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Doing Deals Under the SEC's Revised Cross-Border Tender Offer, Exchange Offer and Business Combination Rules

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The SEC revised its cross-border transaction rules in late 2008 to reduce regulatory conflict between U.S. and foreign rules and market practices, with the goal of facilitating the inclusion of U.S. investors in cross-border transactions who might otherwise be excluded by bidders due to such regulatory conflict. The revised rules provide bidders greater certainty and flexibility in structuring deals for non-U.S. targets. This article provides an overview of the SEC's revisions to its cross-border transaction rules and related interpretive guidance.

The Securities and Exchange Commission ("SEC") adopted amendments in 2008 to its rules for cross-border tender offers, exchange offers and business combinations.[1] These cross-border rules apply when the target company in a tender offer, exchange offer or business combination is a "foreign private issuer," as defined in Rule 3b-4(c) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In the SEC's Adopting Release describing the amendments, the SEC also provides interpretive guidance with respect to certain of these rules. The amendments were adopted substantially as proposed[2] and represent the first major changes to the cross-border business combination transaction[3] rules since they were adopted in 1999.[4] The amendments have been effective since December 8, 2008.

The amendments address areas of continuing conflict or inconsistency between U.S. rules and foreign regulations and practice in the cross-border area, but do not alter the nature or scope of the 1999 cross-border regulatory framework. Many of the rule changes the SEC adopted codify staff interpretive and no-action positions and exemptive orders. The amendments are intended to encourage more offerors and issuers in cross-border business combination transactions to permit U.S. security holders to participate in these transactions in the same manner as other holders. Time will tell whether the revisions will achieve this goal. In two instances, the SEC extends rule changes to apply to all tender offers, including those for U.S. target companies.[5]

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The Adopting Release also includes revisions to the beneficial ownership reporting rules for certain foreign institutions.

I. Background

Before the original cross-border exemptions were adopted in 1999, U.S. investors were routinely excluded from cross-border transactions because acquirors were concerned about U.S. regulatory burdens associated with extending offers to U.S. investors and conflicts with foreign local laws. The SEC attempted to remedy these concerns with the adoption of the cross-border rules, which provide two tiers of exemptive relief from the SEC's generally applicable tender offer and registration requirements based on the percentage of target securities of a non-U.S. issuer beneficially owned by U.S. holders. For purposes of the cross-border rules, a U.S. holder is any security holder resident in the United States.

Tier I. Where no more than 10% of the subject securities are held in the U.S., a qualifying cross-border transaction will be exempt from most U.S. tender offer rules pursuant to Tier I[6] exemptive relief and, where the transaction consideration includes acquirer securities, from the registration requirements of Section 5 of the Securities Act of 1933, as amended (the "Securities Act"), pursuant to Securities Act Rules 801 and 802. Tier I transactions are also exempt from the additional disclosure requirements for going private transactions under SEC rules.[7] U.S. target security holders must be permitted to participate in the qualifying cross-border transaction offer on terms at least as favorable as those afforded other target holders. Also, U.S. target security holders must be provided with the offering materials, in English, on a comparable basis to that provided to other target holders.

Tier II. Relief under Tier II applies when more than 10% but no more than 40% of the subject securities are held in the U.S.[8] The Tier II exemptions encompass narrowly-tailored relief to address recurring areas of regulatory conflict with respect to tender offers, such as the prompt payment, tender offer extension and notice of extension requirements in Regulation 14E. The Tier II exemptions do not provide relief from the registration requirements of Securities Act Section 5, nor do they include an exemption from the additional disclosure requirements of Rule 13e-3 applicable to going private transactions.

Cross-border business combination transactions eligible for Tier I or II exemptive relief remain subject to the antifraud and anti-manipulation provisions of the U.S. securities laws. Where the level of U.S. beneficial ownership in the non-U.S. subject company exceeds 40 percent, cross-border business combinations must fully comply with the SEC's applicable tender offer and registration rules, to the extent specific no-action relief is not obtained.

Even when Tier I or II exemptive relief was available under the original cross-border rules, many bidders continued to exclude U.S. shareholders from offers due to ambiguity in applying the cross-border rules, continuing challenges in reconciling U.S. and foreign requirements, and concern over exposure to liability and litigation in the U.S. The amendments to the cross-border exemptions address certain of these impediments to bidders taking advantage of the cross-border exemptions.

II. Summary of Revisions to Cross-Border Rules

The SEC's revisions are intended to address the most frequent areas of conflict or inconsistency with foreign regulations and practice that acquirors encounter in cross-border business combination transactions. The SEC acknowledges that these revisions will not eliminate all conflicts in law or practice presented by cross-border business combination transactions. The SEC staff will continue to address those conflicts in law or practice in cross-border business combination transactions not covered by these revisions on a case-by-case basis, as is currently the practice.

(a) Revised Eligibility Test for the Cross-Border Exemptions

The revised rules do not change the threshold percentages of U.S. ownership for reliance on the cross-border exemptions; however, the SEC changed the manner in which these percentages are determined. In particular, as discussed below, the revised rules include changes to the manner in which the look-through analysis for negotiated transactions[9] must be conducted, to alleviate timing concerns associated with that calculation. To address situations were acquirors in negotiated transactions are unable to conduct this analysis, the SEC adopted an alternate test for determining eligibility to rely on the cross-border exemptions, based in part on a comparison of average daily trading volume ("ADTV") of the subject securities in the U.S. and worldwide. This alternate test, discussed below, is also available for all non-negotiated transactions (not conducted pursuant to an agreement between the target and the acquiror) and replaces the hostile presumption[10] test.

(i) Changes to Look-Through Analysis

To measure the level of U.S. ownership of securities for the purpose of determining eligibility to rely on the cross-border exemptions, an acquiror in a negotiated transaction[11] must "look through" the record ownership of brokers, dealers, banks and other nominees resident in specified jurisdictions—which are the U.S., the issuer's home jurisdiction and, if different, the jurisdiction of primary trading market—to identify securities beneficially held by persons located in the U.S.[12]

(1) Change to Reference Date and Expansion of Time Frame for Determining Eligibility. Under the rules before the amendments, acquirors were required to calculate U.S. ownership as of a set date — the 30th day before the commencement of a tender offer or before the solicitation for a business combination other than a tender offer. The revisions (i) change the reference date to the public announcement of a business combination transaction and (ii) expand the time frame for determining eligibility. For these purposes, the SEC 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.[13] Under the SEC's revised rules, an acquiror seeking to rely on the cross-border exemptions may calculate U.S. ownership as of any date no more than 60 days before and no more than 30 days after the public announcement of the cross-border transaction.[14] Where the issuer or acquiror is unable to complete the look-through analysis within this 90-day period, it may use a date within 120 days before public announcement.[15] Where the acquiror or issuer cannot accomplish the look-through analysis within this time period, it may use the alternate test described below.

Using public announcement instead of commencement as the reference point for the calculation will allow acquirors to determine and inform the market and target holders about the treatment of U.S. holders at an earlier stage in the process. In addition, this change allows the calculation of U.S. ownership to be made before the target security holder base is affected by the public announcement. The SEC expanded the rule to permit the calculation as of a date no more than 30 days after announcement to address concerns about the confidentiality of the look-through analysis. Where that analysis must be conducted before announcement, it may compromise the confidentiality of the transaction.[16]

(2) 10% or More Holders No Longer Excluded. Under the SEC's revised rules, individual holders of more than 10 percent of the subject securities are no longer required to be excluded from the calculation of U.S. ownership, as they were under the rules before the amendments. This change should increase the availability of the cross-border exemption. Requiring the exclusion of large target holders generally has the effect of skewing upward the percentage of U.S. ownership of foreign private issuers, which in turn decreases the availability of the cross-border exemptions. The SEC, however, is retaining the requirement that securities held by the acquiror must be excluded from both the numerator and denominator in calculating U.S. beneficial ownership.

(ii) Alternate Test for Determining Percentage of U.S. Holders

Where an issuer or acquiror in a negotiated transaction is unable to conduct the look-through analysis mandated in the SEC rules, it may use an alternate test, based in part on a comparison of ADTV in the U.S. and worldwide. Acquirors in all non-negotiated transactions may also rely on the alternate test, which is similar to and replaces the hostile presumption test.

(1) Circumstances Justifying Use of the Alternate Test

The Adopting Release states that merely needing to dedicate substantial time and resources to the "look-through" analysis or having concerns about the completeness and accuracy of the U.S. ownership levels obtained by completing a "look-through" analysis will not necessarily justify use of the alternate test. Furthermore, the Adopting Release makes clear that acquirors must make a good faith effort to conduct a reasonable inquiry into determining the level of U.S. beneficial ownership. The SEC did not provide an exhaustive list of the situations that would justify the use of the alternate test, but noted a few examples where the alternate test would be appropriate, such as: where security holder lists are generated only at fixed intervals and the published information is as of a date outside the range specified for calculation; where nominees are prohibited by law from disclosing information about the beneficial owners on whose behalf they hold; or where the subject securities are in bearer form.

Under the alternate test, an acquiror may rely on the cross-border exemptions unless, as discussed below: (i) ADTV in the U.S. exceeds the threshold percentages set forth in the SEC's rules, (ii) reports filed by the target company indicate levels of U.S. ownership inconsistent with the limits for the applicable exemption, or (iii) the acquiror knows or has reason to know that U.S. ownership exceeds the limits for the applicable exemption.

(2) Elements of the Alternate Test

The first prong of the alternative test is satisfied where ADTV for the subject securities in the U.S. over a twelve-month period ending no more than 60 days before the announcement of the transaction is not more than 10 percent (40 percent for Tier II) of the ADTV on a worldwide basis.[17] Similar to the revised look-through analysis, the alternate test provides acquirors with a range of dates by which they may make the comparison of U.S. and worldwide ADTV; that range does not, however, extend beyond the date of announcement. The revised rules require that there be a "primary trading market" for the subject securities, as the term is defined in the SEC's rules, in order for the acquiror in a negotiated transaction to rely on the alternate

test as a result of being unable to conduct the look-through analysis. "Primary trading market" means that 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.[18] In addition, if the trading of the subject securities occurs in two foreign markets, the trading in at least one of the two must be larger than the trading in the U.S. for that class.

The second prong of the alternate test is that the acquiror must consider information about U.S. ownership levels that appear in annual reports or other annual information filed by the issuer with the SEC or with the regulator in its home jurisdiction before the public announcement of the transaction. It may be disqualified from relying on the cross-border exemption sought if those reports or other filings indicate levels of U.S. ownership that exceed applicable limits for that exemption.[19] The only change from the pre-amendment comparable element for non-negotiated transactions is the limitation on the type of filings that must be considered under the revised rules (i.e., annual reports and other annual information) and the time limit on the information the acquiror must considered under the revised rules (i.e., information filed before public announcement).

Finally, the revised rules retain the condition that the acquirer must not have a "reason to know" that the target's U.S. beneficial ownership levels exceed applicable limits for a particular exemption. The revised rules clarify that an offeror has reason to know any information (whether made available by the issuer or any third party) that is publicly available, including beneficial ownership information filed with the SEC, a home country regulator or (if different) the jurisdiction in which its primary trading market is located.[20] An offeror must also take into account information available from the issuer or obtained or readily available from any other source that is reasonably reliable,[21] including the parties' advisors to the transaction and independent information service providers. However, an acquiror seeking to rely on the presumption is not required to engage such third parties for such purpose. The relevant cut-off date for the bidder's actual or imputed knowledge is the date of announcement, permitting a bidder to disregard conflicting information received after such date.

(b) Changes to Eligibility Test for Rights Offerings

The SEC adopted changes similar to those for business combinations to the method of calculating U.S. ownership for purposes of the exemption for rights offerings. Issuers may now calculate U.S. ownership as of a date no more than 60 days before and 30 days after the record date for the rights offering.[22] Thus, issuers will have greater flexibility on the timing of the calculation of U.S. ownership within a range of dates; however, the reference point for the calculation will

continue to be the record date for rights offerings, rather than the date of public announcement for business combinations. In addition to the changes to the look-through analysis mandated under the SEC revised rules, the alternate test for calculating U.S. ownership also will be available for issuers unable to conduct the look-through analysis.

(c) Revisions to Tier I Exemptions: Expanded Exemption from Rule 13e-3

Exchange Act Rule 13e-3 requires certain heightened disclosure for "going private" transactions because of the conflicts of interest inherent in such transactions.[23] In broad terms "going private" transactions are purchases of a company listed in the U.S. by the company itself or an affiliate of that company that result in the company becoming deregistered or delisted. Prior to the amendments, the Tier I exemption provided relief from the enhanced disclosure requirements for only particular types of affiliated transactions under Rule 13e-3, including tender offers. It did not apply to some transaction structures commonly used in non-U.S. jurisdictions, such as schemes of arrangements, cash mergers and compulsory acquisitions for cash. Revised Rule 13-3(g) permits all transaction structures to be exempt from the Rule 13e-3 disclosure requirements if they meet the conditions set forth in Rule 802 or the Tier I exemption.

(d) Revisions to Tier II Exemptions

The exemptive relief available for Tier II-eligible transactions is designed principally to allow bidders in cross-border tender offers to comply with certain home country procedural practices and requirements that differ from U.S. rules. The revised rules for Tier II transactions mainly address practical issues that have often been the subject of requests for exemptive or no-action letter relief.

(i) Tier II Relief for Regulation 14E-Only Transactions[24]

The SEC staff had previously informally taken the position that the Tier II exemptions should be available for tender offers that otherwise would qualify for the exemptions, but for the fact that the transaction is not subject to Rule 13e-4 or Regulation 14D (such as tender offers for securities that are not registered under Section 12 of the Exchange Act). The SEC has codified this position in the revised Tier II rules, which specifically make the Tier II exemptions available to offers subject to only Regulation 14E,[25] where the exemptions would have been available if those offers were subject to Rule 13e-4 or Regulation 14D.[26]

Certain of the Tier II exemptions may not be necessary for tender offers not subject to the requirements of Rule 13e-4 or Regulation 14D, because Regulation 14E may not have a corresponding regula-

tory requirement. For example, there is no requirement in Regulation 14E to make a tender offer available to all target security holders. Therefore, the accommodation from the all-holders provisions in Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) will not be necessary for an offer subject only to Regulation 14E.

(ii) Tier II Relief for Concurrent U.S. and Non-U.S. Offers

Multiple non-U.S. offers in connection with a U.S. offer. The revised rules permit the use of more than one offer outside of the U.S. for tender offers conducted under Tier II.[27] Prior to the amendments, the Tier II cross-border exemptions permitted a bidder to conduct only two separate but concurrent tender offers: (i) one open only to U.S. target security holders and (ii) another open only to non-U.S. target holders. However, in some instances, a tender offer may be subject to more than one regulatory regime outside the U.S., particularly where the target's country of incorporation is not the location of the primary trading market for the target securities. Prior to the cross-border amendments, bidders requested and were granted relief to conduct more than one non-U.S. offer outside of the U.S. pursuant to the Tier II exemptions.[28] With regard to proration of tendered securities, under the preexisting as well as the revised rules, bidders who conduct separate non-U.S. and U.S. offers to minimize the difficulties of complying with two different regulatory regimes applicable to the offer must prorate tendered securities on an aggregate basis, where required under U.S. rules.

Expansion of the categories of persons who may participate in the U.S. offer and the non-U.S. offer. With regard to the U.S. offer, the revised rules allow a bidder in a cross-border tender offer conducted under Tier II to make the U.S. offer available to all holders of American Depositary Receipts ("ADRs"), including non-U.S. holders.[29] This rule change is not intended to enable a bidder to make an offer open only to ADR holders, which would be prohibited where the target securities are registered under Section 12 of the Exchange Act and the all-holders provisions of U.S. tender offer rules apply. Prior to the amendments, the Tier II exemptions specified that a U.S. offer conducted in connection with a concurrent non-U.S. offer under Tier II may be open to U.S. persons only. This limitation creates a problem because bidders frequently seek to include all holders of ADRs, not only U.S. holders in the U.S. portion of a dual offer. The SEC staff often granted relief to permit a U.S. offer in a dual offer structure to include all holders of ADRs, including non-U.S. holders of ADRs.

With regard to the non-U.S. offer, the revised rules allow a bidder in a cross-border tender offer conducted under Tier II to make the non-U.S. offer open to U.S. target security holders in situations where:

(i) the laws of the non-U.S. target company's home jurisdiction expressly prohibit the exclusion of any target security holders, including U.S. persons; and (ii) the offer materials distributed to U.S. persons fully and completely describe the risks to U.S. holders of participating in the non-U.S. offer.[30]

(iii) Termination of Withdrawal Rights While Counting Tendered Securities

The Exchange Act and related SEC rules require bidders to provide "back-end" withdrawal rights if tendered securities have not been accepted for payment within a certain date after the commencement of a tender offer.[31] In many non-U.S. jurisdictions the counting of tendered securities after the end of the initial offering period can take substantial time during which such back-end withdrawal rights create uncertainty in determining whether a minimum tender condition has been met. Under the cross-border rules before the amendments, back-end withdrawal rights are suspended between the end of an initial offering period and the commencement of a subsequent offering period. The revised rules expand this relief by permitting a bidder in a cross-border tender offer conducted under Tier II to suspend back-end withdrawal rights after the expiration of an offer while tendered securities are being counted and until those securities are accepted for payment, even if no subsequent offering period is ultimately provided, so long as: (i) the bidder has provided an offer period (including withdrawal rights) of at least 20 U.S. business days;[32] (ii) at the time withdrawal rights are suspended, all offer conditions other than the minimum acceptance condition have been satisfied or waived;[33] and (iii) back-end withdrawal rights are suspended only until tendered securities are counted and are reinstated immediately after that process, to the extent they are not terminated by the acceptance of the tendered securities.[34] The revised rules also operate to suspend back-end withdrawal rights that may exist after the expiration of a subsequent offering period, to the extent the bidder meets the conditions outlined in the rules.

(iv) Subsequent Offering Period Changes

U.S. rules on subsequent offering periods have been a frequent source of conflict with foreign regulations in the context of cross-border tender offers. The revised rules are intended to eliminate certain conflicts.

Maximum time limit on subsequent offering period eliminated. SEC tender offer rules prior to the amendments imposed a maximum time limit of 20 U.S. business days on the length of a subsequent offering period. However, subsequent offering periods of significantly longer duration are common under law or practice in

many non-U.S. jurisdictions. The revised tender offer rules eliminate the maximum time limit on the length of a subsequent offering period for all tender offers, including those for U.S. target companies.[35] Subsequent offering periods may still be no shorter than three business days, in accordance with U.S. rules.

Prompt payment of securities tendered during the subsequent offering period. U.S. tender offer rules mandate that securities tendered during a subsequent offering period must be paid for as soon as they are tendered, on a "rolling" basis, which in practice means every day. In a cross-border tender offer, non-U.S. rules or practice often dictate payment practices during the subsequent offering period that conflict with U.S. rules. For example, non-U.S. rules or practice may require securities tendered during the subsequent offering period 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 revised rules allow a bidder in a cross-border tender offer conducted pursuant to the Tier II exemptions to bundle and pay for securities tendered in the subsequent offering period within 20 business days of the date of tender.[36] For this purpose, a business day is determined by reference to the relevant non-US jurisdiction. However, under the revised rules, if 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 to satisfy U.S. prompt payment requirements.

Payment of interest on securities tendered during the subsequent offering period. In some non-U.S. jurisdictions, bidders are legally obligated to pay interest on securities tendered during a subsequent offering period. These payments, however, conflict with U.S. rules that mandate that consideration paid to any tendering security holder be the highest consideration paid to any other security holder and that security holders that tender during the subsequent offering receive the same form and amount of consideration as security holders tendering into the initial offering period. Because of this prohibition, bidders in cross-border transactions prior to the amendments have requested and received exemptive relief to address the direct conflict of law presented. The revised rules permit bidders in Tier II cross-border tender offers to pay interest on securities tendered during a subsequent offering period, where required under non-U.S. law.[37] The revised rules do not limit the amount of interest that may be paid on securities tendered during the subsequent offering period. The SEC's rule change does not permit the payment of interest on securities tendered during the initial offering period.

Mix and match offers and the initial and subsequent offering

periods. In a mix and match offer, bidders offer a set mix of cash and securities in exchange for each target security, but permit tendering holders to request a different proportion of cash or securities. These elections by tendering holders are satisfied to the extent that other tendering security holders make offsetting elections for the opposite proportion of cash and securities, subject to a maximum amount of cash or securities that the bidder is willing to issue. To facilitate the timely payment of consideration to tendering security holders, bidders typically provide for two separate pools of cash and securities to be used to accommodate target shareholders' mix and match elections, one for the initial offering period and another for the subsequent offering period. Mix and match offers may violate U.S. rules that prohibit the payment of different consideration in the initial and subsequent offering periods, as well as U.S. rules that prohibit the imposition of a ceiling on any form of alternate consideration offered during the subsequent offering period. The revised rules expressly permit the use of separate offset "pools" for securities tendered during the initial and subsequent offering periods for cross-border tender offers conducted under Tier II.[38] The revised rules also eliminate the prohibition on a ceiling for the form of consideration in a mix and match cross-border offer under Tier II, where target security holders are able to elect to receive alternate forms of consideration in the offer.[39]

(v) Reduction or Waiver of Minimum Acceptance Condition

Under U.S. tender offer rules, a bidder must keep a tender offer open for a prescribed period after a material change in the terms of the offer and must provide withdrawal rights during such period. Generally, waiving or reducing the minimum acceptance condition is considered a material change in the terms of the offer. However, this conflicts with law or practice in certain non-U.S. jurisdictions, including, in particular, the United Kingdom. Consequently, the SEC, when it initially adopted the Cross-Border Rules, affirmed the staff's interpretive guidance on when bidders meeting the conditions of the Tier II exemption could, subject to a number of conditions, waive or reduce the minimum acceptance condition without providing withdrawal rights during the remainder of the offer.

The SEC provided additional guidance in the Proposing Release that limits the scope of the relief, which guidance the SEC reaffirmed in the Adopting Release, with some further modifications. As reiterated in the Adopting Release, the SEC stated that its earlier guidance was intended to be relied upon only where law or practice in the applicable non-U.S. jurisdiction does not permit the bidder to provide withdrawal rights after the reduction or waiver.[40] The fact that a non-

U.S. jurisdiction would merely allow such practice is not sufficient. As a new requirement, 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 non-U.S. 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.[41] The interpretive guidance does not apply to mandatory extensions of the initial offer period 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.[42] The SEC emphasized the importance of including in the offer materials a robust discussion of the implications of any waiver or reduction, including at the specific levels contemplated.

(vi) Early Termination of an Initial Offering Period or a Voluntary Extension of Such Period

The SEC also considers a change in the expiration date of a tender offer as material, requiring a bidder to keep a tender offer open for a prescribed period after such change and to provide withdrawal rights during such period. This extension requirement in U.S. rules conflicts with the law or practice in some non-U.S. jurisdictions, which mandate that once all offer conditions have been satisfied or waived, the initial offering period and withdrawal rights must terminate so that the bidder may begin the payment process. The SEC's staff has given no-action relief to terminate the initial offering period (or any voluntary extension thereof) before its scheduled expiration, thereby terminating withdrawal rights, upon satisfaction of all offer conditions. The revised rules codify this relief, permitting bidders in cross-border tender offers conducted under tier II to terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights end: (i) the initial offering period has been open for at least 20 U.S. business days; (ii) the bidder has adequately discussed the possibility and the impact of the early termination in the original offer materials; (iii) the bidder provides a subsequent offering period after the termination of the initial offering period; (iv) all offer conditions are satisfied as of the time when the initial offering period ends; and (v) 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.[43]

(vii) Exceptions From Rule 14e-5 for Tier II Cross-Border Tender Offers

Exchange Act Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as

part of the tender offer. The rule's prohibitions apply from the time of public announcement of the tender offer until the offer expires. The rule applies to "covered persons," which include, among others, the offeror and its affiliates and the offeror's dealer-manager and its affiliates. The 1999 cross-border rules exempt Tier I tender offers from Rule 14e-5,[44] but not Tier II offers. The revised rules codify and refine three class exemptive letters in the Tier II cross-border tender offer context.[45]

Purchases pursuant to a foreign tender offer. New Exchange Act Rule 14e-5(b)(11) codifies the ability of a bidder to purchase or arrange to purchase target securities of a non-U.S. issuer pursuant to a non-U.S. offer made concurrently or substantially concurrently with a U.S. Tier II tender offer. The exception is conditioned on U.S. security holders being treated at least as favorably, both economically and procedurally, as non-U.S. tendering security holders and the bidder disclosing in the U.S. offering documents its intention to make purchases pursuant to the non-U.S. tender offer. The exception is limited to purchases in non-U.S. tender offers and does not apply to open market transactions, private transactions, or other transactions outside the tender offer, although other exemptions may be available for such purchases.

Purchases by an affiliate of the financial advisor and an offeror and its affiliates. New Exchange Act Rule 14e-5(b)(12) codifies the ability of bidders, their affiliates and affiliates of financial advisors to purchase or arrange to purchase target securities of a non-U.S. issuer outside a Tier II tender offer; provided, that such purchases (i) are made outside the U.S.; (ii) are disclosed in the U.S., to the extent that such information is made public in the subject company's home jurisdiction; (iii) with regard to an affiliate of a financial advisor, are consistent with such affiliate's normal and usual business practices and are not made to facilitate the tender offer, and the affiliate is registered as a broker or dealer under Section 15(a) of the Exchange Act; and (iv) with regard to an offeror and its affiliates, are at a price not exceeding the tender offer price. If purchases by the bidder or its affiliates outside at tender offer are at price exceeding the tender offer price, then the tender offer price must be increased to match such higher price. Additionally, the U.S. offering materials must disclose prominently the possibility of purchases of target securities outside of the tender offer.

(e) Expanded Availability of Early Commencement

Under the cross-border rules prior to the amendments, a bidder could commence an exchange offer before a related registration statement is declared effective (i.e., early commence) only when an exchange offer is subject to Rule 13e-4 or Regulation 14D. Such cross-

border rules made no provision for early commencement of Regulation 14E-only exchange offers, which include, for example, offers for unregistered equity securities and cross-border debt tender offers. In order to put such exchange offers on equal footing with cash tender offers and exchange offers subject to Rule 13e-4 or Regulation 14D, the SEC amended its rules to allow "Regulation 14E-only" exchange offers—for both U.S. and foreign target companies—to commence upon the filing of the registration statement registering the offer, so long as: (i) the bidder provides withdrawal rights to the same extent as would be required under Rule 13e-4 and Regulation 14D; and (ii) if there is a material change in the information provided to target security holders, the bidder must disseminate revised materials as would be 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.[46] As is currently the case with exchange offers subject to Rules 13e-4 and Regulation 14D, no securities may be purchased until the registration statement is declared effective. The revised rules also make it clear that the prospectus delivery requirements of the Securities Act extend to Regulation 14E-only offers. Early commencement is not available for roll-ups and going-private transactions.

Since Regulation 14E-only exchange offers require a Form S-4 or F-4 filing but not a Schedule TO filing, and there's not a box anywhere on the cover of the registration statement that indicates that the bidder is using early commencement, the SEC staff urges bidders to include some correspondence to convey to the SEC staff that the tender offer has already commenced.[47] The Adopting Release provides that the SEC is committed to expediting the staff review process for exchange offers so that they can compete more effectively with cash offers. However, the SEC staff has cautioned that sometimes the review may take slightly longer in cases where there are novel or complex issues or where the bidder is registering its IPO and the SEC is looking at its financial statements for the first time.[48]

(f) Changes to Schedules and Forms

Form CB. 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 under cover of Form CB, if the tender offer would have been subject to Rules 13e-3 or 13e-4 or Regulation 14D.[49] The bidder or issuer must also file a Form F-X to appoint an agent in the U.S. for service of process.[50] No filing requirement exists for a Regulation 14E-only tender offer. Prior to the amendments, only persons already filing reports with the SEC were required to submit Form CB electronically via EDGAR. Non-reporting persons could submit Form CB in paper. The SEC's revised rules require that all

Form CBs and the related Form F-X for appointment of an agent in the U.S. for service of process be submitted electronically via EDGAR.[51]

Schedule TO, Form F-4 and Form S-4. The SEC adopted changes to Schedule TO and Forms F-4 and S-4 to include boxes on the cover page of the forms that a filing person will be required to check to indicate reliance on one or more applicable cross-border exemptions. The SEC believes including this information will help avoid misperceptions about which exemption the filer is seeking and may expedite staff review.

(g) Beneficial Ownership Reporting By Foreign Institutions

The beneficial ownership reporting provisions of Section 13 of the Exchange Act require, subject to exceptions, that any person who acquires more than five percent of a class of equity securities registered under Section 12 of the Exchange Act report the acquisition on Schedule 13D within ten days. Certain classes of U.S. institutional investors holding securities in the ordinary course of business and not with a control purpose, however, are permitted instead to file a short-form Schedule 13G within 45 days of the end of the calendar year in which they acquired the reportable holding. Before the revised rules, the list of institutional investors that may file a Schedule 13G did not include non-domestic institutions generally. Historically, foreign institutions that sought to use Schedule 13G need to obtain a no-action position from the SEC staff. The revised rules allow foreign institutions that certify that they are subject to a foreign regulatory scheme substantially comparable to the regime applicable to specified U.S. institutions use Schedule 13G.[52] Such foreign institutions must also undertake to furnish to the SEC staff, upon request, the information it otherwise would be required to provide in a Schedule 13D. As with U.S. domestic institutions, filing on Schedule 13G will only be available to foreign institutions that acquire and hold the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer. The SEC also adopted a corresponding change to Rule 16a-1(a)(1) under the Exchange Act, in which 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.

(h) Interpretive Guidance

In addition to the revised rules and guidance discussed above, the Adopting Release provided updated interpretive guidance in the fol-

lowing areas: the application of the "all-holders" rule; the ability to exclude U.S. security holders; and vendor placement arrangements.

(i) Foreign Target Security Holders and U.S. All-Holders Requirements

In the Adopting Release, the SEC reaffirmed its position regarding the U.S. all-holders requirements: (i) tender offers subject to the provisions of Section 13(e) or 14(d) of the Exchange Act must be open to all target security holders, including foreign persons; and (ii) although foreign target holders may not be excluded from U.S. tender offers under these provisions, the SEC rules do not require dissemination of offer materials outside the U.S.[53] The SEC indicated that a statement that a tender offer is not being made into a particular jurisdiction is permissible where it means that tender offer materials are not being distributed into that jurisdiction. However, it may not mean that tenders from foreign target holders resident there will not be accepted, where an offer is subject to the U.S. all holders requirements. The SEC clarified in the Adopting Release 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 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.[54]

(ii) Exclusion of U.S. Target Security Holders From Cross-Border Tender Offers

The SEC seeks to encourage bidders in cross-border business combination transactions to include U.S. holders in those transactions, particularly where the subject securities trade on a U.S. stock exchange, but recognizes that bidders will not always do so and may have legitimate reasons for excluding U.S. holders. The SEC has previously indicated that a bidder who is not a U.S. person making a tender offer for a non-U.S. issuer may exclude U.S. target security holders if (i) the offer is conducted outside the U.S. and (ii) U.S. jurisdictional means are not implicated. In the Adopting Release, the SEC reiterates and supplements its previously issued guidance on avoiding U.S. jurisdictional means.

The SEC reaffirmed its view that in addition to legends and disclaimers indicating that the offer is not being made in the U.S., a bidder will need to take special precautions to prevent sales to (in the case of exchange offers) or tenders from U.S. target holders.[55] Such special precautions may include the bidder requiring representations by the tendering security holder, or anyone tendering on that person's behalf, that the tendering holder is not a U.S. holder or someone tendering on behalf of a U.S. holder. Where tenders in exclusionary

offers are made through offshore nominees, bidders could require that these nominees certify that tenders are not being made on behalf of U.S. holders.

The SEC indicated that where a foreign all-holders requirement does not permit a bidder to reject tenders from U.S. holders and does not permit statements that the offer may not be accepted by U.S. holders, it may not be possible for the bidder to take adequate precautionary measures to avoid U.S. jurisdictional means. Also, where a bidder knowingly permits U.S. holders to tender into offers made offshore, whether directly or through foreign intermediaries, the SEC believes it may be difficult to avoid the use of U.S. jurisdictional means.

Where tenders are made by nominees on behalf of U.S. holders, and those nominees or holders misrepresent their status as U.S. persons in order to participate in exclusionary offers, the bidder will not be viewed as having targeted the U.S., provided, that (i) the bidder has taken adequate measures reasonably intended to prevent sales to and tenders from U.S. holders; and (ii) there is an absence of indicia that would put the bidder on notice that the tendering holder is a U.S. holder.[56] Such indicia would include receipt of payment drawn on a U.S. bank, provision of a U.S. taxpayer identification number or statements by the tendering holder that notwithstanding a foreign address, the tendering holder is a U.S. investor.

(iii) Vendor Placements in Cross-Border Exchange Offers

Bidders in Tier I-eligible exchange offers are permitted to offer cash to U.S. holders in lieu of stock of the bidder offered to holders outside the U.S., provided that the bidder has a reasonable basis to believe that the cash offered is substantially equivalent in value to the stock offered to non-U.S. holders. In exchange offers that are not eligible for the Tier I exemption, bidders sometimes seek to implement a "vendor placement" arrangement to avoid the registration requirements of the Securities Act. In a vendor placement, the bidder generally employs a third party to sell in offshore transactions the securities to which tendering U.S. security holders are entitled in the offer. The bidder (or the third party) then remits the proceeds of the resale (minus expenses) to those U.S. target security holders that tendered in the offer. Two U.S. securities law issues arise in connection with vendor placements: (i) whether the securities sold offshore for U.S. holders must be registered under the Securities Act, and (ii) for exchange offers subject to Section 13(e) or 14(d) (*i.e.*, offers for equity securities registered under Section 12 of the Exchange Act), whether the vendor placement arrangement violates the U.S. equal treatment rules.

The SEC indicated that the staff no longer intends to issue vendor placement no-action letters regarding the registration requirements of

the Securities Act; however, bidders may continue to use the vendor placement procedure in accordance with the guidance set forth in the Adopting Release, which reiterates the guidance set forth in the Proposing Release and previous relief.[57] The following factors should be considered when determining whether a vendor placement requires registration: (i) the level of U.S. ownership in the target company; (ii) the number of bidder securities to be issued in the business combination transaction as a whole as compared to the amount of bidder securities outstanding before the offer; (iii) the amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer; (iv) the liquidity and general trading market for the bidder's securities; (v) 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; (vi) the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales; and (vii) the process used to effect the vendor placement sales.[58] Of these factors, the SEC places particular importance on the market for the bidder's securities being highly liquid and robust and the number of bidder securities to be issued for the benefit of U.S. target holders being relatively small compared to the total number of bidder securities outstanding.[59] In the SEC's view, a vendor placement arrangement with different facts would be subject to Securities Act registration.

Bidders which seek to use the vendor placement structure for tender offers subject to Section 13(e) or 14(d) of the Exchange Act at U.S. beneficial ownership levels above Tier I must also seek an exemption from the U.S. equal treatment rules. While the SEC indicated that its staff will consider such requests for relief, it also stated that it generally believes that Tier I-eligible transactions represent the appropriate circumstances under which bidders may provide cash to U.S. target holders while offering securities to foreign target holders.[60]

III. Conclusion

The revisions to the SEC's cross-border transaction rules and related interpretive guidance address a number of regulatory conflicts and ambiguities that have limited the utility of the 1999 cross-border rules. The expanded availability and certainty of the cross-border exemptions remove some of the disincentives bidders had to including U.S. investors in cross-border business combination transactions. However, there will continue to be legal and practical challenges associated with conducting the look-through analysis. Whether the revisions will result in increased inclusion of U.S. investors in cross-border transactions remains to be seen.

NOTES:

[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 Nos. 33-8957; 34-58597 (September 19, 2008) (the "Adopting Release").

[2]"Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions," Release Nos. 33-8917; 34-57781 (May 6, 2008) (the "Proposing Release").

[3]"Business combination" is defined in Rule 800(a) under the Securities Act of 1933, as amended ("Securities Act"), as any "statutory amalgamation, merger, arrangement or other reorganization requiring the vote of security holders of one or more of the participating companies. It also includes a statutory short-form merger that does not require a vote of security holders." In the Adopting Release, the term is used more broadly to include those kinds of transactions, as well as tender and exchange offers. Similarly, this article uses the term more broadly to include those kinds of transactions, as well as tender and exchange offers.

[4]"Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings," Release Nos. 33-7759, 34-420554 (October 22, 1999).

[5]The rule changes that will apply to all tender offers, including those for U.S. target companies: (1) eliminate the maximum time limit on the length of the subsequent offering period and (2) provide the ability to commence an exchange offer upon the filing of a registration statement and before its effectiveness in exchange offers not subject to Rule 13e-4 or Regulation 14D. See amended Exchange Act Rule 14d-11 and amended Securities Act Rule 162.

[6]Exchange Act Rule 14d-1(c).

[7]Exchange Act Rules 13e-3(g)(6) and 13e-4(h)(8).

[8]Exchange Act Rule 14d-1(d).

[9]A negotiated transaction is a transaction made pursuant to an agreement between the acquiror and the target company. See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and (d).

[10]References to the "hostile presumption" test mean the test used prior to the SEC's revisions to the cross-border transaction rules to determine eligibility for the cross-border exemptions for non-negotiated transactions. See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and (d).

[11]An acquiror that is an affiliate of the target in a "non-negotiated" transaction must also conduct the "look through" analysis. See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and (d).

[12]The Adopting Release provides that where nominees are prohibited by law from disclosing information about the beneficial owners on whose behalf they hold, it would be appropriate to refer to the alternative ADTV test.

[13]See amended Securities Act Rule 800(h)(1); Instruction 2 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2 to amended Exchange Act Rules 14d-1(c) and (d).

[14]See Instruction 2.i. to amended Exchange Act Rules 14d-1(c) and (d); amended Securities Act Rule 800(h); and Instruction 1.i. to amended Exchange Act Rules 13e-4(h)(8) and (i).

[15]See Instruction 2.i. to amended Exchange Act Rules 14d-1(c) and (d); amended

Securities Act Rule 800(h)(1); Instruction 2.i. to amended Exchange Act Rules 13e-4(h)(8) and (i). This expanded date range is not available for rights offerings.

[16]The Adopting Release acknowledges that in some foreign jurisdictions, the acquiror may need to conduct the look-through analysis before announcement because home country law may require detailed information about the transaction, including the treatment of U.S. holders, to be included in the announcement. See footnote 83 of the Adopting Release.

[17]See Instruction 3.i. to amended Exchange Act Rules 14d-1(c) and (d); new Securities Act Rule 800(h)(7)(i); and Instruction 3.i. to amended Exchange Act Rules 13e-4(h)(8) and (i).

[18]Exchange Act Rule 12h-6(f)(5)(i).

[19]See Instruction 3.ii. to amended Exchange Act Rules 14d-1(c) and (d); amended Securities Act Rule 800(h)(7)(ii); and Instruction 3.ii. to amended Exchange Act Rules 13e-4(h)(8) and (i).

[20]See Instruction 3.iii. to amended Exchange Act Rules 14d-1(c) and (d); amended Securities Act Rule 800(h)(7)(iii); and Instruction 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i).

[21]See Instruction 3.iii. to amended Exchange Act Rules 14d-1(c) and (d); amended Securities Act Rule 800(h)(7)(iii); and Instruction 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i).

[22]See amended Securities Act Rule 800(h).

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

[24]The Adopting Release addresses Tier II relief for Regulation 14E-only transactions. The SEC staff has historically taken the position that Tier I relief for Regulation 14E-only transactions is expressly provided in Exchange Act Rule 14d-1(c), which exempts all tender offers satisfying the Tier I conditions from Rules 14e-1 and 14e-2 (the latter exemption being repeated in Rule 14e-2 itself). Also, Rule 14e-5 contains an express exemption for tender offers satisfying the Tier I conditions.

[25]Regulation 14E applies to all tender offers, including those not subject to Section 13(e) or 14(d) of the Exchange Act. These include tender offers for non-equity securities and securities that are not registered under Section 12 of the Exchange Act, as well as partial offers for less than all of the subject class, where the bidder will not own more than five percent of the subject class of equity securities after the tender offer (based on purchases in the tender offer and ownership in the target before the offer commences).

[26]See amended Exchange Act Rules 13e-4(i) and 14d-1(d).

[27]Amended Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

[28]See, e.g., Alcan, Inc. (October 7, 2003); Asia Satellite Telecommunications Holdings Limited (May 25, 2007); BCP Crystal Acquisition GmbH & Co (February 3, 2004) and Mittal Steel Company N.V. (June 22, 2006) ("Mittal").

[29]Amended Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

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

[31]For issuer tender offers subject to Rule 13e-4, tendering security holders must be able to withdraw tendered securities after the expiration of 40 business days from

the commencement of the tender offer. Exchange Act Rule 13e-4(f)(2)(ii). For third-party tender offers, Section 14(d)(5) of the Exchange Act states that withdrawal rights exist "at any time after sixty days from the date of [commencement] of the original tender offer . . ."

[32]New Exchange Act Rules 13e-4(f)(2)(v)(A) and 14d-1(d)(2)(viii)(A).

[33]The only conditions that may survive the expiration of the initial offering period are regulatory approvals necessary to consummate the tender offer. The rule changes the SEC adopted are not intended to eliminate back-end withdrawal rights where a regulatory condition remains outstanding after the expiration of the offering period.

[34]New Exchange Act Rules 13e-4(f)(2)(v)(C) and 14d-1(d)(2)(viii)(C).

[35]See amended Exchange Act Rule 14d-11.

[36]See amended Exchange Act Rule 14d-1(d)(2)(iv).

[37]New Exchange Act Rule 14d-1(d)(2)(vi).

[38]New Exchange Act Rule 14d-1(d)(2)(viii).

[39]New Exchange Act Rule 14d-1(d)(2)(viii).

[40]Adopting Release, *supra* note 1, at Part II.C.5.

[41]Adopting Release, *supra* note 1, at Part II.C.5.

[42]Adopting Release, *supra* note 1, at Part II.C.5.

[43]New Exchange Act Rule 14d-1(d)(2)(ix).

[44]See Exchange Act Rule 14e-5(b)(10).

[45]See the following three no-action letters: Mittal; Sulzer AG (March 2, 2007); and Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007).

[46]See amended Securities Act Rule 162(a) and (b).

[47]See transcript of "The SEC Staff on M&A" (March 19, 2009) (available at http://www.deallawyers.com/member/Programs/Webcast/2009/03__19/transcript.htm).

[48]See transcript of "The SEC Staff on M&A" (March 19, 2009) (available at http://www.deallawyers.com/member/Programs/Webcast/2009/03__19/transcript.htm).

[49]Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i), and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii).

[50]See Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii).

[51]See amended Rule 101(a) of Regulation S-T.

[52]New Exchange Act Rule 13d-1(b)(1)(ii)(J).

[53]Adopting Release, *supra* note 1, at Part II.G.1.

[54]Adopting Release, *supra* note 1, at Part II.G.1.

[55]Adopting Release, *supra* note 1, at Part II.G.2.

[56]Adopting Release, *supra* note 1, at Part II.G.2.

[57]Adopting Release, *supra* note 1, at Part II.G.3.

[58]Adopting Release, *supra* note 1, at Part II.G.3.

[59]Adopting Release, *supra* note 1, at Part II.G.3.

[60]Adopting Release, *supra* note 1, at Part II.G.3.