Cross-Border Business Combination Transactions

SEC Amends Rules on Cross-Border Tender Offers, Business Combinations and Rights Offerings

SUMMARY
The U.S. Securities and Exchange Commission (the “SEC”) recently amended rules that apply to cross-border tender offers, business combinations and rights offerings. The amendments were adopted substantially as proposed by the SEC in May 2008, and reflect the first significant rulemaking in this area since the current cross-border business combination rules were adopted in 1999. In many instances, the amended rules codify existing no-action, interpretive and exemptive positions previously articulated by the staff of the SEC aimed at resolving frequently encountered conflicts between U.S. rules and local laws and practice in cross-border transactions, as well as at certain unintended consequences that have detracted from the effectiveness of the cross-border business combination rules.

Key rule changes include the following:

- The date for calculation of U.S. beneficial ownership of a target’s securities (for purposes of determining eligibility for certain relief from U.S. tender offer rules and registration requirements) is changed from the 30th day prior to “commencement” of a tender or exchange offer to any date within 60 days prior to and 30 days following the date of “public announcement” of the transaction, or in the case of rights offerings, the applicable record date; if an offeror is “unable” to perform the eligibility calculation within 60 days prior to public announcement, the SEC staff indicated that the calculation may be performed as of the most recent practicable date before “public announcement”, but in no event earlier than 120 days prior to it.

- The amended rules largely preserve, with some modifications, the original “hostile presumption” that allowed hostile bidders to assume the level of U.S. ownership based on the average daily trading volume (“ADTV”) of the subject class of securities, and, significantly, now also allow bidders participating in negotiated transactions to use this alternate eligibility test if they are “unable” to determine the level of U.S. beneficial ownership of a target’s securities within any of the periods described above.
Holders of more than 10% of the class of securities subject to a tender or exchange offer are no longer excluded from the calculation of U.S. beneficial ownership of the target's securities (but exclusion of securities held by the bidder and its affiliates will continue to be required).

The Tier I exemption, which provides broad relief from U.S. regulation where no more than 10% of the class of subject securities are held by U.S. holders, has been expanded to provide relief from enhanced disclosure requirements for “going private” transactions under Rule 13e-3 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), regardless of the structure of the transaction.

The Tier II exemption, which provides relief from U.S. regulation where no more than 40% of the class of subject securities are held by U.S. holders and is designed primarily to allow bidders in cross-border transactions to comply with certain home country procedural requirements or practices in lieu of U.S. rules, has been extended to apply also to tender and exchange offers subject to Regulation 14E under the Exchange Act only.

The relief currently available under the Tier II exemption is expanded and refined, principally to eliminate recurring conflicts between U.S. and home-country law and practice, as follows:

- Bidders may conduct multiple non-U.S. offers in parallel with a U.S. offer, under certain conditions.
- Bidders may include non-U.S. holders of American depositary receipts (“ADRs”) in the U.S. offer and, under certain conditions, include U.S. holders in the concurrent non-U.S. offer or offers.
- Bidders may suspend withdrawal rights while tendered securities are being counted, under certain conditions.
- Bidders may pay for securities tendered during a subsequent offering period within a period mandated and/or permitted by local law and practice, up to 20 business days from the date of the tender of such securities.
- Bidders may pay interest on target securities tendered during a subsequent offering period, where required under applicable local law.
- The amended rules allow separate offset and proration pools for securities tendered during the initial and subsequent offering periods in cases of tender and exchange offers that permit the target shareholders to request a different proportion of share or cash consideration than the default mix of consideration offered by the bidder (known as “mix-and-match offers”), and also allow ceilings on the form of alternate consideration offered during the subsequent offering period in a mix-and-match offer.
- The amended rules provide revised guidance on the circumstances under which the minimum acceptance condition to a tender or exchange offer may be waived or reduced.
- Bidders may terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date, under certain circumstances.
- The amended rules codify the class relief previously granted for eligible tender and exchange offers from Rule 14e-5 under the Exchange Act (which generally prohibits purchases of subject securities and “related” securities, except as part of the offer).

Bidders and issuers that do not already file reports under the Exchange Act with the SEC no longer have the option to submit Form CB and Form F-X, which are currently required in connection with Tier I-eligible transactions, in paper form, and must now submit them electronically via the SEC’s EDGAR system.

The amended rules also include the following two amendments that apply to acquisitions of U.S. companies, as well as cross-border business combinations:

- Bidders may extend subsequent offering periods beyond the current 20 U.S. business day cap.
• Bidders may use “early commencement” procedures for exchange offers that are subject to Regulation 14E only.

In addition, the SEC provided interpretive guidance on the following issues relating to cross-border transactions:

• Exclusion of U.S. holders of a target’s securities from offers.
• Circumstances under which a bidder may exclude non-U.S. security holders from an offer in compliance with Section 14(d) of the Exchange Act and Rule 14d-10(b)(2) (known as the “all-holders rule”).
• Certain issues applicable to “vendor placement” arrangements.

As we discussed in a separate memorandum, the SEC release also revised the beneficial ownership reporting rules under Sections 13(d) and 13(g) of the Exchange Act. The amended rules allow certain non-U.S. institutions to report their holdings of U.S. equity securities on a short-form Schedule 13G to the same extent as would be permitted for their U.S. counterparts, where specified conditions are satisfied. The SEC also adopted a corresponding amendment to the reporting, short-swing profit recovery and short sale provisions under Section 16 of the Exchange Act to include these same types of non-U.S. institutions in the list of persons that are not deemed to be beneficial owners of securities held on behalf of third parties.

Aside from adopting the changes described above with respect to calculation of U.S. beneficial ownership of a target’s securities, the SEC largely left intact the existing exemptive framework for cross-border offers, which is based principally on levels of U.S. beneficial ownership of target securities, rather than determinations made solely on the basis of the ADTV of the subject securities. While the SEC’s stated purpose in adopting the amended rules was to encourage offerors and issuers in cross-border tender offers, business combinations and rights offerings to permit U.S. security holders to participate in these transactions in the same manner as other holders, it is not certain that the amended rules will achieve this result. Under the revised rules, there will continue to be burdens imposed for extending offers into the United States (for example, in applying the SEC’s interpretive guidance on the application of the all-holders rule to non-U.S. security holders), which may encourage exclusion of the U.S. market.

The interpretive guidance became effective on October 9, 2008 and the amended rules will become effective on December 8, 2008.

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1 See our publication, dated October 8, 2008, entitled “SEC Expands Eligibility for Short-Form Schedule 13G Reporting to Certain Non-U.S. Institutions and Amends Beneficial Ownership Calculation under Section 16”.

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BACKGROUND

A. 1999 CROSS-BORDER RELEASE

U.S. securities laws and regulations include a number of substantive and procedural requirements applicable to tender offers, business combinations and rights offerings. Prior to 1999, these rules applied equally to all transactions extended to U.S. shareholders, whether they involved U.S. or non-U.S. companies. During the 1990s, however, the SEC became increasingly concerned that, where the percentage of the target’s or issuer’s shares held by U.S. persons was sufficiently small so that a transaction could be completed successfully without their participation, bidders and issuers were routinely excluding U.S. security holders in order to avoid complying with U.S. regulations. Given that tender offers and business combinations are extraordinary events in the life of a company and affect all security holders regardless of whether they participate directly, the SEC believed it important that U.S. security holders be included in these transactions.²

To encourage the inclusion of U.S. security holders in these types of cross-border transactions, on October 22, 1999, the SEC adopted a series of exemptions (the “1999 Rules”) from its generally applicable tender offer and registration requirements for cross-border transactions involving non-U.S. target companies or issuers with limited U.S. ownership. The 1999 Rules provide two tiers of relief. Tier I relief, which is codified primarily in Rules 13e-4(h)(8) and 14d-1(c) under the Exchange Act, and Rules 801 and 802 under the Securities Act of 1933, as amended (the “Securities Act”), provides broad relief from U.S. regulation where no more than 10% of the class of subject securities (i.e., the securities to which the transaction applies), as calculated pursuant to the notes to the rules, are held by U.S. holders. Under Tier I relief, subject to certain conditions:

- Bidders, issuers and targets are exempt from most of the filing, dissemination and procedural requirements of the U.S. tender offer rules.
- Bidders making exchange offers and issuers making rights offerings are exempt from the registration requirements of Section 5 of the Securities Act.
- Bidders in tender offers that would be deemed “going-private” transactions for purposes of the SEC’s rules are exempt from the heightened disclosure requirements of Rule 13e-3 under the Exchange Act.

Tier II relief, which is codified primarily in Rules 13e-4(i) and 14d-1(d) under the Exchange Act, provides much narrower relief for tender offers where more than 10% but no more than 40% of the class of subject securities, as calculated pursuant to the notes to the rules, are held by U.S. persons. Under Tier II relief:

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- Compliance with certain home-country procedural requirements (e.g., prompt payment rules and the rules on extending offers and providing notice of such extensions) is permitted in lieu of compliance with U.S. rules.
- Bidders and targets otherwise remain subject to most filing, dissemination and procedural requirements of the U.S. rules (including the registration requirements of Section 5 of the Securities Act).

B. PROPOSED AMENDMENTS

In the release proposing amendments to the 1999 Rules, the SEC stated that it generally believed the 1999 Rules functioned well. The SEC acknowledged, however, that there have been a number of recurring problems and unintended consequences arising from conflicts of law that were not anticipated at the time the 1999 Rules were adopted. The SEC’s staff has regularly granted individual no-action, interpretative and exemptive relief to address these issues on a case-by-case basis. The proposed amendments to the 1999 Rules largely sought to codify, with some clarification and expansion, existing staff positions on these matters, and to address certain new issues with a view toward encouraging more offers into the United States.

AMENDED RULES

The amendments (the “Revised Rules”) included in the final rule release were adopted substantially as proposed, with certain modifications discussed below. In particular, the Adopting Release extended two amendments beyond the proposals, which would have applied to cross-border tender offers only, to apply these amendments to U.S. domestic offers as well. The SEC noted that the Revised Rules are intended to address the most frequently encountered areas of conflict or inconsistency with non-U.S. regulation and practices. The staff of the SEC will continue to address other conflicts in law or practice presented by

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4 As a practical matter, following adoption of the 1999 Rules, bidders continued to exclude U.S. shareholders routinely due to the perceived burden of complying with even the reduced obligations imposed by the SEC’s rules for Tier I- or Tier II-eligible transactions.

5 See Proposing Release, at Section I.B.


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cross-border business combination transactions that are not addressed by the Revised Rules on a case-by-case basis, as is currently the practice.

A. REVISED ELIGIBILITY TEST FOR THE CROSS-BORDER EXEMPTIONS

The rules for measuring U.S. ownership levels for purposes of determining eligibility for the Tier I and Tier II exemptions currently differ between negotiated transactions (which include negotiated tender and exchange offers and, for this purpose, issuer tender offers and rights offerings) and non-negotiated transactions. The Revised Rules amend both tests.

1. Negotiated transactions

In negotiated transactions, the current eligibility test requires a bidder to calculate the level of U.S. beneficial ownership of subject securities by reference to the target’s non-affiliated, or “free” float, which includes securities underlying ADRs that are convertible or exchangeable into the subject securities but excludes (from both the numerator and denominator of the calculation) all holders of more than 10% of the class of subject securities and any subject securities held by the bidder or issuer. The bidder or issuer must “look through” nominees to determine whether the interest is held for the benefit of, or on behalf of, U.S. persons. Under the current rules, the level of U.S. beneficial ownership must be measured as of the 30th day before commencement of a tender offer, as of the 30th day before the solicitation for other types of business combinations or as of the record date for a rights offering. The SEC noted in the Proposing Release that, in many countries, it is impracticable or impossible to obtain share ownership information as of a precise date, and, in others, it takes longer than 30 days to collect the information. In some situations, the SEC’s staff has provided no-action relief permitting the analysis to occur as of the closest possible date within the 30-day period before commencement, but that relief does not always mitigate the problem.

The SEC also has recognized that using the date of commencement as the benchmark date for performing the calculation creates additional issues. Offers are often announced publicly months before they actually commence (with commencement only following receipt of regulatory approvals), and, in many jurisdictions, bidders and offerors need to know whether they will be eligible for U.S. relief in order to comply with home country requirements at the time of announcement. Moreover, the shareholder base of a target company often changes materially following announcement, as arbitrageurs and hedge funds move into the stock. Consequently, by the 30th day prior to commencement of a tender offer, the

7 The “look-through” requirement applies only to nominees in the home country, United States and primary market (if different). In addition, bidders may assume that beneficial holders are residents of the jurisdiction in which the nominee has its principal place of business, if, after reasonable inquiry, the bidder is unable to obtain information from that nominee.

8 See Securities Act Rule 800(h) and Instruction 2 to Exchange Act Rules 14d-1(c) and 14d-1(d).
percentage of shares held by U.S. holders may have changed significantly. Fixing the calculation to the
date of commencement also creates an inconsistency with the rules on purchases made outside of a
tender offer (Rule 14e-5 under the Exchange Act), which are triggered at the date of public
announcement.

Even if bidders are not required by home country rules to know whether they will be eligible for U.S. relief
as of the time of announcement, knowing whether a bidder is Tier I- or Tier II-eligible at the time of
negotiation or otherwise during the preparatory stages will have a significant effect on transaction
planning. For this reason, many bidders choose to exclude U.S. shareholders entirely from tender offers
for shares of non-U.S. issuers where Tier I- versus Tier II-eligibility is uncertain and extension of the offer
into the U.S. is not likely to affect the outcome of the offer (e.g., the ability to reach the squeeze-out
thresholds under home country law).

In response to these concerns, the Revised Rules continue to require acquirors in negotiated transactions
to conduct the look-through analysis, but permit them to do so as of any day within a 90-day range
commencing not more than 60 days prior to and concluding not more than 30 days following “public
announcement” of a transaction. For rights offerings, the calculation may be performed as of a date not
more than 60 days prior to and 30 days following the record date. The SEC expanded the amended rule
to permit calculation as of a date no more than 30 days after public announcement to address concerns
raised by commenters on the Proposing Release regarding circumstances where conducting the look-
through analysis before public announcement may compromise the confidentiality of the transaction. The
date range is designed to provide bidders who are permitted under home country laws to wait to conduct
the analysis until after public announcement with flexibility to maintain confidentiality to the greatest extent
possible. The SEC generally considers “public announcement” to be “any oral or written communication
by the acquiror or any party acting on its behalf, which is reasonably designed to inform or has the effect
of informing the public or security holders in general about the transaction.”

The SEC noted in the Adopting Release that, while this 90-day period should be sufficient in many cases,
procedural hurdles to performing the calculation in this timeframe may exist in certain jurisdictions,
depending on procedures available for obtaining beneficial ownership information. Where an acquiror is
unable to perform the look-through analysis in the prescribed 90-day period, it may do so as of the most
recent practicable date before public announcement, but in no event earlier than 120 days before public
announcement. Based on the discussion in the Adopting Release and the text of the Revised Rules,
however, it is unclear whether this test would also continue to incorporate the 30-day post-public

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9 See Adopting Release at p. 60055, n. 79 and accompanying text. In view of this amendment,
however, as well as other rules that are triggered on public announcement (such as Rule 14e-5,
discussed below), parties will need to be increasingly mindful of the consequences whenever
circumstances force them to publicly disclose a transaction prematurely.
While doing so would be in keeping with the overall policy concerns articulated by the SEC, the language of the rules is ambiguous on the point and would require subsequent clarification with the staff of the SEC.\(^{11}\)

Further, in limited situations where even the expanded look-through period does not accommodate the necessary beneficial ownership analysis, the amended rules permit an acquiror to employ an alternate test based on ADTV to determine its Tier I- or Tier II-eligibility. The SEC noted, however, that it expects the look-through test to be the primary means of determining eligibility for the cross-border exemption and that the foregoing alternate test would only be available in “limited situations” where the bidder is “unable” to conduct the look-through analysis. This determination will be based on the facts and circumstances of that particular transaction. As a threshold matter, the burdens associated with the time and resources that a bidder must spend on the look-through analysis alone will not support a finding that it is “unable” to conduct the look-through analysis. Each bidder is required to make a good faith effort to conduct a reasonable inquiry into ascertaining the level of U.S. beneficial ownership. While the SEC did not purport to provide in the Adopting Release an exhaustive list of situations that would justify the use of the alternate test, it provided examples of certain indicative scenarios. These scenarios include:

- Transactions in non-U.S. jurisdictions where security holder lists are generated only at fixed intervals and are not otherwise available, so that published information is available only as of a date falling outside the extended look-through period.
- Transactions where the subject securities are held in bearer form.
- Transactions in non-U.S. jurisdictions where nominees are prohibited by law from disclosing information, including country of residence, about the beneficial owners.\(^{12}\)
- Non-negotiated business combination transactions.\(^{13}\)

The alternate eligibility test, if available, requires that each of the following five tests be met:

- There is a “primary market” for the subject securities (generally speaking, this means that at least 55% of the trading volume of the subject securities takes place in a single, or not more than two, non-U.S. jurisdictions during a recent 12 month period, and if the trading occurs in two non-U.S. markets, that trading in at least one of the two must be larger than trading in the U.S. for that class).

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\(^{10}\) See Adopting Release at p. 60056; see also amended Securities Act Rule 800(h)(1); Instruction 2.i. to amended Exchange Act Rules 13e–4(h)(8) and (i); and Instruction 2.i. to amended Exchange Act Rules 14d–1(c) and (d).

\(^{11}\) This expanded range is not available for rights offerings on the theory that an issuer ought to be able to determine ownership as of the record date that it sets for the rights offering.

\(^{12}\) In such a jurisdiction, in an issuer tender or exchange offer, an issuer itself may be unable to conduct the look-through analysis and may take advantage of the alternate test under the revised rules.

\(^{13}\) The reliance of acquirors in non-negotiated transactions on a test based on ADTV is consistent with the existing rules. The alternate test adopted in the Adopting Release replaces the current “hostile presumption” for non-negotiated transactions, as discussed below. See Adopting Release at p. 60057.
The primary market for the subject securities is located outside of the United States.

ADTV for the subject securities in the United States over a 12-month period ending on a date chosen by the bidder that is not more than 60 days before public announcement of the transaction is not more than 10% (for Tier I eligibility) or 40% (for Tier II eligibility) of the worldwide ADTV for such securities.

Annual public disclosure filed by the target or issuer with the SEC or regulator in its home jurisdiction does not indicate levels of U.S. ownership that exceed the limits for the Tier I or Tier II exemption, as applicable.

The bidder does not know or have reason to know that U.S. beneficial ownership levels exceed such limit.

The "reason to know" element of the test covers information that the bidder may learn as a result of its own assessment of the target and the proposed transaction. The SEC believes that the bidder should not be permitted to ignore such data "simply because it comes from sources other than those captured in the other elements of [the] alternate test." While the test inherently depends on the particular facts and circumstances of the transaction, in response to inquiries received by SEC staff over the years about what constitutes "reason to know" in the context of the original "hostile presumption" and in response to the Proposing Release, the Revised Rules provide a non-exclusive list of circumstances where a bidder may have "reason to know":

Any information about U.S. ownership of the subject class that appears in any filing with the SEC or any regulatory authority in the issuer's home country or the jurisdiction in which its primary trading market is located (whether made by the target or other parties reporting their beneficial ownership of subject securities).

Any information that is available from the issuer or obtained or readily available from any other source that is reasonably reliable, including from persons retained to advise about the transaction as well as from third-party information providers.

Any information that is known to the target, in cases where the acquiror and the target enter into an agreement pursuant to which the acquiror has the right to obtain information from the target (which the SEC assumes will almost always be the case in negotiated transactions).

The Revised Rules further clarify that an acquiror need not take affirmative action to seek out information about U.S. ownership levels (although a bidder may not ignore credible information it receives from non-public sources). Finally, the Revised Rules make clear that knowledge or "reason to know" refers to knowledge as of the date of public announcement of the transaction; a bidder is not required to take into account information received after that date (provided that the bidder does not have a reason to know that information before then).

14 "Readily available" means publicly available from sources reasonably accessible to the issuer or bidder at no or limited cost (but is not intended to cover all information "no matter how obscure or costly to obtain").

15 The rules do not require, however, that the parties engage such third parties in order to satisfy this element of the test.
As noted, while the SEC solicited comments in the Proposing Release with respect to potential modification of the threshold percentages of U.S. ownership for reliance on the cross-border exemptions, the Adopting Release retained both the 10% threshold for Tier I eligibility and the 40% threshold for Tier II eligibility. The Revised Rules do, however, eliminate the requirement that greater-than-10% holders of the target class of securities be excluded from the calculation of the percentage of U.S. ownership. This amendment reaches all greater-than-10% holders, including those holders that are otherwise affiliated with the target, since the SEC believed it too cumbersome to require acquirors to determine target affiliation. Securities held by the acquiror and its affiliates must continue to be excluded from both the numerator and denominator in calculating U.S. beneficial ownership under the Revised Rules.

2. Non-negotiated transactions

In non-negotiated transactions, bidders are subject to the same thresholds of U.S. ownership as in negotiated transactions for purposes of determining Tier I or Tier II eligibility. In recognition of the difficulty of measuring the ownership of the target’s shares without the target’s cooperation, however, the current rules permit bidders to assume the level of U.S. ownership based on the ADTV of the subject class of securities for a 12 month period ending 30 days before commencement. This “hostile presumption” is not available where the bidder knows or has “reason to know” that actual ownership is inconsistent with the ADTV figure.16

In addition to the concerns discussed above with respect to using the 30th day prior to commencement as the measurement date, in the Proposing Release, the SEC called attention to three issues with the operation of the hostile presumption in practice:

• Bidders have expressed uncertainty about what constitutes a “reason to know” that the level of U.S. ownership of the target exceeds the level indicated by trading volume, and whether and to what extent they have an obligation to take affirmative action to seek out information about U.S. ownership levels.
• Bidders have been unclear as to whether the “reason to know” carveout applies only as of the measurement date or at any time through commencement.
• The reporting and knowledge elements of the hostile presumption are susceptible to defensive exploitation by targets, who may file preemptive reports with the SEC or contact a potential bidder’s counsel directly to assert a level of actual ownership which would disqualify the bidder from relying on an exemption.

As discussed above, the Revised Rules are intended to address these concerns with the existing rules. Under the new eligibility framework non-negotiated transactions often may fall into the category of situations where a bidder is “unable” to conduct the look-through analysis and is therefore permitted to employ the alternate eligibility test based on ADTV, which now effectively replaces the “hostile presumption”.

16 See Instruction 3 to Exchange Act Rules 14d-1(c) and 14d-1(d).
B. CHANGES TO THE TIER I EXEMPTIONS

1. Tier I relief from Rule 13e-3

Rule 13e-3 under the Exchange Act provides enhanced disclosure requirements for “going private” transactions (in general terms, the purchase of a U.S.-listed company by an affiliate of the company that results in the company becoming delisted or deregistered) in light of the perceived conflicts of interest inherent in such situations. The Tier I exemption provides relief from these enhanced disclosure requirements in connection with a tender offer or certain other business combinations. Under the current rules, however, relief is not available in connection with certain business combination structures commonly used in non-U.S. jurisdictions, including (among others) schemes of arrangement, cash mergers and compulsory acquisitions for cash.17

Because the form of the transaction should not prevent an otherwise-eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3, the SEC adopted, as proposed, revisions to Rule 13e-3 that will extend the exemption to all transactions that meet the eligibility criteria of Tier I or Rule 802 (which provides a parallel exemption from registration requirements under the Securities Act), regardless of the transaction structure. The transaction will continue to be required to satisfy the conditions of Tier I relief, including the requirements to furnish certain information to the SEC (as discussed below).

C. CHANGES TO THE TIER II EXEMPTIONS

The relief currently available for Tier II-eligible transactions is designed primarily to allow bidders in cross-border tender offers to comply with certain home country procedural requirements or practices in lieu of U.S. rules. The SEC expands and refines this relief in several ways in the Revised Rules.

1. Tier II relief for Regulation 14E-only offers

The SEC adopted, as proposed, rules that will extend the application of the relevant Tier II exemptions to tender offers that are subject to Section 14(d) of the Exchange Act and Regulation 14D promulgated thereunder, which generally apply to certain tender or exchange offers for equity securities of issuers registered under the Exchange Act (“Section 14(d) offers”).18 Regulation 14E, on the other hand, applies to all offers made in the United States. Most of the procedural and substantive regulation of tender and exchange offers is contained in Regulation 14D, and, consequently, many of the accommodations

17 See Exchange Act Rule 13e-3(g)(6).

18 Section 14(d) applies to offers for any of the following types of securities, if, after consummation of the offer, the holder would be the beneficial owner of more than five percent of the subject class of securities: (i) equity securities registered pursuant to Section 12 of the Securities Act (which covers almost all companies with their equity securities listed on a U.S. securities exchange); (ii) equity securities of certain insurance companies; and (iii) equity securities issued by a closed-end investment company registered under the Investment Company Act of 1940.
provided by the Tier II exemption do not have a substantial bearing on Regulation 14E-only offers. The Revised Rules nonetheless codify the SEC’s position that tender offers subject to Regulation 14E only may rely on Tier II relief, where applicable, to the same extent, and subject to the same conditions, as would have applied had it been a Section 14(d) offer.

2. Dual and multiple offers

Rule 14d-10(a)(1) under the Exchange Act (the “all-holders rule”) requires that all Section 14(d) offers be held open to all holders of securities of the subject class. In a Tier II-eligible tender offer, however, the bidder may conduct two (but, under the current rules, not more than two) separate and parallel offers, one made only to non-U.S. security holders and the other made, on at least as favorable terms, only to U.S. security holders. This is intended to help accommodate some of the procedural differences between home country tender offer rules and the U.S. rules.

The Revised Rules, adopted as proposed, allow a bidder to conduct multiple non-U.S. offers in parallel with one U.S. offer, so long as the U.S. offer is made on terms at least as favorable as each of the non-U.S. offers. The Revised Rules also broaden the universe of security holders who may be included in each offer:

- The U.S. offer may include all holders of ADRs issued in respect of the target’s securities, even if the holders are not U.S. persons.
- The non-U.S. offer or offers may include U.S. security holders so long as (1) the laws of the jurisdiction governing the non-U.S. offer expressly prohibit the exclusion of any security holders, including U.S. persons, from the non-U.S. offer and (2) the offer documents distributed to U.S. persons fully and adequately disclose the risks of participating in the non-U.S. offer, as compared with the U.S. offer.

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19 See, e.g., Exchange Act Rule 14d-1(d)(2).
20 The Adopting Release clarified that bidders relying on the multiple offer provision in the Tier II exemptions to conduct separate U.S. and non-U.S. offers must, however, prorate tendered securities on an aggregate basis where required by U.S. rules. See, however, discussion of “mix-and-match” offers at Section C.4.d. below.
22 The SEC did not expand the rules to allow bidders to include in the U.S. offer non-U.S. persons who hold subject securities directly in share form in the U.S. offer. The Adopting Release explained that this type of relief has not typically been requested by bidders; if circumstances arise that weigh in favor of permitting this type of relief, case-by-case requests for exemptive or no-action relief will be considered by the SEC staff.
23 The offer cannot, however, be made only to ADR holders (which would violate the all-holders rule for Section 14(d) offers).
24 A U.S. holder is not required to tender into the non-U.S. offer (if it is extended to U.S. holders as well) and may, if it so prefers, tender the securities into the U.S. offer.
3. Back-end withdrawal rights

The U.S. tender offer rules require that tendering security holders in Section 14(d) offers be permitted to withdraw their securities at any point during the following two overlapping time periods:

- Throughout the initial offering period.\(^{25}\)
- Unless there is a subsequent offering period, for 60 days after the commencement of the offer, even if the initial offering period has expired, up until the time that the bidder accepts and pays for the tendered securities.\(^{26}\)

Rights to withdraw tendered securities after the initial offering period has closed are known as "back-end withdrawal rights". The current Tier II exemptions allow a bidder to suspend withdrawal rights during a subsequent offering period (i.e., an offering period commenced after the tender offer has been declared unconditional in order to permit remaining holders to receive the same consideration for their securities as those who tendered in the initial offering period) and, therefore, not to offer back-end withdrawal rights, so long as two conditions are met:

- The bidder announces the results of the initial offering period and pays for tendered securities in accordance with home country laws and practice.
- The subsequent offering period begins immediately thereafter.\(^{27}\)

In the United States, security holders generally tender their shares to a single exchange agent engaged by the bidder, putting the bidder in a position to know at any point in the offering period the number of securities tendered. In a number of non-U.S. jurisdictions, however, shares are often tendered through multiple financial intermediaries rather than a single agent, and, as a consequence, it often takes several days after expiration of the initial offering period before the tendered shares can be counted. This creates a problem for bidders under U.S. rules: in order to make an accurate count, it is important that no security holder withdraw tendered shares during the counting period. But, because the bidder cannot know whether the offer’s minimum acceptance condition is satisfied – and therefore whether the bidder will be able to declare the offer unconditional and initiate a subsequent offering period – the Tier II exemption suspending back-end withdrawal rights is unavailable.

In response to this situation, the Revised Rules codify, as proposed, existing staff relief which permits bidders in Tier II-eligible tender offers to suspend withdrawal rights while tendered securities are being counted, even if no subsequent offering period is ultimately provided. Use of this relief requires that each of the following conditions, which have typically been included in the relief granted previously on a case-by-case basis, be met:

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\(^{25}\) See Exchange Act Rule 14d-7(a)(1).

\(^{26}\) See Exchange Act Section 14(d)(5).

\(^{27}\) See Exchange Act Rule 14d-1(d)(2)(v).
The offer must include an initial offering period of at least 20 U.S. business days, during which withdrawal rights are provided.

When withdrawal rights are suspended, all offer conditions must have been satisfied or waived except to the extent that the bidder is still counting tendered securities to determine if the minimum acceptance condition has been satisfied.

Withdrawal rights are suspended only during the necessary centralization and counting process period and are reinstated immediately thereafter, unless the bidder declares the offer unconditional and immediately accepts the tendered securities.

The Revised Rules, consequently, do not permit the suspension of back-end withdrawal rights while an offer condition, other than a minimum acceptance condition, remains outstanding (for example, where a regulatory condition remains outstanding after the expiration of the offer period, which, in the SEC’s view, is the only condition which may survive expiration of the initial offering period).

4. Subsequent offering periods

Rule 14d-11 under the Exchange Act contains the rules applicable to subsequent offering periods in Section 14(d) offers. Among other things, the current rule requires that:

- The subsequent offering period be no longer than 20 U.S. business days.
- The bidder immediately accept all securities tendered during the initial offering period and promptly pay for those securities after the expiration of that period.
- The bidder immediately accept and promptly pay for all securities on a rolling basis as they are tendered during the subsequent offering period.
- The bidder offer the same form and amount of consideration to holders in both the initial and the subsequent offering periods.
- Where a bidder is offering target security holders a choice of different forms of consideration, there may be no ceiling on any form of consideration offered.

The relief currently provided by the Tier II exemption allows bidders to accept and pay for securities tendered during the initial offering period (but not during the subsequent offering period) in accordance with home country law and practice. The Revised Rules in this area are intended to expand and refine the exemptions in order to allow bidders to conduct subsequent offering periods in a manner more consistent with non-U.S. law and practice.28

a. Maximum length

Under the current rules, a subsequent offering period cannot exceed 20 U.S. business days. It is common in some non-U.S. jurisdictions, however, to provide for longer periods. In order to avoid this

28 Subsequent offering periods are not permitted for issuer tender offers.
b. Prompt payment

Although Tier II eligibility allows bidders to rely on home country practice with respect to the timing of acceptance of and payment for securities tendered in the initial offering period, securities tendered during the subsequent offering period normally must be accepted and paid for on an as-tendered basis, which in practice means every day. The rationale for this discrepancy is that because security holders are not given withdrawal rights during a subsequent offering period, they should be paid as quickly as possible. In many jurisdictions there are practical impediments to rolling acceptance and payment, however. For example, in some jurisdictions, local law may require tendered securities to be paid for within a certain number of days after the expiration of the subsequent offering period, or may require “bundling” of securities and payment on specified periodic take-up dates.

The SEC’s staff has granted relief in a number of cases where these impediments arise, and the Revised Rules largely codify that relief by allowing acceptance and payment on a “modified rolling” basis. This means that, in any Tier II-eligible offer, securities may be paid for within 20 business days after they are tendered. The SEC believes, based on its experience, that this timeframe is sufficient in most jurisdictions to overcome the practical impediments. Under the Revised Rules, if a jurisdiction’s law or practice requires longer than 20 business days for acceptance and payment, then the bidder will still need to approach the SEC’s staff for specific relief. The Revised Rules also set a minimum standard by providing that where local law mandates and local practice permits payment on a more expedited basis, payment must be made more quickly than 20 business days from the date of tender in order to satisfy U.S. prompt payment requirements.

c. Payment of interest during subsequent offering periods

Payment of interest on securities tendered during a subsequent offering period in a Section 14(d) offer is currently prohibited by Rule 14d-10(a)(2) under the Exchange Act (the “best price rule”) as well as the requirement under Rule 14d-11(f) that the same form and amount of consideration be paid in the initial and subsequent offering periods. The SEC has observed, however, that in some jurisdictions, bidders are required to pay interest on securities tendered during a subsequent offering period. The Revised Rules permit the payment of interest on securities tendered during a subsequent offering period in a Tier II-eligible offer, but only where required by applicable home country law (and not, for example, when used as an inducement to tendering). The rules do not limit the amount of interest that may be paid.

29 While this change was proposed with respect to tender offers for non-U.S. targets only, it has been expanded in the Adopting Release to apply to both non-U.S. and U.S. tender offers.

30 For this purpose, business days are determined by reference to the relevant local jurisdiction.
Revised Rules do not permit interest to be paid on securities tendered during the initial offering period; the SEC will consider case-by-case requests for relief in situations where local law requires the payment of interest on securities tendered during the initial offering period.

d. “Mix-and-match” offers

In a “mix-and-match” offer, which is common in many jurisdictions outside the United States, target security holders are offered as consideration a set mixture of cash and bidder securities (often referred to as the “standard entitlement”) with the option to elect a different proportion of cash and securities. The bidder typically sets a maximum amount of cash and/or securities that it will pay or issue in the offer. Holders’ elections are offset against each other, but to the extent that target security holders in the aggregate have elected to receive cash or securities in excess of the maximum, the elections cannot be satisfied in full and so are prorated.

Under the current rules, such mix-and-match facilities may only be extended in a subsequent offering period for a Section 14(d) offer if two conditions are satisfied:

- The form and amount of consideration is the same between the initial offering period and the subsequent offering period.\(^{31}\)
- There is no ceiling on the form of consideration that may be received.\(^{32}\)

Both conditions create problems for bidders seeking to offer a mix-and-match facility. The prohibition of a ceiling on a form of consideration is inconsistent with the structure of mix-and-match facilities and impractical for bidders who do not wish, or are not able to, offer 100% cash consideration to all holders. In addition, because mix-and-match facilities work by offsetting some holders’ preferences against others, and securities tendered during the initial offering period need to be paid for promptly while those tendered in the subsequent offering period can be settled at a later date, the elections of holders in the initial offering period cannot be aggregated with those in the subsequent offering period for purposes of offset and proration. This results in one proration pool for the initial offering period and a separate pool for the subsequent offering period. As a result, a holder who tenders during the subsequent offering period may receive a different mix of cash and securities than a holder who made the same election but tendered during the initial offering period.

The SEC’s staff has granted no-action relief to allow mix-and-match facilities to be used in subsequent offering periods in certain cases. The Revised Rules codify the SEC’s position by:

- Permitting the use of separate offset and proration pools for securities tendered during the initial and subsequent offering periods.


\(^{32}\) Exchange Act Rule 14d-11(b).
• Eliminating the prohibition on a ceiling for the form of consideration in mix-and-match offers.

The SEC did not extend these changes to U.S. offers, in part because U.S. law already permits acquirors to achieve the same result as a mix-and-match tender offer structure through the use of statutory mergers.

5. Waiver or reduction of minimum acceptance condition

Rule 14d-4(d) under the Exchange Act requires a bidder in a Section 14(d) offer to keep the offer open, with withdrawal rights, for specified periods of time after a material change in the terms of the offer is communicated to target security holders. Waiver or reduction of the minimum acceptance condition is generally considered to be a material change. Requiring withdrawal rights after such a waiver or reduction, however, may conflict with customary practice in some jurisdictions. Including disclosure in offer documentation to the effect that the minimum acceptance condition may be reduced or waived is insufficient to avoid the obligation to inform target security holders of this development if it actually occurs. The SEC has, in the past, provided guidance that in a Tier II offer the minimum acceptance condition may be waived or reduced without extending the offer and providing withdrawal rights, under certain conditions.

In the Proposing Release, the SEC indicated that its earlier guidance was intended to be relied upon only where the requirement to provide withdrawal rights after a reduction in, or waiver of, a minimum acceptance condition under U.S. rules is prohibited under local law or practice. This threshold condition is also codified in the Adopting Release. Provided that this is the case, the SEC will not object if a bidder in a Tier II-eligible cross-border tender offer waives or reduces the minimum acceptance condition without extending the offering period and providing withdrawal rights, provided it satisfies each of the following conditions:

• The bidder must announce that it may waive or reduce the minimum acceptance condition at least five days before the actual waiver or reduction (as noted above, a blanket statement that this may occur that is included in offer documentation will not suffice).

• The bidder must disseminate the announcement through a press release and other methods reasonably calculated to inform U.S. holders of the possibility of a waiver or reduction, which may include placing an advertisement in a newspaper of national circulation in the United States (but, depending on facts and circumstances, may include other means of publication as well).

• The press release must state the exact percentage to which the minimum acceptance condition may be reduced (or if it will be waived, rather than reduced): the bidder must announce its actual intentions regarding waiver or reduction as soon as required under home country rules.

• During the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided.

• The announcement must advise security holders to withdraw tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition.

• The procedure for waiver or reducing the minimum acceptance conditions must be described in the offering materials.
The offer must remain open for at least five business days after the waiver or reduction of the minimum acceptance condition.

All offer conditions are satisfied or waived when withdrawal rights are terminated.

The potential impact of the waiver or reduction of the minimum acceptance condition is fully discussed in the initial offering materials or any supplemental materials.

The bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable foreign law, and in any case, may not reduce or waive the minimum acceptance condition below a majority of the outstanding securities of the subject class.

The relief may not be relied on to allow a bidder to terminate withdrawal rights required in connection with a mandatory extension of the initial offering period (i.e., pursuant to Rule 14e-1).

The SEC also noted that it is particularly important to include in the offer document a robust discussion of the implications of any waiver or reduction, and that special concerns arise when the minimum acceptance condition is reduced by a significant amount. With respect to the disclosure requirement, the SEC considers that both a qualitative discussion and, in some circumstances, alternative sets of pro forma financial statements (which may prove to be particularly burdensome to offerors in many situations) be included.

6. Changes to expiration date of initial offering period

Under the current rules, early termination or voluntary extension of the initial offering period constitutes a material change in terms, which in a Section 14(d) offer results in a minimum period during which the initial offer must remain open following the change. In some jurisdictions, bidders are required to close the offer immediately after all offer conditions are satisfied, which poses a conflict with this requirement. The SEC’s staff has previously granted specific relief to permit early termination of the initial offering period (or voluntary extension thereof) in third party and issuer offers, subject to certain conditions. The Revised Rules largely codify this existing staff guidance, if, at the time the initial offering period and withdrawal rights end, each of the following conditions is met:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied.
- The bidder has adequately discussed the possibility and impact of the early termination in the original offer documents.
- The bidder provides a subsequent offering period after the termination of the initial offering period.
- All offer conditions are satisfied as of the time when the initial offering period ends.

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See Exchange Act Rule 14d-4(d). Although the minimum time periods during which an offer must remain open after notice of a material change in its terms is communicated to target security holders are, by their terms, applicable only to early commenced exchange offers, the SEC has stated that it views these time periods as generally applicable to all tender offers, including those subject to Regulation 14E only.
The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.

This relief, however, is available only once offer conditions are satisfied, but not in the event of the waiver of an offer condition. In that case, the offering period must be extended in accordance with U.S. rules.34

7. Purchases outside of a tender offer

Rule 14e-5 under the Exchange Act prohibits “covered persons” from purchasing or arranging to purchase any subject securities (i.e., securities of the target that are the subject of the tender offer) or “related securities” except as part of the tender offer. This prohibition applies from the time of “public announcement”35 of the tender offer until the offer expires. Covered persons include:

- The offeror and its affiliates.
- The offeror’s dealer-manager and its affiliates.
- Any advisor to the offeror and its affiliates or the offeror’s dealer-manager and its affiliates whose compensation depends on completion of the offer.
- Any person acting, directly or indirectly, in concert with the foregoing.
- The target and its affiliates and advisors in the context of a friendly deal.

Related securities are securities that are immediately convertible into, or exchangeable or exercisable for, subject securities.

a. Current exemption

Under the current rules, Tier I-eligible offers are exempt from Rule 14e-5,36 but Tier II-eligible offers are not. The SEC has granted frequent case-by-case (and, ultimately, class) exemptive relief for three types of purchases made outside of a Tier II-eligible tender offer:

- Purchases outside of the offer made pursuant to a non-U.S. tender offer where there are separate U.S. and non-U.S. offers.
- Purchases outside of the offer made by offerors and their affiliates, outside of the United States (and subject to other detailed conditions).37
- Purchases outside of the offer made by affiliates of financial advisors, outside of the United States (and subject to other detailed conditions).38

34 See discussion of waiver of minimum acceptance conditions at Section C.5. above.
35 See discussion of “public announcement” at Section A.1. above.
37 See Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007).
The Revised Rules codify the exemptive class relief previously granted for Tier II-eligible offers. In a dual (or multiple) offer scenario, the Revised Rules permit purchases pursuant to a non-U.S. offer during the Rule 14e-5 prohibited period, so long as each of the following conditions is satisfied:

- The offers are eligible for the Tier II exemption.
- The economic terms (including, without limitation, the consideration) of the offer are the same (subject to use of different currencies at disclosed exchange rates).
- The procedural terms of the U.S. offer are at least as favorable as those of the non-U.S. offer.
- Disclosure regarding the offeror's intent to make purchases pursuant to a non-U.S. offer is included in the U.S. offering documents.
- Purchases are made solely in the non-U.S. offer, and not pursuant to open market transactions, private transactions or other transactions outside the tender offer.

Separately, the Revised Rules permit purchases outside a Tier II-eligible offer, including open market and privately negotiated purchases, by an offeror, its affiliates and its financial advisors' affiliates under certain circumstances. In order to be allowed to make such purchases, each of the following must be true:

- The covered person must reasonably expect that the offer qualifies for the Tier II exemptions.
- The purchases and arrangements to purchase (other than pursuant to the offer) must be made outside the United States.
- The definitive U.S. offering materials must prominently disclose the possibility of or intention to make purchases outside the tender offer (unless permitted by an existing exception from Rule 14e-5 or specific SEC no-action relief or exemptive order).
- To the extent that information about the purchases is required to be made public in the home jurisdiction, it must be disclosed in the United States as well.
- Where the purchase is made by the offeror or its affiliates, the tender offer price must be raised to equal any higher price paid outside the tender offer.\(^{39}\)
- Where the purchase is made by an affiliate of the offeror's financial advisor:
  - information barriers must be in place to prevent the flow of information that may result in a violation of U.S. securities laws;
  - the financial advisor must have a broker-dealer affiliate registered under Section 15(a) of the Exchange Act;
  - the U.S.-registered broker-dealer affiliate must have no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) in common with the financial advisor that direct, effect or recommend transactions in the subject securities or related securities who will also be involved in providing the bidder or target with financial advisory services or dealer-manager services;
  - the financial advisor's purchasing activities are consistent with its normal and usual business practice;\(^{40}\)

\(^{39}\) Consistent with SEC practice, the Proposing Release provides no guidance as to how to calculate the price in an exchange offer scenario. In practice, this is typically calculated on a real-time, mark-to-market basis, based on the then-prevailing exchange rate.
purchases cannot be intended to facilitate the tender offer or for the purpose of creating actual or apparent active trading in, or maintaining or affecting the price of, the subject or related securities.

The Proposing Release included an express prohibition on purchases made for the purpose of risk arbitrage. In the Revised Rules, however, the SEC elected not to prohibit such activities, instead emphasizing the more general prohibition on purchases made to facilitate the offer.

The Revised Rules do not extend relief to ordinary course trading activities by financial institution principals (as they do, by extension from existing class relief, for their financial advisors), nor do the Revised Rules include any similar relief from Rules 101 and 102 of Regulation M (which prohibits purchases and arrangements to purchase shares of the offeror where those shares are being used as consideration in the offer). Bidders that are financial institutions must continue to request specific relief from the SEC’s staff on a case-by-case basis.

D. EXPANDED AVAILABILITY OF EARLY COMMENCEMENT

In adopting the 1999 Rules, the SEC sought to put exchange offers on a level footing with cash tender offers by permitting offerors to “early commence” a registered exchange offer before the registration statement is declared effective. The 1999 Rules made no provision for early commencement of a Regulation 14E-only exchange offer (which generally would be an offer for debt securities or unregistered equity securities). In order to put such offers on even ground with cash tender offers and registered exchange offers, the Revised Rules will allow issuer and third-party Regulation 14E-only exchange offers to be eligible for commencement prior to effectiveness of the registration statement that is filed to register the offered securities. While the Proposing Release contemplated expansion of the availability of early commencement to Regulation 14E-only cross-border tender offers only, the Adopting Release further expanded its application to offers for U.S. target companies as well.

To address concerns that Regulation 14E-only offers are not subject to many of the disclosure and procedural protections applicable to Section 14(d) offers, the Revised Rules permit early commencement only to the extent that:

(footnote continued)

40 The SEC will focus on both the nature of activity, as well as the level of activity (for example, where it exceeds the usual or expected level of activity following the announcement of an offer).

41 See, e.g., Combination of Barclays PLC and ABN AMRO Holding N.V. (April 24, 2007).

42 See, e.g., Barclays PLC tender offer for ABN AMRO Holding N.V. (August 7, 2007).

The bidder provides withdrawal rights to the same extent as would be required under a Section 14(d) offer.

If there is a material change in the information provided to target security holders, the bidder must disseminate revised materials and must hold the offer open (with withdrawal rights) for certain minimum time periods specified in Rules 13e-4(e)(3) and 14d-4(d) under the Exchange Act (subject to such limits on the need to provide withdrawal rights for Tier II-eligible tender and exchange offers as would be available for Section 14(d) offers).44

The Revised Rules retain the limitation that exchange offers that are roll-ups or going-private transactions are not eligible for early commencement. In 1999, the SEC declined to provide automatic effectiveness of exchange offer registration statements. It did, however, commit to expediting the staff review process so that they can compete more effectively with cash offers. In the Adopting Release, the SEC noted it believes the Revised Rules will significantly expand the universe of exchange offers that may commence early, resulting in an increased burden on the SEC staff to complete the review process. The Adopting Release noted that while the SEC staff intends to continue to utilize expedited review for exchange offer filings, the review process may take longer in cases involving novel or unusually complex issues (such as exchange offers where the bidder is registering its initial public offering concomitantly with its offer for the target).45

E. CHANGES TO SCHEDULES AND FORMS

1. Forms CB and F-X

Although the Tier I exemptions as currently in force provide broad relief from U.S. filing and disclosure requirements, bidders and issuers who rely on the Tier I exemptions are required to furnish an English translation of their home country offering materials to the SEC. The materials must be furnished under cover of Form CB, and the bidder or issuer must also file a Form F-X to appoint an agent in the United States for service of process. Bidders and issuers who do not already file Exchange Act reports with the SEC may currently submit Forms CB and F-X in either paper or electronic form via the SEC’s EDGAR system (while reporting bidders and issuers must submit them electronically). In line with the SEC’s policy of requiring most other forms to be filed electronically, the Revised Rules, adopted as proposed, eliminate the option for non-reporting bidders and issuers to submit Forms CB and F-X in paper form.

See discussion of withdrawal rights at Section C.3. above.

SEC review is an iterative process that involves successive rounds of comments and discussions with the SEC staff, prior to having the registration statement declared effective. It typically takes up to four weeks to receive the initial round of comments. Depending on complexity of the transaction (especially accounting and disclosure issues), it can take up to two months (or more in case of especially complicated issues) to have the registration statement declared effective.
2. Forms F-4 and S-4 and Schedule TO

The Revised Rules include the addition of a checkbox on the cover page of Schedule TO and Forms F-4 and S-4 (which are used to register bidder securities offered to target security holders in exchange offers) indicating reliance on one of the applicable cross-border exemptions. The SEC suggests that this will help avoid misperceptions about which exemption the filer is seeking, as tender offer materials are often silent as to whether or which exemptions are being relied upon, and may also expedite SEC review.

INTERPRETIVE GUIDANCE

In addition to the Revised Rules discussed above, the Adopting Release provided updated guidance on the SEC’s position in respect of several topics.

1. Application of all-holders rule to non-U.S. target security holders

The Adopting Release stated that, as the SEC continues to encourage international securities and takeover regulators to minimize the ability of bidders to exclude U.S. holders from business combination transactions, it aims to take similar steps with regard to the ability of bidders to exclude non-U.S. holders when offers are subject to the SEC’s rules. To this end, the SEC reiterated its position, initially articulated in 1986, that, notwithstanding that some bidders purport to exclude holders outside their home jurisdiction from Section 14(d) tender offers, the all-holders rule prohibits the exclusion of any U.S. security or non-U.S. security holder from a Section 14(d) offer. Bidders are not necessarily required to disseminate offering materials into every jurisdiction outside their home jurisdiction, but the SEC’s view is that they cannot prevent a holder from tendering into the offer if such holder decides to do so.

The SEC noted in the Proposing Release that certain bidders have required target security 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 SEC reiterated in the Adopting Release that it does not believe it is appropriate to shift this burden of compliance to target security holders as they may not be in possession of the relevant facts regarding the bidder’s actions and the provisions of local law in their home jurisdiction necessary to make this determination.

The SEC declined to adopt either a de minimis or other exception to the “all-holders” rule or amendments that would permit exclusion of certain non-U.S. target holders from U.S. tender offers. In the Adopting Release, the SEC also stated its view that rule amendments are not necessary at this time to permit exclusion of non-U.S. target holders from U.S. tender offers, but suggested that it will monitor the issue to determine whether further action is needed, and that its staff will entertain requests for case-by-case relief in special circumstances.
2. Exclusion of U.S. holders

Although the aim of the Tier I and Tier II exemptions is to encourage bidders to include U.S. security holders in cross-border offers, the SEC acknowledged that bidders may exclude U.S. security holders, and thereby avoid the application of U.S. rules, if they avoid triggering U.S. jurisdictional means. The SEC previously has provided guidance on measures that bidders may take to avoid U.S. jurisdiction, and in the Proposing Release the SEC expanded upon that guidance. The SEC stated in the Adopting Release that it believes that when a bidder knowingly permits U.S. holders to participate in a cross-border offer, it must do so in compliance with U.S. rules. The Revised Rules are meant to limit the circumstances under which bidders will exclude U.S. target holders.

In the Proposing Release, the SEC reaffirmed its position that business combination transactions present special considerations not applicable to capital raisings. Because of their pre-existing investment in a target company, the target’s security holders, including U.S. holders, are likely to seek out information about the target company, the bidder and the proposed transaction. U.S. security holders also may have a greater incentive and opportunity to find a means to participate in transactions involving their target securities. As a result, bidders need to take special precautions – above and beyond those used in capital-raising transactions – to ensure that their offers are not made in the United States.

The SEC then outlined some considerations surrounding two particular types of precautions:

- **Legends and disclaimers.** Although the SEC recommends that offering materials and Internet web sites be legended to make clear that an offer is not being made into the United States and that offering materials may not be distributed there, such legends are unlikely to be sufficient to establish that the offer is not being made into the United States. Instead, the bidder needs to ensure that, as a practical matter, U.S. holders are prevented from participating in the offer using U.S. jurisdictional means, such as by refusing to accept tenders from U.S. addresses, or where there is a U.S. taxpayer identification number, or from a U.S. nominee or institution.

- **Representations and certifications.** The SEC recommends that bidders require representations or certifications from tendering holders that they are not U.S. holders. The SEC acknowledges that target security holders could misrepresent their status in order to tender into an exclusionary offer and has stated previously that where this occurs, bidders will not be viewed as having targeted U.S. investors and thereby invoked U.S. jurisdictional means. This position is premised, however, on the bidder 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 any facts that would or should have put the bidder on notice that the tendering holder is a U.S. investor. Where tenders in exclusionary offers are made through offshore nominees, the SEC suggests that bidders require that these nominees certify that tenders are not being made on behalf of U.S. holders.

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46 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), 63 FR 14806 (March 27, 1998), and the 1999 Release.

47 As a practical matter, such certifications are difficult or impossible to obtain in certain jurisdictions. Moreover, U.S. institutional or other large shareholders often participate in exclusionary offers by tendering their shares offshore.
Local law in some non-U.S. jurisdictions may prohibit the exclusion of any target security holders in a tender offer for all outstanding securities of a subject class. Such all-holders requirements, like similar U.S. rules, may not require that offer materials be disseminated into another jurisdiction; however, they may provide that the bidder may not reject tenders from security holders from any jurisdiction, including the United States, should those holders learn of and tender into the offer on their own initiative. Contrary statements about the exclusion of U.S. target security holders may also not be permitted in offer materials in such jurisdictions. In such cases, the SEC noted that it may not be possible for a bidder to take adequate precautionary measures to avoid U.S. jurisdictional means.

Where a bidder fails to take adequate measures to prevent tenders by U.S. target holders (whether by choice or because it is unable to do so under applicable foreign law), the SEC noted that the bidder will be viewed as implicating U.S. jurisdictional means notwithstanding its purported exclusion of U.S. target holders. On the other hand, where tenders are made by nominees on behalf of U.S. holders who have misrepresented their status in order to participate in an exclusionary offer, the SEC noted that the bidder will not be viewed as having targeted the United States, so long as it had taken adequate measures reasonably intended to prevent sales to and tenders from U.S. holders.

The Proposing Release indicated that the SEC could become more active in monitoring the procedures utilized by bidders in connection with exclusionary offers. To date, the SEC has typically refrained from actively policing exclusionary offers or intervening to require issuers to implement more robust offering restrictions. It remains to be seen how this administrative position will change in practice.

The Adopting Release reiterated the SEC’s position with respect to exclusionary offers, and, in particular, noted that, in cases of offers for securities of foreign private issuers that trade on a U.S. exchange or are otherwise registered under Section 12 of the Exchange Act, bidders must make “every effort” to include U.S. holders on equal terms. To that end, exclusionary offers for those securities will be viewed with skepticism where the participation of those U.S. holders is necessary to meet the minimum acceptance condition in the tender offer.

Further, the Adopting Release suggested that, with its expansion of the cross-border exemptions, fewer circumstances warranting exclusionary offers will exist because it will be easier for bidders to balance the regulatory requirements of U.S. and non-U.S. rules. Specifically, the SEC noted that permitting U.S. institutional holders to participate in an offshore offer pursuant to a private placement or under Regulation S while excluding other U.S. holders is inconsistent with the tender offer rules’ all-holders provisions, and that neither the burden on bidders to include U.S. holders in cash cross-border tender offers nor the litigation risk of doing so is greater than is present under Tier I and Rule 802.
3. Vendor placements

Tier I relief permits bidders to offer cash-only consideration to U.S. security holders (subject to certain conditions) even if the bidder offers securities of the bidder to holders outside of the United States. The Tier II exemption provides no such relief, so bidders who are offering securities and do not qualify for Tier I sometimes seek to establish a “vendor placement” arrangement to avoid the registration requirements of the Securities Act. In a vendor placement, the bidder typically employs a third party to sell the securities that the tendering U.S. holders would otherwise be entitled to receive in the offer. The securities are sold in transactions outside the United States and the bidder (or the third party) then remits the proceeds of the sale (minus expenses) to the tendering U.S. holders.

a. Registration under the Securities Act

The practical effect of a vendor placement is that it converts 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 Securities Act registration) as it relates to tendering U.S. holders.

The SEC indicated, in both the Proposing Release and the Adopting Release, that it often receives inquiries about the use of the vendor placement structures in cross-border offers and notes that individual relief has been granted to allow vendor placements in limited situations. The relief letters recite a number of factors that the SEC considers in deciding whether the vendor placement obviates the need for Securities Act registration. These 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 previously outstanding.
- The amount of bidder securities to be issued to tendering U.S. holders that are subject to the vendor placement, as compared to the amount of bidder securities previously outstanding.
- The liquidity and general trading market of the bidder’s securities.
- The likelihood that the vendor placement can be effected within a very short time after the termination of the offer and the bidder’s acceptance of shares tendered in the offer.
- The likelihood that the bidder plans to disclose material information around the time of the vendor placement sales.
- The process used to effect the vendor placement sales.

The SEC stated that a vendor placement arrangement in cross-border exchange offers would be subject to Securities Act registration unless the market for the bidder securities to be issued in the exchange offer and sold pursuant to the vendor placement procedure is highly liquid and robust and the number of bidder securities to be issued in the exchange offer and for the benefit of tendering U.S. holders is relatively

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small compared to the total number of bidder securities outstanding. The SEC also stated that it will consider the following facts and circumstances:

- The timeliness of the vendor placement process; that is, whether sales of bidder securities through the vendor placement process are effected within a few business days of the closing of the offer.
- Whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before the vendor placement process is complete.
- Whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

The Adopting Release noted that the staff of the SEC will no longer issue no-action letters regarding the registration requirements of Section 5 of the Securities Act in connection with proposed vendor placements.

b. All-holders and best price rules

In Section 14(d) offers, the all-holders and best price rules are also implicated by the use of the vendor placement structure.

The best price rule is implicated because U.S. security holders would receive different consideration than their non-U.S. counterparts. The SEC stated in the Adopting Release that it generally believes that only in Tier I-eligible cross-border transactions should a bidder be able to offer cash to U.S. holders while issuing shares to their counterparts outside the United States. For purposes of Securities Act registration requirements, bidders may continue to use vendor placement arrangements (and therefore not register the offered securities) in accordance with the guidance set forth in the Adopting Release. However, a bidder that wants to use the vendor placement structure for an exchange offer that is not eligible for Tier I relief and is subject to the all-holders and best price rules must seek an exemption from those rules.

The SEC also stated that exchange offers for SEC-registered securities may not be made in the United States on a private offering basis, consistent with the all-holders rule. Thus, even where the bidder is eligible to rely on an exemption from Section 5 of the Securities Act for such offers, it is the SEC’s view that such a private offering would violate the equal treatment provisions of the all-holders rule by excluding target security holders for whom an exemption was not available. Similarly, it is the SEC’s view that offering cash under a vendor placement arrangement to some U.S. holders and bidder securities to others (such as institutions) is not permitted in tender offers subject to the all-holders rule.

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