SEC revises the cross-border tender and exchange offer rules

By Lloyd Spencer

Introduction

The Securities and Exchange Commission (the “Commission”) recently voted to amend its rules that govern cross-border business combinations. In an effort to encourage bidders to include U.S. stockholders in cross-border transactions, the commission, in 1999, adopted exemptive rules in connection with tender offers and registrations under the Securities Act of 1933, as amended, for cross-border tender and exchange offers, business combinations, and rights offerings relating to the securities of foreign companies. The purpose of the exemptions is to address conflicts between U.S. and foreign regulation, thereby facilitating the inclusion of U.S. investors in cross-border transactions. The commission has now adopted amendments to those exemptive rules, to expand and enhance their utility. Many of the amendments codify interpretive positions and exemptive orders previously granted by the commission staff on individual transactions. In the adopting release, the commission also provided interpretive guidance on several matters relating to cross-border transactions. In addition, the commission amended its rules, to allow certain foreign institutions to report their stock ownership on Schedule 13G where specified conditions are satisfied.

The amendments to the exemptive rules will be effective for transactions that commence after December 8, 2008, and the interpretive guidance is currently effective.1

Eligibility threshold – Determining U.S. ownership

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 beneficially owned by U.S. holders. The basic elements of the existing cross-border exemptions (which are not changed by the recent amendments to the rules):

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exempt from most U.S. tender offer rules a qualifying cross-border transaction where U.S. ownership of the target corporation’s securities is 10 percent or less (Tier I exemption);

provide limited relief from certain U.S. tender offer rules if U.S. ownership of the target corporation’s securities is greater than 10 percent but 40 percent or less (Tier II exemption); and

exempt from Securities Act registration the securities issued in business combination transactions and rights offerings if U.S. ownership of the target corporation’s securities is 10 percent or less.

U.S. ownership of the target corporation is determined by reference to the target corporation’s non-affiliated float. Under the current rules, all holders of greater than 10 percent of the subject class are excluded from the calculation. Although not part of the commission’s proposing release, the amended rules will no longer require that individual holders of more than 10 percent of the subject class be excluded from the calculation.

**Negotiated transactions**

The relevant date for determining U.S. ownership is the 30th day before commencement of a tender or exchange offer, or the solicitation for a business combination other than a tender offer. Under the current rules, the bidder must “look through” securities held of record by nominees located in specified jurisdictions (i.e., the United States, the target corporation’s jurisdiction of incorporation, and the jurisdiction that is the primary trading market for the subject securities) to identify those held for the accounts of persons located in the United States.

Practical difficulties arise in certain jurisdictions in calculating U.S. ownership as of the 30th day before commencement of a tender or exchange offer. In addition, using the commencement as the reference point also creates practical difficulties because, in some jurisdictions, the exact date of commencement is not within the control of the bidder. Therefore, the commission modified the reference date for the calculation of U.S. ownership to allow calculation as of any date no more than 60 days before and no more than 30 days after the announcement of the business combination transaction. Recognizing that this 90-day range still may not be enough time in some foreign jurisdictions, the commission included a provision in the amended rules that permit an acquiror to use a date within 120 days before the public announcement (the extended look-through period).

Where acquirors are unable to conduct the look-through analysis, they may use the newly adopted alternate test described below. However, the look-through test remains the primary means of determining eligibility to rely on the cross-border exemptions for negotiated transactions. An acquiror in such transactions will be able to use the alternate test only in limited situations. The commission noted that certain reasons, such as the need to dedicate time and resources to the look-through analysis and concerns about accuracy and completeness of the information obtained through the analysis, will not justify the use of the alternate test.
Non-negotiated transactions

Due to the practical limitations on a bidder in a non-negotiated transaction to perform the look-through analysis, the current rules provide for a presumption for non-negotiated transactions. The “hostile presumption” allows a third-party bidder in a non-negotiated tender or exchange offer to assume that U.S. ownership in the target corporation is no more than 10 percent or 40 percent, the thresholds for Tier I and Tier II, respectively, as long as average daily trading volume (ADTV) in the United States does not exceed 10 percent or 40 percent of the ADTV worldwide over a 12-month period ending 30 days before commencement, and the bidder has no reason to know that actual U.S. ownership is inconsistent with that figure.

In the amended rules, the commission has reconstituted the hostile presumption as a new alternate eligibility test. Consequently, where a business combination transaction is non-negotiated, the acquiror need not conduct the look-through analysis and may use the alternate test.

Alternate eligibility test

The first part of the new alternate test is based on a comparison of ADTV of the subject securities in the United States to worldwide ADTV. This element of the alternate test is satisfied when ADTV for the subject securities in the United States over a 12-month period ending no more than 60 days before the announcement of the transaction is not more than 10 percent (40 percent for Tier II) of ADTV on a worldwide basis. For a negotiated transaction, there must be a “primary trading market” for the subject securities for the acquiror to rely on the alternate test as a result of being unable to conduct the look-through analysis. A primary trading market means that at least 55 percent of the trading volume in the subject securities takes place in a single foreign jurisdiction, or no more than two foreign jurisdictions, during a recent 12-month period.

The second part of the new alternate test is that the acquiror must consider information about U.S. ownership levels that appear in annual reports or other annual information filed by the issuer with the commission or with the regulator in its home jurisdiction. Only annual reports or other annual information filed before the public announcement of the transaction must be taken into account by the acquiror. It may be disqualified from relying on the cross-border exemption sought if those reports or other filings indicate levels of U.S. ownership that exceed applicable limits for that exemption.

The third part of the new alternate test provides that an applicable cross-border exemption is not available, even where all other elements of the alternate test are met, if the acquiror “knows or has reason to know” that U.S. beneficial ownership levels exceed the limits for the applicable exemption. The new rules specify that a bidder has reason to know information that appears in any filing with the commission or any regulatory authority in the issuer’s home country or (if different) the jurisdiction in which its primary trading market is located, including filings by entities other than the issuer, such as beneficial ownership reports on Schedules 13D, 13F, or 13G. Additional sources of information that will be attributed to the acquiror include information about U.S. ownership available from the issuer or obtained or readily available from any other source that is reasonably reliable. “Readily
available” means publicly available from sources reasonably accessible to the issuer or acquiror at no or limited cost. Other sources of information of which the acquiror will be deemed to have knowledge under the rule revisions include third-party information providers and other advisors engaged by the parties to the transaction that may have provided information about U.S. ownership. The amended rules also provide that the bidder’s knowledge or reason to know refers to knowledge as of the date of announcement, and that a bidder could ignore conflicting information received after announcement.

**Eligibility test for rights offerings**

The commission amended the eligibility tests for the cross-border exemptive rules in connection with rights offerings. Issuers may now calculate U.S. ownership as of a date no more than 60 days before and 30 days after the record date for the rights offering. An extended period similar to the extended look-through period is not available for rights offerings. However, the alternate test for calculating U.S. ownership will be available for issuers unable to conduct the look-through analysis.

**Proposed changes to Tier I and Tier II exemptions**

**Tier I exemption**

Rule 13e-3 under the Securities Exchange Act of 1934, as amended, provides filing and disclosure requirements for going-private transactions. While Rule 13e-3 provides an exception for issuer and third-party tender offers that qualify under Tier I, certain structures commonly used abroad are not within the scope of the Tier I exemption. The commission staff has granted several no-action requests for transaction structures not covered within the scope of current Rule 13e-3(g)(6), but which otherwise met the conditions for reliance on that exemption. The commission stated in the adopting release that it does not believe that the form of the transaction structure should prevent an otherwise eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3. To encourage acquirors to include U.S. stockholders in such transactions, the commission revised Rule 13e-3(g)(6) to remove any restriction on the category of transactions covered.

**Tier II Exemption**

**Target securities not subject to Rule 13e-4 or Regulation 14D.** Currently, the Tier II exemptions apply to transactions governed by Rule 13e-4 or Regulation 14D. The applicability of these exemptions to tender offers that are governed solely by Regulation 14E (i.e., tender offers for unregistered equity securities and debt securities) is unclear. The staff has been permitting bidders to use the Tier II exemptions if they otherwise meet the conditions for reliance on such exemptions, even if the subject class of securities is not subject to Rule 13e-4 or Regulation 14D. Some of the Tier II exemptions provide relief from requirements of Rule 13e-4 and Regulation14D that are not required under Regulation 14E and, therefore, are not necessary for Regulation 14E tender offers. However, the commission amended its rules to clarify that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D.

**Dual or multiple offers.** The U.S. tender offer rules require that, when a bidder makes a tender offer that is subject to Section 13(e) or 14(d) of the Exchange Act, that tender offer
must be open to all target security holders of that class. The Tier II exemptions currently permit a bidder conducting a tender offer to separate that offer into two separate offers – one U.S. and one foreign – for the same class of securities. In practice, bidders may be required to, or wish to, make more than one offer outside the United States. The commission decided to eliminate the restriction on the number of foreign offers a bidder may make in a cross-border tender offer. The commission clarified that bidders relying on the dual offer provision in the Tier II exemptions to conduct separate U.S. and non-U.S. offers for less than all of a class of target securities must use a single proration pool in accordance with the existing requirements of the tender offer rules.

The existing Tier II dual offer exemption provides that the U.S. offer can be open only to stockholders resident in the United States and that the foreign offer be available only to non-U.S. holders. The staff has granted relief to several bidders from these requirements. The commission amended the exemptive rules to allow a U.S. offer to be made to U.S. target holders and all holders of ADRs representing interests in the subject securities, including foreign holders, provided the offer is made on terms at least as favorable as those offered any other holder of the subject securities. In addition, the commission amended the exemptive rules to provide that U.S. persons may be included in the foreign offer only where the laws of the jurisdiction governing such foreign offer expressly preclude the exclusion of U.S. persons from the foreign offer and where the offer materials distributed to U.S. persons fully and adequately disclose the risks of participating in the foreign offer.

**Termination of withdrawal rights while tendered securities are counted.** The tender offer rules provide that securities deposited pursuant to a tender offer may be withdrawn at any time after 60 days from the date of the original tender offer, in the case of third-party tender offers, and at any time after 40 business days from the commencement of the tender offer in the case of issuer tender offers. These rights are referred to as “back-end” withdrawal rights. However, Rule 14d-11 provides for the use of a subsequent offering period during which securities may be tendered but not withdrawn.

The mechanics of the tender offer process in non-U.S. tender offers are generally different than domestic offers. Tenders often are made through many different financial institutions instead of through a single tender agent, as in the United States. The process of centralizing and counting tendered securities, therefore, may take an extended period of time. Due to these conflicts with the tender, acceptance, and payment procedures in foreign jurisdictions, the commission amended the exemptive rules to allow withdrawal rights to be terminated at the end of an offer and during the counting process for offers conducted under the Tier II exemptions.

The revised rules are conditioned on the following factors:

- The offer must include an offering period, including withdrawal rights, of at least 20 U.S. business days.

- The time withdrawal rights are suspended and all offer conditions have been satisfied or waived, except to the extent that the bidder is still counting tendered securities to determine if the minimum acceptance condition has been satisfied.
• Back-end withdrawal rights are suspended only during the necessary centralization and counting process period and are reinstated immediately thereafter, except to the extent that they are terminated by the acceptance of tendered securities.

Expanded relief for subsequent offering periods. The commission noted that foreign requirements and practices relating to tender offers have frequently led to conflicts with the rule on subsequent offering periods. Several bidders have sought relief to extend the permissible time period of their subsequent offering periods to reconcile U.S. rules with foreign law or customary practice. Therefore, the amended rules eliminate the current 20 business-day time limit on subsequent offering periods for cross-border tender offers eligible to rely on the Tier II exemptions. In addition, the commission amended its rules to eliminate the 20 business day time limit on subsequent offering periods for domestic tender offers, based on its belief that the flexibility to conduct a longer subsequent offering period will be beneficial to bidders and target security holders.

The commission also noted that the requirement that securities be paid for on an-as tendered basis during the subsequent offering period conflicts with market practice in certain non-U.S. jurisdictions. The commission amended the exemptive rules to allow, under certain circumstances, securities tendered during the subsequent offering period for a Tier II cross-border tender offer to be purchased on a modified rolling basis. The amended rule will permit securities to be bundled and paid for within 20 business days from the date of tender. For purposes of this rule provision only, a business day will be determined by reference to the relevant foreign jurisdiction. The amended rule also provides that where local law mandates and local practice permits payment on a more expedited basis, payment must be made more quickly than 20 business days from the date of tender to satisfy U.S. prompt payment requirements.

In certain foreign jurisdictions, bidders are legally required to pay interest on securities tendered during the subsequent offering period. Under U.S. law, such practice would violate the requirement to pay the same form and amount of consideration for securities tendered during the subsequent offering period as paid for securities tendered into the initial offering period, and the best price rule. The commission amended its rules to permit the payment of interest for securities tendered during a subsequent offering period in a Tier II cross-border tender offer only where required under foreign law.

“Mix and match” offers also present various conflicts with U.S. requirements. In a mix-and-match offer, target stockholders 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 stockholders make opposite elections. The bidder typically sets a maximum amount of cash or securities that it will issue in the offer, and, to the extent that more tendering target stockholders elect cash or bidder securities, their elections are prorated to the extent they cannot be satisfied through offsetting elections made by other target stockholders. U.S. law provides that a bidder may offer a choice of different forms of consideration in the subsequent offering period, but only if there is no ceiling on any form of consideration offered. Also, the U.S. tender offer rules require a bidder to offer the same form and amount of consideration to tendering stockholders in both the initial and subsequent offering periods. Bidders in mix-and-match offers have requested relief from the
staff to use two different proration and offset pools in their offers: one for securities tendered during the initial offering period, and another for those tendered in the subsequent offering period. The commission amended its rules to specifically allow separate offset and proration pools for securities tendered during the initial and subsequent offering periods. In addition, the commission eliminated the prohibition on a ceiling for the form of consideration offered in the subsequent offering period, where target stockholders are given the ability to elect between two or more different forms of offer consideration.

**Termination of withdrawal rights after reduction or waiver of minimum acceptance condition.** The tender offer rules provide that a bidder must allow an offer to remain open for a certain period of time after a material change in its terms is communicated to target stockholders. The bidder must provide withdrawal rights during such period. The commission has provided guidance that a bidder meeting the conditions of the Tier II exemptions may waive or reduce the minimum acceptance condition without providing withdrawal rights during the time remaining in the tender offer after the waiver or reduction if certain conditions are met. In the adopting release, the commission provides additional guidance limiting the circumstances under which bidders may rely upon the commission’s interpretive position in cross-border tender offers to waive or reduce a minimum acceptance condition without providing withdrawal rights after such waiver.

In this regard, the commission noted that, where bidders may seek to waive or reduce a minimum acceptance condition in a Tier II eligible tender offer without extending withdrawal rights after the waiver or reduction, the following conditions must be met:

- The bidder must announce that it may waive or reduce the minimum acceptance condition at least five business days before the actual waiver or reduction;
- The bidder must disseminate the announcement through a press release and other methods reasonably calculated to inform U.S. holders of the possibility of a waiver or reduction, which may include placing an advertisement in a newspaper of national circulation in the United States;
- The press release must state the exact percentage to which the minimum acceptance condition may be reduced (or if it will be waived, rather than reduced). The bidder must announce its actual intentions regarding waiver or reduction as soon as required under home country rules;
- During the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided;
- The announcement must advise security holders to withdraw tendered securities immediately if their willingness to tender into the offer would be affected by the reduction or waiver of the minimum acceptance condition;
- The procedure for waiving or reducing the minimum acceptance condition must be described in the offering materials;
• The offer must remain open for at least five business days after the waiver or reduction of the minimum acceptance condition;

• All offer conditions must be satisfied or waived when withdrawal rights are terminated;

• The potential impact of the waiver or reduction of the minimum acceptance condition must be fully discussed in the initial offering materials or any supplemental materials; and

• The bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable foreign law, and, in any case, may not reduce or waive the minimum acceptance condition below a majority of the outstanding securities of the subject class.

The commission’s interpretive position may be relied upon only where law or practice in the applicable foreign jurisdiction does not permit the bidder to provide withdrawal rights after the reduction or waiver, as required under U.S. law.

**Early termination of the initial offering period or a voluntary extension of the initial offering period.** The commission stated that it believes that, where the expiration of a tender offer has been set, whether at the outset of the offer or through a voluntary extension, a change in that expiration date constitutes a material change requiring an offer to remain open for a certain period of time. However, it noted that the minimum time periods established under the U.S. tender offer rules for changes to the terms of a tender offer may conflict with foreign law or practice, where bidders may be required to terminate an offer and withdraw rights immediately after all offer conditions are satisfied. The staff has permitted bidders to terminate the initial offering period before its scheduled expiration if, at the time the initial offering period expires and withdrawal rights terminate:

• the initial offering period has been open for at least 20 U.S. business days;

• the bidder has adequately discussed the possibility and the impact of the early termination in the original offer materials;

• the bidder provides a subsequent offering period after early termination of the initial offering period;

• all offer conditions have been satisfied when the initial offering period terminates; and

• the bidder does not terminate the initial offering period during any mandatory extension of the initial offering period required under U.S. tender offer rules.

The commission amended the exemptive rules applicable to third party and issuer tender offers to codify this staff position.

**Codification of Rule 14e-5 Cross-Border Exemption.** Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the
tender offer. Over the past several years, the staff has granted several exemptions from Rule 14e-5 for Tier II tender offers for purchases and arrangements to purchase securities of a foreign private issuer:

- pursuant to the non-U.S. tender offer for a cross-border tender offer where there are separate U.S. and non-U.S. offers;
- by offerors and their affiliates outside of a tender offer; and
- by a financial advisor’s affiliates outside of a tender offer.

In 2006 and 2007, three class exemptive letters were issued by the staff in these areas. The commission has now codified this exemptive relief in the amended rules.

The commission amended Rule 14e-5 to allow purchases or arrangements to purchase the subject securities pursuant to a foreign offer or multiple foreign offers and during a U.S. tender offer if certain conditions are satisfied. The conditions are:

- The U.S. and foreign tender offer meet the conditions for reliance on the Tier II cross-border exemptions;
- U.S. stockholders are treated at least as favorably as non-U.S. tendering stockholders;
- Cash consideration to be paid to U.S. stockholders may be converted from the currency paid in the foreign offer to U.S. dollars at the exchange rate disclosed in the U.S. offering documents;
- The bidder’s intent to make purchases pursuant to the foreign offer must be adequately disclosed in the U.S. offering documents; and
- Purchases by the acquiror in the foreign tender offer are made solely pursuant to the foreign tender offer and not pursuant to an open market transaction, a private transaction or other transaction.

In addition, the commission amended Rule 14e-5 to permit purchases or arrangements to purchase outside of a Tier II tender offer by a bidder and its affiliates and an affiliate of a financial advisor if certain conditions are satisfied. The amended rule prohibits any purchases or arrangements to purchase in the U.S. otherwise than pursuant to the tender offer. Further, the amendments require that the U.S. offering materials prominently disclose the possibility of or the intention to make purchases or arrangements to purchase outside the tender offer. The amendments also require disclosure in the U.S. of purchases made outside the tender offer to the extent that such information is made public in the home jurisdiction. Where a bidder or its affiliate purchases or arranges to purchase outside of a tender offer, the tender offer price must be raised to equal any higher price paid outside of the tender offer.

Where an affiliate of a financial advisor purchases or arranges to purchase outside of a tender offer, the amended rules require that the financial advisor and affiliate maintain and enforce written policies and procedures designed to prevent the flow of information among
the financial advisor and the affiliate that might result in a violation of the federal securities laws and regulations. The amended rules also require that the affiliate have no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor who directly affect or recommend transactions in the subject securities or related securities who also will be involved in providing the bidder or target corporation with financial advisory services or dealer-manager services. The amended rules also require that the financial advisor have a registered broker-dealer affiliate under Section 15(a) of the Exchange Act. Purchases or arrangements to purchase made to facilitate the tender offer will be prohibited.

Early commencement for exchange offers

In 1999, the commission adopted changes to the tender offer rules to permit exchange offers to commence upon the date of filing of a registration statement. However, this early commencement option is not available for exchange offers that are not subject to Rule 13e-4 or Regulation 14D. The commission stated that it believes that exchange offers eligible for the Tier II cross-border exemptions and for domestic target companies should be able to take advantage of the early commencement procedure, even if the exchange offer is subject only to the provisions of Regulation 14E, under the following conditions:

- The bidder provides withdrawal rights to the same extent as would be required under Rule 13e-4 and Regulation 14D; and
- If there is a material change in the information provided to target security holders, the bidder must disseminate revised materials as required under Exchange Act Rules 13e-4(e)(3) and 14(d)-4(d) and must hold the offer open with withdrawal rights for the minimum time periods specified in those rules.

No securities may be purchased until the registration statement is declared effective. Such exchange offers will also be subject to the prospectus delivery requirements to the same extent as exchange offers subject to Rule 13e-4 and Regulation 14D.

Beneficial ownership reporting by foreign institutions

The beneficial ownership reporting requirements in Sections 13(d) and 13(g) of the Exchange Act require, subject to exceptions, that any person who acquires more than 5 percent of a class of equity securities registered under Section 12 of the Exchange Act and other specified equity securities report the acquisition on Schedule 13D within 10 days. Persons holding more than 5 percent of a class of such securities at the end of the calendar year, but not required to report on Schedule 13D, must file a short-form Schedule 13G within 45 days after December 31. These Schedule 13G filers include specified institutional investors holding securities in the ordinary course of business and not with a control purpose. The list of institutional investors in Rule 13d-1(b)(1)(ii) currently does not include non-domestic institutions generally, and is limited to institutions such as brokers, dealers, investment advisers, and investment companies registered with the commission, or regulated banks, pension funds, or insurance companies. Historically, a foreign institution has been able to seek an exemptive order or no-action position to report on Schedule 13G, provided that the foreign institution is subject to a regulatory scheme in its country comparable to the
U.S. regulatory scheme for the particular category of institution and the foreign institution undertakes to grant the commission access to information that would otherwise be disclosed on Schedule 13D.

The commission amended Rule 13d-1(b)(1)(ii) to include foreign institutions that are substantially comparable to the U.S. institutions listed therein. The foreign institution must determine and certify on Schedule 13G that it is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to its U.S. counterparts and undertake to furnish to the commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D. The commission also made a corresponding change to Rule 16a-1(a)(1), which provides that these foreign institutions will not be deemed to be the beneficial owners of securities held for the benefit of third parties or in customer or fiduciary accounts for purposes of Section 16 under the Exchange Act.

Interpretive guidance

In the adopting release, the commission provided interpretive guidance on the matters discussed below.

Application of the All-Holders Rule to foreign target stockholders

The U.S. tender offer rules require that third-party tender offers subject to Section 14(d) of the Exchange Act, as well as issuer tender offers subject to Section 13(e) of the Exchange Act, be open to all holders of the subject class of securities. The commission reaffirmed its position that the all-holders requirement does not allow the exclusion of any foreign or U.S. target stockholder in tender offers subject to those rules, but noted that the rules do not require dissemination of offer materials outside the United States.

The commission determined not to adopt any de minimis or other exceptions to the all-holders rule, but noted that requests for relief will be considered on a case-by-case basis, particularly where a bidder can demonstrate unusual facts warranting an accommodation from the all-holders rule.

Ability of bidders to exclude U.S. target stockholders. A bidder making a tender offer for target securities of a foreign private issuer may exclude U.S. target stockholders if the offer is conducted outside the United States and U.S. jurisdictional means are not implicated. A bidder may implicate U.S. jurisdictional means if it fails to take adequate measures to prevent tenders by U.S. target stockholders while purporting to exclude them. The commission stated that a legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself. Bidders need to take special precautions to prevent sales to or tenders from U.S. target stockholders.

To avoid triggering U.S. law, bidders may require a representation or certification from tendering holders that they are not U.S. stockholders. Recognizing that target stockholders could misrepresent their status, the commission stated that bidders employing such precautions will not be viewed as having targeted U.S. investors, thereby invoking U.S. jurisdictional means. However, the commission’s guidance is based on the bidder having taken adequate measures reasonably designed to guard against purchases from and sales to
U.S. stockholders and on the absence of indicia that would or should put the bidder on notice that the tendering holder is a U.S. investor. The commission noted that, where tenders in exclusionary offers are made through offshore nominees, bidders could require that these nominees certify that tenders are not being made on behalf of U.S. stockholders.

Finally, the commission stated that the staff will more closely monitor exclusionary offers to determine whether commission action is necessary to protect U.S. target stockholders.

**Vendor placements.** In certain cross-border exchange offers, bidders may seek to avoid the registration requirements under the Securities Act by establishing a vendor placement arrangement for the benefit of U.S. target stockholders who tender into the offer. In a vendor placement, the bidder generally employs a third party to sell in offshore transactions the securities to which tendering U.S. stockholders are entitled in the offer. The bidder or the third party then remits the proceeds of the resale, less expenses to those U.S. target stockholders that tendered into the offer. The staff has issued no-action letters permitting the use of this structure in limited situations.

The commission stated that the staff no longer intends to issue vendor placement no-action letters regarding the registration requirements of Section 5 under the Securities Act. Bidders should consider the following factors in deciding whether to use the vendor placement procedures:

- the level of U.S. ownership in the target corporation;
- the number of bidder securities to be issued overall in the business combination, as compared to the amount of bidder securities outstanding before the offer;
- the amount of bidder securities to be issued to tendering U.S. holders and subject to the vendor placement, as 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 tendered in the offer;
- the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales; and
- the process used to effect the vendor placement sales.

The commission stated that it believes 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 exchange offer and sold pursuant to the vendor placement procedure is highly liquid and robust and the number of bidder securities to be issued in the exchange offer and for the benefit of tendering U.S. holders is relatively small.
compared to the total number of bidder securities outstanding. The commission also stated that bidders should consider:

- the timeliness of the vendor placement process; that is, whether sales of bidder securities through the vendor placement process are effected within a few business days of the closing of the offer;

- whether the bidder announces material information, such as earnings results, forecasts, or other financial or operating information, before that process is complete; and

- whether the vendor placement involves special selling efforts by brokers or others acting on behalf of the bidder.

Bidders seeking to use the vendor placement structure for a tender offer subject to the all-holders rule must seek an exemption from those rules.
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<td>David Tamman</td>
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<td>James Weller</td>
<td>jweller</td>
<td>516-832-7543</td>
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