

Torys on Mergers and Acquisitions

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SEC Amends Cross-Border Tender Offer Rules and Relaxes Beneficial Ownership Reporting Rules for Non-U.S. Institutional Investors

By [Leslie McCallum](#)

The SEC has amended its cross-border tender offer rules governing transactions involving non-U.S. targets. The changes relate primarily to the existing “Tier II” exemption, which offers limited relief from some of the U.S. tender offer rules if U.S. investors own 40% or less of a target’s securities.¹

Reliance on the Tier II exemption is often unnecessary in transactions involving a Canadian target because such transactions can usually take advantage of either

- the Canada-U.S. Multijurisdictional Disclosure System, which offers significantly more favourable exemptions than Tier II and is available when U.S. investors own up to 40% of a Canadian target’s securities; or
- the Tier I exemption, which offers comprehensive relief from the U.S. tender offer, registration and going-private rules, as long as no more than 10% of a target’s securities are owned by U.S. investors.

This bulletin briefly summarizes the tender offer rule changes as well as changes to the U.S. beneficial ownership reporting requirements affecting non-U.S. institutional investors.

Going-Private Transactions Under Tier I

Transactions structured as bids that qualify for the Tier I exemption are also exempt from the U.S. going-private rules.² The SEC has extended the going-private exemption to cover any kind of M&A transaction under Tier I, regardless of whether it is structured as a bid, a merger, a plan of arrangement or otherwise.

Eligibility for the Tier I and Tier II Exemptions

Before the current amendments, the date for calculating a target’s U.S. ownership to determine whether an exemption was available was the 30th day before commencing a

To discuss these issues, please contact the author.

For media calls, please contact [Stuart Wood](#), Director, Marketing & Business Development, 416.865.8205.

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¹ The SEC’s objective is to reduce conflict between U.S. and non-U.S. legal requirements so that U.S. securityholders are less likely to be excluded from cross-border transactions. The U.S. exemptions are generally conditioned on the acquiror treating U.S. securityholders as favourably as other securityholders.

² These rules impose heightened disclosure requirements when the acquiror and target are related parties, similar to the protections afforded minority shareholders under MI 61-101 in Ontario and Quebec.

transaction. The new rules permit acquirors to calculate a target's U.S. ownership as of a date within 60 days before and 30 days after a transaction is publicly announced (or, where the acquiror is unable to make the calculation within this period, it may use a date within 120 days before public announcement). Furthermore, the holdings of significant securityholders (except for the bidder) will no longer have to be excluded from the calculation, which should result in more transactions qualifying under the 10% and 40% thresholds. Where an acquiror is unable to calculate U.S. ownership, including in hostile transactions, the SEC has adopted an alternative test for Tier I and Tier II eligibility, based on the proportion of the target's trading volume in the United States.

Expansion of the Tier II Exemption

The SEC has expanded the Tier II exemption so that a bidder may

- purchase securities under a separate, non-U.S. tender offer, provided that the consideration in the U.S. tender offer is the same as in the non-U.S. tender offer and the procedural terms of the U.S. tender offer are as favourable as those of the non-U.S. tender offer;³
- usually commence a bid as soon as the SEC registration statement is filed, if share consideration is being offered (although no securities may be purchased pursuant to the bid until the SEC has declared the registration statement effective);
- sometimes terminate an initial offering period before its scheduled expiration, if all offer conditions are satisfied;
- permit U.S. shareholders to participate in a separate foreign offer if required by foreign law, provided that adequate cautionary disclosure is given;
- suspend withdrawal rights after an offer has expired while tendered securities are being counted, if certain conditions are met; and
- implement a subsequent offering period exceeding 20 business days and otherwise modify the subsequent offering in various ways to reduce conflict between U.S. and foreign law.

The SEC has also provided guidance on the following issues that frequently arise in cross-border tender offers: (i) a bidder's ability to reduce or waive a minimum acceptance condition without providing withdrawal rights; (ii) the application of the U.S. "all-holders" rule to non-U.S. securityholders; (iii) a bidder's ability to exclude U.S. holders from a tender offer for a non-U.S. target's securities; and (iv) the appropriate criteria for using "vendor placements" to offer cash instead of securities to U.S. holders in order to avoid U.S. registration.

³ The new rules also permit acquirors, their affiliates, and affiliates of financial advisers to purchase securities outside the United States during a Tier II tender offer, if permitted by the target's home country law, provided that (i) in the case of purchases by acquirors or their affiliates, the tender offer price is increased to match any greater consideration paid outside the offer; and (ii) in the case of purchases by affiliates of financial advisers, certain informational and operational barriers between the financial adviser and the affiliate are maintained, the adviser has an affiliate that is registered with the SEC as a broker or dealer, and the purchases are not made to facilitate the tender offer.

Beneficial Ownership Reporting by Non-U.S. Institutional Investors

Acquirors are generally required to file Schedule 13D within 10 days of acquiring more than 5% of a class of SEC-registered, voting equity securities. Schedule 13D requires extensive disclosure. However, U.S. institutional investors holding securities in the ordinary course of business, and not with the purpose or effect of changing or influencing control of the issuer, are permitted to file Schedule 13G – a substantially abbreviated document compared with Schedule 13D – within 45 days of the end of the year. Until now, non-U.S. institutions enjoyed this exemption only if they obtained individual no-action relief from the SEC. To remedy the disparity, the SEC has amended its rules to permit non-U.S. institutions that

- are regulated comparably to their U.S. counterparts, and
- are holding securities in the ordinary course of business and not with a control purpose

to report their holdings within 45 days of the end of the year on Schedule 13G without obtaining advance exemptive relief from the SEC. **1**