
Securities Law Developments

CORPORATE FINANCE DEVELOPMENTS

SEC Proposes Significant Changes to the Regulation of Takeovers and Security Holder Communications

On November 3, 1998, the Securities and Exchange Commission (the "Commission") issued two much anticipated releases. The first release (the "Securities Act Reform Release")^{1/} proposes significant amendments to modernize and clarify the regulatory structure for offerings under the Securities Act of 1933, as amended (the "Securities Act"). The second release (the "Reg M&A Release")^{2/} proposes significant amendments to update and simplify the regulatory structure applicable to business combinations and takeover transactions under the Securities Act and the Securities Exchange Act of 1934, as amended (the "Exchange Act"). This newsletter discusses the Reg M&A Release. We encourage you to read this newsletter in conjunction with our newsletter dated December 11, 1998, which discusses the Securities Act Reform Release. The Commission will receive public comments on the proposals discussed in the releases until April 5, 1999.

I. Background and Summary

The proposals outlined in the Reg M&A Release represent the Commission's response to significant changes in the takeover market since the applicable regulatory framework was established. The current takeover market has evolved dramatically over the past twenty years, as

^{1/} Securities Act Release No. 7606 (November 3, 1998).

^{2/} Exchange Act Release No. 40633 (November 3, 1998).

seen by the increase in takeover transactions involving stock as consideration, in the number of hostile transactions involving proxy or consent solicitations, and in the technological advances in communications. In contrast, the applicable regulatory framework has remained substantially the same.

The Commission therefore has undertaken to update the regulatory framework applicable to all business combinations and takeover transactions, including cash and stock tender offers^{3/} and cash and stock mergers. The main goal of the Reg M&A Release is to reduce regulatory burdens on participants in a takeover transaction, while maintaining investor protection and improving the timeliness and quality of information available to investors. The Commission's main proposals, which are discussed in more detail below, are as follows:

Expand Communications Permitted in Tender Offers and Mergers.

- Acquirors and bidders^{4/} would be permitted to communicate with security holders before the filing of a registration statement in connection with a stock tender offer or a stock merger; before the filing of a tender offer statement; and before the filing of a proxy statement, whether or not the proxy statement involves a takeover transaction.
- The communications principles applicable to business combinations under the Securities Act, tender offer rules and proxy rules would be harmonized.
- The safe harbor under Rule 14a-12, which permits certain solicitations before furnishing security holders with a written proxy statement, would be expanded to apply to all solicitations and not just to solicitations involving opposed matters.

Reduce the Disparate Treatment of Stock and Cash Tender Offers.

- Bidders in stock tender offers would be able to commence the tender offer upon filing a Securities Act registration statement, instead of upon its effectiveness. This would treat stock tender offers more like cash tender offers, which currently commence on filing.

Integrate and Streamline Disclosure Requirements for Tender Offers and Mergers.

^{3/} Stock tender offers, which are tender offers in which the consideration offered to security holders includes securities, are also referred to as “exchange offers.”

^{4/} We refer to “bidder” to mean the offeror or purchaser in a tender offer.

- The disclosure requirements for tender offers, going-private transactions and other extraordinary transactions would be integrated into a new subpart 1000 of Regulation S-K, referred to as “Regulation M-A.”
- Schedules for issuer and third-party tender offers would be combined into a single schedule available for all tender offers, referred to as “Schedule TO.”
- A “plain English” summary term sheet would be required in all cash tender offer, cash merger and going-private transactions.
- Item 14 of Schedule 14A would be revised to harmonize cash merger with cash tender offer disclosure.
- Financial statement requirements for target companies, acquirors and bidders would be revised and clarified.

Update the Tender Offer Rules.

- Bidders in certain offers could choose to have a subsequent offering period during which security holders can tender their shares for a ten-day period after completion of a tender offer.
- Rule 13e-1, which requires issuers whose securities are subject to a third-party tender offer to notify their security holders of certain information before repurchasing their securities, would be revised to clarify that the notification must be given after a third-party tender offer has commenced.
- Tender offer and proxy rules relating to delivery of a stockholder list and security position listing would be harmonized.
- Rule 10b-13 would be revised to clarify the prohibition on purchases outside a tender offer and would be redesignated Rule 14e-5.

II. Expand Communications Permitted in Tender Offers and Mergers

A. General Communications Proposals - Securities Act, Proxy Rules and Tender Offer Rules

The Commission proposes to eliminate the restrictions on communications with security holders about an upcoming merger, tender offer or other business combination. The Commission proposes to create “free communications” safe harbors that would have the following key elements:

- Acquirors, targets and bidders could communicate, orally or in writing, with security holders about a merger, tender offer or other business combination before the filing of a Securities Act registration statement for stock tender offers or stock mergers, before the filing of a tender offer statement, or before the filing of a proxy statement whether or not the proxy statement involves a takeover transaction.^{5/} After filing, communications could continue.
- The safe harbors would not restrict the content of communications.
- Unlike the Securities Act Reform Release proposals for general offering communications, the safe harbors would not be limited to transactions of large or seasoned companies.
- Acquirors, targets and bidders would have to file with the Commission upon first use all written communications concerning the transaction from the date of the first announcement of the transaction.
- Each communication would include a prominent legend advising investors to read the registration statement, tender offer statement or proxy statement.
- Business information that is factual in nature and relates solely to ordinary business matters would be permitted at any time and without filing.^{6/}
- All communications in transactions that include securities as consideration would be subject to Securities Act Section 12(a)(2) liability and all communications would be subject to anti-fraud liability.

^{5/} The Commission stated that it was considering an alternative safe harbor for pre-filing communications that would limit free communications to a defined period, such as 48 hours after announcement of the transaction, or any period ending at the beginning of a 30-day “cooling off” quiet period before filing.

^{6/} In the Securities Act Reform Release, the Commission has proposed additional safe harbors for regularly released forward-looking information and for the publication of research reports by broker-dealers. These safe harbors also would apply to business combinations. See Proposed Rules 169, 168(b), 13e-4(c), 14a-12 and 14d-2, and proposed revisions to Rules 137, 138 and 139.

B. Free Communications Under the Securities Act

To implement the “free communications” safe harbors discussed above, the Commission proposes new Rules 166(b) and 165 under the Securities Act to permit free communications by the acquiror in connection with any registration statement for a business combination. Rule 166(b) would allow offers before a registration statement is filed for a business combination as long as written materials used after announcement of the transaction are filed under proposed Rule 425, and, to the extent applicable, the offers are made in accordance with the tender offer rules and the proxy rules. Rule 165 would allow post-filing writings to be used as long as they are filed concurrent with first use.

C. Free Communications Under the Proxy Rules

1. Expand Rule 14a-12 Safe Harbor

Currently, Rule 14a-12 under the Exchange Act permits issuers to communicate with security holders regarding corporate matters so long as no proxy card is furnished to or requested from security holders. The rule, however, is limited to solicitations in opposition to an earlier solicitation, invitation for tenders or certain other publicized activities.

The Commission proposes to expand the safe harbor in Rule 14a-12 by applying it to all solicitations and not just to those involving opposed or contested matters. The other elements of the rule would be retained, including (1) the condition that no form of proxy be furnished until a written proxy statement is furnished, (2) the inclusion in any communication to security holders of the identity of the participants in the solicitation and a description of their interests, and (3) the delivery of a written proxy statement to all solicited security holders as soon as practicable.

In addition, the rule would (1) apply to oral and written communications, (2) require the filing of written solicitations with the Commission upon first use, and (3) require each communication to include a prominent legend advising security holders to read the proxy statement.

These changes to Rule 14a-12 would not be limited to business combination transactions. Accordingly, the rules for shareholder communications generally would substantially be relaxed. In connection with proposing to expand Rule 14a-12, the Commission requested comment on whether there should be a mandatory minimum solicitation period under the proxy rules. The Commission also requested comment on whether to permit solicitation of proxies using preliminary proxy materials, as long as the vote was not taken until definitive proxy materials were prepared.

2. Eliminate Confidential Treatment of Merger Proxies

Currently, preliminary proxy material relating to certain business combinations, other than going-private or roll-up transactions, may be filed confidentially with the Commission.^{7/} In light of companies' practice to disclose deal-related information and the proposed "free communications" safe harbors, the Commission proposes to eliminate confidential treatment for preliminary merger proxy statements. The elimination would harmonize the treatment of preliminary merger proxy statements with preliminary prospectuses and tender offer materials, which are publicly available when filed.

D. Free Communications Under the Tender Offer Rules

Under the tender offer rules, a bidder is required to file with the Commission and disseminate to security holders certain information regarding its offer upon the offer's "commencement." Rule 14d-2 under the Exchange Act provides that triggering commencement of an offer, and the corresponding filing and disclosure obligations of a bidder, may be as simple as publicly announcing certain minimal information about an offer. Once a cash tender offer is announced, it generally must be commenced by filing and disseminating tender offer materials within five business days of announcement. If the tender offer is a stock tender offer (as opposed to cash), the bidder is required to file a registration statement promptly after announcement.

The Commission proposes to amend Rule 14d-2 to permit bidders to engage in communications with security holders about a tender offer without triggering the tender offer filing and dissemination requirements, as long as no transmittal form or instructions on how to tender are included. Under the proposal, a bidder would be required to file and disseminate tender offer materials only when a bidder first provides transmittal forms or information on how to tender. A bidder's pre-commencement communication would have to include a prominent legend advising security holders to read the complete tender offer statement. These pre-commencement materials would be filed with the Commission as soon as practicable on the date of the communication.^{8/}

To prevent a bidder from making a tender offer announcement without the intent or ability to complete the offer, or with the intent to manipulate the price of the bidder's or the target's

^{7/} Exchange Act Rule 14a-6(e)(2).

^{8/} The Commission also proposed to eliminate long-form publication of tender offers in a newspaper as a means to commence a tender offer, and solicited comment on whether other changes to the means-to-commence provisions should be made.

securities, the Commission also proposes a new Rule 14e-8 under the Exchange Act to make clear that such practices would be prohibited as fraudulent under the tender offer rules.

Under the Commission's proposal, target companies would be treated the same as bidders and could engage in the same free pre-commencement communications as bidders.

III. Permit Stock Tender Offers to Commence On Filing

The Commission proposes to more closely equalize the regulatory treatment of cash and stock tender offers. Under the current rules, stock tender offers are subject to regulatory delays that are not applicable to cash tender offers. Cash tender offers can commence as soon as the bidder files a tender offer statement with the Commission. Stock tender offers cannot commence as soon as the bidder files a registration statement with the Commission. Instead, the bidder must wait until the registration statement becomes effective. This regulatory delay in stock tender offers gives competing cash tender offers a timing advantage.

The Commission proposes to amend Rule 14d-4(b) under the Exchange Act to permit third-party stock tender offers to commence when the bidder files a registration statement and a tender offer statement and delivers a preliminary prospectus, rather than having to wait until the registration statement becomes effective. Bidders could not purchase shares tendered by security holders until after the registration statement is effective, the minimum 20 business day tender offer period has expired, and all material changes have been disseminated to security holders with sufficient time for them to review those changes.^{2/} Security holders could withdraw shares tendered at any time before the bidder purchased them.

The Commission's proposal is limited to third-party stock tender offers. Issuer stock tender offers and going-private and roll-up transactions involving stock tender offers would not be permitted to commence before the effectiveness of a registration statement.

The Commission also proposes a new Rule 162 under the Securities Act to prevent the tendering of securities into a third-party stock tender offer from being viewed as a "sale" without an effective registration statement. The new rule would exempt from the Securities Act requirements sales all shares tendered during the waiting period, which is the period between the filing and effectiveness of a registration statement.

^{2/} The Commission proposed specific minimum periods for supplemental materials, including five business days for a supplement disclosing material changes other than price or share levels and ten business days for changes in price, share levels or other specified terms of the tender offer.

IV. Integrate and Streamline the Disclosure Requirements for Tender Offers and Mergers

A. Adoption of Subpart 1000 of Regulation S-K (“Regulation M-A”) and Combination of Schedules (“Schedule TO”)

The Commission proposes to integrate and harmonize the disclosure items contained in the various schedules relating to issuer and third-party tender offers, tender offer recommendations and going-private transactions. The disclosure items applicable to these transactions would be relocated into a new subpart of Regulation S-K called “Regulation M-A.”

The Commission also proposes to combine current Schedule 13E-4 and Schedule 14D-1, the schedules currently used for issuer and third-party tender offers, respectively, into a new schedule called “Schedule TO.”

B. Disclosure Requirements

1. Include a “Plain English” Summary Term Sheet

The Commission believes disclosure in tender offer and merger proxy statements is lengthy and difficult to understand. It therefore proposes to require that issuer and third-party cash tender offer statements, cash merger proxy statements and going-private disclosure documents begin with a short “plain English” summary term sheet. The summary term sheet would be on the first or second page of the disclosure document. Each item on the summary term sheet would be presented in bullet point format with a cross-reference to more detailed discussion found elsewhere in the disclosure document. The proposal does not require specific items to be addressed in the summary term sheet; however, the summary term sheet should highlight the key aspects of the transaction. The Commission gave examples of these key aspects, as discussed below.

In general, in a cash tender offer, the summary term sheet should contain information on matters such as the following:

- the bidder and its financial resources
- the classes and amounts of securities sought
- the offer price and form of payment
- the most significant conditions to the offer
- the time period in which to tender, including circumstances for extending the offer period
- the instructions on how to tender shares

- the time period in which and instructions on how to withdraw tendered shares
- any other transactions that are planned by the bidder (e.g., a back-end merger)

In a cash merger proxy statement, the summary term sheet should contain information on:

- the matters proposed
- the material terms of the proposals and the parties involved
- the consideration to be received by security holders
- the board's recommendation on how to vote
- the effect of a vote for and against each proposal
- the effects of not voting
- the procedures for voting and changing or revoking a vote
- the existence of appraisal rights

In going-private transactions, the summary term sheet should contain information on:

- the most material terms and consequences of the transaction
- conflicts of interest
- whether a fairness opinion was received
- the identity, role and relationship of any affiliates
- the filer's belief as to the fairness of the transaction to security holders
- any recommendations made to security holders regarding the transaction

The Commission would not require a summary term sheet for mergers or tender offers that involve the registration of securities. Those transactions are already subject to "plain English" disclosure rules requiring issuers to write the cover page, summary, and risk factors sections of their prospectuses in plain English.^{10/}

2. Revise Item 14 of Schedule 14A to Clarify Requirements and Harmonize Cash Merger with Cash Tender Offer Disclosure

^{10/} See Securities Act Rule 421(d).

The Commission proposes to clarify the disclosure required in proxy statements by revising Item 14 of Schedule 14A.^{11/} The most significant revisions would be to the financial statement requirements, which would be revised as follows:

- Financial statements of the acquiror in a cash merger would not be required where such information is not material to evaluation of the transaction (such as when the acquiror has demonstrated its financial ability to satisfy the terms of the merger).
- If financial statements of the acquiror are required, two years instead of three years of financial statements would be sufficient.
- Financial statements and other information about the target in a cash merger would not be required where the acquiror's security holders are not voting on the merger.
- Information about the target would not be required where only the target's security holders are voting on whether to approve a merger with consideration consisting of an acquiror's securities exempt from Securities Act registration. Information about the acquiror and the target would be required if the acquiror's security holders are voting on the merger.

3. Reduce Financial Statements Required for Non-Reporting Target Companies

Financial statements of a target company are required in most stock mergers and stock tender offers. Relaxed treatment is given to target companies not subject to the reporting obligations under the Exchange Act. The Commission proposes additional relaxed treatment to non-reporting target companies in stock mergers and stock tender offers that do not require the vote of the acquiror's security holders. Instead of requiring financial statements of a non-reporting target company to be prepared in accordance with Regulation S-X for the three most recent fiscal years, the Commission would require financial statements of a non-reporting target company to be prepared in conformity with generally accepted accounting principles ("GAAP") for the latest fiscal year. These financial statements would have to be audited only to the extent

^{11/} Item 14 disclosure is required when a vote or consent is solicited on (1) a merger, (2) a consolidation, (3) the acquisition of assets, a business or securities, (4) the sale or transfer of all or substantially all the assets of the issuer, (5) a liquidation, or (6) a dissolution. Item 14 requires information about the transaction, and the business and financial information of the companies involved. The information in Item 14 is similar to that required in a registration statement on current Form S-4 if registered securities are being offered.

practicable. If the non-reporting target company previously provided its security holders with GAAP financial statements for either of the two fiscal years before the latest fiscal year (or both), GAAP financial statements would also be required for those years.

If the non-reporting target is a foreign company, the proposed reduction in the required financial statements would operate in a similar manner as for domestic companies. If the acquiror's security holders are not voting on the transaction, and the target company's financial statements are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, a reconciliation to U.S. GAAP would be required, unless a reconciliation is unavailable or otherwise is not obtainable without unreasonable cost or expense.

4. Clarify Financial Information Required for Bidders in Cash Tender Offers

a. *Bidder's Financial Statements in Cash Tender Offers*

There currently is a great deal of uncertainty about when financial statements of bidders are required in cash tender offers. The Commission proposes an instruction in Schedule TO that a bidder's financial statements are not material and thus not required to be filed if (1) only cash is offered, (2) no financing condition exists, and (3) either (a) the bidder is a public reporting company under the Exchange Act, or (b) the offer is for all outstanding securities of the target.

If the financial statements of the bidder are required to be filed in a cash tender offer, only two years instead of the current three years of financial statements would be required.

b. *Bidder's Source of Funds*

The Commission believes a bidder's ability to pay for securities in an offer is a material disclosure item. It proposes to expand the "Source of Funds" item requirement in the tender offer and going-private rules to require the specific source of financing, any material conditions to the financing, and the bidder's ability to finance the offer if the primary source becomes unavailable.

c. *Pro Forma Financial Information in Two-Tier Transactions*

A "two-tier" transaction is one in which the bidder first offers to acquire shares of the target in a cash tender offer with any securities remaining outstanding acquired in a back-end merger where securities are offered as consideration. The Commission believes security holders should have pro forma financial information regarding the combined entity at the first tier to permit them to evaluate the second tier of the transaction when deciding whether to tender. The Commission therefore proposes to require pro forma and related financial information in the first tier when a second tier is contemplated in which non-tendering security holders will receive

securities. The Commission raised a number of questions about this proposal, including whether it would need to be modified to minimize difficulties for bidders in hostile transactions.

d. *Financial Statements in Issuer Tender Offers and Going-Private Transactions*

Current financial disclosure requirements in issuer tender offers and going-private transactions call for certain financial information as of the most recent fiscal year end and the latest interim balance sheet date. The Commission proposes reducing the requirement to only the most recent balance sheet date. This proposed change would also apply to third-party tender offers.

V. Update the Tender Offer Rules

A. Subsequent Offering Period

The Commission believes bidders should be able to accept shares in certain tender offers after the offer is completed. In proposed new Rule 14d-11, the Commission proposes a subsequent offering period, similar to that available in many United Kingdom tender offers, during which security holders may tender shares. With such a period, holders who did not tender in the initial offer would be able to sell their shares to the bidder after results were announced without having to sell into an illiquid market or wait for the back-end merger.

The subsequent offering period would only be available if (1) the tender offer is a third-party cash or stock tender offer for all the outstanding shares of the target, and (2) the bidder intends (and publicly discloses its intent) to engage in a back-end merger with the target after the tender offer. If those requirements are met, the subsequent offering period would begin after all conditions to the initial offer were satisfied or waived and the bidder paid for all the shares tendered during the initial offer. The subsequent offering period would be for a fixed ten business day period. Security holders would have no withdrawal rights.

The subsequent offering period is at the option of the bidder. The bidder would have to disclose its intention to provide a subsequent offering period in the initial or supplemental tender offer materials filed and disseminated to security holders.

B. Reporting of Issuer Repurchases After Commencement of a Third-Party Tender Offer

Rule 13e-1 of the Exchange Act prohibits an issuer whose securities are the subject of a tender offer from purchasing its securities until the issuer files with the Commission and

disseminates information about the acquisition. According to the Commission, only six statements have been filed under this rule in the last five years, which suggests it may not be understood. The current rule may also be read to permit the information to be filed before the third-party tender offer commences, which diminishes the usefulness of the rule. The Commission proposes to revise Rule 13e-1 to make clear that an issuer that repurchases its securities must provide notice of its repurchases to security holders after and not before the third-party tender offer has commenced.

C. Harmonization of Tender Offer and Proxy Rules Relating to Delivery of a Stockholder List and Security Position Listing

The Commission proposes to harmonize Rule 14d-5 and Rule 14a-7 under the Exchange Act relating to dissemination of certain tender offers by use of stockholder lists and security position listings. Specifically, the Commission proposes to revise Rule 14d-5 to incorporate a stockholder list requirement in tender offers similar to that provided by Rule 14a-7 in proxy solicitations. Under the revised rule, a target company that elects to provide a bidder with a stockholder list instead of mailing the bidder's materials would need to disclose the most recent list of names, addresses and security positions of non-objecting beneficial owners (as well as record holders) it has in its possession or subsequently obtains. This proposal would give bidders the same ability as target companies to communicate directly with non-objecting beneficial owners of securities. The proposal also would conform the stockholder list requirements for solicitations of tenders and proxies.

D. Prohibition on Purchases Outside an Offer

1. Redesignate and Clarify Rule Relating to Purchases Outside an Offer

Rule 10b-13 under the Exchange Act prohibits a person who is making a cash or stock tender offer from purchasing the security that is the subject of the offer otherwise than as part of the offer. Because Rule 10b-13 addresses conduct during tender offers, the Commission proposes redesignating it as Rule 14e-5 under Regulation 14E of the Exchange Act. Like Rule 10b-13, Rule 14e-5 would apply only to offers for equity securities.

In addition, the Commission proposes clarifying the persons and securities subject to Rule 14e-5 and the time during which it applies. Rule 14e-5 would apply to "covered persons," defined as the offeror and its affiliates; the offeror's dealer-manager and other advisors; and any person acting in concert with them. Rule 14e-5 would prohibit purchases outside the offer of not only the subject security but also "related securities." Under Rule 14e-5, "related securities" would include "securities that are immediately convertible into, exchangeable for or exercisable for subject securities." Rule 14e-5 adds securities that are immediately "exercisable for" subject

securities to clarify that securities such as options (which can be exercised to receive subject securities) are included in those securities that a covered person cannot purchase outside the offer. The rule would provide that the prohibition applies from the time the offer is first announced or otherwise made known until completion of the tender offer, including any subsequent offering period.

2. Clarify Excepted Transactions

Rule 14e-5 would clarify that the following transactions are excepted from the prohibition on purchases outside the offer:

- A covered person may convert, exchange or exercise related securities, as long as the covered person owned the related securities before the offer was publicly announced or otherwise made known to security holders.
- Rule 14e-5 would eliminate all references to Internal Revenue Code provisions to define permissible plan purchases and rely instead on the more expansive plan provisions contained in Regulation M.
- Purchases during an issuer odd-lot tender offer conducted in compliance with Rule 13e-4(h)(5) would be excepted.
- Unsolicited purchases by a dealer-manager that are made on an agency basis would be excepted. This exception would allow a dealer-manager to continue to conduct its customary brokerage activities during a tender offer.

E. Safe Harbor for Forward-Looking Statements

The Commission proposes permitting significantly more communications before the commencement of a tender offer and the filing of a tender offer statement . Bidders however may be unwilling to communicate freely about an offer without a safe harbor from liability for forward-looking communications. The Commission has not yet proposed but is considering whether to extend the current safe harbor provisions in the Private Securities Litigation Reform Act of 1995 (“PSLRA”) for forward-looking statements to forward-looking statements made in connection with a tender offer. The PSLRA safe harbor for forward-looking statements currently applies to statements made in connection with mergers, but has a specific exclusion for tender offers.

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As noted above, the comment period for the Reg M&A proposals expires on April 5, 1999. If you have any questions, please call Meredith Cross (202/663-6644), Roger Patterson (202/663-6246) or Stephanie Evans (202/663-6578).

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