SEC Revisions to the Cross-Border Transaction Exemptions

On September 19, 2008, the Securities and Exchange Commission (the "Commission" or "SEC") adopted amendments to rules which provide cross-border transactions with a variety of exemptions from the tender offer rules, the going private rules and registration requirements.[1] The term "cross-border transaction" refers to a third-party or issuer tender offer or exchange offer where the company subject to the offer is a "foreign private issuer" having U.S. investors among its security holders.[2] The term also refers to a rights offering by a foreign private issuer having U.S. investors.

Many of the rule changes codify SEC Staff interpretive positions and exemptive orders issued since 2000 when the present cross-border exemptive rules became effective.[3] In addition, the rules include Staff interpretative guidance on the application of existing rules. The objective of the revised rules is to further encourage foreign private issuers to include, rather than exclude, the participation of their U.S. investors in cross-border transactions.

The final rule is effective December 8, 2008.

I. Background

Prior to 1999, U.S. investors in foreign private issuers which were the subject of tender offers, exchange offers or rights offerings would routinely be excluded from participation in such transactions because compliance with U.S. laws was considered too burdensome. In an effort to encourage foreign private issuers to include their U.S. security holders in such transactions, the Commission adopted the so-called cross-border exemptions which went into effect in January 2000.

Generally speaking, the exemptions are structured as a two-tier system broadly based on the level of U.S. interest in a transaction, measured by the percentage of securities held by U.S. investors in foreign private issuers which are the subject of a transaction.[4] Where no more than 10% of the subject securities are held by U.S. investors ("Tier I"),[5] a cross-border transaction will be exempt from most U.S. tender offer rules and the

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1 Release Nos. 34-58597; File No. S7-10-08, *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* (September 19, 2008), available at http://www.sec.gov/rules/final/2008/33-8957.pdf (the "revised rules" or the "revised exemptions" or the "Adopting Release").

2 The term "foreign private issuer" is defined in Rule 3b-4(c) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

3 Release Nos. 33-7759, 34-42054; 39-2378, International Series Release No. 1208, File No. S7-29-98, *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offering* (October 22, 1999), available at http://www.sec.gov/rules/final/33-7759.htm.

4 In the case of a tender offer, the focus of the exemptions is on the ownership of the securities of the foreign company which is the target of a transaction whether the offeror is a U.S. or non-U.S. company. In the case of a rights offering, the exemptive rules focus on the ownership of the securities of the issuer.

5 As defined in Exchange Act Rules 13e-4(h)(8) and 14d-1(c) and Securities Act Rules 801 and 802.

registration requirement of Section 5 of the Securities Act of 1933, as amended (the "Securities Act"). This includes the filing, dissemination and procedural requirements of U.S. tender offer rules, the heightened disclosure requirements for going private transactions under Exchange Act Rule 13e-3 and the obligation of a target company's Board of Directors to express a position with respect to a tender offer.[6]

Where U.S. security holders own more than 10 percent but no more than 40 percent of the securities of a foreign private issuer ("Tier II"),[7] the cross-border exemption would provide narrowly tailored relief to address recurring areas of regulatory conflict with respect to tender offers, such as the prompt payment, extension and notice requirements in Exchange Act Regulation 14E. The Tier II exemption does not provide relief from Securities Act registration requirements[8] nor the additional disclosure requirements of Rule 13e-3 for going private transactions.

II. Summary of Revised Rules

A. Revised eligibility test for the revised cross-border exemptions

The Commission has adopted changes to the eligibility test for the cross-border exemptions to reduce the burden of determining eligibility. For negotiated transactions, acquirors must continue to conduct the look-through analysis, as amended to provide greater flexibility.[9] For situations where acquirors are unable to conduct this analysis, the revised rules provide for an alternate test that incorporates elements from the current hostile presumption[10] for non-negotiated deals, including an element based on average daily trading volume of the subject securities ("ADTV").[11]

The cross-border exemptions require acquirors to query record holders and other nominees to determine U.S. beneficial ownership. The acquirors need only "look through" nominees located in the United States, the subject company's jurisdiction of incorporation and that of each participant in the business combination transaction, and the jurisdiction that is the primary trading market for the subject securities, if different from the jurisdiction of incorporation. The SEC has recognized that acquirors who do not have the cooperation of the target company (non-negotiated transactions or hostile bids) may have limited access to information from nominees, making the "look-through" analysis very difficult.

The existing cross-border exemptions and the revised exemptions continue to be available only when the target company is a foreign private issuer as defined in the securities laws.[12] As is the case with the existing

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6 See Exchange Act Rule 14e-2(d).

7 As defined in Exchange Act Rules 13e-4(i) and 14d-1(d).

8 Tier II therefore does not apply in the case of tender offers in which securities are offered as consideration or to issuer rights offerings, among other things.

9 See new Securities Act Rules 800(h)(6) and (7); Instructions 2 and 3 to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instructions 2 and 3 to amended Exchange Act Rules 14d-1(c) and (d).

10 Reference to the "hostile presumption" means the existing test used to determine eligibility for the cross-border exemptions for non-negotiated transactions, i.e. those not 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).

11 Reference to "subject securities" means securities of a target company that are the subject of a tender offer or are sought to be acquired in another kind of business combination transaction.

12 See Exchange Act Rule 3b-4(c). For the Securities Act Rule 801 exemption for rights offerings, the issuer must be a foreign private issuer as defined in that rule. For business combinations such as mergers of equals, where both parties to

cross-border exemptions, the revised exemptions are available equally to both U.S. and foreign acquirors, where the company being acquired qualifies as a foreign private issuer.

1. Changes to the look-through analysis

a. Timing of the calculation. Prior to the adoption of the revised rules, 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.[13] Under the revised rules, an acquiror seeking to rely on the cross-border exceptions 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. However, where the issuer or acquiror is unable to complete the look-through analysis in this 90-day period, it may use a date within 120 days before public announcement. For these purposes, the Commission 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.[14]

The Commission believes this range of dates allows the parties to a business transaction to determine and inform the markets of the treatment of U.S. target security holders at an earlier stage in the planning process, as well as providing the acquirors whose home country law permits them to wait to conduct the analysis until after public announcement with flexibility to maintain confidentiality to the greatest extent possible.

b. Elimination of exclusion of large target security holders. To qualify for the Tier I or Tier II exemption, the percentage of target securities of a foreign private issuer beneficially owned by a U.S. holder must meet certain threshold requirements.[15] The revised rules change the way these threshold percentages are calculated by no longer requiring that individual holders of more than 10 percent of the subject securities be excluded from the numerator and denominator in calculating U.S. ownership.[16] The Commission has recognized that eliminating the exclusion of individual holders of more than 10 percent from the calculation will increase the availability of the cross-border exemptions, but believes this will not compromise investor protection goals.

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the transaction will be replaced by a successor entity which issues securities in the amalgamation, U.S. holders may hold no more than 10 percent of the subject class, as if measured immediately after the business combination. See Securities Act Rule 802(a).

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

14 See generally, Instruction 5 to Exchange Act Rules 13e-4(c) and 14d-2 (defining public announcement for purposes of pre-commencement communications about issuer or third-party tender offers).

15 See Securities Act Rules 801(a)(2) and 802(a)(1) and Exchange Act Rules 13e-4(h)(8)(i) and (i)(1)(ii) and 14d-1(c)(1) and (d)(2)(ii).

16 Under the current rules, all securities held by persons or entities that individually hold more than 10 percent of the subject class, whether U.S. or foreign, must be excluded from both the numerator (U.S. ownership) and denominator (worldwide ownership) when calculating U.S. ownership percentages. See Securities Act Rule 800(h)(2); Instruction 2.ii. to Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d). Under the amended rules, these securities will be included in both the numerator and denominator.

c. **Under what circumstances is the issuer or acquiror unable to conduct the look-through analysis to determine eligibility to rely on cross-border exemption?** Whether an issuer or an acquiror is unable to conduct the look-through analysis required by the rules (and thus use the alternative test) will depend on the facts and circumstances of the particular analysis. In each instance, the bidder must make a good faith effort to conduct a reasonable inquiry into ascertaining the level of U.S. beneficial ownership. In the Adopting Release, the Commission has recognized specific factual scenarios where the alternative test can be used:[17]

- in foreign jurisdictions where the published information regarding security holder information is as of a date outside the range specified in the revised rules;
- when the subject securities are in bearer form;
- in foreign jurisdictions where nominees are prohibited by law from disclosing information about the beneficial owners of the subject securities; and
- in situations where a business transaction is non-negotiated (not conducted pursuant to an agreement between the target and the acquiror).

2. Elements of the alternative test

The alternative test may only be used in cases where an acquiror is unable to conduct the required look-through analysis because of specific circumstances or where a transaction is not made pursuant to an agreement between a acquiror and a target company.[18] Under the alternative test, an acquiror may rely on the cross-border exemptions unless (i) ADTV in the United States exceeds the limits set forth in the rules (the "ADTV Test "), (ii) reports filed by the target company indicate levels of U.S. ownership inconsistent with the limits for the applicable exemption (the "Information Filed by the Issuer with the Commission or Home Country Regulators Test") or (iii) the acquiror knows or has reason to know that U.S. ownership exceeds the limits for the applicable exemption (the "Reason to Know Test").

a. **ADTV Test.** The first prong of the alternate test is based on a comparison of ADTV of the subject securities in the United States, as compared to worldwide ADTV.[19] This element of the alternative test is satisfied where ADTV for the subject securities in the United States 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 ADTV on a worldwide basis.[20]

The revised rules require that there be a "primary trading market" for the subject securities, as the term is defined in the rules,[21] in order for the acquiror in a negotiated transaction to rely on the

17 See the Adopting Release at 32-34.

18 See new Securities Act Rule 800(h)(6) and Instruction 3 to amended Exchange Act Rules 14d-1(c) and (d).

19 The comparable prong of the existing hostile presumption test compares "aggregate trading volume of the subject securities on all national securities exchanges in the United States, on the Nasdaq market, or on the OTC market as reported to the NASD" to the worldwide aggregate trading volume. See, e.g., the existing Instruction 3 to Exchange Act Rules 14d-1(c) and (d). Although the revised instruction in the Adopting Release refers to "average daily" instead of "aggregate" trading volume, and eliminates the references to the NASD (or its successor FINRA), these changes do not appear to be substantive.

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

21 See Exchange Act Rule 12h-6(f)(5).

alternate test as a result of being unable to conduct the look through analysis. "Primary trading market" means that at least 55 percent of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdictions during a recent twelve-month period.[22] 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 United States for that class.[23] It should be noted that where there is no primary trading market for the subject securities outside of the United States, an acquiror in a negotiated transaction may not rely on the alternative test.

b. Information Filed by the Issuer with the Commission or Home Country Regulators Test. The second prong of the alternate test requires the acquiror to consider information about U.S. ownership levels that appear in annual reports or other annual information filed by the issuer with the Commission or with the regulator in its home jurisdiction. The revised rules specify that only annual reports or other annual information filed before the public announcement of the transaction must be taken into account by the acquiror because the Commission believes it is appropriate to set a time limit on the information that an acquiror must consider, since the planning process of the transaction and the certainty of the exemption itself may be disrupted by a filing that is made late in the process.

c. Reason to Know Test. The third prong of the alternative test provides that an applicable cross-border exemption is not available, even where all the other elements of the alternate test are met, if the acquiror "knows or has reason to know" that U.S. beneficial ownership levels exceed the limits of the applicable exemption.[24] The revised rules clarify that an offeror is deemed to have reason to know information about U.S. ownership of the subject class that appears in any filing (either by the issuer or by other parties reporting beneficial ownership of the subject securities)[25] with the Commission or any regulatory authority in the issuer's home country or (if different) the jurisdiction in which its primary trading market is located.[26] The Commission has recognized that each other element of the eligibility test has limitations which may translate into an inaccurate and incomplete picture of the subject security holder base, and thus, this element is intended by the SEC to protect the interests of U.S. investors under the current hostile presumption because this element captures information that the acquiror may gain as a result of its own assessment of the target company and the feasibility of the transaction.

The revised rules also contain additional references to specific sources of information that will be attributed to the acquiror,[27] including (i) information about U.S. ownership available from the issuer or obtained or "readily available"[28] from any other source that is reasonably reliable, (ii) information

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22 See Exchange Act Rule 12h-6(f)(5)(i).

23 See Exchange Act Rule 12h-6(f)(5)(ii).

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

25 Only "annual reports" or filing of "annual information" by the issuer are covered in the element of the test described in 2.b. above. Reports that may be covered by the "reason to know" element of the revised test include beneficial reports by third parties reporting ownership in the subject class.

26 See proposed Securities Act Rule 802(c)(4) and proposed Instruction 3.iv. to Exchange Act Rules 14d-1(c) and (d)

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

28 "Readily available" for these purposes means publicly available from sources reasonably accessible to the issuer or the acquiror at no or limited cost.

about U.S. ownership which could be obtained pursuant to an agreement between target and acquiror where the acquiror has the right to obtain information from the target related to U.S. ownership or (iii) information about U.S. ownership acquired by third party information providers and other advisors engaged by the parties to the transaction. The examples of specific sources cited in the revised rules are not intended to be exclusive; an acquiror may have reason to know information from other sources, depending on the particular facts and circumstances of the transaction.

The Commission also believes that a time limit is appropriate so that the ability to rely on a cross-border exemption is not called into question by knowledge acquired after announcement and has adopted limiting language to the revised instructions that makes it clear that knowledge or reason to know acquired after the public announcement will not disqualify the acquiror from relying on the cross-border exemptions.[29]

3. Changes to eligibility test for rights offering

The changes to the eligibility test adopted by the revised rules will also apply to the calculation of U.S. ownership for rights offerings. Issuers will be permitted to 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.[30] This change will give issuers 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 of rights offerings, rather than the date of public announcement for business combinations.

B. Changes to the Tier I exemptions

1. Expanded exemption from Exchange Act Rule 13e-3

Rule 13e-3 establishes filing and disclosure requirements for certain affiliated transactions, where those transactions would have a "going private" effect. Prior to the revisions, Rule 13e-3(g)(6) exempted parties engaged in an affiliated cross-border business combination transaction from the application of Rule 13e-3 where that transaction was structured as an issuer or third-party tender offer under the Tier I cross-border exemptions, or as a securities offering made pursuant to Securities Act Rule 802. Transactions such as cash mergers, compulsory acquisitions for cash, and schemes of arrangement not consummated under these rules could be subject to Rule 13e-3 even where they otherwise would have been eligible for the cross-border exemption pursuant to Rule 13e-3(g)(6), if structured under Tier I or Securities Act Rule 802.

As revised, Rule 13e-3(g)(6) expands the scope of the exemptions from Rule 13e-3 to cover a broader range of cross-border transactions by eliminating the limits on the kinds of cross-border transactions that could be covered under the exemption in Rule 13e-3(g)(6). Now, in order to qualify for the expanded exemption from Rule 13e-3, a party must meet all of the conditions for reliance on Rule 802 or Tier I and need not worry about the form of the transaction.

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[29] The Commission has done this by inserting the words "before the public announcement" into the first sentence of this amended provision. See new Securities Act Rule 800(h)(7)(iii); Instruction 3.iii. to amended Exchange Act Rules 13e-4(h)(8) and (i); and Instruction 3.iii. to amended Exchange Act Rules 14d-1(c) and (d).

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

It should be noted that a party relying on revised Rule 13-3(g)(6) for affiliated transactions not conducted pursuant to Securities Act Rule 802 or Tier I must submit a Form CB to the same extent as would be required in a transaction conducted pursuant to those provisions. Form CB is discussed in Section E, below.

2. Technical changes to Rule 802

The Commission adopted as proposed the changes to Rules 802(a)(2) and (3) to substitute the word "offer" for "issuer." This is a correction to the existing rule rather than a substantive change.

C. Changes to the Tier II Exemptions

1. Tier II relief for tender offers not subject to Rule 13e-4 or Regulation 14D

Because the Tier II exemptions are contained in Rule 13e-4 and Regulation 14D, the staff of the SEC has received numerous questions about whether a bidder may rely on these exemptions for a tender offer subject to the provisions of Regulation 14E only. In the Adopting Release and the revised rules, the Commission has clarified the rules to make Tier II exemptions available to Regulation 14E-only offers regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D[31] so long as the tender offers would otherwise qualify for those exemptions, but for the fact that the tender offer is not subject to Rule 13e-4 or Regulation 14D.

2. Tier II relief for concurrent U.S. and non-U.S. offers

a. **Multiple foreign offers in connection with a U.S. offer.** The Tier II cross-border exemptions that existed prior to the revised rules permitted a bidder to conduct two separate but concurrent tender offers: one made only to U.S. target security holders and another open only to foreign target holders. The revised rules now permit the use of more than one offer outside of the United States to be made.[32] Bidders relying on this exemption must pro rate tendered securities on an aggregate basis, where required under U.S. rules.[33]

b. **U.S. offer may include non-U.S. holders of American Depositary Receipts ("ADR").** Prior to the implementation of the revised rules, Tier II exemptions specified that a U.S. offer conducted in connection with a concurrent foreign offer under Tier II may be open only to U.S. security holders.[34] This limitation has proved problematic because bidders frequently seek to include all holders of ADRs, not only U.S holders, in the U.S. offer. The revised rules have responded to this concern and allow a bidder in a cross-border tender offer conducted under Tier II to make the U.S. offer available to all holders of ADRs, including non-U.S. holders.[35] The Commission has emphasized that this and other rule changes to the Tier II exemptions are not intended to enable a bidder to make an offer open exclusively to ADR holders.

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

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

33 See Exchange Act Section 14(d)(6) and Exchange Act Rules 13e-4(f)(3) and 14d-8. See also Release Nos. 33-8917; 34-57781; File No. S7-10-08, *Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions* (May 6, 2008), available at http://www.sec.gov/rules/proposed/2008/33-8917.pdf (the "Proposing Release") at in Section II.C.2.c..

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

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

c. **U.S. holders may be included in foreign offer.** The Commission has adopted as proposed revisions allowing a bidder to include U.S. target security holders in a foreign offer conducted under Tier II only where: (i) the laws of the foreign 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.[36]

3. Termination of withdrawal rights while counting tendered securities

The Commission has adopted as proposed the rule revisions permitting a bidder in a cross-border tender offer conducted under Tier II to suspend withdrawal rights after the expiration of an offer while tendered securities are being counted and until those securities are accepted for payment so long as:[37]

- 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 other than the minimum acceptance condition have been satisfied or waived; and
- 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 tendered securities.

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.

4. Subsequent offering period changes

a. **Maximum time limit on subsequent offering period eliminated.** Previously, Rule 14d-11 permitted a third party bidder in a tender offer for all of the subject class of securities to include a subsequent offering period of 20 U.S. business days during which securities may be tendered and purchased on a rolling or "as tendered" basis if certain conditions were met. The 20 day offering period often conflicted with foreign laws because the subsequent offering periods are significantly longer in many foreign jurisdictions. The revised rules have eliminated the maximum time limit on the length of a subsequent offering period in both foreign and domestic tender offers (this change has also been made to all tender offer rules).

b. **Prompt payment of securities tendered during the subsequent offering period.** Before the adoption of the revised rules, bidders had to immediately and promptly pay for all securities tendered in a subsequent offering period and in many instances, this requirement was practically unworkable in non-U.S. jurisdictions. The revised rules will 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 (determined by reference to the relevant foreign jurisdiction) of the date of tender. The Commission adopted this rule change to set a minimum standard for payment for securities tendered during a subsequent offering period. Where local law mandates and local practice permits payment on a more expedited basis, payment must be made more quickly than 20 business days from the date of tender to satisfy U.S. prompt payment requirements.

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

[37] See new Exchange Act Rules 13e-4(f)(2)(v) and 14d-1(d)(2)(viii).

c. **Payment of interest on securities tendered during the subsequent offering period.** The Commission has adopted as proposed a rule change permitting bidders in a Tier II cross-border offer to pay interest on securities tendered during a subsequent offering period, where required under foreign law.[38] This rule change was adopted to correct a direct conflict between Regulation 14D, which requires a bidder to pay the same form and amount for securities tendered in the subsequent offering as in the initial period, and the laws of certain foreign jurisdictions where bidders are required to pay interest on securities tendered during the subsequent offering period.

d. **Mix and match offers and the initial subsequent offering periods.** The Commission has adopted as proposed, rules to facilitate so called "mix and match" cross-border tender offers. In a mix and match offer, target security holders are offered a set mix of cash and securities of the bidder with the option to elect a different proportion of cash and securities of the bidder to the extent that other tendering security holders make opposite elections. The bidder typically sets a maximum amount of cash that it will issue and holders' elections are prorated to the extent they cannot be satisfied through offsetting elections made by other security holders. These "mix and match" offers conflict with U.S. requirements applicable to the subsequent offering period that require there be no ceiling on the form of consideration offered, as well as rules that require a bidder to offer the same form and amount of consideration to tendering security holders in both the initial and subsequent offering periods. The revised rules expressly permit the use of separate offset pools from securities tendered during the initial and subsequent offering periods and 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.

5. Terminating withdrawal rights immediately after reducing or waiving a minimum acceptance condition

U.S. tender offer rules generally provide that a bidder must allow a tender offer to remain open for a certain period of time after a material change to its terms is communicated to the target holders, as well as provide withdrawal rights during this period. In general, waiving or reducing the minimum acceptance condition is considered a material change in the terms of the offer which triggers this requirement. The Commission has recognized that this requirement conflicts with foreign laws and will not object if a bidder in a cross-border tender offer satisfying the requirements of Tier II waives or reduces the minimum acceptance condition in the offer without providing withdrawal rights after the reduction or waiver (except where an extension is required under Exchange Act Rule 14e-1) under the following conditions:

- The bidder must announce that it may waive or reduce the minimum acceptance condition at least five business days before the actual waiver or reduction;
- The bidder must disseminate the announcement through a press release and other methods reasonably calculated to inform U.S. holders of the possibility of a waiver or reduction which may include placing an advertisement in a newspaper of national circulation in the United States;
- The press release must state the exact percentage to which the minimum acceptance conditions may be reduced (or if it will be waived, rather than reduced);
- The bidder must announce its actual intentions regarding waiver or reduction as soon as required under home country rules;

[38] See new Exchange Act Rule 14d-1(d)(2)(vi).

- During the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided;
- The announcement must advise security holders to withdraw tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition;
- The procedure for waiving or reducing the minimum acceptance conditions must be described in the offering materials;
- The offer must remain open for at least five business days after the waiver or reduction of the minimum acceptance condition;
- All offer conditions are satisfied or waived when withdrawal rights are terminated;
- The potential impact of the waiver or reduction of the minimum acceptance condition is fully discussed in the initial offering materials or any supplemental materials; and
- The bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable foreign law, and in any case, may not reduce or waive the minimum acceptance condition below a majority[39] of the outstanding securities of the subject class.

It should be noted that the SEC staff's guidance above can **only** be relied upon where law or practice in the applicable foreign jurisdiction does not permit the bidder to provide withdrawal rights after the reduction or waiver, as required under U.S. law.

6. Early termination of an initial offering period or voluntary extension of an initial offering period

Where the expiration date of a tender offer has been set by the bidder, whether in the original offer materials or in supplemental materials announcing an extension of the offer, changing that expiration date requires notice to target security holders before the initial offering period closes and withdrawal rights terminate. This extension requirement in U.S. rules conflicts with the law or practice in some foreign 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. Because of this conflict, many bidders have sought additional relief from the SEC staff to terminate the initial offering period before its scheduled expiration, thereby terminating withdrawal rights, upon the satisfaction of all offer conditions.

The Commission has amended Exchange Act Rules 13e-4 and 14d-1(d) to codify the guidelines set forth in prior staff guidance to permit early termination of an initial offering period, including a voluntary extension of that period, if at the time the initial offering period and withdrawal rights end:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied;
- The bidder has adequately discussed the possibility and 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

[39] The Commission considers a "majority" for these purposes to be any number greater than 50% of the outstanding securities of the subject class.

- 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.

As discussed in the Proposing Release, the amendments to Exchange Act Rules 13e-4 and 14d-1(d) do not permit early termination upon the waiver of an offer condition.[40]

7. Exceptions from Rule 14e-5 for Tier II cross-border tender offers

Rule 14e-5 safeguards the interests of persons who sell their securities in response to a tender offer by prohibiting an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the tender offer, while other security holders are limited to the terms of the tender offer. As amended, new Rules 14e-5(b)(11) and (b)(12) seek to modernize and enhance the utility of Rule 14e-5 by codifying class exemptive letters in three areas: purchases and arrangements to purchase securities of a foreign private issuer (x) pursuant to the non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers; (y) by offerors and their affiliates outside of a tender offer; and (z) by financial advisors' affiliates outside of a tender offer.

a. Purchases or arrangements to purchase pursuant to a foreign tender offer(s). Rule 14e-5(b)(11) provides an exception to the prohibitions of Rule 14e-5 by permitting purchases in a foreign offer(s) made concurrently or substantially concurrently with a U.S. offer if each of the conditions of the exception are met.[41] These conditions include requiring that U.S. security holders be treated as favorably as foreign holders as well as requiring transparency regarding the offeror's intent to make purchases pursuant to a foreign offer in the U.S. offering documents.

b. Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates. Revised Rule 14e-5(b)(12) permits purchases or arrangements to purchase outside of a Tier II tender offer by an affiliate of the financial advisor and an offeror and its affiliates if certain conditions are satisfied, including that the subject company must be a foreign private issuer and the covered person must reasonably expect that the tender offer qualifies under Tier II. In order to comply with the exception, the financial advisor's purchasing activities must be "consistent with the [f]inancial [a]dvisor's [a]ffiliates' normal and usual business practices, and ... not conducted for the purpose of promoting or otherwise facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or maintaining or affecting the price of, the securities of the subject company."[42]

D. <u>Expanded availability of early commencement of exchange offers</u>

Prior to the revisions, the ability to "early commence" an exchange offer was available only when an exchange offer was subject to Rule 13e-4 or Regulation 14D.[43] As revised, the rules now allow all exchange offers, including those for domestic target companies not subject to Rule 13e-4 or Regulation 14D, to commence upon the filing of the registration statement registering the offer.[44] Amended Securities Act Rule 162(a) will allow early commencement for a "Regulation 14E-only" exchange offer only under the following conditions:

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40 See Proposing Release, footnote 216.

41 See new Exchange Act Rule 14e-5(b)(11)(i) through (v).

42 See page 83 of the Adopting Release note 267 referencing Condition 4 in the letter *Rule 14e-5 Relief for Certain Trading Activities of Financial Advisiors* (April 4, 2007).

43 Securities Act Rule 162(a).

44 See amended Securities Act Rule 162(a) and (b).

- The bidder provides withdrawal rights to the same extent as would be required under Rule 13e-4 and Regulation 14D;[45] and
- If there is a material change in the information provided to target security holders, the bidder must disseminate revised materials as required under Exchange Act Rules 13e-4(e)(13) and 14d-4(d) and must hold the offer open with withdrawal rights for the minimum time periods specified in those rules.

The Commission also amended Securities Act Rule 162(b) to make it clear that the prospectus delivery requirements, including the requirement to deliver a revised prospectus and prospectus supplements contained in that provision, also will extend to offers not subject to Rule 13e-4 or Regulation 14D.[46]

E. Changes to schedules and forms

1. Form CB

When an offeror or issuer relies on the Tier I cross-border exemption, it must submit to the Commission a Form CB,[47] including an English translation of the offering materials, if the tender offer would have been subject to Rules 13e-3 or 13e-4 or Regulation 14D, but for the Tier I exemption. Prior to the revisions, only persons already filing reports with the Commission under Section 13(a) or 15(d) of the Exchange Act were required to submit a Form CB electronically via the EDGAR system. The revised rules now require all Form CB's be submitted via the EDGAR system and if a Form F-X is filed in connection with a Form CB, it also must be submitted via EDGAR[48]. The Commission has recognized that submitting these forms via EDGAR may result in additional costs and timing concerns for foreign companies not already required to do so, but it does not believe that these electronic filings will be a significant burden compared with other considerations that enter into the decision to include or exclude U.S. target holders, and that it will be a benefit to U.S. security holders to have electronic access to this information.[49]

2. Schedule TO, Form F-4 and Form S-4

The Commission has adopted as proposed 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 Commission believes that these boxes will enable the staff to perform their review process more efficiently because the marking of each applicable box will provide the staff with information that will eliminate staff comments that may be based on misperceptions about which exemption the filer is seeking and which U.S. rules apply to the transaction.

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45 This includes back-end withdrawal rights as well as withdrawal rights during an offer.

46 See amended Securities Act Rule 162(b).

47 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).

48 Form F-X must be filed by all foreign companies that furnish a Form CB to the Commission and in other circumstances.

49 In situations in which the electronic submission poses a significant burden, a hardship exemption is available. See Rules 201 and 202 of Regulation S-T.

F. Beneficial Ownership Reporting by Foreign Institutions

The beneficial reporting requirements in Sections 13(d) and 13(g) of the Exchange Act and corresponding regulations provide investors and the issuer with information about accumulation of securities that may have the potential to change or influence control of an issuer. Any person who acquires more than 5 percent of a class of equity securities registered under Section 12 of the Exchange Act and other specified equity securities, must report the acquisition on Schedule 13D within 10 days and any person holding more than 5 percent of a class of such securities at the end of the calendar year, but not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. Schedule 13G filers include persons exempt from the requirements of Section 13(d), as well as specified institutional investors holding securities in the ordinary course of business and not with a control purpose.

Before the adoption of the revised rules, foreign institutions that sought to use Schedule 13G as qualified institutions under Rule 13d-1(b)(1)(ii) needed to obtain an exemptive order from the Commission or a no-action position from the Division of Corporation Finance. Now, pursuant to the revised Rule 13d-1(b)(1)(ii) foreign institutions may use Schedule 13G if they are subject to a foreign regulatory scheme substantially comparable to the regime applicable to the U.S. institutions listed in subparagraphs (A) — (J) of the current rule. This exemption is only available to institutions that acquire and hold the equity securities in the ordinary course of business and not with the purpose of effecting or influencing or changing control of an issuer. The Commission's revisions to Rule 13d-1(b)(1)(ii) are intended to codify no-action relief granted to certain institutions, and each institution's continued reliance on the no-actions letters will be appropriate to the extent the facts presented in the letter do not differ materially in the future.

G. Interpretive Guidance

1. Foreign target security holders and U.S. all-holders requirement

The majority of the revisions discussed in the Adopting Release deal with cross-border business combination transactions where the target is a foreign private issuer. As the SEC continues to encourage international securities and takeover regulators to minimize the ability of bidders to exclude U.S. holders, the Commission has recognized the need to take similar steps regarding the ability of U.S. bidders to exclude non-U.S. holders. The SEC therefore reiterated its position that the all-holders rules,[50] which require all target security holders in a tender offer to be included in the tender offer and treated equally, apply to both U.S. and non-U.S. target holders.

The Commission has recognized that this may present a burden for bidders that must comply with both foreign and U.S. rules, and after soliciting comments on whether an amendment to the U.S. equal treatment provisions was necessary, decided not to adopt a de minimis or other exception to the U.S. all-holder provisions. It noted however, that in special circumstances, requests for relief will be considered on a case-by-case basis, particularly where a bidder can demonstrate unusual facts warranting an accommodation from the all-holders rule.

The Commission also solicited comment on whether any amendments to the U.S. equal treatment provisions were necessary or advisable to allow certain target security holders to be excluded from the offer, and concluded that they were not.

The Adopting Release also reiterated the Commission's statement in the Proposing Release that it is inappropriate for bidders to shift the burden of assuring compliance with the relevant jurisdiction's laws to target

[50] See Rule 13e-4(f), as amended, and Rule 14d-10.

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 its offer.

2. Exclusion of U.S. target security holders from cross-border tender offers

Notwithstanding the Commission's desire for the inclusion of U.S. holders in foreign target tender offers, the SEC release in which the cross-border exemptions were initially adopted provided guidance regarding the circumstances under which offer materials for foreign tender offers may be posted on the internet without triggering U.S. jurisdictional means and U.S. tender offer and registration rules. The SEC provided additional guidance in this area.

Where a bidder makes an exclusionary offer[51] for securities of foreign private issuers that trade on a U.S. exchange, the Commission will look closely to determine whether bidders are taking reasonable measures to keep the offer out of the United States. The Commission has identified some precautionary measures bidders may take to avoid triggering U.S. rules in prior releases.[52]

In some foreign jurisdictions, local law may prohibit the exclusion of any target security holders in a tender offer for all outstanding securities of a subject class. Such foreign all-holders requirements, like similar U.S. rules, may not require that offer materials be disseminated into another jurisdiction; however, they generally provide that a bidder in a tender offer for all target securities may not reject tenders from security holders from any jurisdiction, including the United States, should those holders learn of and tender into the offer on their own initiative. 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.[53]

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 United States so long as the bidder takes adequate measures intended to prevent sales to and tenders from U.S. holders.[54]

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51 "Exclusionary Offer" means a tender offer, including an exchange offer, that excludes U.S. holders of the subject class of securities for which the offer is made.

52 See Statement of the Commission regarding use of Internet Web sites to offer securities, solicit securities transactions or advertise services offshore, Release No. 33-7516 (March 23, 1998) [63 FR 14806] ("1998 Internet Release"), Section III.B and See *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release No. 33-7759, 34-42054 (October 22, 1999) [64 FR 61382], Section II.G.2. As noted in the Proposing Release, bidders should not avoid payments to U.S. target holders in business combinations other than tender offers, where the target company is being merged out of existence, because in these kinds of transactions, unlike in tender offers, all target securities will be acquired in a single transaction.

53 See Proposing Release, Section II.G.3. The Commission notes that in many foreign jurisdictions that have such all-holders rules, foreign regulators may grant exemptions to permit exclusion of U.S. and other foreign holders under certain circumstances, such as when U.S. holders make up only a small percentage of the total target security holder base. The Commission is troubled when a bidder announces to the marketplace that it will exclude U.S. target holders before it receives the required approvals from foreign regulatory authorities to do so, and where the announcement itself causes U.S. holders to sell into the marketplace, thereby reducing their numbers to the point at which an exemption to allow exclusion of U.S. holders is acceptable to the foreign regulator.

54 See generally, 1998 Internet Release, Section III.C. and Proposing Release, Section II.G.2.

3. Vendor Placements

A vendor placement in a cross-border exchange offer occurs when a bidder offers securities to foreign target holders in an offer, but establishes an arrangement whereby securities that would be issued to tendering U.S. target holders are sold offshore by third parties on behalf of U.S persons, who receive cash proceeds from the sale. When permissible, the vendor placement procedure allows a bidder in a cross-border exchange offer to extend the offer into the United States without registering the securities offering under Section 5 of the Securities Act.

In the Adopting Release, the Commission has provided clarity about the factors the bidders should consider when contemplating the use of the vendor placement procedure. 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 as compared to the number of bidder securities outstanding before the offer;
- The number of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the number 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 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.

The Commission believes that the liquidity of the market for the bidder's securities is relevant to whether registration under Section 5 should be required, and stated in the Adopting Release, that "unless the market for the bidder's securities to be sold through the vendor placement process is highly liquid and robust and the number of bidder securities to be issued for the benefit of U.S. target holders relatively small compared to the total number of bidder securities outstanding, a vendor placement arrangement in a cross-border exchange offer would in our view be subject to Securities Act registration under Section 5."[55] In addition, the Commission believes it is relevant whether sales of a bidder's securities in the vendor placement process are accomplished within a few business days of the close of the offer and whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before the sales process is complete and whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

Where a tender offer is also subject to the equal treatment provisions of the U.S. tender offer rules, bidders must seek an exemption from the rules in order to offer U.S. security holders a different form of consideration than that provided for foreign target holders. In the Adopting Release, the Commission explains that issuing securities to some U.S. holders, such as U.S. institutions for whom an exemption from Section 5 is available, while providing cash to all others pursuant to a vendor placement arrangement, is inconsistent with the equal treatment requirements of U.S. tender offer rules.[56] The SEC generally believes that cross-border tender

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[55] See Adopting Release at page 118.

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

offers eligible to be conducted under Tier I exemption represent the appropriate circumstances under which bidders may provide cash to U.S. target holders while offering securities to foreign target holders.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

Ltd. (August 20, 1999).