SEC Provides Guidance and Adopts Amendments to the Cross-Border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions

On September 19, 2008, the U.S. Securities and Exchange Commission (the “SEC”, or the “Commission”) issued its final rule and interpretive release adopting amendments to the current exemptions for cross-border tender offers, exchange offers and business combination transactions and rights offerings (the “Cross-Border Rules”) in order to expand and enhance the utility of these exemptions and to encourage offerors and issuers to permit U.S. security holders to participate in these transactions on the same terms as other target security holders. The Commission also set forth interpretive guidance on several topics. The amendments were adopted by the Commission at an open meeting on August 27, 2008 substantially as proposed in May 2008, with some modifications discussed in greater detail below. The amendments are contained in Release 33-8957 (34-58597), entitled “Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions” (September 19, 2008) (the “Adopting Release”). A copy of the Adopting Release is available on the Commission’s website at http://www.sec.gov/rules/final/2008/34-58597.pdf. The rule amendments will become effective 60 days from the date of publication in the Federal Register and are available for transactions that commence after the effective date. The interpretive guidance will be effective immediately on the date of publication in the Federal Register.

I. Overview

The amendments are intended to address the most frequent areas of conflict or inconsistency between U.S. and foreign regulations and practice that acquirors encounter in cross-border business combination transactions, thereby facilitating the inclusion of U.S. investors in such transactions. Many of the rule changes codify existing interpretive positions and exemptive orders in the cross-border area. In two instances, the Commission extends rule changes to apply to all tender offers, including those for U.S. target companies, where the Commission believes the changes initially proposed in the cross-border context will be useful and in the public interest if applied to all tender offers.

The amendments follow recent rulemaking initiatives undertaken by the Commission that affect foreign private issuers. Most recently, the Commission adopted changes to the manner of determining the availability of the Rule 12g3-2(b) exemption from registration under the Securities Exchange Act of 1934 (the “Exchange Act”), and 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.

In the Adopting Release, the Commission states that the amendments are intended to address the realities of the modern securities markets and, in particular, the increasing globalization of those markets, and that the amendments appropriately balance the need to protect U.S. investors through the application of protections afforded under U.S. law, while facilitating transactions that may benefit all security holders, including those in the United States.

This client memorandum summarizes the most significant amendments contained in the Adopting Release.

II. Executive Summary of the Amendments

The key rule changes adopted by the Commission include the following:

- Modifying the manner in which the look-through analysis under the Cross-Border Rules must be conducted, including:
  - Changing the reference date for the calculation of U.S. beneficial ownership to allow calculation as of any date no more than 60 days before and no more than 30 days after the public announcement of the transaction; acquirors unable to conduct the look-through analysis in this time frame may make the calculation as of a date no more than 120 days before public announcement.
  - For rights offerings, the amended rule permits calculation as of a date no more than 60 days before and no more than 30 days after the record date.
  - Eliminating the requirement to exclude individual holders of more than 10 percent of the subject securities from the calculation of U.S. ownership.

- Adopting an alternate test for determining eligibility to rely on the cross-border exemptions, based in part on a comparison of average daily trading volume of the subject securities in the United States and worldwide. This alternate test is available for all non-negotiated transactions and those negotiated transactions for which a look-through analysis may not be conducted.

- Expanding the relief afforded under the Tier II exemption to eliminate recurring conflicts between U.S. and foreign law and practice, including: (1) allowing multiple foreign offers in conjunction with a concurrent U.S. offer; (2) permitting bidders to include foreign holders of American Depositary Receipts in the U.S. offer and, under specified conditions, U.S. holders in the foreign offer(s); (3) allowing bidders to suspend back-end withdrawal rights while tendered securities are counted; (4) allowing subsequent offering periods in both cross-

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2 As used in this memorandum, the term “business combination” or “business combination transaction” includes tender offers and exchange offers.

3 Exemption From Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Release No. 34-58465 (September 5, 2008) [73 FR 52752].

4 These rule revisions were adopted on August 27, 2008. The revisions were proposed in Foreign Issuer Reporting Enhancements, Release No. 33-8900 (February 29, 2008) [73 FR 13404]. The final rule release is not yet available.
border and U.S. domestic offers to extend beyond 20 U.S. business days; (5) allowing securities tendered during the subsequent offering period to be purchased within 20 business days from the date of tender, rather than 14 business days as originally proposed; (6) allowing bidders to pay interest on securities tendered during a subsequent offering period, where required under foreign law; (7) allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods for certain kinds of tender offers; and (8) permitting bidders to terminate an initial offering period or any voluntary extension thereof before a scheduled expiration date.

- Codifying three class exemptive letters 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, including offers for U.S. target companies; and
- Permitting foreign institutions to report on Schedule 13G to the same extent as their U.S. counterparts, subject to certain conditions, and expanding the definition of beneficial ownership in Exchange Act Rule 16a-1(a)(1) to include those foreign institutions.

The Commission also provides interpretive guidance on the following issues:

- The ability of bidders in tender offers to waive or reduce the minimum tender condition without providing withdrawal rights;
- The application of the U.S. all-holders provision to foreign target security holders in transactions subject to U.S. equal treatment provisions;
- The ability of bidders to exclude U.S. target security holders in cross-border tender offers; and
- The availability of the vendor placement procedure for exchange offers.

III. Eligibility Threshold – Calculation of U.S. Ownership

A. “Look-Through” Analysis

The existing cross-border exemptions are structured as a two-tier system based on the level of U.S. interest in a transaction, measured by the percentage of target securities beneficially held by U.S. holders. Under the amendments, this two-tier system and the threshold U.S. ownership percentages are retained. Despite widespread support for an alternative eligibility test based on relative trading volume, the Commission retains the look-through analysis and the focus on beneficial ownership as the central element of the eligibility test. The Commission adopts, however, amendments to the manner in which U.S. beneficial ownership must be determined to address concerns commonly associated with the look-through analysis and to provide acquirors with greater flexibility and certainty regarding the availability of the exemptions at an earlier stage of the planning process.

The proposed changes to the timing and reference date for the U.S. ownership calculation are adopted with some modification. While the existing rules require 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, the Commission had initially proposed that acquirors be permitted to calculate U.S. ownership as of any date within the 60-day period preceding announcement of a cross-border business combination transaction. In the Adopting Release, the Commission expands that range to a period comprising 60 days before and 30 days after the announcement to alleviate confidentiality concerns. In addition, if an acquiror is unable to accomplish the look-through analysis as of a date during this 90-day period, it may use a date no more than 120 days before public announcement.

The revised rules no longer require that individual holders of more than 10 percent of the subject securities be excluded from the calculation of U.S. ownership. This requirement frequently had the effect of disproportionately inflating the percentage of U.S.
ownership of foreign private issuers, as holders of large blocks of foreign stock are more likely to be non-U.S. persons, thereby making the exemptions unavailable. The SEC believes that this change will significantly expand the number of cross-border transactions eligible for the exemptions, without compromising investor protection. The requirement to exclude securities held by the acquiror from the calculation is retained.

B. Alternate Test

Notwithstanding its continued focus on U.S. beneficial ownership as the central element of the eligibility test for reliance on the cross-border exemptions, the SEC recognizes that circumstances exist in which acquirors will be unable to conduct the look-through analysis. The Commission therefore adopts an alternate test, based in part on a comparison of average daily trading volume, which may be used if an acquiror is unable to conduct the look-through analysis. In the Adopting Release, the SEC emphasizes that the need to dedicate time and resources to the look-through analysis or concerns about the completeness and accuracy of the information obtained will not necessarily justify the use of the alternate test. In each instance, bidders must make a good faith effort to conduct a reasonable inquiry into ascertaining the level of U.S. beneficial ownership. While not providing an exhaustive list, the SEC mentions specific factual scenarios when the alternate test could be used: jurisdictions where security holder lists are generated only at fixed intervals and the published information is as of a date outside the specified range for the calculation; subject securities are issued in bearer form; or nominees are prohibited by law from disclosing information about the country of residence of the beneficial owners. Acquirors in non-negotiated transactions may continue to rely on the alternate test, which is similar to and replaces the current “hostile presumption”.

The first prong of the alternate test is based on a comparison of average daily trading volume (“ADTV”) of the subject securities in the United States, as compared to worldwide ADTV, and is satisfied where ADTV for the subject securities in the United States over a twelve-month period ending no more than 60 days before the announcement of the transaction is not more than 10 percent (40 percent for Tier II) of ADTV on a worldwide basis. In line with the revised look-through analysis, the alternate test provides acquirors with a range of dates by which they may make the comparison of U.S. and worldwide ADTV; that range does not, however, extend beyond the date of announcement. The revised rules also require that there be a “primary trading market”5 for the subject securities in order for the acquiror in a negotiated transaction to rely on the alternate test, to ensure there is a primary regulator with oversight over the transaction.

Similar to the existing test for non-negotiated transactions, the second prong of the alternate test requires that the acquiror must consider information about U.S. ownership levels that appear in annual reports or other annual information filed by the issuer with the Commission or with the regulator in its home jurisdiction. The new rules specify, however, that only annual reports and annual information filed before public announcement must be taken into account to avoid disruption of the acquiror’s planning process. Conversely, the acquiror will also not gain eligibility to rely on the exemptions based on reports filed after announcement indicating a reduction in the percentage of U.S. holders.

Finally, the Commission also retains the condition that the test is qualified by information about U.S. ownership that the bidder otherwise knows or has reason to know, an element of the test that has often created uncertainty for bidders. In the new rules, the Commission now clarifies that a bidder has reason to know any information that is publicly available and appears in public filings in the U.S. or the issuer’s home jurisdiction, including beneficial ownership reports filed by third parties and information available from the issuer or obtained or readily available from any other source that is reasonably reliable, including the parties’ advisors to the transaction and independent information service providers. However, an acquiror

5 “Primary trading market” means that at least 55 percent of the trading volume in the subject securities takes place in a single, or no more than two, foreign jurisdiction(s) during a recent twelve-month period. If the trading occurs in two foreign markets, the trading in at least one of the two must be larger than the trading in the United States.
seeking to rely on the presumption is not required to engage such third parties. The relevant date for the bidder’s actual or imputed knowledge is the date of announcement, allowing a bidder to ignore conflicting information received after such date.

The changes to the eligibility test discussed above will also apply to rights offerings. Issuers may now calculate U.S. ownership as of a date no more than 60 days before and no more than 30 days after the record date for the rights offering. In addition, if the issuer is unable to conduct the look-through analysis, it may rely on the alternate test, a change from the existing rules where the “hostile presumption” was not available to issuers or affiliated bidders.

IV. Changes Relating to the Tier II Exemption

In the Proposing Release, the Commission proposed a number of changes to the Tier II exemption in order to alleviate practical difficulties that often result in the need for companies to request specific exemptive or no-action relief. The SEC adopts these changes substantially as proposed.

A. Extension of the Tier II Exemption

The SEC adopts amendments clarifying that the Tier II exemptions are available regardless of whether the target securities are subject to Rule 13e-4 or Regulation 14D. Thus, so-called “14E offers” are now unequivocally afforded all relevant protections provided under the Tier II exemption.

B. Dual and Multiple Offer Structures

The amendments eliminate the current restriction on the number of non-U.S. offers a bidder may make in connection with a concurrent U.S. offer in a cross-border tender offer. The SEC reiterates its position that where a bidder makes a partial offer for less than all of a class of target securities and relies on the provision in the Tier II exemption allowing the use of multiple offer structures, the securities tendered into the U.S. and non-U.S. offers must be pro rated on an aggregate basis, using a single proration “pool.”

The Commission also revises its rules to allow all ADR holders to participate in U.S. offers, and 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. The SEC emphasizes that the adopted changes are not intended to allow a bidder to make an offer open only to ADR holders, which would be prohibited where the target securities are registered under the Exchange Act and the U.S. all-holders rule applies.

C. Termination of Withdrawal Rights During Counting Procedure

The Commission adopts a provision allowing the suspension of back-end withdrawal rights in all tender offers conducted under the Tier II exemption during the counting of tendered securities. U.S. law requires bidders to provide back-end withdrawal rights after a set date, measured from the commencement of a tender offer. This requirement has created conflicts in many foreign jurisdictions where the process of counting tendered securities may take an extended period of time, and, without relief, back-end withdrawal rights may apply during this period. The revised rules are conditioned on several factors, including satisfaction or waiver of all offer conditions other than the minimum acceptance condition at the time withdrawal rights are suspended. The rule changes are not intended to eliminate back-end withdrawal rights where a regulatory condition remains outstanding after the expiration of the tender offer.

D. Subsequent Offering Periods

The Commission has proposed several revisions relating to subsequent offering periods in the context of Tier II cross-border tender offers, which it is adopting substantially as proposed. The SEC is eliminating the maximum time limit on the length of a subsequent offering period in both U.S. domestic and non-U.S. offers. It originally proposed this change only for non-U.S. offers qualifying for the Tier II exemption. In addition, under the new rules, bidders in a cross-border tender offer are permitted to pay for securities tendered
into a subsequent offering period on a “modified rolling basis”, allowing them to “bundle” and pay for tendered securities within 20 business days from the date of tender, a modification from the 14 business days originally proposed. However, where local law mandates or local practice permits payment on a more expedited basis, payment must be made more quickly than 20 business days from the date of tender to satisfy U.S. prompt payment requirements.

Other adopted changes permit the payment of interest for securities tendered during a subsequent offering period in a Tier II offer where required under foreign law and accommodate “mix and match” offer structures, specifically allowing separate offset and proration pools for securities tendered during the initial and subsequent offering periods, and eliminating the prohibition on a “ceiling” for the form of consideration offered in the subsequent offering period, where target security holders are given the ability to elect between two or more different forms of offer consideration.

V. Additional Guidance with Respect to Terminating Withdrawal Rights after Reduction or Waiver of a Minimum Acceptance Condition

U.S. tender offer rules generally require that a bidder allow an offer to remain open, and provide withdrawal rights, for a certain period of time after a material change in its terms is communicated to target security holders. A reduction or waiver of a minimum acceptance condition is considered to constitute a material change. As this U.S. requirement has created a conflict with many jurisdictions, in particular the U.K., the SEC, when it initially adopted the Cross-Border Rules, affirmed the staff’s interpretive guidance on when bidders meeting the conditions of the Tier II exemption could waive or reduce the minimum acceptance condition without providing withdrawal rights during the remainder of the offer and has provided additional guidance in the Proposing Release.

The Adopting Release generally reaffirms the SEC’s interpretive position, including the position that its guidance was and continues to be limited to instances where home country law and practice make it impossible or unnecessarily burdensome to comply with the extension requirements of U.S. law and that a bidder seeking to rely on this guidance must fully disclose and discuss in its offering materials all of the potential implications of the potential waiver or reduction, including at the specific levels contemplated. The Commission, however, further modifies its proposed prohibition to waive or reduce the minimum acceptance condition below a majority of the outstanding target securities. According to the Adopting Release, the Commission’s interpretive guidance may not be relied upon unless the bidder undertakes not to waive either below a simple majority, or the percentage threshold required to control the target company under applicable foreign law, if it is greater. It is the SEC’s belief that, in these instances, security holders should be afforded withdrawal rights after the change, as the nature of their investment decision may have changed fundamentally.

VI. Early Termination of an Initial Offering Period or a Voluntary Extension of Such Period

The Commission also considers a change in the expiration date of a tender offer as material, and the staff of the SEC has given specific relief from the U.S. extension requirements to bidders to permit the early termination of an initial offering period (or any voluntary extension thereof) in situations where foreign law and practice require a bidder to terminate an offer and withdrawal rights immediately after all the offer conditions are satisfied. Such relief is contingent on several conditions similar to those that have been established for bidders wishing to waive or reduce a minimum acceptance condition and is also not available during any mandatory extension of the offer. In the Adopting Release, the Commission codifies the guidelines set forth in staff no-action precedent in this area. The Commission also emphasizes that its position does not permit early termination upon the waiver, as opposed to the satisfaction, of an offer condition.
VII. Codification of Existing Exemptive Orders with Respect to the Application of Rule 14e-5 for Tier II Tender Offers

Rule 14e-5 prohibits purchasing or arranging to purchase any subject securities or any related securities except as part of the tender offer. The existing rules exempt Tier I tender offers from Rule 14e-5, but Rule 14e-5 does apply to Tier II offers. Over the past several years, frequent exemptions from the Rule’s prohibition have been granted for Tier II offers in three recurring areas: purchases and arrangements to purchase securities of a foreign private issuer (1) pursuant to the non-U.S. tender offer for a cross-border offer where there are separate U.S. and non-U.S. offers; (2) by offerors and their affiliates outside of a tender offer; and (3) by financial advisors’ affiliates outside of a tender offer.

With respect to the first area, in 2006 the staff of the SEC granted “global” relief from the prohibition of Rule 14e-5 for multiple offers in a class exemptive letter (the Mittal letter). Rule 14e-5(b)(11) now codifies that relief and states that purchases or arrangements to purchase subject securities pursuant to a Tier II foreign offer (or multiple foreign offers) during a U.S. tender offer will be allowed if certain conditions designed to protect U.S. security holders are satisfied.

Similarly, with respect to the second and third areas, the staff of the SEC has, through other recent class exemptive relief letters (the Sulzer and Financial Advisors letters), granted global relief from the prohibition of Rule 14e-5 to bidders and financial advisors to allow purchases outside an offer, including open market and privately negotiated purchases and certain enumerated trading activities, when this activity is permissible under the laws of the target’s foreign home jurisdiction, if certain conditions designed to promote the fair treatment of tendering security holders are met. The Adopting Release now codifies that global relief, in the form of Rule 14e-5(b)(12), with slight modifications to the conditions. The new rule does not impose any additional conditions to those provided in the Sulzer and Financial Advisors letters, but some conditions from those letters are not incorporated, making the rule somewhat more lenient.

VIII. Change to Tier I Exemption as it Relates to Rule 13e-3

Rule 13e-3 establishes specific filing and disclosure requirements for certain kinds of affiliated transactions due to the conflicts of interest inherent in such situations. The rule applies to these transactions by issuers or their affiliates, where the transactions would have a “going private” effect.

Currently, the Tier I exemption from Rule 13e-3 does not apply to some transaction structures commonly used outside the U.S., including schemes of arrangement, cash mergers, compulsory acquisitions for cash and other types of transactions. The scope of the Tier I exemption from Rule 13e-3 is now expanded to remove any restriction on the category of transaction covered. In order to qualify for the expanded exemption from Rule 13e-3, a party must meet all of the conditions for reliance on Rule 802 or Tier I.

IX. Expanded Availability of Early Commencement for Exchange Offers

In an attempt to reduce the regulatory disparity between cash and stock tender offers, the Commission in 1999 adopted rules permitting certain exchange offers to commence upon the date of the filing of a registration statement, rather than the date on which the registration statement is declared effective by the SEC. Nevertheless, regulatory disparity has continued to exist because the early commencement option has not been available for exchange offers that are not subject to Rule 13e-4 or Regulation 14D.

The rules regarding early commencement are now revised to allow all exchange offers, including those for U.S. targets, to take advantage of the early commencement procedure, regardless of whether the exchange offer is subject to the provisions of Regulation 14E only, under the condition that the offeror voluntarily provides certain protections – including withdrawal rights – that are required in an offer subject to Rule 13e-4 or Regulation 14D. Originally, it was proposed that this change apply only to Tier II offers.
X. Beneficial Ownership Reporting by Foreign Institutions

The Commission also adopts amendments to its beneficial ownership reporting rules, allowing certain foreign institutions to comply with SEC beneficial ownership reporting requirements by filing on Schedule 13G, as opposed to the more burdensome Schedule 13D. To be eligible to file on Schedule 13G, the foreign institution has to be of a type substantially comparable to the types of U.S. institutions currently eligible to file on Schedule 13G, such as brokers, dealers, investment companies and investment advisers registered with the SEC. Additionally, the foreign institution is required to certify on Schedule 13G that it is subject to a regulatory scheme substantially comparable to the regulatory scheme applicable to its U.S. counterparts. Finally, in its certification on Schedule 13G, the foreign institution needs to undertake to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D. As with U.S. domestic institutions, filing on Schedule 13G is only available to foreign institutions so long as the owned securities are held in the ordinary course of business and not with the purpose or effect of influencing or changing control of the issuer. The SEC is also adopting a corresponding change to Exchange Act Rule 16a-1(a)(1) to expand the definition of beneficial ownership to include those foreign institutions.

XI. Interpretive Guidance

A. Foreign Target Security Holders and U.S. All-Holders Requirements

In the Adopting Release, the Commission reiterates its position regarding the all-holders requirement of U.S. law: (1) tender offers subject to Section 13(e) or 14(d) of the Exchange Act must be open to all target security holders, including foreign persons; and (2) although foreign target holders may not be excluded from U.S. tender offers under these provisions, the U.S. rules do not require dissemination of offer materials outside the United States. While the Commission has asked commenters in the Proposing Release whether any amendments to the U.S. equal treatment provisions are necessary or advisable to allow certain foreign target security holders to be excluded from an offer, it concludes that no amendments, including de minimis or other exceptions, are necessary at this time.

B. Exclusion of U.S. Target Security Holders from Cross-Border Tender Offers

On a related point, the Commission reiterates guidance it has given in the past with respect to offers for foreign targets from which U.S. security holders are excluded, stressing its view that in addition to legends and disclaimers, a bidder will need to take special precautions to prevent sales to or tenders from U.S. target holders. In addition, in the Adopting Release, the SEC supplements its prior guidance. It is the SEC’s view that where a foreign all-holders requirement does not permit a bidder to reject tenders from U.S. holders and does not permit statements that the offer may not be accepted by U.S. holders, it may not be possible for a bidder to take adequate precautionary measures to avoid U.S. jurisdictional means. In addition, in response to commenters’ requests to expressly permit U.S. institutional holders to participate in offshore exclusionary offers without triggering U.S. tender offer rules, the SEC emphasizes that it views the ability of institutional investors to participate in an offshore offer very differently under the Williams Act than under the provisions that may apply to allow their participation in offshore securities offerings under Regulation S under the Securities Act, believing that fundamental differences between those regulatory provisions warrant different treatment. Finally, the Commission states that it expects bidders in offers for U.S. registered securities, in particular those listed on a U.S. exchange, to make every effort to include U.S. holders on the same terms as all other target holders. Exclusionary offers for securities of foreign private issuers that trade on a U.S. exchange will be viewed with skepticism where the participation of those U.S. holders is necessary to meet the minimum acceptance condition in the tender offer.
C. Vendor Placements

Finally, the Commission briefly discusses vendor placements in the Adopting Release, but only to reiterate previous guidance on the subject and to provide clarity about the factors that bidders should consider when contemplating the use of the vendor placement procedure.

In the Adopting Release, the Commission states that since the adoption of the cross-border exemptions, Tier I has afforded a method by which acquirors in cross-border offers may issue cash to U.S. target holders and that, therefore, the staff of the SEC no longer intends to issue vendor placement no-action letters regarding the registration requirements of the Securities Act. Bidders may continue to use the vendor placement procedure in accordance with the guidance set forth in the Adopting Release. The vendor placement process, where appropriately used, will avoid the need for registration of securities under the Securities Act.

Where the tender offer is subject to the equal treatment provisions of the U.S. tender offer rules, acquirors also must seek an exemption from those rules in order to offer U.S. security holders a different form of consideration than what is provided to foreign target holders. Most of the vendor placement no-action letters issued by the staff involved tender offers that were not subject to U.S. equal treatment provisions. The Commission states in the Adopting Release that, in the future, the staff will consider whether requests for relief from the equal treatment provisions are appropriate and in the best interests of U.S. security holders. The Commission states that it generally believes that cross-border tender offers eligible to be conducted under the Tier I exemption represent the appropriate circumstances under which bidders may provide cash to U.S. target holders while offering securities to foreign target holders.

Experience suggests that no-action relief for a vendor placement in the context of a Tier II offer subject to the equal treatment provisions of the U.S. tender offer rules will be very difficult to obtain.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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