

CORPORATE & SECURITIES UPDATE

Proposed Revisions to SEC Cross Border Tender Offer, Exchange Offer and Business Combination Rules

June 17, 2008

The U.S. Securities and Exchange Commission (the “SEC”) recently issued a release proposing rule changes aimed at expanding and improving the utility of the SEC’s cross-border exemptions for international business combination transactions.¹ These changes are consistent with the SEC’s efforts to encourage offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers, to permit U.S. security holders to participate in these transactions in the same manner as other holders.

The proposed rule changes are intended to address certain areas of conflict or inconsistency with non-U.S. regulations and practice that acquirors frequently encounter in cross-border business combination transactions.² Whether non-U.S. issuers list their securities on a U.S. market or U.S. investors access overseas trading markets to purchase their securities, cross-border business combination transactions can frequently present conflicts between U.S. and non-U.S. regulatory systems. The current cross-border exemptions are premised on the status of the target company in a business combination, or

the issuer in a rights offering, as a foreign private issuer.

Many of the proposed rule changes would codify existing SEC interpretive positions and exemptive orders in the cross-border transactions area. In the proposing release, the SEC also addressed certain other interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations.

Comments in response to the rule change proposals are required to be provided by June 23, 2008.

Background and Current SEC Regulatory Framework

Before the SEC’s current cross-border exemptions became effective in January 2000, U.S. holders of securities in a non-U.S. issuer or non-U.S. target company frequently were excluded from cross-border business combination transactions or rights offerings because of actual or perceived conflicts between U.S. and non-U.S. law. Where U.S. security holders held a relatively small percentage of a non-U.S. target’s securities,

their participation was often not necessary to the successful completion of the business combination transaction and acquirors frequently excluded them. Even where the percentage of securities held in the United States was significant, acquirors and issuers in business combination transactions and rights offerings sometimes avoided extending the offer into the United States because of perceived litigation risks or conflicts in rules or practice, or the desire not to engage in the process of preparing and filing a registration statement under Section 5 of the Securities Act of 1933, as amended (the “Securities Act”). Such exclusion of U.S. investors was viewed as depriving U.S. investors of some or all of the benefits of such cross-border transactions.

In an effort to facilitate the inclusion of U.S. security holders in primarily non-U.S. transactions, the SEC adopted the cross-border exemptions in 1999.³ The cross-border exemptions addressed areas of frequent regulatory conflict or differences in practice encountered by the SEC’s staff during those years.

Generally speaking, the cross-border exemptions are structured as a two-tier system based broadly on the level of U.S. interest in a transaction, measured by the percentage of target securities of a foreign private issuer held by U.S. investors. Where no more than 10 percent of the subject securities are held in the United States, a qualifying cross-border transaction will be exempt from most U.S. tender offer rules and from the registration requirements of Section 5 of the Securities Act based on the Tier I exemption under Regulation 14D of

the Securities Exchange Act of 1934 (the “Exchange Act”) and Rules 801 and 802 under the Securities Act. Tier I provides a broad exemption from the filing, dissemination and procedural requirements of the U.S. tender offer rules and the heightened disclosure requirements applicable to going private transactions as defined in Exchange Act Rule 13e-3. Tier I also exempts the company that is the subject of a tender offer from the obligation to express and support a position with respect to that tender offer. At the same level of U.S. ownership, Securities Act Rules 801 and 802 also provide relief from the registration requirements of the Securities Act for securities issued in rights offerings and business combination transactions.

Issuers relying on Securities Act Rule 801, offerors relying on Securities Act Rule 802, and third party bidders and issuers relying on the Tier I cross border exemption, must furnish a Form CB to the SEC. Form CB is a cover sheet for an English translation of the disclosure document used in the non-U.S. home jurisdiction and disseminated to U.S. target security holders. This form must be submitted to the SEC by the next business day after the disclosure document attached and used in the non-U.S. home jurisdiction is published or otherwise disseminated in accordance with home country rules. The materials submitted under cover of Form CB are not deemed filed with the SEC, and the filer is not subject to the liability provisions of Section 18 of the Exchange Act.

A bidder relying on the Tier I exemption must submit a Form CB only if the tender offer would have been subject to Regulation

14D or Exchange Act Rule 13e-4, but for the Tier I exemption. No filing requirement exists for a tender offer subject only to Section 14(e) of the Exchange Act and Regulation 14E and, accordingly, furnishing a Form CB is not necessary.

Where U.S. holders own more than 10 percent, but no more than 40 percent of the target securities (known as the Tier II exemption), the cross-border exemptions provide targeted relief from some U.S. tender offer rules to address certain recurring areas of regulatory conflict. The Tier II exemptions encompass narrowly-tailored relief from certain U.S. tender offer rules, such as the prompt payment, extension and notice of extension requirements in Regulation 14E. The Tier II exemptions do not provide relief from the registration requirements of Section 5 of the Securities Act, nor do they include an exemption from the additional disclosure requirements applicable to going private transactions by issuers or affiliates.

The scope of the Tier I and Tier II cross-border exemptions and the exemptions from Securities Act registration requirements provided in Securities Act Rules 801 and 802 are based broadly on the level of U.S. interest in a given transaction, as illustrated by the percentage of shares held by U.S. persons. In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.

Summary of Rule Change Proposals and SEC Guidance

The SEC is of the view that the existing cross-border exemptions have generally tended to facilitate the inclusion of U.S. security holders in non-U.S. business combination transactions in a manner consistent with the agency's U.S. investor protection mandate. However, the SEC does acknowledge that in some instances the exemptions are not operating as well as intended, or do not address continuing and recurring conflicts of law and practice not anticipated when they were originally adopted.

The rule revisions proposed by the SEC address certain recurring issues and unintended consequences that are thought to have impeded the usefulness of the cross-border exemptions. The SEC anticipates that the proposed revisions will encourage more offers to be extended into the United States. The proposed revisions generally represent an expansion and refinement of the current cross-border exemptions and, in some areas, would codify *ad hoc* relief previously granted by the SEC on an individual basis. The codification of various SEC staff interpretive positions would make such relief available as a matter of right, thereby reducing the burdens and costs for bidders and issuers of extending cross-border offers to U.S. holders when conducting cross-border transactions.

In some instances, the rule changes proposed would address practical problems that have limited the ability of bidders and issuers to rely on the exemptions. For example, the proposed changes relating to the calculation

of U.S. ownership of the target foreign private issuer are intended to provide greater certainty and ease of use for those seeking to rely on the exemptions.

In the proposed rule change release, the SEC also provides guidance on some of the interpretive issues that have arisen since the current cross-border exemptions were adopted.

The rule changes that have been proposed by the SEC include the following:

- Refinement of the tests for calculating U.S. ownership of the target company for purposes of determining eligibility to rely on the cross-border exemptions in both negotiated and hostile transactions, including changes to:
 - » Use the date of public announcement of the business combination as the reference point for calculating U.S. ownership;
 - » Permit the offeror to calculate U.S. ownership as of a date within a 60 day range before announcement;
 - » Specify when the offeror has reason to know certain information about U.S. ownership that may affect its ability to rely on the presumption of eligibility in non-negotiated tender offers;
- Expanding relief under Tier I for affiliated transactions subject to Exchange Act Rule 13e-3 for transaction structures not covered under the current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash;
- Extending the specific relief afforded under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act;
- Expanding the relief afforded under Tier II in several ways to eliminate recurring conflicts between U.S. and non-U.S. law and practice, including:
 - » Allowing more than one offer to be made outside the U.S. in conjunction with a U.S. offer;
 - » Permitting bidders to include non-U.S. security holders in the U.S. offer and U.S. holders in the non-U.S. offer(s);
 - » Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;
 - » Allowing subsequent offering periods to extend beyond 20 business days; Allowing securities tendered during the subsequent offering period to be purchased within 14 business days from the date of tender;
 - » Allowing bidders to pay interest on securities tendered during a subsequent offering period; and
 - » Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods;
- Codifying existing exemptive orders with respect to the application of Exchange Act Rule 14e-5 for Tier II tender offers;
- Expanding the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act;

- Requiring that all Form CBs (and the Form F-Xs that accompany them) be filed electronically;
- Modifying the cover pages of certain tender offer schedules and registration statements to list any cross-border exemptions relied upon in conducting the relevant transactions; and
- Permitting non-U.S. institutions to report on Schedule 13G to the same extent as their U.S. counterparts, without individual no-action relief.

In addition to these proposed rule changes, the SEC is providing guidance or soliciting views on the following issues:

- The ability of bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date;
- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;
- The application of the all-holders provisions of tender offer rules to non-U.S. target security holders;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The ability of bidders to use the vendor placement procedure for exchange offers subject to Section 13(e) or 14(d) of the Exchange Act.

It is anticipated that the proposed rule changes (with modifications depending on comments received) will be adopted in final form and go into effect at some point later this year. We will keep abreast of these

developments and are available to discuss the proposed changes or any other related matters should you have any questions.

Endnotes

¹ Release Nos. 33-8917; 34-57781 (May 6, 2008)

² A “foreign private issuer” is a non-U.S. company in which U.S. residents hold less than a majority of the shares or, if they do hold a majority, in which a majority of its directors and officers are not U.S. citizens or residents, its business is administered from outside the United States and a majority of its assets are located outside the United States. “Cross-border” generally refers to business combinations in which the target company is a foreign private issuer and rights offerings where the issuer is a foreign private issuer.

³ Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings: Release Nos. 33-7759, 34-42054 (October 22, 1999).

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