

Client Alert

Financial Markets Developments

SEC Amends Cross-Border Rules

On September 19, 2008, the US Securities and Exchange Commission (the "SEC") published its release (the "Adopting Release") containing amendments to the rules applicable to cross-border tender offers, exchange offers, business combination transactions and rights offerings (the "Cross-Border Rules"), as well as related interpretive guidance.¹ The amendments will become effective 60 days from the date of publication in the Federal Register and will be available for transactions that commence after the effective date. The interpretive guidance will be effective on the date of publication in the Federal Register.

I. Overview

The amendments to the current Cross-Border Rules make the following significant changes:

- **Calculating US Ownership for Eligibility.** The amendments make three changes to the eligibility test for calculating US ownership of the subject securities.
 - **Increased Time Period.** The amendments provide much greater flexibility as to when US ownership can be measured. A bidder may calculate US beneficial ownership of the subject securities as of any date within a 90-day range starting from 60 days *before* to 30 days *after* the public *announcement* of the tender offer, exchange offer or business combination transaction. The same 90-day range may be used by issuers in rights offerings except that the reference date will be the record date. If a bidder is unable to calculate US beneficial ownership within such period, the bidder may measure from any date within the 120-day period *before* public *announcement*. This 120-day period is not available for rights offerings which now may use the 90-day period to calculate US ownership.
 - **Elimination of Exclusion of 10 percent Holders.** The amendments provide that holders of more than 10 percent of the subject securities will no longer be excluded from the public "free" float when determining the level of US ownership. The calculation of the US ownership percentage, however, will continue to exclude subject securities held by a bidder. For calculations involving companies with significant numbers of non-US 10 percent holders, these changes would mean that the level of US ownership of the public "free" float would no longer be artificially inflated.
 - **Alternate Average Daily Trading Volume (ADTV) Test.** The alternate ADTV test will only be available in limited circumstances in friendly transactions. Bidders in hostile transactions and bidders in negotiated transactions who are unable to conduct the modified "look-through" analysis can calculate US ownership by comparing the US ADTV of the subject securities with the worldwide ADTV over a 12-month period ending no more than 60 days before the public announcement of the transaction.



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- **Expanded Tier I Relief from Rule 13e-3.** The amendments expand the scope of the Tier I exemption from Rule 13e-3 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to cover all affiliated transactions, regardless of transaction structure.
- **Expanded Tier II Relief.** The amendments expand the relief under the Tier II exemption as follows:
 - **Transactions not Subject to Rule 13e-4 or Regulation 14D.** The amendments expand the Tier II exemption to include tender offers subject only to Regulation 14E of the Exchange Act.
 - **Multiple Tender Offers.** Multiple offers will be allowed abroad in conjunction with a US offer. US offers may include non-US persons while non-US offers may include US persons.
 - **Withdrawal Rights.** Bidders will be allowed to suspend back-end withdrawal rights during the counting of tendered securities and until they are accepted for payment.
 - **Subsequent Offering Periods.** Subsequent offering periods may be extended beyond 20 US business days.²
 - **Purchases Outside a Tender Offer.** The amendments codify existing “no-action” exemptive relief from Rule 14e-5 to allow purchases and arrangements to purchase securities of a foreign private issuer³ outside of tender offers conducted under the Tier II exemption, if certain conditions are met.
- **Schedule 13G.** Many foreign institutions will be eligible to file a Schedule 13G as qualified institutional investors instead of having to meet the more burdensome requirements applicable to passive investors or for holdings of more than 20 percent of the subject securities, having to file a more burdensome Schedule 13D.
- **Interpretive Guidance.** The Adopting Release also provides interpretative guidance in the following areas: the application of the “all-holders” rule; the ability to exclude US security holders and vendor placement arrangements.

II. Background

These amendments are the first major changes to the current Cross-Border Rules since they were first adopted in 1999.⁴ In recognition that foreign issuers often excluded US security holders from their transactions in order to avoid SEC regulation, the SEC adopted the Cross-Border Rules in 1999 to exempt certain cross-border transactions from regulatory requirements when the target company or the issuer in a rights offering is a “foreign private issuer” with US ownership below certain thresholds. The SEC’s goal was for foreign issuers to include US security holders in these types of cross-border transactions.

The broadest relief available to bidders is the “Tier I” exemption pursuant to Rule 14d-1(c) for tender offers and the exemptions pursuant to Rule 801 for rights offerings and Rule 802 for exchange offers and business combination transactions. In order for a target to qualify for these exemptions, US ownership of the target’s securities must be less than 10 percent. The Tier I exemption provides bidders with broad relief from filing and other procedural requirements under the tender offer rules. The Tier I exemption also provides relief from the enhanced disclosure requirements under the Rule 13e-3 going private rules⁵ in connection with certain transactions which would otherwise trigger Rule 13e-3. Rules 801 and 802 under the Securities Act of 1933, as amended (the “Securities Act”), exempt foreign private issuers from the registration requirements under the Securities Act for certain rights offerings and exchange offers or business combination transactions, respectively.

A narrower exemption for cross-border transactions is the “Tier II” exemption, which relieves a bidder from certain US tender offer rules. The Tier II exemption applies to transactions in which US ownership of the target’s securities is less than 40 percent. The Tier II exemption does not relieve a foreign private issuer from the registration requirements under the Securities Act.

With these amendments, the SEC aims to encourage the inclusion of US security holders in cross-border transactions by providing more flexibility and broader exemptions than those under the current Cross-Border Rules. The amendments also codify certain no-action letter policy and interpretive positions and reconcile certain discrepancies between US and non-US regulations and market practices.

III. Amended Rules

A. Determining US Beneficial Ownership

Under the current Cross-Border Rules, US beneficial ownership of a target company is determined by reference to the target's or the issuer's public "free" float, which excludes from the calculation of US ownership securities held by the bidder and 10 percent holders of the subject securities. The issuer or the bidder must look through securities held of record by brokers, banks and nominees in specified jurisdictions to determine whether the beneficial owners of the subject securities are US persons. Currently, the relevant date for determining US beneficial ownership is the record date for a rights offering or the 30th day before the commencement of the tender offer, exchange offer or other business combination transaction. The Adopting Release revises the current eligibility test for negotiated transactions, hostile transactions and rights offerings.

A1. Change of Relevant Date for Determination of US Ownership

The amendments allow a bidder to determine US ownership as of any date during a 90-day period ranging from 60 days *before* to 30 days *after the public announcement*⁶ of the tender offer, exchange offer or other business combination transaction. If a bidder is unable to calculate US ownership on a date within such 90-day period, the bidder may calculate US ownership as of any date no more than 120 days *before the public announcement* of the transaction.

The amendments also allow issuers in rights offerings to calculate US ownership as of any date during a 90-day period ranging from 60 days before to 30 days after the record date of a rights offering. However, the amendments did not expand the period for up to 120 days prior to the record date for rights offerings. The Adopting Release explained that, if the US ownership information is not available within the 90-day range period, an issuer has the power to set an appropriate record date for its rights offering.

Changing the reference date from the date of commencement to the date of announcement is intended to aid in planning transactions⁷ and encourage the use of the exemptions.⁸ By permitting a bidder to determine US ownership as of a

date chosen by the bidder during a period of up to 60 days or during an expanded period of up to 120 days under certain circumstances, before the public announcement, the bidder would know at an earlier date whether the Tier I or Tier II exemption will be available. The SEC expressed concern about potential abuses of this flexibility and reiterated in the Adopting Release that the cross-border exemptions are not available for any transaction that technically complies with the Cross-Border Rules but is in fact part of a scheme to evade compliance with the US securities laws.

The requirement under the current Cross-Border Rules to use the date of commencement as a reference date for cross-border tender offers conflicts with the time period during which purchases outside of the tender offer are prohibited by Rule 14e-5 under the Exchange Act,⁹ which employs the date of announcement as the beginning of the restricted period. For example, in a transaction where the announcement predates the commencement by more than 30 days, a bidder under the current rules might not know whether it would qualify for an exemption from Rule 14e-5 at the time of announcement. The amendments will harmonize the Tier I and II exemptions with Rule 14e-5.

A2. Elimination of Exclusion of 10 percent Holders

Under the current Cross-Border Rules, securities owned by holders of more than 10 percent of the class of subject securities or by the bidder are excluded in calculating US ownership for the purpose of determining Tier I or Tier II eligibility. The amendments eliminate the exclusion of 10 percent holders, regardless of whether any such holder is an affiliate of the bidder or a US holder. Subject securities held by the bidder will continue to be excluded. This amendment is expected to increase the availability of the exemptions under the Cross-Border Rules, although it may decrease the availability of the cross-border exemptions for certain situations which previously would have qualified under the current rules (e.g., where a target company has a disproportionately large number of 10 percent holders of the subject class in the US).

A3. ADTV test for US Ownership

In the context of a hostile tender offer, the current Cross-Border Rules do not require a bidder to look through the target's

securities to determine US beneficial ownership based on a presumption that the target will not cooperate. Instead, a bidder can determine the level of US ownership of the target by looking at the aggregate trading volume of the target's securities in the US as compared to worldwide aggregate trading volume during a 12-month period ending 30 days before commencement of the offer (the "Hostile Presumption"). However, if a bidder knows or has reason to know that the actual level of US ownership is higher than shown by the trading volume calculation, it cannot rely on the trading volume calculation. For hostile tender offers, the amendments preserve the use of the comparison of US and worldwide ADTV,¹⁰ but change the 12-month measuring period, which must now end no more than 60 days before the public announcement of the transaction. Even though in the look-through test the SEC permits a bidder to determine the US ownership as of a date after the public announcement, it does not allow a bidder to use a range of dates that extends beyond announcement in the alternative ADTV test.

In a negotiated transaction, a bidder may rely on the alternative ADTV comparison test only if such bidder is unable to obtain US beneficial ownership information as of a date within the 90-day period or within the expanded 150-day period under certain circumstances. The SEC recognized that specific situations would justify the use of the alternative test. For example, a bidder is generally deemed unable to conduct the required look-through test when the subject securities are in bearer form. In addition, a bidder may be unable to conduct the look-through test in some non-US jurisdictions where security holder lists are generated only at fixed intervals during the year and are not otherwise available. For a bidder in a negotiated transaction to utilize the alternative ADTV test, there must be a "primary trading market"¹¹ for the subject securities. The SEC considers the existence of a primary trading market as important to ensure that a primary foreign regulator is overseeing the transaction.

The alternative ADTV test requires a bidder or issuer, whether in a hostile or negotiated transaction, to take into account US ownership figures in *annual* reports or other *annual* information in filings with the SEC or the home country regulator that have been filed before the public announcement of the transaction. A bidder's eligibility to rely on the cross-border exemptions will not be affected by filings after the public announcement of the

transaction (i.e., a bidder will not lose or gain eligibility to rely on the cross-border exemptions based on reports filed after the public announcement).

The alternative ADTV test also requires that a bidder take into account information it "knows or has reason to know" before the public announcement of the transaction. The current Hostile Presumption contains a similar requirement and bidders have often expressed uncertainty as to the meaning of "reason to know" and the date on which the "reason to know" standard applies. The amendments clarify that a bidder is presumed to know US ownership information that is disclosed in any filing with the SEC, the home country regulator or the primary trading market or that is publicly available. Such information includes information in filings made by the issuer and other parties reporting beneficial ownership of the subject securities. A bidder is deemed to know information about US ownership available from the issuer or obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers. A bidder is not required to engage a third-party service at its own expense to obtain such information. The amendments also clarify that the date on which the "reason to know" standard applies is the date of announcement. Information the bidder "knows or has reason to know" after the date of announcement is not relevant in determining its eligibility for the cross-border exemptions. The use of the date of announcement as the cut-off date for information known to the bidder is also intended to prevent bidders from evading applicable regulations by taking advantage of any expected post-announcement changes in the level of US ownership.

B. Expanded Tier I Relief

The Tier I exemption under the current Cross-Border rules provides relief for bidders from registration and disclosure requirements for only particular types of affiliated transactions under Rule 13e-3 under the Exchange Act; it does not apply to some transaction structures commonly used abroad, such as schemes of arrangements, cash mergers and compulsory acquisitions for cash. Rule 13e-3 generally imposes heightened disclosure requirements for transactions having a "going private" effect because of the conflicts of interest inherent in such transactions. The amendments

allow all transaction structures to be exempt from the Rule 13e-3 disclosure requirements if they meet the conditions set forth in Rule 802 or the Tier I exemption.

C. Expanded Tier II Relief

The Tier II exemptions are narrower in scope than the Tier I exemptions. Where US persons hold more than 10 percent but no more than 40 percent of the relevant class of subject securities, the Tier II exemptions provide relief from specific US tender offer rules. The Tier II exemptions do not provide relief from the US filing, disclosure and dissemination obligations under Regulation 14D or Rule 13e-3 under the Exchange Act, the registration requirements of Section 5 of the Securities Act or any disclosure requirements under Rule 13e-3 under the Exchange Act.

C1. Extended Relief to Unregistered Tender Offers

The Tier II exemption applies to transactions governed by Regulation 14D and Rule 13e-4, but under the current Cross-Border Rules it is unclear whether transactions not covered by those rules qualify for the Tier II exemption. The amendments extend the availability of the Tier II exemption to tender offers subject only to Regulation 14E, such as tender offers for classes of securities of an issuer with no securities registered under Section 12 of the Exchange Act, provided the exemptions would have been available if those offers were subject to Regulation 14D or Rule 13e-4.

C2. Expanded Relief for Dual or Multiple Offers

C2a. Multiple Offers Abroad Allowed

The “all-holders” rule under the Exchange Act requires that all tender offers subject to Section 14(d) of the Exchange Act be held open to all holders of securities of the subject class and all holders must be treated equally. The Tier II exemption currently allows a bidder to separate an offer into a US offer and a non-US offer so long as the US offer is made on terms at least as favorable as the non-US offer. A literal reading of this dual offer provision raises questions because the text of this exemption permits only two offers for the target class of securities: one US offer and one non-US offer. The SEC has consistently issued no-action letters to allow bidders to conduct multiple offers abroad where a bidder is subject to more than one non-US regulatory scheme. The Adopting Release

eliminates the restriction on the number of non-US offers a bidder may make in a cross-border combination transaction. The amendments permit a bidder to conduct multiple non-US offers contemporaneously with a US offer. This amendment is not intended to permit the use of separate proration pools where such a structure is used in the context of a partial cross-border tender offer.

C2b. Participation in Dual or Multiple Offers

The existing Tier II exemption limits US offers to only US persons and non-US offers to only non-US persons. This creates a problem because bidders often want to include holders of American Depositary Receipts (“ADRs”) who are not necessarily US persons in a US offer. Similarly, the existing Tier II exemption prohibits US persons from participating in non-US offers. In some non-US jurisdictions, this prohibition conflicts with laws which do not permit the exclusion of any security holders, including US holders.

The amendments relax the participation rules by allowing bidders to include non-US holders of ADRs in a US offer. Based on the individual relief requests received in the past, the SEC explicitly refused to extend the US offer to non-US target holders who do not hold in ADR form. This amendment is not intended to enable an offer to be made only to holders of ADRs or only to holders of the underlying securities, where the target shares are registered under Section 12 or where Rule 13e-4 otherwise would apply.

The amendments will also allow, but will not require, US holders to participate in non-US offers, provided that: (i) the laws of the jurisdiction governing such non-US offer(s) expressly preclude the exclusion of US persons from the non-US offer(s) and (ii) the offer materials distributed to US persons fully and adequately disclose the risks of participating in the non-US offer(s).

C3. Back-end Withdrawal Rights

The US tender offer rules require that tendering security holders in Section 14(d) offers be provided with “back-end” withdrawal rights.¹² The existing Tier II exemption provides limited relief from the requirement of back-end withdrawal rights. Under the current Tier II exemption, the back-end withdrawal rights may be terminated by the bidder upon the expiration of the initial offering period so long as: (i) the bidder announces the results of the initial offering period and pays for tendered securities in accordance

with home country law or practice and (ii) the subsequent offering period, if any, begins immediately. These conditions require that a bidder knows whether the offer conditions, including the minimum acceptance condition, have been satisfied at the end of the initial offering period. Different tendering mechanics in different jurisdictions render the satisfaction of these conditions very difficult, primarily because subject securities are often tendered through multiple financial institutions in a number of foreign jurisdictions. Without knowing whether the minimum acceptance condition has been satisfied, a bidder cannot initiate the subsequent offering period immediately, which makes the Tier II exemption suspending back-end withdrawal rights unavailable.

The amendments will no longer require a bidder to provide a back-end withdrawal period after the initial offering while tendered securities are being counted and before they are accepted for payment. This relief is conditioned on the following factors:

- The transaction must qualify for the Tier II exemption
- The offer must include an offering period with withdrawal rights of at least 20 US business days
- When withdrawal rights are suspended, the offer conditions must have been satisfied or waived, except to the extent that the bidder is counting the tendered securities to determine if the minimum acceptance condition has been satisfied. The SEC emphasized that back-end withdrawal rights cannot be suspended where a regulatory condition remains outstanding after the expiration of the offer period
- If there is a subsequent offering period, withdrawal rights are only suspended during the counting process after the initial offering period; withdrawal rights must be reinstated immediately afterwards to the extent that they are not terminated by the acceptance of tendered securities.

The amendments also allow the suspension of back-end withdrawal rights that may exist after the expiration of a subsequent offering period, to the extent that the bidder meets the conditions outlined above.

C4. Subsequent Offering Periods

The amendments to the current Cross-Border Rules regarding subsequent offering periods are primarily intended to eliminate certain conflicts between the US rules and non-US laws or market practices.

C4a. Expansion of Subsequent Offering Period

The US tender offer rules currently provide that the maximum period for a subsequent offering period is 20 US business days. The SEC believed that the current 20-business day limit on the length of a subsequent offering period unnecessarily created a conflict between US law and non-US laws or market practices. The amendments remove the maximum time limit on the length of a subsequent offering period. This amendment applies to all tender offers, not only tender offers that qualify for Tier II relief. The current requirement that a subsequent offering must last for at least three US business days remains unchanged.

C4b. Prompt Payment Rule

The US tender offer rules require a bidder to accept and promptly pay for all securities tendered during the subsequent offering period, which effectively requires daily aggregation and payment. Although the current Tier II exemption allows bidders to rely on home country practice with respect to the timing of acceptance of and payment for securities tendered during the initial offering period, it requires a bidder to comply with the prompt payment requirement for securities tendered during the subsequent offering period based on the rationale that security holders are not given withdrawal rights during the subsequent offering period and should be paid promptly. This requirement has created conflicts with non-US laws and market practices. The amendments no longer require daily payment for securities tendered during the subsequent offering period. Instead, a bidder will be allowed to wait to pay for the securities tendered during the subsequent offering period until the end of a period not to exceed 20 business days¹³ after the date of tender. The SEC stated that 20 days is sufficient time and is aligned with non-US market practices. If a jurisdiction's law or practice permits payment on a more expedited basis, payment must be made more quickly than at the end of such 20-business day period.

C4c. Payment of Interest

The US tender offer rules prohibit paying interest on the offer price to holders of securities tendered during a subsequent offering period, which is another common area of conflict with non-US laws. The amendments allow a bidder to pay interest to sellers for securities tendered during a subsequent offering period in a Tier II tender offer where the payment of interest is required by the law of the relevant foreign jurisdiction.

C4d. “Mix and Match” Offers

In a typical “mix and match” offer, target security holders are offered a mix of cash and securities with the option to elect a different proportion of cash and securities. It is expected that tendering security holders will make different and opposite elections so their elections will “offset” against each other. The bidder typically sets a maximum amount of cash and securities that it will pay in the offer. To the extent that tendering security holders’ elections exceed the maximum, the elections will be prorated.

The current US tender offer rules allow a choice of different forms of consideration in the subsequent offering period only if there is no ceiling on the forms of consideration. The prohibition of a ceiling is inconsistent with the offset feature of mix and match offers. The prohibition makes a mix and match offer impractical for bidders who have insufficient financing to offer 100 percent cash consideration. The current US tender offer rules also require that the same form and amount of consideration be offered to tendering security holders in both the initial and subsequent offering periods. But under the prompt payment rule, the elections of holders in the initial offering period will be aggregated and offset against each other immediately so the security holders who tendered during the initial offering period can be paid promptly. This effectively creates two different proration and offset pools, one for securities tendered during the initial offering period and the other for the subsequent offering period. The amendments remove the ceiling prohibition and allow bidders to use different proration pools for initial and subsequent offering periods, provided that the offer qualifies for the Tier II exemption.

C5. Terminating Withdrawal Rights after Reduction or Waiver of Minimum Acceptance Condition

The current US tender offer rules which provide that a bidder must allow an offer to remain open for a certain period of time after a material change in the offer’s terms is communicated to target security holders. The minimum 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. When the Cross-Border Rules were first adopted in 1999, the SEC provided interpretive guidance allowing a bidder qualifying for the Tier II exemption, and meeting certain other conditions, to waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining in the tender offer following the waiver or reduction.

In the Adopting Release, the SEC raises the concern that bidders in the past relied on this interpretive position in contexts that the SEC did not intend.

Therefore the SEC is limiting its interpretive position. The termination of withdrawal rights after a reduction or waiver of a minimum acceptance condition will only be available under the following conditions:

- The transaction is eligible for the Tier II exemption
- The applicable foreign law does not permit the bidder to provide withdrawal rights after the reduction or waiver of the minimum acceptance condition
- The bidder must announce that it may waive or reduce the minimum acceptance condition at least five business days before the actual waiver or reduction. A statement in the initial offering materials will not satisfy this condition
- The bidder must disseminate the announcement through a press release and other methods reasonably calculated to inform US holders of the possibility of a waiver or reduction, which may include placing an advertisement in a newspaper of national circulation in the US. Such announcement should be filed on EDGAR

- The press release must state the exact percentage to which the minimum acceptance condition may be reduced (or if it will be waived, rather than reduced). The bidder must announce its actual intentions regarding waiver or reduction as soon as required under home country rules
- During the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided
- The announcement must advise security holders to withdraw tendered securities immediately if their willingness to tender would be affected by the reduction or waiver of the minimum acceptance condition
- The procedure for waiving or reducing the minimum acceptance conditions must be described in the offering materials
- The offer must remain open for at least five business days after the waiver or reduction of the minimum acceptance condition
- All offer conditions must be satisfied or waived when withdrawal rights are terminated
- The potential impact of the waiver or reduction of the minimum acceptance condition must be fully disclosed in the initial offering materials or any supplemental materials
- An extension is not otherwise required by Rule 14e-1¹⁴
- The bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable foreign law, and in any case, may not reduce or waive the minimum acceptance condition below a majority of the outstanding securities of the subject class. A majority is more than 50 percent of the outstanding target securities available in the offer. This is to ensure that the target's security holders are not disadvantaged when a bidder, among competing bidders, waives or reduces its minimum acceptance condition to purchase a minority stake in the target company.

C6. Early Termination of the Initial Offering Period or a Voluntary Extension of the Initial Offering Period

The current US tender offer rules require that the initial offering period remain open for certain specified minimum time periods after a material change in the terms of the offer, which includes a change in the expiration date of an offer. Under non-US law, however, a bidder may be required to purchase 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. To resolve this conflict, the SEC has granted no-action relief to bidders who terminated the initial offering period early, subject to certain conditions. The amendments codify a bidder's ability to terminate an initial offering period early, including a voluntary extension of that period, thereby terminating withdrawal rights, if the following conditions are met:

- The initial offering period has been open for at least 20 US business days and all offer conditions have been satisfied
- The original offering materials adequately disclosed the possibility and impact of early termination
- There is a subsequent offering period after early termination of the initial offering period
- All offer conditions are satisfied when the bidder terminates the initial offering period, without waiving or reducing the minimum conditions
- 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.¹⁵

C7. Purchases Outside of a Tender Offer

Rule 14e-5 does not allow "covered persons," which include, among others, the bidder and its affiliates, from purchasing or arranging to purchase subject securities outside of a tender offer. This prohibition applies from the time of public announcement until the end of the offering period. The provisions of Rule 14e-5 apply to Tier II transactions while Tier I transactions are exempt.

In 2006 and 2007, the SEC granted blanket no-action relief for the following three types of purchases outside of a Tier II tender offer, in each case subject to certain conditions:

- Pursuant to a non-US tender offer where there are separate US and non-US offers
- By bidders and their affiliates outside of a tender offer
- By a financial advisor's affiliates outside of a tender offer.

The amendments codify the exemptive class relief previously granted for Tier II tender offers by adopting Rules 14-e5(b)(11) and 14-e5(b)(12).

Rule 14-e5(b)(11) permits purchases or arrangements to purchase pursuant to one or more non-US offers during the Rule 14e-5 prohibited period, if:

- The tender offer is being conducted as a Tier II tender offer
- The economic terms and consideration in the US and non-US tender offers are the same, provided that any cash consideration to be paid to US holders may be converted from the currency to be paid in non-US tender offer(s) to US dollars at an exchange rate disclosed in the US offering documents
- The procedural terms of the US tender offer are at least as favorable as the terms of the non-US tender offer(s)
- The bidder discloses its intention to make purchases outside of the tender offer pursuant to the non-US tender offer in the US offering documents
- Purchases or arrangements to purchase are made solely in non-US tender offers outside the US, and not pursuant to any open market transaction(s), private transaction(s) or other transaction(s).

Rule 14-e5(b)(12) permits purchases or arrangements to purchase, including market transactions, private transactions or other transactions outside the tender offer, by: (i) a bidder and its affiliates and (ii) an affiliate of a financial advisor, if:

- The subject company is a foreign private issuer
- The covered person must reasonably expect that the offer qualifies for the Tier II exemption
- Purchases are made outside the US
- The US offering documents prominently disclose the possibility of or the intention to make purchases or arrangements to purchase outside the tender offer
- To the extent any information about the purchases is made public in the home jurisdiction, it must be disclosed in the US as well
- Where a bidder or its affiliate purchases or arranges to purchase target securities outside a tender offer, the tender offer price must be raised to equal any higher price paid outside of the tender offer
- Where an affiliate of the bidder's financial advisor purchases or arranges to purchase target securities outside a tender offer
 - Written policies and procedures must be in place to prevent the flow of information that could result in a violation of US securities laws
 - The affiliate must not have any officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) in common with the financial advisor who directly affects or recommends transactions in the subject securities or related securities
 - The financial advisor must have a US registered broker-dealer affiliate
 - The purchases or arrangements to purchase are not made to facilitate the tender offer.

The SEC expressed its intention to deter any financial advisor or affiliate from abusing this provision or using this provision to facilitate the tender offer. Any purchases or arrangements to purchase must be within the financial advisor's affiliate's normal

course of business. In the original proposal, the SEC explicitly excluded risk arbitrage from “normal course of business.” However, the Adopting Release removes the “no risk arbitrage” exclusion. In addition, the amendments contain a general prohibition that purchases or arrangements to purchase outside a tender offer by a financial advisor’s affiliate cannot be made to facilitate the tender offer.

D. Expanded Availability of Early Commencement Exchange Offers

When the SEC adopted the Cross-Border Rules in 1999, it also revised the regulations generally applicable to takeover transactions. Those revisions were intended to minimize the differences between cash and stock tender offers by permitting bidders offering stock in a tender offer to commence a registered exchange offer on the date of the filing of the registration statement with the SEC, so long as certain conditions are met. The rules, as revised in 1999, do not allow a bidder to take advantage of the early commencement option if the subject securities are not subject to Regulation 14D or Rule 13e-4, such as an offer for unregistered securities or an offer for convertible debt securities. This limitation created an obstacle in some non-US jurisdictions where a bidder could be required to make an offer for any class of the target’s securities that may be converted into the subject securities. If one class of subject securities is not subject to Regulation 14D or Rule 13e-4, the bidder loses the ability to commence the exchange offer early under the existing rules.

The amendments being adopted at this time allow early commencement in all exchange offers other than going-private transactions and roll-up transactions, regardless of whether the offer is subject to Regulation 14E only or whether the offer is eligible for Tier II relief. To use early commencement, two conditions must be met: (i) the bidder must provide withdrawal rights in the offer to the same extent as would be required under Regulation 14D or Rule 13e-4 and (ii) such offers must provide for the same time periods after the occurrence of specified change as are currently required for offers subject to Regulation 14D.

E. Beneficial Ownership Reporting by Foreign Institutions

Sections 13(d) and 13(g) of the Exchange Act and the corresponding regulations¹⁶ require persons owning 5 percent or more of a class of equity securities registered under Section 12 of the Exchange Act to provide certain information to the SEC in public filings. The beneficial ownership reporting requirements in such rules and regulations establish a comprehensive reporting system for information about the ownership of equity securities. Certain institutional investors, including qualified institutions as set forth in Rule 13d-1(b)(1)(ii), may file the short form Schedule 13G. Historically, a foreign institution that sought to use Schedule 13G under Rule 13d-1(b)(1)(ii) needed to obtain an exemptive order from the SEC. Alternatively, a foreign institution may use Schedule 13G under Rule 13d-1(c) if it is a passive investor holding less than 20 percent of the target class of securities.

The amendments allow foreign institutions that are substantially comparable to US institutions to use the short form Schedule 13G on the same basis as US institutional investors provided they: (i) certify they are subject to a regulatory scheme substantially comparable to that of the US and (ii) undertake to furnish information otherwise required under Schedule 13D. The extension of Schedule 13G to foreign institutions will be available only to institutions that acquire and hold the equity securities in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer, nor in connection with or as a participant in any transaction that has such a purpose or effect. If a foreign institution determines that it is no longer eligible to report its beneficial ownership of the subject securities on Schedule 13G and is not otherwise eligible to use Schedule 13G, it will be required to file a Schedule 13D within ten calendar days of the change.

IV. Interpretive Guidance

In addition to the amendments, the Adopting Release contains updated guidance on the SEC's position on several other topics.

A. Application of the All-Holders Rule to Non-US Target Security Holders

Rules 14d-10 and 13e-4(f) under the Exchange Act require all issuers, both domestic and foreign, to include all target security holders, both US and non-US, in tender offers subject to Section 13(e) or 14(d) of the Exchange Act. These provisions are intended to encourage both US and foreign issuers to treat target security holders equally. The SEC noted that issuers repeatedly exclude non-US security holders because of the regulatory burdens imposed by certain foreign jurisdictions.

The SEC recognized that issuers may face difficulty in complying with both US and non-US regulatory regimes. Nonetheless, the SEC reiterated its position in the Adopting Release that issuers may not exclude any target security holders if the tender offer is subject to Rules 14d-10 and 13e-4(f). Rather than adopting a *de minimis* (or any other) exception to the all-holders rule, relief from such rule will be granted on an individual basis, such as in situations where a cash alternative is provided to foreign target holders in a jurisdiction in which securities may not be issued.

B. Ability of Bidders to Exclude US Target Security Holders

Bidders that do not use US jurisdictional means in connection with an offer are not required to comply with the US tender offer rules. In the Adopting Release, the SEC sought to clarify the types of precautionary measures that a bidder must take in order to avoid triggering the US jurisdictional means, including measures designed to prevent US persons from buying or tendering securities in the offer.¹⁷ Precautionary measures bidders may take to avoid triggering US rules include, but are not limited to:

- Placing legends on offer documents
- Prohibiting the distribution of offer documents into the US
- Putting in place measures to ensure that tenders are not accepted from, nor securities issued to, US holders, including

obtaining adequate information in responding to inquiries and processing letters of transmittal to determine whether the target security holder is a US holder

- Obtaining representations from tendering holders or persons tendering on others' behalf, that the tendering holder is not a US holder
- Taking special care to avoid mailing into the US.

The SEC stated that simply including a restrictive legend or disclaimer or stating on a website that the offering materials may not be distributed in the US are not sufficient methods to avoid triggering the US jurisdictional means. The SEC further noted that, if foreign law does not permit a bidder to reject tenders from US holders and does not permit statements that the offer may not be accepted by US holders, it may be impossible for the bidder to take adequate precautionary measures to avoid US jurisdictional means.

If a target security holder misrepresents its US person status, the SEC will not sanction the foreign issuer as long as it has taken precautionary measures reasonably designed to avoid tenders by US persons. In the context of offers made through offshore nominees, the SEC suggested that the foreign issuer require the nominee to certify that the sale was not being made on behalf of US persons.

C. Vendor Placements

In a vendor placement arrangement, the bidder employs a third party to sell securities that US holders would otherwise receive. The third party then returns the profits from the sales to the US holders who tendered their target securities. A vendor placement arrangement in a cross-border exchange offer will be subject to Securities Act registration requirements unless: (i) the market for the bidder's securities is robust and highly liquid and (ii) the number of US holders is small compared to the total number of bidder securities outstanding. Additional considerations include, but are not limited to: (i) the level of US ownership in the target company; (ii) the timeliness of the vendor placement process; (iii) whether the bidder announces material information, such as earnings results, forecasts or other financial or operating information, before the process is complete and (iv) the process used to effect the vendor placement sales.

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 a vendor placement structure because US holders are receiving different consideration than their non-US counterparts. The SEC believes that a bidder should only be able to offer cash to US securities holders while issuing shares to their counterparts outside the US in Tier I transactions. In the Adopting Release, the SEC also stated that offering cash under a vendor placement arrangement to some US holders and bidder securities to others is not permitted in tender offers subject to all-holder rules. Particularly, if US ownership is above 10 percent, the SEC requires a bidder using the vendor placement structure for a tender offer to seek no-action exemptive relief from the requirements of Rule 14d-10 if US ownership is above 10 percent.

V. Logistical Changes

The Adopting Release also includes logistical changes to certain filings. The SEC will now require both the Form CB and the Form F-X to be filed electronically. If the issuer does not already have a filing code, it will need to obtain a “Central Index Key (CIK)” to file with EDGAR. The issuer will need to file a notarized authenticating document with the SEC. The SEC added boxes on the cover pages of Schedule TO and Forms F-4 and S-4, indicating the reliance on one or more applicable cross-border exemptions. Contrary to the originally proposed amendments, the SEC will not require a filer to specify on the cover pages of these forms and schedules the percentage of US ownership supporting reliance on the cross-border exemptions claimed.

- 1 SEC Release No. 33-8957, 34-58597 (September 19, 2008) available at <http://www.sec.gov/rules/final/2008/34-58597.pdf>.
- 2 This amendment applies to all tender offers and is not limited to tender offers that qualify for Tier II relief.
- 3 A “foreign private issuer” is a foreign issuer, except a foreign government, where (1) US residents do not hold, directly or indirectly, more than 50 percent of the issuer’s outstanding voting securities and (2) such issuer meets one of the following conditions: (i) a majority of its executive officers or directors are not US citizens or residents; (ii) its assets located in the US may not be more than 50 percent of its total assets and (iii) its business is not administered principally in the US.
- 4 SEC Release Nos. 33-7759, 34-412054 and International Series Release No. 1208 (October 22, 1999).
- 5 Rule 13e-3 refers to certain transactions that have a “going private effect.” These transactions include any purchases of securities or solicitations to purchase securities made by the issuer or an affiliate of the issuer to cause either: (1) a class of securities to be held by less than 300 persons or (2) the class of securities to be no longer listed on a national exchange or authorized to be quoted on an inter-dealer quotation system.
- 6 A “Public announcement” is any oral or written communication by the bidder, or any person authorized to act on the bidder’s behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer or the business combination transaction. See Instruction 5 to Rule 14d-2(b)(2); Instruction 5 in Rule 13e-4(c) and Rule 165(f)(3).
- 7 For example, the amended rules should eliminate the risk of a disqualifying increase in US ownership due to post-announcement changes in the target’s shareholder base as arbitrageurs purchase the stock in transactions where the announcement predates the commencement by more than 30 days.
- 8 The SEC identified several recurring problems with using the 30th day before commencement: the look-through analysis took longer than 30 days; information was only available at intervals; the exact commencement date was outside the bidder’s control and collecting information before commencement alerted the market of a potential transaction and caused unwanted market responses.
- 9 Rule 14e-5 prohibits purchases, directly or indirectly, by covered persons made outside of a tender offer. The prohibition is in effect from the time of the public announcement to the end of the offering period. The prohibition does not apply to subsequent offering periods as long as the consideration paid in the subsequent offering period is the same as the consideration paid during the tender offer.
- 10 The current Cross-Border Rules compare “aggregate trading volume of the subject securities on all national securities exchanges in the United States, on the Nasdaq market or on the OTC market as reported to the NASD” to the worldwide aggregate trading volume. Although the amendments refer to “average daily” instead of “aggregate” trading volume, and eliminate the references to the NASD, the SEC does not view these changes as substantive.
- 11 “Primary trading market” means that at least 55 percent of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdictions during a recent 12-month period. In addition, if the trading of the subject securities occurs in two foreign markets, the trading in at least one of the two must be larger than the trading in the US for that class.
- 12 For issuer tender offers subject to Rule 13e-4 under the Exchange Act, tendering security holders must be able to withdraw their tendered securities after the expiration of 40 business days from the commencement of the tender offer. For third-party tender offers, Section 14(d)(5) of the Exchange Act states that withdrawal rights exist “at any time after sixty days from the [commencement] date of the original tender offer or request or invitation...”
- 13 The SEC originally proposed 14 business days, but was convinced that 20 business days would provide more flexibility without detriment to investors. For purposes of this rule provision only, a “business day” is determined by reference to the target’s home jurisdiction.
- 14 Rule 14e-1(b) requires that a tender offer must be kept open for a minimum ten business days after an increase or decrease in the amount of securities being sought, the consideration offered or the dealer’s soliciting fee.
- 15 The US tender offer rules require mandatory offer extensions for certain changes to the terms of a tender offer, such as changes in the offer consideration or the percentage of target securities sought in the tender offer.
- 16 Regulation 13D-G, Exchange Act Rule 13d-1 *et seq.*

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