SEC PROPOSES REVISIONS TO RULES GOVERNING CROSS-BORDER TENDER OFFERS, EXCHANGE OFFERS, BUSINESS COMBINATIONS AND RIGHTS OFFERINGS

On May 6, 2008, the U.S. Securities and Exchange Commission (the "SEC") proposed amendments to its rules applicable to cross-border tender offers, exchange offers, business combinations and rights offerings, as well as rules pertaining to beneficial ownership reporting by certain foreign institutions (the "Release").[1] The stated purpose of the proposed amendments, which follow several other recent SEC rulemaking initiatives affecting foreign issuers, is to encourage foreign bidders to include U.S. holders in cross-border transactions.[2]

In large part, the proposed amendments would codify existing SEC interpretive positions and address certain conflicts or inconsistencies between U.S. regulations and foreign regulations that frequently occur in cross-border business transactions due to different requirements and time frames under U.S. and foreign regulatory regimes.

Additionally, the Release contains interpretive guidance regarding: (i) the application of the tender offer "all-holders" rules to foreign target security holders, (ii) the ability of foreign bidders to exclude U.S. target security holders in cross-border tender offers and exchange offers, and (iii) the ability of bidders in exchange offers to use a vendor placement procedure to avoid the registration requirements of the U.S. Securities Act of 1933, as amended (the "Securities Act").

I. Background

In 1999, the SEC adopted the original cross-border exemptions,[3] which were designed to provide relief in cross-border business combinations[4] from certain U.S. regulatory requirements in order to facilitate the inclusion of U.S. security holders in primarily foreign transactions. The available exemptions are:

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[1] SEC Release Nos. 33-8917 and 34-57781 (May 6, 2008). Comments on the proposed rules are due by June 23, 2008.

[2] For example, the SEC has recently revised its rules to allow the use of financial statements prepared in accordance with International Financial Reporting Standards, amended the deregistration rules for exiting the U.S. regulatory system when the level of U.S. interest in a foreign private issuer has decreased, and proposed other rule revisions applicable to foreign issuers intended to improve the accessibility of the U.S. public capital markets and enhance information available to investors.

[3] SEC Release Nos. 33-7759, 34-42054, and International Series Release No. 1208 (October 22, 1999) (the "Cross-Border Adopting Release").

[4] A business combination qualifies as cross-border if the target company is a "foreign private issuer," which refers to any foreign issuer (other than a foreign government), except an issuer that meets the following conditions: (1) more than fifty percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States and (2) any of the following: (i) the majority of the executive officers or directors are U.S. citizens or residents; (ii) more than fifty percent of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

- **Tier I Exemption; Rules 801 and 802** – The Tier I exemption provides a broad-based exemption from the filing, dissemination and procedural requirements of the U.S tender offer rules and the more stringent disclosure requirements applicable to "going private" transactions if ten percent or less of the subject class of securities are held by U.S. holders. Rules 801 and 802 under the Securities Act provide exemptions from the registration requirements of the Securities Act for securities issued in certain rights offerings by foreign private issuers and business combination transactions if ten percent or less of the subject securities are held by U.S. holders.
- **Tier II Exemption** – The Tier II exemption provides targeted and narrowly tailored relief from certain U.S. tender offer rules (including the requirements of prompt payment and extending a tender offer and giving notice of extensions), if between ten and forty percent of the subject securities are held by U.S. persons. The Tier II exemptions do not provide relief from the registration requirements of the Securities Act.

In practice, the Tier I exemption has proved to be of limited utility in cross-border transactions involving widely held companies because U.S. persons frequently hold more than ten percent of the securities of the target. Thus, we anticipate that the SEC is likely to receive comments proposing an increase in such threshold or the use of a different test to determine beneficial ownership which broadens the number of companies that may be eligible for the exemption. Whether the SEC will modify its approach is another question, particularly given that we are in an election year.

II. Summary of Proposals

In the Release, the SEC has proposed, among other things, to:

- for purposes of determining the availability of Tier I, Tier II and Rule 802 exemptions, allow an acquiror to determine the percentage of U.S. ownership in a target company within a 60-day range before the announcement of the offer rather than requiring the determination to be made as of 30 days before the commencement of the offer, as currently required;
- expand Tier I relief to cover additional business combination structures currently excluded from Tier I (notably, schemes of arrangements, cash mergers and compulsory acquisitions for cash);
- expand Tier II relief to cover tender offers not subject to Rule 13e-4 or Regulation 14D under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act");
- expand the limited relief granted under Tier II to, among other things, (i) permit "multiple" tender offers, (ii) permit U.S. offers to include non-U.S. persons and foreign offers to include U.S. persons, (iii) allow the termination of withdrawal rights while tendered securities are being counted, and (iv) expand relief for subsequent offering periods;
- codify existing no-action relief regarding the application of Rule 14e-5 ("Rule 14e-5") under the Exchange Act to Tier II tender offers;

- expand the availability of early commencement of exchange to offers not subject to Section 13(e) or 14(d) of the Exchange Act; and
- permit certain foreign institutions to report beneficial ownership in U.S. registered companies on short-form Schedule 13G (rather than Schedule 13D) to the same extent as domestic institutions, if they are subject to comparable regulatory regimes.

III. Proposed Amendments

A. Eligibility Threshold Test Determining U.S. Ownership

Under current SEC rules, a bidder must determine whether it is eligible for the cross-border exemptions discussed above by reference to the U.S. ownership of the subject class of securities as of the thirtieth day before commencement of a tender offer, an exchange offer or the solicitation for a business combination, or as of the record date in the case of a rights offering.[5] In recognition of the difficulties[6] in calculating U.S. ownership based on this test, the SEC is proposing to amend existing rules to provide that the acquiror in a cross-border transaction would be permitted to calculate U.S. ownership *within a sixty-day range* before the public announcement of the cross-border tender offer or business combination instead of the current requirement to calculate U.S. ownership as of a specified date before the commencement of the offer.[7]

Under current SEC rules, a third-party bidder in a non-negotiated (i.e., hostile) transaction may assume that it qualifies for Tier I or Tier II exemptive relief, as applicable, if (i) the average daily trading volume in the United States over a twelve-month period ending thirty days prior to the commencement of the tender offer does not exceed ten percent or forty percent, as applicable, and (ii) the bidder has no "reason to know" that actual U.S. ownership is inconsistent with such figure based on the issuer's information filings with the SEC or foreign regulators, or based on the bidder's actual or imputed knowledge from other sources.

[5] In the context of a negotiated transaction, a bidder is required to make such assessment based on the percentage of the target's non-affiliated public float (i.e., subject securities held by non-affiliates, after excluding any securities held by holders of greater than ten percent of the subject class of securities and any securities held by the acquiror in a business combination transaction). An acquiror is required to "look through" securities held of record by nominees in specified jurisdictions to identify those held for the account of persons located in the United States. After "reasonable inquiry," if the acquiror is unable to obtain information on the location of the security holders for whom a nominee holds the securities, the acquiror is permitted to assume that the security holders reside in the same jurisdiction as the nominee's principal place of business.

[6] The requirement to calculate U.S. ownership as of the thirtieth day before the commencement of a tender offer or exchange offer, or before the solicitation for other kinds of business combination transactions, is problematic for acquirors in certain jurisdictions for a number of reasons, including that the look-through analysis may take longer than thirty days to perform, U.S. ownership cannot always be calculated as of a specified date in the past and in some cases it can only be calculated as of fixed intervals, and the exact date of commencement is not always known or within the control of the acquiror.

[7] The SEC has not proposed to change the requirement to calculate U.S. ownership levels as of the record date for rights offerings.

In addition to the proposed changes with respect to when a bidder must make such assessment, the SEC has also proposed to clarify the "reason to know" element of this test by specifying that an acquiror has "reason to know" information that is publicly available, including reports compiled by independent information service providers generally available to the public, although a bidder is not, and will not be, required to engage such third-party services at its own expense. The proposed amendments would also clarify that acquirors are presumed to know information regarding beneficial ownership reflected in third-party reports filed with the SEC, such as Schedules 13D, 13F and 13G, as well as similar reports filed in the target's home country and the country of the target's primary trading market, if different. The SEC has also clarified that acquirors may not ignore credible information that it receives from non-public sources such as investment bankers or other market participants, including the target company, regarding U.S. ownership levels. Due in part to the concern that some target companies may attempt to manipulate their disclosure of U.S. ownership with respect to unsolicited offers, the SEC has proposed to revise the existing rules to provide that the acquiror's knowledge or "reason to know" refers to knowledge as of the date of the announcement, the effect of which would allow an acquiror to ignore conflicting information received after announcement.

In the Release, the SEC has requested comments on whether to continue to exclude persons holding greater than ten percent of a target's securities or shares held by an acquiror from the calculation of U.S. ownership, as well as whether the SEC should consider raising the maximum U.S. ownership level permitted for use of the Tier I exemption to fifteen percent. The SEC has also requested comments on whether to propose a different test for Tier I and Tier II eligibility (i.e., a test based on U.S. average daily trading volume as compared to worldwide average daily trading volume over a certain period of time or a test based on the percentage of shares held in American Depositary Receipt ("ADR") form) and whether to then adjust the thresholds to maintain the number of transactions eligible for the cross-border exemptions.

B. *Proposed Changes to Tier I Exemptions*

Currently, the Tier I and Rule 802 exemptions from the SEC's "going private" rules under Rule 13e-3 do not extend to certain transaction structures commonly used abroad, including schemes of arrangement, cash mergers and compulsory acquisitions for cash. The SEC has proposed to revise the scope of the Tier I and Rule 802 exemptions to provide uniform treatment for all transactions that would otherwise qualify for such exemptions but for the issuer's or affiliate's use of a previously unapproved transaction structure.

C. *Proposed Changes to Tier II Exemptions*

The SEC is proposing specifically targeted and narrowly tailored amendments to the Tier II exemptions to reduce the need for individual requests for relief relating to certain areas where the Tier II exemptions have presented conflicts between U.S. and foreign regulation or practice.

1. Extended Relief Where Target Securities Not Subject to Rule 13e-4 or Regulation 14D

Under current SEC rules, Tier II relief is only available to transactions subject to Regulation 14D[8] under the Exchange Act and Exchange Act Rule 13e-4. Over time, the SEC has taken the position that bidders otherwise meeting the conditions for reliance on the Tier II exemption may rely on such relief in making tender offers for a subject class of securities not subject to Rule 13e-4 or Regulation 14D. The SEC has proposed to codify this position by formally expanding the scope of the Tier II exemption to apply, to the extent applicable, to tender offers not subject to Regulation 14D or Rule 13e-4 under the Exchange Act, provided that the bidder otherwise meets the conditions for reliance on such exemptions.

2. Expanded Relief for Dual or Multiple Offers

a. Multiple Non-U.S. Offers

The Tier II exemptions currently permit the use of two separate but concurrent offers, one made in compliance with U.S. tender offer rules and one made in compliance with foreign law or practice. In recognition of the fact that a bidder may be required (or wish) to make more than one foreign offer (for example, where the primary trading market for the target's securities differs from the target's country of incorporation), the SEC has proposed to revise the Tier II exemptions to provide that a bidder may make "multiple" offers rather than just "dual" (i.e., two) offers.

b. Expanded Scope of U.S. Offers and Foreign Offers

The Tier II exemptions currently provide that a U.S. offer may be open only to U.S. holders (i.e., security holders resident in the United States), which makes it more difficult to structure a transaction because bidders often seek to include all holders of a target's ADRs, not just U.S. holders, in the U.S. offer. Likewise, the Tier II exemptions currently provide that a foreign offer be made only to non-U.S. holders, which presents practical problems because the laws of a target's home country may not permit the exclusion of any security holders, including those in the United States. The SEC has proposed to codify existing no-action relief to provide that a U.S. offer may include all holders of ADRs, including foreign holders,[9] provided the U.S. offer is made on terms at least as favorable as those offered to any other holder. The SEC has also proposed to permit U.S. holders to participate in non-U.S. offers where the exclusion of U.S. persons is expressly prohibited under foreign law, so long as U.S. holders are provided with full and adequate disclosure concerning the risks for U.S. holders participating in the foreign offer.

c. Proration and Use of Dual or Multiple Offers

Under current SEC rules, in order to assure equal treatment of tendering security holders, when a bidder makes a "partial tender offer"[10] subject to Section 13(e) or 14(d) of the Exchange Act, a bidder must purchase tendered securities on a pro rata basis if the offer is oversubscribed. The

[8] Regulation 14D applies only where the equity security that is the subject of the tender offer is registered under Section 12 of the Exchange Act.

[9] The SEC is not proposing to allow foreign target holders who do not hold their shares in ADR form to be included in U.S. tender offers.

[10] A "partial tender offer" is a tender offer where the bidder is offering to purchase less than all of the outstanding securities of the subject class.

proposed amendments clarify and reiterate the SEC's existing position that bidders making a partial tender offer and who are relying on the Tier II exemptions to make multiple offers are required to prorate the securities tendered into the U.S. and non-U.S. offers on an aggregate basis (i.e., using a single proration "pool") so as to not disadvantage U.S. holders as compared to holders tendering in a foreign tender offer.

3. Termination of Withdrawal Rights While Tendered Securities Are Counted

Under current SEC rules, persons tendering securities in a tender offer may, under Section 14(d)(5) of the Exchange Act and Rule 13e-4(f)(2)(ii) under the Exchange Act, withdraw such securities from the offer after a specified time period beginning at commencement of the tender offer. As a result, "back-end withdrawal rights" exist until the bidder accepts the tendered shares for payment, even though the tender offer has closed and tenders are no longer being accepted. The Tier II exemptions provide relief from such provisions, allowing a bidder not to extend withdrawal rights during the time between the initial offering period and a subsequent offering period while tendered securities are being counted and before they are accepted for payment in accordance with foreign regulations, so long as the subsequent offering period begins immediately afterwards. The proposed amendments would extend this relief to all tender offers regardless of whether or not there is a subsequent offering period. Because a bidder cannot accept tendered securities until all offer conditions, including the minimum tender condition, have been satisfied or waived and the counting process is complete, a bidder in a cross-border tender offer may not know whether the minimum tender offer condition has been satisfied immediately after the end of the initial offering period.

The proposed amendments would be available both to third-party bidders for securities of a foreign private issuer and to foreign private issuers repurchasing their own securities, and are conditioned on the following factors: (i) the availability of the Tier II exemption, (ii) the inclusion in the offer of an offering period, including withdrawal rights, of at least twenty U.S. business days, (iii) all offer conditions having been satisfied or waived at the time the withdrawal rights are suspended, except to the extent the bidder is still counting tendered securities to determine if the minimum acceptance condition has been satisfied, and (iv) the suspension of withdrawal rights during only the necessary centralization and counting process and the reinstatement immediately thereafter, except to the extent already terminated by the acceptance of tendered securities.

4. Expanded Relief for Subsequent Offering Periods

a. Extension of Subsequent Offering Period

U.S. tender offer rules currently impose a maximum length on any subsequent offering period of twenty U.S. business days. However, in some cases, foreign law mandates, or market practice dictates, subsequent offering periods of longer than twenty U.S. business days. The proposed amendments would eliminate the time limit on subsequent offering periods for offers conducted under Tier II and specifically permit subsequent offering periods longer than twenty U.S. business days. Such extended period will enable bidders to reach the necessary thresholds for acquiring the remaining securities not tendered in an initial offering period and allow remaining

security holders to tender into a successfully consummated offer, after which the market for their securities may be limited. In addition, the SEC has requested comment on whether the twenty-business-day limit should be eliminated for all tender offers, including for domestic issuers.

b. Prompt Payment and Payment of Interest

Currently, U.S. rules require that bidders immediately accept and promptly pay for securities tendered in subsequent offering periods on a rolling basis, which conflicts with market practice or is otherwise impossible to do in some foreign jurisdictions. The proposed amendments would permit a bidder in a Tier II tender offer to "bundle" the securities tendered during the subsequent offering period and pay tendering security holders within fourteen business days from the date of tender. The proposed amendments would also permit the payment of interest for securities tendered during a subsequent offering period in a Tier II transaction where required under foreign law, which is currently prohibited by the equal treatment principles under the U.S. tender offer rules.

c. Prompt Payment and "Mix and Match" Offers

In a "mix and match" offer, target security holders are offered a set mix of cash and securities with the option to elect a different mix to the extent other tendering holders make opposite elections. Under current rules, "mix and match" offers structured this way and ceilings on consideration are prohibited under U.S. tender offer rules pertaining to subsequent offering periods, which rules provide that bidders may only offer different forms of consideration if there is no ceiling on any form of consideration and that bidders must offer the same form and amount of consideration to tendering security holders regardless of whether they tender during the initial offering period or a subsequent offering period. Such requirements present difficulties for "mix and match" offers, as bidders want to impose a maximum limit on the number of securities and/or cash they will be obligated to deliver if the offer is successful. Likewise, the offset feature of "mix and match" offers conflicts with the requirement that holders tendering during the initial or subsequent offering periods be offered the same form and amount of consideration. The proposed amendments would permit separate offset and proration pools for securities tendered during the initial and subsequent offering periods. The proposed amendments would also eliminate the prohibition on a ceiling for the form of consideration offered in the subsequent offering period when holders are presented with a "mix and match" offer. The SEC has requested comments on whether it should extend these changes to all tenders offers, including tender offers for U.S. issuers.

5. Terminating Withdrawal Rights After Reduction or Waiver of a Minimum Acceptance Condition

Under current SEC rules applicable to tender offers subject to Section 13(e) and 14(d) of the Exchange Act (generally applicable to companies with U.S. listings), a bidder must allow an offer to remain open for acceptance for specified periods after a material change to the terms of the offer is communicated to security holders. The minimum time periods for which an offer must remain open vary based on the type of change involved. During these periods the bidder must provide withdrawal rights to security holders who have already tendered their securities. The requirement to provide withdrawal rights conflicted with foreign practices, in particular with respect to the SEC's requirement to provide withdrawal rights following a waiver of a minimum

acceptance condition. Accordingly, in the Cross-Border Adopting Release the SEC permitted a bidder meeting the conditions of the Tier II exemptions, as well as certain other conditions, to waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining after the waiver or reduction.[11] This interpretation was premised on a bidder's need to reduce the minimum acceptance condition in order to declare the offer wholly unconditional so as to permit the participation of certain institutional holders that were prohibited from entering into conditional offers.

In addition to codifying the conditions outlined below in footnote 11, the SEC is proposing to narrow this interpretation by (i) clarifying that the ability of a bidder to waive or reduce the minimum acceptance condition without providing withdrawal rights after such waiver or reduction is limited to instances where it is necessary because of specific features of home country law or practice that make it impossible or unnecessarily burdensome to comply with the extension requirements, (ii) requiring that the initial offering materials or any supplement fully disclose the implications of such waiver or reduction, and (iii) requiring that the bidder be eligible to rely on the Tier II exemptions and undertake not to waive or reduce the minimum acceptance condition below a majority (i.e, fifty percent of the outstanding securities that are the subject of the tender offer). In the Release, the SEC also specified that bidders will not be able to rely on this interpretation if there is a change in the tender offer for which the U.S. rules require a mandatory extension (such as changes related to the consideration offered, the amount of target securities sought in the tender offer, or a change to the soliciting fee of the dealer).

6. Early Termination of the Initial Offering Period or a Voluntary Extension of the Initial Offer Period

Under current SEC rules, the initial offering period of a tender offer must remain open for certain specified minimum time periods after a material change in the terms of the offer, which vary depending on the materiality of the change. The SEC views a change in the expiration date of an offer as a material change that requires the offer to remain open for the applicable time period established by the SEC. As a result, the minimum time periods established by the SEC may conflict with foreign law or practice, where bidders may be required to terminate an offer and withdrawal rights immediately after all offer conditions are satisfied. For example, under foreign law a bidder may be required to tender securities and begin the payment process as soon as all offer conditions are satisfied, even if this occurs before the scheduled expiration date of the initial offering period or voluntary extension thereof.

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[11] The SEC interpretive guidance was conditioned on the following: (i) 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, (ii) the bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, which methods may include placing an advertisement in a newspaper of national circulation in the United States, (iii) the press release must state the exact percentage to which the condition may be reduced and the bidder must announce its actual intentions once it is required to do so under the target's home country rules, (iv) 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, (v) 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, (vi) the procedure for reducing or waiving the minimum acceptance condition must be described in the offering document, and (vii) 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.

The SEC has permitted (through no-action relief) a bidder to terminate early the initial offering period or any voluntary extension thereof if at the time the initial offering period expires and withdrawal rights terminate (i) all offer conditions have been satisfied and the initial offering period has been open for at least twenty U.S. business days, (ii) the bidder has adequately discussed in the original offer materials the impact and possibility of an early termination, (iii) the bidder provides a subsequent offering period after early termination of the initial offering period, (iv) all offer conditions have been satisfied when the initial offering period terminates, and (v) the bidder does not terminate the initial offering period during any mandatory extension required under U.S. tender offer rules. While the SEC has not proposed to codify its existing position, it has, however, requested comment as to whether this relief is necessary, and if it is, under what conditions.

7. Codification of Rule 14e-5 Cross-Border Exemptions

Under current SEC rules, Rule 14e-5 prohibits "covered persons," which includes, among others, the offeror and its affiliates, from purchasing or arranging to purchase any subject securities or related securities except as part of the tender offer. This prohibition applies from the public announcement of the tender offer until the offer expires. Tender offers that qualify for the Tier I exemption are exempt from Rule 14e-5; however, Rule 14e-5 applies to Tier II offers.

In 2006 and 2007, the SEC granted no-action "class" relief for Tier II tender offers in three recurring areas, relating to purchases and arrangements to purchase securities of a foreign private issuer: (i) pursuant to a non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers, (ii) by offerors and their affiliates outside of the tender offer, and (iii) by a financial advisor's affiliates outside the tender offer.

The SEC has proposed to adopt new Rule 14e-5(b)(11), which would codify this existing no-action "class" relief by permitting purchases or arrangements to purchase pursuant to a foreign tender offer (or more than one foreign offer) during Rule 14e-5's prohibited period if certain conditions are satisfied, including that the tender offer qualifies as a Tier II tender offer. The SEC has also proposed to adopt new Rule 14e-5(b)(12), which would codify existing no-action "class" relief by permitting purchases or arrangements to purchase outside of a Tier II tender offer by an offeror and its affiliates, as well as affiliates of an offeror's financial advisor, if certain conditions are satisfied. Risk arbitrage is excluded from the exception applicable to the financial advisor's affiliate. The SEC notes that risk arbitrage is so closely related to the tender offer that the incentive for abusive behavior is significant. As is the case with existing no-action relief, the new rules would provide that no purchases or arrangements to purchase may be made in the United States other than pursuant to the tender offer.

D. *Expanded Availability of Early Commencement for Exchange Offers*

The current SEC rules were intended to minimize the regulatory disparity between cash and stock tender offers. Prior to the adoption of such rules, cash tender offers could commence on the date of the filing of the tender offer statement with the SEC, while exchange offers could not begin until the SEC had reviewed and declared effective the registration statement filed by the bidder. Current SEC rules now permit exchange offers subject to Rule 13e-4 and Regulation 14D to commence upon the date of the filing of the registration statement with the SEC, or "early commence," so long as certain conditions are satisfied, including that the offeror may not

terminate the exchange offer and purchase tendered shares until the registration statement has been declared effective by the SEC. However, under existing SEC rules, if a class of securities is not subject to Rule 13e-4 or Regulation 14D (such as convertible debt securities), the bidder will not be able to "early commence" a tender offer with respect to such securities. This position presents a practical problem for bidders in certain foreign jurisdiction where non-U.S. tender offer rules provide that, where a bidder makes a tender offer for one class of a target's securities, it must also make a tender offer for any other class or classes of securities issued by the same target that are convertible in the subject securities. The SEC has proposed to expand this rule by providing that all exchange offers eligible for the Tier II exemptions may take advantage of the early commencement procedure, regardless of whether the exchange offer is subject to the provisions of Regulation 14E only, so long as (i) the bidder provides withdrawal rights in the offer to the same extent as would be required under Regulation 14D and Rule 13e-4, and (ii) such offers provide for the same time periods after the occurrence of specified changes as are currently required for other "early commencement" offers.

E. *Beneficial Ownership Reporting by Foreign Institutions*

Under current SEC rules, certain domestic institutions (but not foreign institutions) may, upon becoming the beneficial owner of more than five percent of a class of equity securities registered under Section 12 of the Exchange Act, file with the SEC a short-form Schedule 13G within forty-five days after the end of the calendar year in which they exceed such amount, rather than the more detailed Schedule 13D, which must be filed with the SEC within ten days after exceeding the applicable threshold.

The SEC is proposing to amend existing rules such that foreign institutions would be eligible to make use of Schedule 13G if they are "substantially comparable" to the domestic institutions currently entitled to use the short form, which include brokers, dealers, banks, insurance companies, registered investment companies and registered investment advisers, among others. If the amendments are adopted, a foreign institution would be required to determine and certify that it qualified to use a Schedule 13G at the time it exceeded the five percent ownership threshold, including that it is subject to a comparable regulatory scheme to that of the domestic entities discussed above. A foreign institution would also be required to furnish to the SEC, upon request, the information it would otherwise be required to include in a Schedule 13D. As is currently the case with those filing a Schedule 13G, any institution that acquired the equity securities with the purpose or effect of influencing or changing control of the issuer, and not in the ordinary course of business, would be prohibited from using Schedule 13G.

If, after filing a Schedule 13G, the foreign institution later determined that it was no longer eligible to file a Schedule 13G due to its holding the securities with a disqualifying purpose or effect, it would be required to file a Schedule 13D within ten calendar days of such change. Additionally, the institution would be subject to a "cooling-off period" lasting until the end of the tenth calendar day from the date the Schedule 13D was filed, during which such institution is prohibited from voting or directing the voting of the equity securities, as well as from acquiring beneficial ownership of the issuer's equity securities or equity securities of any person controlling the issuer.

IV. Interpretive Guidance

A. *Application of "All-Holders Rule" to Foreign Target Security Holders*

Under current SEC Rule 14d-10 and Rule 13e-4(f), referred to as the "all-holders rule," all target security holders subject to those rules must be able to participate in a tender offer and be treated equally. The all-holders rule applies equally to U.S. and foreign shareholders and therefore limits the ability of bidders to exclude foreign target security holders from tender offers, including those for U.S. targets. Notwithstanding this restriction, the SEC notes in the Release that it is aware that certain bidders are purporting to exclude foreign target security holders in tender offers subject to those rules. In fact, this practice is fairly widespread, as many issuers have sought to exclude foreign holders in jurisdictions that present particular burdens due to the requirements of local securities laws. However, in the Release, the SEC reiterated that the all-holder requirement does not allow the exclusion of any foreign or U.S. target holders in tender offers subject to Rule 14d-10 and Rule 13e-4(f). In recognition of the fact that it may be difficult to comply with both U.S. and foreign securities laws, the SEC is soliciting comments on whether to expand the existing exceptions to the all-holders rule. In this regard, the SEC notes in the Release that current rules provide that a bidder may exclude all security holders in a U.S. state where the bidder is prohibited by administrative or judicial action pursuant to statute after a good-faith effort to comply with such statute, and is soliciting comment on whether this concept should be extended to target holders in a foreign jurisdiction. The current rules also do not require that offering materials be mailed into foreign jurisdictions.

B. *Ability of Bidders to Exclude U.S. Target Security Holders*

The Release includes guidance from the SEC on the ability of a bidder to exclude U.S. target security holders from a foreign tender offer. As a general matter, under current SEC rules, a bidder that makes a tender offer or exchange offer for target securities of a foreign private issuer may exclude U.S. target security holders if the offer is conducted outside the United States and no U.S. jurisdictional means are implicated. In the Release, the SEC reiterated that if a bidder wishes to conduct an exclusionary offer, it may not be enough for a bidder to include a restrictive legend or disclaimer offering materials or information posted on a bidder's website stating that offering materials may not be distributed in the United States, but instead the bidder must also take other special precautionary measures to prevent sales to, or tenders from, U.S. holders. One such measure has, in the past, included requiring tendering holders to represent or certify that they are not U.S. holders. In the event that a target security holder has misrepresented its status as a U.S. person, bidders will not be deemed to have targeted U.S. holders or otherwise invoked sufficient U.S. jurisdictional means so long as the bidder has taken adequate measures reasonably designed to guard against purchases and sales to U.S. holders.

The SEC's position is premised on the absence of facts that would or should put the bidder on notice that a tendering security holder is a U.S. investor, such as the provision of a U.S. taxpayer identification number or receipts of payment drawn on a U.S. bank. The SEC also notes that if tenders in exclusionary offers are made through offshore nominees, the bidders could require that the nominees certify that they are not tendering securities on behalf of U.S. holders. This could,

however, be difficult for a bidder to accomplish where the law of such foreign jurisdiction prevents nominees from knowing the identity or location of the beneficial owners on whose behalf they hold. The SEC also notes in the Release that the SEC staff will, in the future, closely monitor exclusionary offers to determine whether SEC action is necessary to protect U.S. holders.

C. *Vendor Placements*

In certain cross-border exchange offers, bidders have employed "vendor placements" to avoid the registration requirements of the Securities Act. In a vendor placement, the bidder offers securities to the target shareholders but employs a third party to sell the securities that U.S. tendering holders would otherwise receive in offshore transactions. The bidder or the third party then remits the net proceeds of such sales to the U.S. holders that tendered into the exchange offer.

In the Release, the SEC indicated that in addition to the other factors the SEC has considered in the past,[12] a vendor placement would be subject to registration under Section 5 of the Securities Act unless the market for the bidder's securities that will be issued in the exchange offer and sold in the vendor placement is highly liquid and robust and the number of bidder securities to be issued in the exchange offer and for the benefit of tendering U.S. holders is relatively small compared to the total number of bidder securities outstanding. The SEC also indicated that it would consider (i) the timeliness of the vendor placement process (i.e., whether sales of bidder securities through the vendor placement process are effected within a few business days of the closing of the offer), (ii) whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before that process is complete, and (iii) whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder. Most importantly, the SEC indicated that if a tender offer is subject to Section 14(d) of the Exchange Act, the parameters of the Tier I exemptions (i.e., that ten percent or less than the target's securities are held by U.S. persons) should represent the outer limits under which a bidder in a tender offer subject to Regulation 14D may offer cash to U.S. holders while issuing shares to security holders outside the United States. Finally, the SEC indicated that in the context of an exchange offer subject to Section 14(d) of the Exchange Act, it would be impermissible for a bidder to exclude some U.S. target holders while at the same time permitting only those U.S. holders (such as accredited investors) for whom an exemption from Section 5 of the Exchange Act is available to participate.

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[12] The SEC has, through no-action relief, articulated factors that it would consider in determining whether a vendor placement would obviate the need for Securities Act registration, including (i) the level of U.S. ownership in the target company, (ii) the amount of bidder securities to be issued overall in the business combination as compared to the amount of bidder securities outstanding before the offer, (iii) the amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as compared to the amount of bidder securities outstanding before the offer, (iv) the liquidity and general trading market of the bidder's securities, (v) the likelihood that the vendor placement can be effected within a very short time after the termination of the offer and the bidder's acceptance of shares tendered in the offer, (vi) the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales, and (vii) the process used to effect the vendor placement sales.

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