

June 3, 2008

SEC Proposes Changes to Cross-Border Tender Offer Rules

Introduction and Summary of Proposed Rules

On May 8, 2008, the Securities and Exchange Commission (SEC) released the full text of proposed amendments to the cross-border tender offer rules under the Securities Exchange Act of 1934, as amended. These are the first proposed changes to the rules since they were initially adopted in 1999. The proposed rules generally provide for an expansion of the exemptions for Tier I and Tier II cross-border transactions, including changes in how U.S. securities ownership is calculated and the codification of certain interpretive positions and exemptions frequently granted by the SEC in cross-border transactions due to conflicts with foreign regulatory regimes.

The primary purpose behind the proposals is to further facilitate the inclusion of U.S. securities holders in cross-border business combinations by decreasing the burdens on bidders and issuers who must comply with multi-jurisdictional regulatory systems. The proposed rules seek also to update the cross-border rules in order to account for a global business market and to accommodate frequent conflicts with foreign jurisdiction regulations and practices.

Brief History of Cross-Border Rules

Prior to 1999, there was no special exemption from U.S. securities laws for cross-border transactions, which resulted in frequent exclusion of U.S. securities holders from transactions. To address this issue, the SEC adopted rules in 1999 that allow for the inclusion of more U.S. holders in cross-border deals.

The cross-border exemptions are structured into two tiers, Tier I and Tier II. The applicable Tier is based on the percentage of target securities of a foreign private issuer held by U.S. investors. Under current law, a Tier I exemption is available where 10 percent or less of the subject securities are held in the United States. If the transaction qualifies for a Tier I exemption, it will be exempt from most U.S. tender offer rules and the heightened disclosure obligations in Rule 13e-3 going private transactions. When relying on this exemption, the bidder must furnish a Form CB to the SEC. A Tier II exemption applies when U.S. holders own more than 10 percent, but less than 40 percent, of the subject securities. A Tier II exemption is more limited, only providing exemption from some rules, such as the prompt payment and extension requirements in Regulation 14E.

The proposed rules would retain the two-Tier structure based on applicable U.S. ownership thresholds but would modify the procedures used to calculate U.S. ownership as well as expand the availability and scope of the exemptions. While the transactions qualifying for an exemption would be expanded under the proposed rules, disclosure and other obligations associated with each Tier are not proposed to change.

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What is the existing U.S. ownership calculation to determine eligibility for exemptions?

Under the existing exemptions, the U.S. ownership calculation is based, in part, on whether the transaction is negotiated or non-negotiated (hostile). In the case of negotiated transactions, the exemption is based on the percentage of U.S. beneficial holders of the relevant class of target securities. This is determined by reference to the target's non-affiliated float. Holders of the target securities with more than 10 percent ownership are excluded, as well as any securities held by the acquiror in the business combination transaction.

Under the current cross-border rules for hostile transactions, the bidder can assume that U.S. ownership in the target is no more than 10 percent (Tier I) or 40 percent (Tier II), so long as average daily trading volume in the United States does not exceed 10 percent or 40 percent of the average daily trading volume worldwide over a twelve-month period ending 30 days before commencement of the offer, and the bidder has no reason to know that actual U.S. ownership is inconsistent with that figure.

The Proposed Test for Calculating U.S. Ownership

The SEC has proposed to change 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.

Did the SEC propose to change the reference date for the exemptions?

Yes. The proposed rules would allow an offeror to use the date of public announcement (instead of commencement) of the business combination as the triggering event for calculating U.S. ownership.

Did the SEC propose to change the time period in which an issuer needed to calculate U.S. beneficial ownership?

Yes. The proposals would permit the offeror to calculate U.S. ownership as of a date within a 60 day range before announcement in negotiated transactions and trading value over the twelve month period, ending no later than 60 days prior to announcement for hostile transactions.

In calculating U.S. ownership, did the SEC give any guidance on when a company has “reason to know” certain information about U.S. ownership?

Yes. The SEC proposed that a company has “reason to know” all information that is publicly available, including, but not limited to, information disclosed in SEC filings, such as beneficial ownership filings or periodic reports. The proposed rules would also clarify that a company may not ignore non-public information that it receives prior to announcement of the transaction.

Changes to the Tier I Exemption

What changes did the SEC propose to the Tier I exemption?

The proposed rules would expand the scope of the Tier I exemption from Rule 13e-3 to remove any restriction on a category of transactions that the exemption covers. The Tier I relief would cover structures not currently exempt under the current cross-border regimes such as schemes of arrangement, cash mergers or compulsory acquisitions for cash. The proposed rules will focus more on the substance, rather than form, of the transaction to determine if it qualifies for a Tier I exemption.

Changes to the Tier II Exemption

What changes did the SEC propose to the Tier II exemption?

The majority of the proposals deal with expanding the Tier II exemption to accommodate foreign law and practice by increasing structural and practical flexibility to include U.S. investors. The SEC proposes to extend the specific relief afforded under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act.

The proposed rules would expand relief under Tier II to eliminate recurring conflicts between U.S. and foreign law and practice and accommodate differing practices and transaction structures. The expansion generally codifies certain exemptions frequently granted in cross-border transactions on a case-by-case basis and includes

1. allowing more than one offer to be made abroad in conjunction with a concurrent U.S. offer (Current rules allow an offer to be made in only one foreign jurisdiction while an offer is outstanding in the U.S.);
2. permitting bidders to include foreign security holders in a U.S. offer and U.S. holders in a foreign offer(s) where required under foreign law and where adequate disclosure is provided;
3. allowing bidders to suspend back-end withdrawal rights while tendered securities are counted and before they are accepted for payment, provided that the offer includes an initial offering period, including withdrawal rights, of at least 20 business days;
4. allowing subsequent offering periods to extend beyond 20 U.S. business days;
5. allowing securities tendered during a subsequent offering period to be purchased within 14 business days from the date of tender in order to provide flexibility in connection with local jurisdiction requirements and local market conditions;
6. allowing bidders to pay interest on securities tendered during a subsequent offering period (Payment of interest, where required under foreign law, will not be deemed to violate equal treatment principles in Section 14(d) of the Exchange Act.); and
7. allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods to facilitate prompt payment and permit the use of a “mix and match” structure.

Additionally, the proposed rules seek to expand the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act. The SEC also proposed to no longer permit bidders to terminate withdrawal rights after reducing or waiving minimum acceptance conditions to non-majority levels. The proposed rules also will codify existing exemptive orders with respect to the application of Rule 14e-5 for purchases outside of the offer for Tier II tender offers.

What other changes did the proposed rules include?

In addition to the proposed changes discussed above, the SEC also proposed to

1. require that all Form CBs and the accompanying forms be filed electronically;
2. modify 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
3. permit foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, without individual no-action relief, which will include a certification that it is subject to a regulatory scheme similar to that of its U.S. counterpart.

SEC Request for Comment

In addition to those proposed rule changes, the SEC solicited commenters' views on the following issues covered by the proposed rules:

- alternative eligibility tests, including the average trading volume in a 12 month period standard or number of securities held in American Depositary Receipts form
- exclusion of greater than 10 percent beneficial owners in the U.S. from calculation of U.S. ownership in the foreign target company for Tier I and Tier II exemption purposes
- changing the Form CB cover page and certain tender offer schedules and registration statements to create a space for disclosure of U.S. ownership interest in the foreign target company
- amending the U.S. equal treatment provisions in the context of the requirement to make an offer available to all foreign target holders, inquiring particularly as to whether such provisions should allow certain holders to be excluded
- provision by the SEC of additional guidance or rules on how foreign bidders can avoid triggering U.S. jurisdiction and U.S. regulations

The comment period ends on June 23, 2008.

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