SEC Proposes Revisions to the Cross-Border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions

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On May 6, 2008, the U.S. Securities and Exchange Commission (the "Commission") published for comment a number of proposed changes (and a number of additional contemplated changes) to the rules governing cross-border business combination transactions.[1] The proposed changes in large part codify existing staff interpretive and no-action positions and exemptive orders and address recurring areas of conflict or inconsistency between the U.S. rules and foreign regulations and practice.[2] The proposed changes expand and enhance the usefulness of the Tier I/Tier II exemptions initially adopted in 1999.

By proposing the rule amendments, the Commission hopes to encourage bidders for shares of foreign companies to open their offers to U.S. shareholders of those companies. Currently, many bidders exclude U.S. shareholders from offers to avoid the application of the U.S. rules, and they do not take advantage of the 1999 exemptions even when they might be available. While the proposed amendments solve some technical problems with the existing exemptions, in a number of areas they do not go as far as some practioners had hoped. Comment letters are likely to focus on whether they will be sufficient to accomplish the Commission's goal of expanding U.S. investor participation in tender offers for foreign issuers, and what additional improvements would need to be made in order to achieve this goal.

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1 SEC Release No. 33-8917 (May 6, 2008) (the "Release").

2 For these purposes, "cross-border" refers to business combinations in which the target company is a "foreign private issuer," as defined in Rule 3b-4(c) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and rights offerings where the issuer is a foreign private issuer. "Business combination" is defined in Rule 800(a) under the Securities Act of 1933, as amended (the "Securities Act"), as any "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." In the Release, the term is used more broadly to include those kinds of transactions, as well as tender and exchange offers. *See* Securities Act Rule 165(f)(1) (defining the term more broadly to include the types of transactions listed in Rule 145(a), as well as exchange offers).

The principal changes being proposed by the Commission are:

- refining the tests for calculating U.S. ownership of a target company for purposes of determining eligibility to rely on the cross-border exemptions in both negotiated and hostile transactions;

- expanding relief under Tier I for affiliated transactions from Exchange Act Rule 13e-3 for transaction structures not covered under the existing cross-border exemptions;

- expanding the relief afforded under Tier II in several ways to eliminate recurring conflicts between U.S. and foreign law and practice;

- codifying existing exemptive orders with respect to the application of Exchange Act Rule 14e-5 for Tier II tender offers;

- expanding the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act, *i.e.*, exchange offers other than for registered equity securities; and

- permitting specified types of foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, without individual no-action relief.

The Release also includes interpretive guidance regarding the application of certain rules in the area of cross-border business combinations, which should be viewed as having effect as of the date of the Release. This interpretive guidance includes the Commission's position on:

- the application of the "all-holders" provisions of the tender offer rules to foreign target security holders;

- the ability of non-U.S. bidders to exclude U.S. target security holders in cross-border tender offers; and

- the ability of non-U.S. bidders to use the vendor placement procedure for cross-border exchange offers.

The Commission is soliciting comments on its proposals. Comments on the proposals are due by June 23, 2008. The Commission's full release, including the text of the proposed amendments, is available at http://www.sec.gov/rules/proposed/2008/33-8917.pdf.[3]

I. Overview of Existing Cross-Border Exemptions

A bid to acquire a non-U.S. company, if made to U.S. holders of that company's securities, may be subject to the U.S. tender offer rules, irrespective of the size of the U.S. holding. In addition, the offer or sale of securities in the United States, whether by way of an exchange offer, in connection with a business combination (such as a merger) or through a rights offering, must be registered under the Securities Act unless an exemption is available. These rules thus differ from the rules of many other countries, the application of which turns not on the residence of the investor, but rather on the jurisdiction of incorporation (or sometimes the jurisdiction of listing) of the target company. This difference reflects one of the fundamental principles of the U.S. securities laws – protection of U.S. investors regardless of the nationality of the bidder or the target and of the investor protections afforded by their regulators in their home markets.

To avoid these U.S. rules, particularly when the percentage of U.S. ownership of the non-U.S. company is relatively small, bidders have often excluded U.S. holders from these transactions. In an effort to discourage this practice, in October 1999, the Commission adopted rules exempting from certain U.S. tender offer regulations and the registration requirements of the Securities Act certain tender and exchange offers involving foreign private issuer[4] targets where the number of U.S. shareholders of the target is limited.[5] In particular, the Commission's rules (i) exempt from most U.S. tender offer rules a qualifying cross-border transaction where U.S. ownership of the securities of the target foreign private

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3 The Commission's proposals to enhance its rules in the cross-border business combination area are a continuation of recent efforts to revise the regulatory system applicable to foreign private issuers. *See* SEC Release No. 34-55540 (March 27, 2007), where the Commission adopted amendments to the deregistration rules for foreign private issuers exiting the U.S. regulatory system; SEC Release No. 33-8879 (December 21, 2007), where the Commission adopted rules to accept from foreign issuers in their filings with the Commission financial statements prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board; and SEC Release No. 34-57350 (February 19, 2008), where the Commission proposed amendments to the rule that exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Exchange Act. These rules and proposals are discussed in separate memoranda prepared by the firm.

4 Rule 3b-4 under the Exchange Act defines "foreign private issuer" as a national of any foreign country or a corporation or other entity organized under the laws of any foreign country, unless (1) more than 50% of the issuer's securities are held directly or indirectly by U.S. residents and (2) a majority of the issuer's executive officers or directors are U.S. residents, more than 50% of the issuer's assets are located in the United States or the issuer's business is administered principally in the United States.

5 *See* Release No. 33-7759 (October 22, 1999) (the "Cross-Border Adopting Release"). Although the target (or issuer in a rights offering) must be a foreign private issuer, the acquiror relying on the cross-border exemptions need not be a foreign private issuer and, in fact, may be a U.S. company.

issuer is 10% or less ("Tier I exemption");[6] (ii) provide limited relief from certain U.S. tender offer rules if U.S. ownership of the target securities is greater than 10% but 40% or less ("Tier II exemption");[7] and (iii) exempt from Securities Act registration the securities issued in business combination transactions and rights offerings if U.S. ownership of the target is 10% or less.[8, 9]

In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.[10]

The Commission's exemptions have met with limited success since they were adopted in 1999. While many acquirors take advantage of the Tier II exemption, relatively few bidders use the Tier I exemption, in part because of technical problems with the rules, and also because they find that the effort and expense of determining whether they qualify for Tier I, and the risk of submitting to U.S. court jurisdiction, are not worthwhile given the small number of additional shares to which they gain access by using the exemption. While the Commission's proposed amendments would appear to improve the rules from a technical perspective, they may not be sufficient to address the more fundamental problem that results from the limited economic incentive bidders have to use the Tier I exemption. This is likely to be a key topic in the comment process.

II. Proposed Amendments

A. Eligibility Threshold: Determining U.S. Ownership

1. Negotiated Transactions

In order to determine eligibility to rely on any cross-border exemptions, an acquiror must calculate the applicable percentage of the relevant shares held by U.S. holders and, in doing so, must "look through" the securities held of record by nominees in specified jurisdictions to identify those held for the accounts of persons located in the United States. The Commission has proposed allowing acquirors to make this U.S. beneficial ownership calculation on a date chosen by the bidder *within a 60-day period* before the public

6 Exchange Act Rule 14d-1(c).
7 Exchange Act Rule 14d-1(d).
8 Securities Act Rules 801 and 802.
9 In calculating U.S. ownership of the target company, holders of greater than 10% of the subject class and shares, if any, held by the bidder are excluded from the numerator and the denominator.
10 Securities Act Rules 801(a)(3) and 802(a)(2); Exchange Act Rules 13e-4(h)(8)(ii) and (i)(2)(ii); and 14d-1(c)(2) and (d)(2)(ii).

announcement of the transaction for which exemption is being sought.[11] Under the current rules, the relevant date for determining U.S. ownership is limited to *the 30th day* before *commencement* of the relevant transaction.[12] These two key changes – focusing on a range of dates rather than a specific date and keying to announcement rather than commencement – reflect the difficulties transaction participants have had obtaining information as of a specific date, especially in light of the uncertainty of when commencement would actually occur, and addresses the uncertainty facing bidders at the time of announcement as to the continued availability of needed exemptions at the time of commencement.

Keying the "look through" analysis to announcement, rather than commencement, would also serve to harmonize Tier I and Tier II exemptions with relief with respect to Rule 14e-5 under the Exchange Act, which generally prohibits purchases of target securities outside a tender offer from the date of announcement of that offer through its expiration. Tender offers conducted in reliance on the Tier I exemption are exempt from the application of Rule 14e-5 (and the Commission has, through class-wide exemptive relief, extended this exemption in certain areas for Tier II-eligible tender offers, and has proposed to codify these exemptions as part of the proposed changes). However, because Rule 14e-5 applies from the date of announcement of the tender offer, a bidder will not necessarily know at the time of announcement whether it will qualify for the cross-border exemptions as of the 30th day before commencement.

The Commission's determination to propose a longer and more flexible "look-back" period for calculating U.S. ownership is based on the staff's experience over the past eight years and its acknowledgement that in some countries it takes longer than 30 days to perform the analysis or it is not possible to calculate ownership as of a specific date in the past.[13] The Commission notes that while it seeks to provide greater flexibility regarding the date on which U.S. ownership in the target company must be assessed, it remains concerned about the possibility that a date for calculation would intentionally be chosen to present a less than representative picture of the target security holder base. The Commission emphasizes that the instructions to the cross-border exemptions make it clear that the exemptions are not available for any transaction or series of transactions that technically comply with the Commission's rules but are, in fact, part of a plan or scheme to evade them in practice.

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[11] *See* proposed revisions to Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i) and Instruction 2.i. to Exchange Act Rules 14d-1(c) and (d).

[12] The Commission is not proposing to change the reference point for calculation of U.S. ownership in rights offerings, which is the record date for the rights offering. *See* Rule 800(a)(1).

[13] *See, e.g.*, Serono S.A. (September 12, 2002) (cited in footnote 65 of the Release) (hereinafter "Serono"); Alcan, Inc. (October 7, 2003) (hereinafter "Alcan"); and Equant N.V. (April 18, 2005) (cited in footnote 69 of the Release).

2. Non-negotiated or "Hostile" Transactions

In adopting the eligibility standard for negotiated transactions described above, the Commission recognized that the required look-through analysis would be even more difficult or impossible for third-party acquirors in non-negotiated, or hostile, transactions, because they would not have the cooperation of the issuer. In particular, obtaining information from nominees that hold for the account of others is difficult for third-party acquirors and may have the effect of alerting the market to a contemplated offer before the acquiror wishes to make its intentions known. For that reason, the Commission included in the original cross-border exemptions a "hostile presumption" that would allow a third-party bidder in a non-negotiated tender or exchange offer to assume that U.S. ownership in the target company is no more than 10% or 40%, the thresholds for Tier I and Tier II, respectively, so long as average daily trading volume ("ADTV") in the United States does not exceed 10% or 40%, as the case may be, of the ADTV worldwide over a 12-month period ending 30 days before commencement, and the bidder has no "reason to know" that actual U.S. ownership is inconsistent with that figure (either based on the issuer's informational filings with the Commission or foreign regulators or based on the bidder's actual or imputed knowledge from other sources).

For purposes of the element of that test relating to the ADTV calculation, the Commission proposes to modify the instruction to the rules to mandate a calculation over a 12-calendar month period ending no later than 60 days before announcement.[14]

The Commission also seeks to address uncertainty about what constitutes "reason to know" with respect to the level of U.S. ownership of the target. The Commission states that an acquiror has "reason to know" information that is publicly available. This would include information appearing in reports compiled by independent information service providers that are generally available to the public. Acquirors would be presumed to know information about beneficial ownership reflected in filings by third parties with the Commission, such as beneficial ownership reports on Schedule 13D, 13F or 13G, or similar reports filed by third parties in the target's home country and in the country of its primary trading market, if different. In addition, the proposed rules would add a timing element to the test for the availability of the hostile presumption, providing that the acquiror's knowledge or "reason to know" refers to knowledge as of the date of announcement. As such, the proposed rules would allow an acquiror to ignore conflicting information received after announcement.[15]

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[14] *See* proposed revisions to Securities Act Rule 802(c)(2) and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d).

[15] *See* proposed Securities Act Rule 802(c)(3) and Instruction 3.iii. and iv. to Exchange Act Rules 14d-1(c) and (d).

3. Proposed Alternative Eligibility Standards

The Commission's proposals are at least as significant for what they do *not* propose as for what they do. In particular, the Commission requests comment on, but stops short of proposing, an eligibility requirement for negotiated transactions based on ADTV, an approach that has been urged by commenters and practitioners in past years in response to difficulties in determining actual U.S. beneficial ownership of foreign issuer securities. In the Commission's view, based on analysis performed by the staff comparing U.S. beneficial ownership figures based on a look-through analysis and ADTV, it appears that trading volume may understate beneficial holdings of U.S. investors in a target company. Moreover, the Commission is interested in obtaining comments on, but is not proposing at this time, an eligibility test that would be based on the percentage of target securities held in American Depositary Receipt ("ADR") form. The Commission is concerned that an ADR test might not be an effective proxy for U.S. beneficial ownership and might not be workable for foreign private issuers whose shares trade in ordinary form. Finally, the Commission has requested comment on, but has not proposed, eliminating the requirement in calculating U.S. ownership to exclude all greater-than-10% holders, limiting the exclusion only to those holders that are otherwise affiliates of the target or modifying the percentage ownership thresholds applicable to these exemptions.[16]

B. Proposed Changes to the Tier I Exemption: Rule 13e-3

Rule 13e-3 under the Exchange Act establishes specific filing and disclosure requirements for certain affiliated transactions[17] with the purpose or effect of "going private"[18] because of the conflicts of interest inherent in such situations. Cross-border transactions where the U.S. ownership is 10% or less conducted by the issuer or its affiliates under the existing Tier I exemption and Securities Act Rule 802 are currently exempt from the requirements of Rule 13e-3. However, the scope of the existing Tier I exemption from

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16 The Commission also is not proposing to amend at this time any of the rules applicable to cross-border acquisitions by Canadian companies pursuant to the U.S.-Canadian Multijurisdictional Disclosure System.

17 The kinds of transactions covered by Exchange Act Rule 13e-3 include tender offers, purchases of securities, mergers, reorganizations, reclassifications and sales of substantially all the assets of a company. *See* Rule 13e-3(a)(3)(i)(A) - (C).

18 Exchange Act Rule 13e-3(a)(3)(ii) lists the effects that will cause the rule to apply to a specified transaction: (A) causing any class of equity securities of an issuer which is subject to Section 12(g) or Section 15(d) of the Exchange Act to be held of record by fewer than 300 persons; or (B) causing any class of equity securities of the issuer which is listed on an exchange or quoted on an interdealer quotation system to no longer be so listed or quoted. For foreign private issuers engaged in transactions that would have a going private effect under the rules, the Commission interprets Rule 13e-3 to apply where the transaction results in fewer than 300 security holders of record in the United States. *See* Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008).

Rule 13e-3 does not apply to some business combination transaction structures commonly used abroad.

The Commission notes that the heightened disclosure requirements of Rule 13e-3 represent a significant disincentive for acquirors to include U.S. security holders in cross-border transactions that do not currently fit within the Rule 13e-3(g)(6) exemption, particularly where U.S. holders make up no more than 10% of the target shareholder base. The Commission further notes that the form of the transaction structure should not prevent an otherwise-eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3. The Commission proposes to expand the set of cross-border business combination transactions that are exempt from the requirements of Rule 13e-3 to include schemes of arrangement, cash mergers, compulsory acquisitions for cash and other types of transactions, assuming they would otherwise qualify for the Tier I or Rule 802 exemption.[19]

C. Proposed Changes to the Tier II Exemption

Unlike the Tier I exemption and the Securities Act Rule 801 and 802 exemptions, the Tier II exemption does not exempt third-party bidders or issuers from applicable U.S. filing, disclosure, dissemination and procedural requirements for tender offers or going-private transactions subject to Rule 13e-3. Transactions eligible for the Tier II exemption also do not have corresponding relief from the registration requirements of Section 5 of the Securities Act.

1. Clarify that Tier II Relief Applies Where Target Securities Are Not Subject to Rule 13e-4 or Regulation 14D

Under the current rules, there is some uncertainty whether the Tier II exemption applies only to transactions governed by Regulation 14D and Rule 13e-4 under the Exchange Act,[20] or also is available when a tender offer is governed by Regulation 14E only.[21] Tender offers governed by Regulation 14E only include, for example, offers for

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[19] Many of such transactions, to the extent they involve the offering of securities in the United States, are already exempt from the registration requirements of the Securities Act. For example, the securities issued in many schemes of arrangement are exempt under Section 3(a)(10) of the Securities Act.

[20] Regulation 14D and Rule 13e-4 apply only to tender offers for equity securities. Regulation 14D applies only where the equity security that is the subject of the tender offer is registered under Section 12 of the Exchange Act, and where the bidder makes a partial offer for less than all of the outstanding securities of the subject class and could own more than 5% of those securities when purchases in the tender offer are aggregated with its existing ownership of those securities. Rule 13e-4 applies to an issuer equity tender offer where the subject securities are not themselves registered under Section 12, but where the issuer has another class of securities that is so registered.

[21] Regulation 14E applies to all tender and exchange offers, whether for debt or equity, and whether or not the security is registered under Section 12. The Commission is also proposing a technical amendment to the definition of Regulation 14E in Rule 14d-1(a) to clarify that it encompasses the entire regulation, *(cont'd)*

unregistered equity and cross-border debt tender offers. The Commission proposes to eliminate any uncertainty and to codify its position that bidders that otherwise meet the conditions for reliance on the Tier II cross-border exemption may rely on that relief in making such tender offers, to the extent applicable.[22]

The Commission explains that certain of the relief afforded under the Tier II exemption will not be necessary in the case of offers not subject to Rule 13e-4 or Regulation 14D. For example, because the "all-holders" requirement[23] does not apply to such offers, the Tier II provision permitting the use of a dual offer structure may be unnecessary. However, where the relief provided in Tier II is needed, the Commission clarifies that it sees no reason to restrict its application only to tender offers subject to Rule 13e-4 or Regulation 14D. This is consistent with this Firm's long-held view that the Commission intended Tier I and Tier II to be available whether or not Rule 13e-4 or Regulation 14D applies.

2. <u>Expand Tier II Relief for Dual or Multiple Offers</u>

The Commission proposes to expand and clarify the relief afforded under Tier II in the following ways to help eliminate recurring conflicts between U.S. and foreign law and practice:

- permit the offeror to make more than one non-U.S. offer;
- allow the U.S. offer to include non-U.S. persons and the foreign offer(s) to include U.S. persons; and
- clarify that bidders relying on the dual offer provision in the Tier II exemption to conduct separate U.S. and non-U.S. offers for less than all of a class of target securities must use a single proration "pool."

U.S. tender offer rules require that when a bidder makes a tender offer subject to Rule 13e-4 or Regulation 14D under the Exchange Act, that tender offer must be open to all target security holders of the subject class. The Tier II cross-border exemption currently contains a provision permitting a bidder conducting a tender offer to separate that offer into two separate offers – one U.S. and one foreign – for the same class of securities. By permitting the use of two separate but concurrent offers – one made in compliance with U.S. rules and the other conducted in accordance with foreign law or practice – the dual offer provision facilitates cross-border tender offers.

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including Rules 14e-1 through 14e-8. The current definition includes only Rules 14e-1 and 14e-2 and was not amended when the additional rules were adopted under Regulation 14E.

22 *See* proposed Exchange Act Rules 13e-4(i) and 14d-1(d).

23 *See* Exchange Act Rules 13e-4(f)(8) and 14d-10(a).

In practice, however, issues have arisen because the text of the exemption specifically permits only *two* offers for the target class of securities. Bidders may be required to (or may wish to) make more than one offer outside the United States. This may be the case, for example, where the primary trading market for the target's securities differs from the target's country of incorporation. The Commission notes that companies have, upon request, received relief permitting multiple foreign offers[24] and proposes in the Release to eliminate the restriction on the number of non-U.S. offers a bidder may make in a cross-border tender offer by changing the references to "dual offers" to refer instead to "multiple offers."[25]

In addition, the Commission proposes to revise the multiple offer provisions to allow a U.S. offer to be made to U.S. holders of the subject securities and *all* holders of ADRs representing interests in the subject securities, including foreign holders. This revision codifies relief afforded in numerous cross-border transactions under the existing rules, because bidders generally prefer to include all holders of ADRs in a single offer.[26] The proposed rule provides that the U.S. offer must be made on terms at least as favorable as those offered any other holder of the subject securities. The Commission states that the proposed changes are not intended to enable an offer to be made only to holders of ADRs or only to holders of the underlying securities, where the target shares are registered under Section 12 or where Rule 13e-4 otherwise applies. The Commission notes that it views ADRs and the underlying securities as a single class for purposes of the tender offer and beneficial ownership reporting rules. The Commission further notes that it is not proposing to allow foreign target holders who do not hold in ADR form to participate in U.S. offers.

The proposed changes to Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) would also provide that U.S. persons may be included in the foreign offer(s) as well where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. persons from the foreign offer(s) and where the offer materials distributed to U.S. persons fully and adequately disclose the risks of participating in the foreign offer(s).

The Commission also seeks to clarify that bidders relying on the dual offer provision in the Tier II exemption to conduct separate U.S. and non-U.S. offers for less than all of a class of target securities must use a single proration "pool," in accordance with the existing requirements of the rules.[27] This is to assure equal treatment of security holders who have tendered their securities.

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24 *See, e.g.*, Mittal Steel Company N.V. (June 22, 2006) (cited in footnote 117 of the Release).

25 *See* proposed Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

26 *See, e.g.*, Serono, Alcan and Southern Cross (March 5, 2002).

27 *See* Section 14(d)(6) of the Exchange Act and Rules 13e-4(f)(3) and 14d-8.

3. Termination of Withdrawal Rights While Tendered Securities Are Counted

The Commission proposes to revise the current rules to address certain issues relating to the "back-end" withdrawal rights required under Section 14(d)(5) of the Exchange Act and Rule 13e-4(f)(2)(ii) under the Exchange Act for tender offers conducted under the Tier II cross-border exemption. Under the proposed changes, new provisions would be added to the Tier II exemption permitting the suspension of back-end withdrawal rights during the time after the initial offering period when tendered securities are being counted and before they are accepted for payment. Both of the back-end withdrawal rights provisions require bidders to provide withdrawal rights after a set date (60 days), measured from the commencement of a tender offer.[28] Thus, even where a tender offer has technically closed and tenders are no longer being accepted, back-end withdrawal rights may exist until the offeror accepts tendered shares for payment.

The Commission points out that differences in the tender, acceptance and payment procedures between U.S. and foreign offers necessitate this relief. Unlike in the United States, where employment of a single exchange agent permits bidders to know at any point in the offering period the number of securities tendered, the mechanics of the tender process in non-U.S. tenders, including centralizing and counting tendered securities, may take an extended period of time. The bidder in a cross-border tender offer may not know whether the minimum tender condition has been satisfied immediately after the end of the initial offering period. The bidder cannot accept tendered securities until all offer conditions, including the minimum tender condition, have been satisfied or waived and the counting process is completed.

The Commission previously granted relief from back-end withdrawal rights when it adopted Rule 14d-11 under the Exchange Act, which permits the use of a subsequent offering period during which securities may be tendered but not withdrawn. The proposed revisions to the Tier II cross-border tender offer rules would codify relief the Commission has granted in connection with prior cross-border transactions[29] and would permit both third-party bidders for securities of a foreign private issuer and foreign private issuers repurchasing their own securities to suspend back-end withdrawal rights while tendered securities are being counted, even where no subsequent offering period is provided. The proposed rules would be conditioned on the following factors:

- the Tier II exemption must be available;

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28 *See* Section 14(d)(5) of the Exchange Act.
29 *See, e.g.*, Serono.

- the offer must include an offering period, including withdrawal rights, of at least 20 U.S. business days;

- at the time withdrawal rights are suspended, all offer conditions must have been satisfied or waived,[30] except to the extent that tendered securities are being counted to determine if the minimum acceptance condition has been satisfied; and

- withdrawal rights may be suspended only during the necessary centralization and counting process period and are reinstated immediately thereafter, except to the extent they are terminated by the acceptance of tendered securities.

4. <u>Expanded Relief for Subsequent Offering Periods</u>

The Commission proposes to eliminate the current rule imposing a 20 U.S. business day limit on the length of the subsequent offering period for cross-border tender offers eligible to rely on the Tier II exemption. The Commission has previously granted relief on a case-by-case basis to permit longer periods[31] and notes that allowing subsequent offering periods in cross-border tender offers to extend beyond the current 20 business day maximum period is consistent with one of the primary reasons the Commission revised its rules to permit subsequent offering periods generally – to enable bidders to reach the necessary thresholds for acquiring the remaining target securities not tendered in an initial offering period and to pay tendering security holders before they would receive payment in a second-step "squeeze out" process.[32]

The Commission also addresses the requirement under the U.S. rules that bidders must immediately accept and promptly pay[33] for all securities "as they are tendered during the subsequent offering period."[34] The requirement to purchase securities tendered during

[30] The Commission takes the view that the only conditions that may survive the expiration of an initial offering period are regulatory approvals. While the Commission has not proposed to make this relief available if a regulatory condition survives, it did indicate that the staff will continue to consider limited relief under those circumstances where a compelling reason exists. *See* footnote 151 of the Release.

[31] *See, e.g.*, STATS ChipPAC Ltd. (March 15, 2007).

[32] *See* SEC Release No. 33-7760 (October 22, 1999) ("Regulation M-A Adopting Release"), Section II.G.1. ("The purpose of the subsequent offering period is two-fold. First, the period will assist bidders in reaching the statutory state law minimum necessary to engage in a short-form, back-end merger with the target. Second, the period will provide security holders who remain after the offer one last opportunity to tender into an offer that is otherwise complete in order to avoid the delay and illiquid market that can result after a tender offer and before a back-end merger."). Because of these benefits, the Commission also requests comment on whether it should eliminate the 20 business day limit on subsequent offering periods for all tender offers generally, including for domestic targets.

[33] Prompt payment is generally understood to mean within three business days.

[34] *See* Exchange Act Rule 14d-11(e).

the subsequent offering period on a rolling basis exists because, in the absence of withdrawal rights, which need not be provided during a subsequent offering period, the Commission's view is that tendering security holders should receive their offer consideration as quickly as possible.

The Commission acknowledges that the requirement that securities be paid for on an as tendered basis in the same manner as in the United States may conflict with market practice in non-U.S. jurisdictions. The Commission is proposing to allow, under certain circumstances, securities tendered during the subsequent offering period for a Tier II cross-border tender offer to be purchased on a modified rolling basis. As proposed, new Rule 14d-1(d)(2)(iv) would define "prompt payment" for purposes of the requirement under Rule 14d-11(e) to purchase on an as tendered basis. Instead of requiring daily aggregation of securities tendered during the subsequent offering period, the proposed rule would permit such securities to be "bundled" and paid for within 14 business days from the date of tender.

Another area of conflict involving subsequent offering periods the Commission addresses relates to the requirement, in certain foreign jurisdictions, that bidders pay interest on securities tendered during the subsequent offering period. Paying interest on securities tendered during a subsequent offering period conflicts with the equal treatment principles in Rule 14d-10(a)(2). The Commission proposes to revise the rules to permit a departure from Rule 14d-10(a)(2) for the payment of interest for securities tendered during a subsequent offering period in a Tier II cross-border tender offer where required under foreign law.

The final issue with respect to subsequent offering periods addressed by the Commission relates to cross-border tender offer structures that include a "mix and match" election feature. In mix and match offers, target security holders are offered a set mix of cash and securities of the bidder – often referred to as the "standard entitlement" – with the option to elect a different proportion of cash and securities to the extent that other tendering security holders make opposite elections. The bidder typically sets a maximum amount of cash or securities that it will issue in the offer. To the extent that more tendering target security holders elect cash or bidder securities, their elections are prorated to the extent they cannot be satisfied through "offsetting elections" made by other target security holders.

Mix and match offers often conflict with U.S. requirements applicable to the subsequent offering period.[35] Those rules provide that a bidder may offer a choice of different forms of consideration in the subsequent offering period, but only if there is no ceiling on any form of consideration offered. In addition, the rules require a bidder to offer

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[35] In the United States, a mix and match offer often can be achieved through a statutory merger, a structure not available in many non-U.S. jurisdictions. However, the Commission has requested comment on whether it should extend its proposed changes to accommodate mix and match offers to all tender offers, including those for U.S. issuers.

the same form and amount of consideration to tendering security holders in both the initial and subsequent offering periods. In these kinds of offers, bidders want to impose a maximum limit on either (or both) the number of securities or the amount of cash they will be obligated to deliver if the offer is successful. In addition, the offset feature characteristic of mix and match offers is inconsistent with the prohibition on offering different forms and amounts of consideration in the initial and subsequent offering periods.

The Commission proposes to revise its rules specifically to allow separate offset and proration pools for securities tendered during the initial and the subsequent offering periods. The Commission notes that these changes are necessary and appropriate to facilitate the prompt payment for securities tendered during these offer periods, and to permit the use of the mix and match offer structure generally. Citing the same practical considerations, the Commission also proposes to eliminate the prohibition on a "ceiling" for the form of consideration offered in the subsequent offering period, where target security holders are given the ability to elect between two or more different forms of offer consideration. These changes would be accomplished by adding a provision in Rule 14d-1(d)(2) that specifies that such practices are permissible for Tier II cross-border offers.

5. Additional Guidance Regarding Termination of Withdrawal Rights After Reduction or Waiver of a Minimum Acceptance Condition

The U.S. tender offer rules generally provide that a bidder must allow an offer to remain open for a certain period of time after a material change in its terms is communicated to target security holders and that the bidder must provide withdrawal rights during such period. In the 1999 release adopting the cross-border exemptions, the Commission affirmed the staff's then interpretive position that a bidder meeting the conditions of the Tier II exemption may waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining in the tender offer after the waiver or reduction, subject to certain specified conditions.[36]

The Commission now has stated that it is further limiting the interpretive position it adopted in the Cross-Border Adopting Release. The relief from the extension requirements of the tender offer rules adopted in the Cross-Border Adopting Release may no longer be relied upon unless the bidder is eligible to rely on the Tier II exemption and the bidder undertakes not to waive or reduce the minimum acceptance condition below a majority. The Commission states that this interpretive position is limited to circumstances where there is a requirement of law or practice in the foreign home country justifying a bidder's inability to extend the offer after a waiver or reduction in the minimum offer condition. Furthermore, this interpretive position does not apply to mandatory extensions for changes related to the offer consideration, the amount of target securities sought in the offer or a change to the

[36] The Cross-Border Adopting Release, Section II.B.

dealer's soliciting fee. Bidders seeking to rely on this guidance, as modified, will be required to disclose fully and discuss all of the implications of the potential waiver or reduction, including at the specific levels contemplated, in the offering materials. Since the Release describes the Commission's current interpretive position, it should be regarded as applying with immediate effect, whether or not the proposed rule changes eventually are adopted.

6. Early Termination of the Initial Offering Period or a Voluntary Extension of the Initial Offering Period

Under specified circumstances, the Commission has granted relief to bidders requesting early termination of the initial offering period (or any voluntary extension of that period), which under U.S. tender offer rules must remain open for specified minimum time periods after a material change in the terms of an offer. Early termination of the initial offering period is not permitted, however, where U.S. rules require mandatory offer extensions for certain changes to the terms of an offer, including those arising from changes in the offer consideration, the dealer's soliciting fee, the percentage of target securities for which the offer is made or other material changes. Thus, bidders making any of these kinds of changes to the terms of a tender offer may not terminate an initial offering period (or any extension of that period) before the scheduled expiration of the mandatory extension.

In the Release, the Commission expressly declines to codify the guidelines set forth in staff no-action precedent for cross-border tender offers regarding the ability to terminate early an initial offering period or a voluntary extension of that period. The Commission notes that it will determine whether to revise its rules to codify this relief, under specified conditions, after considering the responses it receives to its request for comment.[37]

7. Codification of Rule 14e-5 Cross-Border Exemptions

The Commission proposes to revise Exchange Act Rule 14e-5 to codify recent exemptive relief issued for Tier II-eligible tender offers in the following three areas: purchases and arrangements to purchase securities of a foreign private issuer (1) pursuant to the non-U.S. tender offer(s) for a cross-border tender offer where there are separate U.S. and non-U.S. offers; (2) by offerors and their affiliates outside a tender offer in accordance with local country practice in jurisdictions meeting certain criteria; and (3) by financial advisors'

[37] The Commission requests comment on, among other things, whether the relief is necessary to alleviate practical difficulties; whether the rules should limit the relief only to early termination of the initial offering period or only to early termination of a voluntary extension; and whether the relief should be conditioned on a requirement under foreign law or only foreign practice. The Commission also notes that to the extent foreign law would permit a waiver of the offer conditions to trigger a requirement to immediately terminate the initial offering period or any voluntary extension of that period, the staff will continue to consider requests for relief on a case-by-case basis.

affiliates outside a tender offer. Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer and applies from the time of public announcement of the tender offer until the offer expires. The rule applies to "covered persons" as that term is defined in the rule.[38]

Proposed Rule 14e-5(b)(11) would permit purchases or arrangements to purchase pursuant to a foreign tender offer (or in more than one foreign offer) during the Rule 14e-5 prohibited period if certain conditions are satisfied. This proposed exception would permit purchases in a foreign offer or offers made concurrently or substantially concurrently with a U.S. offer under Rule 14d-1(d)(2)(ii). The tender offer must qualify as a Tier II tender offer under Rule 14d-1(d). The proposed exception is conditioned on the existence of certain safeguards to help protect U.S. security holders. The conditions require that U.S. security holders are treated at least as favorably as non-U.S. tendering security holders. The proposal also permits any cash consideration to be paid to U.S. security holders to be converted from the currency paid in the foreign offer to U.S. dollars at the exchange rate disclosed in the U.S. offering documents. In addition, the conditions require transparency regarding the offeror's intent to make purchases pursuant to a foreign offer in the U.S. offering documents. As proposed, the exception does not apply to open market transactions, private transactions or other transactions outside the tender offer.

Proposed Rule 14e-5(b)(12) would permit purchases or arrangements to purchase outside a Tier II tender offer by (i) an offeror and its affiliates and (ii) an affiliate of a financial advisor if certain conditions are satisfied. The Commission states that the proposed rule is intended to address situations where the subject company is a foreign private issuer, and the covered person must reasonably expect that the tender offer qualifies as Tier II.[39] The proposal prohibits any purchases or arrangements to purchase in the United States otherwise than pursuant to the tender offer.[40] Further, it contains conditions to enhance the transparency of the excepted activity. For example, the proposal requires that the U.S. offering materials prominently disclose the possibility of or the intention to make purchases or arrangements to purchase outside the tender offer. The proposal also requires disclosure in the United States of purchases made outside the tender offer to the extent that such information is made public in the subject company's home jurisdiction.

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38 Covered persons include the offeror and its affiliates, the offeror's dealer-manager and its affiliates, any advisor to such persons and any person acting, directly or indirectly, in concert with such persons in connection with any purchase or arrangement to purchase any subject securities or any related securities.

39 The Commission notes in the Release that it would modify the reasonable expectation condition if the proposal to change the timing of the Tier II calculation to a date no earlier than 60 days before the tender offer announcement is adopted. We would hope, however, that even if the Commission modifies the reference date, it will retain a reasonable expectation standard as it relates to such new date, at least as to financial advisors' affiliates.

40 We will ask the Commission to confirm that financial advisors and their affiliates should continue to be able to make purchases in the United States pursuant to other available exemptions.

Where an offeror or its affiliate purchases or arranges to purchase outside a tender offer, the proposed exception imposes one additional condition regarding consideration. In order to safeguard against the disparate treatment of security holders, the proposed exception requires that the tender offer price be raised to equal any higher price paid outside the tender offer.[41]

Where an affiliate of a financial advisor purchases or arranges to purchase outside a tender offer, the proposed exception imposes additional conditions. The proposal requires that the financial advisor and affiliate maintain and enforce written policies and procedures designed to prevent the flow of information between the financial advisor and the affiliate that might result in a violation of the federal securities laws and regulations. It also would require that the affiliate have no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that directly effect or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services. The proposed exception also would require that the financial advisor have a registered broker-dealer affiliate under Section 15(a) of the Exchange Act. As the exception is premised on the affiliate of the financial advisor carrying out its normal business activity when purchasing outside a tender offer, it would not permit purchases or arrangements to purchase to be made to facilitate the tender offer. Accordingly, purchasing activity effected in reliance on the proposed exception should be consistent with the affiliate's prior levels of activity.[42]

The Commission specifically excludes risk arbitrage from the exception applicable to the financial advisor's affiliates. The Commission states that it views risk arbitrage, which may involve the purchase of the subject security and the sale of stock in the proposed acquiror, as being so closely related to the tender offer that the incentive for abusive behavior is significant.[43]

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[41] Prior relief granted by the Commission had required that the law of the applicable local jurisdiction itself require such an increase in the offer price to match any consideration paid outside the offer. This addition permits a bidder to *elect* to provide such treatment to have the benefit of the Rule 14e-5 exemption.

[42] To the extent that the proposed rule would require that the purchasing activity be consistent with the affiliate's prior levels of trading activity, it is more restrictive than previous relief the staff has granted to financial advisors, which permitted purchasing activities when, among other conditions, such activities were "consistent with the [f]inancial [a]dvisor's [a]ffiliates' . . . normal and usual business practices, and . . . 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." *See* Condition 4 in Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007) ("Financial Advisor Letter"), providing class exemptive relief under the conditions specified. The focus in the previous relief was thus on the nature of the prior activities, rather than on the level of such activities.

[43] The Commission's wholesale exclusion of risk arbitrage from the types of activities financial advisors' affiliates may conduct outside the tender offer is in fact a departure from the relief it *(cont'd)*

The Commission's proposed rules also have removed certain conditions to the availability of the exemptions that have been granted from time to time to offerors, financial advisors and their respective affiliates, such as voluntary compliance by the financial advisor and its affiliates with the pertinent provisions of the United Kingdom's City Code on Takeovers and Mergers and Rules Governing Substantial Acquisition of Shares[44] and certain compliance requirements with the laws of the target's home jurisdiction and the existence of a bilateral or multilateral memorandum of understanding.[45] The absence of these unnecessary conditions is a welcome improvement that promises to make the proposed exemptions more useful to offerors, financial advisors and their affiliates.

8. Expanded Availability of Early Commencement for Exchange Offers

In 1999, as part of amendments to the tender offer rules separate from the cross-border amendments, the Commission adopted rule changes permitting exchange offers to commence upon the date of the filing of a registration statement under specified conditions to address the disparity in the regulatory process for cash tender offers (which could commence immediately upon filing of a tender offer statement) and exchange offers (which, prior to the 1999 rule revisions, could not commence until the staff completed its review of the registration statement and it had been declared effective).[46] Noting that the regulatory disparity continues to exist to some extent because the early commencement option is not available for exchange offers that are not subject to Rule 13e-4 or Regulation 14D, the Commission proposes to expand the availability of early commencement for cross-border exchange offers not subject to Rule 13e-4 or Regulation 14D under the conditions outlined in the proposed rules.[47] Such exchange offers would include, for example, offers for unregistered equity securities and cross-border debt tender offers.

The proposed rule would permit early commencement for exchange offers not subject to Rule 13e-4 or Regulation 14D only where the bidder provides withdrawal rights in the offer to the same extent as would be required under such rules.[48] In addition, the proposed rule would require the same minimum time periods after the occurrence of specified changes as are required for other "early commencement" offers. The Commission

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previously granted in the Financial Advisor Letter, which did not contain such a flat prohibition**.** *See* Financial Advisor Letter and the attached request at page 3. We believe the general prohibition on activities designed to facilitate the tender offer should be sufficient to protect against abuse without a general exclusion for risk arbitrage, which in any event would be difficult to define with precision.

44 *See* Condition number 10 in the Financial Advisor Letter.

45 *See, e.g.*, Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007).

46 *See* Regulation M-A Adopting Release, Section II.E.1.

47 Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x). The Commission also has requested comment on whether such proposed changes should be made available for all exchange offers, including those for domestic targets not within the scope of current Rule 162, discussed below.

48 Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

also proposes a corresponding change to Securities Act Rule 162[49] to extend the exemption from Section 5(a) of the Securities Act in that rule to exchange offers not subject to Rule 13e-4 or Regulation 14D that otherwise meet the conditions for the Tier II exemption.

III. Beneficial Ownership Reporting by Foreign Institutions

The beneficial ownership reporting provisions require, subject to exceptions, that any person who acquires more than 5% of a class of voting equity securities registered under Section 12 of the Exchange Act report the acquisition on Schedule 13D within 10 days. Under certain circumstances, however, investors that have acquired the securities in the ordinary course of business without the purpose or effect of changing or influencing control of the issuer may qualify to file a short-form report on Schedule 13G instead of Schedule 13D. Utilization of Schedule 13G currently is available for such passive investments only if such investor is a U.S. bank as defined in Section 3(a)(6) of the Exchange Act, registered investment company or other specified type of U.S. institutional investor (a "qualified institutional investor")[50] or if the investor beneficially owns less than 20% of the outstanding voting equity securities (a "non-qualified passive investor").[51] Qualified institutional investors generally need not file their Schedule 13G until 45 days after the end of the calendar year in which the acquisition occurred, and only if they remain above the 5% threshold at the end of the calendar year. Non-qualified passive investors must file their Schedule 13G within the same period as a Schedule 13D would be due, *i.e.*, within 10 calendar days of crossing the threshold.

In the Release, the Commission proposes to extend Schedule 13G filing eligibility based on the qualified institutional investor exception to include foreign institutions that are substantially comparable to the U.S. institutions listed in the current rule. To be eligible to file on Schedule 13G as a qualified institutional investor, the foreign institution would be required to determine, and to certify on Schedule 13G, that it is subject to a regulatory scheme "substantially comparable" to the regulatory scheme applicable to its U.S.

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49 Rule 162 under the Securities Act provides an exemption from Section 5(a) of the Securities Act for soliciting tenders in an eligible exchange offer before a registration statement is effective, so long as no securities are purchased prior to effectiveness.

50 *See* Rule 13d-1(b) under the Exchange Act. As specified in Rule 13d-1(b)(1)(ii), the types of institutional investors that may file on Schedule 13G under that rule include a broker or dealer registered under Section 15 of the Exchange Act, a bank as defined in Section 3(a)(6) of the Exchange Act, an insurance company as defined in Section 3(a)(19) of the Exchange Act, an investment company registered under Section 8 of the Investment Company Act of 1940 (the "Investment Company Act"), an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 or under the laws of any state, an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974, a savings association as defined in Section 3(b) of the Federal Deposit Insurance Act of 1950, a church plan that is excluded from the definition of an investment company under Section 3(c)(14) of the Investment Company Act, and related holding companies and groups.

51 *See* Rule 13d-1(c) under the Exchange Act.

counterparts.[52] In addition, the foreign institution would need to undertake, in its certification on Schedule 13G, to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D.[53]

If these proposed rule changes are adopted, the Commission makes clear that Rule 13d-1(b) would continue to be available only to institutions that acquire and hold equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer. In the event that an institution – foreign or domestic – determines that it holds subject securities with a disqualifying purpose or effect, it would be required to file a Schedule 13D as set forth in Rule 13d-1(e) no later than 10 calendar days after the change in investment purpose. In addition, such institution would be subject to a "cooling-off period," during which time the reporting person is prohibited from voting or directing the voting of the subject securities or acquiring additional beneficial ownership of any equity securities of the issuer or any person controlling the issuer.

IV. Commission Interpretive Guidance

In addition to the proposed rule changes and interpretive guidance discussed above, the Release includes Commission guidance, and solicits commenters' views, on the following issues:

- the application of the all-holders provisions of the tender offer rules to foreign target security holders;
- the ability of non-U.S. bidders to exclude U.S. target security holders in cross-border tender offers; and
- the ability of non-U.S. bidders to use the vendor placement procedure for cross-border exchange offers.

A. Application of the All-Holders Rule to Foreign Target Security Holders

In 1986, the Commission adopted Rule 14d-10 and amended Rule 13e-4(f) to require that all target security holders in a tender offer subject to either of those rules be included in

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52 The Commission did not define what it means by substantially comparable, and requests comment on whether foreign institutions will find it difficult to certify whether they are subject to comparable regulation.

53 This latter requirement appears to be too broad, at least in the case of those foreign institutions eligible to rely on the non-qualified passive investor exception, since such institutions ultimately would be entitled to file a beneficial ownership report on Schedule 13G, and the principal benefit of the proposed rule is the timing advantage of delaying the filing until 45 days after the end of the calendar year (or eliminating the filing altogether if the foreign institution's holdings have fallen below 5%).

the tender offer and treated equally.[54] These rules require, with narrow exceptions, that third-party tender offers subject to Section 14(d) of the Exchange Act, as well as issuer tender offers subject to Section 13(e) of the Exchange Act, be open to all holders of the subject class of securities. This equal treatment provision does not prohibit tender offers for less than all outstanding securities of a subject class, but it does require that all security holders be able to accept the tender offer if they choose. Implicitly, the all-holders provisions in Rules 14d-10 and 13e-4(f) apply equally to U.S. and non-U.S. target holders.

The Commission is reiterating its position that the all-holders requirement does not allow the exclusion of any foreign or U.S. target holder in tender offers subject to those rules. The Commission states that it is in the interest of U.S. investors to enforce U.S. equal treatment principles for the benefit of non-U.S. target security holders, particularly where comparable foreign all-holders requirements may protect U.S. investors by preventing their exclusion from cross-border offers. The Commission recognizes, however, that the requirement to make an offer available to all foreign target holders, particularly for registered exchange offers, may present a burden for bidders that may need to comply with both foreign and U.S. rules. It is therefore soliciting comment on whether any amendments to the U.S. equal treatment provisions are necessary or advisable to allow certain target security holders to be excluded from the offer.[55]

Notwithstanding the requirements of Rule 14d-10 and Rule 13e-4(f) to extend an offer to all holders of a target company's securities, the Commission clarifies that these provisions have not been interpreted to require that offering materials be mailed into foreign jurisdictions. In addition, noting that certain bidders have required target holders to certify that tendering their securities complies with local laws or that an exemption applies that allows such tenders without further action by the bidder to register or qualify its offer, the Commission states that it does not believe it is appropriate to shift this burden of assuring compliance with the relevant jurisdiction's laws to target security holders, because target security holders may not be in possession of relevant facts regarding the bidder's action and the provisions of local law in their home jurisdiction necessary to make this determination.

[54] *See* Amendments to Tender Offer Rules: All-Holders and Best-Price, Release No. 34-23421 (July 11, 1986).

[55] In this regard, the Commission cites the exception in Rule 14d-10(b), which states that the all-holders rule will not "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." The Commission also is soliciting comment whether Rule 14d-10(b) should be amended to include a similar provision with respect to target holders in foreign jurisdictions and whether the Commission should specifically define what a "good faith effort" means.

B. Ability of Non-U.S. Bidders to Exclude U.S. Target Security Holders

The Commission also provides additional guidance in the Release on whether and how bidders in cross-border business combination transactions legitimately may avoid the application of U.S. registration and tender offer rules. Whether U.S. tender offer rules apply in the context of a cross-border tender offer depends on whether the bidder uses U.S. jurisdictional means in making a tender offer. The Commission has provided guidance on measures acquirors may take to avoid using U.S. jurisdictional means through previously issued releases.[56]

The Commission reiterates that a legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself, because if the bidder wants to support a claim that the offer has no jurisdictional connection to the United States, it also will need to take special precautions to prevent sales to or tenders from U.S. target holders.

The Commission also points out that bidders may require a representation or certification from tendering holders that they are not U.S. holders to avoid application of U.S. law. The Commission recognizes the possibility that target security holders could misrepresent their status in order to be permitted to tender into an exclusionary offer. The Commission has previously stated that where this occurs, bidders will not be viewed as having targeted U.S. investors, thereby invoking U.S. jurisdictional means.[57] However, the Commission clarifies that this position is premised on the bidder's having taken adequate measures reasonably designed to guard against purchases from and sales to U.S. holders. It is also premised on the absence of indicia, such as payment drawn on a U.S. bank or provision of a U.S. taxpayer identification number, that would or should put the bidder on notice that the tendering holder is a U.S. investor.

The Commission did not discuss the implication of the target's conduct on a bidder's attempt to avoid the use of U.S. jurisdictional means, and this remains an area of possible comment and concern.[58]

The Commission indicates in the Release that in the future it will more closely monitor exclusionary offers to determine whether Commission action is necessary to protect U.S. target holders.

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[56] *See generally* Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Securities Offshore, Release No. 33-7516 (March 23, 1998) (the "1998 Internet Release") and the Cross-Border Adopting Release.

[57] *See* 1998 Internet Release, Section III.C.

[58] *Cf. Plessey Co. plc v. General Electric Co. plc*, 628 F. Supp. 477 (D. Del. 1986), holding that the bidder did not have to comply with the tender offer rules under the Exchange Act when the *target* made use of U.S. jurisdictional means.

C. Vendor Placements

In certain cross-border exchange offers, bidders may seek to avoid the registration requirements of the Securities Act by establishing a vendor placement arrangement for the benefit of U.S. target security holders who tender into the offer. In a vendor placement, the bidder generally employs a third party to sell in offshore transactions the securities to which tendering U.S. security holders would be entitled in the offer. The bidder (or the third party) then remits the proceeds of the resale (minus expenses) to those U.S. target security holders that tendered into the offer. In effect, the vendor placement is an effort to convert an exchange offer involving the offer and sale of the bidder's securities (which would require Securities Act registration) into an offer involving solely cash (which does not require registration) as it relates to tendering U.S. security holders.

In several no-action letters,[59] the staff has taken the position that if a foreign company offers and issues to U.S. persons securities that are immediately resold outside the United States for the account of the U.S. person, no offer or sale (as those terms are defined in the Securities Act) to the U.S. person occurs. Accordingly, the securities issued to and sold on behalf of the U.S. persons need not be registered under the Securities Act. Factors that the staff looks to in determining whether the vendor placement arrangement obviates the need for Securities Act registration include:

- the level of U.S. ownership in the target company;
- the amount of bidder securities to be issued overall in the business combination as compared to the amount of bidder securities outstanding before the offer;
- the amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer;
- the liquidity and general trading market of the bidder's securities;
- the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales;
- the timeliness of the vendor placement process, *i.e.*, whether sales of bidder securities through the vendor placement process can be effected through regular market transactions within a few business days of the closing of the offer; and

[59] *See, e.g.*, Singapore Telecommunications Ltd (May 15, 2001); Oldcastle, Inc. (July 3, 1986); Hudson Bay Mining and Smelting Co., Ltd. (June 19, 1985); Getty Oil (Canadian Operations) Ltd. (May 19, 1983); Equitable Life Mortgage and Realty Investors (December 23, 1982); and Electrocomponents PLC (September 23, 1982).

- whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

In exchange offers subject to Section 14(d) of the Exchange Act, the all-holders and best price requirements in Rule 14d-10 are also implicated by the use of the vendor placement structure, because U.S. target security holders would receive different consideration from their non-U.S. counterparts. In addition, the Commission states that exchange offers for securities subject to Section 14(d) of the Exchange Act may not be made in the United States on a private offering basis consistent with the all-holders provisions of Rule 14d-10. Thus, even where the bidder is eligible to rely on an exemption from Securities Act Section 5 for such offers, in the Commission's view it would violate the equal treatment provisions applicable to such offers to exclude target security holders for which an exemption is not available. Similarly, according to the Commission, offering cash under a vendor placement arrangement to some U.S. holders and bidder securities to others (such as qualified institutional buyers or other institutions) is not permitted in tender offers subject to the all-holders rule.

The Commission notes that bidders may continue to use vendor placement arrangements in accordance with the guidance set forth in the Release. Where a bidder seeks to use the vendor placement structure for a tender offer subject to Rule 14d-10 at U.S. ownership levels above Tier I, however, it must seek an exemption from those rules. The Commission indicates that such relief will be granted only where it is in the interests of U.S. investors.

To our knowledge, the Commission has not previously indicated formally that vendor placements should be limited to exchange offers otherwise eligible for the Tier I exemption. Indeed, such relief, if conditioned on Tier I eligibility, would likely be of limited value, since the securities issued in Tier I-eligible offers are in most cases also eligible for the Rule 802 exemption under the Securities Act; thus, a bidder would have little reason to want to effect a vendor placement.[60]

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[60] The only exception to this might be for a cross-border exchange offer in which a non-reporting foreign private issuer acquires the securities of one that is already registered. In such case, the non-reporting foreign private issuer will no longer be able to rely on Rule 12g3-2(b) to avoid becoming subject to the Exchange Act, because its securities will be deemed to be registered under Section 12, unless they are held by fewer than 300 U.S. holders or unless the acquiror meets the conditions for deregistration of equity securities under the provisions of new Rule 12h-6 under the Exchange Act. *See* Rule 12g-3(a); Rule 12g3-2(d & e) and Rule 12h-6.

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

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