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SEC Proposes Revisions to the Cross-Border Transaction Exemptions

On May 6, 2008, the Securities and Exchange Commission (the “Commission” or “SEC”) proposed amendments to rules which provide cross-border transactions with a variety of exemptions from the tender offer rules, the going private rules and registration requirements.¹ The term “cross-border transaction” refers to a third-party or issuer tender offer or exchange offer where the company subject to the offer is a “foreign private issuer” having U.S. investors among its security holders.² The term also refers to a rights offering by a foreign private issuer having U.S. investors.

Many of the proposed rule changes would codify SEC Staff interpretive positions and exemptive orders issued since 2000 when the present cross-border exemptive rules became effective.³ In addition, the proposing release includes Staff interpretive guidance on the application of existing rules as well as the proposed amendments.⁴ The objective of the proposal is to further encourage foreign private issuers to include, rather than exclude, the participation of their U.S. investors in cross-border transactions.

¹ Release Nos. 33-8917; 34-57781; File No. S7-10-08, Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (May 6, 2008), available at <http://www.sec.gov/rules/proposed/2008/33-8917.pdf> (the “Proposing Release”).

² The term “foreign private issuer” is defined in Exchange Act Rule 3b-4(c). A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents and (2) any of the following: (i) a majority of its officers and directors are citizens or residents of the United States, (ii) more than 50 percent of its assets are located in the United States, or (iii) its business is principally administered in the United States.

³ Release Nos. 33-7759, 34-42054; 39-2378, International Series Release No. 1208, File No. S7-29-98, *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offering* (October 22, 1999), available at <http://www.sec.gov/rules/final/33-7759.htm>

⁴ The Rules affected by the proposal are: Rules 162, 800 and 802 under the Securities Act of 1933,

Comments on the proposed rules should be received by the SEC by June 23, 2008.

1. Background

Prior to 1999, U.S. investors in foreign private issuers which were the subject of tender offers, exchange offers or rights offerings would routinely be excluded from participation in such transactions because compliance with U.S. laws was considered too burdensome. In an effort to encourage foreign private issuers to include their U.S. security holders in such transactions, the Commission adopted the so-called cross-border exemptions which went into effect in January 2000. The Commission is now proposing changes to enhance the utility of these exemptions.

Generally speaking, the exemptions are structured as a two-tier system broadly based on the level of U.S. interest in a transaction, measured by the percentage of securities held by U.S. investors in foreign private issuers which are the subject of a transaction.⁵ Where no more than 10% of the subject securities are held by U.S. investors (“Tier I”),⁶ a cross-border transaction will be exempt from most U.S. tender offer rules and the registration requirement of Section 5 of the Securities Act. This includes the filing, dissemination and procedural requirements of U.S. tender offer rules, the heightened disclosure requirements for going private transaction under Rule 13e-3 and the obligation of a target company Board of Directors to express a position with respect to a tender offer.⁷

Where U.S. security holders own more than 10% but no more than 40 percent of the securities of a foreign private issuer (“Tier II”),⁸ the cross-border exemption would provide narrowly tailored relief to address recurring areas of regulatory conflict with respect to tender offers, such as the prompt payment, extension and notice requirements in Exchange Act Regulation 14E. The Tier II exemption does not pro-

Footnote continued from previous page.

as amended (the “Securities Act”); Rule 101 of Regulation S-T; Rules 13d-1, 13e-3, 14d-1, and 14e-5 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Form S-4, Form F-4, Form F-X, Form CB, Schedule 13G and Schedule TO are proposed to be amended as well.

⁵ In the case of a tender offer, the focus of the exemptions is on the ownership of the securities of the foreign company which is the target of a transaction whether the offeror is a U.S. or non-U.S. company. In the case of a rights offering, the exemptive rules focus on the ownership of the securities of the issuer.

⁶ As defined in Exchange Act Rules 13e-4(h)(8) and 14d-1(c) and Securities Act Rules 801 and 802.

⁷ Exchange Act Rule 14e-2(d).

⁸ As defined in Exchange Act Rules 13e-4(i) and 14d-1(d).

vide relief from Securities Act registration requirements⁹ nor the additional disclosure requirements of Rule 13e-3 for going private transactions.

2. Summary of Proposals

A. Changes to method of determining eligibility threshold for U.S. ownership

1. **Negotiated offers to acquire a foreign private issuer.** Currently, U.S. ownership is determined by reference to a target's non-affiliated float as of 30 days before the commencement of a tender offer. Holders of greater than 10% of the subject class are excluded from the calculation. The acquirer is required to "look through" securities held by nominees to identify those securities actually held for accounts of person located in the U.S.

Due to the difficulty in many jurisdictions of performing the "look through" analysis within a 30-day timeframe as well as the logistical problem of having to look back to a date 30 days prior to a transaction commencement date which may not be in the control of the offeror under the rules of some foreign jurisdictions, the Commission now proposes that acquirers be permitted to calculate U.S. ownership within a 60 day period before the public announcement of a cross-border tender offer or business combination transaction.¹⁰

This change will allow the application of the exemption to be based on the characteristics of the target security holder base before it is influenced by the announcement of the transaction as well as permit acquirers to meet home country timing requirements that mandate that the acquirer include information about the treatment of U.S. holders.

2. **"Hostile" offers to acquire a foreign private issuer.** Recognizing that a "look through" analysis would be difficult for third-party hostile offerors not having the cooperation of a target in obtaining security holder information as to its security holders, the Commission created a "hostile presumption" that allows a third party bidder to assume U.S. ownership is no more than 40%, so long as average daily trading volume ("ADTV") in the U.S. does not exceed 40% of an issuer's ADTV worldwide over a twelve-month period ending 30 days before commencement, and the bidder has no "reason to know" actual U.S. ownership is inconsistent with that figure. The presumption is qualified by information about U.S. ownership reported in the target's most recent annual report.

The SEC proposes to clarify that "reason to know" only includes information that is publicly available, though bidders may not ignore credible information received from non-

⁹ Tier II therefore does not apply in the case of tender offers in which securities are offered as consideration or to issuer rights offerings, among other things.

¹⁰ See proposed revisions to Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and Instruction 2.i. to Exchange Act Rules 14d-1(c) and (d).

public sources available at the time of announcement. Publicly available information includes information about beneficial ownership reflected on Schedules 13D, 13F, and 13G filed by third parties as well as similar reports filed by third parties in the target's home country.

The Commission also proposes to require the percentage calculation be done over a 12 month period ending no later than 60 days before announcement of the transaction. The proposed rules would allow an acquirer to ignore conflicting information received after the announcement.¹¹

3. **Comments sought on possible alternative new eligibility standards for both negotiated and hostile transactions.** The SEC seeks comment on various other alternative new eligibility standards including one based on U.S. ADTV compared to worldwide ADTV over a twelve month period which would likely result in many more transactions being eligible for Tier I.

B. Proposed changes to Tier I exemptions

Expanded Exemption from Rule 13e-3. Rule 13e-3 establishes filing and disclosure requirements for certain affiliated transactions, where those transactions would have a “going private” effect. Cross-border transactions conducted by an issuer or its affiliates under Exchange Act Rules 13e-4(h)(8), 14d-1(c) and Securities Act Rule 802 and coming within the definition of Tier I would be exempt from the requirements of Rule 13e-3. Currently, the scope of the Tier I exemption does not apply to some transaction structures commonly used abroad such as cash mergers, compulsory acquisitions for cash and other types of transactions. The Commission proposes to expand the scope of the exemption to include these transactions, assuming they otherwise qualify for Tier I.¹²

C. Proposed changes to Tier II exemptions

1. **Clarify availability of Tier II relief for offers for target securities not subject to Rule 13e-4 or Regulation 14D.** The Commission proposes to codify a position previously taken by the Staff making the Tier II exemption available with respect to offers for target securities regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D, i.e. offerings which would only be subject to Regulation 14E.¹³

¹¹ See proposed revisions to Securities Act Rule 802(c)(2) and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d); and, proposed Securities Act Rule 802(c)(3) and (4) and Instructions 3.iii. and iv. to Exchange Act Rules 14d-1(c) and (d).

¹² See proposed revisions to Exchange Act Rule 13e-3(g)(6).

¹³ See proposed Exchange Act Rules 13e-4(i) and 14d-1(d).

2. **Expand Tier II relief for dual or multiple offers**

- A. **Offeror may make more than one non-U.S. offer.** Tier II exemptions currently permit a bidder conducting a tender offer to separate that tender offer into two separate offers - one U.S. and one foreign - for the same class of securities. Questions have arisen under this provision in circumstances where bidders are required to make more than one offer outside the U.S.

The Commission believes there is no reason to limit the number of offers and therefore proposes to change the reference to “dual offers” to instead refer to “multiple offers”.¹⁴

- B. **U.S. offer may include non-U.S. persons and foreign offer(s) may include U.S. persons.** The existing Tier II dual offer exemption provides that a U.S. offer can be open **only** to U.S. security holders. This limitation has proved problematic because bidders frequently seek to include all holders of ADRs in the U.S. offer. Similarly, the provision mandates that the foreign offer be available **only** to non-U.S. holders. The SEC Staff has previously granted relief allowing for both offers to be open to all security holders. The Commission proposes to change the rules by revising the equal treatment provisions in Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

Under the proposed amendment, a U.S. offer may be made to all the holders of ADRs if the offer provides for terms at least as favorable as those offered to any other holder. Additionally, the revised rules would allow U.S. persons to be included in a foreign offer where the laws of the relevant foreign jurisdiction requires it.

- C. **Proration and the use of dual or multiple offer structure.** Rule 14(d)(6) currently requires tendered securities to be purchased on a pro rated basis if an offer is oversubscribed. The Commission is not proposing to change this requirement. Rather the Commission proposes making it clear that this rule also applies to bidders relying on the Tier II multiple offer provision who must use a single proration “pool” for the U.S. and non-U.S. offers.

3. **Termination of withdrawal rights while tendered securities are counted.** Currently, under Exchange Act Section 14(d)(5) and Rule 13e-4(f)(2)(ii), bidders must provide “back-end” withdrawal rights after a set date even where a tender offer may have technically closed. The Commission proposes to modify this requirement with respect to cross-border transactions. As proposed, third party bidders for securities of a foreign private issuer as well as foreign private issuers repurchasing their own securities would be permitted to suspend back-end withdrawal rights while tendered securities are being counted,

¹⁴ See proposed Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

even where there is no subsequent offering period. The ability to rely on the revised rules would be conditioned on the following:

- The Tier II exemption must be available.
- The offer must include an offering period, including withdrawal rights, of at least 20 business days.
- At the time withdrawal rights are suspended, all offer conditions must be satisfied, except to the extent that the bidder is counting the securities to determine if the minimum acceptance condition has been satisfied.
- Withdrawal rights are only suspended during the necessary counting process and reinstated immediately thereafter, unless terminated by acceptance.¹⁵

4. Expanded relief for subsequent offering periods. The Commission proposes to modify the rules applicable to subsequent offering periods as follows:

- Currently, bidders must immediately and promptly pay for all securities tendered in a subsequent offering period. In many instances, this requirement is practicably unworkable in non-U.S. jurisdictions. The Commission proposes for securities tendered during the subsequent offering period to be purchased on a modified rolling basis. The proposal would permit securities to be “bundled” and paid for within 14 business days from the day of tender.¹⁶
- Rule 14d-11 currently caps any subsequent offering period at 20 business days. This Rule conflicts with practice abroad because in some non-U.S. jurisdictions, market practice dictates a longer subsequent offering period making compliance with Rule 14d-11 problematic. The Commission proposes to eliminate this provision for cross-border transactions. This change would provide an opportunity for the remaining target security holders to tender into a successfully consummated offer during a period when the trading market for their securities may be very limited.¹⁷
- In certain foreign jurisdictions, bidders are required to pay interest on securities tendered during the subsequent offering period. This conflicts with regulation 14D which requires a bidder pay the same form and amount for securities tendered in the subsequent offering as in the initial offering period. The Commis-

¹⁵ See proposed Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(viii).

¹⁶ See proposed Exchange Act Rule 14d-1(d)(2)(iv).

¹⁷ See proposed Exchange Act Rule 14d-1(d)(2)(vi).

sion proposes to permit the payment of interest where required under foreign law.¹⁸

- The Commission also addresses subsequent offering periods in so-called “mix and match” offers. In this structure, target security holders are offered a set mix of cash and securities of the bidder with the option to elect a different proportion of cash and securities, to the extent that other tendering security holders make opposite elections. The bidder typically sets a maximum amount of cash that it will issue and holders’ elections are prorated to the extent they cannot be satisfied through offsetting elections made by other security holders. These “mix and match” offers conflict with U.S. requirements applicable to the subsequent offering period that require there be no ceiling on the form of consideration offered as well as rules that require a bidder to offer the same form and amount of consideration to tendering security holders in both the initial and subsequent offering periods. The Commission proposes to revise the rules to allow separate offset and proration pools for securities tendered during the initial and the subsequent offering period, thus permitting the general use of the “mix and match” structure. This proposal would also eliminate the prohibition on a “ceiling” on the form of consideration offered in the subsequent offering period.¹⁹

5. Additional guidance with respect to terminating withdrawal rights after reduction or waiver of a minimum acceptance condition. U.S. tender offer rules generally provide that a bidder must allow a tender offer to remain open for a certain period of time after a material change to its terms is communicated to the target holders as well as provide withdrawal rights during this period. This requirement created conflicts with foreign laws and in adopting the cross-border exemptions, the Commission affirmed the Staff’s previous interpretative position allowing a Tier II bidder to waive or reduce the minimum acceptance period without providing withdrawal rights if certain conditions are satisfied including:

- Bidder must announce that it may reduce or waive the minimum condition at least five business days before actually doing so.
- Bidder must disseminate the announcement through a press release reasonably designed to inform U.S. security holders.
- During the five-day period after the announcement of the possible waiver, security holders who have tendered must be afforded the right to withdraw. The

¹⁸ See proposed Exchange Act Rule 14d-1(d)(2)(vii).

¹⁹ See proposed Exchange Act Rule 14d-1(d)(2)(ix).

bidder must adequately disclose the impact of a potential waiver or reduction in the initial offering materials.

- The exemption may only be relied upon by an eligible Tier II bidder who undertakes not to waive or reduce the minimum acceptance condition below a majority.

The Commission is clarifying that this exemption is only permitted where the specific features of the foreign countries rules require it.²⁰

6. Early termination of the initial offering period or a voluntary extension of the initial offering period. The Commission takes the position that a change in the expiration date of a tender offer constitutes a material change requiring an offer to remain open for the period required by their rules.²¹ To the extent that this conflicts with foreign law which requires bidders to terminate an offer and begin a payment process as soon as all offer conditions are satisfied, the Commission proposes to permit the early termination of an initial offering period if certain condition are satisfied including:

- The initial offering period has been open for at least 20 U.S. business days and all offer conditions have been satisfied.
- The bidder adequately discussed the possibility of and impact of the early termination in the original offer materials.
- The bidder provides a subsequent offering period.²²

7. Codification of Rule 14e-5 cross-border exemptions. Rule 14e-5 prohibits “covered persons”²³ from purchasing or arranging to purchase any subject securities or any related securities except as part of a tender offer. In adopting the cross border exemptions, the Commission adopted an exception allowing prohibited Rule 14e-5 transactions in a Tier I offer. Since numerous requests have been received for similar relief in the case of Tier II offers, the Commission proposes to codify relief from Rule 14e-5’s prohibition for Tier II

²⁰ Proposing Release at 76 - 84.

²¹ See Exchange Act Rules 13e-4(e)(3)(i) through (iv) and 14d-4(d)(2)(i) through (iv) and 14e-1(b).

²² Proposing Release at 84 - 90.

²³ “Covered persons” include the offeror and its affiliates, the offeror’s dealer-manager and its affiliates, any advisor to the offeror and its affiliates or the offeror’s dealer-manager and its affiliates whose compensation is dependent on the completion of the offer, as well as any person acting, directly, or indirectly, in concert with the abovementioned persons in connection with any purchase or arrangement to purchase any subject securities or any related securities.

offers in certain specific situations involving the purchases and arrangements to purchase securities of a foreign private issuer outside of a tender offer:

- Where there are concurrent separate U.S. and non-U.S. tender offers so long as there are safeguards to protect the interests of the U.S. tendering security holders. Safeguards include requiring that U.S. security holders be treated as favorably as foreign holders as well as requiring transparency regarding the offeror's intent to make purchases pursuant to a foreign offer in the U.S. offering documents.²⁴
- By offerors and their affiliates and by financial advisor's affiliates outside of a tender offer in a foreign jurisdiction where that jurisdiction permits it.²⁵ Certain conditions must be met including requiring that the offering documents prominently disclose the possibility of a purchase outside the tender offer as well as disclosure in the U.S. of any actual foreign purchases made outside the tender offer. In the case of an offeror or its affiliate, there is an additional condition requiring that the tender offer price be raised to equal any price paid outside the tender offer.

In the case of an affiliate of a financial advisor, there are three additional conditions relating to internal information barriers and common officers and employees as follows:

- The financial advisor must maintain and enforce written policies and procedures designed to prevent the flow of information among the advisor and the affiliate that might result in a violation of the federal securities laws.
- The affiliate may not have officers or employees in common with the financial advisor that directly effect or recommend transactions in the subject securities who will also be involved in providing the subject company with financial advisory services.
- The financial advisor must have a broker-dealer affiliate registered under the Exchange Act.²⁶

D. Expanded availability of early commencement for exchange offers. In 1999, the SEC adopted rule revisions intended to minimize the regulatory disparity between cash and stock tender offers by permitting exchange offers to commence upon the date of the filing of a registration statement under

²⁴ See proposed Exchange Act Rule 14e-5(b)(11).

²⁵ See proposed Exchange Act Rule 14e-5(b)(12).

²⁶ Proposing Release at 90 - 98.

specified conditions provided that a bidder not terminate that offer and purchase tendered shares until the registration statement has been declared effective.²⁷ Recognizing that a regulatory disparity may still exist because the Staff review process might delay the effectiveness of the registration statement and the bidder's ability to close the exchange offer, the Staff undertook to expedite the review of such exchange offers. However, the SEC now recognizes there may still exist a regulatory disparity since the early commencement option is not available for exchange offers not subject to Rule 13e-4 or Regulation 14D. This creates an undue burden on bidders in foreign jurisdictions that require a bidder making a tender offer to make the offer to all classes of securities since if one class is not subject to the aforementioned rules, the bidder loses the ability to early commence for all classes of securities. The SEC proposes to expand the availability of early commencement for cross-border exchange offers not subject to the aforementioned rules subject to specified conditions.²⁸ To address the concern that such offers lack the requirement to provide withdrawal rights, the SEC proposes that this expanded exception only be permitted where the bidder provides withdrawal rights to the same extent as would be required under Rule 13e-4 or Regulation 14D.²⁹

E. Proposed changes to Forms and Schedules³⁰

1. **Form CB.** When an offeror relies on the Tier I cross-border exemption, it may be required to furnish to the Commission an English translation of the offer materials, submitted under cover of Form CB. In 2002, the Commission adopted rule changes mandating electronic filing with only a few exceptions. As a result of the widespread use of technology the SEC proposes to require all Form CBs be filed electronically via the EDGAR system. For the same reasons, the Commission proposes that Form F-X,³¹ the form for appointment of an agent in the U.S. for service of process, must also be filed electronically.
2. **Proposed changes to Schedule TO, Form F-4 and Form S-4.** The SEC proposes to add a box on the cover page of these forms that a filing person would be required to check to indicate reliance on one of the applicable cross-border exemptions.

²⁷ Offers in which securities were offered as consideration were at a disadvantage because of the review process associated with the filing of a Securities Act registration statement. To eliminate this perceived disadvantage the SEC adopted Rule 162 in 1999.

²⁸ Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

²⁹ Proposed Exchange Act Rules 13e-4(i)(2)(vi) and 14d-1(d)(2)(x).

³⁰ Id.

³¹ Form F-X is only required to be filed electronically when Form CB must be.

3. **Beneficial ownership reporting by foreign institutions.** The beneficial ownership reporting provisions³² require any person who acquires more than five percent of a class of securities to report the acquisition on Schedule 13D within ten days. An exemption from the Schedule 13D filing requirement permits certain institutional investors holding securities in the ordinary course of their business with no control purpose to file a short form Schedule 13G within 45 days after year end.³³ These institutional investors include U.S. regulated broker-dealers, banks, insurance companies, investment companies and investment advisers. Historically, use of the exemption by foreign institutions has been limited to those that have received an exemptive order from the Commission.

The SEC recognizes this imposes an undue burden on foreign institutions and proposes to revise the rule to allow foreign institutions to utilize Schedule 13G subject to certain conditions. A foreign institution would be required to certify that it is subject to a regulatory scheme comparable to the regulatory scheme applicable to its U.S counterparts. Additionally, it would need to undertake to furnish to the Commission, upon request, the information otherwise required in a Schedule 13D. Finally, the exemption would continue to be available to only those foreign institutions that hold the equities in the ordinary course of their business with no intention of changing control of the issuer. This expanded exception would be subject to Rule 13d-1(e) which requires a qualified institutional investor who determines that it holds securities with a disqualifying purpose or effect to file a Schedule 13D within ten calendar days and would subject the institution to a “cooling-off” period during which time it would be prohibited from voting the subject securities it beneficially owns or acquiring additional subject securities.

F. Interpretive Guidance

1. **Application of the “all-holders rule” to foreign target security holders.**³⁴ The majority of the proposing release deals with cross-border exemptions where the target is a foreign private issuer. As the SEC continues to encourage international securities and take-over regulators to minimize the ability of bidders to exclude U.S holders, the Commission has recognized the need to take similar steps regarding the ability of U.S. bidders to exclude non-U.S. holders. The SEC therefore reiterates its position that the all-holders

³² Exchange Act Sections 13(d) and 13(g).

³³ Rule 13d-1(b)(1)(ii).

³⁴ Proposing Release at 118 - 124.

rules,³⁵ which require that all target security holders in a tender offer be included in the tender offer and treated equally, apply to both U.S. and non-U.S. target holders.

The SEC recognizes this may present a burden for bidders that need to comply with both foreign and U.S. rules and is therefore soliciting comment on whether any amendments to the U.S. equal treatment provisions are necessary.

Rule 14d-10(b) permits a bidder to exclude security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial actions after the bidder has made a good faith effort to comply. The SEC is seeking comment on whether the rule should be amended to include a similar provision with respect to target holders in foreign jurisdictions.

The all-holders rules do not require that offering materials be mailed into the foreign jurisdictions unless required by the foreign jurisdiction. The SEC further noted that some bidders have required target security holders to certify that the tender of securities complies with local laws or that an exemption permits such tenders. The SEC does not believe that it is appropriate to shift the burden of assuring compliance with relevant laws to target security holders.

2. **Ability of bidders to exclude U.S. target security holders.**³⁶ Notwithstanding their desire for the inclusion of U.S. holders in foreign target tender offers, the original cross-border adopting release provided guidance regarding the circumstances under which offer materials for foreign tender offers may be posted on the internet without triggering U.S. jurisdictional means and U.S. tender offer and registration rules. The SEC provides additional guidance in this area. Bidders must include legends on the offer materials themselves and on any web sites on which they are posted, indicating that the offer is not being made in the U.S. However, legends and disclaimers are not viewed as being sufficient in themselves if, as a practical matter, U.S. holders are not and may not be prevented from participating in the offer using U.S. jurisdictional mean. In addition, the bidder should take “special precautions” to assure that tenders are not accepted from target security holders in the U.S. by obtaining adequate information to determine whether a target security holder is a U.S. investor and may not ignore indicia that may, or should, put the bidder on notice that the tendering holder is a U.S. investor. The SEC has advised that bidders could require representations that the holder is not a U.S. holder or someone tendering on a U.S. holder’s behalf, but recognizes that under some foreign laws nominees may not know the identity or location of a beneficial owner of securities. Nevertheless, if a target security holder misrepresents its status in order to tender into an exclusionary offer, the SEC will not view the bidders as having targeted U.S. investors.

³⁵ Rule 13e-4(f), as amended, and Rule 14d-10.

³⁶ Proposing Release at 124 - 130.

3. **Vendor placements.**³⁷ For Tier I eligible tender offers, for purposes of complying with the equal treatment requirement, bidders are permitted to offer cash consideration to U.S. holders in lieu of securities so long as the bidder reasonably believes the amount of cash is substantially equivalent to the amount of consideration offered to non-U.S. holders.³⁸ Some bidders relying on this rule seek to avoid the Securities Act registration requirements by establishing a vendor placement arrangement for U.S. target security holders who tender into the offer. The vendor sells in offshore transactions the securities to which tendering U.S. securities holders are entitled, and then remits the proceeds of the sale, after expenses, to the U.S. target security holders. This effectively converts a transaction in which securities are offered as consideration (and thus requiring Securities Act registration) into an offer for cash. The vendor placement does not always eliminate the requirement for Securities Act registration because tendering U.S. holders may still be effectively making an “investment decision with respect to the purchase of a security” since the amount of cash received is largely dependent on the market value of the underlying security. In no-action letters previously issued by Staff, there are a number of factors the staff looks to in deciding whether the vendor placement obviates the need for Securities Act registration. These factors include:

- The level of U.S. ownership in the target company.
- The amount of bidder securities to be issued overall in the business combination compared to the amount of bidder securities outstanding before the offer.
- The amount of bidder securities to be issued specifically to tendering U.S. holders.
- The likelihood that the bidder will disclose material information around the time of the vendor placement sales.
- 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.

The SEC guidance in the Proposing Release advises that a vendor placement arrangement in cross-border exchange offers would be subject to Securities Act registration unless the market for the bidder securities to be issued in the offer and sold pursuant to the placement process is highly liquid and the number of securities to be issued for the benefit of tendering U.S. holders is relatively small compared to the total number of shares outstanding. The Staff will also consider the aforementioned factors of the timeliness of the vendor placement process, the disclosure of material information before the process is complete as well as whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

³⁷ Proposing Release at 131 - 135.

³⁸ Rules 13e-4(h)(8)(ii)(C) and 14d-1(c)(2)(iii).

Bidders have asked whether they may exclude some U.S. target holders and include in an exchange offer only those U.S. target holders, such as accredited investors, for whom an exemption from the registration requirement may be available. The SEC advised that these exchange offers may not be made in the U.S. on a private offering basis because it would violate the equal treatment provisions and would not be permitted in tender offers subject to the all-holders rule. Bidders may continue to use vendor placement arrangements in accordance with the guidance in the SEC's release. If a bidder wishes to use the vendor placement structure for a tender offer above a Tier I transaction, it must seek an exemption. The SEC has advised that such relief will only be granted when it is in the interests of U.S. investors.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jon Mark at (212) 701-3100 or jmark@cahill.com; or John Schuster at (212) 701-3323 or jschuster@cahill.com.