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SEC Proposes to Revise Cross-Border Business Combination Rules (Short)

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Client Advisory
May 22, 2008 by Guy P. Lander and Alice Kenniff

The SEC recently proposed revisions to its rules for cross-border business combinations. These revisions are intended to address practical difficulties encountered since the cross-border rules were adopted in 1999, in an effort to enhance their usefulness.

Currently, the cross-border rules cover statutory mergers, amalgamations, tender offers and exchange offers where a target company is a foreign private issuer.[1] The cross-border exemptions are structured as a two-tier system based on the level of U.S. interest in a transaction, which is measured by the percentage of a foreign target's securities held by U.S. investors. Where 10% or less of the securities of a foreign private issuer that is the target are held by U.S. investors, a qualifying cross-border transaction will be exempt from most U.S. tender offer rules and from the registration requirements of Section 5 of the Securities Act of 1933. These are the Tier I Rules and Rules 801 and 802. Where more than 10% but no more than 40% of the securities of a foreign private issuer that is the target are held by U.S. investors, the cross-border exemptions provide narrow relief from certain U.S. tender offer rules. These are the Tier II Rules and cover accommodations such as those for prompt payment, 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 for going private transactions.

The proposed rule changes include:

1. Refining the tests for calculating U.S. ownership of the target company to determine eligibility to rely on the cross-border exemptions in both negotiated and hostile transactions. These refinements include changes to:

    a. use the date of public announcement of the business combination as the reference point for calculating U.S. ownership;

    b. permit the offeror to calculate U.S. ownership as of a date within a 60-day range before announcement; and

    c. specify when the offeror has reason to know information about U.S. ownership that may affect its ability to rely on the presumption of eligibility in hostile tender offers.

2. Expanding the relief under Tier I for affiliated transactions subject to Rule 13e-3 (the going private rule) for transaction structures not covered under the current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash.

3. Extending the specific relief under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act (i.e., for targets that are not filing periodic reports with the SEC under the Securities Exchange Act).

4. Expanding the relief under Tier II to eliminate recurring conflicts between U.S. and foreign law and practice, including:

   a. allowing more than one offer to be made outside the United States in conjunction with a U.S. offer;

   b. permitting bidders to include foreign security holders in the U.S. offer and U.S. holders in the foreign offers;

   c. allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;

   d. allowing subsequent offering periods to extend beyond 20 U.S. business days;

   e. allowing securities tendered during the subsequent offering period to be purchased within 14 business days from the date of tender;

   f. allowing bidders to pay interest on securities tendered during a subsequent offering period; and

   g. allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods.

5. Codifying existing exemptive orders for the application of Rule 14e-5 for Tier II tender offers.

6. Expanding the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act (i.e., for targets that are not filing periodic reports with the SEC under the Securities Exchange Act).

7. Requiring that all Form CBs and accompanying Form F-Xs be filed electronically.

8. Modifying the cover pages of certain tender offer schedules and registration statements to list the cross-border exemptions being relied upon.

9. Permitting foreign institutions to report on Schedule 13G to the same extent as U.S. institutions, without obtaining individual no-action relief.

Additionally, the SEC provided guidance or solicited comments on the following issues:

1. The ability of bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date.

2. The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights.

3. The application of the all-holders provisions of the tender offer rules to foreign target security holders.

4. The ability of bidders to exclude U.S. target security holders in cross-border tender offers.

5. The ability of bidders to use the vendor placement procedure for exchange offers subject to Section 13(e) or 14(d) of the Exchange Act.

Questions regarding this client advisory may be directed to Guy P. Lander at (212-238-8619, lander@clm.com).

Please click here if you would like to see an in depth look at "SEC Proposes to Revise Cross-Border Business Combination Rules."Footnotes

[1] A foreign private issuer is a non-U.S. company that either (a) has 50% or less of its outstanding voting securities held of record by U.S. residents, or (b) has more than 50% of its outstanding voting securities held by U.S. residents and does not have (i) a majority of its officers or directors who are U.S. citizens or residents, or (ii) more than 50% of its assets located in the United States or (iii) its business principally administered in the United States.

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