failure by Riley Holdings or Riley Acquisition to perform their obligations under the merger agreement required to be performed by them prior to the effective time of the merger, not to exceed $125 million. Prior to signing the merger agreement, Cerberus arranged bank commitments to Riley Holdings for $2.35 billion of debt financing. We believe the sums committed plus our cash on hand when the merger takes place will be sufficient for the merger consideration, to repay or retire at least most of our indebtedness and to pay the costs of the transactions.

L. Will LNR's stockholders have to approve the transaction?
A:
Yes. LNR's stockholders will have to adopt the merger agreement under which the transaction will take place. The transaction cannot take place unless the LNR stockholders adopt that merger agreement. We will not be seeking approval of a majority of our unaffiliated stockholders to adopt the merger agreement.
:
M. What vote will it take for the stockholders to adopt the merger agreement?
A:
The merger agreement must be adopted by the affirmative vote of a majority of the votes that can be cast with regard to the proposal to adopt it. The holders of the common stock and the Class B common stock will vote together on the proposal, as though they were a single class. Holders of the common stock can cast one vote per share and holders of the Class B common stock can cast ten votes per share.
:
N. Does this mean that the Miller family alone has the power to approve the transaction?
A:
Yes. If the Miller family vote all the shares they own in favor of the transaction, the transaction will be approved even if no other shares were voted in favor of it. Mr. Miller has the sole power to determine how the Miller family will vote.

:

O. Is it likely that the Miller family will vote in favor of the transaction?

A:

Yes. The Miller family have signed an agreement to vote in favor of the transaction. However, if the Board of Directors or the Special Committee (a) withdraws or modifies or amends in an adverse manner its recommendation that stockholders vote for the adoption of the Plan and Agreement of Merger or (b) approves or recommends (or the Board of Directors fails to recommend against) a proposal by someone other than Riley Holdings, if there is one, the Miller family voting agreement will terminate unless particular members of the Miller family agree within five days to continue it in effect as to them.

P. Will our directors have interests in the transaction different from those of the unaffiliated stockholders?

A:

Our directors other than Stuart A. Miller (the Chairman of our Board of Directors) and Jeffrey P. Krasnoff (our President and Chief Executive Officer) own a total of 381,295 shares of our common stock, have rights to receive a total of 20,000 shares under our 2003 Non-Qualified Deferred Compensation Plan and have options to purchase a total of 273,896 shares of our common stock for a total of $7.1 million. Therefore, they will receive a total of $35.5 million as a result of the merger. Of this, a total of $2.2 million will be received by the three directors who are members of the Special Committee. * * *

Q. Was the Special Committee aware when it voted to recommend approval of the merger that Stuart A. Miller and other members of our senior management had interests that were different from those of the unaffiliated stockholders?

A:

Yes. The Special Committee was aware from early in the negotiation process that the Miller family would be required by Cerberus to make a significant investment in Riley Holdings and the Special Committee considered the possibility that the willingness of the Miller family, including Stuart A. Miller, to support the transaction on the terms contained in the merger agreement might have been affected by the investment the Miller family will be making in Riley Holdings.

In addition, the Special Committee was aware throughout the negotiation process that the Management Investors will receive substantial sums of money if the merger takes place, as merger consideration, with regard to stock options and stock purchase agreements, and under change in control agreements. They also were informed early in the negotiation process that the Management Investors would be required by Cerberus to make substantial investments in Riley Holdings and would be participating in equity based incentive programs implemented by Riley Holdings after the merger takes place. The Special Committee considered the possibility that these interests might have led them to favor the merger even if it had not been in the best interests of our unaffiliated stockholders.

:

R. Under what circumstances can the Board of Directors or the Special Committee withdraw its recommendation that stockholders vote in favor of the transaction?

A:

The Board of Directors or the Special Committee can withdraw its recommendation at any time prior to the special meeting if it determines, after consultation with legal counsel, that there is a reasonable likelihood that failing to do so would violate the directors' fiduciary obligations. If the Board of Directors or the Special Committee withdraws its recommendation under those circumstances, Riley Holdings will have the option either to terminate the merger agreement or to require that the special meeting be held. If Riley Holdings decides to terminate the merger agreement we will have to reimburse Riley Holdings for its expenses in connection with the transaction contemplated by the merger agreement (not to exceed $75 million) and pay a termination fee equal to the excess of $75 million over the amount paid as expense reimbursement.

In addition, the Board of Directors or the Special Committee can cause us to terminate the merger agreement if there has been a proposal to acquire us that the Board of Directors or the Special Committee believes is more favorable to our stockholders than the transaction with Riley Holdings. If the Board of Directors or the Special Committee causes us to terminate the merger agreement to accept a more favorable proposal, we will have to reimburse Riley Holdings for its expenses in connection with the transaction contemplated by the merger agreement (not to exceed $75 million) and pay a termination fee equal to the excess of $75 million over the amount paid as expense reimbursement.

S. What will happen if the shares as to which LNR stockholders seek appraisal equal more than 5% of LNR's outstanding stock?

A:

Riley Holdings will have the right to terminate the merger agreement if the shares as to which LNR stockholders seek

appraisal equal more than 5% of LNR's outstanding stock. If that occurs, on the day the agreement is terminated LNR will have to pay Riley Holdings the greater of its expenses in connection with the transaction contemplated by the merger agreement (not to exceed $75 million) and $37.5 million. If within 12 months after the merger agreement terminates, we enter into an agreement or understanding with somebody else relating to a sale or similar transaction, we will have to pay Riley Holdings an amount equal to the difference between $75 million and the amount paid at termination of the merger agreement.

:

T. Will LNR incur a cost if the merger agreement is terminated?

A:

If (a) LNR terminates the merger agreement to accept what the Board of Directors or the Special Committee believes to be a superior proposal, (b) Riley Holdings terminates the merger agreement because the Board of Directors or the Special Committee withdraws or modifies or amends in an adverse manner its recommendation, or approves or recommends (or the Board fails to recommend against) a proposal by someone other than Riley Holdings, or (c) either Riley Holdings or LNR terminates the merger agreement because the vote of the LNR stockholders is not sufficient to adopt the merger agreement, LNR will have to reimburse Riley Holdings for its expenses in connection with the transaction contemplated by the merger agreement (not to exceed $75 million) and pay a termination fee equal to the excess of $75 million over the amount paid as expense reimbursement.

If either Riley Holdings or we terminate the merger agreement because the merger does not take place by May 31, 2005 and within 12 months after that we agree to enter into a sale transaction or similar transaction with somebody else, when we enter into that transaction, we will have to reimburse Riley Holdings for its expenses in connection with the transaction contemplated by the merger agreement (not to exceed $75 million) plus any amount by which the expense reimbursement is less than $75 million.

If Riley Holdings terminates the merger agreement because our representations and warranties are not correct or because we do not fulfill our obligations under the merger agreement, we will have to pay Riley Holdings when the merger agreement terminates the greater of its expenses in connection with the transaction contemplated by the merger agreement (not to exceed $75 million) and $37.5 million. If within 12 months after the merger agreement terminates we enter into an agreement or understanding with somebody else relating to a sale or similar transaction, we will have to pay Riley Holdings an amount equal to the difference between $75 million and the amount paid at termination of the merger agreement.

We have the financial ability to pay Riley Holdings the $75 million as expense reimbursement and a termination fee if we are required to do so. Further, in deciding whether to withdraw its recommendation that our stockholders vote in favor of the merger, or in deciding whether an alternate acquisition proposal would be more favorable to our stockholders than the merger, our Board and the Special Committee would take into account the fact that we would have to pay $75 million in connection with termination of the merger agreement. * * *

§ IV Disclosures in the Proxy Statement on Schedule 14A Relating Item 8, Fairness of the Transaction

A. Positions of the Miller Family, the Management Investors and the Cerberus Entities as to the Fairness of the Merger

Because the Miller family owns stock that entitles them to cast approximately 77.2% of the votes that can be cast by all our stockholders, the Miller family can be deemed to control us. Similarly, the Management Investors can be deemed to be our affiliates. Under the rules of the Securities and Exchange Commission governing "going private" transactions, because the Miller family and the Management Investors will own approximately 25% of Riley Holdings, the Miller family, the Management Investors and the Cerberus Entities may be deemed affiliates of one another and of us and therefore they all may be required to express their beliefs as to the fairness of the merger to our unaffiliated stockholders. Each of the Miller family, the Management Investors and the Cerberus Entities believe that the terms of the merger agreement and the merger are fair (taking account both of their substantive terms and the procedures by which they were negotiated and are being approved) to all our stockholders, including our unaffiliated stockholders, on the basis of the factors described below.

Position of the Miller Family as to the Fairness of the Merger

The Miller family, and in particular Stuart A. Miller (who controls the voting of the shares of our stock owned by the Miller family), considered the fact that the $63.10 per share merger consideration is 5.8% higher than the highest price at which our stock had ever traded prior to the day we announced the signing of the merger agreement and the principal terms of the merger. Mr. Miller considered the fact that many potential purchasers were contacted and that very few of them were willing to acquire all our businesses, and that none of them was willing to offer per share consideration that was as great as the $63.10 per share merger consideration agreed to by Cerberus. Further, Stuart A. Miller was

personally involved in negotiating the principal terms of the transaction and he several times tried to persuade Cerberus to agree to a higher price, including doing so in a lengthy conversation the night before our Board of Directors and the Special Committee approved the transaction, in which he was only able to get Cerberus to increase the merger consideration from $63.00 to $63.10 per share. He also considered the factors that have limited our growth that are described under the caption "Special Factors—Background of the Merger" on page 14 and the concerns described under that caption about the long term effects our realizing relatively moderate growth could have upon the price of our stock. Mr. Miller considered the fact that the merger consideration substantially exceeded our net book value, and that, because of tax costs and other costs that would be incurred in liquidating us, it is unlikely that the proceeds available to our stockholders from a liquidation of us would be as great as the merger consideration and they probably would not be available for several years. Mr. Miller was aware that Greenhill had provided an opinion that the merger consideration was fair from a financial point of view to the holders of our common stock. While this was of relatively little importance to him or to the Miller family with regard to their holdings, because their holdings consisted primarily of Class B common stock, and Greenhill had not been asked to, and did not, address the fairness of the merger consideration to the holders of the Class B common stock, Greenhill's opinion was important to Mr. Miller in his capacity as a director, and as one of the principal negotiators of the transaction. Finally, he considered the fact that sales of some, but not all, of our businesses would require us to pay taxes and would eliminate the benefit of synergies among our businesses without generating the proceeds that would result from a sale of us as a going concern or from a total liquidation. Based upon all those factors, the Miller family believes the terms of the merger agreement and the merger are fair (taking account both of their substantive terms and of the procedures by which they were negotiated and are being approved) to all our stockholders, including our unaffiliated stockholders. The strongest indication that the Miller family believes the merger is fair to the unaffiliated stockholders is that the Miller amily has agreed to vote for the transaction (unless LNR's Board of Directors or the Special Committee withdraws or adversely modifies or amends its recommendation), which will result in the Miller family's disposing of its 31.0% stock interest in LNR for the same $63.10 per share merger consideration that is being paid to our unaffiliated stockholders. While the Miller family has interests that are different from those of our stockholders generally, it is significant that the Miller family's 31.0% ownership interest in LNR exceeds the 20.4% ownership interest Stuart Miller will have in Riley Holdings, and the merger consideration the Miller family will receive ($586 million) will substantially exceed the amount Stuart Miller will be investing in Riley Holdings ($150 million). Therefore, it is to the economic advantage of the Miller family that the merger consideration be as high as possible.

B. Position of the Management Investors as to the Fairness of the Merger

The Management Investors believe that, because of the high share prices, even during the spring of 2004, of companies engaged in investments related to commercial real estate, because of concerns about the effect an increase in interest rates might have upon the valuations of companies engaged in investments related to commercial real estate, and because of concerns about factors that make it difficult for us to achieve a high rate of growth while we are a publicly traded company, this is an opportune time for LNR to be sold. Although the Management Investors have some interests in the merger that are different from the interests of our unaffiliated stockholders, the Management Investors believe, based primarily on the factors described below, that the terms of the merger agreement and the merger are fair (taking account both of their substantive terms and of the procedures by which they were negotiated and are being approved) to all our stockholders, including our unaffiliated stockholders. * * *

C. Position of the Cerberus Entities as to the Fairness of the Merger

At the time that the merger was negotiated, the Cerberus Entities owned no interest in LNR and had no duty to consider the fairness of the merger to the unaffiliated stockholders of LNR. However, the SEC requires that the Cerberus Entities express their beliefs as to such fairness. In formulating their belief set forth below, the Cerberus Entities considered a number of substantive factors, including:

•
The merger consideration is 35.90% higher than the last reported sale price of LNR's common stock on May 11, 2004, the day on which LNR gave Cerberus exclusive rights for three weeks (subsequently extended to four weeks) to negotiate a definitive agreement to acquire it;

•
The merger consideration is 22.55%, 16.04% and 14.15% higher than the last sale prices of LNR's common stock on the 90th, 30th and 10th trading days before the day on which LNR announced the signing of the merger agreement and the principal terms of the merger;

•
The merger consideration is 6.77% higher than the last sale price of LNR's common stock reported on the New York Stock Exchange on the last trading day before LNR announced the signing of the merger agreement and the principal terms of the merger;

•

The merger consideration is 5.82% higher than the highest sale price of LNR's common stock ever reported on the New York Stock Exchange;

•

The total merger consideration of $63.10 per share will substantially exceed LNR's per share book value, which was $38.79 at August 31, 2004.

•

Based upon statements made by LNR, the Cerberus Entities understood that during the past two years, LNR did not receive from any potential purchaser a firm offer or an indication of a willingness to purchase LNR for consideration with a value as high as the merger consideration.

•

The fact that a special committee, consisting entirely of directors who are not (and have not been in the past) officers or employees of, or consultants to, LNR or the Cerberus Entities, unanimously determined that the terms of the merger and the merger agreement are fair to, and in the best interests of, the LNR's unaffiliated stockholders;

•

The nature of the negotiations with respect to the merger agreement;

•

The fact that the merger was not subject to a financing condition; and

•

The likelihood that the merger will be consummated.

In formulating their belief set forth below, the Cerberus Entities also considered a number of factors relating to the procedural fairness of the transaction, including:

•

The fact that LNR may participate in discussions with, and in other ways assist, a person who makes an unsolicited proposal regarding a transaction (a) that LNR's Board of Directors or the Special Committee determines, after consultation with legal counsel and financial advisors, would be more favorable to LNR and to its stockholders than the merger, if (b) the Board of Directors or the Special Committee determines, after consultation with legal counsel, that there is a reasonable likelihood that failure to do so would be inconsistent with its fiduciary obligations;

•

The fact that LNR can terminate the merger agreement if it receives a proposal that its Board of Directors or the Special Committee determines to be superior to the merger;

•

The fact that Greenhill delivered an opinion to the Special Committee and the Board of Directors that, based upon and subject to the matters described in the opinion, the merger consideration was fair to the holders of LNR's common stock from a financial point of view; and

•

The availability of appraisal rights under the merger agreement and Delaware law for LNR's stockholders who oppose the merger.

The Cerberus Entities considered the fact that the merger does not require the approval of a majority of LNR's unaffiliated stockholders as a potentially negative factor, but determined that this was not a material factor in weighing the fairness of the merger because LNR's stockholders have rights under Delaware law to receive payment in cash for the appraised fair value of their shares of common stock instead of the merger consideration. The Cerberus Entities believe that this provides LNR's unaffiliated stockholders sufficient protection.

After considering the foregoing, the Cerberus Entities believe that the terms of the merger agreement and the merger are fair (taking account both of their substantive terms and of the procedures by which they were negotiated and being approved) to all of LNR's shareholders, including LNR's unaffiliated shareholders. This belief, however, should not be construed as a recommendation to any stockholder as to how you should vote on the merger because Riley Holdings will indirectly own all of the shares of LNR following the merger and the Cerberus Entities therefore are not objective in their views with regard to the fairness of the merger. The Cerberus Entities do not make any recommendations as to how the stockholders of LNR should vote. In reaching the determination as to fairness, the Cerberus Entities did not assign specific weights to particular factors, but rather considered all factors as a whole.

The Cerberus Entities did not establish their own liquidation value of the pre-acquisition LNR. However, based upon LNR's liquidation analysis (see page 27), the Cerberus Entities believe that the merger consideration would exceed the likely after-tax proceeds of a liquidation of LNR. In addition, the Cerberus Entities did not consider LNR's pre-acquisition going concern value in determining the fairness of the merger because, following the merger, LNR will have a significantly different capital structure, which will result in different opportunities and risks for the business as a highly-leveraged private company.

DOCUMENTARY APPENDIX HH, DOCUMENTS RELATING TO THE AIR PRODUCTS 2010 PROXY CONTEST TO ELECT DIRECTORS TO THE BOARD OF AIRGAS

[*See* Principally Chapters 3, 16, and 23 of Business Planning for Mergers and Acquisitions]

§ I Airgas Announces Filing of Preliminary Proxy Statement on Schedule 14A for September 2010 Annual Meeting June 21, 2010

SCHEDULE 14A
Proxy Statement Pursuant to Section 14(a)
of the Securities Exchange Act of 1934
Filed by the Registrant □
Filed by a Party other than the Registrant •
Check the appropriate box:

- Preliminary Proxy Statement
- Confidential, For Use of the Commission Only (as permitted by Rule 14a-6(e)(2))
- Definitive Proxy Statement
- Definitive Additional Materials

□ Soliciting Material Pursuant to Section 240.14a-12
Airgas, Inc.
(Name of Registrant as Specified In Its Charter)
N/A
(Name of Person(s) Filing Proxy Statement, if other than the Registrant) * * *

For release: Immediately

AIRGAS FILES PRELIMINARY PROXY MATERIALS IN CONNECTION
WITH 2010 ANNUAL MEETING OF STOCKHOLDERS
Urges Stockholders to Vote for Airgas' Three Incumbent Directors
RADNOR, PA – June 21, 2010 – Airgas, Inc. (NYSE: ARG) today announced that it has filed its preliminary proxy statement with the Securities and Exchange Commission ("SEC") in connection with the Company's 2010 Annual Meeting of Stockholders. The Airgas Board of Directors unanimously recommends that stockholders vote for the Board's three director nominees – W. Thacher Brown, Richard C. Ill and Peter McCausland – and against Air Products' By-Law Amendment proposals. The Company today issued the following statement:
We believe that the Air Products offer significantly undervalues Airgas and that the Air Products nominees have been selected and paid by Air Products to facilitate the transfer of Airgas' inherent value to Air Products at a grossly inadequate price.
Our nominees are proud to stand on their record. Airgas has employed a disciplined and highly successful approach to

steadily growing revenue, EBITDA and shareholders equity, and this approach has delivered outstanding returns for the Company's stockholders.

Over the past five years, Airgas has achieved a total shareholder return of 85%, compared to a return of negative 6% from the S&P 500 Index1. In addition, Airgas has delivered a total shareholder return of 4,201% from the Company's IPO in 1986 through February 4, 2010 – more than seven times the return of the S&P 500 Index – ranking Airgas above 94% of all companies in the S&P 500 Index2. We believe this long and enviable track record of industry and market leading performance clearly demonstrates that the Airgas Board of Directors is committed to acting in the best interests of all Airgas stockholders.

The Airgas Board believes that the interests of Air Products and its nominees are diametrically opposed to those of Airgas stockholders, and that Air Products picked its nominees and proposals precisely to advance its own interests – not those of all Airgas stockholders. Airgas strongly urges stockholders to re-elect the Company's directors and to reject Air Products' grossly inadequate offer as well as its nominees and proposals. * * *

§ II Air Products, Rule 14a-12 Material Issued Prior to Furnishing the Definitive Proxy Statement to the Air Gas Shareholders: News Release Urging Airgas Shareholders to Support Tender Offer and to Vote for Air Products' Nominees to Airgas' Board, July 21, 2010

SCHEDULE 14A
(Rule 14a-101)

INFORMATION REQUIRED IN PROXY STATEMENT

SCHEDULE 14A INFORMATION

Proxy Statement Pursuant to Section 14(a) of the
Securities Exchange Act of 1934 (Amendment No. __)

Filed by the Registrant□ □
Filed by a Party other than the Registrant□ □
Check appropriate box:
□ **Preliminary Proxy Statement**
□ **Confidential, For Use of the Commission Only (as permitted by Rule 14a-6(e)(2))**
□ **Definitive Proxy Statement**
□ **Definitive Additional Materials**
□ **Soliciting Material under Rule 14a-12**

Airgas, Inc.
(Name of Registrant as Specified in Its Charter)

Air Products Distribution, Inc.
Air Products and Chemicals, Inc.
(Name of Persons Filing Proxy Statement, if Other than Registrant) * * *

Air Products Responds to Airgas' Rejection of
Increased $63.50 Per Share All-Cash Tender Offer

Urges Airgas Shareholders to Send Strong Message to Airgas Board by Tendering Shares
and Supporting Air Products' Nominees and Proposals

LEHIGH VALLEY, Pa. (July 21, 2010) – Air Products (NYSE: APD) today responded to the announcement by Airgas, Inc. (NYSE: ARG) that its Board of Directors has rejected Air Products' fully financed offer to purchase all of the outstanding shares of Airgas for the increased price of $63.50 per share in cash made on July 8. * * *

Airgas' 2010 Annual Meeting remains unscheduled but Airgas has stated in SEC filings that it expects to hold the meeting on or before September 17, 2010, and has set a record date of July 19, 2010 for shareholders to be eligible to

vote at the meeting. Air Products encourages Airgas shareholders to take the necessary steps with their custodian banks and brokerage firms to ensure they are eligible to vote at the Annual Meeting. Shareholders should contact MacKenzie Partners, Inc. at the numbers below if they have any questions about voting or tendering procedures.

Air Products previously filed preliminary proxy materials with the Securities and Exchange Commission for its planned solicitation of proxies at the 2010 Airgas Annual Meeting. Air Products intends to solicit proxies from Airgas shareholders to elect three independent nominees to the Airgas Board of Directors and to approve three additional proposals that Air Products believes will ensure the Airgas Board will act independently and in the best interest of Airgas shareholders. * * *

ADDITIONAL INFORMATION * * *

This communication does not constitute an offer to buy or solicitation of an offer to sell any securities. The tender offer is being made pursuant to a tender offer statement on Schedule TO (including the Offer to Purchase, a related letter of transmittal and other offer materials) filed by Air Products with the U.S. Securities and Exchange Commission ("SEC") on February 11, 2010. INVESTORS AND SECURITY HOLDERS OF AIRGAS ARE URGED TO READ THESE AND OTHER DOCUMENTS FILED WITH THE SEC CAREFULLY IN THEIR ENTIRETY BECAUSE THEY CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED TRANSACTION. Investors and security holders can obtain free copies of these documents and other documents filed with the SEC by Air Products through the web site maintained by the SEC at http://www.sec.gov. The Offer to Purchase and related materials may also be obtained for free by contacting the Information Agent for the tender offer, MacKenzie Partners, Inc., at 212-929-5500 or toll-free at 800-322-2885.

Air Products has filed a preliminary proxy statement on Schedule 14A with the SEC on June 16, 2010, and a revised preliminary proxy statement on Schedule 14A on July 9, 2010, in connection with the solicitation of proxies for the 2010 annual meeting of Airgas stockholders. Air Products expects to file a definitive proxy statement with the SEC in connection with the solicitation of proxies for the 2010 annual meeting of Airgas stockholders and may file other proxy solicitation material in connection therewith. Any definitive proxy statement will be mailed to shareholders of Airgas. INVESTORS AND SECURITY HOLDERS OF AIRGAS ARE URGED TO READ THESE AND OTHER DOCUMENTS FILED WITH THE SEC CAREFULLY IN THEIR ENTIRETY AS THEY BECOME AVAILABLE BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION. Investors and security holders will be able to obtain free copies of these documents (if and when available) and other documents filed with the SEC by Air Products through the web site maintained by the SEC at http://www.sec.gov. These materials may also be obtained for free by contacting Air Products' proxy solicitor for the 2010 Airgas annual meeting, MacKenzie Partners, Inc., at 212-929-5500 or toll-free at 800-322-2885.

CERTAIN INFORMATION REGARDING PARTICIPANTS
Air Products, Purchaser, and certain of their respective directors and executive officers and the Air Products nominees may be deemed to be participants in the proposed transaction under the rules of the SEC. Security holders may obtain information regarding the names, affiliations and interests of Air Products' directors and executive officers in Air Products' Annual Report on Form 10-K for the year ended September 30, 2009, which was filed with the SEC on November 25, 2009, and its proxy statement for the 2010 Annual Meeting, which was filed with the SEC on December 10, 2009; and of Purchaser's directors and executive officers in the Offer to Purchase. * * *

FORWARD-LOOKING STATEMENTS * * *

§ III Air Products, Definitive Proxy Statement on Schedule 14A Contested Election at Airgas, July 29, 2010

July 29, 2010
To the Stockholders of Airgas, Inc.:

Earlier this year we extended an offer to the stockholders of Airgas to purchase your shares of Airgas common stock for $60.00 per share in cash, a 38% premium to the closing price of Airgas's stock on the last trading day before the public announcement of our offer. On July 8, 2010, we increased our offer to $63.50 per share in cash, a 46% premium to the

closing price of Airgas's stock on the last trading day before the public announcement of the offer. We commenced our tender offer because, as described in the enclosed proxy statement, Airgas's board of directors repeatedly refused to negotiate with us, even though we communicated to Airgas on several occasions that we were seeking a business combination with Airgas and were willing to pay a substantial premium to Airgas's stockholders. Since then, despite our repeated invitations to Airgas's board of directors to meet with us and provide information that could lead to a higher value for shareholders, Airgas's board continues to refuse to engage with us to discuss our offer.

We are sending you the enclosed proxy statement and accompanying GOLD proxy card because we are soliciting proxies from Airgas's stockholders to be used at the 2010 annual meeting of Airgas's stockholders. At this annual meeting, three directors will be elected to serve for terms expiring at Airgas's 2013 annual meeting, and certain other business (including business proposed by Air Products, described in more detail in the enclosed proxy statement) will be transacted. Airgas has announced that the 2010 annual meeting will be held on September 15, 2010 at 8:30 a.m., Eastern Time, at Drexelbrook, Drexelbrook Drive and Valley Road, Drexel Hill, PA 19026, and that the record date for determining the holders of record of Airgas common stock who are entitled to vote at the 2010 annual meeting is July 19, 2010.

We are seeking your support for the election of our three nominees to Airgas's board, and your support for our other proposals, because we believe that the current directors of Airgas are not acting, and in our opinion will not act, in your best interests. Specifically, as described in the enclosed proxy statement, despite our repeated requests, the Airgas board continues to refuse to negotiate with us or to appoint a special committee of independent directors to evaluate our offer. Although the Airgas board of directors has rejected our offer, it has not explained to stockholders how it will deliver value equal to our fully financed, all cash offer of $63.50 per share.

We believe that you deserve a board of directors that is answerable to you and will act in your best interests. We urge you to send a strong message to Airgas that you want a board that will act in your best interests and let you have the opportunity to accept our cash offer (subject to the satisfaction of the conditions to the offer and the tender of your shares).

WHETHER OR NOT YOU PLAN TO ATTEND THE 2010 ANNUAL MEETING, WE URGE YOU TO HAVE YOUR SHARES VOTED FOR THE ELECTION OF THE AIR PRODUCTS NOMINEES AND FOR THE APPROVAL OF THE OTHER AIR PRODUCTS PROPOSALS BY SIGNING, DATING AND RETURNING THE ENCLOSED GOLD PROXY CARD IN THE POSTAGE-PAID ENVELOPE TODAY.

REMEMBER, IF YOU HOLD YOUR AIRGAS SHARES WITH A BROKERAGE FIRM OR BANK, THE BROKER OR BANK MUST VOTE YOUR SHARES FOR YOU, BUT CAN DO SO ONLY UPON RECEIPT OF YOUR SPECIFIC INSTRUCTIONS. ACCORDINGLY, IT IS IMPORTANT THAT YOU PROMPTLY CONTACT THE PERSON RESPONSIBLE FOR YOUR ACCOUNT AND GIVE INSTRUCTIONS TO HAVE YOUR SHARES VOTED FOR THE ELECTION OF THE AIR PRODUCTS NOMINEES AND APPROVAL OF THE OTHER AIR PRODUCTS PROPOSALS.

If you have any questions or require any assistance in executing or delivering your proxy, please call our proxy solicitor, MacKenzie Partners, at 212-929-5500 (collect) or 800-322-2885 (toll free).

Very truly yours,

John E. McGlade
Chairman, President and Chief Executive Officer
Air Products and Chemicals, Inc. * * *

§ IV Air Products, Additional Definitive Proxy Soliciting Materials Filed by Non-Management and Rule 14(a)(12) Material, Fight Press Release, August 26, 2010

Air Products Issues Statement Regarding Airgas' Request That Delaware Court

Reject Valid By-law Amendment Regardless Of Shareholder Vote

LEHIGH VALLEY, Pa. (August 26, 2010) – Air Products (NYSE: APD) today issued the following statement in response to a letter submitted today by Airgas (NYSE: ARG) to the Delaware Chancery Court. In the letter, Airgas stated that it intends to seek to invalidate any affirmative decision by a majority of Airgas shareholders to approve adoption of a new by-law at the September 15 Airgas Annual Meeting requiring Airgas to hold its next annual meeting in January 2011, and requests that the Court resolve the issue on an expedited basis should a majority of shareholders vote in favor of the by-law.

"Airgas' request today for the Delaware Chancery Court to rule against the will of a majority of its shareholders reveals the Airgas Board's disdain for shareholders' interests. This request is a tactic to use the Delaware Chancery Court to intimidate shareholders into voting against Air Products' valid by-law amendment -- it is well-settled that the Delaware Chancery Court will make itself available on an expedited basis and will not decide on the validity of by-laws prior to a shareholder vote. Airgas has also made it clear that it intends to use the courts to attempt to circumvent the will of the majority of its shareholders. Air Products agrees that any challenge Airgas may bring against its valid by-law amendment should be decided promptly after the Airgas September 15 Annual Meeting. We are confident that a majority of the Airgas shareholders can determine the date of the next Airgas annual meeting.

"Today's request by Airgas is simply another in a long line of increasingly desperate tactics adopted by the Airgas Board in an attempt to remain entrenched and thwart Air Products' premium, all-cash offer for the company. We believe these tactics have recently included private communications to select Airgas shareholders regarding promises of a potential sale or auction of the company at some point well in the future in exchange for voting against Air Products' January 2011 annual meeting by-law.

"Air Products will promptly issue a full reply to the Delaware Chancery Court regarding Airgas' latest tactic.

"Air Products urges Airgas' shareholders to reject these tactics of the Airgas Board and management, and to vote their GOLD proxy card "FOR" the three highly qualified Air Products nominees and "FOR" the by-law amendments at the September 15 Airgas Annual Meeting."

Air Products (NYSE:APD) serves customers in industrial, energy, technology and healthcare markets worldwide with a unique portfolio of atmospheric gases, process and specialty gases, performance materials, and equipment and services. Founded in 1940, Air Products has built leading positions in key growth markets such as semiconductor materials, refinery hydrogen, home healthcare services, natural gas liquefaction, and advanced coatings and adhesives. The company is recognized for its innovative culture, operational excellence and commitment to safety and the environment. In fiscal 2009, Air Products had revenues of $8.3 billion, operations in over 40 countries, and 18,900 employees around the globe. For more information, visit: www.airproducts.com.

ADDITIONAL INFORMATION
On February 11, 2010, Air Products Distribution, Inc. ("Purchaser"), a wholly owned subsidiary of Air Products and Chemicals, Inc. ("Air Products"), commenced a cash tender offer for all the outstanding shares of common stock of Airgas, Inc. ("Airgas") not already owned by Air Products, subject to the terms and conditions set forth in the Offer to Purchase dated as of February 11, 2010 (the "Offer to Purchase"). The purchase price to be paid upon the successful closing of the cash tender offer is $63.50 per share in cash, without interest and less any required withholding tax, subject to the terms and conditions set forth in the Offer to Purchase, as amended. The offer is scheduled to expire at midnight, New York City time, on Friday, October 29, 2010, unless further extended in the manner set forth in the Offer to Purchase.

This communication does not constitute an offer to buy or solicitation of an offer to sell any securities. The tender offer is being made pursuant to a tender offer statement on Schedule TO (including the Offer to Purchase, a related letter of transmittal and other offer materials) filed by Air Products with the U.S. Securities and Exchange Commission ("SEC") on February 11, 2010. INVESTORS AND SECURITY HOLDERS OF AIRGAS ARE URGED TO READ THESE AND OTHER DOCUMENTS FILED WITH THE SEC CAREFULLY IN THEIR ENTIRETY BECAUSE THEY CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED TRANSACTION. Investors and security holders can obtain free copies of these documents and other documents filed with the SEC by Air Products through the

web site maintained by the SEC at http://www.sec.gov. The Offer to Purchase and related materials may also be obtained for free by contacting the Information Agent for the tender offer, MacKenzie Partners, Inc., at 212-929-5500 or toll-free at 800-322-2885.

Air Products has filed a definitive proxy statement on Schedule 14A dated July 29, 2010 with the SEC in connection with the solicitation of proxies for the 2010 annual meeting of Airgas stockholders. The definitive proxy statement has been mailed to shareholders of Airgas. INVESTORS AND SECURITY HOLDERS OF AIRGAS ARE URGED TO READ THE PROXY STATEMENT AND OTHER DOCUMENTS RELATED TO THE SOLICITATION AND FILED WITH THE SEC CAREFULLY IN THEIR ENTIRETY AS THEY BECOME AVAILABLE BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION. Investors and security holders will be able to obtain free copies of these documents (if and when available) and other documents filed with the SEC by Air Products through the web site maintained by the SEC at http://www.sec.gov. These materials may also be obtained for free by contacting Air Products' proxy solicitor for the 2010 Airgas annual meeting, MacKenzie Partners, Inc., at 212-929-5500 or toll-free at 800-322-2885.

CERTAIN INFORMATION REGARDING PARTICIPANTS * * *

FORWARD-LOOKING STATEMENTS * * *

DOCUMENTARY APPENDIX II, DOCUMENTS RELATING TO THE TENDER OFFER BY MALLINCKRODT PLC FOR THE STOCK OF CADENCE PURSUANT TO A MERGER AGREEMENT WITH A SECTION 251(h) SECOND STEP MERGER PROVISION

[*See* Principally Chapters 2, 13, and 20 of Business Planning for Mergers and Acquisitions]

§ I Excerpts from the Offer to Purchase for Cash Stock of Cadence, February 19, 2014

Offer to Purchase for Cash
All Outstanding Shares of Common Stock
of
Cadence Pharmaceuticals, Inc.
at
$14.00 Net Per Share
by
Madison Merger Sub, Inc.
a wholly owned indirect subsidiary of
Mallinckrodt plc * * *

Madison Merger Sub, Inc., a Delaware corporation (which we refer to as the "Purchaser") and a wholly owned indirect subsidiary of Mallinckrodt plc, an Irish public limited company (which we refer to as "Parent"), is offering to purchase for cash all of the outstanding shares of common stock, par value $0.0001 per share (the "Shares"), of Cadence Pharmaceuticals, Inc., a Delaware corporation (which we refer to as "Cadence"), at a purchase price of $14.00 per Share (the "Offer Price"), net to the seller in cash, without interest thereon and less any applicable withholding taxes, upon the terms and subject to the conditions set forth in this Offer to Purchase (the "Offer to Purchase") and in the related Letter of Transmittal (the "Letter of Transmittal" which, together with this Offer to Purchase and other related materials, as each may be amended or supplemented from time to time, constitutes the "Offer").

The Offer is being made pursuant to the Agreement and Plan of Merger, dated as of February 10, 2014 (as it may be amended from time to time, the "Merger Agreement"), by and among Parent, Purchaser and Cadence. The Merger Agreement provides, among other things, that following the consummation of the Offer and subject to the satisfaction or waiver of certain conditions, Purchaser will be merged with and into Cadence (the "Merger") as soon as practicable without a meeting of the stockholders of Cadence in accordance with Section 251(h) of the General Corporation Law of the State of Delaware, with Cadence continuing as the surviving corporation (which we refer to as the "Surviving Corporation") in the Merger and thereby becoming a wholly owned indirect subsidiary of Parent. In the Merger, each Share outstanding immediately prior to the effective time of the Merger (other than Shares held (i) in the treasury of Cadence or by Parent, Purchaser or any of Parent's other subsidiaries, which Shares will be canceled and will cease to exist or (ii) by stockholders who validly exercise appraisal rights under Delaware law with respect to such Shares) will be automatically canceled and converted into the right to receive $14.00 per Share or any greater per Share price paid in the Offer, without interest thereon and less any applicable withholding taxes. As a result of the Merger, Cadence will cease to be a publicly traded company and will become wholly owned by Parent. Under no circumstances will interest be paid on the purchase price for Shares, regardless of any extension of the Offer or any delay in making payment for Shares.

The Offer is conditioned upon, among other things, (a) the absence of a termination of the Merger Agreement in accordance with its terms (the "Termination Condition") and (b) the satisfaction of (i) the Minimum Condition (as described below), (ii) the HSR Condition (as described below) and (iii) the Governmental Entity Condition (as described below). The Minimum Condition requires that the number of Shares validly tendered (excluding Shares tendered pursuant to guaranteed delivery procedures but not yet delivered) in accordance with the terms of the Offer and not validly withdrawn on or prior to the end of the day, 12:00 midnight, New York City time, on March 18, 2014 (the "Expiration Date," unless Purchaser shall have extended the period during which the Offer is open in accordance with the Merger Agreement, in which event "Expiration Date" shall mean the latest time and date at which the Offer, as so extended by Purchaser, shall expire), together with any Shares then owned by Parent and its subsidiaries, equals one

Share more than one half of all Shares then outstanding. The HSR Condition requires that any applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the rules and regulations promulgated thereunder (the "HSR Act"), shall have expired or otherwise been terminated. Under the HSR Act, each of Parent and Cadence filed on February 18, 2014 a Premerger Notification and Report Form with the Federal Trade Commission (the "FTC") and the Antitrust Division of the U.S. Department of Justice in connection with the purchase of Shares in the Offer. The Governmental Entity Condition requires that there be no law, regulation, order, injunction or decree enacted, enforced, amended, issued, in effect or deemed applicable to the Offer, by any governmental entity (other than the application of the waiting period provisions of the HSR Act to the Offer) that is in effect, and that no governmental entity shall have taken any other action, in each case the effect of which is to make illegal or otherwise prohibit consummation of the Offer or the Merger. The Offer is also subject to other conditions as described in this Offer to Purchase. See Section 15 — "Conditions of the Offer."

The board of directors of Cadence, among other things, has unanimously (i) determined that the Merger Agreement and the transactions contemplated thereby, including the Offer and the Merger, are advisable and fair to, and in the best interests of, Cadence and its stockholders, (ii) approved the Merger Agreement and the transactions contemplated thereby and declared that the Merger Agreement, the Offer, the Merger and the other transactions contemplated by the Merger Agreement are advisable and (iii) resolved to recommend that the stockholders of Cadence accept the Offer and tender all of their Shares pursuant to the Offer.

A summary of the principal terms of the Offer appears under the heading "Summary Term Sheet." You should read this entire Offer to Purchase carefully before deciding whether to tender your Shares pursuant to the Offer.

February 19, 2014 * * *

11. The Merger Agreement; Other Agreements.

Merger Agreement * * *

The Merger. The Merger Agreement provides that, following completion of the Offer and subject to the terms and conditions of the Merger Agreement, and in accordance with the DGCL, at the Effective Time, Purchaser will be merged with and into Cadence, and the separate existence of Purchaser will cease, and Cadence will continue as the Surviving Corporation after the Merger. The Merger will be governed by Section 251(h) of the DGCL. Accordingly, Parent, Purchaser and Cadence have agreed to take all necessary action to cause the Merger to become effective as soon as practicable following the acceptance for payment of Shares pursuant to the Offer without a meeting of Cadence's stockholders in accordance with Section 251(h) of the DGCL.

The certificate of incorporation and bylaws of Purchaser immediately prior to the Effective Time will be the certificate of incorporation and bylaws of the Surviving Corporation at and immediately after the Effective Time. * * *

§ II Excerpts from the Merger Agreement Relating to Section 251(h) Merger, Dated February 10, 2014

AGREEMENT AND PLAN OF MERGER
AMONG
MALLINCKRODT PUBLIC LIMITED COMPANY,
MADISON MERGER SUB, INC.
and
CADENCE PHARMACEUTICALS, INC.
Dated as of February 10, 2014 * * *

AGREEMENT AND PLAN OF MERGER (this "Agreement"), dated as of February 10, 2014, among Mallinckrodt public limited company, an Irish public limited company ("Parent"), Madison Merger Sub, Inc., a Delaware corporation and an indirect wholly owned subsidiary of Parent ("Merger Sub"), and Cadence Pharmaceuticals, Inc., a Delaware corporation (the "Company").

RECITALS

WHEREAS, the Board of Directors of the Company (the "Company Board") has unanimously (a) determined that this Agreement and the transactions contemplated hereby, including the Offer (as defined below) and the Merger (as defined below), are advisable and fair to, and in the best interests of, the Company and its stockholders, (b) approved this Agreement and the transactions contemplated hereby and declared that this Agreement, the Offer, the Merger and the other transactions contemplated by this Agreement are advisable and (c) resolved to recommend that the stockholders of the Company accept the Offer and tender all of their Shares (as defined below) into the Offer, on the terms and subject to the conditions of this Agreement;

WHEREAS, the Board of Directors of each of Parent and Merger Sub has approved this Agreement and the transactions contemplated hereby and determined that this Agreement, the Offer, the Merger and the other transactions contemplated by this Agreement are in the best interests of their respective shareholders;
WHEREAS, on the terms and subject to the conditions set forth herein, Parent has agreed to cause Merger Sub to commence a tender offer (as it may be extended, amended or supplemented from time to time as permitted by this Agreement, the "Offer") to purchase any (subject to the Minimum Condition (as defined in Annex I)) and all of the issued and outstanding shares of common stock of the Company, par value $0.0001 per share (each, a "Share"), at a price per share equal to $14.00 net to seller in cash, without interest (such amount, or any greater amount per share paid pursuant to the Offer, the "Offer Price");
WHEREAS, following the consummation of the Offer, the parties intend that Merger Sub will be merged with and into the Company on the terms and subject to the conditions set forth in this Agreement (with the Merger (as defined below) being governed by Section 251(h) of the General Corporation Law of the State of Delaware (the "Corporation Law"));
WHEREAS, as a condition and inducement to the willingness of Parent and Merger Sub to enter into this Agreement, concurrently with the execution and delivery of this Agreement, certain of the Company's stockholders are entering into a tender and support agreement with Parent and Merger Sub (the "Support Agreement") pursuant to which, among other things, each such stockholder has agreed to tender Shares (totaling, in the aggregate, approximately 13% of the outstanding Shares) to Merger Sub in the Offer; and
WHEREAS, the Company, Parent and Merger Sub desire to make certain representations, warranties, covenants and agreements in connection with this Agreement.

NOW THEREFORE, in consideration of the mutual covenants, representations, warranties and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

ARTICLE I.
THE OFFER
Section 1.01 The Offer.
(a) Provided that this Agreement shall not have been terminated in accordance with Section 8.01, Merger Sub shall, and Parent shall cause Merger Sub to, on or before the date that is ten (10) Business Days after the date of the initial public announcement of this Agreement (but in no event earlier than five (5) Business Days after the date of the initial public announcement of this Agreement), commence (within the meaning of Rule 14d-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act")) the Offer.
(b) The obligations of Merger Sub to, and of Parent to cause Merger Sub to, accept for payment and pay for any Shares pursuant to the Offer is subject to the terms and the satisfaction or waiver (as provided in Section 1.01(c) below) of the conditions set forth in Annex I (the "Offer Conditions") (without limiting the right of Merger Sub to terminate, extend or modify the Offer in accordance with the terms of this Agreement). [See Annex I with respect to the minimum tender condition] On the terms and subject to the conditions of the Offer and this Agreement, Merger Sub shall, and Parent shall cause Merger Sub to, accept and pay for all Shares validly tendered and not validly withdrawn pursuant to the Offer (the "Tendered Shares") as soon as practicable after the Expiration Date (as defined below) and in compliance with applicable Law (as defined below). The acceptance for payment of Shares pursuant to and subject to the conditions of the Offer is referred to in this Agreement as the "Offer Closing," and the date and time at which the Offer Closing occurs is referred to in this Agreement as the "Acceptance Time." Parent shall provide, or cause to be provided, to Merger Sub on the date of the Offer Closing funds necessary to purchase and pay for any and all Shares that Merger Sub becomes obligated to accept for payment and purchase pursuant to the Offer and this Agreement.
(c) The Offer Conditions are for the sole benefit of Parent and Merger Sub, and Parent and Merger Sub may waive, in whole or in part, any Offer Condition at any time and from time to time, in their sole and absolute discretion, other than the Minimum Condition, which may be waived by Parent and Merger Sub only with the prior written consent of the Company. * * *

(d) On the date the Offer is commenced, Merger Sub shall, and Parent shall cause Merger Sub to, file with the U.S. Securities and Exchange Commission (the "SEC") a Tender Offer Statement on Schedule TO with respect to the Offer, which Tender Offer Statement shall include an offer to purchase, letter of transmittal, summary advertisement and other required ancillary offer documents (such Schedule TO and the documents included therein pursuant to which the Offer will be made, together with any supplements or amendments thereto, the "Offer Documents") and cause the Offer Documents to be disseminated to the holders of Shares as and to the extent required by applicable Law. The Company

hereby consents to the inclusion of the recommendation of the Company Board that the Company's stockholders accept the Offer and tender their Shares pursuant to the Offer (the "Company Board Recommendation") in the Offer Documents. Merger Sub shall, and Parent shall cause Merger Sub to, cause the Offer Documents to comply as to form in all material respects with the requirements of applicable Law. The Company shall promptly furnish to Parent and Merger Sub all information concerning the Company and the holders of Shares that may be required to be set forth in the Offer Documents or reasonably requested in connection with any action contemplated by this Section 1.01(d), including communication of the Offer to the record and beneficial holders of Shares. Each of the parties agrees to promptly correct any information provided by it for use in the Offer Documents if and to the extent that it shall have become false or misleading in any material respect, and Parent and Merger Sub further agree to take all steps necessary to cause the Offer Documents as so corrected to be filed with the SEC and disseminated to the holders of Shares, in each case as and to the extent required by applicable Law. Parent and Merger Sub shall provide the Company and its counsel in writing with any written comments (and shall orally describe any oral comments) that Parent, Merger Sub or their counsel may receive from time to time from the SEC or its staff with respect to the Offer Documents promptly after receipt of such comments. Prior to the filing of the Offer Documents (including any amendment or supplement thereto) with the SEC or dissemination thereof to the holders of Shares, or responding to any comments of the SEC with respect to the Offer Documents, Parent and Merger Sub shall provide the Company with a reasonable opportunity to review and comment on such Offer Documents or response, and Parent and Merger Sub shall give reasonable consideration to any comments provided by the Company. Parent and Merger Sub shall use reasonable best efforts to respond promptly to any such SEC comments.

(e) Subject to the terms and conditions set forth in the Offer Documents, the Offer shall remain open until midnight, New York City time, at the end of the 20th business day (for purposes of this Section 1.01(e) calculated in accordance with Rule 14d-1(g)(3) under the Exchange Act) after the date that the Offer is commenced (the "Initial Expiration Date") or, if the period of time for which the Offer is open shall have been extended pursuant to, and in accordance with, this Section 1.01(e) or as may be required by applicable Law, the time and date to which the Offer has been so extended (the Initial Expiration Date or such later time and date to which the Offer has been extended in accordance with this Section 1.01(e), the "Expiration Date"). * * *

Section 1.02 Company Action.

(a) The Company shall file with the SEC, as promptly as reasonably practicable after the Offer Documents are filed with the SEC (and in any event within five (5) Business Days after the Offer Documents are filed with the SEC), a Solicitation/Recommendation Statement on Schedule 14D-9 pertaining to the Offer (together with any amendments or supplements thereto, the "Schedule 14D-9") that contains the Company Board Recommendation, the fairness opinions of the Company's financial advisors referenced in Section 4.21 and the notice and other information required by Section 262(d)(2) of the Corporation Law, and shall promptly disseminate the Schedule 14D-9 to the holders of Shares as and to the extent required by applicable Law, including by setting the Stockholder List Date (as defined below) as the record date for the purpose of receiving the notice required by Section 262(d)(2) of the Corporation Law. The Company shall cause the Schedule 14D-9 to comply as to form in all material respects with the requirements of applicable Law. Parent and Merger Sub shall as promptly as reasonably practicable following the date hereof furnish to the Company all information concerning Parent and Merger Sub that may be required or reasonably requested by the Company for inclusion in the Schedule 14D-9. Each of the parties agrees to promptly correct any information provided by it for use in the Schedule 14D-9 if and to the extent that it shall have become false or misleading in any material respect, and the Company further agrees to take all steps necessary to cause the Schedule 14D-9 as so corrected to be filed with the SEC and disseminated to the holders of Shares, in each case as and to the extent required by applicable Law. The Company shall provide Parent, Merger Sub and their counsel in writing with any written comments (and shall orally describe any oral comments) that the Company or its counsel may receive from time to time from the SEC or its staff with respect to the Schedule 14D-9 promptly after receipt of such comments. Prior to the filing of the Schedule 14D-9 (including any amendment or supplement thereto) with the SEC or dissemination thereof to the holders of Shares, or responding to any comments of the SEC with respect to the Schedule 14D-9, the Company shall provide Parent and Merger Sub with a reasonable opportunity to review and comment on such Schedule 14D-9 or response, and the Company shall give reasonable consideration to any comments provided by Parent or Merger Sub. The Company shall use reasonable best efforts to respond promptly to any such SEC comments.

(b) The Company shall reasonably promptly after the date hereof provide to Parent, or cause to be provided to Parent, a list of the holders of Shares as well as mailing labels and any available listing or computer file containing the names and addresses of all record and beneficial holders of Shares and lists of securities positions of Shares held in stock depositories[.] * * *

ARTICLE II.
THE MERGER

Section 2.01 The Merger. Upon the terms and subject to the conditions set forth herein, and in accordance with the relevant provisions of the Corporation Law, Merger Sub shall be merged with and into the Company (the "Merger"), effective at such time as the certificate of merger is duly filed with the Secretary of State of the State of Delaware in accordance with Section 2.02, or at such later time as Parent and the Company shall agree and specify in such certificate of merger (the date and time at which the Merger becomes effective, the "Effective Time"). The Company shall be the surviving corporation in the Merger (the "Surviving Corporation") under the name "Cadence Pharmaceuticals, Inc." and shall continue its existence under the Laws of the State of Delaware. In connection with the Merger, the separate corporate existence of Merger Sub shall cease. The Merger shall be governed by Section 251(h) of the Corporation Law and shall be effected as soon as practicable following the Offer Closing.

Section 2.02 Consummation of the Merger. On the terms and subject to the conditions set forth herein, on the Closing Date (as defined below), but following the Offer Closing, Merger Sub and the Company shall cause the Merger to be consummated by filing with the Secretary of State of the State of Delaware a duly executed certificate of merger, as required by the Corporation Law, and the parties shall take all such further actions as may be required by Law to make the Merger effective. Prior to the filing referred to in Section 2.01 and this Section 2.02, as soon as practicable following the satisfaction or waiver, if permissible, of the conditions set forth in Article VII (other than those conditions that by their nature are to be satisfied at the Closing but subject to their satisfaction or, if permissible, waiver, at the Closing) or on such other day as the parties may mutually agree, the closing of the Merger (the "Closing") will be held at the offices of Latham & Watkins LLP, 12670 High Bluff Drive, San Diego, California 92130 (or such other place as the parties may mutually agree). The date on which the Closing occurs is referred to herein as the "Closing Date."

Section 2.03 Effects of the Merger. The Merger shall have the effects set forth herein and in the applicable provisions of the Corporation Law. From and after the Effective Time, the Surviving Corporation shall possess all of the rights, powers, privileges, franchises and be subject to all of the obligations, liabilities, restrictions and disabilities of the Company and Merger Sub, all as provided in the Corporation Law.

Section 2.04 Certificate of Incorporation and Bylaws. At the Effective Time, the Certificate of Incorporation of Merger Sub as in effect immediately prior to the Effective Time shall be Certificate of Incorporation of the Surviving Corporation until thereafter amended as permitted therein or by applicable Law. At the Effective Time, the Bylaws of Merger Sub as in effect immediately prior to the Effective Time shall be the Bylaws of the Surviving Corporation until thereafter amended as permitted therein or by applicable Law.

Section 2.05 Directors and Officers. * * *

ARTICLE III.
CONSIDERATION; PAYMENT FOR SHARES, OPTIONS AND WARRANTS

Section 3.01 Conversion of Shares; Cancellation of Treasury Shares and Parent-Owned Shares. Each Share issued and outstanding immediately prior to the Effective Time (other than Shares owned by Parent, Merger Sub or any Subsidiary (as defined below) of Parent or held in the treasury of the Company, and other than Dissenting Shares (as defined below), which shall have only those rights set forth in Section 3.09) shall, by virtue of the Merger and without any action on the part of the Company, Parent, Merger Sub or the holders thereof, be converted at the Effective Time into the right to receive in cash an amount per Share (subject to any applicable withholding Tax) equal to the Offer Price (the "Merger Consideration"), upon the surrender of the Certificates (as defined below) or Book-Entry Shares (as defined below), as applicable, in accordance with this Article III. At the Effective Time all such Shares shall no longer be outstanding and shall automatically be canceled and shall cease to exist, and each holder of Certificates or Book Entry Shares (in each case representing such Shares) shall cease to have any rights with respect thereto, except the right to receive the Merger Consideration as provided herein. Each Share issued and outstanding immediately prior to the Effective Time that is at such time owned by Parent, Merger Sub or any Subsidiary of Parent or held in the treasury of the Company shall, by virtue of the Merger and without any action on the part of the Company, Parent, Merger Sub or the holders thereof, be canceled and shall cease to exist at the Effective Time, and no consideration shall be delivered in exchange therefor.

Section 3.02 Conversion of Common Stock of Merger Sub. Each share of common stock, $0.01 par value, of Merger Sub issued and outstanding immediately prior to the Effective Time shall, by virtue of the Merger and without any action on the part of the Company, Parent, Merger Sub or the holders thereof, be converted at the Effective Time into and become one (1) share of common stock of the Surviving Corporation.

Section 3.03 Payment for Shares.

(a) On or prior to the Closing Date, Parent will, or will cause the Surviving Corporation to, deposit, or cause to be

deposited, with a bank or trust company designated by Parent and reasonably acceptable to the Company (the "Paying Agent") sufficient funds to make the aggregate payments of the Merger Consideration due pursuant to Section 3.01(a) (which, for the avoidance of doubt, in each case shall not include the Option Payoff Amount or the Merger Consideration payable with respect to Restricted Stock Units) (such amount being hereinafter referred to as the "Payment Fund"). * * *

ANNEX I
Offer Conditions
Notwithstanding any other provisions of the Offer and in addition to Merger Sub's rights to extend, amend or terminate the Offer in accordance with the provisions of the Agreement and applicable Law, neither Parent nor Merger Sub shall be required to accept for payment or, subject to any applicable rules and regulations of the SEC including Rule 14e-1(c) under the Exchange Act, pay for any Shares validly tendered and not validly withdrawn, if:
(a) there shall not have been validly tendered and not validly withdrawn that number of Shares that, when added to the Shares then owned by Parent and its Subsidiaries, would represent one share more than one half of all Shares then outstanding (such condition in this clause (a), the "Minimum Condition")[.]

DOCUMENTARY APPENDIX JJ, COMBINATION TENDER OFFER/MERGER AGREEMENT WITH A TOP-UP OPTION—WILD OATS

[*See* Principally Chapters 2, 15, and 20 of Business Planning for Mergers and Acquisitions]

§ I Comment on the Whole Foods-Wild Oats "Top-Up Option"

This negotiated tender offer/merger contained a "Top-Up Option." As discussed in Section 20.10, such an option gives an acquiror that does not hold 90% of the shares of the target after the completion of the tender offer and, therefore, cannot effectuate a short-form merger, the right to purchase shares directly from the target so that the 90% short-form merger condition is satisfied. For example, if the target has 100,000 shares outstanding, and the acquiror receives 87,000 of the target's shares in the tender offer, a top-up option would give the acquiror the right to purchase sufficient shares to take it to 90%. In this case, the acquiror would have to purchase an additional 30,000 shares directly from the target. Such a purchase would give the acquiror 117,000 shares of the target's 130,000 shares, which is exactly 90% of the post-purchase outstanding shares of the target. Of course, the target would have to have sufficient authorized but unissued shares to issue pursuant to the option.

§ II Excerpts from the Whole Foods-Wild Oats Merger Agreement, February 21, 2007

[Set out below are provisions of the merger agreement pursuant to which Whole Foods acquired Wild Oats in a combined negotiated tender offer and merger. The agreement contains a top-up option. Also, an excerpt from the conditions to the tender offer are set out in Exhibit A below. In combined tender offer-merger transactions the conditions to the tender offer are generally set out in such an exhibit.]

WILD OATS' AGREEMENT AND PLAN OF MERGER

AGREEMENT AND PLAN OF MERGER, dated as of February 21, 2007 (the "Agreement"), by and among Wild Oats Markets, Inc., a Delaware corporation (the "Company"), WFMI Merger Co., a Delaware corporation ("Merger Sub"), and Whole Foods Market, Inc., a Texas corporation ("Purchaser"). * * *

WHEREAS, on the terms and subject to the conditions set forth herein, Merger Sub has agreed to commence a tender offer (the "Offer") to purchase all outstanding shares of common stock, par value $0.001 per share, of the Company (the "Company Common Stock"), including the associated preferred stock purchase rights (the "Rights") issued pursuant to the Rights Agreement, as amended, dated May 22, 1998, by and between the Company and Wells Fargo Bank, N.A., as successor in interest to Norwest Bank Minneapolis, N.A. (the "Rights Agreement") (the shares of Common Stock, together with the Rights, being referred to collectively as the "Shares"), at a price of $18.50 per Share, net to the seller in cash (such price, or any higher price as may be paid in the Offer in accordance with this Agreement, the "Offer Price");

WHEREAS, following the consummation, or under certain conditions, the termination of the Offer, on the terms and subject to the conditions set forth herein, Merger Sub shall merge with and into the Company (the "Merger") and each Share that is issued and outstanding immediately prior to the Effective Time (other than Shares held in the treasury of the Company or owned by Merger Sub, Purchaser or any direct or indirect wholly-owned Subsidiary of Merger Sub or the Company immediately prior to the Effective Time, which will be canceled with no consideration issued in exchange therefor, and other than Dissenting Shares) will be canceled and converted into the right to receive cash in an amount equal to the Offer Price, all upon the terms and conditions set forth herein; * * *

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants and agreements herein contained, and intending to be legally bound hereby, the parties hereby agree as follows:

ARTICLE I OF WILD OATS' MERGER AGREEMENT

THE OFFER

SECTION 1.1. The Offer.

(a) (i) Merger Sub shall, and Purchaser shall cause Merger Sub to, promptly (but in no event later than February 27, 2007) commence (within the meaning of Rule 14d-2 under the Securities Exchange Act of 1934, as amended (the "Exchange Act")) the Offer to purchase all outstanding shares of Company Common Stock, at the Offer Price. The obligations of Merger Sub to, and of Purchaser to cause Merger Sub to, accept for payment and to pay for any shares of Company Common Stock tendered pursuant to the Offer shall be subject to only those conditions set forth in Exhibit A hereto (the "Offer Conditions").* * *

(ii) Subject to the satisfaction or waiver by Merger Sub of the Offer Conditions as of the time of any scheduled expiration of the Offer (including at the expiration of any extension of the Offer as described below), Merger Sub shall, and Purchaser shall cause Merger Sub to, accept for payment and promptly pay for shares of Company Common Stock validly tendered and not withdrawn pursuant to the Offer. Merger Sub may, without the consent of the Company, (A) extend the Offer [in certain circumstances], * * * or (C) elect to provide a subsequent offering period for the Offer in accordance with Rule 14d-11 under the Exchange Act, provided that Merger Sub shall not extend the Offer pursuant to clause (A) of this Section beyond the Outside Date [drop dead date] without the consent of the Company. The Offer Price may be increased, and the Offer may be extended to the extent required by law in connection with such increase in the Offer Price, in each case without the consent of the Company. * * *

(c) On the date of commencement of the Offer, Purchaser and Merger Sub shall (i) file or cause to be filed with the SEC a Tender Offer Statement on Schedule TO (together with all amendments and supplements thereto, the "Schedule TO") with respect to the Offer which shall contain the offer to purchase and related letter of transmittal and summary advertisement and other ancillary documents and instruments required thereby pursuant to which the Offer will be made (collectively with any supplements or amendments thereto, the "Offer Documents") and (ii) cause the Offer Documents to be disseminated to holders of Company Common Stock. The Company and its counsel shall be given a reasonable opportunity to review and comment on the Offer Documents prior to their filing with the SEC, and the Purchaser and Merger Sub shall give reasonable and good faith consideration to any comments made by Company and their counsel. * * *

SECTION 1.2. Company Consent; Schedule 14D-9.

(a) The Company hereby approves of and consents to the Offer.

(b) On the date the Offer Documents are filed, the Company shall file with the SEC a Solicitation/Recommendation Statement on Schedule 14D-9 (together with all amendments and supplements thereto, the "Schedule 14D-9") containing, subject to Section 5.3, the recommendations of the Company Board described in Section 4.4(b). * * *

SECTION 1.5. Top-Up Option.

(a) The Company hereby irrevocably grants to Merger Sub an option (the "Top-Up Option"), exercisable only after the acceptance by Merger Sub of, and payment for, Shares tendered in the Offer, to purchase that number (but not less than that number) of Shares (the "Top-Up Shares") as is equal to the lowest number of Shares that, when added to the number of Shares owned by Purchaser, Merger Sub and any Subsidiaries or Affiliates of Purchaser or Merger Sub, taken as a whole, at the time of such exercise, shall constitute one share more than 90% of the total shares of Company Common Stock then outstanding (assuming the issuance of the Top-Up Shares) at a price per share equal to the Offer Price; provided, however, that (i) in no event shall the Top-Up Option be exercisable (x) for a number of shares of Company Common Stock in excess of the Company's then authorized and unissued shares of Common Stock (including as authorized and unissued shares of Common Stock, for purposes of this Section 1.5, any shares of Company Common Stock held in the treasury of the Company), or (y) if the issuance of shares of Company Common Stock by the Company in connection with the exercise of the Top-Up Option by Merger Sub would violate applicable Nasdaq rules [i.e., an issuance of more than 20% of the outstanding stock] (ii) Merger Sub shall, concurrently with the exercise of the Top-Up Option, give written notice to the Company that as promptly as practicable following such exercise, Merger Sub shall (and Purchaser shall cause Merger Sub to) consummate the Merger in accordance with Section 253 of the Delaware GCL as contemplated by this Agreement, and (iii) the Top-Up Option may not be exercised if any provision of applicable law or any judgment, injunction, order or decree of any federal, state, provincial, local and foreign government, governmental, quasi-governmental, supranational, regulatory or administrative authority, agency, commission or any court, tribunal, or judicial or arbitral body (each, a "Governmental Entity") shall prohibit, or require any action, consent, approval, authorization or permit of, action by, or filing

with or notification to, any Governmental Entity or the Company's stockholders in connection with the exercise of the Top-Up Option or the delivery of the Top-Up Shares in respect of such exercise, which action, consent, approval, authorization or permit, action, filing or notification has not theretofore been obtained or made, as applicable.

(b) Any certificates evidencing Top-Up Shares may include any legends required by applicable securities laws. [See Chapter 4]

(c) Purchaser and Merger Sub understand that the shares of Company Common Stock that Merger Sub may acquire upon exercise of the Top-Up Option will not be registered under the Securities Act of 1933, as amended (the "Securities Act"), and will be issued in reliance upon an exemption thereunder for transactions not involving a public offering. Purchaser and Merger Sub represent and warrant to the Company that Merger Sub is, and will be upon exercise of the Top-Up Option, an "accredited investor" (as defined in Rule 501 of Regulation D promulgated under the Securities Act). Merger Sub agrees that the Top-Up Option and the Top-Up Shares to be acquired upon exercise thereof are being and will be acquired for the purpose of investment and not with a view to or for resale in connection with any distribution thereof within the meaning of the Securities Act. [See Chapter 4] * * *

Exhibit A TO WILD OATS' MERGER AGREEMENT
CONDITIONS TO THE OFFER

Capitalized terms used in this Exhibit A and not otherwise defined herein shall have the meanings assigned to them in the Agreement to which it is attached (the "Merger Agreement").

1. Notwithstanding any other provision of the Offer or the Merger Agreement, Merger Sub shall not be required to accept for payment or, subject to any applicable rules and regulations of the SEC, including Rule 14e-l(c) under the Exchange Act (relating to Merger Sub's obligation to pay for or return tendered shares of Company Common Stock promptly after the termination or withdrawal of the Offer), to pay for any shares of Company Common Stock tendered in connection with the Offer and, subject to the terms of the Merger Agreement, may terminate or amend the Offer, unless, immediately prior to the Expiration Date:

(a) there shall have been validly tendered in the Offer and not properly withdrawn that number of shares of Company Common Stock (including the shares of Company Common Stock subject to the Support Agreement), which, together with the number of Shares, if any, then owned beneficially by Purchaser, Merger Sub and any Subsidiary or Affiliate of Purchaser or Merger Sub, taken as a whole, constitutes at least a majority of the total number of then-outstanding shares of Company Common Stock on a fully diluted basis (which shall mean, as of any time, the number of shares of Company Common Stock outstanding, together with all shares of Company Common Stock (if any) which the Company would be required to issue pursuant to any then outstanding warrants, options, benefit plans or obligations or securities convertible or exchangeable into shares of Company Common Stock or otherwise, but only to the extent then exercisable, other than potential dilution attributable to the Rights on the date shares of Company Common Stock are accepted for payment (the "Minimum Tender Condition"); and

(b) the applicable waiting period under the HSR Act in respect of the transactions contemplated by this Agreement, if any, shall have expired or been terminated. * * *

DOCUMENTARY APPENDIX KK- JOINT ANNOUNCMENT OF A FIRM INTENTION BY WALMART TO MAKE AN OFFER TO AQUIRE 51% OF SOUTH AFRICA'S MASS MART

[*See* Chapter 26 of Business Planning for Mergers and Acquisitions]

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JOINT ANNOUNCEMENT OF A FIRM INTENTION BY WALMART TO MAKE AN OFFER TO ACQUIRE 51% OF THE ORDINARY SHARE CAPITAL OF MASSMART ON THE BASIS SET OUT IN THIS ANNOUNCEMENT AND
WITHDRAWAL OF CAUTIONARY ANNOUNCEMENT

I. EXECUTIVE SUMMARY*

- The boards of directors of Massmart and Walmart are pleased to announce the terms of a recommended cash offer to be made by Walmart to acquire:

• 51% of Massmart ordinary shares, equivalent to 51 out of every 100 Massmart ordinary shares held, (excluding the Excluded Shares), by way of a scheme of arrangement; and

• 51% of the total entitlement to Massmart ordinary shares beneficially owned by the beneficiaries of the Employee Share Trust, the Thuthukani Trust and the BSS Trust, whether vested or unvested, restricted or unrestricted, by way of Private Treaty Agreements

- Under the terms of the Offer, Massmart shareholders will receive R148.00 in cash per Massmart ordinary share sold to Walmart

- The Offer represents a premium of approximately 19.2% to the volume weighted average price per Massmart ordinary share for the 30 days up to and including 23 September 2010, being the last business day immediately prior to the date of the first cautionary announcement

- Massmart, following the implementation of the Offer, will remain listed on the JSE

- The Massmart board has appointed Morgan Stanley as its independent financial advisor in terms of the SRP Code to consider the terms of the Offer and opine on whether or not the Offer is fair from a financial point of view to the holders of Massmart ordinary shares and the beneficiaries of the Employee Share Trust, the Thuthukani Trust, and the BSS Trust

- Morgan Stanley has indicated that in its view the Offer is fair from a financial point of view

- Accordingly, the Massmart board has resolved to support and to facilitate the Offer and the Substitute Offer, if made (subject to receiving a favourable fairness opinion in relation to the Substitute Offer) and therefore is recommending to Massmart shareholders that they vote in favour of all resolutions required to implement the Offer

- Walmart has received irrevocable undertakings from certain institutional shareholders to vote in favour of, or to recommend to their clients to vote in favour of, the Offer in respect of Massmart ordinary shares representing approximately 35.2% of the existing issued ordinary share capital of Massmart

*The definitions and interpretations used in this announcement apply to the Executive Summary section of this announcement.

II.INTRODUCTION

Further to the cautionary announcements published by Massmart on 27 September 2010 and 28 October 2010, Massmart shareholders are advised that Walmart has delivered to the Massmart board of directors ("the Massmart board") notice of its firm intention ("firm intention letter") to make four inter-conditional offers to acquire, subject to the conditions set out in paragraph 4 below:

2.1. 51% of the total issued ordinary share capital of Massmart ("Massmart ordinary shares"), being 51 out of every 100 Massmart ordinary shares held (subject to rounding), from the holders of Massmart ordinary shares registered as such on the record date of the Scheme ("the Scheme Record Date") ("the Scheme Shares") by way of a scheme of arrangement in terms of section 311 of the Companies Act, 1973 as amended ("the Companies Act") to be proposed by Walmart between Massmart and the holders of Massmart ordinary shares ("the Scheme") but specifically excluding any Massmart ordinary shares beneficially owned by:

- the Massmart Holdings Limited Employee Share Trust ("Employee Share Trust");

- the option holders of options under the Employee Share Trust ("ESOP Option Holders") as a consequence of the implementation of the provisions of the ESOP Addendum, as defined in paragraph 4.7 below (being the Massmart ordinary shares resulting from the exercise of 51% of both vested and unvested options) ("the ESOP Shares");

- the beneficiaries of the Thuthukani Empowerment Trust ("Thuthukani Trust") ("the Thuthukani Beneficiaries") (which holds the Massmart "A" convertible redeemable non-cumulative participating preference shares of 1 cent each in the issued share capital of Massmart ("Massmart "A" preference shares")) as a consequence of the implementation of the provisions of the Thuthukani Addendum (as defined in paragraph 4.7 below) (being the Massmart ordinary shares resulting from the deemed election to accelerate 51% of the vested and unvested allocation balance of the Thuthukani beneficiaries) ("the Thuthukani Shares"); and

- the beneficiaries of the Black Scarce Skills Trust ("BSS Trust") ("the BSST Beneficiaries") (which holds the Massmart "B" convertible redeemable non-cumulative preference shares of 1 cent each in the issued share capital of Massmart ("Massmart "B" preference shares")) as a consequence of the implementation of the provisions of the BSST Addendum (as defined in paragraph 4.7 below) (being the Massmart ordinary shares resulting from the exercise of 51% of the vested and unvested allocation balance of the BSST Beneficiaries) ("the BSST Shares");

(collectively "the Excluded Shares"); and

2.2. all of the ESOP Shares, the Thuthukani Shares and the BSST Shares by way of three private treaty agreements

as further detailed in paragraph 5.2 below;

(collectively "the Offer").

The Offer will be made at a cash price of R148.00 per Massmart ordinary share to be acquired by Walmart ("the Offer Consideration").

The Offer is being made on the basis that, other than in the ordinary course of its business, Massmart will not declare or pay any dividends or declare or make any other distributions to the holders of ordinary and preference shares between 25 November 2010 and the operative date of the Scheme. Massmart shall be entitled to declare and pay an ordinary interim dividend for the six months ending December 2010, at levels consistent with prior years, on or after 14 March 2011.
The listing of Massmart's ordinary shares on the securities exchange operated by JSE Limited ("the JSE") will continue, with trading and settlement taking place under a new International Securities Identification Number ("ISIN"), with effect from the commencement of business on the first business day following the last day to trade in order to participate in the Scheme. It is expected that Massmart will remain a constituent of the MSCI Emerging Market and FTSE JSE Top 40 Indices.

Should the South Gauteng division of the High Court of South Africa ("the Court") refuse to convene the Scheme meeting, or if the Scheme fails for any reason other than as a result of failure to receive of a regulatory approval (as contemplated in paragraph 4 below), Walmart shall be entitled (at its discretion) to make a substitute offer to holders of Massmart ordinary shares (excluding the Excluded Shares) by way of a general offer and which will incorporate an appropriate offer to the ESOP Option Holders, the Thuthukani Beneficiaries and the BSST Beneficiaries ("the Substitute Offer").

The firm intention letter has been countersigned by the Massmart board and no variation or amendment thereof will be binding unless reduced to writing and signed by Massmart and Walmart.

III. STRATEGIC RATIONALE

3.1. Walmart's rationale for the transaction

The Offer is in line with Walmart's strategy to grow its international business by increasing its exposure to emerging markets with high growth potential. Walmart's core proposition is to save people money so they can live better, and this proposition has a strong appeal to consumers in emerging markets. Therefore, South Africa presents a compelling growth opportunity for Walmart and offers a platform for expansion into the rest of Africa.

Within the South African market, Walmart sees Massmart as an ideal entry point into the region and a strategic fit with Walmart's global organisation. Walmart is attracted to Massmart's talented management team, cultural fit with Walmart, expertise in general merchandise, strong food and consumables business, multi-format capability, and strong regional knowledge and experience.

3.2. Benefits to Massmart shareholders

The Offer has the dual benefit of allowing Massmart shareholders the opportunity to realise an attractive premium on part of their investment at R148.00 per Massmart ordinary share in cash while affording them the opportunity to participate in the future value of the Massmart ordinary shares that remain listed on the JSE.

3.3. Benefits to consumers, employees, suppliers and communities

The proposed transaction contemplated in this announcement is expected to result in benefits to consumers, employees, suppliers and communities.

IV. CONDITIONS PRECEDENT TO THE SCHEME

The offers to be made to each of the Massmart ordinary shareholders, the ESOP Option Holders, the Thuthukani Beneficiaries and the BSST Beneficiaries as set out in paragraphs 2.1 and 2.2 above, are inter-conditional (subject

to the waiver provisions below).

The Scheme will be subject to the fulfilment or, where applicable, waiver of the following conditions precedent ("Scheme Conditions"), which must be fulfilled by no later than six months after the date of posting of the circular to Massmart shareholders ("Scheme circular") :

4.1. the Scheme having been approved by a requisite 75% majority of Massmart ordinary shareholders at the Scheme meeting present in person or by proxy, the Scheme being sanctioned by the Court and the order of Court sanctioning the Scheme being registered with the Registrar of Companies;

4.2. the receipt of regulatory approvals, to the extent required by law, in relation to the Offer and the Substitute Offer (if made), from all applicable regulators in South Africa and in any other country in which Massmart operates, including without limitation, the JSE, the Securities Regulation Panel ("SRP"), the competition authorities established under the (South African) Competition Act, 89 of 1998, and the Financial Surveillance Department of the South African Reserve Bank;

4.3. from the date of the firm intention letter referred to above until 17h00 (SA time) on the business day immediately preceding the finalisation date of the Scheme, no material adverse change having arisen in the business of Massmart. "Material adverse change" shall mean an adverse effect, fact, circumstance or any potential adverse effect, fact or circumstance which has arisen or occurred, or might reasonably be expected to arise or occur and which is or might reasonably be expected (alone or together with any other such actual or potential adverse effect, fact or circumstance) to be material with regard to the business, condition, assets, liabilities, operations, financial performance, net income and prospects of Massmart and/or any member of its group (whether as a consequence of the Offer or not); and/or any restrictive covenant or covenants or similar provision entered into by Massmart or any member of its group which may materially reduce the actual or potential value of Massmart or its group. To be "material" there should be an adverse impact of no less than R1.5 billion upon the value or potential value of Massmart and/or its froup, as the case may be or, if the adverse impact is upon Massmart's consolidated earnings before interest, tax, depreciation and amortisation (EBITDA), it shall be no less than 5% of the said EBITDA when measured against Massmart's 2010 EBITDA numbers. For the purposes of this definition, "value" shall include the value of assets and/or revenues and/or reserves without double counting where a single matter affects more than one measure of value;

4.4. where such consent is necessary, the consent for the proposed transaction contemplated in this announcement being obtained from the relevant counterparties to certain key contracts, as identified by Walmart during the due diligence review conducted by Walmart on the Massmart group. These consents relate primarily to "change of ownership" clauses in property leases, certain banking facilities and certain commercial agreements, which clauses are usual for agreements of that nature;

4.5. the approval by the holders of Massmart ordinary and preference shares of all resolutions required to successfully implement the Offer or the Substitute Offer (if made), including but not limited to the Whitewash Resolution (as defined in paragraph 5.4 below) and the resolution approving the execution of the ESOP Addendum (as defined in paragraph 4.7 below);

4.6. the SRP (a) accepting the Whitewash Resolution and waiving the requirements of Rule 8 of the Securities Regulation Code on Takeovers and Mergers ("SRP Code") relating to the obligation for Walmart to make a mandatory offer to acquire shares in Massmart held by Massmart's minority shareholders; and (b) approving the offers to be made to the holders of the ESOP Shares, the Thuthukani Shares and BSST Shares;

4.7. the execution of the deeds of amendment to each of the ESOP Trust Deed ("ESOP Addendum"), the Thuthukani Trust Deed ("Thuthukani Addendum"), the BSS Trust Deed ("BSST Addendum") and same becoming unconditional.

V. PROPOSED MECHANICS OF THE OFFER AND CONTINUED LISTING OF MASSMART ON THE JSE

The Offer will constitute an "affected transaction" as defined in section 440A(1) of the Companies Act and will be implemented as detailed below.

5.1. Massmart ordinary shareholders

5.1.1. The Scheme

The Offer in relation to the Scheme Shares will be implemented by way of the Scheme. Subject to the Scheme becoming operative, holders of Massmart ordinary shares on the Scheme Record Date (other than those holding the Excluded Shares) will be deemed to have disposed of their Scheme Shares in exchange for payment by Walmart of the aggregate Offer Consideration to Massmart. Massmart will administer and effect payment of the Offer Consideration to the scheme participants.

Massmart ordinary shareholders will retain the balance of their Massmart ordinary shares, representing 49% of their shareholdings in Massmart ordinary shares on the Scheme Record Date (subject to rounding).

5.1.2. The Substitute Offer

Should the Scheme not be proposed or if the Court refuses to convene the Scheme meeting, or if the Scheme fails other than as a result of failure of a regulatory Scheme Condition, Walmart shall be entitled to make the Substitute Offer to the Massmart shareholders to acquire the Massmart ordinary shares (excluding the Excluded Shares) by way of a general offer in terms of Chapter XVA of the Companies Act on the same terms and conditions, mutatis mutandis, as the Scheme.

5.2. Beneficiaries of the Massmart share trusts

5.3. Listing of Massmart ordinary shares on the JSE

Application will be made to the JSE for the listing of the new Massmart ordinary shares to be issued in terms of the implementation of the ESOP Addendum and the issue of new Massmart ordinary shares as a consequence of the conversion of the Massmart preference shares, as contemplated in terms of the Thuthukani Addendum and the BSST Addendum.

5.4. Waiver of mandatory offer, including SRP waiver procedure

In terms of Rule 8 of the SRP Code an "affected transaction" requires a mandatory offer to be made by Walmart in respect of all the Massmart shares. In terms of Rule 8 of the SRP Code, the requirement for a mandatory offer may be dispensed with by the SRP provided that a majority of the Massmart shareholders at a properly constituted meeting of the holders of relevant securities vote in favour of the resolution to waive their right to have Walmart make such a mandatory offer ("Whitewash Resolution").
Accordingly, Massmart shareholders will be asked at a general meeting to approve the Whitewash Resolution.
The SRP has advised that it is willing to consider an application to grant dispensation to Walmart in terms of the SRP Code, which would have the effect of releasing Walmart from its obligation to make an offer for all the issued shares in the share capital of Massmart, subject to the SRP considering representations (if any) made by Massmart shareholders.
Prior to granting a dispensation in terms of the SRP Code, the SRP will consider any objections or representations (if any) made by any Massmart shareholder. Accordingly, any Massmart shareholder who wishes to object to the dispensation shall have 14 (fourteen) calendar days from the date of posting of the Scheme circular referred to in paragraph 17 below to raise such an objection with the SRP. Objections should be made in writing and addressed to the "Executive Director, Securities Regulation Panel" at any one of the following addresses:

Physical: Sunnyside Office Park
1st Floor, Building B
32 Princess of Wales Terrace (off St Andrews Road) Parktown, 2193
Postal: PO Box 91833
Auckland Park
Johannesburg, 2006
Telefax: (27) 11 642 9284

If any submissions are made to the SRP within the permitted timeframe, the SRP will consider the merits thereof and, if necessary, provide the objectors with an opportunity to make representations to the SRP. Thereafter, subject to the Whitewash Resolution having been approved at the general meeting, the SRP will rule on Walmart's application for dispensation.

VI. FUNDING, CASH CONFIRMATION AND WALMART UNDERTAKING TO SRP

The aggregate Offer Consideration will be funded through Walmart's existing cash resources and facilities. Walmart guarantees the obligations of Main Street 830 (Proprietary) Limited as principal.

The SRP has received confirmation from N M Rothschild & Sons (South Africa) (Proprietary) Limited and JPMorgan Chase Bank, N.A., Johannesburg branch in accordance with Rules 2.3.2(b) and 21.7 of the SRP Code that resources are available to Walmart sufficient to satisfy in full the aggregate Offer Consideration.

Walmart has undertaken to the SRP that it will not acquire Massmart ordinary shares at a price above the Offer Consideration, for a period of six months from the Scheme Record Date, unless it is required in order to ensure that Walmart does not dilute below the percentage of issued Massmart ordinary shares which it will hold immediately following the implementation of the Scheme and the Private Treaty Agreements.

VII. UNAUDITED PRO FORMA FINANCIAL EFFECTS OF THE OFFER ON MASSMART

VIII. EFFECTS OF THE OFFER ON A MASSMART ORDINARY SHAREHOLDER

IX. INTER-COMPANY AGREEMENTS BETWEEN WALMART AND MASSMART

Massmart and Walmart have agreed that as a condition to the Offer they will enter into inter-company agreements on an arm's length basis which will govern, inter alia, Massmart:

- having access to Walmart's procurement capability through a Buying Agency agreement;

- being able to use Walmart's technical skills and services through a Technical and Consulting Services agreement;

- having access to and use of Walmart's information technology hardware and software through an Information Systems Division Services Support agreement; and

- making use of the full range of Walmart's retail, operational, supply chain, marketing and merchandise skills and intellectual property through an Intellectual Property Licence agreement.

Further details on these agreements will be included in the Scheme circular.

X. BREAK FEE

Subject to applicable law, Massmart undertakes that it will pay to Walmart an amount in South African Rands equal to 1% of the aggregate Offer Consideration (plus any VAT which may be payable in connection with the same) to compensate it for, inter alia, management time, reputational damages, costs, fees and other expenses incurred pursuant to the Offer (or Substitute Offer, if made):
10.1. if, following the making of the Offer or the Substitute Offer, the Massmart board withdraws, or adversely modifies or qualifies, its recommendation of the Offer or the Substitute Offer as contemplated in paragraph 12; or result of a higher offer being made and succeeding for the acquisition of 35% or more of the Massmart ordinary shares.

XI. BOARD OF DIRECTORS AND MANAGEMENT

XII. OPINIONS, RECOMMENDATIONS AND UNDERTAKINGS

Morgan Stanley South Africa (Proprietary) Limited ("Morgan Stanley") has been appointed independently to advise the Massmart board as to the fairness from a financial point of view of the terms of the Offer. Based on its independently performed procedures and subject to the matters set out in the Morgan Stanley letter, Morgan Stanley is of the view that, as at the date of the Morgan Stanley letter, the terms of the Offer are fair from a financial point of view to holders of Massmart ordinary shares, the Thuthukani Beneficiaries, the BSST Beneficiaries and the ESOP Option Holders.
10.2. if, following the making of the Offer or the Substitute Offer, the Offer (or the Substitute Offer) fails as a will appoint an independent financial advisor to opine on the fairness of the Substitute Offer at that time.

The Massmart board has considered the terms of the Scheme and the Private Treaty Agreements and has considered the opinion of Morgan Stanley, and is of the opinion that the terms of the Scheme and the Private Treaty Agreements and the Substitute Offer, if made (subject to receiving a favourable fairness opinion in relation to the Substitute Offer) are fair to Massmart ordinary shareholders, the Thuthukani Beneficiaries, the BSST Beneficiaries and the ESOP Option Holders, respectively.

The Board:

- recommends that Massmart ordinary shareholders vote in favour of the Scheme and, to the extent that the Massmart board members are holders of Massmart ordinary shares, such Massmart board members undertake to vote in favour of the Scheme;

- undertakes to facilitate the Scheme to the extent that a board of directors will normally be required for purposes of the implementation of a scheme of arrangement in terms of the Companies Act; and

- recommends that all Massmart shareholders vote in favour of the requisite resolutions to be proposed at the general meeting, and to the extent that Massmart board members are holders of Massmart ordinary shares, such Massmart board members have undertaken to vote in favour of the requisite resolutions.

XIII. SHAREHOLDER SUPPORT

Walmart has received irrevocable undertakings from certain institutional shareholders to vote in favour of or to recommend to their clients to vote in favour of, the Offer in respect of ordinary shares representing approximately 35.2% of the existing issued ordinary share capital of Massmart. In addition, the directors representing in aggregate 1.4% of the existing issued ordinary share capital of Massmart have undertaken to vote in favour of the Scheme and the resolutions to be proposed at the general meeting.

XIV. EXISTING HOLDING OF SECURITIES IN MASSMART

As at the date of this announcement, Walmart does not own or control, or have the option to purchase, any securities in Massmart.

XV. SPECIAL ARRANGEMENTS

DOCUMENTARY APPENDIX LL, SHAREHOLDER CIRCULAR FOR WALMART'S ACQUISITION OF 51% OF SHARES OF SOUTH AFIRCA'S MASSMART

[*See* Chapter 26 of Business Planning for Mergers and Acquisitions]

[Selected Provisions of] Circular to the Holders of Massmart Ordinary * Shares Relating to the Proposed Acquisition by Walmart of 51 Massmart Ordinary Shares for Every 100 *** Massmart Ordinary [Shares] ***

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I. [THIS SHAREHOLDER CIRCULAR ADDRESSES:]

• a scheme of arrangement in terms of section 311 of the Companies Act [now Sections 114 and 115 of the Companies Act of 2008] proposed by Walmart [a publicly held U.S. Corporation] between Massmart [a public limited company traded on the JSE] and the Massmart ordinary shareholders (other than the excluded shareholders) which if approved by Massmart ordinary shareholders and sanctioned by the Court will result in Walmart acquiring, subject to the fulfillment of the conditions precedent, 51 Massmart ordinary shares from each Massmart ordinary shareholder (other than the excluded shareholders) for every 100 Massmart ordinary shares held on the scheme record date for a cash consideration of R148.00 per Massmart ordinary share, which will result in Massmart becoming a subsidiary of Walmart; ***

• the waiver by Massmart ***shareholders of Walmart's to make [a mandatory (see Regulation 86 of the Takeover Regulations)] offer for 100% of the Massmart ordinary shares held by each Massmart ordinary shareholder after implementation of the scheme ***; ***

• a possible substitute offer to Massmart ordinary shareholders (other than the excluded shareholders)

II.[THE CIRCULAR INCORPORATES:]

– a notice of general meeting ***;
– a notice of the scheme meeting to Massmart ordinary shareholders;
– an explanatory statement in terms of section 312(1)(a)(i) of the Companies Act [now Regulation 106 of the Takeover Regulations];
– the scheme of arrangement in terms of section 311 of the Companies Act [now governed by Sections 114 and 115 of the Companies Act of 2008];
– a valuation statement in terms of section 312(1)(a)(ii) of the Companies Act[Now Regulations 106(h) and 110(7)];
– a statement of directors' interests in terms of section 312(1)(a)(iii) of the Companies Act [now Regulation 108]; ***
– a form of proxy in respect of the general meeting ***;
– a form of proxy in respect of the scheme meeting ***;
– the Order convening the scheme meeting; and
– a form of surrender and transfer ***.

III. SALIENT FEATURES ***

– *** [The offer represents] a premium of approximately 19.2% to the volume weighted average price per Massmart ordinary share for the 30 days up *** the last business day immediately prior to the date of the first cautionary announcement.
– Massmart, following the implementation of the Transaction, will remain listed on the JSE. ***
– Morgan Stanley has indicated that in its view the Transaction is fair from a financial point of view.
– Accordingly, the Massmart board *** is recommending to Massmart shareholders that they vote in favour of all resolutions required to implement the Transaction.
– Walmart has received irrevocable undertakings from certain institutional shareholders *** in respect of Massmart ordinary shares representing approximately 35.2% of the existing issued ordinary share capital of Massmart *** [and] non-binding letters in support of the Offer *** in respect of Massmart ordinary shares representing approximately 15% of Massmart's existing issued ordinary share capital. ***

IV. REQUIREMENTS AND MECHANICS OF THE SCHEME

3.1 In terms of section 311 of the Companies Act, a scheme of arrangement proposed between a company and its shareholders (or any class of its shareholders), will become binding on that company and all its shareholders (or all its shareholders of the relevant class) (irrespective of whether or not any such shareholder agrees with the scheme and is willing to be bound) if: ***
3.1.2 the scheme is agreed to by a majority representing not less than 75% [see Section 65 of the Companies Act] of the votes exercisable by scheme members present and entitled to vote, either in person or by proxy at such meeting;
3.1.3 after such approval, the scheme is sanctioned by the Court at an open hearing [see Section 115(2)(c) of the Companies Act]; ***.***

V. THE SCHEME AND EFFECT THEREOF

4.1 If the scheme is approved by the requisite majority at the scheme meeting ***[; and]
4.2 If the Court sanctions the scheme and the other conditions precedent are fulfilled, or waived (to the extent that waiver is possible), the scheme will become binding and:
4.2.1 scheme participants will be deemed to have disposed of 51 for every 100 Massmart ordinary shares held *** to Walmart which will be deemed to have acquired ownership of such scheme shares. Any fractions will be rounded ***;
4.2.2 scheme participants will be entitled to receive the scheme consideration;
4.2.3 Walmart will be obliged to transfer the aggregate scheme consideration to Massmart and Massmart will be obliged to transfer the scheme consideration to the scheme participants;
4.2.4 Massmart will procure:
4.2.4.1 the transfer of the scheme shares to Walmart on behalf of each scheme participant;
4.2.4.2 registration of the scheme shares disposed of by the certificated scheme participants in the name of Walmart; and
4.2.4.3 the collection *** of the scheme consideration from Walmart and the payment of the scheme consideration to each scheme participant ***;
4.2.5 scheme participants will be entitled to enforce their rights only against Massmart which, in turn, undertakes *** to enforce all its rights *** against Walmart;
4.2.6 as a result, Walmart will become the beneficial holder of not less than 51% of the issued ordinary share capital of Massmart. *** and
4.2.7 the listing of Massmart ordinary shares on the JSE will be amended ***.

VI. THE SCHEME MEETING

5.1 The scheme will be put to a vote at the scheme meeting ***. ***
5.2 Section 311(2)(b) of the Companies Act requires that to be binding the scheme must be approved by the requisite majority.
5.3 Each certificated *** scheme member holding Massmart ordinary shares *** on the voting record date, can attend, speak and vote at the scheme meeting in person or give a proxy to someone else ***. ***

VII. CONDITIONS PRECEDENT

*** [T]he following suspensive conditions *** must be fulfilled or waived (if applicable) by not later than 6 months from the date of this circular:

10.1 the scheme having been approved, sanctioned and registered as provided for in the Companies Act;
10.2 the receipt of all necessary regulatory approvals to the extent required by law***, including without limitation: [the JSE, the SRP, the competition authorities, and the Financial Surveillance Department of the South African Reserve Bank];
10.3 from 25 November 2010 until 17:00 on the business day immediately preceding the finalization date, no material adverse change has arisen and if required by Walmart, Massmart certifying as at that date, by written notice to Walmart that, to the best of Massmart's knowledge and belief, no material adverse change has arisen;
10.4 *** consent *** from the relevant counterparties to certain key contracts***;
10.5 the approval by the Massmart *** shareholders in general meeting*** of all resolutions required***; ***
10.6 the SRP accepting [the waiver of] the requirements of Rule 8 of the SRP Code [now Regulation 86 of the Takeover Regulations] relating to the requirement for Walmart to make a mandatory offer [for] shares *** held by Massmart's minority shareholders; ***
10.14 Waiver. Walmart [may] waive *** any of the conditions *** above upon written notice ***prior to the date required for fulfillment of the relevant condition ***
10.15 Extension. Walmart will be entitled to extend the date for the fulfilment of any of the conditions precedent, by 90 days *** upon written notice ***. ***

VIII. EFFECTS OF THE SCHEME

If the scheme becomes operative:
12.1 each scheme participant (whether he voted in favour of the scheme or not), will be deemed to have disposed of his scheme shares to Walmart for the scheme consideration (any fractions will be rounded down ***[or] up to the nearest whole number ***) and will retain a shareholding in Massmart equivalent to 49% of his/her shareholding on the scheme record date; and
12.2 Walmart will become the beneficial owner of 51% of the Massmart ordinary shares. The listing of Massmart ordinary shares on the JSE will continue, with trading and settlement taking place under the new Massmart ISIN. ***
12.2.1 [Exchange Controls for Emigrants from the common monetary area.] The scheme consideration is not freely transferable from South Africa and must be dealt with in terms of the Exchange Control Regulations.
12.3.1 [Exchange Controls for All other non-residents of the common monetary area.] The scheme consideration due to a certificated scheme participant who is a non-resident of South Africa and who has never resided in South Africa, whose registered address is outside the common monetary area and whose documents of title have been restrictively endorsed under the Exchange Control Regulations, will be deposited with the authorised dealer in foreign exchange in South Africa nominated by such scheme participant.

IX. TAX IMPLICATIONS FOR SCHEME PARTICIPANTS

The tax treatment of scheme participants is dependent on their individual circumstances and on the tax jurisdiction applicable to such scheme participants. It is recommended that scheme participants seek their own appropriate advice in this regard.

X. OPINIONS, RECOMMENDATIONS AND UNDERTAKINGS

15.1 Morgan Stanley has been appointed to act as the appropriate external adviser to the Massmart board pursuant to Rule 3.1 of the SRP Code [See Regulation 110(1)] in order to opine on the fairness of the scheme ***. *** Morgan Stanley is of the opinion that, as at the date of the Morgan Stanley letter, the Transaction is fair from a financial point of view to scheme participants ***.
15.2 *** The foregoing paragraph 15.1 is qualified by reference to [the Morgan Stanley letter] and shareholders are urged to read this letter carefully in its entirety.
15. 3 The Massmart board has considered the terms of the scheme *** and has considered the opinion of Morgan Stanley, and is of the opinion that the terms of the scheme *** are fair to Massmart ordinary shareholders ***.
15.4 The Massmart board:
15.4.1 recommends that Massmart ordinary shareholders vote in favour of the scheme and, to the extent that the Massmart board members are holders of Massmart ordinary shares, such Massmart board members undertake to vote in favour of the scheme;
15.4.2 undertakes to facilitate the scheme ***; and
15. 4.3 recommends that all Massmart shareholders vote in favour of the requisite resolutions *** and to the extent that Massmart board members are holders of Massmart ordinary shares, such Massmart board members have undertaken to vote in favour of the requisite resolutions. * * *

XI. BREAK FEE

16.2.1 Massmart has agreed to pay [not later than 5 business days after the fee is due] Walmart an amount, in Rands, equal to 1% of the aggregate scheme consideration (plus any VAT which may be payable thereon) (the "Break Fee"), to compensate it for, inter alia, management time, reputational damage, costs, fees and other expenses incurred in pursuit of the Transaction (or the substitute offer, if made), if following the making of the offers contemplated in the Transaction or the substitute offer:

16. 2.1.1 the Massmart board withdraws, or adversely modifies or qualifies its recommendation on the Offer or the substitute offer; or

16. 2.1.2 the Offer (or the substitute offer) fails as a result of a higher offer being made and succeeding for the acquisition of 35% or more of the issued ordinary shares of
Massmart. ***

DOCUMENTARY APPENDIX MM, JOINT ANNOUNCEMENT OF POSSIBLE VOLUNTARY CONDITIONAL OFFER BY COCA-COLA FOR CHINA'S HUIYUAN JUICE GROUP

[*See* Chapter 26 of Business Planning for Mergers and Acquisitions]

I. THE PARTIES TO THE ANNOUNCMENT

ATLANTIC INDUSTRIES
(incorporated in the Cayman Islands as an exempted company with limited liability)
JOINT ANNOUNCEMENT

POSSIBLE VOLUNTARY CONDITIONAL CASH OFFERS BY
ABN AMRO ASIA CORPORATE FINANCE LIMITED
ON BEHALF OF
ATLANTIC INDUSTRIES, A WHOLLY-OWNED SUBSIDIARY OF
THE COCA-COLA COMPANY,
TO ACQUIRE
ALL OF THE ISSUED SHARES IN THE CAPITAL OF,
ALL OF THE OUTSTANDING CONVERTIBLE BONDS OF,
AND FOR THE CANCELLATION OF ALL THE OUTSTANDING OPTIONS OF,
CHINA HUIYUAN JUICE GROUP LIMITED
AND
RESUMPTION OF TRADING * * *

II. INTRODUCTION

The Coca-Cola Company, Atlantic Industries and Huiyuan jointly announce that ABN AMRO will, on behalf of Atlantic Industries, a wholly-owned subsidiary of The Coca-Cola Company, subject to the satisfaction of the Pre-Condition, make voluntary conditional cash offers: (a) to acquire all of the issued shares in the share capital of Huiyuan; (b) to acquire all the outstanding convertible bonds of Huiyuan; and (c) for the cancellation of all the outstanding options of Huiyuan. All references to the Offers in this Announcement are possible Offers which will be made if and only if the Pre-Condition is satisfied.

III. CONSIDERATION FOR THE OFFERS

The consideration in respect of the Offers is as follows:

The Share Offer

For each Huiyuan Share HK$12.20 in cash

The Convertible Bond Offer

For each US$1,000 nominal amount of each outstanding Convertible Bond HK$18,577.73 in cash

The Option Offers

For each outstanding Pre-IPO Huiyuan Option HK$6.20 in cash

For each outstanding Post-IPO Huiyuan Option HK$5.81 in cash

IV. PRE-CONDITION TO THE SHARE OFFER AND CONDITIONS OF THE OFFERS

The making of the Offers is subject to the satisfaction of the Pre-Condition, namely that any applicable waiting periods for a response from the relevant governmental or regulatory body have expired or been terminated and/or any consent or approval (including any antitrust approval) of any governmental or regulatory body in relation to the Share Offer or the completion thereof have been obtained in terms reasonably satisfactory to the Offeror pursuant to the provisions of any laws or regulations in the PRC, in each case where necessary for completion of the Share Offer.

Atlantic Industries will issue a Further Announcement after the Pre-Condition has been satisfied.

The Share Offer itself will be conditional upon:

(a) valid acceptances of the Share Offer having been received at or before 4.00 p.m. on the First Closing Date (or such other time as Atlantic Industries may, subject to the Takeovers Code, decide) in respect of all the Huiyuan Shares held by the Undertaking Shareholders (which constitute 64.51% of the issued share capital of Huiyuan as at the Last Trading Date); and

(b) no government, governmental, quasi-governmental, statutory or regulatory body, court or agency in any jurisdiction having taken or instituted any action, proceeding, suit, investigation or enquiry, or enacted or made or proposed, and there not continuing to be outstanding, any statute, regulation, demand or order that would make the acquisition of any Huiyuan Shares by Atlantic Industries void, unenforceable or illegal or which would impose any material conditions or obligations with respect to the acquisition by Atlantic Industries of any Huiyuan Shares pursuant to the Share Offer.

Atlantic Industries reserves the right to waive all or any of the Conditions in whole or in part, save that the Condition referred to in (a) above may only be waived subject to Atlantic Industries having received acceptances in respect of Huiyuan Shares which would result in Atlantic Industries holding more than 50% of the voting rights in Huiyuan. Under the terms of the Irrevocable Undertakings, the Undertaking Shareholders have agreed to accept the Share Offer within seven days of the posting of the Composite Document. It is therefore expected that the Condition referred to (a) above will be fulfilled and the Share Offer will be unconditional as to acceptances within seven days of the posting of the Composite Document.

Atlantic Industries intends to exercise the right to compulsorily acquire those Huiyuan Shares not acquired by Atlantic Industries pursuant to the Share Offer under Section 88 of the Cayman Islands Companies Law if it, within four months of the posting of the Composite Document, acquires not less than 90% in value of the Huiyuan Shares (as at the date which is four months of the posting of the Composite Document) as required by Rule 2.11 of the Takeovers Code. Should compulsory acquisition rights arise and be exercised in full, Huiyuan will become a wholly-owned subsidiary of Atlantic Industries and an application will be made for the withdrawal of the listing of the Huiyuan Shares from the Stock Exchange pursuant to Rule 6.15 of the Listing Rules.

The Convertible Bond Offer will be subject to and conditional upon the Share Offer becoming or being declared unconditional in all respects.

The Option Offers will be subject to and conditional upon the Share Offer becoming or being declared unconditional in all respects. The board of directors of Huiyuan has approved the cancellation of the Huiyuan Options that are duly tendered for cancellation under the Option Offers.

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V. IRREVOCABLE UNDERTAKINGS

HY Holdings, Danone and Gourmet Grace have each given an irrevocable undertaking to Atlantic Industries.

VI. NON-COMPETE UNDERTAKING

Mr. Zhu Xinli, the indirect controlling shareholder of HY Holdings and the Chairman of the board of directors of Huiyuan, has undertaken in favour of Atlantic Industries and Huiyuan (for itself and for each member of the Huiyuan Group) that he will not and that he will procure that none of his affiliates will, for a period of two years from the date on which the Share Offer becomes or is declared unconditional in all respects, directly or indirectly, either on his or their own account or in conjunction with or on behalf of any person, firm or company, carry on, participate or be interested or engaged in or acquire or hold any business in the PRC which is or may be in competition with the core business of the Huiyuan Group, other than the milk business.

VII. NO DIVIDEND OR OTHER DISTRIBUTION

Huiyuan does not intend to declare or pay any dividend or other distribution on the Huiyuan Shares during the Offer Period.

VIII. STATEMENT BY EXECUTIVE DIRECTORS OF HUIYUAN

The executive directors of Huiyuan believe that the terms of the Offers are fair and reasonable and in the interests of the Huiyuan Shareholders as a whole. However, an independent board committee comprising all the non-executive directors of Huiyuan who have no direct or indirect interest in the Offers (other than as a Huiyuan Shareholder) will be appointed to advise the Huiyuan Shareholders, the Huiyuan Bondholders and the Huiyuan Optionholders on the Offers. The Huiyuan IBC will also appoint an independent financial adviser to advise it in respect of the Offers. The advice of the Huiyuan IBC and the letter from the Huiyuan IFA will be included in the Composite Document.

IX. COMPOSITE DOCUMENT

It is expected that a Composite Document, comprising the offer document and the response document, which sets out the terms and details of the Offers, the advice of the Huiyuan IBC, the letter from the Huiyuan IFA, together with the acceptance and transfer forms in respect of the Offers, will be despatched to the Huiyuan Shareholders, the Huiyuan Bondholders and the Huiyuan Optionholders by the Latest Despatch Date.

X. THE OFFER

The Coca-Cola Company, Atlantic Industries and Huiyuan jointly announce that ABN AMRO will, on behalf of Atlantic Industries, a wholly-owned subsidiary of The Coca-Cola Company, subject to the satisfaction of the Pre-Condition, make voluntary conditional cash offers: (a) to acquire all of the issued shares in the share capital of Huiyuan; (b) to acquire all the outstanding convertible bonds of Huiyuan; and (c) for the cancellation of all the outstanding options of Huiyuan.

The Offers are made in compliance with the Hong Kong Takeovers Code, which is administered by the Executive.

XI. COMPULSORY ACQUISITION AND WITHDRAWAL OF LISTING OF HUIYUAN

Atlantic Industries intends to exercise the right to compulsorily acquire those Huiyuan Shares not acquired by Atlantic Industries pursuant to the Share Offer under Section 88 of the Cayman Islands Companies Law if it, within four months of the posting of the Composite Document, acquires not less than 90% in value of the Huiyuan Shares (as at the date which is four months of the posting of the Composite Document) as required by Rule 2.11 of the Takeovers Code. Should compulsory acquisition rights arise and be exercised in full, Huiyuan will become a wholly-owned subsidiary of Atlantic Industries and an application will be made for the withdrawal of the listing of the Huiyuan Shares from the Stock Exchange pursuant to Rule 6.15 of the Listing Rules.

DOCUMENTARY APPENDIX NN, STOCK PURCHASE AGREEMENT PURSUANT TO WHICH A SINGAPOREAN SUBSIDIARY OF H.B. FULLER ACQUIRES CHINA'S TONSAN

[*See* Chapter 26 of Business Planning for Mergers and Acquisitions]

H.B. FULLER SINGAPORE PTE., LTD.
(Purchaser)
and
EACH OF THE SELLERS
SET FORTH ON THE SIGNATURE PAGES HERETO
(collectively, Sellers)
AND THE
SELLERS' REPRESENTATIVE IDENTIFIED HEREIN
(solely in its capacity as such)

EQUITY PURCHASE AGREEMENT
THIS EQUITY PURCHASE AGREEMENT dated as of June 24, 2014 (this "Agreement") is entered by and between:
(a) H.B. Fuller Singapore Pte., Ltd., a corporation organized under the laws of Singapore, with a registered address at 8 Marina Boulevard #05-02, Marina Bay Financial Centre Tower 1, Singapore 018981 (the "Purchaser");
(b) Mr. ZHAI Haichao, a citizen of the People's Republic of China (the "PRC" or "China"), with a PRC ID number of 110101196504153014 ("Seller A");
(c) Ms. WANG Bing, a PRC citizen with a PRC ID number of 110108196504040049 ("Seller B");
(d) Mr. LIN Xinsong, a PRC citizen with a PRC ID number of 110107196103210012 ("Seller C");
(e) Mr. LI Yinbai, a PRC citizen with a PRC ID number of 230103196408143211("Seller D");
(f) Beijing Gongchuang Mingtian Investment Advisory Co., Ltd., a limited liability company organized under the laws of the PRC with its registered address at Room D- 0101, Floor 2, Building 3, Courtyard 30, Shijingshan District, Beijing, PRC ("Seller E" or "GCMT"); and
(g) Mr. ZHAI Haichao, in his capacity as the Sellers' representative (the "Sellers' Representative").
Seller A, Seller B, Seller C, Seller D and Seller E, acting jointly and severally, are hereinafter collectively referred to as the "Sellers" and individually as a "Seller." Seller A, Seller B, Seller C and Seller D, acting jointly and severally, are hereinafter collectively referred to as the "Individual Sellers" and individually as an "Individual Seller".
Parties (a) through (g), above, are hereinafter collectively referred to as the "Parties" and individually as a "Party."
RECITALS

A. WHEREAS, Tonsan Adhesive, Inc., is currently a company limited by shares organized under the PRC laws with its registered address at 5 Shuangyuan Road, Badachu High Technology Zone, Beijing, PRC (the "Company");

B. WHEREAS, the Company, directly or indirectly through certain of its subsidiaries, operates a business known as the "Tonsan Group" , which manufactures, markets, distributes and sells various adhesive products (the "Business");

C. WHEREAS, the Sellers collectively own 100% of the issued and outstanding registered capital equity of the Company (the "Equity"); and

D. WHEREAS, the Sellers wish to sell the Equity to the Purchaser, and the Purchaser wishes to purchase the Equity from the Sellers, all on the terms and subject to the conditions set forth below, following the Company's restructuring into a limited liability company.
NOW, THEREFORE, in consideration of the foregoing premises and the representations, warranties, covenants and agreements herein contained, and intending to be legally bound hereby, the Parties hereby agree as follows:

ARTICLE I, DEFINITIONS * * *
ARTICLE II, THE PURCHASE AND SALE

Section 2.1 Purchase and Sale of the Equity; Call Option. On the terms and subject to the conditions of this Agreement, at the Closing, the Purchaser shall purchase:

(a) from each of the Individual Sellers, all of each such Individual Seller's Equity save and except one and one quarter per cent (1.25%) of the Equity, such that following the Closing each Individual Seller shall continue to own one and one quarter per cent (1.25%) of the Equity; and

(b) from GCMT, one hundred per cent (100%) of all Equity owned by GCMT,

in each case, with the Individual Sellers and GCMT, respectively, selling, conveying, transferring, assigning and delivering to the Purchaser all right, title and interest (record and beneficial) in and to such party's Equity (the "Transferred Equity"), free and clear of all Liens. These sales and purchases of the Transferred Equity are hereinafter collectively referred to as the "Acquisition". The percentage of each Sellers' ownership of the Equity and their respective percentage of the Transferred Equity is set forth in Schedule 2.1.

(c) The Purchaser shall not be obliged to complete the purchase of any of the Transferred Equity unless the purchase of all the Transferred Equity is completed simultaneously.

(d) In addition, the Individual Sellers hereby agree that Purchaser (or its designee) shall have the option to purchase simultaneously (the "Call Option") the remaining one and one-quarter per cent (1.25%) of the Equity owned respectively by each Individual Seller (the "Call Option Equity"), as follows:

(i) Purchaser may exercise the Call Option itself or designate an Affiliate as the entity that will purchase the Call Option Equity. Either Purchaser or such Affiliate, as the case may be, is hereinafter referred to as the "Call Option Holder". The Call Option Holder must elect to exercise the Call Option in whole so that upon consummation of the Call Option, one hundred per cent (100%) of the Equity shall be owned by the Purchaser and/or the Call Option Holder, as the case may be, following completion of such transaction. The Call Option Holder shall issue written notice to the Sellers' Representative, on behalf of all Individual Sellers, of the Call Option Holder's exercise of the Call Option at any time between the fifth (5th) anniversary of the Closing Date and the sixth (6th) anniversary of the Closing Date (the "**Call Option Period**");

(ii) Sellers and the Sellers' Representative hereby acknowledge and agree that the Call Option granted hereunder, together with all rights and obligations related thereto, shall become legally binding on the Closing Date. The Call Option purchase price and other details relating to the exercise of the Call Option shall be separately agreed in writing (the "Call Option Agreement") by the Purchaser, the Individual Sellers and the Sellers' Representative (solely in its capacity as such).

(e) The Parties understand and agree that the Company shall, upon completion of the Acquisition and receipt of all relevant Governmental Approvals, be converted into a cooperative joint venture limited liability company established under and governed in accordance with the applicable Laws of the PRC. In furtherance thereof, simultaneously with the execution and delivery of this Agreement, the Parties shall execute and deliver the Cooperative Joint Venture Contract (the "CJV Contract") attached hereto as Exhibit A-6providing for the Parties' respective rights and responsibilities in relation to operation of the Group Companies upon and after the Closing until completion of transactions contemplated by the Call Option granted hereunder.

(f) The allocation of Call Option Equity among the Individual Sellers is also set forth on Schedule 2.1 hereto.

Section 2.2 Purchase Price. Upon the terms and subject to the conditions of this Agreement, the Purchaser shall pay to the Sellers a cash purchase price of one billion four hundred million Renminbi (RMB 1,400,000,000.00) (the "Purchase Price") in consideration for the Transferred Equity, payable as set forth in Section 2.3. The Purchase Price shall be allocated among the Sellers as set forth in Schedule 2.2. The Purchase Price to which each respective Seller is entitled is hereinafter referred to as the "Pro-Rata Allocation."

Section 2.3 Closing; Payment of Purchase Price. The closing of the transactions contemplated by this Agreement (the "Closing") shall take place at the offices of the Company, on the third Business Day after satisfaction (or waiver) of all conditions set forth inArticle VIII, unless another time, date or place is agreed to by the Purchaser and the Sellers' Representative. The date on which the Closing actually occurs is referred to herein as the "Closing Date." The Closing shall be effective as of 11:59 p.m. local Beijing time on the Closing Date (the "Effective Time"). At the Closing, the Purchaser shall pay to each Seller by wire transfer of offshore RMB funds an amount equal to such Seller's respective Pro-Rata Allocation.

Section 2.4 Closing Documents. At the Closing, the closing certificates and all other documents required to be delivered pursuant to Article VIII with respect to the Closing will be exchanged. * * *

[OTHER PROVISIONS INCLUDE TRADITIONAL REPRESENTATIONS AND WARRANTIES, COVENANTS, CONDITIONS TO CLOSING, TERMINATION, GENERAL, AND INDEMNIFICATION]