

HERLEY INDUSTRIES INC /NEW  
Form SC TO-T/A  
March 15, 2011

**UNITED STATES**  
**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**SCHEDULE TO**

**Amendment No. 2**

**(Rule 14d-100)**

**Tender Offer Statement under Section 14(d)(1) or 13(e)(1)**  
**of the Securities Exchange Act of 1934**

**Herley Industries, Inc.**

(Name of Subject Company (Issuer))

**Lanza Acquisition Co.**

**and**

**Kratos Defense & Security Solutions, Inc.**

(Name of Filing Persons (Offerors))

**Common Stock, \$0.10 par value**

(Title of Class of Securities)

**427398102**

(CUSIP Number of Class of Securities)

**Eric M. DeMarco**

**President and Chief Executive Officer**

**Kratos Defense & Security Solutions, Inc.**

**4820 Eastgate Mall**

**San Diego, CA 92121**

**(858) 812-7300**

(Name, address and telephone number of person authorized to receive notices and communications on behalf of filing persons)

**Copy to:**

**Deyan Spiridonov**

**Teri O Brien**

**Paul, Hastings, Janofsky & Walker LLP**

**4747 Executive Drive, 12th floor**

**San Diego, CA 92121**

**(858) 458-3000**

**CALCULATION OF FILING FEE**

**Transaction Valuation\***  
**\$ 296,706,926**

**Amount of Filing Fee\*\***  
**\$ 34,447.67**

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\*

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Estimated for purposes of calculating the filing fee only. This calculation assumes the purchase of 15,616,154 shares of the Common Stock of Herley Industries, Inc. (representing the number of shares, including common stock outstanding and options) at the tender offer price of \$19.00 per share.

- \*\* The amount of the filing fee, calculated in accordance with Rule 0-11 under the Securities Exchange Act of 1934, as amended, and Fee Rate Advisory #5 for fiscal year 2011, issued December 22, 2010, by multiplying the transaction value by .0001161.
- x 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: \$34,447.67  
Form or Registration No.: Schedule TO-T

Filing Party: Kratos Defense & Security Solutions, Inc.  
Date Filed: February 25, 2011

- o 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:

- x third-party tender offer subject to Rule 14d-1.
- o issuer tender offer subject to Rule 13e-4.
- o going-private transaction subject to Rule 13e-3.
- o 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: o

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

- o Rule 13e-4(i) (Cross-Border Issuer Tender Offer)
- o Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)

This Amendment No. 2 (this **Amendment** ) amends and supplements the Tender Offer Statement on Schedule TO (together with any amendments and supplements thereto, the **Schedule TO** ) originally filed with the Securities and Exchange Commission on February 25, 2011, relating to the offer by Lanza Acquisition Co., a Delaware corporation (the **Purchaser** ) and an indirect wholly-owned subsidiary of Kratos Defense & Security Solutions, Inc., a Delaware corporation ( **Kratos** ) to purchase all of the issued and outstanding shares of common stock, par value \$0.10 per share (collectively, the **Shares** and each, a **Share** ), of Herley Industries, Inc., a Delaware corporation ( **Herley** ) at a purchase price of \$19.00 per Share, net to the seller in cash, without interest, less any applicable withholding taxes (the **Offer Price** ), upon the terms and subject to the conditions set forth in the Offer to Purchase, dated February 25, 2011 (the **Offer to Purchase** ), and in the related Letter of Transmittal (the **Letter of Transmittal** ), copies of which are filed with the Schedule TO as Exhibits (a)(1)(A) and (a)(1)(B), respectively. Capitalized terms used and not otherwise defined in this Amendment shall have the meanings assigned to such terms in the Offer to Purchase or in the Schedule TO. This Amendment is being filed on behalf of Kratos and the Purchaser.

All the information set forth in the Offer to Purchase and Letter of Transmittal: (i) is incorporated by reference herein in response to Items 1 through 9 and Item 11 of the Schedule TO, (ii) is supplemented by the information specifically provided in this Amendment and (iii) except as otherwise set forth below, remains unchanged. Capitalized terms used and not otherwise defined in this Amendment shall have the meanings assigned to such terms in the Offer to Purchaser or in the Schedule TO.

**Items 1 through 9 and 11**

Items 1 through 9 and 11 of the Schedule TO are hereby amended and supplemented as follows:

The third paragraph of the Cover Page of the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

There is no financing condition to the Offer. The Offer is conditioned on, among other things, there being tendered in the Offer and not validly withdrawn before the expiration of the Offer, a number of shares of Herley's common stock, par value \$0.10 per share (collectively, the **Shares** and each, a **Share**), that represents at least a majority of the total number of Shares outstanding at the time of the expiration of the Offer (determined on a fully diluted basis (as defined in the Merger Agreement) at the time of the expiration of the Offer and excluding Shares tendered pursuant to guaranteed delivery procedures if such delivery procedures have not been completed at the time of the expiration of the Offer). The Offer is also subject to the satisfaction of certain other conditions set forth in this Offer to Purchase, including, among other conditions, the expiration or termination of any applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. See Section 14 Conditions of the Offer.

The paragraph under the subsection captioned "What is the Minimum Condition to the Offer?" in the Summary Term Sheet of the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

We are not obligated to purchase any Shares in the Offer unless enough Shares are tendered and not validly withdrawn to represent a majority of the total number of Shares outstanding at the Expiration Time (determined on a fully diluted basis (as defined in the Merger Agreement) at the Expiration Time and excluding Shares tendered pursuant to guaranteed delivery procedures if delivery procedures have not been completed at the Expiration Time) (the **Minimum Condition**). Neither Kratos nor the Purchaser currently own any Shares. See Section 14 Certain Conditions of the Offer for a more complete description of the conditions to the Offer.

The fourth paragraph of the Introduction to the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

There is no financing condition to the Offer. The Offer is conditioned on, among other things, there being tendered in the Offer and not validly withdrawn, a number of Shares that represents at least a majority of the total number of Shares outstanding (determined on a fully diluted basis (as defined in the Merger Agreement) at the time of the expiration of the Offer and excluding Shares tendered pursuant to guaranteed delivery procedures if delivery procedures have not been completed at the time of the expiration of the Offer) at 12:00 midnight, New York City time, on Thursday, March 24, 2011 (the end of the day Thursday) unless the Offer is extended (the **Minimum Condition**). The Offer is also subject to the satisfaction of other conditions, including: (i) the expiration or termination of the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the **HSR Act**), (ii) the accuracy of all of the representations and warranties of Herley set forth in the Merger Agreement, except for inaccuracies that, individually or in the aggregate, do not have a material adverse effect on Herley (except for the representations and warranties of Herley regarding its capitalization, which must be true and correct in all respects (other than de minimis inaccuracies)), (iii) the performance in all material respects of the obligations of Herley contained in the Merger Agreement required to be performed prior to the purchase of Shares tendered in the Offer and (iv) since the date of the Merger Agreement, the absence of any event or occurrence that, individually or in the aggregate, has had or would reasonably be expected to have a material adverse effect on Herley.

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The paragraph under the subsection captioned "What is the Top-Up Option and when could it be exercised?" in the Summary Term Sheet of the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

Herley has granted the Purchaser an option (the **Top-Up Option**) to purchase that number of newly-issued or treasury Shares equal to the amount of Shares needed to give Kratos and the Purchaser, in the aggregate, ownership of one Share more than 90% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement), after giving effect to those Shares issued upon the exercise of the Top-Up Option; provided that the number of Shares that may be issued pursuant to the Top-Up Option may not exceed the aggregate number of Shares held as treasury Shares by Herley and the number of Shares Herley is authorized to issue under its certificate of incorporation that are not issued and outstanding, not reserved for issuance and are issuable without approval of Herley's stockholders. Based upon information provided by Herley, as of February 23, 2011, there were 4,383,846 Shares available that may be issued pursuant to the Top-Up Option. Accordingly, approximately 87% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement) would need to be tendered and not validly withdrawn for the exercise of the Top-Up Option to result in Kratos and the Purchaser, in the aggregate, owning one Share more than 90% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement). The Purchaser will pay the Offer Price for each Share acquired upon exercise of the Top-Up Option. The purpose of the Top-Up Option is to permit us to complete the Merger without a special meeting of Herley's stockholders under the short form merger provisions of Delaware law. The Top-Up Option can only be exercised once, in whole and not in part, on or prior to the fifth business day after we accept for payment and pay for Shares in the Offer. See Section 13 "The Merger Agreement; Other Agreements" for a more detailed description of the Top-Up Option.

The sixth paragraph of the Introduction to the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

If Kratos and the Purchaser hold, in the aggregate, at least 90% of the issued and outstanding Shares after completion of the Offer, including any subsequent offering period provided in accordance with Rule 14d-11 under the Securities Exchange Act of 1934 ( **Exchange Act** ) (the **Subsequent Offering Period** ), the Merger Agreement requires that the Purchaser merge with and into Herley under the short-form merger provisions of the Delaware General Corporation Law (the **DGCL** ) without prior notice to, or any action by, any other stockholder of Herley. See Section 12 Purpose of the Offer; Plans for Herley; Other Matters. Under the Merger Agreement, if the Purchaser does not acquire sufficient Shares in the Offer to complete the Merger under the short-form merger provisions of the DGCL, the Purchaser has an option (the **Top-Up Option** ), subject to limitations, to purchase from Herley at the Offer Price a number of additional Shares sufficient to cause Kratos and the Purchaser, in the aggregate, to own one Share more than 90% of the Shares then outstanding, on a fully-diluted basis (as defined in the Merger Agreement), after giving effect to those Shares issued upon the exercise of the Top-Up Option; provided that the number of Shares that may be issued pursuant to the Top-Up Option may not exceed the aggregate number of Shares held as treasury Shares by Herley and the number of Shares Herley is authorized to issue under its certificate of incorporation that are not issued and outstanding, not reserved for issuance and are issuable without approval of Herley's stockholders. Based upon information provided by Herley, as of February 23, 2011, there were 4,383,846 Shares available that may be issued pursuant to the Top-Up Option. Accordingly, approximately 87% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement) would need to be tendered and not validly withdrawn for the exercise of the Top-Up Option to result in Kratos and the Purchaser, in the aggregate, owning one Share more than 90% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement). The exercise price for the Top-Up Option is to be paid either in cash or by delivery of a promissory note, bearing simple interest at 5% per annum, made by the Purchaser and due and payable within one year. The Top-Up Option is exercisable only once, in whole and not in part, if Kratos and the Purchaser hold at least a majority of the outstanding Shares before such exercise and only on or prior to the fifth business day after the purchase of and payment for the Shares pursuant to the Offer by the Purchaser. The Purchaser or Kratos could also acquire additional Shares after completion of the Offer through other means, such as open market purchases.

The subsection captioned Short-Form Merger. of Section 12 Purpose of the Offer; Plans for Herley; Other Matters of the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

Section 253 of the DGCL provides that, if a corporation owns at least 90% of the outstanding shares of each class and series of a subsidiary corporation, the corporation may merge the subsidiary corporation into itself or into another such subsidiary or merge itself into the subsidiary corporation, in each case, without the approval of the board of directors or the stockholders of the subsidiary corporation (such merger, a **Short-Form Merger** ). In the event that Kratos, the Purchaser and their affiliates acquire in the aggregate at least 90% of each class and series of capital stock of Herley in the Offer, in a Subsequent Offering Period or otherwise (and including as a result of its exercise of the Top-Up Option), then the Purchaser will cause the Short-Form Merger to be effected without a meeting of the stockholders of Herley, subject to compliance with the provisions of Section 253 of the DGCL. If the Purchaser does not acquire sufficient Shares in the Offer and after expiration of any Subsequent Offering Period, to complete a Short-Form Merger, the Purchaser expects to exercise the Top-Up Option, subject to the limitations set forth in the Merger Agreement, to purchase a number of Shares required to complete a Short-Form Merger, taking into account the Shares issued upon exercise of the Top-Up Option. Based upon information provided by Herley, as of February 23, 2011, there were 4,383,846 Shares available that may be issued pursuant to the Top-Up Option. Accordingly, approximately 87% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement) would need to be tendered and not validly withdrawn for the exercise of the Top-Up Option to result in Kratos and the Purchaser, in the aggregate, owning one Share more than 90% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement). The Purchaser could also seek to purchase additional Shares in the open market or otherwise to permit the Purchaser to complete a Short-Form Merger.

The first paragraph of the subsection captioned Merger Agreement. - Top-Up Option. of Section 13 The Merger Agreement; Other Agreements of the Offer to Purchase is hereby amended and restated in its entirety to read as follows:

Pursuant to the Merger Agreement, Herley has granted the Purchaser an option to purchase that number of newly-issued or treasury Shares equal to the amount of Shares needed to give Kratos and the Purchaser, in the aggregate, ownership of one Share more than 90% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement), after giving effect to the issuance of such Shares (the **Top-Up Option**), provided that the number of Shares that may be issued pursuant to the Top-Up Option may not exceed the aggregate number of Shares held as treasury Shares by Herley and the number of Shares Herley is authorized to issue under its certificate of incorporation that are not issued and outstanding, not reserved for issuance and are issuable without approval of Herley's stockholders. Based upon information provided by Herley, as of February 23, 2011, there were 4,383,846 Shares available that may be issued pursuant to the Top-Up Option. Accordingly, approximately 87% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement) would need to be tendered and not validly withdrawn for the exercise of the Top-Up Option to result in Kratos and the Purchaser, in the aggregate, owning one Share more than 90% of the outstanding Shares on a fully-diluted basis (as defined in the Merger Agreement).

**SIGNATURES**

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.

**LANZA ACQUISITION CO.**

By: /s/ Deanna H. Lund  
Name: Deanna H. Lund  
Title: Executive Vice President and Chief Financial Officer  
Date: March 14, 2011

**KRATOS DEFENSE & SECURITY SOLUTIONS, INC.**

By: /s/ Deanna H. Lund  
Name: Deanna H. Lund  
Title: Executive Vice President and Chief Financial Officer  
Date: March 14, 2011