



Revised Cross-Border M&A Rules Come Into Effect

On December 8, 2008, the final rule amending the cross-border exemptions for business combination transactions and rights offerings that was published by the Securities and Exchange Commission on September 19, 2008, took effect. See *SEC Release No. 33-7759 (34-58597) (September 19, 2008)*. While the amended rules do not change the basic approach or scope of the U.S. regulatory regime, they should provide participants in cross-border business combination transactions involving non-U.S. targets with greater certainty and flexibility in structuring their transactions.

The U.S. regulatory approach presumptively subjects cross-border transactions to all of the substantive and procedural requirements of the U.S. securities laws and then provides “relief” from these obligations if the transaction qualifies for one of two exemptions. The first, or “Tier I,” exemption exempts tender offers and exchange offers for securities of foreign private issuers if U.S. holders own no more than 10% of the securities subject to the offer. Tier I offers are exempt from most disclosure, procedural and filing requirements of U.S. federal securities laws as long as certain conditions regarding the equal treatment of U.S. and non-U.S. holders and the provision of information to U.S. holders are satisfied. The second, or “Tier II,” exemption applies to tender offers and exchange offers for securities of a non-U.S. entity if U.S. holders own more than 10% but less than 40% of the securities subject to the offer. The Tier II exemption provides limited relief with respect to certain procedural rules, such as those addressing prompt payment, subsequent offering periods, withdrawal rights and certain notice and equal treatment requirements.

To determine whether a transaction falls within one of these exemptions, you must calculate the percentage of the subject securities that are held by U.S. persons. In making this calculation, the amended rules continue to require that the offeror “look through” the record ownership of the securities to identify securities held for the account of U.S. persons. This look-through analysis must be done in the U.S., in the issuer’s home jurisdiction and in the jurisdiction that contains the principal trading market of the subject securities (if it is different than the issuer’s home jurisdiction).

The amended rules retain the look-through requirement. However, the amendments seek to provide greater flexibility with respect to the way in which U.S. ownership is calculated. In addition, the amendments make a number of other changes to both the Tier I and Tier II exemptions and formalize interpretive guidance on a variety of issues. The principal amendments and items of interpretive guidance are discussed below.

AMENDMENTS TO THE RULES

Timing of Calculation: The prior rules required that ownership percentages be calculated within 30 days of the commencement of the offer. The revised rules

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permit ownership percentages to be calculated no more than 60 days before and no more than 30 days after the public announcement of the transaction. The public announcement of a transaction occurs when any oral or written communication that is reasonably designed to inform or has the effect of informing security holders or the public in general about the transaction is made by or on behalf of the offeror. In addition, where offerors are unable to calculate ownership within this 90-day range, a date within 120 days before public announcement may be used.

Inclusion of 10% Holders: The prior rules excluded securities held by any person who holds more than 10% of the subject securities from the calculation of U.S. ownership percentages. The revised rules now permit these securities to be taken into account in both the numerator and the denominator in any such calculation. Securities held by the offeror are still excluded from the calculation.

Alternative Average Daily Trading Volume Test: If an offeror is, due to the facts and circumstances of the particular situation, unable to calculate U.S. ownership within the specified time frame despite having made a good faith effort to do so, it may rely on the alternative, average daily trading volume, or “ADTV,” test to determine the availability of the Tier I and Tier II exemptions. Under the ADTV test, U.S. ownership of the target securities will be presumed to fall within the applicable percentages for either the Tier I or Tier II exemption unless:

- the average daily trading volume of the subject securities in the U.S. over a 12-month period ending no more than 60 days prior to the public announcement of the transaction is more than 10% or 40%, as applicable, of the average daily trading volume of the subject securities on a worldwide basis;
- the most recent annual report or other annual information filed by the issuer with either the SEC or the issuer’s regulator in its home jurisdiction prior to the public announcement of the transaction indicates that U.S. holders hold more than 10% or 40%, as applicable, of the subject securities; or
- the offeror knows or has reason to know that U.S. ownership levels exceed the limits for the applicable exemption.

For purposes of relying on the ADTV test, an offeror or issuer will be deemed to know any information about U.S. ownership of the subject securities that is contained in any filing (whether made by the issuer or another person reporting on beneficial ownership of the subject securities) made with the SEC or the issuer’s regulator in its home jurisdiction or, if different, the jurisdiction of the issuer’s primary trading market. An offeror or issuer will also be deemed to know or have reason to know any information about U.S. ownership of the subject securities that is available from the issuer or obtained or readily available

from any other source that is reasonably reliable. For these purposes, “readily available” means information that is publicly available from sources reasonably accessible to the offeror or issuer at no or limited costs. In addition, if the offeror and the issuer enter into an agreement pursuant to which the offeror has the right to obtain information from the issuer, including information about U.S. ownership, the offeror will be deemed to know any such information known to the issuer. It is worth noting, however, that any information that is obtained or becomes available to the offeror after the public announcement of the transaction will not affect the offeror’s ability to rely on the applicable cross-border exemption.

This alternative test is available for use in both hostile and, in limited circumstances, negotiated transactions.

Other Changes to the Tier I Exemption: The amended rules exempt any Tier I eligible transaction, regardless of form, from the heightened disclosure requirements for “going private transactions” imposed by Exchange Act Rule 13e-3. Prior to the revisions, only transactions structured as an issuer or third-party tender offer, or as a securities offering made pursuant to Securities Act Rule 802 were exempt from the heightened disclosure requirements.

Other Changes to the Tier II Exemption: Amendments to the rules governing offers being made under Tier II include:

- Permitting offerors to conduct multiple non-U.S. offers in conjunction with a U.S. offer (provided that the use of separate proration pools in partial tender offers is not permitted).
- Permitting tender offers to include in the U.S. all holders of American Depositary Receipts, including non-U.S. holders.
- Allowing an offeror that conducts concurrent U.S. and foreign tender offers to include U.S. holders of target securities in the foreign offer if:
 - the laws of the jurisdiction governing the foreign offer expressly prohibits the exclusion of U.S. holders from the foreign offer; and
 - the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offer.
- Subject to the satisfaction of certain conditions, permitting the suspension of “back-end” withdrawal right while tendered securities are being counted.
- Expanding the exemptions from the rules applicable to subsequent offering periods to:
 - eliminate the maximum time period on subsequent offering periods (note that this amendment applies to U.S. issuers as well as non-U.S. issuers);
 - in certain circumstances, permit offerors to “bundle” and pay for securities tendered in the subsequent

- offering period within 20 business days of the date of the tender, rather than paying for them on an “as tendered” basis;
 - permit, where it is mandated by applicable foreign law, the payment of interest on tendered securities during a subsequent offering period; and
 - permit an offeror to include a ceiling on one or more forms of consideration and to use separate offset and proration pools for the initial offering and subsequent offering periods.
 - Permitting the termination of withdrawal rights immediately after reducing or waiving a minimum acceptance condition if certain conditions are met, including:
 - the offeror’s announcement that it may waive or reduce the minimum acceptance condition at least five business days prior to the waiver or reduction and the existence of withdrawal rights during that five-day period;
 - the offer remains open for at least five business days after the waiver or reduction; and
 - the offeror does not waive or reduce the minimum acceptance condition below a majority or, if greater, the percentage required for the offeror to control the issuer under applicable law.
 - Permitting an offeror to terminate an initial offering period (including any voluntary extension thereof) if, at the time of such termination:
 - the initial offering period has been open for at least 20 U.S. business days;
 - the offering materials adequately discussed the possibility and impact of an early termination;
 - a subsequent offering period is provided after the termination;
 - all offer conditions are satisfied at the time the initial offering period ends; and
 - the termination does not occur during any mandatory extension required under the U.S. tender offer rules.
 - Permitting purchases of the subject securities pursuant to a non-U.S. tender offer that is made concurrently with a U.S. tender offer if:
 - both the U.S. and the non-U.S. offers satisfy the conditions for reliance on the Tier II exemption;
 - the economic terms and consideration for the offers is the same (provided that any cash consideration to be paid to U.S. security holders may be converted into U.S. dollars at an exchange rate disclosed in the U.S. offering materials);
 - the procedural terms of the U.S. offer are at least as favorable as the terms of the non-U.S. offer;
 - the offeror’s intention to make purchases pursuant to the non-U.S. offer is disclosed in the U.S. offering materials; and
 - purchases by the offeror in the non-U.S. offer are made solely pursuant to such offer and not pursuant to any open market, private or other transactions.
 - Permitting purchases, including open market and private purchases, of the subject securities outside of a tender offer by the offeror, its affiliates and affiliates of one of its financial advisors if:
 - the subject company is a foreign private issuer;
 - the offeror, its affiliate or the affiliate of one of its financial advisors making the purchases reasonably expects that the offer satisfies the conditions for reliance on the Tier II exemption;
 - no purchases other than pursuant to the tender offer are made in the U.S.;
 - the definitive U.S. offering materials disclose prominently the possibility of such purchases being made and the manner in which information regarding such purchases will be disseminated; and
 - to the extent that such information is made public in the target’s home jurisdiction, there is public disclosure in the U.S. of information regarding all purchases made outside of the tender offer from the time of the public announcement of the tender offer until the tender offer expires. In the case of purchases by the offeror and its affiliates, the tender offer price must be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price.
- Expanded Availability of Early Commencement:** The amended rules also permit exchange offers that are subject only to Regulation 14E to commence on the date of filing of the registration statement, rather than on the date the registration statement becomes effective, if:
- the offeror provides withdrawal rights to the same extent as would be required if the exchange offer were subject to Exchange Act Rule 13e-4 and Regulation 14D; and
 - if there is a material change in the information provided to the holders of the subject security, the offeror disseminates revised materials as required under Exchange Act Rules 13e-4(e)(3) and 14d-4(d) and holds the offer open with withdrawal rights for the minimum time periods specified in those rules.
- Competing bids:** While it is not a change in the rules, it is worth noting that subsequent bidders continue to be eligible to “piggyback” on the initial bidder’s eligibility for a cross-border exemption, even if U.S. ownership levels have increased after the initial bid was made.
- INTERPRETIVE GUIDANCE**
- The SEC also issued guidance in three areas related to cross-border transactions:

Foreign Target Security Holders and the U.S. All-Holders Requirements: The SEC reiterated its position that tender offers subject to Exchange Act Sections 13(e) or 14(d) must be open to all security holders, including foreign security holders. While the rules do not require that the offeror disseminate offering materials outside of the U.S., the offeror may not refuse to accept tenders from non-U.S. holders.

Exclusion of U.S. Security Holders from Cross-Border Tender Offers: The SEC indicated that, when U.S. security holders are being excluded from a tender offer, the offeror must take appropriate measures to avoid making the offer available to U.S. holders. The mere use of a legend or disclaimer that the offer is not being made into the U.S. is likely not sufficient in and of itself. Precautionary measures that the SEC identified include:

- including a clear statement in the offering materials that the offer is not available to U.S. holders;
- obtaining adequate information or representations from tendering holders to identify U.S. holders and confirm that U.S. holders are not tendering securities; and
- taking special care to avoid mailing materials into the U.S.

Vendor Placements: The SEC provided a list of factors that

offerors should consider in determining whether to use a vendor placement structure. A vendor placement in a cross-border transaction occurs when an offeror offers securities to non-U.S. holders, but arranges to have securities that would have been offered to U.S. holders sold offshore by a third party, with the cash proceeds of such sales being remitted to the U.S. holders. The factors that the SEC identified include:

- the level of U.S. ownership in the target;
- the number of offeror securities to be issued in the transaction as a whole as compared to the number outstanding prior to the transaction;
- the amount of offeror securities to be subject to the vendor placement structure as compared to the number outstanding prior to the transaction;
- the liquidity and general trading market for the offeror's securities;
- the likelihood that the vendor placement can be effected within a very short period of time after the termination of the offer;
- the likelihood that the offeror plans to disclose material information around the time of the vendor placement sales; and
- the process used to effect the vendor placement sales.

Meet The Authors

If you have any questions about the matters addressed in this article, please contact the following Kirkland authors or your regular Kirkland contact:

Thomas W. Christopher
Partner
Kirkland & Ellis LLP
153 East 53rd Street
New York, NY 10022
+1 212-446-4790
tchristopher@kirkland.com



Thomas Christopher focuses his practice on mergers and acquisitions, corporate governance, securities, restructurings and related matters. He represents principals and other parties in the purchase and sale of companies, subsidiaries, divisions, joint ventures and other assets. He specializes in representing public companies and over the years has advised numerous acquirers, targets and shareholders in both negotiated and unsolicited change-of-control transactions. Mr. Christopher also has extensive experience advising boards of directors and management of public companies regarding general corporate governance matters. In addition, Mr. Christopher has represented numerous special committees of boards of directors in connection with related party transactions.

Jeffrey D. Symons
Partner
Kirkland & Ellis LLP
153 East 53rd Street
New York, NY 10022
+1 212-446-4825
jsymons@kirkland.com



Jeffrey Symons's practice focuses on domestic and international mergers and acquisitions, joint ventures, private equity investments, corporate governance and related matters. Mr. Symons regularly represents both principals and financial advisors in negotiated and unsolicited transactions, and he has represented numerous special committees in connection with related party transactions. His practice has involved transactions in a variety of industries, including the information services, healthcare and pharmaceutical, transportation and air freight services, insurance and reinsurance, telecommunications, media and entertainment, manufacturing and retail industries. Mr. Symons has also represented both issuers and underwriters in securities offerings in the public and 144A/Regulation S markets.

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Apax Partners, Barclays Capital and The Tchenguiz Group, as part of a private equity consortium, in their pending 1.6 billion sale of Somerfield to The Co-operative Group

Vestar Capital Partners in its \$1.45 billion acquisition of the North American laundry business of Unilever (LON:ULVR)

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