INSIGHTS

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SECURITIES REGISTRATION

Avoiding Securities Act Registration in Share-for-Share Business Combinations between Non-U.S. Companies

If a non-U.S. target company has a shareholder basis that includes a significant percentage of U.S. shareholders, a non-U.S. acquiror must consider the application of the U.S. securities laws. There are, however, ways for the foreign company to avoid registering securities under the Securities Act of 1933.

By Guy P. Lander

When one non-U.S. company seeks to acquire another non-U.S. company, it may choose to structure the transaction as a share-for-share business combination. However, if the target company's shareholder base includes a significant percentage of U.S. holders, a share-for-share transaction could trigger various U.S. securities law issues, including a requirement to register the offered shares with the SEC.[1] For example, if a Canadian company seeks to acquire an Argentinian company and the target Argentinian company has U.S. shareholders, the U.S. securities laws could be implicated.

There are several reasons a non-U.S. acquiror may want to avoid registration under the U.S. Securities Act of 1933 (Securities Act): (1) the cost and delay of registration; (2) liability under Sections 11 and 12(a)(2) of the Securities Act for the acquiror's, directors, officers, underwriters and others; (3) publicity restrictions under the Securities Act; and (4) the acquiror becoming an SEC reporting company. This article addresses how foreign private issuer (FPI) acquirors might avoid SEC registration for the issuance of the acquiror's securities in share-for-share business combinations (including acquisitions that are essentially mergers) between FPIs that are not registered with the SEC and are not reporting in the United States.

Common Structures Using Shares as Consideration

A non-U.S. (FPI) acquiror may use its shares as consideration in a business combination and structure the transactions in a variety of ways. The most common structures are:

- *Exchange offer*. The acquiring company directly invites stockholders of the target company to exchange securities of the target company for those of the acquiror. Exchange offers are tender offers where the

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consideration is stock. (This article will not be covering tender offers.)

- *Plan or scheme of arrangement.* The business combination and issuance of acquiror shares is conducted under statutes where a court supervises and approves the fairness of the transaction.
- *Merger of two entities by operation of law.* Where the stockholders of the target company (disappearing company) receive shares of the acquiring company (surviving company) by operation of law.
- *Amalgamation, consolidation or similar transaction.* Typically, a newly formed holding company issues its securities to the stockholders of the constituent companies, which companies then merge into, or are otherwise acquired by, the new holding company.[2]

Each of these transaction structures requires an analysis of how U.S. federal securities laws (among other laws) apply to the transaction. As discussed above, the U.S. securities laws could affect the process and timing of the transaction as well as post-closing obligations of the company.

Determining Whether SEC Registration Is Required

The Registration Requirement

The acquiror's issuance of its securities in exchange for those of the target could trigger a requirement to register the offered shares with the SEC, particularly if the target's shareholder base includes a significant percentage of U.S. stockholders.[3] When non-U.S. companies that are not reporting companies in the U.S. (even those with no U.S. trading market for their securities) engage in share-for-share mergers (or other binding share exchanges), if the transaction is approved by a shareholder vote of the target's shareholders, then the target shareholders will receive consideration consisting of the securities of the acquiring company.

Section 5 of the Securities Act applies broadly to require the registration with the SEC of every offer or sale of securities in the United States, including securities issued in business combinations, unless an exemption is available. Rule 145(a) under the Securities Act extends the terms "offer" and "sale" to include mergers and other business combinations involving the exchange of securities after a shareholder vote. Transactions outside the United States, even if solely between non-U.S. companies, are subject to Section 5 registration if U.S. jurisdictional means are used, which is interpreted very broadly. Consequently, the issuance by the acquiror of its shares to the U.S. target shareholders in exchange for their shares in the target (*i.e.*, acquired in a merger adopted by stockholder vote) would be deemed an offer and sale of the acquiror's securities within the meaning of Rule 145(a) under the Securities Act. So, the registration requirement of the Securities Act would apply to the securities issued by the surviving entity to U.S. stockholders of the target. Accordingly, the issuance of shares by the surviving company would have to be registered under Section 5 of the Securities Act or be exempt from registration.

What Is a "Foreign Private Issuer?"

The SEC's rules make important accommodations in this area for FPIs. A FPI is an issuer, other than a foreign government and its political subdivisions, formed or organized outside of the U.S. that either:

(1) has 50 percent or less of its outstanding voting securities held of record by U.S. residents or
(2) has more than 50 percent of its outstanding voting securities held of record by U.S. residents but does not have any one of the following:
    (a) a majority of its executive officers or directors are U.S. citizens or residents, or
    (b) more than 50 percent of its assets are located in the U.S. or
    (c) its business is principally administered in the U.S.[4]

Exemptions from Registration

There are numerous exemptions that typically apply in cross-border share-for-share business combinations, which includes mergers.

Issuances to Non-U.S. Security Holders of Target Outside the U.S.

The issuance of securities by the FPI acquiror to the non-U.S. shareholders of the FPI target outside the United States may not be subject to registration under the Securities Act by virtue of Regulation S. Generally, Regulation S limits the requirement to register securities with the SEC to the territory of the U.S.[5]

Under Regulation S, offers and sales of securities outside the United States do not trigger registration under the Securities Act. Regulation S also sets forth a non-exclusive safe harbor for offers and sales outside the United States (*i.e.*, "Offshore Transactions" as defined in Regulation S) with no publicity or other activity undertaken to condition the market in the United States for the relevant securities (*i.e.*, no "Directed Selling Efforts" in the United States as defined in Regulation S). Other offering restrictions may be required to be implemented, including certain transfer restrictions, depending on the circumstances.[6]

If the acquiror is a FPI with substantial U.S. market interest in its securities, the non-U.S. security holders of the target who receive the acquiror's securities outside the United States under Regulation S may receive those securities with restrictions on their ability to resell the securities in the United States.

Issuances to U.S. Security Holders Inside the U. S.

Rule 802. Rule 802 provides an exemption from the registration requirement of the Securities Act for certain cross-border exchange offers and business combinations where U.S. ownership is 10 percent or less of the relevant class of the securities of the target company and the target is a FPI.[7] Accordingly, if the acquiror issues securities in an exchange offer to U.S. shareholders for the securities of a target that is a FPI (or an exchange of securities for the securities of a FPI in a business combination), the issuance will be exempt from registration under Section 5 of the U.S. Securities Act if the U.S. shareholders hold no more than 10 percent of the subject class of securities and certain other conditions are met.[8]

The availability of Rule 802 is subject to the following conditions, among others.

- *Disclosure*. There is no specific information that must be provided under Rule 802. If any document or other information concerning the exchange offer (or business combination) is provided to offeree security holders of the non-U.S. target, an English version must be provided to the SEC (for notice purposes only) on Form CB. Financial Statements prepared under local GAAP that are submitted under Form CB need not be reconciled to U.S. GAAP. Information must be disseminated to offeree security holders of the non-U.S. target (with certain legends) on at least a comparable basis to that provided to security holders in the home jurisdiction. If the acquiror disseminates information by publication in its home jurisdiction, it must publish the information in the United States in a manner reasonably calculated to inform U.S. holders.[9]
- *SEC Filings: Form CB and Form F-X*. The bidder must submit to (but not file with) the SEC for notice purposes, under cover of Form CB, a copy of any information (and any amendments) in English that it disseminates to security holders in the exchange offer. Form CB must be submitted no later than the first business day after dissemination to security holders. A foreign company also must file with the SEC a Form F-X, appointment of agent for service of process in the United States, with Form CB.[10]

- *Transfer Restrictions*. If the securities subject to Rule 802 were "unrestricted" under Rule 144, the new securities also are unrestricted. If the securities were "restricted," the new securities issued under Rule 802 also will be restricted.[11]

Private Placement: Section 4(a)(2). The issuance of securities by the acquiror in an exchange offer (or other business combination) may qualify for a private placement exemption under the Securities Act. Section 4(a)(2) of the Securities Act exempts private placement transactions from the registration requirement of the Securities Act, and Rule 506 of Regulation D is the safe harbor under Section 4(a)(2).

To determine that the issuance of securities in an exchange offer (or other business combination) does not involve a "public offering" under Rule 506 and is, therefore exempt from registration, the acquiror must either (1) establish the identities of the U.S. security holders of the target (this may be possible where the number of securities holders is small and manageable), or (2) require that all U.S. security holders who tender their securities in connection with the business combination certify that they are accredited investors in order to receive the acquiror's securities (failing which they can only receive cash).

The acquiring company could place restrictions on the types of U.S. stockholders who may receive the acquiror's shares. For example, the acquiring company could restrict the issuance of its shares to U.S. stockholders of the target company to only those that are qualified institutional buyers. However, this approach may not be practicable because of the procedural measures required to implement it and because it may be prohibited under the home-country laws of one or both of the companies involved.[12]

So, if the number of U.S. security holders is small and manageable, the issuance of acquiror shares might be structured as a private placement. Generally, a Section 4(a)(2) and Rule 506 private placement may be used because Rule 506 preempts state securities ("blue sky") laws (except for notice and fees to the states). However, for the acquiror to avoid providing to investors the information otherwise required under Rule 506 (*e.g.*, U.S. GAAP reconciliation), all the U.S. holders of target shares must be accredited.[13]

- *Disclosure*. If all of the security holders of the target are accredited investors, the issuance of securities will not be subject to any disclosure requirements (other than the general anti-fraud provisions).[14] But, if there is at least one non-accredited investor in the target security holder group, the acquiror would be required to provide disclosure meeting the requirements of a full prospectus to the non-accredited investor(s) (and, to avoid selective disclosure or other fraud issues, to all other target security holders).
- *Transfer Restrictions*. The securities issued to target security holders in a private placement under Section 4(a)(2) and Rule 506 of Regulation D will be "restricted securities." Holders of restricted securities may resell their securities only outside the United States in an offshore transaction pursuant to Regulation S, or pursuant to a registration statement covering their securities or inside the United States pursuant to an exemption such as Rule 144.[15]

Rule 904 of Regulation S permits holders of restricted securities to resell their securities to purchasers outside the United States or through certain offshore securities markets without imposing any holding periods subject to any initial Regulation S distribution compliance period.[16] Consequently, holders of restricted securities may be able to resell their securities by executing their trade through an offshore stock exchange so long as the transaction has not been pre-arranged with a purchaser in the United States.[17]

Rule 144 imposes a minimum one-year holding period. Sales by non-affiliates of the acquiror could be effected following lapse of the one-year holding period. Once the one year has elapsed, sales of restricted securities can be made freely in the United States by non-affiliates under Rule 144.[18]

Issuances to Security Holders of Both a Non-U.S. Target and U.S. Target

Section 3(a)(10) of the Securities Act provides an exemption from registration for the issuance of the acquiror's shares in exchange for the shares of the target if the fairness of the terms of the exchange are approved by a court after a hearing open to all recipients of securities issued in the exchange. The SEC has granted Section 3(a)(10) no-action relief for numerous cross-border transactions, including schemes of arrangement or similar statutory arrangements involving a vote of affected security-holders, a court convened meeting of those security holders and a subsequent court ruling on the fairness of the transaction. Generally, the Section 3(a)(10) exemption would be available under the laws of various UK commonwealth countries, e.g., Australia, Bermuda, BVI, Canada, Cayman, England, Hong Kong, Ireland and South Africa.[19] However, it has not generally extended similar relief to statutory mergers under the laws of continental Europe, Latin America or other jurisdictions.[20]

The necessary elements for a valid exemption under Section 3(a)(10) are as follows:

(A) The securities must be issued in exchange for securities, claims, or property interests; they cannot be offered for cash.[21]

(B) A court or authorized governmental entity must approve the fairness of the terms and conditions of the exchange.[22]

(C) The reviewing court or authorized governmental entity must:

  (1) find, before approving the transaction, that the terms and conditions of the exchange are fair to those to whom securities will be issued;[23] and

  (2) be advised before the hearing that the issuer will rely on the Section 3(a)(10) exemption based on the court's or authorized governmental entity's approval of the transaction.

(D) The court or authorized governmental entity must hold a hearing before approving the fairness of the terms and conditions of the transaction.

(E) The court or governmental entity must be expressly authorized by law to hold the hearing, although it is not necessary that the law require the hearing.

(F) The fairness hearing must be open to all persons to whom securities would be issued in the proposed exchange.

(G) Adequate notice must be given to all those persons.

(H) There cannot be any improper impediments to the appearance by those persons at the hearing.[24]

The key consideration is whether "those to whom securities will be issued," *i.e.*, the target's security holders, are treated fairly.

The acquiror must confirm that the issuance of its common shares in exchange for the target shares will be covered (*i.e.*, exempt or qualified) in each state in which a U.S. holder is located.[25]

Subsequent exercise of convertible securities. If options, warrants or other convertible securities are issued by the acquiror, Section 3(a)(10) does not provide an exemption for their later exercise. The later exercise of the acquiror's options, warrants or other convertible securities by holders in the United States is viewed as a second, separate investment decision and purchase that must be registered or exempt. For this reason, options, warrants and convertible securities issued in transactions intended to qualify under Section 3(a)(10) are often structured so that they may not be exercised for a year or more, relying on the general view that the issuance of such an option, warrant or convertible security does not involve the present or concurrent offering of the underlying security.

Another way to handle this is to rely on the Rule 506 private placement exemption to cover the subsequent exercise if the exercising holder is accredited and the exercise otherwise meets the requirements for the exemption. In that case, a standard private placement purchaser letter is typically used to cover the exemption.[26]

Alternative Structures

Avoiding U.S. Jurisdictional Means: Exclusionary Offers

The exchange offer or merger could be structured in a so-called "exclusionary" manner (making an offer not open to U.S. residents, *i.e*., excluding U.S. shareholders) that would avoid the use of U.S. jurisdictional means, and thereby avoid the application of U.S. securities laws, because the laws and regulations only apply to offers made in the United States.[27] However, this may be impractical or prohibited under the home-country laws of one or both of the companies involved.

If the number of shares owned by U.S. holders is sufficiently small, making acquisitions of the shares held by such persons unnecessary to the successful conclusion of the acquiror's tender offer or exchange offer, the acquiror may elect to avoid the cost and difficulty of compliance with the U.S. securities law in connection with the acquisition by making an offer that is not open to U.S. residents. This is frequently done by non-U.S. bidders. In fact, the SEC has observed that this exclusion of U.S. investors is the non-U.S. bidder's method of choice in situations in which U.S. share holdings are not necessary for the success of the acquisition. The non-U.S. bidder, in this way, is able to avoid (1) the costs of complying with U.S. laws (which outweigh the benefit of U.S. security holder participation), and (2) registering the non-U.S. acquiror's securities with the SEC under the Securities Act and incurring a continuous reporting obligation under the Exchange Act.

Cash Offers

Cashing out target company shareholders avoids making an offer or sale of acquirors' securities. In stock-for-stock transactions, acquiror companies generally wish to minimize the cash consideration paid in the transaction. However, the acquiror may wish to offer cash consideration to the U.S. security holders of the target if the acquiror determines that only a limited number of target security holders are U.S. holders. By extending a cash only offer to the U.S. holders, the acquiror will be able to avoid the cost and difficulty of preparing a registration statement under the Securities Act.

However, the laws of the home jurisdiction of the acquiror or the target may prohibit different treatment of the target's security holders, i.e., with some holders offered the acquiror's securities and other holders (*i.e*., the U.S. holders) offered cash. Additionally, although the registration requirement of the Securities Act may not apply, the acquiror may have to comply with the tender offer rules under the Exchange Act for a cash tender offer extended to U.S. holders.

Cashing Out U.S. Target Holders

The acquiror may be able to acquire the target securities from U.S. security holders without filing a registration statement by using a "vendor placement." In a vendor placement, the acquiror issues its securities (that would otherwise be issued to the U.S. security holders of the target) to a third-party trustee that is a non-U.S. financial institution. The trustee is instructed by the acquiror to pool the acquiror's securities for all the U.S. security holders of the target and to sell those securities offshore that would have been issued to the U.S. security holders. After the sale, the trustee remits to each U.S. security holder the proceeds from the sale of the acquiror's securities that would have been issued to the U.S. security holder net of all expenses for the sale. A vendor placement requires that the non-U.S. trading market for the acquiror's securities is sufficiently liquid for the sale by the trustee. In effect the vendor placement converts an exchange offer including the acquiror's securities (which would have required Securities Act registration) into an offer solely for cash (which does not require registration).[28]

If the acquiror concludes that a substantial number of target securities are held by U.S. holders who are not "accredited investors" and that the acquisition of the target securities from that U.S. non-accredited investors is necessary for a successful acquisition, then a vendor placement may be appropriate.[29]

Other Considerations

The above list is not exclusive. An exchange offer may qualify for other exemptions from Securities Act registration. Additionally, a transaction may be structured to rely on several exemptions.[30] However, exemptions from registration are strictly construed and the burden of proof is on the issuer claiming the exemption. As a result, an issuer must take precautions when offering and selling securities under an exemption to ensure, if assessed at a later date, that the facts surrounding the issuance supported such an exemption.[31] Whether a particular exemption will be relied on depends on the facts and circumstances of the proposed transaction, including whether reliance is: (1) permitted under the equal treatment principles (and other provisions) of the corporate and other home country laws and practices of the companies involved; (2) feasible from a technical or mechanical perspective, including in light of the level of the target's U.S. ownership; (3) desirable from a marketing or investor relations perspective; and (4) likely to affect the chances of the proposed transaction being consummated.[32]

Registration

The offered shares could be registered, but registration is time consuming and expensive and also will result in the surviving company becoming a reporting company, with various disclosure, compliance and other obligations. The registration statement for business combinations generally is Form F-4, which is used to both register the shares issued and as a proxy statement. The MJDS also is available to eligible Canadian companies.[33]

No Tender Offer Regulation

Generally, a business combination effected by a merger (or similar binding share exchange) carried out through a statutory transaction involves a shareholder vote under local law. Generally, approval is required by the target company's board and its shareholders. In these kinds of business combinations, the tender offer provisions of the Exchange Act do not apply because no purchase offer is being made directly to individual target shareholders. Consequently, the merger (or similar binding share exchange) would not be subject to U.S. tender offer regulation.[34] However, if a transaction is structured as a tender offer, the tender offer regulations will apply (unless an exemption is available).

Other SEC Regulations

Exemption from U.S. Proxy Regulation

In a share-for-share exchange, the target will not be required to comply with U.S. proxy regulation for its offering circular if, as discussed above, it is a FPI. FPIs are exempt from the proxy rules of Section 14 of the Exchange Act.[35]

Regulation M

Regulation M under the Exchange Act generally prohibits participants (including the issuer and any affiliated purchaser) in a "distribution" from bidding for, purchasing or attempting to induce any person to bid for or purchase, a covered security (i.e., a security subject to a distribution and any reference security) during the applicable restricted period.[36] Generally, Regulation M applies to distributions of securities in connection with mergers, share exchanges and similar business combinations by prohibiting purchases of the offeror's shares (or other similar transactions) by the offeror and related persons during the restricted period.[37] Therefore, in an exchange transaction, such as discussed here, procedures may need to be implemented by the acquiror to ensure compliance with Regulation M. For example, the acquiror may need to terminate or suspend any share buyback or similar program.

The restricted period generally begins when proxy or offering materials are first disseminated and ends at the time of the shareholder vote or the expiration of the offer.[38]

Antifraud Provisions

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and similar U.S. state laws prohibit manipulation, fraud and misleading statements or omissions in connection with the purchase or sale of any security. These laws apply to business combinations.

Notes

1. *See* 1 Edward F. Greene, et al., *U.S. Regulation of the International Securities and Derivatives Markets*, at 9-40 n.125 (10th ed. 2013).
2. Alan P.W. Konevsky, *Share-for-Share Business Combinations Between Non-U.S. Companies: SEC Registration and its Consequences*, Practical Law (Aug. 4, 2011), *http://us.practicallaw.com/3-505-8131*. Business combinations providing a choice between cash consideration and shares, or consideration consisting of both cash and shares, would likely raise many of the same considerations as share-for-share transactions. *Id.*
3. *See* 1 Greene, *supra* note 1.
4. 17 C.F.R. § 230.405. Generally, the acquirer must "look through" the record ownership of certain securities brokerage firms, banks or other nominees holding securities of the target for the accounts of their customers to determine the percentage of the securities held in nominee accounts that have U.S. addresses. To determine the percentage of outstanding voting securities held by U.S. residents:
   (a) The issuer must use the "look through" method of calculating record ownership in Rule 12g3-2(a) under the Securities Exchange Act of 1934, except that its inquiry as to the amount of voting securities held in accounts of U.S. residents may be limited to voting securities held of record by broker-dealers, banks, and other nominees located in: (1) the United States, (2) the issuer's jurisdiction of incorporation, and (3) the primary trading market for the issuer's voting securities, if different than the issuer's jurisdiction of incorporation.
   (b) If, after reasonable inquiry, the issuer cannot obtain information from the nominee about the amount of voting securities represented by accounts of U.S. residents, including where a nominee's charge for supplying this information would be unreasonable, the issuer may presume, for purposes of the definition of foreign private issuer, that the customers are residents of the jurisdiction where the nominee has its principal place of business.
   (c) Nevertheless, the issuer must count shares of voting securities as beneficially owned by U.S. residents as stated in beneficial ownership reports that are provided to the issuer or filed publicly, or based on beneficial ownership information otherwise provided to the issuer.
5. Rule 901.
6. *See* Rules 901-905. Securities may be offered and sold outside the United States at the same time they are offered and sold in the country under an exemption such as Rule 802 or Regulation D.
7. Rule 802(a)(1).
8. However, where a U.S. state or jurisdiction does not provide an exemption comparable to Rule 802, thereby requiring registration or qualification, the bidder may exclude security holders in that state or jurisdiction if a cash-only alternative is not being offered in any other state or jurisdiction (whether inside or outside the United States). However, if a cash-only alternative is being offered anywhere, the bidder must offer the same cash-only alternative to security holders in any U.S. state or jurisdiction that would require registration. Similarly, "loan notes" (used abroad to defer capital gains taxes) need not be offered to U.S. shareholders since the tax benefits they provide are not available in the U.S.
Under Rule 802, an "exchange offer" is a tender offer where securities are issued as consideration, and a "business combination" is a statutory amalgamation, merger, arrangement, or other reorganization requiring the vote of security holders of one or more of the participating companies. Under Rule 802, the term "business combination" also includes a statutory short form merger that does not require a vote of security holders. For an amalgamation (i.e., a business combination where the securities will be issued by a successor company to all participating companies), all participants in the business combination must be foreign private issuers. Cross-Border Adopting Release, Release No. 34-52054(Oct. 22, 1999).
9. Rule 802(a)(3)(i)-(iii).

10. To summarize, the conditions of Rule 802 are as follows:
   a. Generally, U.S. holders must participate in the exchange offer on terms at least as favorable as those offered to foreign holders. This includes a consideration of procedural, durational, pro rationing, and withdrawal right concerns.
   b. If the bidder disseminates any information concerning the exchange offer to security holders in Canada, it must disseminate copies of that information (and any amendments) to U.S. security holders in English on at least a comparable basis to that provided to the security holders in Canada. If the bidder disseminates the information solely by publication in Canada, it must publish that information in the United States in a manner reasonably calculated to inform U.S. security holders of the offer. Of course, the bidder may always mail the information to U.S. security holders. The bidder must provide the information to U.S. security holders when it provides the information to home jurisdiction security holders.
   c. A legend must be included in any information the bidder disseminates to U.S. security holders stating, among other things, that the exchange offer is being conducted under foreign disclosure requirements, and that those requirements may differ from U.S. disclosure requirements, including financial statement requirements.

11. General Note 8 to Rules 800-802.

12. *See* Konevsky, *supra* note 2.

13. Rule 502(b)(1).

14. *See Id.*

15. Rule 502(d).

16. *See* Rules 901 and 904(a).

17. Rule 904(b).

18. Rule 144(d)(ii).

19. *See, e.g.*, Constellation Brands, Inc., SEC No-Action Letter, 2003 WL 215032, at *1 (Jan. 29, 2003) (approving an Australian court's fairness determination); Weatherford Int'l, Ltd., SEC No-Action Letter, 2009 WL 142326, at *1 (Jan. 14, 2009) (approving a Bermuda court's fairness determination); Digicon Inc. Veritas Energy Servs. Inc., SEC No-Action Letter, 1996 WL 475801, at *6 (Aug. 19, 1996) (approving a Canadian court's fairness determination); Transocean Inc., SEC No-Action Letter, 2007 WL 2838963, at *2 (Sept. 26, 2007) (approving a Cayman court's fairness determination); Lucas Industries plc, SEC No-Action Letter, 1991 WL 473389 (Aug. 20, 1991) (the Highest Court of Justice in England); The Hongkong and Shanghai Banking Corp., Ltd., SEC No-Action Letter, 1991 WL 176538, at *1 (Jan. 23, 1991) (approving a Hong Kong court's fairness determination); Galen Holding PLC, SEC No-Action Letter, 2000 WL 1234277 (Aug. 7, 2000) (the High Court of the Republic of Ireland); Buffelsfontein Gold Mining Co. Ltd., SEC No-Action Letter, 1996 WL 167738, at *1 (April 9, 1996) (approving a South African court's fairness determination).

20. There are exceptions to this general posture. *See* SanDisk Corp., SEC No-Action Letter, 2006 WL 2805149, at *1 (Sept. 21, 2006) (approving an Israeli court's fairness determination); AngloGold Ltd., SEC No-Action Letter, 2004 WL 111629, at *1 (Jan. 15, 2003) (approving a Ghanaian court's fairness determination).

21. Section 3(a)(10) also exempts sales of securities that are "partly in such exchange and partly for cash…." The SEC takes the position that § 3(a)(10) exempts transactions that are predominantly exchanges and that the "partly for cash" language is intended merely to permit flexibility in structuring those exchanges. Because this analysis necessarily would be very fact-specific, if this issue is presented in a transaction, the issuer should request no-action relief from the SEC for that transaction. SEC Staff Legal Bulletin No. 3A (CF), n.6 (June 18, 2008) *http://www.sec.gov/interps/legal/cfslb3a.htm*.

22. Authorized governmental entities may include state insurance commissions, state corporation or securities commissions, state banking agencies, etc. SEC Staff Legal Bulletin No. 3A (CF), n.7.

23. In the SEC's view, the reviewing court or authorized governmental entity must find the terms and conditions of the exchange to be fair both procedurally and substantively. SEC Staff Legal Bulletin No. 3A (CF), n.8.

24. *See* Securities Act Section 3(a)(10); SEC Staff Legal Bulletin No. 3A (CF), n.5.

25. The National Securities Markets Improvement Act of 1996 (NSMIA) preempts state law from requiring the registration of "covered securities." Although the scope of the covered securities is expansive, the NSMIA specifically removes securities issued pursuant to § 3(a)(10) from protection from State blue-sky laws, thus necessitating compliance from the issuer.

26. *See* Securities Act Section 3(a)(10); SEC Staff Legal Bulletin No. 3A (CF).

27. *See* Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Securities Act Release No. 7759, Release No. 34-42054 (Nov. 10, 1999).

28. *See* Commission and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, Release No. 33-8957 (Oct. 9, 2008). Note: In 2008, the SEC published a release reiterating that cash offers under Tier I were available and announcing that it does not intend to issue no-action letters about vendor placement regarding registration requirements in the future. *Id.* at 116.

29. *See Id.* at II.G.3; Konevsky, *supra* note 2; 1 Greene, *supra* note 1, at 9-41 n.126.

30. Konevsky, *supra* note 2, at 3.

31. SEC Division of Corporate Finance, *Accessing the U.S. Capital Markets-Overview for Foreign Private Issuers*, at IV (Feb. 13, 2013), *https://www.sec.gov/divisions/corpfin/internatl/foreign-private-issuers-overview.shtml*.

32. *See* Konevsky, *supra* note 2, at 3.

33. Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Release No. 33-6902 (June 21, 1991).

34. *See* John M. Basnage, *Cross-Border Tender Offers and Other Business Combinations Exemptions*, *http://us.practicallaw.com/1-500-6746*; 1 Greene, *supra* note 1, at 9-44. *But see* SEC Securities Act Rule, 17 C.F.R. § 230.165(f)(1). As defined in Rule 165(f)(1), a "business combination transaction" is: (a) a transaction specified in Rule 145(a) under the Securities Act (which applies to certain mergers, reclassifications, consolidations, and transfers of assets where security holders are asked to vote or consent); or (b) an *exchange offer*.

35. *See* Rule 3a12-3(b) (exempting foreign private issuers from the SEC's proxy rules).

36. Rule 101(a).

37. Rule 102. For the purposes of purchasing the acquirer's securities pursuant to a merger agreement, the target company is considered an "affiliated purchaser" and is within the scope of Regulation M. However, both the acquirer and the target may purchase the *target's* securities without being within the regulation (provided the value of the acquirer's securities are not somehow linked to that of the target's securities). *See* SEC Staff Legal Bulletin No. 9 (Sept. 10, 2010).

38. Rule 100.