CLEARY GOTTLIEB

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SEC GRANTS CLASS-WIDE RELIEF UNDER RULE 14e-5 FROM FINANCIAL ADVISOR TRADING RESTRICTIONS IN CROSS-BORDER TENDER OFFERS

London
April 5, 2007

On April 4, 2007, the staff of the Division of Market Regulation of the Securities and Exchange Commission (the "Staff"), in response to a request (the "Request") submitted by Cleary Gottlieb, issued class-wide exemptive relief (the "Exemptive Relief") to Goldman Sachs International and similarly situated financial advisors (and their affiliates and separately identifiable departments ("Affiliates and Departments")) from certain restrictions imposed by Rule 14e-5 ("Rule 14e-5") under the Securities Exchange Act of 1934 (the "Act") in the context of certain cross-border tender offers for equity securities issued by foreign private issuers (as defined in Rule 3b-4(c) under the Act). A number of recent transaction-specific letters issued by the Staff had provided relief to financial advisors and their affiliates from Rule 14e-5 in circumstances similar to those described in the Exemptive Relief.

Under Rule 14e-5, a bidder that makes a tender offer for any equity security (regardless of whether the securities are registered under the Act) is prohibited from directly or indirectly purchasing (or arranging to purchase) any of the securities for which the tender offer is being made, or any securities that are immediately convertible into, exchangeable for, or exercisable for such securities, except pursuant to the offer. The prohibition extends from the first public announcement of the offer until the offer has expired. Financial advisors to the bidder or target may be covered by those restrictions because they are acting in the capacity of "dealer-manager" for the bidder, because their compensation is dependent on the completion of the offer or because they are considered to be acting directly or indirectly in concert with a covered person (*e.g.*, the target in a friendly transaction).

Although designed to prevent manipulative and deceptive practices in connection with a cash tender or exchange offer through purchases of, or arrangements to purchase, shares otherwise than pursuant to the offer, a number of ordinary course trading activities of financial advisors and their affiliates are prohibited by the Rule. Certain exemptions built into the Rule, such as for agency trades, allow some ordinary course trading activities to be conducted throughout an offer, although a number of activities that clearly have no manipulative intent are not expressly exempted under the Rule. Although Rule 14e-5(b)(8) provides a potentially broad exemption for purchases made by certain affiliates of the

dealer-manager that have appropriate firewalls in place to prevent the sharing of non-public information with the dealer-manager and that are not made for the purpose of facilitating the tender offer, this exemption has proved of limited use in cross-border tender offers. This is because the Staff has interpreted the requirements of the (b)(8) exemption to mean that the dealer-manager relying on the exemption must be an SEC-registered broker-dealer, a requirement many non-U.S. financial advisors do not meet (a separate issue is whether the non-U.S. financial advisor is acting in the same capacity as a "dealer-manager," the term used in Rule 14e-5(b)(8)).

The Exemptive Relief allows financial advisors, through their Affiliates and Departments, to engage in a broad list of trading activities they might otherwise be prohibited from conducting by Rule 14e-5 absent relief, subject to the conditions summarized below:

1. The company that is the target of the offer (the "subject company') is a "foreign private issuer" as defined in Rule 3b-4(c) under the Act;

2. The financial advisor reasonably believes that the subject company has a level of U.S. shareholding that would enable it to rely on the Tier II exemptive relief provided under Rule 14d-1(d) under the Act;

3. The Trading Activities (as defined in the Request) are only conducted outside the United States;

4. The Trading Activities are consistent with the financial advisor's Affiliates' and Departments' normal and usual business practices, and are not conducted for the purposes of promoting or otherwise facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or maintaining or affecting the price of, the securities of the subject company;

5. The offer document discloses prominently the financial advisor's intention to conduct the Trading Activities;

6. Each of the Affiliates and Departments of the financial advisor that conduct the Trading Activities has no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) who direct, effect or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company in such transactions with financial advisory services or dealer-manager services;

7. The financial advisor has an affiliate that is registered as a broker-dealer under Section 15(a) of the Act;

8. The Trading Activities are permissible under, and will be conducted in accordance with, applicable law of the home jurisdiction, as defined in Rule 14d-1 under the Act.[1] The financial advisor and its Affiliates and Departments will also comply with any information barrier requirements imposed by applicable law of the home jurisdiction;

9. The financial advisor and its Affiliates and Departments maintain and enforce written policies and procedures that are reasonably designed to prevent the transfer of information among the financial advisor and its Affiliates and Departments that conduct the Trading Activities that might result in a violation of the U S. federal securities laws through the establishment of information barriers;

10. The financial advisor, through its Affiliates and Departments, conducts the Trading Activities voluntarily in compliance with the pertinent provisions of the United Kingdom's City Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares (the "City Code"), and the Affiliates and Departments conduct themselves as if they were connected exempt principal traders as defined in the City Code, including complying with regulations with respect to the establishment and maintenance of information barriers, conflict of interest provisions and other requirements, other than with respect to the notification of relevant trades to the U.K. Takeover Panel. The financial advisor will, however, publicly disclose in the United States information regarding the Trading Activities to the extent that such information is required to be made public in the subject company's home jurisdiction;

11. The financial advisor provides to the Division of Market Regulation, upon request, a daily time-sequenced schedule of all transactions effected in the subject securities or related securities by the financial advisor's Affiliates and Departments, on a transaction-by-transaction basis, including:

    a. size, broker (if any), time of execution, and price of purchase; and
    b. the exchange, quotation system or other facility through which the purchase occurred;

12. Upon the request of the Division of Market Regulation, the financial advisor will transmit the information as specified in paragraphs 11.a. and 11.b. above to the Division of Market Regulation at its offices in Washington, D.C. within 30 days of its request;

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[1] The term "home jurisdiction" is defined in the Instructions to paragraphs (c) and (d) of Rule 14d-1 as 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.

13. The financial advisor will retain all documents and other information required to be maintained pursuant to this exemption for a period of not less than two years from the date of the termination of the offer;

14. Representatives of the financial advisor are made available (in person at the offices of the Division of Market Regulation in Washington, D.C. or by telephone) to respond to inquiries of the Division of Market Regulation relating to its records; and

15. The financial advisor and its Affiliates and Departments will comply with Rule 14e-5 except as exempted by the relief granted herein or pursuant to any no-action letter or exemptive relief granted by the Staff. As noted in footnote 11 of the Request, reliance on the relief granted in the Exemptive Relief would not preclude the financial advisor's Affiliates and Departments from making purchases of securities outside a tender offer on behalf of the bidder in such tender offer pursuant to relief granted in the Sulzer letter (described in the penultimate paragraph of this memorandum) or pursuant to a separate letter from the Staff granting relief from Rule 14e-5 and consistent with local law so long as, among other things, the financial advisor's Affiliates and Departments designate an individual trader or traders to make such purchases on behalf of the bidder and its agents, and other than such purchases made on behalf of the bidder or its agents, the designated traders would not make any other purchases of Securities (defined in the Request as subject securities and derivatives related to such securities) during the offer period.

A full list of the trading activities covered by the Exemptive Relief is included in our Request, a copy of which is attached to this alert memorandum. The full text of the Exemptive Relief also is attached.

Since it was issued as class-wide relief, the Exemptive Relief may be relied upon by any financial advisors that are able to satisfy the conditions contained therein in tender offers (including exchange offers) for equity securities issued by foreign private issuers subject to Rule 14e-5. Any financial advisors wishing to rely upon the Exemptive Relief should carefully read both the Request and the Exemptive Relief in order to assess their ability to satisfy the conditions contained therein. The Exemptive Relief does not repeat all of the discussion contained in the Request, so it will be important to confirm that a particular financial advisor's circumstances in a transaction are not different from those outlined in the Request. If they are, or if it is unclear whether they are, a conversation with the Staff may be necessary to confirm the availability of the Exemptive Relief in particular circumstances or the need (and ability) to apply for a deal-specific no-action letter or exemptive relief.

Condition 2 is worth highlighting. To qualify for this relief, the financial advisor must reasonably believe that the offer is eligible for the "Tier II" exemptive relief provided under Rule 14d-1(d) under the Act, which essentially means that the target must be a foreign

private issuer with no more than 40% of the subject class of securities held by U.S. residents (in calculating such ownership, the holdings of the offeror and any securityholder that owns more than 10% of the class are excluded from both the numerator and the denominator).[2] Offerors may not have the same incentive to determine applicability of the Tier II exemption as quickly as financial advisors. Unlike the financial advisors, the offeror in most cases is not conducting trading activities in the target securities on an ongoing basis. Since the announcement of an offer will trigger the applicability of the restrictions of Rule 14e-5, the financial advisor will have a strong incentive to determine quickly the applicability of the Exemptive Relief to a particular offer in order to avoid a disruption in its trading activities. The ability to rely on Tier II relief is perhaps the only condition that cannot be determined by the financial advisor alone, since it will need to depend upon the U.S. shareholding assessments to be made by the offeror regarding the target. The offeror also has an incentive to determine applicability of the Tier II (or Tier I) relief since the offeror itself will need to conduct the offer in compliance with applicable law, so it will likely make that determination at some point early in the process. The financial advisor may, however, need to work with the offeror to attempt to ensure that the determination is made as quickly as possible to reduce or eliminate any delay in reliance by the financial advisor on the Exemptive Relief.

Financial advisors and their counsel should review footnote 9 of the Request when determining availability of Tier II relief. Footnote 9 highlights the difficulties that exist in making this determination, and expressly states that their reasonable determination about the availability of Tier II relief may not involve literal compliance with the U.S. resident shareholder counting rules of Rule 14d-1, but that they would make a determination based upon information to the extent known or which can be obtained without unreasonable effort or expense.

An important feature of the Exemptive Relief is contained in footnote 11 of the Request (and is referenced in Condition 15 of the Exemptive Relief). The Staff had been taking the position that reliance on trading activities relief of the type contained in the Exemptive Relief (and in a number of letters issued over the past year) would preclude affiliates of the financial advisor from making purchases of target securities on behalf of a bidder pursuant to other exemptive relief allowing such purchases where permitted under applicable local law. Provided that the conditions contained in footnote 11 are satisfied, it should now be possible for financial advisors simultaneously to rely both on the Exemptive

[2] If, by contrast, the offer qualifies for "Tier I" relief under Rule 14d-1(d), the restrictions of Rule 14e-5 would not apply to the offer pursuant to an exemption contained in Rule 14e-5(b)(10), assuming the other conditions set out in (b)(10) are satisfied. An offer qualifies for Tier I relief when the target is a foreign private issuer with 10% or less of the class of the subject securities held by U.S. residents (calculated in a similar manner).

Relief and on relief permitting bidders and their agents to make purchases of target securities outside the offer where permitted by local law. On March 2, 2007, the Staff issued class-wide exemptive relief to bidders and their agents permitting such purchases outside an offer provided that certain conditions are satisfied (*see* Letter regarding the cash tender offer by Sulzer AG for the ordinary shares of Bodycote International plc).

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Securities and Capital Markets or Mergers, Acquisitions and Joint Ventures in the "Our Practice" section of our website (http://www.clearygottlieb.com) if you have any questions.

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