

August 28, 2008

Cross-Border Business Combination Transactions

SEC Approves Amendments to Rules on Cross-Border Tender Offers, Business Combinations and Rights Offerings

SUMMARY

At a public meeting held yesterday, the Securities and Exchange Commission (the “SEC”) adopted a number of amendments to the rules that apply to cross-border tender offers, business combinations and rights offerings. The SEC also approved the issuance of interpretive guidance on several topics related to cross-border transactions. These amendments and guidance largely follow the SEC’s May 2008 proposals, and, in many instances, codify existing no-action, interpretive and exemptive positions previously articulated by the staff of the SEC. The SEC intends for the new rules to facilitate and encourage the inclusion of U.S. security holders in cross-border transactions.

BACKGROUND

On May 6, 2008, the SEC proposed amendments to the rules that govern the substantive and procedural requirements applicable to cross-border tender offers, business combinations and rights offerings.¹ The proposals largely sought to codify, with some clarification and expansion, positions taken by the SEC staff with respect to the exemptions for cross-border transactions from generally applicable U.S. tender offer and registration requirements adopted by the SEC in 1999.² Despite many comment letters suggesting that the eligibility thresholds which provide the basis for relief from U.S. tender offer rules and registration requirements be increased, or that the standards be changed to ones based on average daily trading volume in the United States, the SEC staff gave no indication that the rules modify these criteria.

FINAL RULES

On August 27, 2008, the SEC adopted rule amendments and approved the issuance of certain interpretive guidance. Although the text of the final rules has not yet been published, the SEC staff indicated that the final rules and interpretive guidance are substantially similar to those set forth in the proposals, other than as described below.

In particular, the SEC staff noted the following:

- The date for calculation of U.S. beneficial ownership of a target's securities (for purposes of determining eligibility for certain relief from U.S. tender offer rules and registration requirements) will be changed from the 30th day prior to "commencement" of a tender or exchange offer to any date within 60 days prior to, and 30 days following, "public announcement" of the offer. If an offeror is "unable" to perform the eligibility calculation within 60 days prior to public announcement, the SEC staff indicated that the calculation may be performed on any date within 120 days prior to, and 30 days following, public announcement.
- The amended rules largely preserve, with some modifications, the "hostile presumption" that permits hostile bidders to assume the level of U.S. ownership based on the average daily trading volume of the subject class of securities, and, in addition, permit bidders participating in negotiated transactions to use this alternate eligibility test if they are "unable" to determine the level of U.S. beneficial ownership of a target's securities within any of the periods described above. The SEC staff indicated that a bidder in a negotiated transaction would be required to demonstrate a significant level of hardship (such as inability to calculate the level of U.S. beneficial ownership because of structural impediments under local corporate law and practice) in order to avail itself of this presumption.
- Holders of more than 10% of the class of securities subject to a tender or exchange offer will no longer be excluded from the calculation of U.S. beneficial ownership of the target's securities (but exclusion from the calculation of such securities held by the bidder and its affiliates will continue to be mandatory).
- The Tier I exemption, which provides broad relief from U.S. regulation where no more than 10% of the class of subject securities are held by U.S. persons, will be expanded to provide relief from enhanced disclosure requirements for "going private" transactions under Rule 13e-3 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), regardless of the structure of the transaction.
- The relief currently available under the Tier II exemption – which provides relief from U.S. regulation where no more than 40% of the class of subject securities are held by U.S. persons and is designed primarily to allow bidders in cross-border transactions to comply with certain home country procedural requirements or practices in lieu of U.S. rules – will be expanded and refined in certain respects, including the following:
 - Extending the availability of relief to exchange offers not subject to the registration requirements of the Securities Act of 1933, as amended (the "Securities Act");
 - Permitting eligible bidders to conduct multiple non-U.S. offers in parallel with a U.S. offer, under certain conditions;
 - Permitting bidders in eligible tender offers to suspend withdrawal rights while tendered securities are being counted, under certain conditions;
 - Expanding and refining existing exemptions in order to allow eligible bidders to conduct a subsequent offering period in a manner more consistent with non-U.S. law and practice;
 - Permitting, under certain circumstances, bidders to terminate the initial offer period in advance of its scheduled expiration date; and

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- Codifying the exemptive class relief previously granted for eligible tender and exchange offers from Rule 14e-5 under the Exchange Act, which generally prohibits purchases of subject securities and “related” securities, except as part of the offer.
- Bidders and issuers that do not already file reports under the Exchange Act with the SEC will no longer have the option to submit Form CB and Form F-X, which are currently required to be submitted in connection with Tier I-eligible transactions, in paper form.

The new rules will also automatically permit certain eligible non-U.S. institutions to file beneficial ownership reports on a short-form Schedule 13G, to the same extent that similar U.S. institutions would be eligible to report on Schedule 13G. They further provide certain exemptions from beneficial ownership reporting and other requirements of Section 16 under the Exchange Act for such non-U.S. institutions, in each case without having to obtain prior no-action relief from the staff of the SEC.

Finally, in addition to the rule amendments discussed above, the SEC voted to provide updated guidance in the final rules release on its position in respect of several topics relevant to cross-border transactions. These include: the circumstances under which the minimum acceptance condition to a tender or exchange offer may be waived or reduced; the measures that bidders may take to exclude U.S. securities holders, and thereby avoid the application of U.S. rules; the circumstances under which a bidder may exclude non-U.S. jurisdictions from an offer in compliance with Section 14D of the Exchange Act and Rule 14d-10(b)(2) (known as the “all-holders rule”); and lastly, certain issues applicable to “vendor placement” arrangements, which are sometimes used in exchange offers to avoid the registration requirements of the Securities Act and provide U.S. holders with cash consideration in lieu of securities. It is not clear from the discussion at the open meeting whether the guidance on these topics will be substantially different from that set forth in the proposing release.

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We will issue a more detailed publication when the text of the final rules becomes available.

ENDNOTES

¹ See “Proposed Rule: Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions”, SEC Rel. Nos. 33-8917 and 34-57781 (May 6, 2008), 73 FR 26876 (May 9, 2008). See also our publication, dated May 21, 2008, entitled “SEC Proposes to Amend Rules on Cross-Border Tender Offers, Business Combinations and Rights Offerings”.

² See “Final Rule: Cross-Border Tender Offers, Business Combinations and Rights Offerings”, SEC Rel. Nos. 33-7759 and 34-42054 (October 22, 1999), 64 FR 61382 (November 10, 1999).

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CONTACTS

New York

Jay Clayton	+1-212-558-3445	claytonwj@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Mitchell S. Eitel	+1-212-558-4960	eitelm@sullcrom.com
Joseph B. Frumkin	+1-212-558-4101	frumkinj@sullcrom.com
Duncan C. McCurrach	+1-212-558-4066	mccurrachd@sullcrom.com
James C. Morphy	+1-212-558-3988	morphyi@sullcrom.com
Richard A. Pollack	+1-212-558-3497	pollackr@sullcrom.com
George J. Sampas	+1-212-558-4945	sampasg@sullcrom.com

Washington, D.C.

Eric J. Kadel, Jr.	+1-202-956-7640	kadelej@sullcrom.com
--------------------	-----------------	--

Los Angeles

Eric M. Krautheimer	+1-310-712-6678	krautheimere@sullcrom.com
Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com

Palo Alto

Scott D. Miller	+1-650-461-5620	millersc@sullcrom.com
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SULLIVAN & CROMWELL LLP

London

Brian E. Hamilton	+44-20-7959-8440	hamiltonb@sullcrom.com
Alan P.W. Konevsky	+44-20-7959-8509	konevskya@sullcrom.com
Richard C. Morrissey	+44-20-7959-8520	morrisseyr@sullcrom.com
William A. Plapinger	+44-20-7959-8525	plapingerw@sullcrom.com
George H. White	+44-20-7959-8570	whiteg@sullcrom.com

Paris

Krystian Czerniecki	+33-1-7304-5880	czernieckik@sullcrom.com
William D. Torchiana	+33-1-7304-5890	torchianaw@sullcrom.com

Frankfurt

Mathias Strasser	+49-69-4272-5524	strasserm@sullcrom.com
------------------	------------------	--

Melbourne

John E. Estes	+61-3-9635-1503	estesj@sullcrom.com
Burr Henly	+61-3-9635-1508	henlyb@sullcrom.com

Sydney

Waldo D. Jones, Jr.	+61-2-8227-6702	jonesw@sullcrom.com
---------------------	-----------------	--

Tokyo

Izumi Akai	+81-3-3213-6145	akaii@sullcrom.com
Stanley F. Farrar	+81-3-3213-6172	farrars@sullcrom.com

Hong Kong

Michael G. DeSombre	+85-2-2826-8696	desombrem@sullcrom.com
Chun Wei	+85-2-2826-8666	weic@sullcrom.com
John D. Young, Jr.	+85-2-2826-8668	youngj@sullcrom.com

Beijing

Robert Chu	+86-10-5923-5966	chur@sullcrom.com
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