

**SECURITIES AND EXCHANGE COMMISSION  
17 CFR PARTS 230, 232, 239, 240, and 249**

**[RELEASE NOS. 33-8917; 34-57781; FILE NO. S7-10-08]**

**RIN 3235-AK10**

**REVISIONS TO THE CROSS-BORDER TENDER OFFER, EXCHANGE OFFER,  
AND BUSINESS COMBINATION RULES AND BENEFICIAL OWNERSHIP  
REPORTING RULES FOR CERTAIN FOREIGN INSTITUTIONS**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** After eight years of experience with the current cross-border exemptions adopted in 1999, the Commission is proposing changes to expand and enhance the utility of these exemptions for business combination transactions. Our goal continues to be to encourage offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers, to permit U.S. security holders to participate in these transactions in the same manner as other holders. Many of the rule changes we propose today would codify existing interpretive positions and exemptive orders in the cross-border area. In several instances, we request comment about whether the rule changes we propose also should apply to tender offers for U.S. companies. In this release, we also address certain interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations. We hope that this guidance will prove useful in structuring and facilitating these transactions in a manner consistent with U.S. investor protection.

**DATES:** Comments should be received on or before [insert date 45 days after Federal Register publication].

**ADDRESSES:** Comments may be submitted by any of the following methods:

**Electronic Comments:**

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-10-08 on the subject line; or
- Use the Federal Rulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

**Paper Comments:**

- Send paper comments in triplicate to Nancy M. Morris, Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-10-08. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments also are available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Christina Chalk, Senior Special Counsel, or Tamara Brightwell, Senior Special Counsel, at (202) 551-3440, in the Division of Corporation Finance, and Elizabeth Sandoe, Branch Chief, at (202) 551-5720, in the Division of Trading and Markets (for questions relating to the proposed changes to Rule 14e-5), U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-3628.

**SUPPLEMENTARY INFORMATION:** We propose to amend Rules 162,<sup>1</sup> 800<sup>2</sup> and 802<sup>3</sup> under the Securities Act of 1933<sup>4</sup> and Rule 101<sup>5</sup> of Regulation S-T.<sup>6</sup> We also propose to amend Rules 13d-1,<sup>7</sup> 13e-3,<sup>8</sup> 13e-4,<sup>9</sup> 14d-1,<sup>10</sup> and 14e-5<sup>11</sup> under the Securities

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<sup>1</sup> 17 CFR 230.162.

<sup>2</sup> 17 CFR 230.800.

<sup>3</sup> 17 CFR 230.802.

<sup>4</sup> 15 U.S.C. 77a et seq.

<sup>5</sup> 17 CFR 232.101.

<sup>6</sup> 17 CFR 232.10 et seq.

<sup>7</sup> 17 CFR 240.13d-1.

<sup>8</sup> 17 CFR 240.13e-3.

<sup>9</sup> 17 CFR 240.13e-4.

<sup>10</sup> 17 CFR 240.14d-1.

<sup>11</sup> 17 CFR 240.14e-5.

Exchange Act of 1934.<sup>12</sup> We also propose changes to Form S-4,<sup>13</sup> Form F-4,<sup>14</sup> Form F-X,<sup>15</sup> Form CB,<sup>16</sup> Schedule 13G<sup>17</sup> and Schedule TO.<sup>18</sup>

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<sup>18</sup> 17 CFR 240.14d-100.

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## I. BACKGROUND

### A. Introduction

Securities markets today are characterized by increasing globalization. Advances in information technology, the increased use of ADR<sup>19</sup> facilities giving U.S. investors an ownership interest in the securities of foreign companies, and other factors have increased significantly the number of U.S. and foreign companies engaged in cross-border business combination transactions.<sup>20</sup> Computerization and the advent of the Internet age have fueled a revolution in investor participation in global capital markets. With increasing globalization of worldwide securities markets, U.S. investors frequently purchase securities issued by foreign companies, including foreign private issuers.

The Commission has undertaken several recent rulemaking initiatives that impact foreign private issuer reporting and registration requirements. For example, we recently revised our rules to make the U.S. capital markets more attractive to foreign private issuers by allowing the use of financial statements prepared in accordance with International Financial Reporting Standards (or IFRS) as issued by the International Accounting Standards Board (or IASB), without a reconciliation to U.S. GAAP.<sup>21</sup> In addition, we amended the deregistration rules for exiting the U.S. regulatory system when

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<sup>19</sup> “ADRs” refer to American Depositary Receipts. We use this term synonymously with American Depositary Shares, or ADSs.

<sup>20</sup> See Jessica Hall, Cross-Border Mergers Defy U.S. Slump, REUTERS (October 18, 2007)(noting that cross-border deals reached record highs through mid-October 2007, and were up 82 percent over levels for the same period in 2006, according to figures compiled by the research firm Dealogic).

<sup>21</sup> Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Release No. 33-8879 (December 21, 2007) [73 FR 986].

the level of U.S. interest in a foreign private issuer's securities has decreased, such that continued registration is no longer justified.<sup>22</sup> We also have proposed a change to the manner of determining the availability of the Rule 12g3-2(b) exemption from Exchange Act registration.<sup>23</sup> Further, we have proposed rule revisions applicable to foreign issuers, intended to improve the accessibility of the U.S. public capital markets and enhance the information available to investors.<sup>24</sup>

We believe these changes benefit investors and issuers. U.S. investors benefit from additional investment opportunities in securities of foreign companies, while issuers benefit from the potential for increased investor interest and a reduction in the cost of regulatory compliance. Consistent with these recent efforts to enhance our regulatory system applicable to foreign private issuers, we are proposing enhancements to our rules governing cross-border business combination transactions.

The rule revisions we propose today are based on our experiences in the cross-border area during the eight years since the current cross-border exemptions were adopted. The revisions are intended to address the areas of conflict or inconsistency with foreign regulations and practice that acquirors frequently encounter in cross-border

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<sup>22</sup> Termination of a Foreign Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Release No. 34-55540 (March 27, 2007) [72 FR 16934] ("Deregistration Release").

<sup>23</sup> Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-57350 (February 19, 2008) [73 FR 10102] ("Rule 12g3-2(b) Release").

<sup>24</sup> Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008) [73 FR 13404].

business combination transactions.<sup>25</sup> Whether non-U.S. issuers list their securities on a U.S. market or U.S. investors access overseas trading markets to purchase their securities, cross-border business combination transactions frequently present conflicts between U.S. and foreign regulatory systems.<sup>26</sup> The cross-border exemptions are premised on the status of the target company in a business combination, or the issuer in a rights offering, as a foreign private issuer as defined in our rules.

We believe the revisions we propose today represent an appropriate balance between the need to protect U.S. investors through application of the protections afforded by U.S. law, and the desirability of facilitating and enabling transactions that may benefit all security holders, including those in the United States. We also believe expanding the availability of the cross-border exemptions will serve the public interest by encouraging bidders to include U.S. holders in cross-border business combination transactions from which they otherwise might be excluded, thereby extending the benefits of those transactions to U.S. investors.

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<sup>25</sup> The proposed revisions are, with a few exceptions, limited to cross-border business combination transactions. “Cross-border” refers to business combinations in which the target company is a “foreign private issuer” as defined in Exchange Act Rule 3b-4(c) [17 CFR 240.3b-4(c)], and rights offerings where the issuer is a foreign private issuer, as so defined. In the past under very limited circumstances, offerors have obtained no-action and exemptive relief for business combinations in which the target company was a foreign issuer but did not meet the definition of foreign private issuer in Rule 3b-4. Such relief continues to be considered only in special circumstances and will be as narrowly tailored as practicable.

<sup>26</sup> “Business combination” is defined in Securities Act Rule 800(a) as any “statutory amalgamation, merger, arrangement or reorganization requiring the vote of security holders of one or more participating companies. It also includes a statutory short form merger that does not require a vote of security holders.” In this release, we use the term more broadly to include those kinds of transactions, as well as tender and exchange offers. See Securities Act Rule 165(f)(1) [17 CFR 230.165(f)(1)] (defining the term more broadly, to include the types of transactions listed in Rule 145(a) [17 CFR 230.145(a)], as well as exchange offers).

## **1. Treatment of U.S. target security holders before the adoption of the cross-border exemptions**

Before the cross-border exemptions became effective in January 2000, U.S. holders<sup>27</sup> of a foreign issuer or foreign target company frequently were excluded from cross-border business combination transactions or rights offerings because of actual or perceived conflicts between U.S. and foreign law. Where U.S. security holders held a relatively small percentage of a foreign target's securities, their participation was not necessary to the successful completion of the business combination transaction and acquirors frequently excluded them.<sup>28</sup> Even where the percentage of securities held in the United States was significant, acquirors and issuers in business combination transactions and rights offerings sometimes avoided extending the offer into the United States because of perceived litigation risks or conflicts in rules or practice, or the desire not to engage in the process of preparing and filing a Securities Act registration statement.<sup>29</sup> Exclusion deprived U.S. investors of some or all of the benefits of such cross-border transactions.

## **2. Overview of the cross-border exemptions**

In an effort to facilitate the inclusion of U.S. security holders in primarily foreign

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<sup>27</sup> See, e.g., Instruction 2 to Exchange Act Rules 14d-1(c) and 14d-1(d) (defining "U.S. holder" as "any security holder resident in the United States").

<sup>28</sup> See Cross-Border Tender Offers, Business Combinations and Rights Offerings, Release No. 33-7611 (November 13, 1998) [63 FR 69136] ("1998 Cross-Border Proposing Release"), Section II.A. The U.K. Takeover Panel (the entity that regulates tender offers in the United Kingdom) provided us with information it compiled in 1997 based on a random sample of 31 tender offers (out of 171 possible mergers or tender offers). When the U.S. ownership of the target was less than 15 percent (30 offers), the bidders excluded U.S. persons in all of the offers. When the U.S. ownership was more significant, such as 38 percent (one offer), the bidders included U.S. persons. In the 30 offers that excluded U.S. persons, the ownership percentage was as follows: in 27 offers, U.S. persons held less than 5 percent; in the remaining three offers, U.S. persons held 7 percent, 8 percent and 10-15 percent, respectively.

<sup>29</sup> Id.

transactions, we adopted the cross-border exemptions on October 26, 1999.<sup>30</sup> These exemptions represented the culmination of efforts since 1991, when we issued two proposing releases addressing cross-border issues.<sup>31</sup> Between 1991 and 1999, the staff gained valuable experience addressing numerous individual requests for no-action and exemptive relief in the cross-border area.<sup>32</sup> The cross-border exemptions addressed areas of frequent regulatory conflict or differences in practice encountered by the staff during those years.

Generally speaking, 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 held by U.S. investors.<sup>33</sup> Where no more than ten percent of the subject securities are held in the United States (Tier I and

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<sup>30</sup> Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 33-7759, 34-42054 (October 22, 1999) [64 FR 61382] (“Cross-Border Adopting Release”). In this release, we refer to the cross-border exemptions adopted in the Cross-Border Adopting Release as the “cross-border exemptions.” The cross-border exemptions may be found in Securities Act Rules 800 - 802 [17 CFR 230.800 - 802] and Exchange Act Rules 13e-3(g)(6) [17 CFR 240.13e-3(g)(6)], 13e-4(h)(8) [17 CFR 240.13e-4(h)(8)], 13e-4(i) [17 CFR 240.13e-4(i)], 14d-1(c) [17 CFR 240.14d-1(c)], 14d-1(d) [17 CFR 240.14d-1(d)], and 14e-2(d) [17 CFR 240.14e-2(d)].

<sup>31</sup> See International Tender and Exchange Offers, Release No. 33-6897 (June 5, 1991) [56 FR 27582] and Cross-Border Rights Offers; Amendments to Form F-3, Release No. 33-6896 (June 4, 1991) [56 FR 27564]. Additionally, we addressed a number of issues presented in the cross-border context in a concept release in 1990. See Concept Release Multinational Tender and Exchange Offers, Release No. 33-6866 (June 6, 1990) [55 FR 23751].

<sup>32</sup> Where we refer in this release to “relief,” we mean exemptive or no-action relief provided by letter in the context of an individual transaction, unless otherwise indicated. See footnote 49 below referring to the staff’s delegated authority to provide exemptive relief from U.S. rule provisions for specific cross-border transactions. Where we refer to “interpretive guidance,” we mean oral positions taken by the staff or written interpretations promulgated by the Division of Corporation Finance in the Manual of Publicly Available Telephone Interpretations available on our Web site. We refer to “Commission guidance” or “Commission interpretive guidance” to mean positions expressed by the Commission in releases.

<sup>33</sup> Although the target (or issuer in a rights offering) must be a foreign private issuer, the acquiror relying on the cross-border exemptions need not be a foreign private issuer and, in fact, may be a U.S. company.

Rules 801 and 802), a qualifying cross-border transaction will be exempt from most U.S. tender offer rules<sup>34</sup> and from the registration requirements of Section 5 of the Securities Act of 1933.<sup>35</sup> Tier I provides a broad exemption from the filing, dissemination and procedural requirements of the U.S. tender offer rules and the heightened disclosure requirements applicable to going private transactions as defined in Rule 13e-3.<sup>36</sup> Tier I also exempts the subject company of a tender offer from the obligation to express and support a position with respect to that tender offer.<sup>37</sup> At the same level of U.S. ownership, Rules 801 and 802 also provide relief from the registration requirements of Securities Act Section 5 for securities issued in rights offerings and business combination transactions.

Issuers relying on Rule 801, offerors relying on Rule 802, and third-party bidders and issuers relying on the Tier I cross-border exemption, must furnish a Form CB to the Commission.<sup>38</sup> Form CB is a cover sheet for an English translation of the disclosure document used in the foreign home jurisdiction and disseminated to U.S. target security holders.<sup>39</sup> This form must be submitted to the Commission by the next business day after the disclosure document attached and used in the foreign home jurisdiction is published

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<sup>34</sup> The U.S. anti-fraud and anti-manipulation rules and civil liability provisions continue to apply to these transactions. See Cross-Border Adopting Release, Section I.A.

<sup>35</sup> 15 U.S.C. 77e.

<sup>36</sup> Exchange Act Rules 13e-3(g)(6), 13e-4(h)(8) and 14d-1(c).

<sup>37</sup> Exchange Act Rule 14e-2(d).

<sup>38</sup> Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i), and Exchange Act Rules 13e-4(h)(8)(iii) and 14d-1(c)(3)(iii).

<sup>39</sup> Item 1 of Form CB [17 CFR 239.800].

or otherwise disseminated in accordance with home country rules.<sup>40</sup> The materials submitted under cover of Form CB are not deemed filed with the Commission, and the filer is not subject to the liability provisions of Section 18 of the Exchange Act.<sup>41</sup>

A bidder relying on the Tier I exemption must submit a Form CB only if the tender offer would have been subject to Regulation 14D<sup>42</sup> or Rule 13e-4, but for the Tier I exemption. No filing requirement exists for a tender offer subject only to Exchange Act Section 14(e) and Regulation 14E; accordingly, furnishing a Form CB is not necessary.<sup>43</sup>

Where U.S. holders own more than ten percent but no more than 40 percent of the target securities (Tier II), the cross-border exemptions provide targeted relief from some U.S. tender offer rules to address certain recurring areas of regulatory conflict. The Tier II exemptions encompass narrowly-tailored relief from certain U.S. tender offer rules, such as the prompt payment, extension and notice of extension requirements in Regulation 14E. The Tier II exemptions do not provide relief from the registration requirements of Securities Act Section 5, nor do they include an exemption from the

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<sup>40</sup> Securities Act Rules 801(a)(4)(i) and 802(a)(3)(i) and Exchange Act Rules 14d-1(c)(3)(iii) and 13e-4(h)(8)(iii). If the bidder is a foreign company, it must also file a Form F-X with the Commission appointing an agent for service of process in the United States. See, e.g., Exchange Act Rule 14d-1(c)(3)(iii).

<sup>41</sup> 15 U.S.C. 78r. See also, the Cross-Border Adopting Release, Section II.A.2. However, an acquiror or other person submitting Form CB is subject to U.S. anti-fraud provisions. See footnote 34 above.

<sup>42</sup> Exchange Act Rules 14d-1 through 14d-11.

<sup>43</sup> See Cross-Border Adopting Release, Section II.A.2. Regulation 14E applies to all tender offers, including those not subject to Section 13(e) or 14(d) of the Exchange Act. These include tender offers for non-equity securities and securities that are not registered under Section 12 of the Exchange Act [15 U.S.C. 78l], as well as partial offers for less than all of the subject class, where the bidder will not own, based on purchases in the tender offer and ownership in the target before the offer commences, more than five percent of the subject class of equity securities after the tender offer.

additional disclosure requirements applicable to going private transactions by issuers or affiliates.

The scope of the Tier I and Tier II cross-border exemptions and the exemptions from the Securities Act registration requirements provided in Rules 801 and 802 are based broadly on the level of U.S. interest in a given transaction, as illustrated by the percentage of shares held by U.S. persons. In addition to these U.S. ownership thresholds, the cross-border exemptions are conditioned on other requirements, such as the principle that U.S. target security holders be permitted to participate in the offer on terms at least as favorable as those afforded other target holders.<sup>44</sup> This approach differs from our approach in adopting revisions to the deregistration rules applicable to foreign private issuers in 2007<sup>45</sup> and more recently, in our proposed revisions to Rule 12g3-2(b) recommending the use of an average daily trading volume test (“ADTV”).<sup>46</sup>

#### **B. Summary of rule proposals and interpretive guidance**

We believe the existing cross-border exemptions have facilitated the inclusion of U.S. security holders in foreign transactions in a manner consistent with our investor

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<sup>44</sup> Securities Act Rules 801(a)(3) and 802(a)(2) [17 CFR 230.801(a)(3) and 230.802(a)(2)]; Exchange Act Rules 13e-4(h)(8)(ii) and (i)(2)(ii); and 14d-1(c)(2) and (d)(2)(ii).

<sup>45</sup> See the Deregistration Release.

<sup>46</sup> See the Rule 12g3-2(b) Release and the discussion in Section II.A.4 below.

protection mandate.<sup>47</sup> We recognize that in some instances, however, the exemptions are not operating as optimally as intended, or do not address continuing and recurring conflicts of law and practice not anticipated when we adopted them.<sup>48</sup> As a result, companies repeatedly call upon the Commission’s staff to address particular areas of conflict in the context of individual cross-border transactions.<sup>49</sup>

The rule revisions we propose today address recurring issues and unintended consequences that have impeded the usefulness of the cross-border exemptions. We believe the proposed changes will encourage more offers to be extended into the United States. Generally speaking, the proposed revisions represent an expansion and refinement of the current exemptions, and in some areas, would codify relief previously granted only on an individual basis. Our proposed codification of various staff interpretive positions would make such relief available as a matter of right, thereby

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<sup>47</sup> Another area in which we have modified our rules in the foreign private issuer context is the Multijurisdictional Disclosure System (“MJDS”) with Canada. See Exchange Act Rule 14d-1(b). That system allows a bidder in a cross-border tender offer to conduct its offer in accordance with Canadian rules and/or the rules of any applicable Canadian province instead of U.S. tender offer requirements, where the conditions in the rule are met. These include the requirement that the target company in the tender offer be a foreign private issuer and not an investment company, and that U.S. holders own less than 40 percent of the subject securities. The bidder must file its offer materials, prepared in accordance with Canadian requirements, on Form 14D-1F [17 CFR 240.14d-102] with the Commission. See Rule 14d-1(b)(1). MJDS also specifies certain forms to be used by Canadian companies issuing securities to U.S. persons. See, e.g., Forms F-8 [17 CFR 239.38], F-9 [17 CFR 239.39], F-10 [17 CFR 239.40], and F-80 [17 CFR 239.41]. Except for limited solicitations of comment below, this release does not propose changes to MJDS.

<sup>48</sup> For a general discussion of the cross-border exemptions and a broad overview of how they operate, see Steven Davidoff & Brett Carron, “Getting U.S. Security Holders to the Party: The SEC’s Cross-Border Release Five Years On,” 26.3 U. Pa. J. Int’l Econ. L. 455 (2005); and John Basnage, William Curtin III & Jeffrey Rubin, “Cross-Border Tender Offers and Other Business Combination Transactions and the U.S. Federal Securities Laws: An Overview,” 61.3 Business Lawyer 1071 (2006).

<sup>49</sup> Pursuant to Rule 30-1 of the SEC’s Rules of General Organization [17 CFR 200.30-1], the staff has delegated authority to exempt individual bidders and issuers from application of our rules. No-action and exemptive letters issued by the staff in connection with cross-border transactions may be found on our Web site at <http://www.sec.gov/divisions/corpfin/cf-noaction.shtml> and <http://www.sec.gov/divisions/marketreg/mr-noaction.shtml#rule14e5>.

reducing the burdens and costs for bidders and issuers of extending cross-border offers to U.S. holders when conducting cross-border transactions.

In some instances, the changes we propose would address practical problems that have limited the ability of bidders and issuers to rely on the exemptions. For example, we hope the proposed changes relating to the calculation of U.S. ownership of the target foreign private issuer will provide greater certainty and ease of use for those seeking to rely on the exemptions. In proposing these rule revisions, we hope to better address the burdens on bidders and issuers who must comply with two or more regulatory systems in the context of cross-border transactions.<sup>50</sup> As a result, we hope the revisions we propose today will make bidders more likely to extend offers to U.S. holders.

In this release, we also provide guidance on some of the interpretive issues that have arisen during the years since the cross-border exemptions were adopted. In some instances, we propose to codify existing staff interpretive positions. We also discuss our views on some of the interpretive matters addressed in the 1998 Cross-Border Proposing Release and the Cross-Border Adopting Release. The rule changes we propose today include:

- Refinement of 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, including changes to:

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<sup>50</sup> Although the focus of the rule changes we propose is cross-border business combinations, in some instances, we solicit comment on whether certain of these changes should also apply to business combinations where the target company is a U.S. issuer. We may adopt these changes at the time we adopt changes to our cross-border business combination rules. For example, we ask for comments on whether domestic exchange offers not subject to Rule 13e-4 or Regulation 14D should be permitted to commence early. We also solicit comment on whether the rule changes we propose to facilitate “mix and match” tender offers and the relaxation of our rules relating to subsequent offering periods also should apply to tender offers for domestic companies.

- Use the date of public announcement of the business combination as the reference point for calculating U.S. ownership;
- Permit the offeror to calculate U.S. ownership as of a date within a 60-day range before announcement;
- Specify when the offeror has reason to know certain information about U.S. ownership that may affect its ability to rely on the presumption of eligibility in non-negotiated tender offers;
- Expanding relief under Tier I for affiliated transactions subject to Rule 13e-3 for transaction structures not covered under our current cross-border exemptions, such as schemes of arrangement, cash mergers, or compulsory acquisitions for cash;
- Extending the specific relief afforded under Tier II to tender offers not subject to Sections 13(e) or 14(d) of the Exchange Act;
- Expanding the relief afforded under Tier II in several ways to eliminate recurring conflicts between U.S. and foreign law and practice, including:
  - Allowing more than one offer to be made abroad in conjunction with a U.S. offer;
  - Permitting bidders to include foreign security holders in the U.S. offer and U.S. holders in the foreign offer(s);
  - Allowing bidders to suspend back-end withdrawal rights while tendered securities are counted;
  - Allowing subsequent offering periods to extend beyond 20 U.S. business days;

- Allowing securities tendered during the subsequent offering period to be purchased within 14 business days from the date of tender;
- Allowing bidders to pay interest on securities tendered during a subsequent offering period;
- Allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods;
- Codifying existing exemptive orders with respect to the application of Rule 14e-5 for Tier II tender offers;
- Expanding the availability of early commencement to offers not subject to Section 13(e) or 14(d) of the Exchange Act;
- Requiring that all Form CBs and the Form F-Xs that accompany them be filed electronically;
- Modifying the cover pages of certain tender offer schedules and registration statements to list any cross-border exemptions relied upon in conducting the relevant transactions; and
- Permitting foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, without individual no-action relief.

In addition to these proposed rule changes, we provide guidance or solicit commenters' views on the following issues:

- The ability of bidders to terminate an initial offering period or any voluntary extension of that period before a scheduled expiration date;
- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;

- The application of the all-holders provisions of our tender offer rules to foreign target security holders;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The ability of bidders to use the vendor placement procedure for exchange offers subject to Section 13(e) or 14(d) of the Exchange Act.

## **II. DISCUSSION**

### **A. Eligibility threshold – determining U.S. ownership**

Business combination transactions are extraordinary events for target companies and their security holders. When U.S. persons hold a significant percentage of a target’s securities in a cross-border business combination transaction, we believe U.S. tender offer and other rules should provide certain basic protections in transactions that will significantly impact their ownership interest in that target company.<sup>51</sup> When U.S. persons do not hold a significant stake in the subject target class, we believe that by allowing the acquiror to conduct the transaction in accordance with the applicable foreign law, while including U.S. persons and treating them at least as favorably as all other target holders, U.S. persons are better protected than they would be if the acquiror chose

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<sup>51</sup> We believe these protections are even more critical in cross-border tender offers, where home country law may not allow acquirors to eliminate minority security holders under the same circumstances as in the United States. For example, in some foreign jurisdictions, the ability of bidders to “squeeze out” target security holders remaining after a tender offer may be more limited than in the United States, where this generally be accomplished whenever the bidder purchases a majority of target shares. See discussion in footnote 155 below. Therefore, a decision whether to tender into an offer and the procedural protections associated with that offer may be even more critical, because target security holders who remain after the offer may not be cashed out in a back-end merger, as would be typical in the United States.

to exclude them from the transaction so that the transaction would not be subject to U.S. regulations.

When we adopted the cross-border exemptions, we established a threshold eligibility test for use of the exemptions based on the percentage of target shares held by U.S. persons.<sup>52</sup> The current test, based on the level of U.S. ownership in the target company, has worked well conceptually. However, we have become aware of certain difficulties that can make application of our threshold eligibility test problematic in practice, including issues that can arise when conducting both the look-through analysis for negotiated transactions and the alternate test for non-negotiated deals, as discussed below. We believe the recommended changes will enhance the utility of the cross-border exemptions because they will make it easier for bidders and issuers to determine whether they are eligible to rely on them.

- 1. Methods for determining U.S. ownership under the existing cross-border exemptions**

- a. Negotiated transactions**

As discussed above, under our current rules, eligibility to rely on the cross-border exemptions is determined in part by the percentage of U.S. beneficial holders of the

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<sup>52</sup> For rights offerings, eligibility to rely on Rule 801 is determined by the percentage of subject securities of the issuer held by U.S. persons. See Securities Act Rule 800(h).

relevant class of target securities.<sup>53</sup> U.S. ownership of the target company is determined by reference to the target's non-affiliated float<sup>54</sup> and holders of greater than ten percent of the subject class are excluded from the calculation of U.S. ownership.<sup>55</sup> Any securities held by the acquiror in the business combination transaction similarly are excluded from the calculation.<sup>56</sup>

The rules specify the manner in which a bidder in a negotiated transaction must determine which target securities are held by persons resident in the United States.<sup>57</sup> They require the acquiror to “look through” securities held of record by nominees in specified jurisdictions to identify those held for the accounts of persons located in the

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<sup>53</sup> Note that in response to inquiries from U.S. bidders regarding the availability of Securities Act Rules 801 and 802 when there are no U.S. holders in the issuer (in a rights offering) or subject company (in an exchange offer or other business combination), or when an offer is not extended to U.S. holders, the Division of Corporation Finance has taken the position that the cross-border exemptions do not apply unless there is at least one U.S. security holder of the subject class of securities. See Section II.C. Question 1 in the Third Supplement to the Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>. This is consistent with the intent of the exemptions: to facilitate the inclusion of U.S. security holders of foreign private issuers in business combinations and rights offerings.

<sup>54</sup> We use “float” to refer to the aggregate market value of the subject securities held by non-affiliates. See generally, the definition of “Small Business Issuer” in Securities Act Rule 405 [17 CFR 230.405] and the Note to that provision. We do not include in that definition securities held by persons or entities that individually own more than ten percent of the subject securities.

<sup>55</sup> See Instruction 2.ii. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and 14d-1(d). See also Securities Act Rule 800(h)(2).

<sup>56</sup> Id.

<sup>57</sup> See Instruction 2 to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d); Securities Act Rule 800(h).

United States.<sup>58</sup> If after “reasonable inquiry,” the acquiror is unable to obtain information about the location of the security holders for whom a nominee holds, the rules allow the acquiror to assume that the customers are residents of the jurisdiction in which the nominee has its principal place of business.<sup>59</sup> The relevant date for determining U.S. ownership is the 30th day before a benchmark date that varies with the type of transaction for which the exemption is sought.<sup>60</sup>

**b. Non-negotiated transactions**

In adopting the eligibility standard for negotiated transactions described in the preceding section, we recognized that the required look-through analysis would be more difficult for third-party offerors in non-negotiated transactions because they would not have the cooperation of the issuer.<sup>61</sup> In particular, obtaining information from nominees who hold for the account of others is difficult for third-party acquirors and may have the

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<sup>58</sup> See, e.g., Instruction 2.iii. to Exchange Act Rules 14d-1(c) and 14d-1(d) (instructing the bidder to limit its inquiry as to securities held in nominee form to nominees located in the United States, the subject company’s jurisdiction of incorporation and the jurisdiction that is the primary trading market for the subject securities, if different from the target’s jurisdiction of incorporation). We recently revised the rule pertaining to termination of registration to include a definition of “primary trading market” that may include trading in more than one foreign market. See Exchange Act Rule 12h-6(f)(5) [17 CFR 240.12h-6(f)(5)]. This does not change the meaning of “primary trading market” as used in the cross-border exemptions and in the instruction to the definition of foreign private issuer in Exchange Act Rule 3b-4 and Securities Act Rule 405 [17 CFR 230.405]. An acquiror’s or issuer’s obligation to look through nominees in calculating U.S. ownership continues to be limited to the jurisdiction of the single, principal foreign trading market for the target’s securities, if different from the target’s jurisdiction of incorporation.

<sup>59</sup> See Securities Act Rule 800(h)(3) and Instruction 2.iv. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d).

<sup>60</sup> See Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and 14d-1(c) and (d) (specifying that U.S. ownership must be calculated as of the 30th day before commencement of a tender offer). For the Securities Act Rule 801 and 802 exemptions, see Rule 800(h) (stating that U.S. ownership must be calculated as of the record date for a rights offering or as of the 30th day before the commencement of an exchange offer or the solicitation for a business combination other than a tender offer).

<sup>61</sup> See discussion in the Cross-Border Adopting Release, Section II.F.3.

effect of alerting the market to a contemplated offer before the acquiror wishes to make its intentions known. For that reason, the cross-border exemptions include a presumption available for non-negotiated or “hostile” transactions.<sup>62</sup> 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 company is no more than ten percent or 40 percent, the thresholds for Tier I and Rule 802, and Tier II respectively, so long as average daily trading volume in the United States does not exceed ten percent or 40 percent of the average daily trading volume worldwide over a twelve-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 (either based on the issuer’s informational filings with the Commission or foreign regulators or based on the bidder’s actual or imputed knowledge from other sources).<sup>63</sup>

## **2. Current eligibility test for negotiated transactions**

### **a. Concerns**

Although we believe the current tests for determining eligibility to rely on the cross-border exemptions generally have worked well, changes in several areas would be

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<sup>62</sup> We distinguish a “hostile” tender offer from one made pursuant to an agreement with the target company, which we refer to as a negotiated or recommended transaction.

<sup>63</sup> See, e.g., Instruction 3.i.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d) (stating that the presumption is available unless the aggregate trading volume in the U.S. exceeds certain levels, or the bidder knows or should know that actual levels of U.S ownership exceed the ceiling for the applicable exemption). The instruction, as currently written, refers to the Nasdaq market and the trading volume of securities on the over-the-counter (OTC) market as reported to the NASD, but since the adoption of Exchange Act Rules 14d-1(c) and 14d-1(d) and the corresponding instruction, the Nasdaq market has become an exchange, the NASDAQ OMX Group, Inc. Additionally, the trading volume of securities on the OTC market is now reported to the Financial Industry Regulatory Authority, Inc., or FINRA, which was created through the consolidation of the NASD and the member regulation, enforcement and arbitration functions of the NYSE. We therefore propose a technical change to the rules to reflect these changes.

appropriate to address timing and informational restrictions that have impeded the application of the current exemptions. Many of these problems relate to the threshold eligibility determination for negotiated transactions.

In particular, the requirement that U.S. ownership be calculated as of the 30th day before the commencement of a tender offer or exchange offer, or before the solicitation for other kinds of business combination transactions<sup>64</sup> presents practical difficulties for acquirors in certain jurisdictions. In some countries, the look-through analysis we require for negotiated transactions takes longer than 30 days to perform.<sup>65</sup> Numerous acquirors have advised us that in some jurisdictions, it is not possible to calculate U.S. ownership as of a set date in the past. In others, information about the location of target security holders is only published at fixed intervals.<sup>66</sup> Additionally, the exact date of commencement is not within the control of the acquiror in some jurisdictions.<sup>67</sup> In recognition of these problems, issuers have sought guidance from the staff regarding the date of calculating U.S. ownership for purposes of determining eligibility to rely on the cross-border exemptions. The staff has stated that, where the 30th day before

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<sup>64</sup> See Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and 13e-4(i), and Instruction 2.i. to Rules 14d-1(c) and 14d-1(d).

<sup>65</sup> See, e.g., Serono S.A. (September 12, 2002) (“Serono S.A.”) (stating that approximately six to eight weeks is necessary to complete a look-through analysis to obtain information about the level of U.S. beneficial ownership of a French company).

<sup>66</sup> See Section II.E. Question 8 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

<sup>67</sup> In some foreign jurisdictions, for example, a bidder is obligated to commence an offer within a certain number of days of receiving home country regulatory approval of its offer materials. As noted above, bidders cannot always obtain information about U.S. ownership as of a date in the past; rather, they can request that information only as of a current date going forward 30 days to the anticipated date of commencement. When the date of commencement is uncertain, it becomes difficult for offerors to comply with our rules.

commencement is impracticable for reasons outside of the acquiror's control the acquiror may use the date within the 30-day period before commencement that is as close as possible to the 30th day.<sup>68</sup> However, the staff continues to receive inquiries from acquirors who cannot definitively use a date within the 30 days before commencement because of logistical problems in the time needed to conduct the mandated look-through analysis, or because of the regulatory review process.<sup>69</sup> In the case of an exchange offer where the acquiror will issue securities in exchange for target securities, more than 30 days may be needed to prepare offering materials and complete the regulatory review process.

The reference date for assessing U.S. ownership under the cross-border exemptions also creates logistical problems in certain cases. The current exemptions key the determination of U.S. ownership to the date of commencement of the tender offer or the commencement of the solicitation for other types of business combinations, or to the record date for a rights offering.<sup>70</sup> If the announcement of the transaction predates the commencement by more than 30 days, an acquiror will not know with certainty when it announces a transaction whether it will be eligible to rely on the cross-border exemptions at all, or whether it will be eligible for Tier I/Rule 802 or Tier II. The staff has been

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<sup>68</sup> See Section II.E. Question 7 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

<sup>69</sup> For example, shares of listed French companies are not certificated and the majority of such shares are held in bearer form, meaning that the only ownership records for such shares are maintained by Euroclear France, the French clearing system. It generally takes more than 30 days to request and analyze the position listing known as a "TPI report." See, e.g., Alcan, Inc. (October 7, 2003)("Alcan") and Equant N.V. (April 18, 2005)("Equant N.V.") and footnote 65 above.

<sup>70</sup> See Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i), and Instruction 2 to Exchange Act Rules 14d-1(c) and (d).

advised that this is problematic in some foreign jurisdictions because by law, the announcement must provide detailed information about the transaction, including information about how U.S. target security holders will be treated.<sup>71</sup> Even where such information is not legally required at the time of announcement, issuers may wish to inform target security holders and the market at large of this information.

In addition, keying the look-through analysis to commencement creates a discrepancy for purposes of the exemption from Rule 14e-5. Rule 14e-5 generally prohibits purchases of target securities outside of a tender offer from the date of announcement of that offer through its expiration.<sup>72</sup> Tender offers conducted in reliance on the Tier I exemption are exempt from the application of Rule 14e-5.<sup>73</sup> However, because Rule 14e-5 applies from the date of announcement of the tender offer, a bidder will not necessarily know at the time of announcement whether it will qualify for the cross-border exemptions as of the 30th date before commencement.

Finally, from time to time the suggestion is made that excluding holders of greater than ten percent of the subject securities disproportionately elevates the levels of U.S. ownership in target companies. In the 1998 Cross-Border Proposing Release, we proposed to exclude from the calculation of U.S. ownership securities owned by non-U.S. target holders who individually held more than ten percent of the subject class, on the

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<sup>71</sup> The staff has been contacted by counsel for bidders in certain European countries with concerns about calculating U.S. ownership as of the date specified under current rules, where an announcement of the transaction must be made more than 30 days before commencement and under home country regulation the announcement must include detailed information about the treatment of U.S. target holders.

<sup>72</sup> Exchange Act Rule 14e-5 [17 CFR 240.14e-5]. We propose to extend this exemption to encompass Tier II-eligible tender offers.

<sup>73</sup> Exchange Act Rule 14e-5(b)(10)(i).

grounds that such large investors were affiliates and the securities they held were not part of the target's public float.<sup>74</sup> When the exemptions were adopted, they excluded securities held by both U.S. and non-U.S. persons holding greater than ten percent of the target company's securities because of commenters' concerns that excluding only large non-U.S. holders, as originally proposed, would skew the U.S. ownership percentages upward.<sup>75</sup> We continue to receive feedback from various constituencies, however, that exclusion of large holders results in reduced eligibility to rely on the cross-border exemptions. We would be interested in commenters' views on this requirement under our current rules and whether it should be modified or eliminated.

#### **Request for Comment**

- Should we continue to exclude from the calculation of U.S. ownership target securities held by the acquiror in the contemplated transaction?
- Should we eliminate the requirement to exclude subject securities held by greater than ten percent holders in calculating U.S. ownership of the target company? Would U.S. interest in a transaction more appropriately be measured by considering all of the outstanding securities, without excluding large holders? Would changing the rule in this manner result in extending the exemptions to circumstances where U.S. investors could be adversely affected?
- Should we eliminate greater than ten percent holders only where such holders are otherwise affiliated with the issuer?

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<sup>74</sup> See 1998 Cross-Border Proposing Release, Section II.H.2.

<sup>75</sup> See Cross-Border Adopting Release, Section II.F.2.

- Are there problems in determining who is a greater than ten percent holder that should be addressed in revised rules?
- If the requirement to exclude large holders is retained, is a greater than ten percent holding the appropriate level for exclusion? Should the percentage be higher, such as 15 or 20 percent?
- Is there any reason to eliminate the exclusion of greater than ten percent holders only for non-U.S. holders and not for U.S. holders, or vice-versa? What would the impact of such change be on the number of companies eligible for Tier I or Tier II?
- Should we maintain the same tests, with the revisions proposed, but raise the maximum U.S. ownership level for Tier I and Rules 801 and 802 to 15 percent? What effect would this have on the number of cross-border transactions eligible to be conducted under these exemptions? Would expanding the availability of Tier I and Rules 801 and 802 be in the interests of U.S. investors?

**b. Proposed changes to the eligibility standard for negotiated transactions**

We believe that by revising the eligibility tests for negotiated cross-border business combination transactions as proposed, we would eliminate many of the issues that have arisen. As discussed above, the first problem with the current test is the requirement that U.S. ownership be calculated as of a single, specified date.

Accordingly, we propose that acquirors be permitted to calculate U.S. ownership within a

specified 60-day range rather than using a single date.<sup>76</sup> This approach is consistent with the position taken by the staff interpretively in considering timing issues in the cross-border context.<sup>77</sup> It also would provide greater flexibility where the timing of a transaction is driven by market forces or a regulatory process that is, to some extent, outside the control of the acquiror.

While we propose to provide greater flexibility as to the date on which U.S. ownership in the target company may be assessed, we remain concerned about the possibility that a date for calculation would intentionally be chosen to present less than a representative picture of the target security holder base. The instructions to the cross-border exemptions make it clear that the exemptions are not available for any transaction or series of transactions that technically comply with our rules but are, in fact, part of a plan or scheme to evade them in practice.<sup>78</sup>

As discussed above, another logistical problem with the cross-border exemptions centers on the use of commencement as the triggering event for the calculation of U.S. ownership. We now propose to require that U.S. ownership be calculated within a 60-day period before the public announcement of the cross-border tender offer or business combination transaction.<sup>79</sup> For these purposes, public announcement generally means the

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<sup>76</sup> As discussed below, we also propose to change the reference point for calculation of U.S. ownership from commencement to announcement. We are not currently proposing a change to the requirement to calculate as of the record date for rights offerings. See Rule 800(h)(1).

<sup>77</sup> See, e.g., Section II.E. Questions 6, 7 and 8 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm>.

<sup>78</sup> See General Note 2 to Securities Act Rules 800, 801 and 802, Instruction 4 to Exchange Act Rules 13e-4(h)(8) and 13e-4(i), and Instruction 5 to Exchange Act Rules 14d-1(c) and 14d-1(d).

<sup>79</sup> 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).

same as in Instruction 5 to Rule 14d-2(b)(2).<sup>80</sup> By using announcement instead of commencement as the triggering event for purposes of the calculation, we hope to enable acquirors planning cross-border transactions to determine at an earlier point how they will treat U.S. holders.

This change also would allow the application of the exemptions to be based on the characteristics of the target security holder base before it is influenced by the announcement of the transaction.<sup>81</sup> Further, it would permit acquirors to meet home country requirements, which may mandate that the acquiror include information about the treatment of U.S. holders in the announcement of the transaction. In addition, it would encourage bidders to provide the markets and target security holders with valuable information at an earlier stage in the transaction process, including alerting investors who may acquire the target company's securities after the announcement whether they will have the full protections of Regulations 14D and 14E.

Where U.S. ownership levels do not permit the acquiror to rely on the Tier I exemption or Rule 802, calculating the level before announcement would provide more time to plan and put together the necessary offering materials. For those who plan to rely on the Tier II exemption, the proposed change would afford more time to determine and seek any necessary exemptive or no-action relief. In addition, because announcement

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<sup>80</sup> Instruction 5 to Exchange Act Rule 14d-2(b)(2) [17 CFR 240.14d-2(b)(2)] states that “‘public announcement’ is any oral or written communication by the bidder, or any person authorized to act on the bidder’s behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer.”

<sup>81</sup> See Section II.E. Question 6 in the Third Supplement to the Division of Corporation Finance Manual of Publicly Available Telephone Interpretations (July 2001), at <http://www.sec.gov/interps/telephone/phonesupplement3.htm> (discussing the rationale for why the staff has permitted announcement to be used as the reference point for calculating U.S. ownership in “pre-conditional offers” conducted under U.K. or Irish law).

also is the triggering event for application of Rule 14e-5, this change would further harmonize Tier I and Tier II relief as it relates to that provision. However, we are aware that for some business combination transactions, several weeks or months may elapse between the time of announcement and commencement of the transaction, because of home country regulatory review or other reasons. The target security holder base, including the percentage of those securities held by U.S. persons, may change significantly between announcement and commencement. We do not propose to change the relevant date for calculation of U.S. ownership for rights offerings. Issuers will continue to calculate U.S. ownership as of the record date for a rights offering.<sup>82</sup> Because issuers control the record date for rights offerings and generally have greater access to information about their own security holders, the test for calculating U.S. ownership for rights offerings has not been the subject of requests for relief. Therefore, we do not propose to change that test today.

The existing cross-border exemptions provide that where one acquiror is eligible to rely on a particular cross-border exemption based on the level of U.S. ownership in the target, a second acquiror who makes an offer for the same target company may rely on the same exemption.<sup>83</sup> We do not propose to change this result with the rule modifications we propose today. We believe it provides an important safeguard to place competing transactions on an equal footing with respect to calculation of U.S. ownership and eligibility to rely on applicable cross-border exemptions.

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<sup>82</sup> See Securities Act Rule 800(h)(1).

<sup>83</sup> See, e.g., Exchange Act Rule 14d-1(d)(1)(ii). The second bidder may choose not to rely on the same exemption as the first bidder. See also Cross-Border Adopting Release, Section II.F.1.

## **Request for Comment**

- Should we revise the date as of which U.S. ownership is calculated for purposes of determining eligibility to rely on the cross-border exemptions for business combination transactions, as proposed?
  - Should we revise the rules to provide for a range of dates as proposed, or should we continue to specify a date certain for the calculation? If we continue to specify a date certain, should we specify a date earlier than the 30th day before commencement? For example, should we specify the 30th day before announcement?
- Is a range of 60 days before announcement sufficient time to allow bidders and issuers maximum flexibility while avoiding the potential for manipulation of the calculation of U.S. ownership? Or would 75 or 90 days be more appropriate?
- Is announcement the appropriate reference point for determining eligibility to rely on the cross-border exemptions? Or should we retain commencement as the reference point? Are there other alternative reference points we should consider?
- Should we keep commencement as a reference point, but use a range, such as within 60 days before commencement?
- Is it appropriate to use announcement as the reference point, even where a significant period of time may elapse between announcement and commencement, and the makeup of the target security holder base may change in response to announcement or because of the lapse of time? Should

we establish a limit on the period of time which may elapse between the reference point for calculation of U.S. ownership and the commencement of the business combination transaction?

- Should we change the date as of which U.S. ownership is calculated for rights offerings in the same or in a similar manner? If so, please explain what issues may arise under the current test and what changes should be made.
- If we adopt the proposed rule changes allowing bidders and offerors to choose a date within a range for purposes of the calculation of U.S. ownership, should we provide guidance on what dates may not be chosen because of an event or events significantly affecting the target security holder base? For example, if an event occurs that the bidder or offeror knows significantly impacted the U.S. ownership of the target securities within the relevant sixty-day range, but the bidder or offeror did not cause or contribute to such event, should the bidder or offeror be prohibited from using that date as the reference point for the calculation of U.S. ownership?

### **3. The current test for non-negotiated or hostile tender offers**

#### **a. Concerns**

Where a third-party tender offer is not made pursuant to an agreement between the bidder and the target company, the current cross-border exemptions allow a bidder to presume eligibility to rely on the exemptions based on a test outlined in our rules, which focuses on information readily available to the bidder.<sup>84</sup> The hostile presumption was adopted in recognition of the difficulties third parties face in obtaining information about

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<sup>84</sup> See Securities Act Rule 802(c) and Instruction 3 to Exchange Act Rules 14d-1(c) and 14d-1(d).

U.S. ownership without the cooperation of the target company.<sup>85</sup> Because issuers have greater access to information about their own security holders, the hostile presumption is not available for issuer tender offers.

The eligibility standard for hostile transactions is based in part on the trading volume of the target's securities in the United States, as compared to worldwide trading volume, over a 12-month period.<sup>86</sup> However, the presumption of U.S. ownership derived under the trading volume element of the test is qualified by information about U.S. ownership reported in the target's most recent annual report filed with the Commission or its home country regulators.<sup>87</sup> In addition, the bidder cannot rely on the hostile presumption if it knows or has reason to know that the actual level of U.S. ownership of the subject securities exceeds the relevant thresholds for Tier I and Tier II.<sup>88</sup> Knowledge or "reason to know" may come from sources other than reports filed with the Commission or the target's home country regulator and disqualifies the bidder from being able to rely on the cross-border exemptions.

These elements of the hostile presumption have resulted in certain issues in practice. First, acquirors appear to be uncertain about what constitutes "reason to know" with respect to the level of U.S. ownership of the target, other than information reported

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<sup>85</sup> See Cross-Border Adopting Release, Section II.F.3.

<sup>86</sup> Securities Act Rule 802(c)(2) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and 14d-1(d). Trading volume in the hostile presumption is not calculated in the same way as the average daily trading volume used for purposes of deregistration and the threshold proposed for Rule 12g3-2(b). The trading volume in the hostile presumption is calculated using a 12-calendar-month period ending 30 days before commencement of the offer, although we propose to change this calculation to a 12-calendar-month period ending no later than 60 days before announcement of the offer, as discussed below.

<sup>87</sup> Securities Act Rule 802(c)(3) and Instruction 3.iii. to Exchange Act Rules 14d-1(c) and 14d-1(d).

<sup>88</sup> Securities Act Rule 802(c)(4) and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

in filings with the Commission or the home country regulators. Acquirors have expressed uncertainty about whether they have any obligation, and if so, the extent of their obligation to seek out information about U.S. ownership levels. Questions also arise as to the timing of that knowledge. For example, because average daily trading volume is calculated as of the 12-calendar-month period ending 30 days before commencement,<sup>89</sup> acquirors often are unsure of whether their actual or imputed knowledge of U.S. ownership similarly should be as of that date.

It also is possible that targets may use the reporting and knowledge elements of the hostile presumption defensively. For example, targets that learn of a possible hostile offer could file reports preemptively with the Commission stating a percentage of U.S. ownership that precludes the hostile bidder's reliance on certain exemptions, or they may contact the bidder's counsel directly to assert levels of U.S. ownership that disqualify the bidder from relying on Tier I and Rule 802 in particular.<sup>90</sup> In the latter case, bidders have asked whether such an assertion as to U.S. ownership must be substantiated (and if so, how) in order to preclude reliance on the hostile presumption. Even when a target has filed a periodic report with the Commission indicating a certain percentage of U.S. ownership as a defensive measure, we have seen targets reduce those ownership figures when the transaction becomes recommended. These types of situations create a level of uncertainty for unsolicited bidders that may make it difficult to apply the presumption of U.S. ownership in unsolicited offers.

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<sup>89</sup> Securities Act Rule 802(c)(2) and Instruction 3.ii. to Exchange Act Rules 14d-1(c) and 14d-1(d).

<sup>90</sup> It also is possible that a target may attempt to provide information preemptively before announcement of a hostile bid, but we believe this may happen less frequently when the determination of U.S. ownership is made as of a date before announcement, because the negotiations may begin in a friendly manner.

**b. Proposed changes to the presumption for non-negotiated transactions**

Today we propose changes to the hostile presumption for determining eligibility to rely on the cross-border exemptions. First, we propose to clarify the “reason to know” element of that test.<sup>91</sup> In the years since the adoption of the cross-border exemptions, bidders frequently have asked what constitutes “reason to know” information about U.S. ownership for purposes of the hostile presumption. We propose to amend our rules to specify that an acquiror has reason to know information that is publicly available. This would include information appearing in reports compiled by independent information service providers that generally are available to the public. However, neither our current rules nor the changes we propose today affirmatively would require an acquiror seeking to rely on the hostile presumption to engage such a third-party service at its own expense.

The proposed rule also would make it clear that acquirors are presumed to know information about beneficial ownership reflected in filings by third parties with the Commission, such as beneficial ownership reports on Schedule 13D, 13F<sup>92</sup> or 13G. Similarly, acquirors are presumed to know about similar reports filed by third parties in the target’s home country and in the country of its primary trading market, if different. Acquirors may not ignore credible information about target securities held by U.S. persons from non-public sources, such as from investment bankers or other market participants, including the target company, from whom they receive information. As discussed below, however, such information would have to be available before announcement to disqualify the acquiror from relying on the hostile presumption.

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<sup>91</sup> Securities Act Rule 802(c)(4) and Instruction 3.iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

<sup>92</sup> 17 CFR 249.325.

We also propose to specify the time periods applicable to the hostile presumption. For purposes of the element of that test relating to the average daily trading volume calculation, we propose to modify the instruction to our rules to mandate a calculation over a twelve-calendar month period ending no later than 60 days before announcement.<sup>93</sup> This time period for calculation is the same as the period we are proposing for negotiated transactions. We believe it is appropriate that the time periods for measuring levels of U.S. ownership be comparable for both hostile and negotiated transactions.

We also propose to add a timing element to the other components of the hostile presumption test. These changes to the instructions and to the rules would provide that the acquiror's knowledge or "reason to know" refers to knowledge as of the date of announcement. As proposed, our rules would allow an acquiror to ignore conflicting information received after announcement.<sup>94</sup> These changes are intended to address our concern that some target companies may be manipulating their disclosure of U.S. ownership with respect to unsolicited offers. They also would eliminate uncertainties created by changes in the target's security holder base that may be caused by the announcement of the offer.

### **Request for Comment**

- Is it helpful to specify in the rule, as proposed, examples of information that the acquiror has reason to know, or should the rule remain more general?

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<sup>93</sup> See proposed revisions to Securities Act Rule 802(c)(2) and Instruction 2.ii. to Exchange Act Rules 14d-1(c) and (d).

<sup>94</sup> See proposed Securities Act Rule 802(c)(3) and (4) and Instructions 3.iii. and iv. to Exchange Act Rules 14d-1(c) and (d).

- Would the clarifications we propose to the reason to know element of the test prevent the abuse of U.S. ownership information by targets? Are there currently sufficient safeguards to prevent misuse of this information?
- For purposes of the hostile presumption, should we change the date for comparison of the average daily trading volume of the target securities to a twelve-month period ending no later than 60 days before announcement, as proposed?
  - Should we limit the knowledge or reason to know element of the test to the same time, as proposed, so that acquirors will not be disqualified from relying on the presumption if they learn of conflicting U.S. ownership information after the date of announcement? Or should we require acquirors to take into account any information they learn at any time before commencement?
  - Would the proposed cut-off date for the actual knowledge test be disadvantageous for U.S. investors in the target company?
  - Where the target asserts levels of U.S. ownership that are inconsistent with reliance on an applicable presumption in the context of a hostile transaction, should the rules provide any guidance on the extent to which such assertions must be substantiated? Should we allow acquirors to ignore such assertions by the target, absent adequate substantiation or in the face of conflicting information known to the acquiror?

- If the rule changes are adopted as proposed, should we make corresponding changes to the date of comparison in the “actual knowledge” element of the test for the MJDS with Canada?<sup>95</sup>
- Should we decline to make any changes in the reason to know element of the hostile presumption, leaving acquirors to assess the facts and circumstances in a specific situation on a case-by-case basis?

#### **4. Possible new eligibility standards for negotiated and hostile transactions**

Instead of adopting the proposed changes to our current eligibility standards for hostile and negotiated cross-border business combinations discussed above, we could adopt a different approach based on different measures of U.S. investor interest in target securities. For example, for negotiated transactions, we could consider a test based on twelve-month ADTV in the United States as compared to worldwide trading volume over the same period. Alternatively, we could consider a test based on the percentage of shares that are held in the form of ADRs. It is possible that there are other, more suitable tests that we have yet to identify. We could adopt an alternate test for business combination transactions only, or we could adopt it for both business combinations and rights offerings.

As discussed above, the existing hostile presumption available for non-negotiated business combination transactions contains an element based on a comparison of U.S. and worldwide ADTV,<sup>96</sup> and we have recently used this test as a reference in other

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<sup>95</sup> See Exchange Act Rule 14d-1(b).

<sup>96</sup> See Securities Act Rule 802(c) and Instructions 3.i.-iv. to Exchange Act Rules 14d-1(c) and 14d-1(d).

areas.<sup>97</sup> Based on an analysis performed by the staff comparing U.S. beneficial ownership figures yielded by the look-through analysis mandated by our current rules to the figures that would result by using an ADTV-based measure, it appears that trading volume may not reflect beneficial holdings of U.S. investors in a target company. To perform this analysis, the staff considered negotiated business combination transactions conducted under the existing cross-border exemptions using the current look-through analysis and compared the resulting percentages of U.S. beneficial ownership with the figures that would have resulted using the ratio of U.S. to worldwide ADTV. Based upon the transactions considered, the analysis suggests that the correlation between the ADTV-based measure and the percentage of target securities beneficially held by U.S. persons is low.

Using such a test may result in target companies with significant U.S. ownership qualifying for the Tier I and Rules 801 and 802 exemptions. Where a bidder, including a U.S. company, is eligible to rely on the Tier I cross-border exemptions, it may issue securities without registration under Securities Act Rule 802. We are concerned that use of an ADTV test for eligibility to rely on the cross-border exemptions would allow bidders, including U.S. bidders, to issue significant amounts of bidder securities to U.S. holders, without the protections of registration. For cash tender offers and other kinds of business combination transactions, we do not believe the requirements of the U.S. tender offer and other rules applicable to business combinations are onerous. Unlike continuing Exchange Act registration and reporting requirements, these rules apply to a single,

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<sup>97</sup> See footnotes 45 and 46 above.

discrete transaction and, in many instances, are specifically tailored to address potential conflicts with foreign law and practice.

We are concerned that extraordinary events in the life of a corporation, such as tender or exchange offers or other kinds of business combination transactions, may pose unique opportunities and risks to security holders that are not present in the context of deregistration, where we have adopted an ADTV test for measuring U.S. interest in a transaction, or exemption from Exchange Act Section 12(g) registration under Rule 12g3-2(b), where we have proposed an ADTV test. In a tender or exchange offer, where the bidder may present its offer directly to target security holders even where the target company itself does not support the offer, the disclosure and procedural protections of our rules provide critical safeguards for U.S. investors. Unlike capital-raising transactions, the interests of all target security holders, including U.S. holders, are affected by business combinations, whether or not they are permitted to participate in them. As noted above, the requirement to comply with U.S. rules for a business combination transaction is generally less burdensome than the continuous reporting requirements under the Exchange Act. For these reasons, we have historically viewed a test based on U.S. beneficial ownership of target securities as the approach that best aligns U.S. investor interests with application of our rules. Therefore, we are not proposing the use of an ADTV test to determine eligibility to rely on the cross-border exemptions.

Similarly, we are not currently proposing a test based solely on a measure of the percentage of target securities held in ADR form. When the current cross-border exemptions were proposed, we considered an eligibility standard that presumed that

target securities held in ADR form were beneficially held by U.S. persons.<sup>98</sup>

Commenters were critical of any presumption that securities held in ADR form were held only by U.S. persons.<sup>99</sup> An ADR-based test need not rest on a presumption that securities held in ADR form are held by U.S. persons; rather, ADRs could, in general, be considered a proxy for U.S. beneficial ownership, or for a component (e.g., direct retail) of U.S. beneficial ownership. Since some foreign target securities are traded in direct share form in the United States, any test based on securities held in ADR form would be inapplicable to those companies.

We believe that information about the percentage of target shares held in ADR form is not currently readily accessible to third-party bidders in non-negotiated offers. The information might become available through the introduction of registrant disclosure requirements, however. In the case of such disclosure, an ADR-based test could provide a solution for both hostile and negotiated transactions. A weakness of the ADR-based measure is that, as discussed above, because some foreign target securities are traded in direct share form in the United States, any test based on securities held in ADR form would be inapplicable to those companies. We also would need to consider the relevant time period for which we would look at the percentage of target securities held in ADR form if such a test were to be considered, and whether ADRs held by the acquiror and large holders would continue to be excluded from the calculation of U.S. ownership under such a test. If we did not exclude ADRs held by the bidder, the bidder could potentially influence the percentage of such securities held by U.S. persons by changing

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<sup>98</sup> See 1998 Cross-Border Proposing Release, Section II.H.1.

<sup>99</sup> See Cross-Border Adopting Release, Section II.F.1.

the form of its securities held from ADRs into the underlying securities. We are interested in obtaining comments as to whether an ADTV test or a test based on target securities held in ADR form would be appropriate.

### **Request for Comment**

- Is our continued focus on the percentage of target securities beneficially held by U.S. persons as the relevant test for measuring U.S. interest appropriate and in the best interests of U.S. investors?
  - If we change the rules as proposed, would this alleviate sufficiently the practical difficulties with the calculation of U.S. ownership, so that our rules will be more workable and will better encourage and facilitate the inclusion of U.S. security holders in cross-border transactions? Or would there still be a reason to move from the current focus on the percentage of securities held by U.S. investors to another standard?
  - Are there other practical difficulties involving the beneficial ownership standard that we have not addressed and that it would be helpful to address?
- Should we propose a different test for Tier I and Tier II eligibility, based on U.S. ADTV compared to worldwide ADTV over a twelve-month period?
  - Using U.S. ADTV compared to worldwide ADTV would likely result in many more transactions being eligible for Tier I, and some additional transactions being eligible for Tier II if we maintain the existing ten percent and 40 percent thresholds. Should the thresholds be adjusted so that the transactions eligible for the cross-border

exemptions are equivalent, in terms of number of transactions eligible, before and after changing the eligibility test? If ADTV levels in the United States are very low even where beneficial ownership is high, should we adjust the thresholds to account for this situation? For example, should we lower the Tier I threshold to five percent? One percent? Less than one percent? If we do this, should we also adjust the thresholds in the hostile presumption correspondingly? What would be the appropriate adjustments for Tier II?

- Are there reasons for or against adopting an ADTV test? For example, would an ADTV test be an adequate measure for gauging U.S. retail versus institutional ownership of the target securities?
- Should we qualify the ADTV test based on other factors, such as an acquiror's actual knowledge or U.S. ownership as reported by the target?
- If we adopt an ADTV test, should we adopt the concept of "primary trading market" as defined in Exchange Act Rule 12h-6(f)(5)?<sup>100</sup> That is, should we establish the requirement that the issuer maintain a listing for the subject securities on one or no more than two exchanges in a foreign jurisdiction that, alone or together, constitute 55 percent of the trading in the subject securities over a specified period as a comparison point for U.S. trading volume? Should we adopt the concept that the "primary trading market" for the subject securities

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<sup>100</sup> See footnote 58 above.

may encompass one or no more than two foreign markets, and if more than one market, the requirement that the aggregate trading volume in one of those two foreign markets must be greater than the trading volume in the U.S., as specified in Rule 12h-6(f)(5)?

- Should we propose a different test for Tier I and Tier II eligibility, based on the percentage of shares held in ADR form?
  - Is the percentage of shares held in ADR form an effective proxy for U.S. investor ownership? For U.S. institutional ownership? For U.S. direct retail investor ownership?
  - Are there reasons why U.S. persons may choose to hold target securities in direct share form instead of holding ADRs?
  - Under a test based on the percentage of shares held in ADR form, should Tier I and Tier II eligibility thresholds remain constant at their current values (10 percent and 40 percent), or should they change? What criteria should we use, and what evidence should we consult in establishing eligibility thresholds for Tier I and Tier II?
  - If we adopt such a test, as of what date should we measure the securities held in ADR form? Should we exclude from the calculation ADRs held by certain persons, such as the bidder, as we do under our current test for some kinds of business combination transactions?
  - How should we handle securities of foreign private issuers that trade in direct share form?
  - If we adopt a test based on the percentage of shares held in ADR form,

should we amend Form 20-F to require reporting of sponsored ADRs outstanding, so that targets, acquirors and their investors understand eligibility status? How costly or difficult would it be for the issuer to obtain information about the number of sponsored ADRs outstanding? If this information were reported only once each year in the Form 20-F, would the information be current enough for use in cross-border transactions that might occur months later?

- Are there reasons for or against adopting a test based on the percentage of shares held in ADR form?
- ADTV- and ADR-based standards may effectively place companies with no U.S.-traded securities in Tier I. What implications would this have for investor protection?
  - If we move toward a different standard for determining U.S. interest, should this new standard apply only to companies with securities traded in the U.S., with the beneficial ownership standard continuing to apply to companies with no securities traded in the U.S.?  
Alternatively, for securities not traded in U.S. markets, do U.S. investors adequately understand the distinct risks of ownership?
- If we make any changes to the standard for determining Tier I and Tier II eligibility, should we also change the standard for the hostile presumption? Should we adopt this alternative standard for business combination

transactions only, or should we adopt it for both business combinations and rights offerings?

- If we change the standard, should we also change the standard for the tender offer rules in Rule 14d-1(b) under the MJDS with Canada?
- Should we propose a different eligibility test(s) for determining eligibility to rely on the cross-border exemptions? What general criteria are important in selecting a measure for U.S. investor interest, for the purposes of this rule? Several potential criteria are (i) the ease of public access to information related to the measure; (ii) the difficulty of manipulation of the measure; and (iii) the alignment of the measure with the percentage of target securities beneficially held by U.S. investors. Are these criteria appropriate? Are there others we should consider?

## **B. Proposed changes to Tier I exemptions**

### **1. Expanded exemption from Rule 13e-3**

Rule 13e-3 establishes specific filing and disclosure requirements for certain kinds of affiliated transactions, because of the conflicts of interest inherent in such situations.<sup>101</sup> Rule 13e-3 applies to these kinds of transactions by issuers or their

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<sup>101</sup> The kinds of transactions covered by Exchange Act Rule 13e-3 include tender offers, purchases of securities, mergers, reorganizations, reclassifications and sales of substantially all the assets of a company. See Rule 13e-3(a)(3)(i)(A) - (C). Rule 13e-3 requires that a Schedule 13E-3 be filed for these kinds of transactions. See Exchange Act Rule 13e-3(d)(1).

affiliates, where the transactions would have a “going private” effect.<sup>102</sup>

Cross-border transactions conducted by the issuer or its affiliates under Exchange Act Rules 13e-4(h)(8), 14d-1(c) and Securities Act Rule 802 are exempt from the requirements of Rule 13e-3.<sup>103</sup> The scope of the current Tier I exemption from Rule 13e-3 does not apply to some transaction structures commonly used abroad. These include schemes of arrangement,<sup>104</sup> cash mergers, compulsory acquisitions for cash,<sup>105</sup> and other types of transactions. We do not believe there is a reason for excluding these kinds of transactions from the exemption from Rule 13e-3, assuming they would otherwise qualify for Tier I. We believe the form of the transaction structure should not prevent an otherwise-eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3. We therefore propose to expand the scope of the Tier I exemption from Rule 13e-3 to remove any restriction on the category of transactions covered.

The heightened disclosure requirements of Rule 13e-3 may represent a significant disincentive for acquirors to include U.S. security holders in cross-border

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<sup>102</sup> Exchange Act Rule 13e-3(a)(3)(ii) lists the effects that will cause the rule to apply to a specified transaction: (A) causing any class of equity securities of an issuer which is subject to section 12(g) or section 15(d) of the Act to be held of record by less than 300 persons; or (B) causing any class of equity securities of the issuer which is listed on an exchange or quoted on an interdealer quotation system to no longer be so listed or quoted. For foreign private issuers engaged in transactions that would have a going private effect under our rules, we interpret Rule 13e-3 to apply where the transaction results in fewer than 300 security holders of record in the United States. See Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008).

<sup>103</sup> Exchange Act Rule 13e-3(g)(6).

<sup>104</sup> We use this term to refer to a court-approved business combination transaction. See, e.g., U.K. Companies Act, Parts 26 and 27.

<sup>105</sup> By “compulsory acquisition,” we mean a transaction where an acquiror purchases the specified minimum percentage of target securities set by applicable law or the governing instruments of the target company, thereby allowing it to acquire any remaining target securities it does not own without the consent of the holders. A compulsory acquisition may occur after a tender offer for all target securities. A compulsory acquisition of target securities remaining after a tender offer will sometimes be exempt from the application of Exchange Act Rule 13e-3 under existing rules. See Exchange Act Rule 13e-3(g)(1).

transactions that do not currently fit within the Rule 13e-3(g)(6) exemption, particularly where U.S. holders make up no more than ten percent of the target shareholder base. In several instances, the staff has granted individual 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.<sup>106</sup> The revised rule we propose today is consistent with the staff's approach in these no-action letters.

We believe exempting acquirors from the application of Rule 13e-3 in Tier I-eligible transactions is consistent with our goal of facilitating the inclusion of U.S. investors in primarily foreign transactions. Therefore, we propose to eliminate the restriction on the kinds of cross-border transactions that qualify for the Tier I exemption from Rule 13e-3. The proposed rule would include within the exemption any kind of transaction that would otherwise meet the conditions for Tier I or Rule 802 eligibility.<sup>107</sup> By omitting reference to specific kinds of transaction structures, we hope the revised exemption will focus on substance rather than form.

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<sup>106</sup> See, e.g., SUNDAY Communications Ltd. (November 1, 2006)(involving a scheme of arrangement); SUNDAY Communications Ltd. (November 7, 2005)(involving a privatization scheme); and Equant N.V. (involving a synthetic merger).

<sup>107</sup> In order to qualify for the Tier I exemption, an offer must meet the following requirements of Exchange Act Rules 13e-4(h)(8) and 14d-1(c): (i) the acquiree must be a foreign private issuer as defined in Rule 3b-4 of the Exchange Act; (ii) U.S. holders of the acquiree must hold ten percent or less of the securities subject to the offer; (iii) the acquiror must submit an English language translation of the offering materials to the SEC under cover of Form CB and, in the case of an acquiror who is a foreign private issuer, submit to service of process on Form F-X; (iv) U.S. holders must be treated on terms at least as favorable as those offered to any other security holders of the acquiree; and (v) U.S. holders of the acquiree must be provided the offering circular or other offering materials, in English, on a comparable basis as non-U.S. acquiree security holders. See also Securities Act Rule 802(a).

## **Request for Comment**

- Should the proposed expansion of the Tier I exemption from Rule 13e-3 specify the particular types of affiliated transaction structures that will be exempt from Rule 13e-3, as the current rule does?
- If so, what kinds of transactions should be covered?
- Is it preferable to phrase the exemption more generally, as proposed, to avoid limiting the focus on the transaction structure? Are there any kinds of affiliated transactions that should not be included in the exemption?

### **2. Technical changes to Rule 802**

We are proposing a technical change to Rule 802 to clarify the application of Rules 802(a)(2) and (3). When read in context, it is clear that the term “issuer” in those rules is intended to refer to the “offeror” in an exchange offer. We believe it is appropriate to revise those rules to use the term “offeror” instead. This is consistent with the reference to “offeror” in Rule 802(c)(4). These revisions are not intended to change the scope or operation of the existing rule.

In some foreign jurisdictions, local rule or practice dictates that the offeror and the target company jointly prepare a single offer document that is disseminated to target holders. In other jurisdictions, the offeror may prepare the offer materials but they are disseminated by the target company. Our rule change is not intended to change the obligation of the offeror to submit the Form CB with attached offer materials, even where the offer document is technically distributed by another party to the transaction on its behalf.

### **C. Proposed changes to Tier II exemptions**

As discussed above, the Tier II cross-border exemptions currently provide targeted relief from specific U.S. tender offer rules, where U.S. persons hold more than ten percent but no more than 40 percent of the relevant class of target securities.<sup>108</sup> The Tier II exemptions address certain common procedural and practical problems associated with conducting offers in accordance with two or more different regulatory regimes. This relief is limited in scope, in recognition of the substantial U.S. interest in such transactions.

Unlike the Tier I exemptions and the Rule 801 and 802 exemptions, the Tier II exemptions do not exempt third-party bidders or issuers from applicable U.S. filing, disclosure, dissemination and procedural requirements for tender offers or going-private transactions subject to Rule 13e-3. In addition, no exemption is provided from the filing and disclosure requirements of Schedules TO and 13E-3. Accordingly, no Form CB is required for Tier II cross-border tender offers. Unlike Securities Act Rules 801 and 802, the Tier II exemptions do not provide relief from the registration requirements of Section 5 of the Securities Act.

Since the adoption of the cross-border exemptions, we have become aware of specific areas in which the Tier II exemptions do not function as smoothly as intended. We also have identified other instances of conflict between U.S. and foreign regulation or practice which we believe warrant expanded relief. The no-action and exemptive letters issued for Tier II cross-border transactions since the adoption of the exemptions reveal a number of common areas in which further regulatory relief may be appropriate. By

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<sup>108</sup> Exchange Act Rules 13e-4(i) and 14d-1(d).

broadening the relief provided for Tier II-eligible transactions as we propose today, we hope to obviate the need for many of these individual requests for relief in the future. This expanded relief is specifically targeted and narrowly tailored, and as a result, we believe it maintains an appropriate balance between investor protection and the promotion of cross-border transactions, particularly in transactions involving target companies with significant levels of U.S. ownership.

### **Request for Comment**

- In addition to the proposed revisions described below, are there other areas in which Tier II should be expanded to better address the needs of bidders and U.S. target security holders in cross-border tender offers?
- Are there areas in which the existing Tier II exemptions or the revisions we propose should be limited or modified?

#### **1. Extend Tier II relief where target securities are not subject to Rule 13e-4 or Regulation 14D**

The Tier II exemptions apply to transactions governed by Regulation 14D and Rule 13e-4 under the Exchange Act.<sup>109</sup> As currently written, it is unclear whether the Tier II exemptions are available when a tender offer is not subject to those rules, i.e.,

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<sup>109</sup> Rule 13e-4 and Regulation 14D apply only to tender offers for equity securities. Regulation 14D applies only where the equity security that is the subject of the tender offer is registered under Section 12 of the Exchange Act, and where the bidder makes a partial offer for less than all of the outstanding securities of the subject class, where the bidder could own more than 5 percent of those securities when purchases in the tender offer are aggregated with its existing ownership of those securities. Rule 13e-4 applies to an issuer tender offer where the subject securities are not themselves registered under Section 12, but where the issuer has another class of securities that are so registered.

when the tender offer is governed by Regulation 14E<sup>110</sup> only. We believe the Tier II exemptions should be available if the conditions specified in our rules are satisfied, and therefore we propose to amend the rules accordingly to clarify that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D.

Since the adoption of the Tier II cross-border exemptions, the staff has periodically received inquiries from offerors in tender offers that would have qualified for the Tier II cross-border exemptions, but for the fact that the tender offer was not subject to Rule 13e-4 or Regulation 14D. The staff has taken the position that bidders otherwise meeting the conditions for reliance on the Tier II cross-border exemptions may rely on that relief in making tender offers for a subject class of securities not subject to Rule 13e-4 or Regulation 14D, to the extent applicable. Today we propose to codify this position by changing the language of the Tier II exemptions to specifically expand the scope of the exemptions to these kinds of offers.<sup>111</sup>

Some of the relief afforded under the Tier II exemptions will not be necessary in the case of offers not subject to Rule 13e-4 or Regulation 14D. For example, because our “all-holders” requirement<sup>112</sup> does not apply to such offers, the Tier II provision

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<sup>110</sup> Exchange Act Rule 14d-1(a) defines the scope of Regulation 14E and currently includes within the scope of that regulation only Exchange Act Rules 14e-1 and 14e-2. Exchange Act Rule 14d-1(a) was not amended to reflect the increased scope of Regulation 14E, beginning with the adoption of Exchange Act Rule 14e-3 in 1980. See Tender Offers, Release No. 34-17120 (September 4, 1980) [45 FR 60410]. Today we propose a change to the definition of Regulation 14E in Rule 14d-1(a), to encompass Exchange Act Rules 14e-1 through 14e-8.

<sup>111</sup> See proposed Exchange Act Rules 13e-4(i) and 14d-1(d).

<sup>112</sup> See Exchange Act Rules 13e-4(f)(8) and 14d-10(a) [17 CFR 240.14d-10(a)].

permitting the use of the dual offer structure<sup>113</sup> may be unnecessary. However, where the relief provided in Tier II is needed, we see no reason to restrict its application only to tender offers subject to Rule 13e-4 or Regulation 14D.

### **Request for Comment**

- Is the proposed expansion of the application of the Tier II exemptions to tender offers not subject to Rule 13e-4 or Regulation 14D appropriate?
- Should we condition the proposed extension of the relief provided under Tier II on any other factors besides general eligibility to rely on the Tier II exemptions?
- Are there other areas in which we should provide targeted relief (other than those currently proposed for Tier II offers) for tender offers not subject to Rule 13e-4 or Regulation 14D?

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

### **a. Offeror may make more than one non-U.S. offer**

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.<sup>114</sup> The Tier II cross-border exemptions currently contain a provision permitting 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.<sup>115</sup> This exemption for dual offers provides bidders with maximum flexibility to comply with

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<sup>113</sup> Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>114</sup> Exchange Act Rules 13e-4(f)(8) and 14d-10(a)(1).

<sup>115</sup> Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

two sets of regulatory regimes and to accommodate frequent conflicts in tender offer practice between U.S. and foreign jurisdictions. By permitting the use of two separate but concurrent offers – one made in compliance with U.S. rules and the other conducted in accordance with foreign law or practice – the dual offer provision facilitates cross-border tender offers.

In practice, however, issues have arisen because of the language of the dual offer provision contained in the Tier II exemptions. First, the text of the exemption specifically permits only two offers for the target class of securities.<sup>116</sup> Bidders may be required to (or may wish to) make more than one offer outside of the United States. This may be the case, for example, where the primary trading market for the target’s securities differs from the target’s country of incorporation.<sup>117</sup>

We see no reason to limit a bidder to only two offers for target securities. Where a bidder is subject to more than one foreign regulatory scheme, greater potential for regulatory conflicts may exist. We note that companies have, upon request, received relief permitting multiple foreign offers.<sup>118</sup> We propose to eliminate the restriction on the number of non-U.S. offers a bidder may make in a cross-border tender offer by changing the references to “dual offers” to refer instead to “multiple offers.”<sup>119</sup>

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<sup>116</sup> Id.

<sup>117</sup> See, e.g., Mittal Steel Company N.V. (June 22, 2006)(“Mittal”). This letter states that it may be relied upon by any similarly-situated offeror or affiliate meeting the conditions outlined in the letter.

<sup>118</sup> See, e.g., Alcan; Asia Satellite Telecommunications Holdings Limited (May 25, 2007); BCP Crystal Acquisition GmbH & Co (February 3, 2004)(“BCP”) and Mittal (providing relief for purchases outside of a U.S. offer for a tender offer that included more than one offer conducted outside of the United States).

<sup>119</sup> See proposed Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

**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 the U.S. offer can be open only to security holders resident in the United States.<sup>120</sup> This limitation creates a problem because bidders frequently seek to include all holders of ADRs, not only U.S. holders, in the U.S. offer. In many instances, the target's home country regulations do not apply, by their terms, to ADRs.<sup>121</sup> Similarly, the existing Tier II dual offer provision mandates that the foreign offer be available only to non-U.S. holders.<sup>122</sup> The prohibition against permitting U.S. holders from participating in the foreign offer may conflict with the law of the target's home country if those rules do not permit the exclusion of any security holders, including those in the United States.<sup>123</sup>

Companies frequently are forced to seek individual relief from the staff to address these issues.<sup>124</sup> The staff often has granted relief to permit a U.S. offer in a dual offer structure to include all holders of ADRs, including foreign holders.<sup>125</sup> We propose to change our rules so that acquirors will no longer need to seek individual relief to structure

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<sup>120</sup> Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>121</sup> See, e.g., Portugal Telecom, SGPS, S.A. (December 19, 2006) ("Portugal Telecom") (noting that the provisions of the Portuguese Securities Code and the rules and regulations of the Portuguese Comissão de Mercado de Valores Mobiliários did not apply to the offer for ADSs of the target company listed on the New York Stock Exchange).

<sup>122</sup> Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii).

<sup>123</sup> See, e.g., Gas Natural SDG, S.A. (March 6, 2006) (involving Spanish law).

<sup>124</sup> See Harmony Gold Mining Company Limited (November 19, 2004) ("Harmony Gold 2004"); Discount Investment Corporation Ltd. (June 14, 2004); Alcan; Serono S.A.; and Southern Cross (March 5, 2002).

<sup>125</sup> See e.g., Royal Bank of Scotland Group plc (July 23, 2007) ("Royal Bank"); E.ON Aktiengesellschaft (December 6, 2006) ("E.ON"); Koninklijke Ahold N.V. (September 10, 2002).

their offers in this manner. We are not aware of a transaction for which acquirors have sought to extend the U.S. offer to foreign target holders who do not hold in ADR form. Therefore, we are not proposing to allow these holders to participate in U.S. offers.

We also propose to change our rules to allow U.S. holders to participate in non-U.S. offers where required under foreign law and where U.S. holders are provided with adequate disclosure about the implications of participating in the foreign offer. When relief has been granted to permit the inclusion of U.S. persons in a non-U.S. offer, it has been conditioned on appropriate disclosure in the offer materials concerning the risks for U.S. holders of participating in the foreign offer.<sup>126</sup> Relief also has been conditioned on the existence of an express legal requirement in the foreign target company's home jurisdiction to include U.S. target holders.<sup>127</sup>

Today we propose to change our rules to address these issues by revising the equal treatment provisions in Exchange Act Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) to allow a U.S. offer to be made to U.S. target holders and all holders of American Depositary Receipts representing interests in the subject securities. The U.S. offer must be made on terms at least as favorable as those offered any other holder of the subject securities. We note that the proposed changes are not intended to enable an offer to be made only to holders of ADRs or only to holders of the underlying securities, where the target shares are registered under Section 12 or where Rule 13e-4 otherwise applies. We

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<sup>126</sup> See, e.g., Endesa, S.A. (July 3, 2007)(“Endesa”).

<sup>127</sup> Id.

view ADRs and the underlying securities as a single class for purposes of our tender offer and beneficial ownership reporting rules.<sup>128</sup>

In addition, revised Rules 13e-4(i)(2)(ii) and 14d-1(d)(2)(ii) would provide that one or more foreign offers may be conducted in conjunction with a U.S offer for the same subject securities. U.S. persons may be included in the foreign offer(s) only where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. persons from the foreign offer(s) and where the offer materials distributed to U.S. persons fully and adequately disclose the risks of participating in the foreign offer(s).

**c. Proration and the use of the dual or multiple offer structure**

When a bidder makes a partial tender offer<sup>129</sup> subject to Section 13(e) or 14(d) of the Exchange Act, our rules require tendered securities to be purchased on a pro rata basis if the offer is oversubscribed.<sup>130</sup> This is to assure equal treatment of security holders who have tendered their securities.

We are not proposing a change to this requirement. We are clarifying 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

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<sup>128</sup> See American Depositary Receipts, Release No. 33-6894 (May 23, 1991) [56 FR 24420], Section II.D.2 (explaining that, for purposes of determining beneficial ownership reporting requirements under Section 13 of the Exchange Act, ADRs and the underlying securities are to be considered a single class). The staff takes the same view that they are one class for purposes of the tender offer rules.

<sup>129</sup> A “partial tender offer” is a tender offer where the bidder is offering to purchase less than all of the outstanding securities of that the subject class.

<sup>130</sup> See Section 14(d)(6) of the Exchange Act [15 U.S.C. 78n(d)(6)], and Rules 13e-4(f)(3) and 14d-8 [17 CFR 240.14d-8].

“pool,” in accordance with the existing requirements of our rules.<sup>131</sup> This is not a change in how the staff has interpreted existing proration rules; however, it has come to our attention that in the past, certain bidders may have separately pro rated tenders made into the U.S. and foreign offers.<sup>132</sup> In this release, we clarify that where a bidder makes a partial tender offer for less than all outstanding target securities of a given class, and relies on the provision in Tier II allowing the use of a dual or multiple (as proposed) offer structure, the securities tendered into the U.S. and non-U.S. offers must be pro rated on an aggregate basis in order to comply with proration rules. Otherwise, if different proration factors were used, U.S. security holders could be disadvantaged as compared to target holders tendering into a foreign offer.

#### **Request for Comment**

- Should we permit the use of multiple offers outside of the United States for Tier-II eligible tender offers?
- Should we allow all non-U.S. holders to be included in a U.S. offer, or only non-U.S. holders of ADRs, as proposed?
- Should we allow U.S. holders to be included in the foreign offer(s) open to target security holders outside of the United States?
  - Should we permit this, as proposed, only when applicable foreign law does not allow exclusion of U.S. holders from the foreign offer, even where a concurrent U.S. offer is available to them?
  - Is the requirement that the implications of participating in the foreign

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<sup>131</sup> Id.

<sup>132</sup> See AES Corporation (October 22, 2001)(advising against this practice in the context of a partial cross-border tender offer).

offer(s) be disclosed in the U.S. offering materials adequate to protect U.S. investors?

- Should we impose additional conditions on the ability of offerors to include U.S. target holders in the foreign offer(s)?
- Are there situations where bidders in cross-border tender offers should be permitted to separately pro rate securities tendered into U.S. and foreign offers?

### **3. Termination of withdrawal rights while tendered securities are counted**

We are proposing rule revisions to eliminate issues relating to the “back-end” withdrawal rights required under Section 14(d)(5) of the Exchange Act and Rule 13e-4(f)(2)(ii) for tender offers conducted under the Tier II cross-border exemptions. Under today’s proposed changes, new provisions would be added to the Tier II exemptions permitting the suspension of back-end withdrawal rights during the time after the initial offering period, when tendered securities are being counted and before they are accepted for payment.<sup>133</sup> Both of the back-end withdrawal rights provisions require bidders to provide withdrawal rights after a set date, measured from

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<sup>133</sup> See proposed Exchange Act Rules 13e-4(i)(2)(v) and 14d-1(d)(2)(viii).

the commencement of a tender offer.<sup>134</sup> Thus, even where a tender offer has technically closed and tenders are no longer being accepted, back-end withdrawal rights may exist until the offeror accepts tendered shares for payment.<sup>135</sup>

Section 14(d)(5) of the Exchange Act grants us the authority to modify the back-end withdrawal rights afforded under that provision.<sup>136</sup> We exercised this authority in adopting Rule 14d-11, which permits the use of a “subsequent offering period” during which securities may be tendered but not withdrawn.<sup>137</sup> Practical considerations influenced our willingness to modify the withdrawal rights provisions of Section 14(d)(5) for subsequent offering periods. Permitting withdrawal rights during a subsequent offering period, when tendered shares are required to be purchased on a “rolling” or as tendered basis,<sup>138</sup> would interfere with the payment process.

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<sup>134</sup> Section 14(d)(5) of the Exchange Act [15 U.S.C 78n(d)(5)] states that “[s]ecurities deposited pursuant to a tender offer ... may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer ... are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer ..., except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.” Exchange Act Rule 13e-4(f)(2)(ii) includes a similar mandate for issuer tender offers: “The issuer or affiliate making the issuer tender offer shall permit securities tendered pursuant to the issuer tender offer to be withdrawn... if not yet accepted for payment, after the expiration of forty business days from the commencement of the issuer tender offer.” Where the tender offer is subject to Rule 13e-4 and Regulation 14D, bidders also must provide withdrawal rights during the “initial offering period.” We do not propose to modify this requirement.

<sup>135</sup> Whether back-end withdrawal rights arise also will depend on the length of the tender offer period; if the initial offering period and the payment process are completed before such rights arise, back-end withdrawal rights will not be triggered.

<sup>136</sup> See footnote 134 above.

<sup>137</sup> Exchange Act Rule 14d-7(a)(2) [17 CFR 240.14d-7(a)(2)].

<sup>138</sup> Exchange Act Rule 14d-11(c) [17 CFR 240.14d-11(c)].

The Tier II cross-border exemptions provide that a bidder need not extend withdrawal rights from the close of the initial offering period and before the commencement of the subsequent offering period, where the bidder announces the results of the initial offering period and pays for tendered securities in accordance with home country law or practice, so long as the subsequent offering period begins immediately thereafter.<sup>139</sup> Due to similar practical considerations, we propose to extend this suspension of the back-end withdrawal rights provisions for all tender offers conducted under Tier II during the counting of tendered securities. This would allow withdrawal rights to be terminated at the end of an offer and during the counting process for bidders that do not provide a subsequent offering period.<sup>140</sup>

Differences in the tender, acceptance and payment procedures between U.S. and foreign offers necessitate this relief. In a U.S. offer, tendering security holders generally tender their shares to a single exchange agent employed by the bidder.<sup>141</sup> Thus, bidders generally are in a position to know at any point in the offering period the number of securities tendered. Because bidders know how many target securities have been tendered into the offer at the expiration, acceptance of tendered securities in a U.S. offer

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<sup>139</sup> Exchange Act Rule 14d-1(d)(2)(v).

<sup>140</sup> For example, the subsequent offering period structure is available for third-party offerors subject to Regulation 14D, but not for issuer tender offers subject to Exchange Act Rule 13e-4. Applicable foreign law may also impact a third-party offeror's ability to provide a subsequent offering period.

<sup>141</sup> Tenders may be made through nominees, such as broker-dealers, who hold the target securities in "street name," or directly by the ultimate beneficial holder of the target securities.

can occur almost immediately after the expiration of an offer.<sup>142</sup> Therefore, bidders in domestic offers are able to terminate the back-end withdrawal rights almost immediately after expiration by accepting securities tendered (assuming all offer conditions have been satisfied or waived). Bidders can begin the payment process promptly after expiration of the offer, consistent with their obligations under U.S. law to pay promptly.<sup>143</sup>

The mechanics of the tender process in non-U.S. tender offers are generally very different. Tenders often are made through many different financial institutions instead of through a single tender agent, as in the United States.<sup>144</sup> The process of centralizing and counting tendered securities therefore may take an extended period of time.<sup>145</sup> In some countries, entities other than the bidder or its agents undertake the counting process and the announcement of the result of the tender offer.<sup>146</sup>

Because of these differences in procedure, the bidder in a cross-border tender offer may not know whether the minimum tender condition has been satisfied immediately after the end of the initial offering period. The bidder cannot accept

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<sup>142</sup> See Exchange Act Rule 14e-1 [17 CFR 240.14e-1] (stating that a bidder must promptly pay for or return tendered securities after the expiration or withdrawal of a tender offer). According to Rule 14e-1(d), in a U.S. offer, the bidder has only until 9:00 a.m. Eastern time on the next business day after the expiration of the tender offer to announce the extension of the offer.

<sup>143</sup> “Prompt payment” in U.S. offers is generally understood to mean payment within three days of expiration. See Guidance on Mini-Tender Offers and Limited Partnership Tender Offers, Release No. 34-43069 (July 24, 2000) [65 FR 46581].

<sup>144</sup> See, e.g., Technip, S.A. (August 30, 2001)(describing the tender process through banks, and other financial institutions and intermediaries) and Vodafone AirTouch Plc (December 22, 1999)(noting that under German law, tenders of target securities could be made through any branch of over 300 depositary banks through which such securities were held).

<sup>145</sup> See, e.g., Business Object S.A. (December 5, 2007).

<sup>146</sup> Id. (The letter states that once the French Offer has expired, securities tendered in the French Offer are “centralized” at Euronext, which then counts the total number of securities tendered. The Autorite des Marches Financiers (the French regulator) then announces the results of the offer).

tendered securities until all offer conditions, including the minimum tender condition, have been satisfied or waived and the counting process is completed.<sup>147</sup> We already have recognized that the mechanics of the tendering and counting regimes in other countries justifies different treatment under our rules,<sup>148</sup> and for the same reasons, we believe it is appropriate to provide an exemption in this area.

Bidders previously have sought relief from the back-end withdrawal rights provisions for Tier II cross-border tender offers, during the period in which tendered securities are being counted and until the announcement of the results of the offer, where no subsequent offering period is provided.<sup>149</sup> The relief requested generally is premised on the following factors:

- The initial offering period of at least 20 business days has expired, and withdrawal rights were provided during that period;

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<sup>147</sup> While a bidder technically could accept tendered securities immediately after the expiration of a cross-border tender offer by waiving the minimum tender condition, we believe this would be a significant hardship for bidders and would negatively impact bidders' ability to conduct cross-border tender offers.

<sup>148</sup> See Exchange Act Rules 13e-4(i)(2)(iv) and 14d-1(d)(iv). As a result of the differences in process between the U.S. and various foreign jurisdictions, Tier II currently includes prompt payment relief to allow a bidder meeting the conditions of that exemption to pay for tendered securities in accordance with home country law or practice.

<sup>149</sup> See, e.g., Barclays PLC tender offer for ABN AMRO Holding N.V. (August 7, 2007) ("Barclays") (period of no longer than five Dutch trading days); Endesa, S.A. (when the tendered shares are being counted and until payment occurs, in accordance with Spanish law and practice); Portugal Telecom (three Portuguese business days after the special session of Euronext Lisbon); E.ON (when the tendered shares are being counted and until payment occurs, in accordance with Spanish law and practice); and Bayer AG (April 28, 2006).

- All offer conditions, other than the minimum tender condition, are satisfied or waived as of the expiration of the initial offering period;<sup>150</sup> and
- Back-end withdrawal rights are suspended only during the period necessary to centralize and count the tendered securities, and are reinstated immediately at the end of that process, to the extent they are not terminated by acceptance of tendered securities immediately afterwards.<sup>151</sup>

As proposed, both third-party bidders for securities of a foreign private issuer and foreign private issuers repurchasing their own securities would be permitted to suspend back-end withdrawal rights while tendered securities are being counted, even where no subsequent offering period is provided. The revised rules would be conditioned on the following factors:

- The Tier II exemption must be available;
- The offer must include an offering period, including withdrawal rights, of at least 20 U.S. business days;

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<sup>150</sup> If a bidder counts the number of securities tendered as of the expiration date in determining whether the minimum acceptance condition has been satisfied, we view this condition as having been satisfied as of expiration. This is the case even though the counting process may, as a logistical matter, take some period of time after expiration to be completed.

<sup>151</sup> See the letters listed in footnote 149 above. Note that the only conditions that may survive the expiration of the initial offering period are regulatory approvals necessary to consummate the tender offer. We believe that the existence of the back-end withdrawal rights provided in Exchange Act Rule 13e-4(f)(2)(ii) and Section 14(d)(5) of the Exchange Act provide a critical safeguard where a regulatory condition survives the expiration of the initial offering period. These provisions allow tendering security holders to withdraw their tendered securities after a certain period of time. Certain regulatory approval processes, such as anti-trust approvals, may be lengthy and back-end withdrawal rights may provide an important safeguard in such cases. See generally, ProSiebenSat.1 Media AG (January 30, 2007)(in granting no-action relief from the prompt payment requirements of Exchange Act Rule 14e-1(c) where a regulatory condition was expected to survive the expiration of a tender offer, the staff explicitly noted that tendering target holders would have withdrawal rights through the date of receipt of such regulatory approvals). The staff will continue to consider limited relief under those circumstances only where a compelling reason exists.



































































































































































































































































