

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 240 and 249

[Release No. 34-48481, International Series Release No. 1272; File No. S7-15-03]

RIN 3235-A181

### Foreign Bank Exemption From the Insider Lending Prohibition of Exchange Act Section 13(k)

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** We propose to exempt qualified foreign banks from the insider lending prohibition under Section 13(k) of the Securities Exchange Act of 1934, as added by Section 402 of the Sarbanes-Oxley Act. This section prohibits both domestic and foreign issuers from making or arranging for loans to their directors and executive officers unless the loans fall within the scope of specified exemptions. One of these exemptions permits certain insider lending by a bank or other depository institution that is insured under the Federal Deposit Insurance Act. Foreign banks whose securities are registered with the Securities and Exchange Commission are not eligible for the bank exemption under Section 13(k). The proposed rule would remedy this disparate treatment of foreign banks by exempting from Section 13(k)'s insider lending prohibition those foreign banks that meet specified criteria similar to those that qualify domestic banks for this statutory exemption.

**DATES:** Please submit your comments on or before October 17, 2003.

**ADDRESSES:** Send three copies of your comments to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. You also may submit your comments electronically to the following electronic mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Your comment letter should refer to File No. S7-15-03; include this file number in the subject line if you use electronic mail. To help us process and review your comments more efficiently, comments should be sent by hard copy or e-mail, but not by both methods. We will make comment letters available for public inspection and copying in our Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. We will post electronically submitted comment

letters on our Internet Web site (<http://www.sec.gov>).<sup>1</sup>

**FOR FURTHER INFORMATION CONTACT:** Elliot Staffin, Special Counsel, Office of International Corporate Finance, Division of Corporation Finance at (202) 942-2990.

**SUPPLEMENTARY INFORMATION:** We propose to add Rule 13k-1<sup>2</sup> and amend Form 20-F<sup>3</sup> under the Securities Exchange Act of 1934.<sup>4</sup>

#### I. Background

In the wake of well-publicized corporate scandals, Congress enacted Section 402 of the Sarbanes-Oxley Act<sup>5</sup> in order to prevent corporations from issuing personal loans to their executives.<sup>6</sup> This section added Section 13(k), entitled "Prohibition on Personal Loans to Executives," to the Exchange Act.<sup>7</sup> Section 13(k)(1) prohibits any issuer from directly or indirectly extending or maintaining credit, arranging for the extension of credit, or renewing an extension of credit "in the form of a personal loan" to or for any director or executive officer of that issuer.<sup>8</sup> Because the Sarbanes-Oxley Act's definition of issuer draws no distinction between U.S. and non-U.S. companies, Section 402's insider lending prohibition applies to any domestic or foreign entity that has Exchange Act reporting obligations or that has filed a registration statement under the Securities Act of 1933<sup>9</sup> that, although not yet effective, has not been withdrawn.<sup>10</sup>

Four categories of personal loans are expressly exempt from Section 402's prohibition:

(1) any extension of credit existing before the Sarbanes-Oxley Act's enactment as long as no material modification or renewal of the extension of credit occurs on or after the date of enactment;<sup>11</sup>

(2) specified home improvement and consumer credit loans if:

<sup>1</sup> We do not edit personal, identifying information, such as names or electronic mail addresses, from electronic submissions. Submit only information you wish to make publicly available.

<sup>2</sup> Proposed 17 CFR 240.13k-1.

<sup>3</sup> 17 CFR 249.220f.

<sup>4</sup> 15 U.S.C. 78a *et seq.* ("Exchange Act").

<sup>5</sup> Pub. L. 107-204, 116 Stat. 745 (2002).

<sup>6</sup> See Senator Charles Schumer's remarks in 148 Cong. Rec. S. 7350, 7360-7361 (July 25, 2002). See also Senator Carl Levin's letter, dated September 25, 2002, to Chairman Harvey Pitt, reprinted in 149 Cong. Rec. S. 2178, 2179-2180 (February 11, 2003).

<sup>7</sup> 15 U.S.C. 78m(k).

<sup>8</sup> 15 U.S.C. 78m(k)(1). Section 13(k)(1) further prohibits personal loans to an issuer's executive officers or directors by any subsidiary of that issuer.

<sup>9</sup> 15 U.S.C. 77a *et seq.* ("Securities Act").

<sup>10</sup> Sarbanes-Oxley Act Section (2)(a)(7).

<sup>11</sup> Exchange Act Section 13(k)(1).

• Made in the ordinary course of the issuer's consumer credit business,

• of a type generally made available to the public by the issuer, and

• on terms no more favorable than those offered to the public;

(3) loans by a broker-dealer to its employees that:

• Fulfill the three conditions of paragraph (2) above,

• are made to buy, trade or carry securities other than the broker-dealer's securities, and

• are permitted by applicable Federal Reserve System regulations;<sup>12</sup> and

(4) "any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b)."<sup>13</sup>

This last exemption applies only to an "insured depository institution," which, as defined by the Federal Deposit Insurance Act ("FDIA"),<sup>14</sup> is a bank or savings association that has insured its deposits with the Federal Deposit Insurance Corporation ("FDIC").<sup>15</sup> Although this Section 402 provision does not explicitly exclude foreign banks from the exemption, under current U.S. banking regulation a foreign bank cannot be an "insured depository institution" and, therefore, cannot qualify for the bank exemption. Since 1991, following enactment of the Foreign Bank Supervision Enhancement Act ("FBSEA"), a foreign bank that seeks to accept and maintain FDIC-insured retail deposits in the United States must establish a U.S. subsidiary, rather than a branch, agency or other entity, for that purpose.<sup>16</sup> These U.S. subsidiaries of foreign banks, and the limited number of grandfathered U.S. branches of foreign banks that had obtained FDIC insurance prior to FBSEA's enactment,<sup>17</sup> can engage in FDIC-insured, retail deposit activities and, thus, qualify as "insured depository institutions." But the foreign banks that own the U.S. insured depository subsidiaries or operate the grandfathered insured depository branches are not themselves "insured

<sup>12</sup> Exchange Act Section 13(k)(2) [15 U.S.C. 78m(k)(2)] establishes the exemptions for the specified home improvement and consumer credit loans as well as the broker-dealer loans.

<sup>13</sup> Exchange Act Section 13(k)(3) [15 U.S.C. 78m(k)(3)].

<sup>14</sup> 12 U.S.C. 1811 *et seq.*

<sup>15</sup> 12 U.S.C. 1813(c)(2).

<sup>16</sup> 12 U.S.C. 3104(d)(1).

<sup>17</sup> 12 U.S.C. 3104(d)(2).