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CLIENT MEMORANDUM

# SEC Adopts Amendments to Cross-Border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules

***October 3, 2008***

In its release of September 19, 2008 (the "Release"),[1] the U.S. Securities and Exchange Commission (the "SEC") adopted amendments to the rules relating to cross-border tender offers, exchange offers and business combinations and provided interpretive guidance with respect to certain existing rules. The revised rules and interpretive guidance provided in the Release will take effect 60 days following publication in the Federal Register.

## BACKGROUND OF THE RELEASE

In 1999, the SEC adopted a series of exemptions from the substantive and procedural requirements applicable to U.S. tender offers, exchange offers and business combinations to encourage the participation of U.S. investors in cross-border transactions involving securities of foreign private issuers.[2] These rules established a two-tier system of exemptions based on the amount of target securities of the foreign private issuer held by U.S. investors: Where no more than 10% of the subject securities of a foreign private issuer are held by U.S. investors (Tier I), a cross-border transaction is exempt from most U.S. tender offer rules under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and from the registration requirements of Section 5 of the Securities Act of 1933, as amended (the "Securities Act"). Where U.S. investors hold more than 10% but less

1 "Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions," Release No. 33-8957 (34-58597) (September 19, 2008).

2 "Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings," Release No. 33-7759 (34-42054) (October 22, 1999) ("Cross Border Adopting Release"). The Cross Border Adopting Release became effective in January 2000.

than 40% of the target's securities (Tier II), the cross-border exemptions provide a more limited relief from some U.S. tender offers rules to avoid conflicts between the U.S. regulatory system and foreign laws.

In its release of May 6, 2008 (the "Proposing Release"),[3] the SEC proposed a series of revisions to the cross-border exemptions to address certain recurring areas of conflict between the U.S. rules and foreign regulations and practice that the SEC has identified since the adoption of the cross-border rules in 1999.

In the Release of September 19, 2008, the SEC adopted the amendments to the existing cross-border rules substantially as proposed. Many of the revisions codify existing interpretive positions and exemptive orders in the area of cross-border business combinations. In addition, the SEC reaffirmed and refined existing interpretive positions to provide bidders with more certainty and flexibility in structuring transactions involving non-U.S. target companies.

## AMENDMENTS OF EXISTING RULES

### Revised Eligibility Standards

The SEC believes that U.S. beneficial ownership should continue to be the central element of the eligibility test to rely on the cross-border exemptions because the U.S. beneficial ownership of the target's securities represents the aggregate U.S. economic interest in the target company. In order to determine eligibility to rely on a cross-border exemption, an acquiror must, as a starting point, generally calculate the U.S. ownership percentage by reference to the target company's "free float." Importantly, the SEC did not change the rules that require the acquiror to "look through" securities held of record by brokers or other nominees in the United States, the issuer's home jurisdiction and that of the principal trading market to identify those held for the accounts of U.S. persons.[4] In recognition of the concerns raised by commenters about the look-through test, however, the SEC significantly revised the manner in which the test must be performed and introduced an alternate test if the acquiror or issuer is unable to conduct the look-through test.

#### *Changes to the Look-Through Analysis*

**(1) Large Target Security Holders Included in Calculation**

Under the existing rules, in calculating U.S. beneficial ownership, an acquiror must exclude securities held by persons who hold more than 10% of the target's securities. In response to commenters' concern that this exclusion of large holders disproportionately inflates U.S. holdings, the new SEC rules no longer require the acquiror to exclude such persons. Instead, the holdings of those persons will be included in both the numerator and the denominator of the equation. However, the SEC did not change the requirement that securities held by the acquiror be excluded from the calculation.

**(2) Timing of Calculation**

Under the amended rules, acquirors will be allowed to calculate the level of U.S. beneficial ownership as of any date within 60 days before and no more than 30 days after the public announcement of the transaction.[5] Keying the calculation to the date of announcement permits U.S. ownership to be determined before the shareholder base is influenced by the announcement. In addition, expanding the range of dates to allow for a calculation until 30 days after the public announcement, the rules will provide bidders with flexibility to maintain the confidentiality of the transaction. The public announcement of the transaction will be considered to occur upon any oral or written communication by the acquiror or any party acting on its behalf that is reasonably designed to inform or has the effect of informing the public or security holders in general about the transaction.

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3 "Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions," Release No. 33-8917 (34-57781) (May 6, 2008).

4 *See* Instruction 2 to Rule 14d-1(c) and 14d-1(d), Instruction 2 to Rule 13e-4(h)(8) and 13e-4(i) under the Exchange Act and Rule 800(h)(3) under the Securities Act.

5 In the case of a rights offering, the relevant date for the calculation of U.S. beneficial ownership remains the record date.

In addition, where the acquiror or issuer is unable to complete the look-through analysis as of the 90-day period described above, it may use the most recent practicable date before the public announcement of the transaction within the 120 day-period preceding the public announcement.[6] The SEC has indicated that the extended 120 day-period is warranted only where necessary, such as when beneficial ownership information is not available in a foreign jurisdiction during the shorter period.

### *Alternate Test*

If the bidder is unable to conduct the look-through analysis described above, the bidder may use the alternate test to determine eligibility for the cross-border exemptions.[7]

**(1) When is the Acquiror "unable" to conduct the look-through analysis?**

Whether or not the acquiror or issuer is unable to perform the look-through test will depend on the particular facts and circumstances.[8] The SEC emphasized, however, that the need to dedicate time and resources to the look-through analysis or concerns about the completeness and accuracy of the information obtained from the analysis may not be sufficient for a bidder to claim that it is unable to conduct the look-through test. Rather, the bidder must make a good faith effort to conduct a reasonable inquiry into ascertaining the U.S. beneficial ownership level.[9]

The alternate test may be used, for example:

- for jurisdictions where security holder lists are generated only at fixed intervals and the published information regarding U.S. ownership levels is as of a date outside the 90-day or extended 120-day periods described above, unless the acquiror or issuer otherwise has access to more current information;
- if the subject securities are in bearer form;
- if under the laws of the foreign jurisdiction, nominees are prohibited from disclosing information about beneficial owners on whose behalf they hold the securities and the prohibition extends to the country of residence of the beneficial owners of the subject securities; or
- the business combination transaction is non-negotiated (hostile).

**(2) Elements of the Alternate Test**

Under the alternate test, an acquiror may presume that the U.S. beneficial ownership of the target's securities falls within the applicable percentage thresholds and, as a result, the acquiror may rely on the cross-border exemption, unless:

- the average daily trading volume (the "ADTV") of the subject securities in the United States over a 12-month period ending no more than 60 days before the public announcement of the transaction or the record date form rights offering is more than 10% (or 40% for Tier II) of the ADTV of that class of securities on a worldwide basis;
- the most recent annual report or annual information filed by the issuer with securities regulators of its home jurisdiction or the SEC or any jurisdiction in which the subject securities trade before the public announcement of the offer indicates that U.S. holders hold more than 10% (or 40% for Tier II) of the outstanding subject securities; or
- the bidder knows or has reason to know, before the public announcement of the offer, that the level of U.S. ownership exceeds 10% (or 40% for Tier II) of the subject securities.

The second prong of the alternate test now clarifies that only annual reports or other annual information before the public announcement must be taken into account and that the acquiror's reliance on a cross-border exemption will not be affected by filings after that time. The SEC noted that, conversely, the acquiror will not gain eligibility to rely on any exemption based on reports filed after the public announcement.

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6 The expanded range of dates of up to 120 days before the public announcement will not be available in connection with a rights offering.

7 The alternate test will also be available for a rights offering and for issuers in connection with an exchange offer.

8 The SEC acknowledges that even the issuer itself may, under certain circumstances, be unable to conduct the required look-through analysis and, as a result, may turn to the alternate test.

9 If issuers or acquirors have questions about the availability of the alternate test, the SEC will consider whether additional guidance is appropriate.

For purposes of the "reason to know" prong of the test, an acquiror or issuer is deemed to know information:

- that is publicly available and that appears in any filing with the SEC or any regulatory body in the issuer's jurisdiction of incorporation or primary trading market;
- that is available to an acquiror from the issuer; or
- that is obtained or readily available from any other source that is reasonably reliable.

In this context, "readily available" means information that is publicly available from sources reasonably accessible to the issuer or acquiror at no or limited cost. In addition, if the acquiror and the target enter into an agreement pursuant to which the acquiror has the right to obtain information from the target (including information about U.S. ownership), then the acquiror will be deemed to know any such information known to the target. However, for purposes of the "reason to know" prong, information that is obtained or becomes available to the acquiror after the public announcement of the transaction will not affect the acquiror's ability to rely on the cross-border exemptions.

In connection with negotiated transactions only, there must be a primary trading market for the subject securities outside the United States. For purposes of this additional requirement, a "primary trading market" outside the United States exists if at least 55% of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdictions during a recent 12-month period. In addition, if the trading of the subject securities occurs in two foreign markets, the trading volume in at least one of the two must exceed the trading in the United States.

### *Form Amendments*

The SEC also adopted a number of amendments to SEC forms. Under the revised rules, offerors must submit Forms CB and F-X in electronic format. In addition, the SEC revised Schedule TO, Forms S-4 and F-4 to include boxes on the cover page where a filing person must indicate the cross-border exemptions it relies upon. In response to concerns raised by commenters on the Proposing Release, the SEC did not adopt requirements to specify in those forms the level of U.S. ownership interest in the foreign private issuer.

## Expansion of Cross-Border Exemptions

### *Relief for Concurrent U.S. and Non-U.S. Offers*

In the Release, the SEC adopted the proposed amendments to allow bidders to conduct multiple non-U.S. offers in conjunction with a U.S. offer under Tier II.[10] The amendment does not permit, however, the use of separate proration pools in partial cross-border tender offers. If bidders conduct separate foreign and U.S. offers to reduce the difficulties of complying with different regulatory regimes, they must still pro rate tendered securities on an aggregate basis, if required under U.S. tender offer rules.

In addition, under the revised rules bidders in a cross-border tender offer conducted under Tier II may include in the U.S. offer all holders of American Depositary Receipts, including non-U.S. holders. The SEC noted that the revised rule is not intended to enable bidders to make an offer open only to holders of American Depositary Receipts because this would be prohibited if the tender offer were for securities registered under Section 12 of the Exchange Act and subject to the "all-holders" provisions of Exchange Act Rules 13e-4(f) and 14d-10.

Finally, the revised Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) will allow a bidder that conducts U.S. and foreign offers under Tier II to include U.S. holders of target securities in the foreign offers if (1) the laws of the jurisdiction governing the foreign offers expressly prohibit the exclusion of U.S. holders from the foreign offers and (2) the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offers.

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[10] See amended Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) under the Exchange Act.

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### *Suspension of "Back-End" Withdrawal Rights While Counting Tendered Securities*

Under the U.S. tender offer rules, tendering security holders may withdraw their securities at any point during the initial offering period[11] and after 60 days following the commencement of the offer until the bidder has accepted and paid for the tendered securities (so-called "back-end" withdrawal rights).[12] Under existing rules, bidders have been allowed to suspend back-end withdrawal rights in Tier II-eligible third-party tender offers only if a subsequent offering period is provided immediately after the announcement of the results of the initial offering period.[13]

The new rules[14] codify the position that the SEC had previously adopted in connection with Tier II cross-border transactions and permit suspension of back-end withdrawal rights during the counting of tendered securities until those securities are accepted for payment, even where no subsequent offering period is provided, if the following conditions are satisfied:

- the bidder has provided an offer period, including withdrawal rights, of at least 20 U.S. business days;
- at the time withdrawal rights are suspended, all offer conditions have been satisfied or waived, except to the extent that the bidder is in the process of determining whether a minimum acceptance condition included in the terms of the offer has been satisfied by counting tendered securities; and
- withdrawal rights are suspended only during the counting process and are reinstated immediately after that process, except to the extent that they are terminated through the acceptance of tendered securities.

The new rules will not, however, eliminate back-end withdrawal rights where a regulatory condition remains outstanding after the expiration of the offering period because in those cases, withdrawal rights provide an important safeguard for target holders that have tendered their securities.

### *Expanding Exemptions during the Subsequent Offering Period*

The SEC also expanded and refined the Tier II exemptions from the rules applicable to subsequent offering periods in tender offers that are subject to Section 14(d) of the Exchange Act as follows:

**(1) Maximum Time Limit on Subsequent Offering Periods Eliminated**

Under the revised rules, third-party bidders in a tender offer for all of the subject class of securities may now include a subsequent offering period in excess of 20 U.S. business days.[15] Because the flexibility to conduct a longer subsequent offering period will be beneficial in the context of purely domestic offers as well, the revised rules eliminate the 20 U.S. business day limit for both foreign and domestic third-party tender offers.

**(2) Revisions to the Payment Process for Tendered Securities**

Under U.S. tender offer rules, securities tendered during a subsequent offering period must generally be paid on a "rolling basis" as soon as they are tendered. To eliminate recurrent conflicts with foreign rules and practice, revised Rule 14d-1(d)(2)(iv) under the Exchange Act allows bidders to "bundle" tendered securities and pay for those securities during a subsequent offering period within 20 business days from the date of the tender, but only if payment cannot be made on a more expedited basis under local law or practice. The revised rule operates as a minimum standard for payment of the tendered securities, and, if permitted under local law and practice, payment must be made more quickly than within 20 business days.

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11 *See* Rules 14d-7(a)(1) and 13e-4(f)(2)(i) under the Exchange Act.

12 *See* Section 14(d)(5) of the Exchange Act. For issuer tender offers, Rule 13-4(f)(2)(ii) under the Exchange Act provides for a 40-business-day period.

13 *See* Rule 14d-1(d)(2)(v) under the Exchange Act.

14 *See* new Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(vii).

15 *See* revised Rule 14d-11 under the Exchange Act.

For purposes of this rule only, the term "business day" will be determined by reference to the target company's home jurisdiction.

**(3) Payment of Interest on Tendered Securities**

Similarly, under the amended rules, bidders may pay interest on tendered securities during a subsequent offering period, but they may do so only where the payment of interest is mandated by applicable foreign law.[16] The SEC noted that the amendment does not allow bidders to pay more to target holders in a subsequent offering period than during the initial offering period to induce those holders to tender their securities.

**(4) Revisions to Facilitate "Mix and Match" Offer Structures**

The adopted rule changes will remove certain constraints on so-called "mix-and-match" offer structures. In a mix and match offer, tendering security holders can elect different mixes of cash and securities to the extent other holders make offsetting elections, typically up to a ceiling on one or more of the forms of consideration. However, U.S. tender offer rules generally require a bidder to offer the same form and amount of consideration to tendering security holders in both the initial and subsequent offering periods and do not allow a bidder to establish a ceiling on any form of the consideration offered during a subsequent offering period. The new Exchange Act Rule 14d-1(d)(2)(viii) expressly allows a bidder to include a ceiling on one or more forms of consideration and permits the use of separate offset and proration pools for the initial offering and subsequent offering periods.

### *Early Termination of the Initial Offering Period or Voluntary Extension of the Initial Offering Period*

In response to comments received with respect to the Proposing Release, the SEC amended Exchange Act Rules 13e-4 and 14d-1(d) to codify the SEC's interpretive position regarding the early termination of the initial offering period (or a voluntary extension of that period) if all offer conditions are satisfied.

Under the new rules,[17] a bidder may terminate an initial offering period (including a voluntary extension of that period) if, at the time the initial offering period and withdrawal rights terminate, the following conditions are met:

- the initial offering period has been open for at least 20 U.S. business days;
- the bidder has adequately discussed the possibility of and the impact of the early termination in the original offer materials;
- 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; and
- 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.

These rules do not, however, permit an early termination upon the waiver of an offer condition. When a bidder waives an offer condition, the terms of the offer may be fundamentally altered, influencing the investment decision of those holders who have already tendered and those who have not yet tendered. As a result, under existing U.S. tender offer rules, the offer (including withdrawal rights) must be extended if the bidder waives an offer condition. By contrast, the SEC believes that if an offer condition is satisfied, the change is less fundamental in nature because holders of target securities know from the beginning of the offer that the successful completion of the offer is contingent on the occurrence or non-occurrence of the triggering event.

### *Codification of Existing Exemptive Orders with respect to the Application of Rule 14e-5*

Under existing rules, Tier I-eligible offers that meet minimum conditions are exempt from Exchange Act Rule

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16 *See* revised Exchange Act Rule 14d-1(d)(2)(vi).

17 *See* revised Exchange Act Rules 14d-1(d)(2)(ix) and 13e-4(i)(2)(vii).

14e-5, which generally prohibits the offeror, its advisors and any of their affiliates from purchasing or arranging to purchase any subject securities of the target or other related target securities outside the tender offer. The adopted amendments codify and refine exemptive relief for Tier II-eligible tender offers that the SEC has granted in the past.

**(1) Purchases pursuant to Foreign Tender Offers**

Rule 14e-5(b)(11) under the Exchange Act will permit purchases pursuant to a non-U.S. tender offer that is made concurrently with the U.S. tender offer if the following conditions are satisfied:

- the U.S. and foreign tender offers meet the conditions for reliance on the Tier II cross-border exemptions set forth in Exchange Act Rule 14d-1(d);
- the economic terms and consideration in the U.S. tender offer and foreign tender offer are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;
- the procedural terms of the U.S. tender offer are at least as favorable as the terms of the foreign tender offer;
- the intention of the offeror to make purchases pursuant to the foreign tender offer is disclosed in the U.S. offering documents; and
- purchases by the offeror in the foreign tender offer are made solely pursuant to the foreign tender offer and not pursuant to an open market transaction, a private transaction, or other transaction.

**(2) Purchases by the Offeror and its Affiliates or an Affiliate of the Financial Advisor**

Rule 14e-5(b)(12) under the Exchange Act will permit purchases outside a Tier II-eligible tender offer, including open market and private purchases, by the offeror and its affiliates and by affiliates of a financial advisor so long as the following conditions are satisfied:

- the subject company is a foreign private issuer;
- the offeror and its affiliates or the affiliate of the financial advisor reasonably expects that the tender offer meets the conditions for reliance on the Tier II exemptions;
- no purchases other than pursuant to the tender offer are made in the United States;
- the U.S. offering materials (which term refers to the definitive offer materials and not earlier announcements about the offer) disclose prominently the possibility of purchases of the target's securities outside of the tender offer and the manner in which the information regarding such purchases will be disseminated; and
- there is public disclosure in the United States, to the extent that such information is made public in the subject company's home jurisdiction, of information regarding all purchases of the target's securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires.

The requirement that no purchases other than purchases pursuant to the tender offer may be made in the United States will not prevent the offeror, its affiliates or an affiliate of the financial advisor from making purchases outside the tender offer in the United States in reliance on other existing exceptions or based on exemptive relief granted by the staff or the SEC.[18]

In the case of purchases by the offeror and its affiliates, the tender offer price must be increased to match any consideration paid outside the tender offer that is greater than the tender offer price. This condition is satisfied if the laws of the relevant home jurisdiction or the terms of the tender offer provide for matching the higher consideration and the offeror complies with that provision.

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[18] The SEC noted that reliance on the exception in Rule 14e-5(b)(12) under the Exchange Act would not necessarily preclude reliance on the existing exception for purchases pursuant to contractual obligations in Exchange Act Rule 14e-5(b)(7).

In addition to the requirements listed above, purchases by an affiliate of a financial advisor must not be made to facilitate the tender offer, among other conditions. The purchase activities must be consistent with the financial advisor's affiliate's normal and usual business practices and not be conducted for the purpose of promoting or otherwise facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or affecting the price of, the target's securities. While the SEC acknowledged that, following the announcement of a tender offer, the level of normal business activity may fluctuate, the SEC noted that a level of purchasing activity that far exceeds the usual or expected level could suggest improper facilitation.

### *Expanded Availability of Early Commencement*

The SEC had proposed to allow bidders to commence Tier II-eligible exchange offers that are not subject to Regulation 14D or Rule 13e-4 under the Exchange Act (such as offers for unregistered equity securities or debt securities) on the date of filing of the registration statement rather than on the date the registration statement becomes effective. In the Release, the SEC not only adopted the revisions substantially as proposed but also expanded the availability of early commencement to exchange offers for domestic target companies in response to comments solicited by the SEC.

The revised rules[19] will allow early commencement for exchange offers subject only to Regulation 14E under the following conditions:

- the offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to the requirements of Exchange Act Rule 13e-4 or Regulation 14D; and
- if a material change occurs in the information published, sent or given to security holders, the bidder must disseminate revised materials as required under Exchange Act Rules 13e-4(e)(3) and 14d-4(d) and must hold the offer open with withdrawal rights for the minimum time periods specified in those rules.

In connection with an early commencement of an exchange offer, securities of the target may be tendered but may not purchased before the underlying registration statement becomes effective.

### *Other Amendments*

In addition, the SEC adopted the following amendments:

- The revised rules exempt any Tier I-eligible transaction from the heightened disclosure requirements for "going private" transactions of Exchange Act Rule 13e-3 rather than only specified types of transactions. A party relying on the broadened exemption from Rule 13e-3 will be required to submit a Form CB and, if the filer is foreign, a Form F-X.[20]
- Consistent with the SEC's previous interpretive position, the revised rules provide that Tier II exemptions are available for tender offers that are not subject to Regulation 14D or Rule 13e-4 under the Exchange Act, such as offers for unregistered equity securities and debt tender offers.[21]

## Beneficial Ownership Reporting by Foreign Institutions

Subject to exceptions, any person who acquires more than 5% of a class of equity securities registered under Section 12 of the Exchange Act must report the acquisition on Schedule 13D within 10 days. One of the exceptions permits certain investors who acquired the securities in the ordinary course of their business and not with the purpose of influencing control of the issuer to file a short-form statement on Schedule 13G within 45 days after the end of the calendar year if they are an institution of the type listed in Rule 13d-1(b)(1)(ii) under the Exchange Act.[22]

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19 *See* Section 14(d)(5) of the Exchange Act. For issuer tender offers, Rule 13-4(f)(2)(ii) under the Exchange Act provides for a 40-business-day period.

19 *See* new Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(vii).

20 *See* new Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(vii).

21 *See* new Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(vii).

22 *See* revised Rule 14d-11 under the Exchange Act.

Under the existing rules, foreign institutional investors generally did not qualify under Rule 13d-1(b)(1)(ii) and were only able to rely on another exception in Exchange Act Rule 13d-1(c), which permits passive investors holding less than 20% of the class of securities to file a Schedule 13G within 10 days after the acquisition, so long as they have no disqualifying purpose.

In the Release, the SEC has revised Exchange Act Rule 13d-1(b)(1)(ii)(J) to include non-U.S. institutions that are the functional equivalent of the U.S. institutions listed under clauses (A) through (I) of that rule, so long as the non-U.S. institution can certify on Schedule 13G that it is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution. In addition, a non-U.S. institution will be required to undertake, on Schedule 13G, to furnish to the SEC upon request the information it otherwise would be required to disclose on Schedule 13D, the most significant of which is the statement of its investment purpose.

The SEC also adopted a corresponding change to Rule 16a-1(a)(1) under the Exchange Act to include non-U.S. institutions eligible to rely on amended Rule 13d-1(b)(1)(ii)(J).[23] With this change, the SEC codified its previously adopted interpretive position that a foreign institution permitted to file on Schedule 13G rather than Schedule 13D is not deemed, for purposes of Section 16 under the Exchange Act, the beneficial owner of securities held for the benefit of third parties or in customer or fiduciary accounts.

## INTERPRETIVE GUIDANCE FOR EXISTING RULES

### Termination of Withdrawal Rights after Reduction or Waiver of a Minimum Acceptance Condition

U.S. tender offer rules generally provide that a bidder must allow an offer to remain open for a specified period of time after the target security holders have been informed of a material change of the terms of the offer and must provide withdrawal rights during such period.[24] Generally, waiving or reducing the minimum acceptance condition is considered a material change of the terms of the offer. In adopting the original cross-border exemptions, the SEC articulated an interpretive position that a bidder whose offer meets the conditions of the Tier II exemptions may, subject to a number of specified conditions, waive or reduce the minimum acceptance condition without providing withdrawal rights during the remaining offering period.[25] In the Release, the SEC has further refined and limited its interpretive position.

The relief from the extension requirements may not be relied upon unless (1) the bidder undertakes not to waive or reduce the minimum acceptance condition below a majority[26] or the percentage threshold required to control the target company under applicable foreign law, if it is greater, and (2) 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, the interpretive guidance 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 dealer's soliciting fee. Finally, a bidder who seeks to rely on this exemption must fully disclose and discuss all of the implications of the potential waiver or reduction in its offering materials.

### Application of "All-Holders" Provisions of the Tender Offer Rules to Foreign Target Securities Holders

Exchange Act Rules 14d-10 and 13e-4(f) require that tender offers subject to Sections 14(d) or 13(e) of the Exchange Act be open to all holders of the subject class of securities and that all target holders be treated equally.

In the Release, the SEC reaffirmed its position that the so-called "all-holders" provisions in Exchange Act Rules 14d-10 and 13e-4(f) apply equally to U.S. and non-U.S. holders of the subject class of securities and do not allow the exclusion of any foreign holders of the target's

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23 *See* new Rule 16(a)-1(a)(1)(x) under the Exchange Act.

24 *See* Exchange Act Rules 13e-4(e)(3) and 14d-4(d).

25 *See* Cross-Border Adopting Release, Section II.B.

26 By a majority, the SEC means more than 50% of the outstanding target securities that are the subject of the tender offer.

securities. However, although foreign holders of the target's securities may not be excluded, the "all-holders" provisions do not require that offering materials be mailed into foreign jurisdictions.

The SEC reiterated its position that it is inappropriate for bidders to shift the burden of assuring compliance with the relevant jurisdiction's laws to target security holders by requiring them to certify that (1) 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 otherwise qualify its offer. Target security holders may not be in possession of the relevant facts regarding the bidder's action and the provisions of local law in their home jurisdiction necessary to make this determination.

### Ability of Bidders to Exclude U.S. Target Security Holders

In the Release, the SEC supplemented its previously issued guidance[27] on whether and how bidders in cross-border business combinations may avoid the application of U.S. tender offer rules. The application of U.S. tender offer rules depends on whether the bidder uses U.S. jurisdictional means in making the tender offer.

In addition to the interpretive guidance in previous releases, the SEC has reiterated that a legend or disclaimer that the offer is not being made into the United States, or that the offer materials may not be distributed in the United States, is not likely to be sufficient in itself. The Release states that a bidder who wants to support a claim that the offer has no jurisdictional connection to the United States will need to take special precautions to prevent sales or tenders from U.S. holders of target securities, as described in the SEC's previous guidance.

The SEC noted that such exclusionary offers for securities of a foreign private issuer that trade on a U.S. securities exchange will be viewed with skepticism if the participation of U.S. investors is necessary to meet the minimum acceptance condition in the tender offer. In those circumstances, the SEC will look closely at whether the bidder is taking reasonable measures to avoid the application of U.S. jurisdictional means and not make the offer into the U.S.

In addition, where the law of a foreign jurisdiction does not permit a bidder to reject tenders from U.S. holders and prohibits the bidder from making a statement that the offer may not be accepted by U.S. holders, it may not be possible to take adequate precautionary measures to avoid U.S. jurisdictional means.[28] Similarly, the SEC believes that if a bidder knowingly permits U.S. holders to tender their securities into an offshore tender offer, whether directly or through foreign intermediaries, it may be difficult to avoid the use of U.S. jurisdictional means and not trigger the application of U.S. tender offer rules.

Finally, the SEC generally believes that following the expansion of the cross-border exemptions in the Release, there will be fewer circumstances justifying exclusionary offers because bidders will find it easier to reconcile foreign and U.S. tender offer rules.

The SEC reiterated, however, that if U.S. holders tender securities into an exclusionary offer, either directly or through nominees, and those U.S. holders or their nominees misrepresent their status as U.S. persons, the bidder will not be viewed as having targeted U.S. investors in the offer thereby triggering the application of U.S. tender offer rules, so long as (1) the bidder has taken adequate measures reasonably intended to prevent sales to and tenders from U.S. holders (2) there are no indicia that would put the bidder on notice that the tendering holder is a U.S. investor.

Indicia that are considered to put a bidder on notice that a tendering holder is a U.S. holder include, but are not limited to:

- the receipt of payment drawn on a U.S. bank;

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[27] *See* the Proposing Release, Section II.G.2, the Cross-Border Adopting Release, Section II.G. and "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).

[28] In the Release, the SEC indicated that it is "troubled" when a bidder announces to the marketplace that it will exclude U.S. holders before it receives the required approvals from foreign authorities to do so, and where the announcement itself causes U.S. holders to sell their securities, thereby reducing the number of U.S. holders such that an exemption that allows the exclusion of U.S. holders becomes available in that foreign jurisdiction.

- provision of U.S. taxpayer identification number; and
- statements by the tendering holder that, notwithstanding a foreign address, the tendering holder is a U.S. holder.

If, after taking measures to avoid tenders by U.S. investors, the bidder finds out that it has purchased securities from U.S. holders, it should consider other measures to prevent a similar lapse in the future.

### Ability of Bidders to Use the Vendor Placement Procedure for Cross-Border Exchange Offers

If a bidder intends to make an exchange offer in the United States where the consideration includes securities of the bidder, it must consider two issues: First, the issuance of the bidder securities may be subject to the registration requirements under the Securities Act and, second, if the exchange offer is subject to Section 14(d) of the Exchange Act, the "all-holders" and "best price" requirements of Exchange Act Rule 14d-10 will apply.

Tier I-eligible offers may be exempt from the registration requirements of the Securities Act pursuant to Securities Act Rule 802. In addition, in connection with Tier I-eligible exchange offers, bidders are permitted to offer cash to U.S. holders in lieu of offering securities, so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-U.S. holders.[29]

In offers that are not eligible for the Tier I exemption, bidders seeking to obviate the need for registration under the Securities Act often establish so-called "vendor placement arrangements" for the benefit of U.S. holders who tender into the offer. In a vendor placement, the bidder generally employs a third party to sell the securities to which tendering U.S. holders would otherwise be entitled. The bidder securities are typically sold on behalf of the tendering U.S. holders outside the United States, and the bidder (or the third party) then remits the proceeds of the offshore transactions to tendering U.S. holders. As opposed to Tier I-eligible offers in which the bidder offers U.S. holders a fixed amount of cash, the amount of the proceeds a U.S. holder receives in the context of a vendor placement arrangement generally depends on the market price at which the securities are sold.

In the Release, the SEC noted that because the Tier I exemption affords a method by which bidders in exchange offers may offer cash to U.S. holders, the SEC staff no longer intends to issue no-action letters providing exemptive relief from the registration requirements of the Securities Act in connection with vendor placement arrangements.

The SEC reiterated its previously articulated interpretive position to clarify the factors that bidders should consider when contemplating the use of a vendor placement arrangement. These factors include:

- the level of U.S. ownership in the target company;
- the number of bidder securities to be issued in the business combination transaction as a whole, compared to the amount of bidder securities outstanding before the offer;
- the amount of bidder securities to be issued to tendering U.S. holders subject to the vendor placement, compared to the amount of bidder securities outstanding before the offer;
- the liquidity and general trading market for the bidder's securities;
- the likelihood that the vendor placement can be effected within a very short period of 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; and
- the process used to effect the vendor placement sales.

In the Release, the SEC emphasized the importance of the liquidity of the market for the bidder's securities.

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[29] *See* Rules 13e-4(h)(8)(ii)(C) and 14d-1(c)(2)(iii) under the Exchange Act.

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Unless the market for the bidder's securities is highly liquid and robust and the number of bidder securities to be issued for the benefit of U.S. holders is relatively small compared to the total number of bidder securities outstanding, a vendor placement arrangement in a cross-border exchange offer would, in the SEC's view, be subject the registration requirements under the Securities Act.

In addition, the SEC will also consider the following factors:

- the timeliness of the vendor placement process, i.e., 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 that process is complete; and
- whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

If the exchange offer is also subject to the tender offer rules of Regulation 14D under the Exchange Act, the "all-holders" and "best price" requirements in Exchange Act Rule 14d-10 generally do not permit the use of vendor placement arrangements because U.S. holders would receive different consideration (cash) than non-U.S. holders (bidder securities). The SEC noted that for exchange offers that are not Tier I-eligible, bidders must seek an exemption from those rules if they wish to offer U.S. investors a form of consideration different from that offered to foreign target holders.

In addition, the equal treatment provisions and the "all holders" rule prohibit a bidder from structuring an exchange offer that is subject to Section 14(d) of the Exchange Act to (1) exclude most U.S. holders and include only those U.S. holders for whom an exemption from Section 5 of the Securities Act is available to avoid the registration requirements of the Securities Act or (2) issue securities to some U.S. holders (such as large institutional investors) and offer cash under a vendor placement arrangement to others.

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