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CORPORATE & SECURITIES UPDATE

SEC Adopts Final Rules Affecting Cross-Border Tender Offers, Exchange Offers, Rights Offerings and Business Combination Rules

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On September 19, 2008, the U.S. Securities and Exchange Commission (the "SEC") issued its final release, Release Nos. 33-8957; 34-58597, on rule changes aimed at expanding and improving the utility of the SEC's cross-border exemptions for international business combination and rights offerings transactions along with related interpretive guidance (the "Cross-Border Release").[1] These rule changes are designed to expand and enhance the utility of the cross-border exemptions for business combination transactions and rights offerings and to encourage the offerors and issuers involved in such transactions to permit U.S. security holders to participate in these transactions on the same terms as other target security holders.

The cross-border exemption rule changes will be effective for transactions that commence after December 8, 2008. For further information on the background and current SEC regulatory framework regarding cross-border tender offer, exchange offer and business combination rules changes, see our Corporate and Securities Update titled "Proposed Revisions to SEC Cross-Border Tender Offer, Exchange Offer and Business Combination Rules," dated June 17, 2008, available at http://www.mayerbrown.com/publications/article.asp?id=4878&nid=6.

Several of the rule changes reflect new or amended SEC positions, while others represent the codification of existing interpretive positions and exemptive orders. The SEC recognizes that the Cross-Border Release will not eliminate all conflicts in law or practice presented by cross-border business combination transactions and therefore will continue to address issues not covered by the rule changes on a case–by-case basis.

Background

The SEC's cross-border exemptions for business combination transactions are generally 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[2] 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 U.S. Securities Act of 1933 (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. Where U.S. holders own more than 10 percent, but no more than 40 percent of the target securities, the cross-border exemptions provide targeted relief from some U.S. tender offer rules but address certain recurring areas of regulatory conflict (known as the Tier II exemption).

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 qualifying cross-border transaction offer on terms at least as favorable as those afforded other target holders.

Summary of Rule Changes

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

ELIGIBILITY THRESHOLD – CALCULATING U.S. OWNERSHIP

- Refinement of the "look-through" 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 that:
  - » Allow use of 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 range of 60 days before and 30 days after the public announcement of the transaction; if an acquiror in a business combination is unable to accomplish the look-through analysis as of a date during this range, it may calculate U.S. ownership as of a date no more than 120 days before the public announcement.
  - » No longer require that individual holders of more than 10 percent of the subject securities be excluded from the calculation of U.S. ownership (although securities held by the bidder and its affiliates will continue to be excluded from this analysis); and
  - » Allow the eligibility test to apply to the calculation of U.S. ownership for rights offering, calculated as of a date within 60 days before or 30 days after the record date.
- Providing an alternate test for determining eligibility to rely on the cross-border exemption. This test is based in part on a comparison of average daily trading volume of the subject securities in the United States and worldwide, which is available for all non-negotiated transactions and transactions where the look-through analysis may not be conducted (such as where security holder lists are only available at fixed intervals during the year, the subject securities are in bearer form or non-U.S. law prohibits disclosing information about beneficial owners). Satisfaction of this alternate test requires that:
  - » The average daily trading volume for the subject securities in the U.S. over a 12-month period ending no more

than 60 days before the transaction is announced to not be more than 10 percent of the worldwide average daily trading volume (or 40 percent in the case of Tier II);

» At least 55 percent of the trading volume must take place in a single, or not more than two, non-U.S. jurisdictions during a recent twelve-month period;

» Annual information filed with the SEC or home country regulators must not show U.S. ownership levels in excess of applicable limits for the exemption; and

» The offeror must not know or have reason to know that U.S. beneficial ownership levels exceed limits for the exemption.

CHANGE TO TIER I EXEMPTION FOR RULE 13e-3 PURPOSES

- Expanding relief under Tier I for affiliated transactions subject to Exchange Act Rule 13e-3 for transaction structures that previously were not covered under the cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash.

CHANGES RELATING TO TIER II EXEMPTION

- Extending the specific relief afforded under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act (so-called "Regulation 14E tender offers").
- 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. holders of American Depositary Receipts in the U.S. offer and, under specified conditions, 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 20 business days from the date of tender;

» Allowing bidders to pay interest on securities tendered during a subsequent offering period, where required under foreign law;

» Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods for certain kinds of tender offers; and

» Permitting bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date.

OTHER CHANGES

- 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" (i.e., allowing a tender offer that includes securities as consideration to commence on filing, rather than effectiveness, of an SEC registration statement) to offers not subject to Section 13(e) or 14(d) of the Exchange Act, including offers for U.S. target companies.
- 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.
- Requiring that all Form CBs (and the Form F-Xs that accompany them) be filed electronically.
- Permitting non-U.S. institutions to report beneficial ownership on Schedule 13G (rather than the more onerous Schedule 13D), subject to certain conditions, to the same extent as their U.S. counterparts, without individual no-action relief, and expanding the definition of beneficial ownership in Exchange Act Rule 16a-1(1) to include those foreign institutions.

Summary of SEC Guidance

In addition to the rule changes noted above, the SEC provided interpretive guidance on the following issues:

- 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 in transactions subject to U.S. equal treatment provisions, although U.S. rules do not require dissemination of offer materials outside of the United States;
- 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 (i.e., where securities that would be issued to U.S. target holders are sold offshore by third parties).

Practical Considerations

Before commencing a cross-border business combination or rights offering transaction of a foreign private issuer, bidders/parties should determine which date within the 90-day period is most practical to use for the look-through test. This includes considering whether it should be in the period before announcement of the transaction or after, taking into account both practical constraints, such as the availability of the information, and confidentiality concerns.

Because the cross-border exemption cannot be relied upon if the bidder knows or has reason to know that U.S. ownership exceeds the thresholds of the exemption, annual SEC, home regulator filings and other appropriate sources should be reviewed to see what is reported with respect to U.S. ownership.

If the transaction is non-negotiated (i.e., hostile), or if there is a reason why information is not available to support the look-through analysis, it should be confirmed that the primary trading market is outside of the United States. Further, information should be sought about the average daily trading

volume of the target securities both in the United States and worldwide.

If a tender offer is to be made for securities of a U.S. target company that is subject to the provisions of Section 13(e) or 14(d) of the Exchange Act, it remains the SEC's position that such an offer must be open to all target security holders, even if they are non-U.S. persons. While U.S. rules do not require the offer materials to be disseminated outside of the United States, there may be non-U.S. rules that would require distribution of offer materials so there may be risks for bidders who do not distribute materials outside of the United States. It is insufficient to ensure compliance with non-U.S. law by requiring certifications from tendering security holders that such laws have been complied with or that an exemption exists. In special circumstances, the SEC may be willing to consider a request for relief from the all holders rule on a case-by-case basis, but it was not willing to adopt a *de minimis* or other general exception to this rule.

The SEC encourages bidders for securities of foreign private issuers to include U.S. holders in their offers and the rule changes are designed to facilitate the inclusion of U.S. holders in cross-border offers even further. If U.S. holders are to be excluded from an offer made to the holders of securities of a foreign private issuer, the reasons for so doing should be legitimate, such as where U.S. holders own a relatively small percentage of the target securities. The SEC has announced that it will view with skepticism exclusionary offers where the securities held by the U.S. holders are needed to meet the minimum conditions.

If U.S. holders are to be excluded from an offer relating to securities of a foreign private issuer, precautionary measures should be taken to avoid accepting tenders from them while purporting to exclude them. Such measures include obtaining representations from the tendering investors that they are not U.S. holders, avoiding use of the U.S. mail for the offer, and including a legend in the offering materials stating that the offer is not being made in the United States (although there may be some non-U.S. jurisdictions with an all-holders rule that would not permit such language).

In evaluating a vendor placement structure that results in U.S. holders participating on different terms than non-U.S. holders in a cross-border exchange offer, consideration should be given to a number of factors, including: the level of U.S. ownership in the target company, the number of bidder securities to be issued in the transaction as a whole compared to the amount outstanding prior to the offer, the amount of bidder securities to be issued to U.S. tendering holders subject to the vendor placement compared to the amount of bidder securities outstanding before the offer, the liquidity and general trading market for the bidder's securities, the likelihood that the vendor placement can be effected within a very short period of time after the termination of the offer and the bidder's acceptance of shares, and the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales and the process used to effect such vendor placement sales.

If relying on the interpretative position to waive or reduce a minimum acceptance

condition in a Tier II cross-border tender offer without providing withdrawal rights, all of the conditions of the interpretative position need to be met. Some of these conditions must be satisfied in the offering materials, so consideration should be given to those matters when the initial offering materials are prepared. For example, the offering materials must describe the procedure for waiving or reducing the minimum acceptance condition and either the initial offering materials or the supplemental materials must fully discuss the potential impact of the waiver or reduction of the minimum acceptance condition. Certain requirements of this interpretive guidance govern the mechanics, timing and content of the announcement of the possibility of the waiver or reduction. Other aspects relate to the structure of the offer itself, such as requiring that withdrawal rights be provided during the five-day period after the announcement of a possible waiver or reduction and that the offer must remain open for at least five business days after the minimum acceptance condition was waived or reduced.

If the structure of a planned cross-border transaction poses an ambiguity that is not addressed in the SEC's cross-border rules or interpretive guidance, it is still possible to seek a determination on an individual basis. If that is the desired approach, one should allow sufficient time for the questions to be resolved through an SEC telephone interpretation or "no-action letter."

Finally, it is possible for parties to a cross-border transaction that commenced before the effective date of the rule changes to request the SEC to provide relief on a case-by-case basis so that they receive the benefit of the rule changes, although there is no assurance that the SEC will grant such relief.

Endnotes

1 Available at http://www.sec.gov/rules/final/2008/33-8957.pdf.

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 is 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.

If you have any questions regarding the application of U.S. securities laws to cross-border transactions involving foreign private issuers, please contact any of the lawyers listed below or any other member of our Corporate & Securities group.

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