INSIGHTS

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SEC Revises Cross-Border Business Combination Rules

The SEC has revised its rules governing cross-border acquisition, codifying prior no-action and interpretive positions and extending some related acquisitions. The revised rules will make structuring such acquisitions more predictable and flexible when a foreign target has a minority of US shareholders.

by Guy P. Lander

The SEC recently amended its rules for cross-border business combinations and rights offerings. The amendments are intended to enhance the usefulness of these rules by addressing practical difficulties encountered since they were adopted in 1999, including addressing conflicts between US and foreign regulations and encouraging bidders and issuers to permit US security holders to participate in these transactions on the same terms as other target security holders. The amendments are effective December 8, 2008.

Generally, the cross-border rules cover business combinations when a target company is a foreign private issuer regardless of whether the acquiror is a US or non-US company.[1] The cross-border exemptions are structured as a two-tier system based on the level of US interest in a transaction, which is measured by the percentage of a foreign target's securities held by US investors. The Tier I Rules and Rules 801 and 802 apply when the target is a foreign private issuer and not more than 10 percent of the subject securities are held by US investors. Under these rules, a qualifying cross-border transaction will be exempt from: (a) most US tender offer rules; (b) the registration requirements of Section 5 of the Securities Act of 1933 (Securities Act); (c) the heightened disclosure requirements for going private transactions (Rule 13e-3) under the Securities Exchange Act of 1934 (Exchange Act); and (d) management's obligation to express a position with supporting reasons about the tender offer to its security holders.

The Tier II Rules apply when the target is a foreign private issuer and not more than 40 percent of the securities sought in the offer are held by US investors. The cross-border exemptions under the Tier II Rules provide narrow relief from certain US tender offer rules, such as those for prompt payment, extension, and notice of extension requirements in Regulation 14E under the Exchange Act. The Tier II exemptions do not provide an exemption from the additional disclosure requirements for going private transactions, and Rules 801 and 802 do not exempt securities issued in Tier II transactions from registration under the Securities Act.

Overall, the SEC Cross-Border Proposals result in an easier determination of US ownership (due to the new methods of calculating ownership),

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fewer conflicts between US and home country requirements (due to the multiple offer options, back-end withdrawal rights and subsequent offering periods), more flexibility for non-US persons to purchase securities outside US tender offers (due to the 14e-5 revisions) and increased clarity when applying the rules (due to the increased availability of the exemption from Rule 13e-3 and technical changes to Schedule TO, Forms F-4 and S-4). The amendments have codified a number of the SEC's prior no-action letters, providing bright-line rules that will make the applicability of the US rules more predictable, thereby facilitating cross-border business combinations.

Eligibility Threshold—Calculating US Ownership

Negotiated Transactions

Eligibility to rely on the cross-border exemptions is determined by the percentage (up to 10 percent or up to 40 percent) of the relevant class of target securities held by US beneficial owners. Any securities held by the acquiror in the business combination transaction are excluded from the calculation of US ownership. As revised, the rules will no longer exclude securities held by individual holders of more than 10 percent of the subject class from the calculation of US ownership, which has prevented some acquirors from relying on the exemptions.

To identify those securities held for the accounts of persons located in the United States, the rules require the acquiror in a negotiated transaction to "look through" securities held of record by banks, brokers and other nominees in the United States, the subject company's jurisdiction of incorporation and that of each participant in the business combination, and the jurisdiction of the primary trading market for the subject securities. However, if after "reasonable inquiry" the acquiror is unable to obtain information about the location of the security holders for whom a nominee holds, it may assume that the holders are residents of the jurisdiction in which the nominee has its principal place of business. This inquiry has proven to be difficult in some circumstances.

Under the revised rules, acquirors must calculate US ownership in the target company as of any date no more than 60 days before and no more than 30 days after the public announcement (instead of commencement) of the cross-border tender offer or business combination transaction. However, if 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 (although this extended period is not available for rights offerings).

Alternate Test

Given the difficulties in obtaining information about US beneficial ownership, the revised rules provide for an alternate test to determine eligibility to rely on the cross-border exemptions. The alternate test is available for all non-negotiated (*i.e.*, hostile) transactions and in negotiated transactions where the issuer or acquiror is unable to conduct the look-through analysis.

Whether an acquiror is unable to conduct the required look-through analysis is a question of facts and circumstances, but the need to dedicate time and resources to the analysis, or concerns about completeness and accuracy of the information gathered are not adequate justification for using the alternate test. Examples of when the alternate test may be used are: (1) security holders lists are only generated at fixed intervals, are out of date, and more current information is not otherwise available; and (2) when the subject securities are in bearer form and nominees are prohibited by law from disclosing information about the holders.

The new alternate test replaces what was called the "hostile presumption" in the old rules for non-negotiated transactions. Under the alternate test, a third-party bidder in a non-negotiated tender or exchange offer may assume that US ownership in the target company is no more than 10 percent or 40 percent so long as:

- Average daily trading volume in the United States does not exceed 10 percent or 40 percent of the average daily trading volume worldwide over a twelve-month period ending no more

than 60 days before the announcement of the transaction; and
- The bidder has no reason to know that actual US ownership is inconsistent with that figure (either based on the issuer's annual filings with the SEC or foreign regulators made public before announcement of the transaction or based on the bidder's actual or imputed knowledge from other sources).

For an acquiror in a negotiated transaction to rely on the alternate test, the subject securities also must have a "primary trading market," meaning that at least 55 percent of the trading volume take place in one jurisdiction (or two, if the trading in at least one of the foreign jurisdictions is larger than the trading in the United States) during a recent 12-month period. The primary trading market requirement does not apply to the alternate test in non-negotiated transactions.

Under the second element of the alternate test above, an acquiror must consider information that the acquiror knows or has "reason to know" that the US beneficial ownership exceeds 10 percent or 40 percent as applicable. This element of the alternate test provides that the cross-border exemption will not be available and the acquiror would be deemed to know information about US ownership of the subject class that appears in any filing with the SEC or any regulatory authority in the issuer's home jurisdiction or the jurisdiction of its primary trading market, is available from the issuer, is publicly available from sources reasonably accessible at a low cost, or is obtained from a third-party information provider and other advisers engaged by the parties to the transaction that have provided information about US ownership. However, this does not require the issuer or acquiror to engage these third parties, only that the acquiror take into account information obtained from a third-party information provider. Additionally, information acquired after public announcement will not disqualify an acquiror from relying on the cross-border exemptions.

Changes to Eligibility Test for Rights Offerings

Similar changes apply to the calculation of US ownership for rights offerings. Issuers may now calculate US ownership as of a date no more than 60 days before and 30 days after the record date for the rights offering. The reference point for the calculation remains the record date, which is appropriate for rights offerings. Additionally, the alternate test for calculating US ownership is now available for issuers unable to conduct this look-through analysis.

Expanded Exemption from Exchange Act Rule 13E-3

Rule 13e-3 (the going private rule) under the Exchange Act establishes specific filing and heightened disclosure requirements for certain kinds of affiliated transactions that have a "going private" effect. The revised Tier I exemptions from Rule 13e-3 now include some common cross-border transaction structures such as schemes of arrangement, cash mergers, compulsory acquisitions for cash, and other types of transactions. To qualify for the exemption from Rule 13e-3, a party must meet all the conditions for Tier I or Rule 802. A party relying on this revised rule for affiliated transactions not conducted under Rule 802 or Tier I must submit a Form CB (and Form F-X for foreign filers) to the same extent as would be required in a transaction conducted under those provisions.

Changes to Tier II Exemptions

Tier II Relief for Tender Offers not Subject to Rule 13e-4 or Regulation 14D

The Tier II exemptions apply to transactions governed by Regulation 14D and Rule 13e-4 under the Exchange Act (*i.e.*, where the target is a reporting company). The SEC has revised the language of the Tier II exemptions to codify a position they had previously taken, that the Tier II exemptions also apply to offers that are subject only to Regulation 14E, such as a tender offer for a class of equity securities that is not registered under Section 12 of the Exchange Act, or for debt securities. However, the tender offer must comply with the requirements of Regulation 14E and otherwise meet the requirements of the Tier II exemptions under Regulation 14D or Rule 13e-4.

Tier II Relief for Concurrent US and Non-US Offers

Bidder May Make More Than One Non-US Offer in Conjunction with a US Offer. The SEC's position is that the all holders provisions (*i.e.*, Rules 14d-10 and 13e-4(f)) apply to both US and non-US shareholders. The Tier II exemptions currently permit a bidder conducting a tender offer to separate that offer into two separate offers—one US and one foreign—for the same class of securities. To facilitate an acquirors compliance within multiple jurisdictions, the SEC amendments permit a bidder to make more than one offer outside the United States in conjunction with a US tender offer made under Tier II. However when multiple offers are made, the bidders must pro rate securities on an aggregate basis if required under US rules.

US Offer May Include Non-US Holders of ADRs. The existing Tier II dual offer exemptions provide that the US offer can be open only to US persons. This limitation creates a problem because bidders frequently seek to include all holders of American Depositary Receipts (ADRs), not only US holders, in the US offer. The SEC revised rules allow bidders in a cross-border tender offer conducted under Tier II to make a US offer to all holders of ADRs including non-US holders of ADRs. However, the US offer must be limited to US persons who hold the shares directly in share form, and foreign holders who hold in direct share form still may not participate in a US offer under Tier II.

US Holders May be Included in a Non-US Offer. The SEC revised rules allow a bidder to include US target holders in a non-US offer conducted under Tier II when required under foreign law, *i.e.*, if the laws of the jurisdiction governing such foreign offers expressly prohibit the exclusion of any target security holders (including US persons) from the foreign offer, and if the offer materials distributed to US persons fully and adequately disclose the risks of participating in the non-US offer.

Termination of Withdrawal Rights While Tendered Securities are Counted

Under the previous rules, bidders were required to provide back-end withdrawal rights if tendered securities have not been accepted for payment by a set date, measured from the commencement of a tender offer. Thus, even when a tender offer technically had closed and tenders were no longer being accepted, depending on the length of the tender offer period, back-end withdrawal rights could exist until the offeror accepted tendered shares for payment. In jurisdictions outside the United States, the counting of securities can take longer than in the United States and withdrawal rights during this counting process can complicate the counting and payment procedure.

Under the revised rules, both third-party bidders for securities of a foreign private issuer and foreign private issuers repurchasing their own securities may suspend back-end withdrawal rights after the initial offering period expires, when tendered securities are being counted and until they are accepted for payment, even when no subsequent offering period is provided. This relief is provided for a cross-border tender offer conducted under Tier II, so long as:

- The offer provides an offering period (including withdrawal rights) of at least 20 US business days;
- When withdrawal rights are suspended, all offer conditions have been met or waived, except to the extent that the bidder is still counting tendered securities to determine if the minimum acceptance condition has been satisfied; and
- Back-end withdrawal rights are suspended only during the necessary centralization and counting process period and are reinstated immediately thereafter, except to the extent that they are terminated by the acceptance of tendered securities.

The new rules do not eliminate back-end withdrawal rights where a regulatory condition remains outstanding after the expiration of the offer period.

Expanded Relief for Subsequent Offering Periods

The SEC adopted several changes to subsequent offering periods. First, the SEC eliminated the maximum time limit on the length of subsequent offer periods in all types of tender offers (whether or not eligible for Tier I or Tier II).

Second, instead of requiring daily aggregation of securities tendered during the subsequent offering period, the revised rules permit securities tendered in a Tier II offer to be bundled and paid for within 20 business days from the date of tender. However, where local law mandates and local practice permits, payment must be made more quickly than 20 business days from the date of tender to meet US prompt payment requirements.

Third, the SEC adopted changes to permit the payment of interest for securities tendered during a subsequent offering period in a Tier II offer where required under foreign law.

Finally, the SEC's revised rules facilitate Tier II offers that include a mix and match election feature. In "mix and match" offers, the bidders offer a set mix of cash and securities in exchange for each target security with the option for tendering holders to choose a different proportion of cash and securities, to the extent that other tendering security holders make offsetting elections, subject to this maximum amount of cash or securities the bidder is willing to issue. A mix and match offer frequently provides for a subsequent offering period. To facilitate timely payment to tendering security holders, bidders will provide for two separate pools of cash and securities, one for the initial offering period and one for the subsequent offering period. Mix and match offers may violate US rules requiring that tendering security holders in the initial offering period receive the same form and amount of consideration as those who tender into the subsequent offering period. To accommodate mix and match elections, the revised rules allow separate offset and proration pools for securities tendered during the initial offering period and another for security tendered in the subsequent offering period. The SEC also eliminated the prohibition on a "ceiling" for the form of consideration offered when target security holders are able to elect to receive alternate forms of offer consideration (which is another prohibition with which mix and match offers conflicted).

Terminating Withdrawal Rights after Reducing a Minimum Acceptance Condition

Generally, US tender offer rules require that, for a tender offer for a class of equity securities that is registered under Section 12 of the Exchange Act, the bidder must keep the offer open for a set period of time after providing notice of a material change, and the bidder must provide withdrawal rights during that period. A reduction or waiver of a minimum acceptance condition is considered a material change, which triggers withdrawal rights. However, maintaining withdrawal rights after a reduction or waiver of the minimum acceptance condition conflicts with the law or practice in some non-US jurisdictions, including the United Kingdom where some institutional investors are prohibited from tendering into an offer before it is wholly unconditional and withdrawal rights do not apply.

The SEC affirmed its interpretive position that a bidder conducting a Tier II tender offer may waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining in the tender offer after the waiver or reduction, subject to certain conditions. Additionally, this interpretive position is limited to where the law or practice in the target's home country does not permit the bidder to provide withdrawal rights after a waiver or reduction in the minimum offer condition.[2]

Early Termination or a Voluntary Extension of an Initial Offering

A change in the expiration date of a tender offer (whether from the date set at the outset of the offer or through a voluntary extension) constitutes a material change that requires prior notice to target security holders before the offering period closing and withdrawal rights terminate. SEC rules require the offer to remain open after the notice for the time periods established by SEC rules.

In some foreign jurisdictions, bidders may be required to terminate an offer and withdrawal rights immediately after all offer conditions are met or waived, *i.e.*, the offer becomes wholly unconditional, so that the bidder may begin the payment process, even if this occurs before the scheduled expiration date of the initial offering period or any voluntary extension of that period. These jurisdictions believe that once the offer is wholly unconditional and is, therefore, certain to be consummated, the initial offering period should close immediately and tendering security holders should receive the offer consideration as soon as possible. Security holders who did not tender before the end of the initial offering period can tender into the subsequent offering.

Under new Rule 14d-1(d)(2)(ix), bidders in cross-border tender offers conducted under Tier II may terminate the initial offering period (or any voluntary extension of that period)[3] before its scheduled expiration, thereby terminating withdrawal rights, subject to certain conditions.[4] However, this Rule does not permit early termination upon a waiver (in contrast to the satisfaction) of an offer condition.

Similar rules permit issuers or affiliates in a Tier II issuer tender offer (*i.e.*, one under Rule 13e-4), to terminate early the initial offering period, or its voluntary extension, under the same circumstances.

Exceptions from Rule 14e-5 for Tier II

Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer, from the time of the public announcement of the offer until the offer expires. Rule 14e-5 prevents an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms. It applies to "covered persons" who include the offeror and its affiliates, the offeror's dealer manager and its affiliates, any advisor to the offeror and its affiliates or the offeror's dealer-manager and its affiliates whose compensation is dependent on the completion of the offer, as well as any person acting in concert with the listed persons in connection with any purchase or arrangement to purchase any subject securities or any related securities.

The previous rule permitted purchases or arrangements to purchase made outside of Tier I tender offers, but did not cover Tier II offers. The SEC frequently had granted relief from Rule 14e-5's prohibitions for Tier II tender offers in three areas: (1) under the non-US tender offer in a cross-border tender offer where there are separate US and non-US offers, (2) by offerors and their affiliates outside of a tender offer, and (3) by affiliates of a financial advisor to the offeror outside of a tender offer.

In the first area, a Tier II tender offer for a foreign target company may be structured as two concurrent but separate tender offers: one made to US security holders and one or more others made to target security holders outside the United States. If purchases under the foreign offer are made during the Rule 14e-5 prohibited period, those purchases would run afoul of Rule 14e-5 because they technically constitute purchases outside the US tender offer. New Rule 14e-5(b)(11) states that in a tender offer conducted under Tier II purchases or arrangements to purchase in a foreign offer (or in more than one foreign offer) made concurrently with a US tender offer will be allowed if certain conditions designed to protect US security holders are satisfied.[5]

For the second and third areas, a bidder, its affiliates, and affiliates of its financial advisors may purchase target securities outside of a tender offer reasonably believed by the covered person to be conducted under Tier II where the subject company is a foreign private issuer, when this activity is permissible under the target company's home country laws, if certain safeguards designed to protect US security holders are satisfied.[6]

Expanded Availability of Early Commencement for Exchange Offers

The SEC rules are intended to minimize the regulatory disparity between cash tender offers and exchange offers so that they could compete on an equal footing. Accordingly, exchange offers may commence upon the date of the filing of a registration statement under specified conditions, and the SEC attempts to expedite the review of exchange offers so that bidders could terminate the offer and purchase tendered shares once the registration statement has been declared effective by the SEC.

Early commencement previously was not available for exchange offers that are not subject to Rule 13e-4 or Regulation 14D (*i.e.*, where the subject securities are not registered under Section 12 of the Exchange Act). The SEC rules now permit issuers and third-party bidders to commence an exchange offer immediately upon the filing of a registration statement covering the bidders securities in all exchange offers (*i.e.*, for US and non-US target companies and whether or not the subject securities are registered under the Exchange Act), under specified conditions. Rule 162(b) will permit early commencement for "Regulation 14E only" exchange offers only where the bidder provides withdrawal rights in the offer to the same extent as would be required under Regulation 14D or Rule 13e-4. If there is a material change in the information provided to target security holders, the bidder must disseminate revised materials as required under Rules 13e-4(e)(3) and 14d-4(d) under the Exchange Act and must hold the offer open with withdrawal rights for the minimum time periods specified in those rules.

The early commencement rules still do not apply to roll-ups or going private transactions.

The SEC also amended Rule 162(b) under the Securities Act to clarify that the prospectus delivery requirements, including the requirement to deliver revised prospectuses and prospectus supplements contained in that provision, also will apply to offers not subject to Rule 13e-4 or Regulation 14D.

Beneficial Ownership Reporting by Foreign Institutions

Generally, the beneficial ownership reporting provisions require any person who acquires more than 5 percent of a class of equity securities registered under Section 12 of the Exchange Act to report the acquisition on Schedule 13D within 10 days. Persons holding more than 5 percent of a class of such securities at the end of the calendar year, who are not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. These Schedule 13G filers include: broker-dealers, investment advisers and investment companies registered with the SEC; banks and insurance companies regulated in the United States; employee benefit plans or pension funds subject to ERISA; and related holding companies and groups. This list of institutional investors eligible to file a short-form Schedule 13G does not include non-US institutions.

The SEC extended Schedule 13G filing eligibility to include foreign institutions that are subject to a foreign regulatory scheme substantially comparable to the regime applicable to the US institutions listed in the current rule. To do so, a foreign institution would be required to: (a) determine, and certify on Schedule 13G, that it is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to its US counterparts; (b) undertake on Schedule 13G to furnish to the SEC, upon request, the information it otherwise would be required to provide in a Schedule 13D; and (c) certify that it acquired and held the relevant equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer.

A non-US institution currently filing under Schedule 13G under a previously issued no-action letter may continue to rely on it as long as it continues to meet the conditions and facts upon which relief was granted. But, for new filings of, and amendments to, a Schedule 13G, the foreign institution must assess whether it complies with the new rules.

Rule 16a-1(a)(1) now includes eligible non-US institutions as described above (*i.e.*, those eligible to rely on Rule 13d-1(b)(1)(ii)(J)) so that these institutions are not deemed to be beneficial owners of securities held for the benefit of third parties or in customer or fiduciary accounts. Therefore, these holdings will not subject the institutions to Section 16 liability.

Interpretive Guidance

Foreign Target Security Holders and US All-Holders Requirement

The SEC reiterated its view that a tender offer for a class of equity securities registered under Section 12 of the Exchange Act must be open to all target holders, including non US persons. Although non-US target holders may not be excluded from US tender offers, the SEC rules do not require the dissemination of offer materials outside the United States.

Further, the SEC stated that it is inappropriate for bidders to shift the burden of assuring compliance with the relevant laws of other jurisdictions by requiring target security holders to certify that tendering their securities complies with local laws or that a local exemptions permit tenders without further action by the bidder.

Excluding US Target Security Holders from Cross-Border Tender Offers

Bidders in cross-border business combinations frequently seek to avoid the US tender offer and registration rules. The SEC's view is that offer structures that exclude US security holders (exclusionary offers) from offers for foreign targets are inappropriate for US bidders. The SEC stated that where the subject class is registered under Section 12 of the Exchange Act, and particularly, where the subject securities trade on a US exchange, it will view exclusionary offers skeptically where the participation of those US holders is needed to make the minimum acceptance condition in the tender offer.

Whether US tender offer rules apply to a cross-border tender offer depends on whether the bidder triggers US jurisdictional means in making a tender offer.[7] The SEC has provided guidance on measures acquirors may take to avoid triggering US jurisdictional means, and, thereby avoid application of the US tender offer rules. Bidders who are not US persons may structure a tender offer for target securities of a foreign private issuer and exclude US target security holders if the offer is conducted outside the United States and US jurisdictional means are not implicated. However, a bidder may implicate US jurisdictional means if it fails to take adequate measures to prevent tenders by US target holders while purporting to exclude them. When a bidder permits US target security holders to participate in a tender offer, it must follow US rules unless an exemption applies. It is important that bidders do not purport to exclude US holders while still accepting their tenders.

Bidders seeking to avoid the application of US law should take special precautions to assure that their offer is not made in the United States. The most basic measure is to include legends on the offer materials and on any Internet Web site on which they are posted, indicating that the offer is not being made in the United States. The bidder should take precautions to assure that tenders are not accepted from nor sales of bidder securities made (in the case of exchange offers) to target security holders resident in the United States. These may include, in responding to inquiries and processing letters of transmittal, obtaining adequate information to determine whether the target security holder is a US investor. Additionally, the bidder could require representations by the tendering security holder, or anyone tendering on that person's behalf, that the tendering holder is not a US holder or someone tendering on behalf of a US holder. When disseminating cash or securities for tendering holders, special care should be taken to avoid mailing into the United States.

When tenders in exclusionary offers are made through offshore nominees, bidders could require that these nominees certify that tenders are not being made on behalf of US holders. However, this may be problematic where the law of the applicable foreign jurisdiction prevents the nominee from knowing the identity or location of beneficial holders on whose behalf they hold.

Vendor Placements

In many business combination transactions, the offer consideration may include securities of the bidder. In cross-border exchange offers, bidders may seek to avoid the registration requirements under the Securities Act by establishing a vendor placement arrangement for the benefit of US target security holders who tender into the offer. In a vendor placement, the bidder employs a third party to sell offshore the securities that would be issued in the offer to tendering US security holders. The bidder (or the third party) then remits the proceeds of the resale (minus expenses) to those US target security holders that tendered into the offer. In effect, the vendor placement is an effort to convert an exchange offer involving the offer and sale of the bidder's securities (which would require Securities Act registration) into an offer involving solely cash (which does not require registration) for tendering US security holders. In a vendor placement, US holders are not excluded from participating in the offers but they participate in terms different from those afforded other target security holders.

Although tendering holders receive cash in a vendor placement, the amount of cash received largely is dependent on the market value of the underlying security. The protections of the Securities Act are intended to give investors access to information when making an investment decision for the purchase of a security. A vendor placement does not in all circumstances eliminate the requirement for Securities Act registration, because tendering US holders effectively may be making an investment decision for the purchase of a security.

The SEC believes that a vendor placement arrangement in cross-border exchange offers would be subject to Securities Act registration unless the market for the bidder securities to be issued in the exchange offer and sold under the vendor placement procedure is highly liquid and robust and the number of bidder securities to be issued for the benefit of tendering US holders is relatively small compared to the total number of bidder securities outstanding. The SEC also considers:

- Whether sales of bidder securities through the vendor placement process are made within a few business days of the closing of the offer;
- Whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before the sale process is complete; and
- Whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

These factors are intended to ensure that rather than making an investment decision, investors are making a decision to tender their target securities for an amount of cash that although not fixed, can be readily estimated based on historic trading prices.

In tender offers subject to Section 14(d) of the Exchange Act, the all-holders and best price requirements in Rule 14d-10 are implicated by the use of the vendor placement structure because US target security holders would receive different consideration from their non-US counterparts. Generally, the SEC believes that the parameters of the Tier I cross-border exemptions should represent the appropriate limits under which a bidder in a tender offer subject to Regulation 14D may offer cash to US security holders while issuing shares to their counterparts outside the United States. In Tier I tender offers, for purposes of complying with the equal treatment requirement, bidders are permitted to offer cash consideration to US holders in lieu of offering securities so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the consideration offered to non-US holders.

Bidders making a cross-border exchange offer sometimes seek to exclude some US target holders and include in the exchange offer only those US target holders (such as institutional investors) for whom an exemption from the registration requirements of the Securities Act may be available. The SEC has stated that exchange offers for securities subject to Section 14(d) of the Exchange Act may not be made in the United States on a private offering basis, consistent with the all-holders provisions of Rule 14d-10. Thus, even where the bidder is eligible to rely on an exemption from Securities Act Section 5 for such offers, it would violate the equal treatment provisions applicable to such offers by excluding target security holders for whom an exemption was not available. Similarly, as discussed above, offering cash under a vendor placement arrangement to some US holders and bidder securities to others (such as institutions) is not permitted in tender offers subject to the all-holders rule.

When a bidder seeks to use the vendor placement structure for a tender offer subject to Rule 14d-10 at US ownership levels above Tier I, it must seek an exemption from those rules, which is granted only when it is in the interests of US investors (*i.e.*, rarely). Thus, it is not advisable to conduct vendor placements in a Tier II transaction.

Conclusion

By codifying prior no-action and interpretive positions and extending some related accommodations, the new rules make structuring cross border acquisitions more predictable and flexible when a foreign target has a minority of US shareholders. The revisions to the calculation rules will make determining US ownership and eligibility for Tier I or Tier II relief easier. The rules also will reduce conflicts between US and non-US rules, expand the types of transaction structures covered by the relief and enable parties to better accommodate both US and non-US rules.

NOTES

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

2. The SEC conditioned a bidder's ability to rely on this guidance on the following:

- The bidder must announce that it may reduce or waive the minimum acceptance condition at least five business days before it reduces or waives it;
- The bidder must disseminate this announcement through a press release and other methods reasonably designed to inform US security 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 condition may be reduced. The bidder must announce its actual intentions once it is required to do so under the target's home country rules;
- During the five-day period after the announcement of a possible waiver or reduction, security holders who have tendered into the offer must be afforded the right to withdraw tendered securities;
- The announcement must advise security holders to withdraw their 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 reducing or waiving the minimum acceptance condition must be described in the original offer materials;
- The bidder must hold the offer open for acceptances for at least five business days after the reduction or waiver of the minimum acceptance condition;
- All offer conditions are satisfied or waived when the withdrawal rights are terminated;
- The potential affect of the waiver or reduction of the minimum acceptance condition is fully discussed in the offering materials; and
- The bidder may not waive or reduce the minimum acceptance condition below: (i) a simple majority of the outstanding class, or (ii) the percentage threshold required to control the target company under applicable foreign law, if it is greater.

3. A voluntary extension is an extension that is not required under US tender offer rules.

4. Bidders seeking to terminate the initial offering period before its scheduled expiration may do so only if, when the time the initial offering period expires and withdrawal rights terminate:

- The initial offering period has been open for at least 20 US business days and all offer conditions have been met;
- The bidder has adequately discussed the possibility and affect of the early termination in the original offer materials;
- The bidder provides a subsequent offering period after early termination of the initial offering period;
- All offer conditions are satisfied when the initial offering period terminates; and
- The bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under US tender offer rules.

5. To qualify under Rule 14e-5(b)(11): (a) the tender offer must qualify as Tier II; (b) US security holders must be treated at least as favorably as non-US tendering security holders; and (c) the offeror's intent to make purchases under a foreign offer must be disclosed in the US offering documents. Any cash consideration paid to US security holders may converted from the currency paid in the foreign offer to US dollars at the exchange rate disclosed in the US offering documents. Rule 14e-5(b)(11) is limited to purchases in foreign tender offers and does not apply to cover open market transactions, private transactions, or other transactions outside the tender offer.

6. Under Rule 14e-5(b)(12), purchases or arrangements to purchase by an offeror, its affiliates and affiliates of its financial advisors are permitted in accordance with the subject company's home jurisdiction if the following conditions are met:

- The subject company is a foreign private issuer, and the covered person reasonably expect that the tender offer qualifies as Tier II;
- No purchases or arrangements to purchase are made in the US except under the tender offer;
- The US offering materials prominently disclose the possibility of, or the intention to make, purchases or arrangements to purchase the subject securities or related securities outside the tender offer and if there will be public disclosure of purchases of subject or related securities, how information concerning the purchases will be disseminated;
- The actual amount of purchases of subject securities or related securities made outside the tender offer are disclosed in the United States to the extent that such information is made public in the home jurisdiction; and

- For purchases by an offeror and its affiliates, the tender offer price is raised to match any higher price paid outside the offer.

Affiliates of a financial advisor must meet the following additional conditions:

- The financial advisor and affiliate must maintain and enforce information barriers, (i.e., written policies and procedures reasonably designed to prevent the flow of information among the financial advisor and the affiliate that might result in a violation of the federal securities laws and regulations);
- The financial advisor must have a broker-dealer affiliate registered with the SEC;
- The affiliate must have no officers or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and
- Such purchases are not made to facilitate the tender offer.

The exception (particularly the last element) is premised on the affiliate of the financial advisor carrying out its normal business activity when purchasing outside a tender offer, and any purchasing activity by an affiliate of a financial advisor, including risk arbitrage, made to facilitate the tender offer would not be eligible for the exception. Accordingly, purchasing activity effected in reliance on the exception should be consistent with the affiliate's prior levels of activity.

7. The "jurisdictional means" are the means or instrumentalities of interstate commerce or any facility of a national securities exchange.

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