

## SEC PROPOSES EXEMPTIONS FOR CROSS-BORDER TENDER OFFERS AND RIGHTS OFFERINGS

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NOVEMBER 23, 1998

On November 13, 1998, the U.S. Securities and Exchange Commission (the "SEC") issued a release<sup>1</sup> (the "Release") proposing rule changes intended to facilitate the extension of cross-border tender offers and rights offerings to U.S. investors. The Release represents a revival, in part, of certain initiatives first proposed in 1990 and 1991. The Release reflects the SEC's continuing concern that U.S. investors in securities of foreign private issuers are being denied the opportunity to participate in certain tender offers and rights offerings relating to such securities. U.S. investors are often excluded from such transactions to enable bidders and issuers to avoid the application of U.S. securities laws. The SEC wishes to relax the compliance burden placed on persons extending a tender offer or rights offering to U.S. holders. However, the SEC also wishes to maintain certain basic requirements of the U.S. securities laws in order to protect U.S. investors. In the Release, the SEC seeks to reconcile these competing concerns through five new exemptions.

The five new exemptions proposed in the Release are summarized as follows:

- First, if U.S. holders hold of record 10 percent or less of the subject securities of a foreign private issuer, tender offers for such securities would generally be exempt from the provisions of the Securities Exchange Act of 1934 (the "Exchange Act") and rules thereunder governing tender offers. This exemption is referred to as the "Tier I" exemption in the Release and would be available to U.S. and foreign bidders.
- Second, when U.S. holders hold of record less than 40 percent of the class of securities of a foreign private issuer sought in a tender offer, limited tender

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<sup>1</sup> SEC Release No. 33-7611, 34-40678 (November 13, 1998). The New Release was issued shortly after the publication of two other very significant rule-making initiatives, the so-called "Aircraft Carrier" release (Securities Act Release No. 33-7606, 34-40632, IC-23519)(dated November 3, 1998), which proposes major changes in the regulation of securities offerings in the United States, and the Regulation MA release (SEC Release no. 33-7607, 34-40633, IC-23520) (November 3, 1998), which proposes changes intended to update and simplify the regulation of tender offers, mergers, acquisitions and similar transactions. The Aircraft Carrier and the Regulation MA releases are the subject of separate memoranda prepared by the Firm, copies of which can be obtained from any of the contacts identified at the end of this memorandum.

offer exemptive relief would be available to eliminate frequent areas of conflict between U.S. and foreign regulatory requirements. This exemptive relief is referred to in the Release as the “Tier II” exemption and largely represents a codification of current SEC exemptive and interpretive positions. Apart from this standard exemptive relief, a tender offer subject to Tier II would generally need to comply with U.S. requirements.

- Third, subject to certain conditions, if U.S. holders hold of record 10 percent or less of the subject securities, then purchases of securities of a foreign private issuer outside of a pending tender offer would be exempt from Rule 10b-13 under the Exchange Act (which Rule would otherwise prohibit such purchases).
- Fourth, pursuant to proposed new Rule 801 under the Securities Act of 1933 (the “Securities Act”), subject to certain conditions, securities issued in rights offerings by foreign private issuers would be exempt from the registration requirements of the Securities Act if U.S. holders hold of record five percent or less of the class of equity securities that is the subject of the rights offering.
- Fifth, under proposed new Securities Act Rule 802, subject to certain conditions, securities issued in exchange offers for foreign private issuers’ securities (and in certain business combinations involving foreign private issuers) would be exempt from the registration requirements of the Securities Act and the qualification requirements of the Trust Indenture Act of 1939 (the “Trust Indenture Act”) if U.S. holders hold of record five percent or less of the subject class of securities.

The proposed exemptions do not affect a bidder's or issuer's potential liability to U.S. investors under the anti-fraud rules of the U.S. securities laws.

Each of these proposals is discussed in greater detail and analyzed below.

#### **TIER I EXEMPTION**

The Tier I exemption, if implemented, would exempt tender offers from certain tender offer rules<sup>2</sup> under the Exchange Act regulating, among other things, the scope of required

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<sup>2</sup> Modifications are proposed to Rule 13e-3 (which regulates certain “going private transactions”), Rule 13e-4 (which regulates self-tender offers for equity securities which are registered under the Exchange Act), Regulation 14D (which regulates third-party tender offers for equity securities which are registered under the Exchange Act) and Rules 14e-1 and 14e-2 (which currently are applicable to all tender offers extended into the United States, regardless of whether the subject securities are debt or equity securities or are registered under the Exchange Act).

disclosure, timing of filings, minimum offer periods, withdrawal rights and proration. The Tier I exemption would be available subject to satisfaction of the following conditions:

- U.S. holders<sup>3</sup> of record hold 10 percent<sup>4</sup> or less of the class of securities which is the subject of the tender offer;
- if the transaction would otherwise have been subject to Rule 13e-4 or Regulation 14D, the bidder submits to the SEC an English language translation of the offering materials and files a consent to service of process;
- U.S. holders be given the opportunity, subject to certain exceptions, to participate in the offer on terms at least as favorable as those offered to any other holders, including price, type of consideration and choice among different alternatives being offered<sup>5</sup>; and
- bidders provide U.S. holders with offering materials in English on a basis comparable with other securityholders.

The Tier I exemption would be available to U.S. and foreign bidders alike. In addition, the Tier I exemption would be available for offers where the consideration takes the form of securities as well as for cash tender offers (unlike prior proposals which proposed similar relief solely in the context of cash offers).

While the Tier I exemption would simplify the inclusion of U.S. investors in tender offers for securities of non-U.S. issuers where U.S. holders account for 10 percent or less of the subject securities, the exemption does not affect the continued application of the anti-fraud and

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<sup>3</sup> The term "U.S. holder" would generally include any person whose address appears on the records of the issuer of the subject securities, or any voting trustee, depositary, share transfer agent, or any person acting in a similar capacity as being located in the United States. Unless information provided by the depositary demonstrated otherwise, holders of American Depositary Receipts would be counted as U.S. holders of the underlying securities.

<sup>4</sup> Shares held by non-U.S. holders of more than 10 percent of the relevant class would not be included in calculating the public float. The relevant percentage of U.S. holders would be calculated based on the company's non-affiliated public float.

<sup>5</sup> A key exception to the equal treatment rule would permit "loan notes" to be offered to U.K. shareholders of U.K. companies but not to U.S. shareholders. Bidders frequently offer a loan note alternative in U.K. bids because such term notes allow U.K. shareholders to defer recognition of income under U.K. tax rules. Such bidders often prefer not to extend a loan note alternative to U.S. shareholders since it offers U.S. shareholder-taxpayers no U.S. tax advantage but would carry the burden of registering the loan notes under the U.S. Securities Act.

anti-manipulation provisions of the U.S. securities laws to all tender offers. Accordingly, while a bidder may not be separately required to observe the specific requirements of Rule 13e-3, Rule 13e-4, Regulation 14D, Rule 14e-1 and Rule 14e-2, to the extent that these rules are intended to prohibit particular activities which are regarded as fraudulent or manipulative, it is expected that the rules will continue to provide important reference points in connection with the preparation of offering materials and the conduct of tender offers.

## TIER II EXEMPTION

The Tier II exemption would offer limited relief from the application of the U.S. securities laws in connection with tender offers where U.S. holders hold of record less than 40 percent of the class of securities sought in the offer. The limited relief made available under this exemption largely represents a codification of current SEC exemptive and interpretive positions with respect to areas of frequent conflict between U.S. and foreign regulatory requirements. The Tier II exemption would:

- permit offers to be deemed to commence upon mailing or publication pursuant to the requirements of the target company's home jurisdiction rather than upon announcement as under the current U.S. rules;
- permit bidders to terminate withdrawal rights before the expiration of the offer if all conditions to the offer have been met and all duration requirements of the U.S. tender offer rules have been satisfied;
- permit bidders to divide offers into two separate offers having the same terms in which the U.S. offer would comply with the U.S. regulatory scheme and the non-U.S. offer would comply with the home jurisdiction rules, excluding U.S. holders from the foreign offer and limiting the U.S. offer to U.S. holders;
- allow questions of prompt payment for, or return of, tendered securities to be controlled by the requirements and practices of the target company's home jurisdiction; and
- allow bidders to announce extensions of the offer in accordance with the practices of the home jurisdiction, rather than requiring any such announcement to be made before the commencement of trading on the next business day as required by the U.S. rules.

Because the Tier II exemption is designed to address circumstances in which shares held by U.S. holders represent a larger percentage of a target company's outstanding shares, the SEC has presumed (i) that there is less risk of such shareholders being excluded, and (ii) that there is greater need and justification for applying the relevant U.S. securities laws. Unlike offers eligible for the Tier I exemption, offers made subject to the Tier II exemption must therefore

continue to be made pursuant to many of the requirements of Regulation 14D, including the specific disclosure, filing and procedural requirements applicable to U.S. tender offers. In particular, the Tier II exemption would not provide relief from (i) the requirement that an offer be open for at least 20 business days and be extended for a minimum amount of time in the event of certain changes in the offer, (ii) the specific going-private disclosure and procedural requirements of Rule 13e-3 or (iii) the general anti-fraud and anti-manipulation rules.

The specific exemptions referred to above are subject to certain conditions. These conditions are largely similar to those which have been required by the SEC in granting previous exemptive relief, largely in the context of U.K. tender offers and the rules of the London City Code. While these conditions have largely enabled bids to proceed in compliance with local law and would be expected to be generally acceptable in the future, the SEC has also left open the possibility of continuing to grant specific ad-hoc relief on a case-by-case basis if the facts and circumstances require and justify additional relief.

#### **RULE 10b-13 RELIEF**

Rule 10b-13 prohibits a bidder and persons affiliated with or acting for a bidder, such as a dealer-manager, from purchasing, directly or indirectly, the security that is subject to a tender offer other than pursuant to the offer. The rule applies from the time an offer is first publicly announced until the bidder is required to accept or reject the tendered securities. Rule 10b-13 protects investors by prohibiting a bidder from paying more or different consideration to selected holders outside the offer. However, in many jurisdictions, bidders are permitted to purchase shares outside the offer, provided, in some of such jurisdictions, that the bidder provides consideration in the offer equal to at least the highest price paid for the subject securities outside the offer.

In connection with Tier I tender offers, the SEC is now proposing to permit purchases of subject securities outside the formal tender offer, inside or outside the United States, subject to the conditions that:

- the U.S. offer document discloses prominently the possibility of purchases or sales other than pursuant to the terms of the offer;
- the bidder discloses in the United States information about such purchases in a manner that is comparable to disclosure made in the target company's home jurisdiction; and
- the purchases comply with applicable tender offer laws in the target company's home jurisdiction.

Because of the greater U.S. interest in Tier II offers, the SEC is not proposing exceptions to Rule 10b-13 for those offers. Instead, the SEC has announced that in connection with offers

not eligible for the Tier I exemption, the SEC will consider specific requests for relief on a case-by-case basis in light of relevant facts and circumstances.<sup>6</sup>

The SEC also proposed to codify as a new exemption to Rule 10b-13 certain relief which the SEC has previously granted to permit “connected exempt market makers” and “connected exempt principal traders”, as defined by the City Code, to continue their U.K. market making activities during a cross-border offer that is subject to the City Code. Without such an exemption, when such Eligible Traders are affiliated with a bidder's financial advisors, Rule 10b-13 would require them to withdraw from the market, with possible adverse consequences for the liquidity of the subject security. The proposed exemption would be available for Tier I and Tier II offers, but would be subject to certain disclosure and other requirements and conditions.

**RULES 801-802 - EXEMPTIONS FOR RIGHTS OFFERINGS,  
EXCHANGE OFFERS AND BUSINESS COMBINATIONS**

Proposed Rules 801 and 802 under the Securities Act, if implemented, would exempt from the registration requirements of the Securities Act certain securities issued to U.S. holders of a foreign private issuer in a rights offering, exchange offer or business combination. The exemptions from registration under Rule 801 and Rule 802 would be available only if:

- the offeror in any rights offering relying on Rule 801, or the target company of any exchange offer or business combination relying on Rule 802, as the case may be, is a foreign private issuer;
- U.S. holders of record hold five percent or less of the class of securities which is the subject of the offer;
- the terms and conditions of the offer must be the same for U.S. and foreign security holders, subject to certain exceptions; and
- in the case of rights offerings subject to Rule 801, (i) the securities offered must be equity securities<sup>7</sup> of the same class as those held by offerees, must be offered only for cash and only on a pro rata basis to existing holders thereof and (ii) the rights granted to U.S. holders to subscribe for such equity

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<sup>6</sup> In this context, the SEC cited recent relief requested by this Firm on behalf of its client in connection with Trinity Acquisition PLC's bid for Willis Corroon Group PLC. In that transaction, the bidder was granted 10b-13 relief even though 45.5 percent of the target's securities were held by U.S. holders.

<sup>7</sup> As proposed, the term “equity securities” does not include convertible securities, warrants, rights or options.

securities may not be transferable except offshore in accordance with Regulation S under the Securities Act.

Rule 801 provides that any securities that are purchased upon the exercise of the rights will be restricted within the meaning of Rule 144 under the Securities Act. Similarly, Rule 802 provides that any securities issued pursuant to an exchange offer or business combination in exchange or upon conversion of securities that are “restricted securities” under Rule 144 will themselves be “restricted securities”.<sup>8</sup>

Neither Rule 801 or 802 would require any specific information to be sent to U.S. holders, but each Rule would require that any document, notice or other information that is provided to offerees be provided in English to U.S. offerees. If any information is published outside of the United States rather than delivered, then a copy of the publication in English must be delivered to U.S. offerees, in the case of rights offerings, or published in the United States, in the case of exchange offers or business combinations, at the same time that it is provided to offshore holders.

Both Rules would require that a legend be included in the offering document or notice stating that the offering is being conducted pursuant to home jurisdiction disclosure requirements, and that those requirements may differ from the U.S. disclosure requirements, including financial statement requirements. Under both Rules, the offeror would be required to submit a notification to the SEC that includes a copy of any document, notice or other information mailed to U.S. offerees. In addition, the offeror must appoint an agent for service of process in the United States.

Proposed Rule 802 would permit offerors to offer debt securities in an exchange offer or business combination for the target's equity or debt securities. Although the issuance of debt securities in the U.S. ordinarily requires the qualification of an indenture under the Trust Indenture Act and the filing of a Form T-1, a proposed new rule to the Trust Indenture Act would exempt any debt security issued pursuant to proposed Rule 802 from compliance with the relevant provisions of the Trust Indenture Act.

The exemptions provided by Rules 801 and 802 are non-exclusive, and as such securities issued under those Rules would not be integrated with any other exempt offerings of an issuer, such as a subsequent private placement pursuant to Regulation D.

The exemptions available under Rules 801 and 802 do not affect the anti-fraud or anti-manipulation provisions of the federal securities laws or provisions of state law relating to the

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<sup>8</sup> “Restricted securities” could not be freely sold within the United States or deposited in an American Depositary Receipt facility that included unrestricted ADRs; however, “restricted securities” could be sold outside the United States pursuant to Regulation S.

offer and sale of securities. However, the civil liability provisions of the Securities Act that relate only to registered offerings would not apply to these transactions.

Exempt offerings under Rules 801 or 802 would not trigger the continuous reporting obligations of the Exchange Act or disqualify issuers from the exemption from such reporting requirements available under Rule 12g3-2(b).

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If you have any questions concerning the Release, please contact Walt Looney, William Dougherty, Gregory Conway or Michael Wolfson of this firm's London office at 0171-422-4000 or John Lobrano or Alan Klein of this firm's New York Office at 212-455-2000.

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