Cross-Border Exemptions

Last Update: October 17, 2018

These Compliance and Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the cross-border exemptions. They replace the interpretations published in Section II of the July 2001 Interim Supplement to Publicly Available Telephone Interpretations (the "Telephone Interpretations"). In particular, C&DIs 101.03, 103.01, 104.02, 104.03, and 104.05 reflect substantive changes to the Telephone Interpretations. C&DIs 100.04 and 101.01 reflect technical revisions to the Telephone Interpretations. C&DIs 100.01, 101.09, 104.04, and 105.01 reflect only non-substantive changes to the Telephone Interpretations. The remaining C&DIs reflect newly published interpretations. The bracketed date following each C&DI is the latest date of publication or revision.

Section 100. General

Question 100.01

Question: Are Securities Act Rules 801 and 802 available when there are no U.S. security holders of the issuer (in a rights offering) or subject company (in an exchange offer or business combination), or the offer is not extended to U.S. security holders?

Answer: No. *See* General Note 2 to Rules 800, 801 and 802. These exemptions are intended to create an incentive to include U.S. security holders in the offering, not to provide an exemption for offerings made only to foreign security holders. [October 17, 2018]

Question 100.02

Question: A foreign private issuer seeks to do a "warrant flush" whereby it will reduce the exercise price of its outstanding warrants for a set period of time in an effort to induce warrant holders to exercise. Under U.S. rules, this may be considered an issuer tender offer; under the laws of the subject company's home jurisdiction, it is not subject to tender offer regulation, although other provisions of the home jurisdiction's securities laws apply. Can the issuer rely on the Tier I exemption in Exchange Act Rule 13e-4(h)(8) where the transaction is not subject to tender offer regulation in the home jurisdiction?

Answer: Yes. The cross-border exemptions are not premised on the applicability of specific rules in the home jurisdiction that are directly comparable to U.S. rules, but on the presence of an applicable foreign regulatory regime in the home jurisdiction that provides a regulatory framework for the offer. In this case, while the warrant flush is not regulated as a tender offer in the home jurisdiction, other provisions of the home jurisdiction's securities laws do apply to the transaction and provide protection to subject security holders. [October 17, 2018]

Question 100.03

Question: Securities Act Rule 802(a)(1) states that in a business combination in which the securities are to be issued by a "successor registrant," U.S. holders may hold no more than 10 percent of the class of securities of the successor registrant immediately after the completion of the business combination. Does the reference to "successor registrant" mean that the acquiror must be an Exchange Act reporting company after the completion of the business combination?

Answer: No. The term is used generically to refer to the surviving entity, whether or not it is an Exchange Act reporting company after the completion of the business combination, and is unrelated to the concept of being a successor registrant for purposes of Exchange Act Rule 12g-3. [October 17, 2018]

Question 100.04

Return to Top

Question: May a bidder exclude U.S. security holders from an exchange offer made in a foreign jurisdiction at a time when U.S. ownership exceeds 10 percent and then later extend the same offer to U.S. security holders when U.S. ownership falls to 10 percent or below and qualifies for the Tier I exemption?

Answer: This scenario would raise concerns if the facts and circumstances indicate that the bidder excluded U.S. security holders from the exchange offer either with the purpose or intent of causing a migration of securities from the United States to the foreign jurisdiction so that an exemption from Securities Act registration would then become available. An offer conducted with this purpose or intent could be viewed to be a part of a plan or scheme to evade Securities Act registration, thereby rendering the cross-border exemptions unavailable. *See* General Note 2 to Securities Act Rules 800, 801 and 802. *See also* Release No. 33-8957 (September 19, 2008), Section II.G.2 (discussing the exclusion of U.S. target security holders in a cross-border tender offer). [October 17, 2018]

Section 101. Calculation of U.S. Ownership

Question 101.01

Question: Are the securities held by the acquiror excluded from the calculation of U.S. ownership for purposes of determining eligibility under the cross-border exemptions?

Answer: Yes. *See*, *e.g.*, Securities Act Rule 800(h)(2); Instruction 2.ii to paragraphs (c) and (d) of Exchange Act Rule 14d-1. The amendments adopted by the Commission in 2008 eliminated the requirement to exclude greater than 10 percent target holders from the calculation of U.S. ownership. The requirement to exclude target securities held by the acquiror remains unchanged, however. [October 17, 2018]

Question 101.02

Question: A bidder is making a tender offer for the securities of the subject company, which is a foreign private issuer. One of the subject company's shareholders, Shareholder A, is an entity incorporated outside the United States. The bidder, however, is aware that investment and dispositive authority over the shares held in the name of Shareholder A rests with a parent company located in the United States. Should Shareholder A's shares be deemed to be held by a U.S. holder for purposes of calculating eligibility to rely on the cross-border exemptions?

Answer: Yes. Where the bidder knows or has reason to know that investment and dispositive power, within the meaning of Exchange Act Rule 13d-3, over the securities held in the name of a foreign entity are exercised by a U.S. holder, those securities should be counted as part of the U.S. ownership base. [October 17, 2018]

Question 101.03

Question: A business combination frequently involves multiple steps (*e.g.*, a tender offer followed by a clean-up or "back end" merger to acquire any remaining target company securities not tendered in the offer). If an offeror relies on the tender offer exemptions under Tier I or Tier II or the Securities Act exemption under Rule 802 for the first step, must the offeror, for purposes of determining its eligibility under the exemptions, recalculate the U.S. ownership in the target company for the subsequent step in the transaction?

Answer: No. The initial calculation of U.S. ownership made for the first step of the transaction is sufficient to determine eligibility for the use of the exemption in the subsequent step of the transaction, so long as: (1) the disclosure document for the first step discloses the offeror's intent to conduct the subsequent step and the terms of the subsequent transaction; and (2) the subsequent step is consummated within a reasonable time following the first step.

The offeror, however, has the option of recalculating the U.S. ownership for the subsequent step transaction so it can rely on an exemption for the subsequent step transaction that was not available for the first step. In doing so, the offeror must recalculate the U.S. ownership as of the time periods specified in the applicable exemption and it should state in the offering materials for the first step transaction that it may recalculate U.S. ownership for the subsequent step transaction. Recalculation would not be appropriate for what is in effect a continuation of the first step transaction, such as an extended subsequent offering period following a tender offer that is common in some foreign jurisdictions. [October 17, 2018]

Question 101.04

Question: The cross-border exemptions specify the manner in which an acquiror or an issuer must calculate U.S. ownership for purposes of determining eligibility to rely on the exemptions. *See*, *e.g.*, Instructions to Exchange Act Rules 14d-1(c) and (d) and Securities Act Rule 800(h). Pursuant to these instructions and rules, an acquiror or issuer must query certain record holders, nominees and financial intermediaries holding subject securities as to the number of securities held by customers resident in the United States. When an acquiror or issuer is unable to conduct this "look through" analysis of U.S. ownership, an alternate test based in part on average daily trading volume of the subject securities and other factors may be used. *See*, *e.g.*, Instruction 3 to Rules 14d-1(c) and (d), and Rule 800(h)(7). Where record holders such as brokers or other intermediaries in a given jurisdiction are under no obligation, and in fact do not customarily respond to inquiries about the number of securities held for the benefit of customers in the U.S., may an issuer or acquiror eliminate the required "look through" analysis and use the alternate test based in part on trading volume to determine U.S. ownership?

Answer: No. "Reasonable inquiry" for purposes of these instructions and rules dictates that a good faith inquiry, including queries to nominees, must be made even where responses are not likely to be forthcoming or may be incomplete. The instructions and rules address situations where nominees do not respond to "look through" inquiries. They specify what assumptions can be made regarding customer accounts, depending on the location of the nominee record holder. For example, if after reasonable inquiry, an acquiror or issuer is unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, it may assume that customers are resident in the jurisdiction in which the nominee has its principal place of business. *See*, *e.g.*, Instruction 2.iv to Rules 14d-1(c) and (d), and Rule 800(h)(4). [October 17, 2018]

Return to Top

Question 101.05

Question: In calculating U.S. ownership of the subject securities in a tender offer or rights offering, the bidder or issuer may generally calculate as of a date no more than 60 days before or 30 days after public announcement of the transaction. *See* Instruction 2.i to Exchange Act Rules 13e-4(h)(8) and (i), Instruction 2.i to Exchange Act Rules 14d-1(c) and (d), and Securities Act Rule 800(h)(1). Can the calculation be done as of a date after commencement of the transaction if the commencement occurs less than 30 days after announcement?

Answer: Bidders or issuers should calculate U.S. ownership and thereby have a basis to know which U.S. rules apply to a cross-border transaction before commencing the transaction. While the cross-border exemptions were revised in 2008 to provide a range of dates for calculating

U.S. ownership and to key the calculation on public announcement of the transaction, it did not change the staff's longstanding view that the calculation of U.S. ownership should be conducted before commencement of the transaction. [October 17, 2018]

Question 101.06

Question: Securities of an acquiror are excluded in the calculation of U.S. ownership for determining eligibility for the cross-border exemptions. *See*, *e.g.*, Instruction 2.ii to Exchange Act Rules 14d-1(c) and (d) and Securities Act Rule 800(h)(2). In a form of business combination common in certain countries, Company A and Company B would form a new holding company, HoldCo. HoldCo would then issue its shares to the shareholders of Company A and Company B in exchange for their existing shares. In this type of amalgamation, U.S. ownership would be calculated based on the "pro forma" shareholder base of HoldCo assuming the business combination transaction has already taken place. If Company A is considered the acquiror for accounting purposes, can the HoldCo shares to be held by former Company A shareholders be excluded from the calculation of U.S. ownership in the above scenario?

Answer: No. In requiring the exclusion of securities held by the acquiror from the U.S. ownership calculation, the Commission explained that such exclusion would be appropriate because the acquiror would not be participating in the transaction in the same manner as the security holders of the target company. *See* Release No. 33-8957 (September 19, 2008). This would not be true for the shareholders of Company A because HoldCo will, in fact, issue its shares to Company A shareholders as a result of the amalgamation. Therefore, exclusion of the HoldCo shares to be held by former Company A shareholders from the U.S. ownership calculation is not appropriate even though Company A is considered the accounting acquiror. [October 17, 2018]

Question 101.07

Question: Assume the same factual scenario as described in C&DI 101.06 above but with applicable foreign law requiring the transaction to be announced at a time when the ratio for the share exchange of Company A and Company B shares is not known. The exchange ratio will not be known until about four months after announcement, well beyond the range of permissible dates for calculating U.S. ownership for purposes of Securities Act Rule 800(h)(1). Since the exchange ratio will determine the "pro forma" ownership of HoldCo after the amalgamation transaction and thus the level of U.S. ownership of HoldCo, how can a "pro forma" U.S. ownership be calculated under these facts?

Answer: Where the parties do not know the exchange ratio in an amalgamation at announcement and therefore cannot determine the "pro forma" U.S. ownership for the new holding company within the time frames set forth in Rule 800(h)(1), the staff will not object if the comparative market capitalizations of the parties to the transaction are used instead when calculating U.S. ownership. In this case, the respective U.S. ownership levels of Company A and Company B and their respective market capitalization figures would determine the "pro forma" U.S. ownership for HoldCo after completion of the amalgamation. The market capitalization figures used should be determined as of the date range provided in Rule 800(h)(1). Where the parties have a good faith estimate of the exchange ratio within the permissible date range, the staff will not object if such estimate is used. [October 17, 2018]

Question 101.08

Question: A bidder in a potential cross-border tender offer knows from market intelligence that U.S. ownership of the subject company exceeds 40 percent and that the offer will therefore not qualify for the prompt payment relief set forth in Exchange Act Rule 14d-1(d)(2)(iv). Because payment practice in the subject company's home jurisdiction does not comport with U.S. standards in a tender offer, the bidder will seek relief from the staff. Although the bidder is not seeking to rely on the Tier I or Tier II cross-border exemptions, should it still conduct the U.S. ownership inquiry in the manner specified for those exemptions in connection with approaching the staff for relief?

Answer: Yes. A party seeking relief should provide the staff with information about the U.S. ownership of the subject securities, calculated in accordance with the requirements of the cross-border exemptions, so that the staff can consider the level of U.S. regulatory interest in the cross-border transaction in its determination of whether to grant relief. [October 17, 2018]

Question 101.09

Question: If an offeror is unable to calculate the U.S. ownership in the subject company in an exchange offer, can the offeror first file a Securities Act registration statement to avoid violating Securities Act Section 5 and then later withdraw the registration statement and rely on Rule 802 if it determines that U.S. ownership is no more than 10 percent and that it qualifies for the Tier I exemption?

Answer: Yes. Securities Act Rule 477 describes the procedures for withdrawing a registration statement. [October 17, 2018]

Section 102. Determination of the Subject Class

Return to Top

Question 102.01

Question: A foreign private issuer has ordinary shares that are registered under Exchange Act Section 12. The ordinary shares trade on a U.S. national securities exchange in the form of American Depositary Receipts, or ADRs. The issuer also has an outstanding class of convertible debentures that convert into the ordinary shares. The debentures, which are not registered under Exchange Act Section 12, and the ordinary shares trade as separate securities on an exchange in the home jurisdiction. The issuer will make an issuer tender offer to repurchase the ordinary shares, but not the debentures. However, holders of debentures can convert their securities into ordinary shares which may then be tendered into the offer. In calculating U.S. ownership of the relevant class for purposes of determining eligibility to rely on the cross-border exemptions in Rule 13e-4(h)(8) or 13e-4(i), should the issuer look to the U.S. ownership of the shares on an "as converted" basis, whereby it assumes conversion of the debentures into shares? Or should it determine U.S. ownership based on the holders of the ordinary shares only?

Answer: Rules 13e-4(h)(8)(i) and 13e-4(i)(1)(ii) state that in determining eligibility for these exemptions, the issuer must identify the percentage of securities "sought in the offer" that are held by U.S. holders. Under this fact pattern, the subject class is the ordinary shares because only the ordinary shares may be tendered into the offer. U.S. ownership for purposes of the cross-border exemptions should therefore be calculated based on the current holders of the ordinary shares, including ordinary shares held in the form of ADRs, without regard to the convertible debentures. [October 17, 2018]

Question 102.02

Question: A target company is a foreign private issuer with two classes of securities outstanding: preference and ordinary shares. Neither class is registered under Exchange Act Section 12. The target company entered into a merger agreement with a foreign acquiror pursuant to which the foreign acquiror will exchange its shares for both classes of target company securities, subject to a vote of the target company's security holders. For purposes of the vote on the merger with acquiror, the preference and ordinary shares vote as a single class with the same voting rights. However, the two classes of securities vote separately on most other matters. The preference shares and ordinary shares also differ in liquidation preferences, tax treatment and trading liquidity (the ordinary shares trade on an exchange in the target company's home jurisdiction while the preference shares do not). For purposes of the merger, the exchange ratio for the preference and ordinary shares will be different, reflecting the different rights associated with each class.

For purposes of calculating U.S. ownership for eligibility to rely on Securities Act Rule 802, should the preference and ordinary shares be considered a single class simply because they vote together on the transaction for which the exemption is sought?

Answer: No. The fact that holders of both the ordinary shares and preference shares have the same voting rights for the transaction and will vote together is not dispositive as to whether securities are a single class for purposes of calculating U.S. ownership. Other relevant factors that should be considered in determining whether the ordinary and preference shares should be viewed as separate classes for the U.S. ownership test include: the fact that the shares are priced differently in the business combination; one class is publicly traded and the other is not; and the two classes of securities vote separately on matters other than the transaction in question. [October 17, 2018]

Question 102.03

Question: Securities Act Rule 801 exempts a rights offering from Securities Act registration as long as, among other conditions, U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering. Rule 801(a)(5) requires that, in order to be eligible for the Rule 801 exemption, the securities offered in the rights offering must be equity securities of the same class as the securities held by the U.S. offerees either directly or through American Depositary Receipts, or ADRs. A foreign private issuer meets the conditions of Rule 801 except that its U.S. holders hold equity securities through Global Depositary Receipts, or GDRs, rather than ADRs. May this issuer extend the rights offering to its U.S. holders without registering the offering in reliance on Rule 801?

Answer: Yes. The requirement in Rule 801(a)(5) that the securities offered in the rights offering be equity securities of the same class as those held by the U.S. offerees is intended to limit the offering to those who have already made the decision to invest in that class. *See* Release No. 33-7769 (October 22, 1999). Although GDRs are not specifically mentioned in Rule 801(a)(5), they serve the same purpose as ADRs in evidencing ownership of the underlying equity securities. [October 17, 2018]

Section 103. Equal Treatment

Question 103.01

Question: A bidder commences a tender offer for the securities of a foreign private issuer. The bidder initially excludes U.S. subject security holders. While this foreign offer is ongoing, the bidder chooses to extend the offer into the United States and include U.S. subject security holders. How long must the U.S. offer remain open?

Answer: The equal treatment requirement in the Tier I and Tier II exemptions means that the U.S. offer generally must be open for at least as many days as the minimum period required by the laws of the jurisdiction governing the foreign offer. In addition, offers conducted under the Tier II exemption must satisfy the minimum twenty U.S. business day requirement in Exchange Act Rule 14e-1(a). Where either of these requirements could cause the bidder to violate the foreign jurisdiction's laws, such as a limit on the maximum allowable length of the offering period, the staff will consider requests for relief on a case-by-case basis. This position also applies to an issuer tender offer. [October 17, 2018]

Question 103.02

Question: The subject company is a foreign private issuer with ordinary shares listed on a foreign exchange and American Depositary Shares, or ADSs, listed on a U.S. national securities exchange. U.S. shareholders hold 25 percent of the subject company's ordinary shares. Th[illegible] make a cash tender offer for shares of the subject company in reliance on the Tier II cross-border exemptions and will rely on the exemption in Exchange Act Rule 14d-1(d)(2)(ii) to conduct separate U.S. and foreign offers. The U.S. offer will be open to all U.S. holders of shares in direct share form and all holders of ADSs. The foreign offer will be open to all other subject company shareholders. Holders tendering into the U.S. offer will receive U.S. dollars for their subject company shares. Holders tendering into the foreign offer will be permitted to choose between U.S. dollars and the currency of the subject company's foreign home jurisdiction. Does this satisfy the equal treatment requirement in Rule 14d-1(d)(2)(ii)?

Return to Top

Answer: No. To conduct a dual offer in reliance on Rule 14d-1(d)(2)(ii), the U.S. offer must be made on terms at least as favorable as the terms offered to all other holders of the subject securities. Providing tendering shareholders in the foreign offer with a choice between the two different types of currencies, but not extending the same opportunity to tendering shareholders in the U.S. offer, is inconsistent with this purpose of the equal treatment requirement. [October 17, 2018]

Question 103.03

Question: In a cross-border tender offer not subject to Regulation 14D, where U.S. ownership in the subject company is above 10 percent as calculated in accordance with Instructions 2 and 3 to Exchange Act Rules 14d-1(c) and (d), can the bidder offer cash to U.S. holders of the subject company and shares to all other holders of the subject company?

Answer: Given that the offer is not subject to Regulation 14D and its "all holders" and "best price" requirements, this structure would be permissible, assuming it is acceptable under the laws of the home jurisdiction. [October 17, 2018]

Question 103.04

Question: A bidder conducts a cross-border tender offer for a class of securities registered under Exchange Act Section 12 and intends to rely on the Tier I exemption. In the subject company's home jurisdiction, the offer includes a cash/stock election feature, whereby tendering holders can elect to receive either cash or stock, with no ceiling or cap on either the cash or stock consideration. The bidder would like to rely on Exchange Act Rule 14d-1(c)(2)(iii) to offer cash-only consideration to U.S. holders while offering the cash/stock election feature to holders in the subject company's home jurisdiction. Can it do so? If yes, what should be the amount of the cash consideration offered to U.S. holders?

Answer: Yes, a bidder can rely on Rule 14d-1(c)(2)(iii) to offer cash to U.S. holders while offering a choice between cash and stock consideration to non-U.S. holders. Rule 14d-1(c)(2)(iii) requires the bidder to have a reasonable basis to believe that the cash consideration offered to U.S. holders is "substantially equivalent" to the value of the consideration offered to non-U.S. holders so that U.S. holders are treated at least as favorably as their foreign counterparts. This requirement is satisfied where the cash consideration offered under the election feature is equal to or greater than the value of the stock consideration offered under the feature and the bidder offers the same amount of cash to U.S. holders. Accordingly, if the cash consideration offered under the election feature is valued at a premium to the stock consideration, U.S. holders should be offered at least the same amount of cash as non-U.S. holders.

The "substantially equivalent" requirement would not be satisfied, however, where the value of the cash consideration offered under the election feature is less than the value of the stock consideration offered under the feature. In that case, the amount of cash that the bidder must offer to U.S. holders should be at least equivalent to the value of the stock consideration offered to the holders in the subject company's home jurisdiction. The value of the cash consideration and the stock consideration is determined at commencement of the offer and is not re-evaluated during the term of the offer. *See* fn. 26 in Release No. 33-7759 (October 22, 1999). Where the bidder increases the value of the stock consideration of the offer after commencement so that the stock consideration is greater than the cash consideration offered under the feature, the amount of the cash offered to U.S. holders would need to be increased as well in order to satisfy the "substantially equivalent" requirement of the rule. [October 17, 2018]

Section 104. Filing, Publication, and Dissemination of Offer Materials

Question 104.01

Question: A foreign private issuer plans to conduct a rights offering without Securities Act registration in reliance on Securities Act Rule 801. The issuer, however, must file a registration statement for this offering with the regulator in its home jurisdiction via an electronic document retrieval system similar to the EDGAR system in the United States. The registration statement is also posted on the issuer's website.

Pursuant to the home jurisdiction's rules, the registration statement will incorporate by reference certain disclosure documents, such as annual and quarterly reports, previously filed by the issuer with the regulator in the home jurisdiction through its electronic data gathering system and similarly posted on the issuer's website. Do these incorporated documents need to be translated into English and furnished to the Commission under cover of Form CB?

Answer: Yes. Part I, Item 1(a) of Form CB requires a filer to attach an English translation of the entire disclosure document delivered to security holders. While the Item allows exclusion of documents incorporated by reference, it allows exclusion only where those incorporated documents are "not published or distributed to holders of securities." Where documents are required to be incorporated by reference into a registration statement pursuant to the rules of the home jurisdiction, and those documents have been filed electronically via the home jurisdiction regulator's website or posted on an issuer's website and are therefore publicly available, an English translation is necessary to ensure that U.S. holders have the same access to information as their foreign counterparts. [October 17, 2018]

Question 104.02

Question: The ability to rely on the exemption in Securities Act Rule 802 is conditioned on including the legend required by Rule 802(b), which, among other things, advises security holders of the difficulties with enforcing claims that may arise under the federal securities laws b Return to Top issuer is located in a foreign country and some or all of its officers and directors may be residents of a foreign country. If the offeror is located in the United States, with officers and directors also resident in the United States, must the Rule 802(b) legend still be included in its entirety, even though this part of the legend is technically not applicable?

Answer: No. Rule 802(b) specifically provides that the legend must be included only "to the extent applicable." Offerors relying on Rule 802 should tailor the legend as needed so that it is not confusing or misleading for security holders. [October 17, 2018]

Question 104.03

Question: Under the laws of a foreign jurisdiction, an offeror commencing by publication must publish a detailed advertisement that includes an extensive discussion of all terms in a merger agreement. Securities Act Rule 802(a)(3)(iii) states that if an offeror disseminates by publication in its

home jurisdiction, it must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer. Would publication of a less detailed summary advertisement in a publication with national circulation in the United States that specifies the means (such as an email address, website, or a toll-free telephone number) through which U.S. holders can get a complete copy of the offering materials translated into English satisfy this requirement?

Answer: Yes. [October 17, 2018]

Question 104.04

Question: Websites accessible in the United States must not be used to entice U.S. investors to participate in an offshore offering. Section II.G.2 of Release No. 33-7759 (October 22, 1999) states that "reliance on Regulation S to allow participation by U.S. persons offshore would not be appropriate with respect to tender or exchange offers posted on an unrestricted web site." The release then states that business combinations present different issues from tender or exchange offers because participation by U.S. security holders is not voluntary in business combinations. (Note: "business combinations" as defined in this release refers to mergers and other transactions requiring shareholder approval, as distinct from tender or exchange offers.) The release also states that "[n]o special precautions should be taken to prevent U.S. holders from receiving the merger consideration in a business combination involving a foreign company merely because the proxy statement/prospectus was posted on a web site available in the United States." Since this statement implies that the website does not have to be restricted in the United States in a business combination where U.S. security holders are excluded, can the disclosure document then be sent to U.S. security holders?

Answer: No. The discussion does not contemplate sending the proxy statement/prospectus to those U.S. security holders. The release merely points out that there should be no precautions taken to prevent U.S. security holders from receiving the merger consideration even when they are excluded from the business combination, since participation in a business combination that is approved by shareholders is not voluntary for the U.S. security holders. Accordingly, a company using Regulation S to allow participation in a business combination offshore (but not a tender or exchange offer) may put the proxy statement/prospectus on a website that makes clear that the offer is directed only to shareholders in countries other than the United States. This will not be viewed as "directed selling efforts" in the United States. However, the company should not engage in any further activities such as sending the material to U.S. security holders. [October 17, 2018]

Question 104.05

Question: If a foreign private issuer conducts a third party tender offer that excludes U.S. security holders, can it voluntarily furnish the tender offer materials under cover of Form 6-K without becoming subject to the U.S. tender offer rules? Similarly, can a foreign private issuer that is exempt from Exchange Act Section 12 pursuant to Exchange Act Rule 12g3-2(b) post the tender offer materials on its website or send the materials through an electronic information delivery system? Would such steps be viewed as a public announcement in the United States and an inducement for U.S. security holders to tender?

Answer: The tender offer materials may be voluntarily furnished to the Commission, posted on the website of a foreign private issuer relying on the Rule 12g3-2(b) exemption, or sent through an electronic information delivery system, without triggering the applicability of the U.S. tender offer rules so long as the bidder takes steps to ensure that the information is not used as a means to induce indirect participation by U.S. security holders. For example, the materials must not include a transmittal letter or other means of tendering the securities. The materials also must prominently disclose that the offer is not available to U.S. persons or is being made only in countries other than the United States. Further, the issuer must take precautionary measures that are reasonably designed to ensure that the offer is not targeted to U.S. persons. *See* Release No. 33-8957 (September 19, 2008); Release No. 33-7759 (October 22, 1999). [October 17, 2018]

Section 105. Withdrawal Rights

Question 105.01

Question: In Release No. 33-7759 (October 22, 1999), the Commission stated that it "will not object if bidders meeting the requirements for the Tier II exemption reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer" if certain identified conditions are met. May a bidder terminate withdrawal rights during the offer even though the offer has not been declared wholly unconditional?

Answer: No. In order to terminate withdrawal rights, all conditions must be satisfied or waived and the bidder must declare the offer wholly unconditional. In adopting the Tier II exemption, the Commission intended to codify previous staff interpretations regarding waivers or reductions of minimum conditions in cross-border transactions. In prior no-action letters and exemptive orders the Commission and the staff have typically permitted, with five days' advance notice to security holders, a reduction in the minimum condition and termination of withdrawal rights once all other conditions to the offer are satisfied. The reference in the release to "the remainder of the offer" refers to a subsequent offering period. Pursuant to Exchange Act Rules 14d-7(a)(2) and 14d-11, the bidder may include a subsequent offering period during which withdrawa not provided. [October 17, 2018]

Return to Top

Question 105.02

Question: Can a bidder rely on the Commission's position allowing for termination of withdrawal rights immediately after waiving or reducing a minimum tender condition during the time that the tender offer must remain open, *e.g.*, after a material change under Exchange Act Rule 14e-1(b)?

Answer: No. The Commission's position is unavailable under such circumstances. *See*, *e.g.*, fn. 229 in Release No. 33-8957 (September 19, 2008) ("Our position on reduction or waiver was never intended to allow a bidder to terminate withdrawal rights required under a mandatory extension of the offer period, *i.e.*, an extension required under Rule 14e-1."). [October 17, 2018]

Modified: Oct. 17, 2018

Return to Top