

GETTING U.S. SECURITY HOLDERS TO THE PARTY: THE SEC'S CROSS-BORDER RELEASE FIVE YEARS ON*

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1. INTRODUCTION

Cross-border takeovers can be defined as tender offers, exchange offers, business combinations, schemes of arrangement, and other types of acquisition transactions which involve a non-U.S. domiciled corporate entity that has security holders resident in the United States.¹ Cross-border takeovers have increasingly presented unique and troubling issues over and above the usual complicated and vexatious problems of purely domestic takeovers.² The reasons for this stem primarily from the fact that take-

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¹ The broad outline of the Securities and Exchange Commission ("SEC") definition of a takeover is set forth within Rule 145, 17 C.F.R. § 230.145 (2005), promulgated under the Securities Act of 1933, as amended ("Securities Act"), 15 U.S.C. §§ 77a-77aa (2000). Rule 145 sets forth the SEC's definition of what constitutes a takeover transaction within the parameters of what constitutes an offer, offer to sell, offer for sale, or sale for purposes of the availability of the protections of registration under the Securities Act when "there is submitted to security holders a plan or agreement pursuant to which such holders are required to elect, on the basis of what is in substance a new investment decision, whether to accept a new or different security in exchange for their existing security." 17 C.F.R. § 230.145, preliminary note (2005).

² For a review of the issues associated with domestic takeovers see Dennis J. Block, *Public Company M&A: Recent Developments in Corporate Control, Protective*

over rules and securities rules are almost uniformly applied by jurisdictions outside the United States on the basis of the acquiree's jurisdiction of incorporation, whereas the U.S. takeover rules³ and U.S. securities rules⁴ are triggered based upon the use of U.S. jurisdictional means.⁵ This has historically raised difficulties whenever

Mechanisms and Other Deal Protection Techniques, in CONTESTS FOR CORPORATE CONTROL 2005: CURRENT OFFENSIVE & DEFENSIVE STRATEGIES IN M&A TRANSACTIONS, at 9-108 (PLI Corp. Law and Practice, Course Handbook Series No. B-1462, 2005) (examining recent developments in statute and case law and their influence on the structure and prosecution of U.S. takeovers); Meredith M. Brown et al., *Cross-Border Insurance M&A: Inbound and Outbound U.S. Acquisitions and Global Mergers of Equals*, in INSURANCE M&A 1999: A PRACTICAL APPROACH TO STRUCTURING COMPLEX TRANSACTIONS, 467-469 (PLI Corp. Law and Practice, Course Handbook Series No. B-1146, 1999) (reviewing general issues associated with cross-border takeovers, particularly in the insurance industry); Rod J. Howard, *M&A and Securities Law—Selected Recent Developments and Overview*, in UNDERSTANDING THE SECURITIES LAWS 2004, 1251-1279 (PLI Corp. Law and Practice, Course Handbook Series No. B-1443, 1999) (discussing recent developments in U.S. securities laws and their impact on takeover transactions); Samuel C. Thompson, Jr., *Introduction to this Symposium and a Guide to Issues in Mergers and Acquisitions*, 51 U. MIAMI L. REV. 533 (1997) (providing a broad overview of issues associated with U.S. takeovers).

³ "U.S. takeover rules" as used in this Article are the governing rules for U.S. tender offers set forth in the Williams Act, as amended. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (2000 & Supp. II 2002). The Williams Act prescribes the filing, disclosure, dissemination, and procedural requirements for U.S. tender offers and, with respect to tender offers for securities by unaffiliated third parties, is incorporated in Sections 14(d) and 14(e) and Regulations 14D and 14E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). *Id.* § 78a-78u. Section 14(d) and Regulation 14D apply only to third party tender offers for equity securities registered under Section 12 of the Exchange Act, whereas the requirements of Section 14(e) and Regulation 14E apply to all tender offers extended into the United States. Broadly speaking, if a corporation has securities listed on the New York Stock Exchange ("NYSE") or quoted on Nasdaq, a tender offer for those securities will need to comply with Section 14(d) and Regulation 14D as well as Section 14(e) and Regulation 14E. In contrast, an issuer or third party tender offer for equity securities unregistered under Section 12 of the Exchange Act or for debt securities would generally need to comply only with Section 14(e) and Regulation 14E. For simplicity purposes, this Article focuses on third party tender offers and not issuer tender offers. It is worth noting, however, that when an issuer makes a tender offer for its own equity securities—and that issuer has any class of equity security registered under Section 12 of the Exchange Act—the issuer tender offer is governed by Section 13(e) and the related rules under the Exchange Act (which are comparable in certain respects to the third party tender offer rules under Section 14(d) and Regulation 14D).

⁴ "U.S. securities rules" as used in this Article refer to the securities offering requirements under the Securities Act. For purposes of this Article, references to the U.S. takeover rules are, unless otherwise specified, also references to the relevant U.S. securities rules to the extent that they are applicable.

⁵ The SEC has historically applied the U.S. takeover rules based on whether <https://scholarship.law.upenn.edu/jil/vol26/iss3/3>

a cross-border takeover was extended into the United States as conflicting and inapposite U.S. takeover rules were automatically applied wholesale to cross-border takeovers with little connection to the United States.⁶ In the past, the result has been, more often than not, that U.S. persons have been excluded from cross-border takeovers in order to avoid the application of these U.S. rules.⁷

The Securities and Exchange Commission ("SEC"), has long recognized and claimed, starting with the Concept Release on Multinational Tender Offer and Exchange Offers in 1990,⁸ that the habitual exclusion of U.S. persons from cross-border takeovers in or-

U.S. jurisdictional means are employed. Such jurisdictional means could include sending takeover documents to U.S. security holders by mail. The SEC has taken a broad position on what constitutes such means and, for example, has asserted U.S. jurisdiction to be applicable whenever it is reasonably foreseeable that excluded U.S. persons will sell their securities into the secondary market in response to a takeover offer. Cross-Border Concept Release, Securities Act Release No. 6,866, Exchange Act Release No. 28,093, International Series Release No. 127, [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,606, at 80,872 n.2 (June 6, 1990) [hereinafter Cross-Border Concept Release]. The U.S. courts have taken a somewhat narrower view than the SEC's position. See *infra* note 18, for a discussion of federal court cases addressing these issues. See also International Tender and Exchange Offers, Securities Act Release No. 6897, Exchange Act Release No. 29,275, Trust Indenture Act Release No. 2266, International Series Release No. 285, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,803, at 81,746 n.41 (June 5, 1991) [hereinafter International Release] (noting that while the United States, Canada, Japan, and France regulate takeover offers on the basis of domestic market interest or holdings, most other jurisdictions regulate takeovers of domestic companies only); Edward F. Greene et al., *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 U. MIAMI L. REV. 823 (1997) (discussing frequent areas of overlap and conflict in regulation of cross-border takeovers due to, among other factors, differing jurisdictional approaches).

⁶ This problem was exacerbated by the SEC's historical position that the application of the U.S. takeover and securities laws is not dependent upon the materiality of the U.S. shareholder base of the acquiree. Accordingly, prior to the adoption of the Cross-Border Release, participants in cross-border takeovers that did not appropriately exclude the United States were required to comply with U.S. takeover laws without regard to materiality thresholds (e.g., even in circumstances where U.S. holders comprised 1% or less of the holders of the subject securities of the cross-border takeover). See Cross-Border Tender Offerings, Business Combinations and Rights Offerings, Securities Release No. 7,611, Exchange Act Release No. 40,678, International Series Release No. 1,171, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,060, at 81,058-59 (Nov. 13, 1998) [hereinafter Cross-Border Proposing Release] (discussing the difficulties associated with compliance with U.S. securities laws in takeovers where U.S. holdings in the acquiree are *de minimis*).

⁷ See discussion *infra* Section 2 for an in-depth analysis of this historical trend.

⁸ Cross-Border Concept Release, *supra* note 5, at 80,872.

der to avoid the application of U.S. takeover rules was a problem that needed to be addressed and resolved. On October 22, 1999, the SEC, in the Cross-Border Adopting Release ("Cross-Border Release"), adopted new rules, effective January 24, 2000, relating to cross-border tender and exchange offers, business combinations, and rights offerings ("Cross-Border Rules").⁹ These rules were enacted as part of an ambitious program by the staff of the SEC to shepherd the U.S. federal securities laws into the international age by facilitating the inclusion of U.S. holders in cross-border takeovers,¹⁰ transactions in which U.S. holders were routinely ex-

⁹ Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Securities Act Release No. 7,759, Exchange Act Release No. 42,054, Trust Indenture Act Release No. 2,378, International Series Release No. 1,208, [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,214 (Oct. 22, 1999) [hereinafter Cross-Border Release]. The Cross-Border Release adopted with, certain modifications, the Cross-Border Proposing Release. *Id.* at 82,540-41.

¹⁰ The Cross-Border Release formed part of the SEC's efforts to modernize and simplify the U.S. takeover rules applicable to cross-border takeovers ("Cross-Border Rules"). The SEC concurrently adopted comprehensive revisions to the rules and regulations generally applicable to all takeovers that were designed to ease and update the securities regulatory processes governing such transactions. Regulation of Takeovers and Security Holder Communications, Securities Act Release No. 7760, Exchange Act Release No. 42,055, Investment Company Act Release No. 24,107, [1999-2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,215 (Oct. 22, 1999) [hereinafter M&A Release]. These two releases, adopted in October 1999, to date remain the primary SEC rulemaking action in this arena. Since this time, the staff of the SEC has provided limited interpretive guidance on the Cross-Border Rules. *See, e.g.*, The Third Supplement to the SEC's Division of Corporate Finance Manual of Publicly Available Telephone Interpretations, <http://www.sec.gov/interps/telephone/phonesupplement3.htm> (July 2001) [hereinafter Third Supplement] (setting forth certain SEC staff interpretations of the Cross-Border Rules adopted in the Cross-Border Release). The SEC has also issued ad hoc guidance in various cross-border takeovers through publication of various no-action and exemptive letters pursuant to which the SEC granted relief from the U.S. takeover rules not provided for under the Cross-Border Rules. *See, e.g.*, Harmony Gold Mining Company, Ltd., SEC No-Action Letter, 2004 WL 2809186 (Nov. 19, 2004) [hereinafter Harmony Letter] (concerning the takeover of Gold Fields Limited, a company organized under the laws of South Africa, by Harmony Gold Mining Company Limited, a company organized under the laws of South Africa); Sanofi-Synthélabo S.A., SEC No-Action Letter, 2004 WL 1351302 (June 10, 2004) [hereinafter Sanofi Letter] (concerning the takeover of Aventis S.A., a *société anonyme* organized under the laws of France, by Sanofi-Synthélabo S.A., a *société anonyme* organized under the laws of France); UCB S.A., SEC No-Action Letter, 2004 WL 1161232 (May 19, 2004) [hereinafter UCB Letter] (concerning the takeover of Celltech Group plc, a public limited company organized under the laws of England and Wales, by UCB S.A., a company organized under the laws of Belgium) SERENA Software, Inc., SEC No-Action Letter, 2004 WL 842524 (Apr. 13, 2004) (concerning the takeover of Merant plc, a public limited company organized under the laws of England and Wales, by SERENA Software, Inc., a corpora-

cluded.¹¹ The Cross-Border Rules accomplished this task in two

tion organized under the laws of the State of Delaware); BCP Crystal Acquisition GmbH & Co., SEC No-Action Letter, 2004 WL 253710 (Feb. 3, 2004) [hereinafter *Celanese Letter*] (concerning the takeover of Celanese AG, a corporation organized under the laws of Germany, by BCP Crystal Acquisition GmbH & Co., a limited partnership organized under the laws of Germany); Alcan Inc., SEC No-Action Letter, 2003 WL 22480558 (Oct. 8, 2003) [hereinafter *Alcan Letter*] (concerning the takeover of Pechiney S.A., a société anonyme organized under the laws of France, by Alcan Inc., a corporation organized under the laws of Canada); Celltech Group plc, SEC No-Action Letter, 2003 WL 731945 (Mar. 3, 2003) (concerning the takeover of Oxford GlycoSciences plc, a public limited company organized under the laws of England and Wales, by Celltech Group plc, a public limited company organized under the laws of England and Wales); RWE Aktiengesellschaft, SEC No-Action Letter, 2002 WL 1603139 (July 22, 2002) (concerning the takeover of Innogy Holdings plc, a public limited company organized under the laws of England and Wales, by RWE Aktiengesellschaft, a corporation organized under the laws of Germany); Serono S.A., SEC No-Action Letter, 2002 WL 31116135 (Sept. 12, 2002) [hereinafter *Serono Letter*] (concerning the takeover of Genset S.A., a société anonyme organized under the laws of France, by Serono S.A., a société anonyme organized under the laws of Switzerland); Technip S.A., SEC No-Action Letter, 2001 WL 1414994 (Aug. 30, 2001) (concerning the takeover of Coflexip S.A., a société anonyme organized under the laws of France, by Technip S.A., a société anonyme organized under the laws of France); Schlumberger Ltd., SEC No-Action Letter, 2001 WL 771006 (July 2, 2001) (concerning the takeover of Sema plc, a public limited company organized under the laws of England and Wales, by Schlumberger Limited, a company organized under the laws of the Netherlands); Amerada Hess Corp., SEC No-Action Letter, 2000 WL 33226265 (Dec. 13, 2000) (concerning the takeover of LASMO plc, a public limited company organized under the laws of England and Wales, by Amerada Hess Corporation, a corporation organized under the laws of the State of Delaware); Air Products and Chemicals, Inc. and L'Air Liquide, S.A., SEC No-Action Letter, 2000 WL 345732 (Mar. 10, 2000) (concerning the takeover of The BOC Group plc, a public limited company organized under the laws of England and Wales, by Air Products and Chemicals, Inc., a corporation organized under the laws of the State of Delaware, and L'Air Liquide S.A., a société anonyme organized under the laws of France). Other than these actions, no new SEC regulation or other pronouncements in the takeover arena have been forthcoming. Subsequent events, in particular, the scandals involving Enron and infamous others; the consequent adoption of the Sarbanes-Oxley Act and related SEC rulemaking, including recent securities offering reform; as well as the SEC's limited resources appear to have effectively eliminated, in the immediate short term, the possibility that the SEC will adopt new rules applicable to cross-border takeovers or otherwise revise the Cross-Border Rules.

¹¹ In the words of the SEC:

Today, the Commission is adopting exemptive rules that are intended to encourage issuers and bidders to extend tender and exchange offers, rights offerings and business combinations to the U.S. security holders of foreign private issuers. The purpose of the exemptions adopted today is to allow U.S. holders to participate on an equal basis with foreign security holders. In the past, some jurisdictions have permitted exclusion of U.S. holders despite domestic requirements to treat all holders equally

discrete ways. First, the rules exempted certain cross-border takeovers from the application of the U.S. takeover rules altogether. Second, for takeovers not so exempted, the rules set forth harmonizing exemptions with respect to certain historical conflicts between the U.S. takeover rules and those of non-U.S., primarily European, jurisdictions.¹²

Five years on, the full impact of the Cross-Border Rules on the international market remains uncertain and, ironically, rules that were expressly intended to facilitate the inclusion of U.S. security holders in cross-border takeovers have, in many instances, encouraged exclusion.¹³ There are several reasons for this, including a slow shift from the prior market practice of exclusionary offers, the seemingly simpler structure and ample precedent for exclusionary offers, the desire of non-U.S. lawyers to avoid the involvement of U.S. lawyers, and continuing concern over potential liability and litigation in the United States.¹⁴ Importantly, however, the reasons also include a lack of awareness and knowledge of the Cross-Border Rules, and the difficulty and sometimes impossibility of acquirors availing themselves of the exemptions.¹⁵

on the basis that it would be impracticable to require the bidder to include U.S. holders. The rules adopted today are intended to eliminate the need for such disadvantageous treatment of U.S. investors.

Cross-Border Release, *supra* note 9, at 82,539.

¹² *Id.* at 82,544-45.

¹³ For further discussion of these apparent defects, see discussion *infra* Section 4.

¹⁴ See, e.g., Tony Tassell, *Europeans Fall Out of Love with Listing in New York: Changes in Corporate Governance Mean Many Foreign Companies See Less Value in Once-Prized Places on Wall Street*, FIN. TIMES, Dec. 3, 2004, at 24 (noting the declining popularity of secondary listings by European companies on U.S. stock markets due to, among other factors, fear of increased liability exposure and costs as a consequence of Sarbanes-Oxley and other regulation and increased enforcement under U.S. securities rules).

¹⁵ The slow take-up is objectively evidenced by a count of the number of cross-border takeovers that have actually relied upon the exemptions embodied within the Cross-Border Rules. As of October 17, 2005, documentation relating to 812 transactions conducted under the Cross-Border Rules have been furnished to the SEC during this five-year period. However, in the Cross-Border Proposing Release the SEC estimated that 824 transactions per year would file documentation in reliance upon the Cross-Border Rules. Cross-Border Proposing Release, *supra* note 6, at n.150. The treatment of U.S. holders in these offers has not been analyzed, but it can be presumed that the majority of these transactions excluded U.S. persons and/or holders resident in the United States. These figures do not account for Tier I cash tender offers for securities not registered under Section 12 of the Exchange Act—so-called 14E cash offers because they are subject only to Section 14(e) and Regulation 14E (“14E Offers”). These are the simplest of offers

This Article attempts, on the basis of five years of practice and legal development, to pinpoint those areas where the Cross-Border Rules appear to be working; highlight where changes might be beneficial; and suggest possible improvements, reforms, and revisions that would better provide participants with the flexibility that the SEC originally intended. Ultimately, the conclusions and analysis herein, although critical, are not pessimistic. The general purpose of the Cross-Border Rules, and their broad outline, are sensible. The devil is mainly in the details.

In order to better understand the SEC's policy goals as stated in the Cross-Border Release, Section 2 of this Article analyzes the historical development of cross-border takeovers and SEC regulation thereof. The Cross-Border Rules are then examined in Section 3 of this Article, both with respect to the policy goals considered by the SEC when adopting the Cross-Border Release and the principal exemptions available to participants. Section 4 of this Article examines where the Cross-Border Rules have created uncertainty or difficulties for participants and suggests ways in which the rules could be modified to better permit the inclusion of U.S. security holders in cross-border takeovers and provide participants with the flexibility that the SEC originally intended. The conclusion is presented in Section 5 of this Article.

to conduct under the Cross-Border Rules as minimal restrictions are applicable and there is no SEC submission requirement under the Williams Act or the Cross-Border Rules. Because there is no general SEC submission requirement for these takeover offers, numbers are hard to ascertain. However, again, from a subjective viewpoint, because of their simplicity, practitioners have observed that 14E Offers reliant upon the Tier I exemption are increasingly common in Europe, particularly in Germany where the new takeover code effectively bars exclusionary offers, and therefore extension of a cross-border takeover offer into the United States is effectively the only option. See Celanese Letter, *supra* note 10, at *4-*9 (describing the German offer process and the applicable German takeover code). Interestingly, there has also been a dearth of practitioner and scholarly analysis of the Cross-Border Rules themselves. A Westlaw search undertaken on October 17, 2005, reveals that only one law review article, a student note, has been published with respect to the Cross-Border Rules. See Julian T. Perlmutter, Note, *The New Rules on Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings: Competition or Harmonization?*, 22 MICH. J. INT'L L. 169 (2000) (examining the Cross-Border Rules in light of worldwide regulatory standards with respect to cross-border takeovers). A similar search of law periodicals, practicing law institute publications and legal newspapers produced a list of eleven practitioner pieces. A review of these articles, however, found them to be principally explanatory rather than analytical.

2. A HISTORY OF EXCLUDING U.S. HOLDERS

This Section places the emergence and historical development of the cross-border takeover against a backdrop of conflicts between U.S. takeover rules and similar rules of an acquiror's jurisdiction. As part of this discussion, this Section discusses the increasing utilization of the exclusionary offer to partially remedy these issues as well as SEC rulemaking attempts in this arena prior to the adoption of the Cross-Border Release. Finally, the backdrop for the SEC response is set, with a survey of the increasing internationalization of the securities markets throughout the 1990s and the consequent repeated tension between conflicting and overlapping U.S. and non-U.S. takeover rules.

Prior to 1989, the U.S. regulatory and practical experience with integrated cross-border takeovers had been haphazard at best.¹⁶ The conflicts between the U.S. takeover rules and similar non-U.S. rules, the perception that compliance with U.S. rules would be unduly onerous, and a concern about the active plaintiff's bar in the United States discouraged the development of an integrated cross-border regime in which U.S. and non-U.S. holders could participate equally.¹⁷ In transactions where U.S. share ownership was minimal, the benefit of excluding U.S. security holders was often perceived as outweighing the benefit of greater shareholder participation. As a result, participants in cross-border takeovers often decided to exclude U.S. holders from participation therein, what we refer to in this Article as an "exclusionary offer."¹⁸

¹⁶ For a thorough survey of SEC regulatory action on these issues prior to the Cross-Border Release, see Paul Michalski, *Proposals on Cross-Border Rights Offers, Tender Offers; New Form 20-F; and Developments under Regulation S*, in CURRENT SEC & CROSS-BORDER M&A DEVELOPMENTS, at 139, 160-162 (PLI Corp. Law and Practice, Course Handbook Series No. B-1154, 1999).

¹⁷ See Cross-Border Concept Release, *supra* note 5, at 80,871-72 (observing that acquirors in cross-border takeovers have historically tended to exclude U.S. persons due to a perception that compliance with the U.S. takeover rules would be unduly costly and burdensome).

¹⁸ For example, in *Plessy Co. plc v. Gen. Elec. Co. plc*, 628 F. Supp. 477 (D. Del. 1986), the General Electric Company plc ("GE"), a public limited company organized under the laws of England and Wales made an offer for the Plessy Company plc ("Plessy"), a public limited company organized under the laws of England and Wales. Although Plessy's shares were listed and traded on the NYSE in the form of American Depositary Securities and registered under Section 12 of the Exchange Act, approximately 98% of Plessy's shares were held outside of the United States. That is not to say that Plessy had no U.S. security holders: approximately three thousand persons located in the United States held Plessy shares. However, in rejecting Plessy's request for a preliminary injunction to obligate GE to comply

The harbinger of an integrated cross-border regime would be a nonpareil transaction in which the number of securities held by an acquirer's U.S. security holders was substantial enough that U.S. security holders could not, on either a commercial or legal basis, be ignored. This most certainly occurred in 1989 with the announced takeover of Jaguar plc by the Ford Motor Company. On November 2, 1989, Ford announced an agreed \$2.38 billion cash tender offer for all of Jaguar's outstanding ordinary securities. Jaguar's primary market was the London Stock Exchange. However, unlike in other prior cross-border takeovers, Jaguar had a large U.S. shareholder presence: Jaguar's American Depositary Securities ("ADSs")¹⁹ were quoted on the Nasdaq National Market System, its ordinary securities were registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act"),²⁰ at least 25% of Jaguar's security holders were located in the United States, and Ford itself, a U.S. domiciled company, held approximately 13.4% of Jaguar's securities.²¹ Faced with this substantial U.S. presence, Ford

with the Williams Act, the Court concluded that "it would be a perversion of the principles of the Williams Act to delay the processes of a quintessentially British takeover when American investors and interests are but barely touched." *Id.* at 497. See also *John Labatt Ltd. v. Onex Corp.*, 890 F. Supp. 235, 245 (S.D.N.Y. 1995) ("Where . . . a tender offer is totally foreign and neither solicits nor will accept tenders by U.S. shareholders, it is not a tender offer directed to U.S. shareholders and the threshold jurisdictional requirement of Section 14(e) is not met."); Amendments to Tender Offer Rules; All-Holders and Best-Price, Exchange Act Release No. 6653 [1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,016, at 88,189-90 (July 17, 1986) [hereinafter Amendments to Tender Offer Rules] (announcing SEC acknowledgment that U.S. security holders could be excluded from cross-border takeovers). *But see* *Consol. Gold Fields plc v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989), *cert. denied*, 492 U.S. 939 (1989) (holding that a transaction with a "substantial effect" on U.S. residents within the United States was sufficient to allow assertion of subject matter jurisdiction where U.S. residents held 2.5% of the acquirer's outstanding shares with a market value of approximately \$120 million). See generally Meredith M. Brown & Simon MacLachlan, *When Worlds Collide: The Reconciliation of Conflicting Requirements in Cross-Border Acquisitions*, 19 SEC. REG. L. J. 99 (1991) (discussing the SEC's and federal court's guiding principles in asserting jurisdiction over cross-border takeovers).

¹⁹ American Depositary Securities ("ADSs") are securities issued in the United States, evidenced by American Depositary Receipts, which represent an interest in a security issued by a non-U.S. company. See 17 C.F.R. § 230.405 (2005) (setting forth the Securities Act definition of a depositary share). See also Mark A. Saunders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 *FORDHAM INT'L L.J.* 48 (1993) (providing a comprehensive overview of ADSs).

²⁰ 15 U.S.C. § 78l (2000).

²¹ See Steven Prokesch, *Ford to Buy Jaguar for \$2.38 Billion*, *N.Y. TIMES*, Nov. 3, 1989, at D1 (stating that approximately 26% of Jaguar's shares are held in the form
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decided to extend its offer into the United States to U.S. security holders.²²

The Ford offer was required to comply with the governing takeover codes in two jurisdictions: the Williams Act²³ in the United States and the U.K. City Code on Takeovers and Mergers and the Rules Governing Substantial Acquisition of Securities ("City Code") issued by the U.K. Panel on Takeovers and Mergers

of ADSs with United States residents holding an additional 20% in the form of ordinary shares traded on the London Stock Exchange and Ford currently owning 13.4% of Jaguar); *Ford-Jaguar*, N.Y. TIMES, Dec. 12, 1989, at D5 (Ford has acquired 77.4% of the outstanding shares (including shares in the form of ADSs) of Jaguar including Ford's 13% shareholding acquired before commencement of the offer); Kevin Done, *Jaguar Holders Pave Way for Ford Takeover*, FIN. TIMES, Dec. 2, 1989, at 8 (documenting the events surrounding Ford's purchase of Jaguar). See also Cross-Border Concept Release, *supra* note 5, at 80,873 (discussing the issues arising from the Ford offer).

²² Where the participation of U.S. persons is essential to the success of the transaction (*e.g.*, in order to satisfy a minimum tender condition in a takeover offer), it is more likely that the SEC will view the offer as having been extended into the United States, even if steps are taken by the transaction participants to restrict publicity and other information about the takeover. See *supra* note 6, for a discussion of the SEC position with respect to exclusionary offers and the application of U.S. takeover rules. In light of the high percentage of securities held by U.S. persons, the participation of Jaguar's U.S. security holders would likely have been considered critical to the success of the takeover offer by both the participants, Jaguar and Ford, and the regulators, the SEC and the U.K. Panel on Takeovers and Mergers in the United Kingdom ("Takeover Panel"). As a result, it would likely have been difficult to structure the Ford offer as a U.S. exclusionary offer and take the position that U.S. jurisdictional means were not being used, even if the parties had so desired. It is interesting to note that the SEC position in the Cross-Border Concept Release, specifically that it would consider U.S. jurisdictional means to have been used whenever it is reasonably foreseeable that excluded U.S. persons would sell their securities into the secondary market in response to an offer, Cross-Border Concept Release, *supra* note 5, at 80,871 n.2, is quite expansionary and not necessarily consistent with *Plessy*. However, it may have some continued relevance as the SEC also indicated in the Cross-Border Concept Release that to the extent it is willing to grant exemptive and no-action relief in order to reconcile conflicts between applicable U.S. and non-U.S. rules, it is also more likely to assert jurisdiction in situations where acquirors structure their transactions as exclusionary offers in order to avoid the application of U.S. takeover rules. *Id.* at 80,871. Whether a U.S. court, considering *Plessy*, would agree with the assertion of jurisdiction by the SEC in such situations is far from clear, however. As a practical matter, there remains some uncertainty as to when a cross-border takeover can legitimately be structured as a U.S. exclusionary offer, particularly in instances where U.S. participation is critical to the success of the offer and in light of the availability of the Cross-Border Rules. Clarification on this point by the SEC would assist participants in structuring their transactions.

²³ See *supra* note 3 for a detailed discussion of the Williams Act requirements.

in the United Kingdom ("Takeover Panel").²⁴ Under the Williams Act, the acquiror, in this case Ford, was required to prepare and file with the SEC a tender offer statement on Schedule TO (at that time known as a Schedule 14D-1).²⁵ The acquiree, in this case, Jaguar, was also required to file a response statement on Schedule 14D-9.²⁶ In addition, the Williams Act imposes, and imposed on Ford, numerous procedural requirements, including that the offer commence within five U.S. business days of its announcement,²⁷ be kept open for a minimum of twenty U.S. business days,²⁸ and be open to all holders.²⁹ The Williams Act also requires that the acquiror and its affiliates make no purchases outside the offer.³⁰ Among other things, these U.S. requirements were designed to provide U.S. security holders with procedural and substantive protections from potentially abusive and manipulative practices through clear rules of conduct.³¹ In the Ford offer (and in subse-

²⁴ The City Code is a voluntary code which effectively has the force of law. It is administered in the United Kingdom by the Takeover Panel, a self-regulatory body of market professionals. See generally The Takeover Panel, The Panel on Takeovers and Mergers, available at <http://www.thetakeoverpanel.org.uk/> (last visited Oct. 3, 2005) (describing the role and status of the Takeover Panel and the City Code).

²⁵ 17 C.F.R. § 240.14d-100 (2005).

²⁶ *Id.* § 240.14d-9.

²⁷ 17 C.F.R. § 240.14d-3 (1999) (subsequently repealed). See M&A Release, *supra* note 10, at 82,589-90 (discussing repeal of the Rule 14d-3 requirement that a takeover offer consisting solely of cash consideration commence within five business days of announcement).

²⁸ 17 C.F.R. § 240.14e-1(a) (2005).

²⁹ *Id.* § 240.14d-10(a)(1). There were a number of other procedural obligations applicable to the offer under the U.S. takeover rules. See *id.* § 240.14d-7(a) (requiring that withdrawal rights be provided so long as the offer was pending); *id.* § 240.14e-1(d) (requiring that a notice of extension of the offer comply with certain informational requirements); *id.* § 240.14e-1(c) (requiring that the consideration offered be promptly paid); *id.* § 240.14d-4 (requiring that the offer remain open for at least five U.S. business days in the event of any material change to the terms of the offer); *id.* § 240.14e-1(b) (requiring that the offer remain open for ten U.S. business days in the event of a revision to the offer consideration).

³⁰ *Id.* § 240.14e-5. At the time of the Ford offer this rule was designated Rule 10b-13 of the Securities Act. 17 C.F.R. § 240.10b-13 (1999). Rule 10b-13 was originally promulgated by the SEC under Sections 10, 13 and 14 of the Exchange Act. For a discussion of the historical rationale behind Rule 10b-13 and the changes reflected in the new Rule 14e-5, see M&A Release, *supra* note 10, at 82,608-09.

³¹ The Williams Act was intended, among other purposes, to alleviate "undue pressure on security holders to act hastily and to accept an offer, before management or any other group has an opportunity to present opposing argument or competing offers." *Full Disclosure of Corporate Equity Ownership and in Corporate*

quent cross-border takeovers) the U.S. requirements existed alongside sometime conflicting and differing U.K. disclosure and procedural requirements.

The applicable U.S. rules conflicted in several aspects with the City Code.³² Under the City Code, for example, tendered securities cannot be withdrawn in the period after the offer conditions have been satisfied or waived and the offer has been declared "unconditional, as to acceptances."³³ This City Code restriction on withdrawal rights conflicts, and conflicted at the time of the Ford offer, with the U.S. requirement under the Williams Act that withdrawal rights be available at all times during the pendency of an offer.³⁴ In addition, in order to comply with the differing disclosure and procedural requirements in the United Kingdom and the United States, Ford used a common technique in non-exclusionary cross-border takeovers and structured its offer as two distinct offers cross-conditional on each other: a U.K. offer for U.K. and non-U.S. persons made in compliance with the City Code using a U.K. compliant disclosure document, and a U.S. offer for U.S. persons made in compliance with the Williams Act using a disclosure document compliant with Schedule TO (at that time known as a Schedule 14D-1).³⁵ However, this dual offer structure technically violated

Banking and Currency, 90th Cong., 21 (1967). For example, the minimum notice periods under the Williams Act provide security holders, and the market, time to assess material information and make informed investment decisions. In the years following the 1968 passage of the Williams Act, the SEC has adopted a number of rules designed to further implement the Williams Act principles of security holder protection and informed choice, including: in 1979, Rule 14e-1(a) under the Exchange Act requiring tender offers to remain open for at least twenty U.S. business days; in 1982, Rule 14d-8 under the Exchange Act requiring that partial offers be pro-rated; in 1986, Rule 14d-7 under the Exchange Act requiring acquirors to provide withdrawal rights throughout the offer period for tender offers for listed equity securities; and Rule 14d-10 under the Exchange Act, the so-called "all holders/best price" rule. See generally Mark L. Berman, *SEC Takeover Regulation Under the Williams Act*, 62 N.Y.U. L. REV. 580 (1987) (discussing the Williams Act principles and history of SEC regulation thereunder).

³² See International Release, *supra* note 5, at 81,761-62 (highlighting principal points of conflict between the Williams Act and the City Code). For an overview of the City Code see generally Charles M. Nathan & Michael R. Fischer, *An Overview of Takeover Regimes in the United Kingdom, France and Germany* (Latham & Watkins, 2003), http://www.lw.com/resource/publications/_pdf/pub485.pdf.

³³ THE CITY CODE ON TAKEOVERS AND MERGERS AND THE RULES GOVERNING SUBSTANTIAL ACQUISITIONS OF SECURITIES RULE, 6 Palmer's Company L. 97, at Rule 34 (1992) [hereinafter the City Code].

³⁴ 17 C.F.R. § 240.14d-7(a) (2005).

³⁵ Typically, in a non-exclusionary, cross-border takeover, the U.S. offer is

the all-holders rule set forth in Rule 14d-10 of the Exchange Act³⁶ which provides that an offer must be made to all acquiree security holders wherever located and the prohibition on purchases outside the offer set forth in Rule 14e-5 of the Exchange Act (then Rule 10b-13), since U.K. holders could not tender into the U.S. offer and the purchases made in the U.K. offer constituted purchases outside the U.S. offer and vice-versa.

These and other issues that to this day vex practitioners in cross-border takeovers had to be confronted and solved as matters of first impression: differing and conflicting U.K. and U.S. rules sorted and harmonized, offering documentation prepared to comport with the requirements of multiple jurisdictions, and timing differentials between the U.K. and U.S. rules reconciled. All of the foregoing needed to occur among parties and legal advisors of variant nationalities from differing cultures, operating using different terminology, and pursuant to different and sometimes conflicting legal regimes.³⁷ U.K. and U.S. regulators were also forced to interact on unprecedented levels and to consider and grant new types of relief from the strict application of national takeover rules. Both the SEC and the Takeover Panel would eventually provide exemptive and no-action relief on both a formal and informal basis to permit the Ford offer to legally proceed in its respective jurisdictions.³⁸

made to all U.S. holders of securities wherever located and all non-U.S. and U.S. holders of ADSs wherever located. For a further discussion of this mechanic, see *infra* note 164 and accompanying text.

³⁶ 17 C.F.R. § 240.14d-10(a)(1) (1989).

³⁷ For example, in the Ford offer the U.K. government waived its right to block the takeover through its "golden share" in Jaguar on the condition that Jaguar's security holders waived a prohibition in Jaguar's articles of association of any individual shareholder holding more than 15% of Jaguar. The British government's failure to assert this right was derided by one Jaguar shareholder who referred to the protection of the "golden share" as "a Ridley tin share that bends and rattles with the wind." Done, *supra* note 21, at 8. See also *Keeping the Golden Share*, AVIATION WEEK & SPACE TECHNOLOGY, Dec. 4, 1989, at 15 (noting the British government's retention of a "golden share" in certain strategically significant U.K. companies).

³⁸ See *In Re Ford Motor Company Limited Offer to Purchase the Ordinary Shares and Am. Depositary Receipts of Jaguar plc*, Exchange Act Release No. 27,425, 44 SEC Docket 1537 (Nov. 7, 1989) (explaining the exemption order issued with respect to the Ford offer); S.G. Warburg Akroyd, Rowe & Pittman, Mullens Securities Limited, SEC No-Action Letter, 1989 WL 246589 (Nov. 9, 1989) (granting exemptive relief from Rule 10b-13 to the extent it would otherwise have prohibited S.G. Warburg Securities from undertaking market-making activities in Jaguar securities in connection with the Ford offer).

In the end, the Ford offer was successful, and a full-fledged, U.S. inclusionary, cross-border takeover, at least in the English-speaking Western world, was now a possibility. But success had been difficult.³⁹

The staff of the SEC recognized this, and in the summer of 1991 made its first attempt in the International Tender and Exchange Offers Release ("International Release"), albeit a failed one, to establish rules governing cross-border takeovers.⁴⁰ Although unsuccessful

³⁹ If the consideration offered by Ford had comprised securities, instead of all cash, then more significant issues would have arisen due to the application of Section 5 of the Securities Act and the registration requirements thereunder. 15 U.S.C. § 77e (2000). These require that a registration statement on Form S-4 or Form F-4 be filed and declared effective with the SEC in connection with the offer. Form S-4 and Form F-4 disclosure can be quite extensive and contains a requirement to include U.S. Generally Accepted Accounting Principles ("GAAP") or U.S. GAAP-reconciled financial statements for the acquiror, and, in certain circumstances, the acquiree. The difficulties of preparing this required U.S. GAAP information has been repeatedly cited as one of the key reasons for the exclusion of U.S. persons from takeover offers for non-U.S. acquirees in which securities comprise part of the offered consideration. This is particularly true in cases where either the acquiror or acquiree does not already prepare its financial statements in U.S. GAAP or reconcile them to U.S. GAAP. This problem was illustrated in the 1990 exchange offer by Procordia Aktiebolag ("Procordia") and Aktiebolag Volvo ("Volvo") for the Swedish company, Pharmacia Aktiebolag ("Pharmacia"), a Swedish company with a NYSE listing, securities registered under Section 12, and 7.9% of its share capital held in the United States. Procordia was required to register its offered securities under the Securities Act since the takeover offer was extended into the United States. Procordia, a company not listed on the NYSE, quoted on Nasdaq or with securities registered under Section 12 of the Exchange Act, was therefore required to reconcile its Swedish financial statements to U.S. GAAP, a significant and time-consuming endeavour. The SEC granted significant exemptive and no-action relief with respect to this transaction including allowing Item 17 reconciliation under Form F-4 and permitting Procordia to forgo reconciliation of entire otherwise required periods. See *In re Procordia Aktiebolag and Aktiebolaget Volvo to Purchase the Share, Convertible Debentures and Am. Depositary Shares of Pharmacia Aktiebolag*, Exchange Act Release No. 27,671, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,514 (Feb. 2, 1990) [hereinafter *Pharmacia Release*] (granting Procordia and Volvo *inter alia* exemptive relief from the provisions of Section 14(d)(5) of the Exchange Act and Rule 14d-7, Rule 14d-10, Rule 10b-13 and Rule 10b-6 thereunder). See also *Cross-Border Concept Release*, *supra* note 5, at 80,873-74 for a discussion of the issues surrounding the Pharmacia offer.

⁴⁰ *International Release*, *supra* note 5. The SEC also proposed rules governing cross-border rights offerings which were also never adopted. *Cross-Border Rights Offers; Amendments to Form F-3*, Securities Act Release No. 6896, Exchange Act Release No. 29,274, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,802 (June 5, 1991); see also *Cross-Border Concept Release*, *supra* note 5, at 80,873-74 (highlighting in this initial SEC release certain unique issues and problems associated with cross-border takeovers).

ful, the proposed releases for these rules established the outlines of the SEC staff's thinking on and approach to these transactions, and provided commentators, practitioners, and regulators a basis to comparatively assess the need for additional rules and their scope.⁴¹ The unintended delay from the time of the International Release to the Cross-Border Release may have been sound for this reason alone, but also because it permitted further experience in other jurisdictions, such as France, Germany and the United Kingdom, to accumulate, be measured and applied.⁴² It also permitted the SEC to develop and refine its approach to other related areas of cross-border securities law.⁴³ The rules that were ultimately adopted in the Cross-Border Release bear a remarkable similarity to the International Release, but also reflect a more nuanced approach borne out by experience and other continued ancillary rulemaking.

⁴¹ This analysis was not conducted solely by the SEC, however, as commentators continued to suggest methods of addressing cross-border conflicts and related issues. *See, e.g.*, Greene et al., *supra* note 5, at 828 (proposing "that the SEC take action to minimize tension between the U.S. and foreign takeover rules, and to provide greater certainty as to foreign bidder liability risk, within certain classes of cross-border takeovers" and "an international regulatory response to the difficulty posed by cross-border acquisitions"); Roberta S. Karmel, *Transnational Takeover Talk – Regulations Relating to Tender Offers and Insider Trading in the United States, the United Kingdom, Germany, and Australia*, 66 U. CIN. L. REV. 1133, 1133 (1998) (discussing differences in approach to "the control of information announcing a public tender offer" in four jurisdictions).

⁴² For example, prior to the Cross-Border Release, acquirors in fifty-four transactions sought no-action or exemptive relief from the SEC with respect to cross-border takeovers. Almost all of these applications for relief occurred after the publication of the International Release. *See* Cross-Border Release, *supra* note 9, at 82,548 n.53 ("54 requests for exemptive relief [were] received by the Commission between 1990 and 1998.").

⁴³ *See, e.g.*, Offshore Offers and Sales, Securities Act Release No. 6863, Exchange Act Release No. 27,942, Investment Company Act Release No. 17,458, [1989-1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,524 (Apr. 24, 1990) [hereinafter Regulation S Release] (adopting Regulation S which exempted offers and sales of securities made outside the United States from the registration requirements of Section 5 of the Securities Act); Offshore Offers and Sales, Securities Act Release No. 7505, Exchange Act Release No. 39,668, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,006 (Feb. 17, 1998) (describing amendments to Regulation S "curb[ing] abusive practices concerning the offshore sale of equities by domestic issuers"); Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, Securities Act Release No. 7516, Exchange Act Release No. 39,779, Investment Company Act Release No. 23,071, 63 Fed. Reg. 14806 (Mar. 23, 1998) (establishing parameters for the offering of securities on the internet and resultant trigger of the registration requirements of Section 5 of the Securities Act).

The eight-year wait also permitted pattern and practice to take hold. In cross-border takeovers where the acquiree company had a small number of U.S. security holders, or compliance with U.S. laws was simply too difficult or burdensome, U.S. persons typically were excluded by acquirors and the U.S. rules rendered inapplicable through the avoidance of U.S. jurisdictional means. However, when U.S. ownership was significant or material, U.S. persons were generally included.⁴⁴ As previously noted, the inclusion of U.S. persons led to a developing body of precedent transactions—patterns of necessary SEC relief that harmonized conflicting rules and raised familiarity among lawyers and regulators of different countries. These were all taken into account when the Cross-Border Rules were ultimately adopted in 1999.

Additionally, the exclusionary offer was not necessarily deleterious to U.S. security holders. U.S. security holders could still sell into the market upon announcement, albeit without the benefit of the offer documentation, which was prohibited from being distributed to them. Arguably, the U.S. security holders' loss (or, more aptly, lost opportunity) was primarily the vanished benefit of the risk arbitrage spread between the offer consideration and the trading price of the security in the market, the opportunity of a higher second takeover bid, and any brokerage fees.⁴⁵ This loss, however, may be inconsequential when marked against the actual premium received by the shareholder and the traded risk of a broken deal and no premium whatsoever. In fact, investment professionals have historically recommended that small holders sell upon announcement of a takeover transaction, a "take the money and run" approach—it is for the arbitrageurs and more sophisticated financial investors to better assume the risk of completion.⁴⁶ In any

⁴⁴ In a sample of thirty-one takeover offers compiled in 1997 by the Takeover Panel and cited by the SEC in the Cross-Border Release, U.S. ownership was determined to be less than 15% in thirty of the thirty-one offers. In each of the thirty offers, the acquirors excluded U.S. holders or persons from participating. In the remaining offer, the U.S. ownership was 38% and the acquiror included U.S. holders or persons. In referring to this sample, the SEC noted that "[i]n the 30 offers that excluded U.S. persons, the ownership percentage was as follows: in 27 offers, U.S. persons held less than 5%; in the remaining three offers, U.S. persons held 7%, 8% and 10-15%, respectively." Cross-Border Release, *supra* note 9, at 82,539 n.8.

⁴⁵ See Frederick B. Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. PA. L. REV. 466, 471-72 (1971) (outlining the benefits of a shareholder selling upon announcement, but prior to consummation, of a takeover offer).

⁴⁶ See Roger J. Dennis, *This Little Piggy Went to Market: The Regulation of Risk* <https://scholarship.law.upenn.edu/jil/vol26/iss3/3>

event, the number of individual investors who invested directly in non-U.S. issuers during the 1990s was relatively small compared to U.S. domestic investment.⁴⁷ Consequently, the aggregate number of U.S. security holders who were adversely affected in an exclusionary offer was arguably immaterial in most cases.

Nor were the larger U.S. domiciled institutional holders, the Qualified Institutional Buyers ("QIBs"),⁴⁸ or other classes of sophisticated institutional investors (those that typically hold the bulk of securities in non-U.S. companies) usually affected. These investors could often tender into exclusionary offers by transferring their investment discretion to an offshore affiliate who could then make the investment decision to tender.⁴⁹ Such investors were suffi-

Arbitrage after Boesky, 52 ALB. L. REV. 841, 843-44 (1988) (outlining the benefits of risk arbitrage); Thomas Lee Hazen, *Volatility and Market Inefficiency: A Commentary on the Effects of Options, Futures, and Risk Arbitrage on the Stock Market*, 44 WASH. & LEE L. REV. 789, 794-95 (1987) (discussing SEC regulation of risk arbitrage). The SEC has always vigorously disputed this proposition in the context of exclusionary offers, arguing that U.S. security holders are ab initio not provided sufficient information to make such a decision, due to the exclusionary nature of the offer. See Cross-Border Concept Release, *supra* note 5, at 80,872 (discussing "[e]xclusion or discriminatory treatment of U.S. holders" due to lack of disclosure and adherence to U.S. regulatory schemes).

⁴⁷ The SEC noted that in 1990 only \$130.9 billion was invested by U.S. investors in non-U.S. corporations. International Release, *supra* note 5, at 81,743. The relative immateriality of the U.S. investors at this time was illustrated by the fact that in 1990, of 239 takeovers of U.K. companies subject to the City Code, only a small number of these included U.S. shareholders. See *id.* ("[A]lthough data on the percentage of target company shares held by U.S. investors generally is not available, these acquisitions routinely have excluded shareholders resident in the United States . . ." (footnote omitted)). However, the amount of U.S. investment in non-U.S. corporations grew to \$558.9 billion by the time of the adoption of the Cross-Border Release. See *infra* note 56.

⁴⁸ Qualified Institutional Buyers (commonly known as "QIBs") are defined in Rule 144A of the Securities Act to include any entity, acting for its own account or the accounts of other QIBs, that, in the aggregate, owns and invests on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with that entity. 17 C.F.R. § 230.144A(a)(i) (2005).

⁴⁹ Historically, tenders of this nature were permissible under the U.S. takeover rules and securities laws. See, e.g., Regulation S, 17 C.F.R. § 230.902(h) (2005) (defining an offshore transaction under the Securities Act); see also 1 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS 7-52 n.186 (7th ed. 2004) (setting forth the mechanics for an offshore tender in a cross-border takeover). Although historically this technique may have been permissible, it is more likely to be challenged by the SEC post-adoption of the Cross-Border Rules. This is because the SEC may now view the affiliate's acceptance on behalf of the U.S. parent as a means to avoid the rightful application of U.S. rules. To date, however, there have been no public SEC actions on the matter. See JAMES M. BARTOS, UNITED STATES SECURITIES LAW: A PRACTICAL GUIDE

ciently sophisticated to know of this procedure and how to use it.

Nonetheless, the SEC has historically disfavored the exclusionary offer approach, especially for unsophisticated investors.⁵⁰ The SEC's traditional focus has been on protecting the average, rather than the financially sophisticated, investor.⁵¹ However, the detriment to a U.S. investor clearly existed, regardless of its level of materiality. As the SEC itself stated in the Cross-Border Release when referring to exclusionary offers: "[t]he rules adopted today are intended to eliminate the need for such disadvantageous treatment of U.S. investors."⁵²

In addition, the number of U.S. investors in non-U.S. companies increased exponentially during this period, and cross-border takeovers increased with the general rise of mergers and acquisitions activity in the 1990s⁵³—the culmination undoubtedly being the approximately \$127 billion unsolicited cross-border, U.S. inclusionary takeover of Mannesmann AG, a German company with significant U.S. holdings and listed on the New York Stock Exchange ("NYSE"), by Vodafone plc, an English public limited company also listed on the NYSE.⁵⁴

Addressing these transactions on an ad hoc basis increased the drain on the SEC staff's resources,⁵⁵ and, from the vantage point of

148-56 (2d ed. 2002) (summarizing exclusionary techniques post-adoption of the Cross-Border Rules).

⁵⁰ See Cross-Border Release, *supra* note 9, at 82,539 (expressing disapproval of exclusion of U.S. security holders from off-shore investment opportunities).

⁵¹ This was particularly true during the term of Arthur Levitt who was the Commissioner of the SEC when the Cross-Border Rules were initially proposed in 1998. See, e.g., Ken Hoover, *Levitt To Step Down As Chairman Of SEC Hailed As Champion Of Small Investor, He Fought For Disclosure*, INVESTOR'S BUS. DAILY, Dec. 21, 2000, at B1 (chronicling Levitt's tenure at the SEC).

⁵² Cross-Border Release, *supra* note 9, at 82,539.

⁵³ According to the SEC, the number of cross-border takeovers in Europe increased from 1,434 in 1991 to 1,648 in 1997. The dollar value of such transactions increased from \$40.4 billion in 1991 to \$136.9 billion in 1997. Cross-Border Proposing Release, *supra* note 6, at 81,060 n.23.

⁵⁴ See Vodafone AirTouch plc, SEC No-Action Letter, 1999 WL 1332185 (Dec. 22, 1999) (granting exemptive relief under Rules 14e-1(c) and 14e-1(d) under the Exchange Act and Rule 10b-13 under the Securities Act [now Rule 14e-5 under the Exchange Act] in connection with the Vodafone-Mannesmann takeover offer). See generally Andrew Ross Sorkin, *Market Place: The Mannesmann-Vodafone Fight Takes on a Decidedly American Tone*, N.Y. TIMES, Dec. 23, 1999, at C8 (detailing the controversy surrounding Vodafone's unsolicited cross-border takeover offer for Mannesmann).

⁵⁵ See *supra* note 42 (discussing the increase in exemption requests following the Cross-Border Release).

the late 1990s, such a drain was expected to increase further as the number of non-U.S. companies listed on the NYSE and quoted on the Nasdaq increased.⁵⁶ It was against this backdrop that the SEC proposed and adopted the new Cross-Border Rules.⁵⁷

3. THE CROSS-BORDER RULES

This Section begins by sketching a broad overview of the available exemptions under the Cross-Border Rules. It then continues with a discussion of certain principal concepts underlying the rules and, on a topical basis, the SEC's approach. More specifically, it examines in the context of these underlying precepts the SEC's handling of the equal treatment rules, application of the anti-fraud and anti-manipulation provisions of the U.S. securities laws, acquiror eligibility, and the disclosure and dissemination requirements.

3.1. *The Exemptions*

The exemptions created by the Cross-Border Rules can be set forth in three strokes. Tender offers for the securities of non-U.S. companies (defined as "foreign private issuers"⁵⁸) became exempt from most of the provisions of the Williams Act, so long as U.S. holders held 10% or less of the class of securities sought in the offer. This exemption is typically referred to as the "Tier I exemption."⁵⁹ Similarly, in exchange offers and business combinations, where new securities were being offered as consideration to security holders of the non-U.S. acquiree company, acquirors became exempt from the registration requirements under Section 5 of the Securities Act⁶⁰ that applied to new securities offerings, and from the qualification requirements of the U.S. Trust Indenture Act of

⁵⁶ In the Cross-Border Proposing Release, the SEC noted that, "U.S. ownership of foreign companies increased from \$158.8 billion in 1991 to \$558.9 billion in 1996," and that "the number of foreign companies reporting under the Exchange Act has more than doubled since 1991 . . . with over 1,100 foreign companies reporting as of June 1998." Cross-Border Proposing Release, *supra* note 6, at 81,059.

⁵⁷ The proposing release for the Cross-Border Rules was publicly disseminated on November 13, 1998. Nineteen comment letters were submitted. Cross-Border Release, *supra* note 9, at 82,540.

⁵⁸ See *infra* note 65.

⁵⁹ 17 C.F.R. §§ 240.14d-1(c), 240.14d-9(d), 240.14e-2(d) (2005). This exemption also encompassed issuer tender offers, *id.* § 240.13e-4(h), and the "going-private rules," *id.* § 240.13e-3(g).

⁶⁰ 15 U.S.C. §§ 77a-77aa (2000).

1939,⁶¹ so long as U.S. holders held 10% or less of the class of securities sought in the offer. This exemption is typically referred to as the "Rule 802 exemption."⁶² Finally, tender offers for the securities of a non-U.S. acquiree company received limited exemptive relief of a procedural nature to eliminate frequent areas of conflict between U.S. and non-U.S. regulatory requirements in situations where U.S. holders held 40% or less of the class of securities sought in the offer. This exemption is typically referred to as the "Tier II exemption."⁶³

3.1.1. Tier I Exemption

Under the Tier I exemption, qualifying tender and exchange offers are exempt from almost all of the requirements of the Williams Act, including the provisions therein concerning disclosure, filing, dissemination, minimum offering period, equal treatment, material amendments, withdrawal rights, and proration requirements.⁶⁴ In order to qualify for the Tier I exemption, an offer must meet the following requirements: (i) the acquiree must be a foreign private issuer as defined in Rule 3b-4 of the Exchange Act;⁶⁵ (ii) U.S. holders⁶⁶ of the acquiree must hold 10% or less of the securities subject

⁶¹ 15 U.S.C. § 77aaa (2000).

⁶² 17 C.F.R. § 230.802 (2005).

⁶³ *Id.* § 240.14d-1(d). This exemption also applied to issuer tender offers. *Id.* § 240.13e-4(h).

⁶⁴ More specifically, the Tier I exemption exempts a qualifying offer from Rules 13e-3, 13e-4, Regulations 14D, Rules 14e-1, 14e-2, and 14e-5 of the Exchange Act, including the filing provisions thereunder. *Id.* §§ 240.13e-3(g), 240.13e-4(h), 240.14d-1(c), 240.14d-9(d), 240.14e-2(d), 240.14e-5(b)(10).

⁶⁵ In general, under the U.S. securities laws, a company is considered either a U.S. domestic issuer or a foreign private issuer. Foreign private issuers benefit from certain exemptions under the U.S. securities rules that are not available to U.S. domestic issuers. For simplicity's sake, throughout this article, foreign private issuers are also referred to as "non-U.S. companies," "non-U.S. issuers" or "foreign corporations." However, the term "foreign private issuer" has a specific meaning under Rule 3b-4 of the Exchange Act, and in certain instances, companies incorporated and doing business outside of the United States do not qualify as foreign private issuers and are subject to the U.S. domestic issuer rules. *Id.* § 240.3b-4.

⁶⁶ The Cross-Border Rules define a U.S. holder to mean any security holder resident in the United States. *Id.* §§ 230.800(h), 240.14d-1. *See also* Cross-Border Release, *supra* note 9, at 82,552 (setting forth the definition of "U.S. holder"). This is a narrower definition than that historically used by the SEC in other cross-border contexts and may reflect a flexibility that the SEC desired to maintain with the Cross-Border Rules. *See, e.g.,* Regulation S Release, *supra* note 43, at 80,676-7 (adopting a broader definition of "U.S. person" in the offshore context). Particu-

to the offer; (iii) the acquiror must submit an English language translation of the offering materials to the SEC under cover of Form CB and, in the case of an acquiror who is a foreign private issuer, submit to service of process on Form F-X; (iv) U.S. holders must be treated on terms at least as favorable as those offered to any other security holders of the acquiree; and (v) U.S. holders of the acquiree must be provided the offering circular or other offering materials, in English, on a comparable basis as non-U.S. acquiree security holders.⁶⁷

The creation and availability of the Tier I exemption significantly reduces the burden of complying with U.S. federal securities laws and provides incentives for acquirors to include U.S. holders in cross-border takeover offers. In addition, subject to certain conditions, the prohibition in Rule 14e-5 under the Exchange Act relating to purchases outside of the offer does not apply to offers qualifying for the Tier I exemption.⁶⁸ This provides an acquiror and its advisors flexibility in an offer qualifying for the Tier I exemption to make such purchases in accordance with local rules. Consequently, under the Tier I exemption, it was and is the SEC's design that an acquiror could include U.S. holders in its cross-border takeover offer without significant additional cost or other burden above what is normally required by the home jurisdiction of the acquiree.⁶⁹

3.1.2. Rule 802 Exemption

In a similar fashion, the SEC also adopted Rule 802 under the Securities Act. Rule 802 exempts from the registration requirements of Section 5 of the Securities Act any exchange offer for a

larly interesting is that the SEC has historically discussed the interaction of extra-territorial application of the U.S. takeover rules and exclusionary offers in terms of whether the takeover offer included or excluded "U.S. persons," which is not the narrower definition of U.S. holder. Because of this, there is uncertainty among practitioners as to whether a "good" U.S. exclusionary offer must exclude U.S. persons or need only exclude holders residing in the United States or another more limited category of U.S. holders. See *supra* note 18 for a discussion of the federal cases in which the SEC has proffered this argument.

⁶⁷ 17 C.F.R. § 240.14d-1(c).

⁶⁸ *Id.* § 240.14e-5. The relevant amendments to Rule 14e-5 were adopted in M&A Release, *supra* note 10, at 82,608.

⁶⁹ See Cross-Border Release, *supra* note 9, at 82,539. In the Cross-Border Release, the SEC also adopted Rule 801 to provide a similar exemption for rights offerings by foreign private issuers. 17 C.F.R. § 230.801. The parameters of this exemption are beyond the scope of this Article.

class of securities of a foreign private issuer or any securities issued in exchange for those of a foreign private issuer in any business combination.⁷⁰

The exemption from Section 5 is applicable only if: (i) the subject company is a foreign private issuer; (ii) U.S. holders hold no more than 10% of the subject securities, or in the case of a business combination in which the securities are to be issued by a successor registrant, U.S. holders hold no more than 10% of the class of securities of the successor registrant, as measured immediately after the business combination; (iii) U.S. holders are permitted to participate on terms at least as favorable as those offered any other holder of the subject securities; (iv) the acquiror is a foreign private issuer, it must file a Form F-X with the SEC appointing an agent for service of process in the United States; and (v) the acquiror complies with the SEC filing and informational dissemination requirements outlined *infra* in Section 2.5.⁷¹

Rule 802 is not an exclusive exemption. An issuer may also rely on any other applicable exemption from the registration requirements of the Securities Act.⁷² In adopting Rule 802, the SEC enunciated a strict approach towards its use and the use of the accompanying Tier I exemption. The SEC stated that these exemptions would not be available for any transaction or series of transactions that technically complies with the exemption but is part of a plan or a scheme to evade the registration requirements of the Securities Act.⁷³

⁷⁰ 17 C.F.R. § 230.802. A business combination is broadly defined under Rule 802 to mean a statutory amalgamation, merger, arrangement or other reorganization requiring the vote of security holders of one or more participating companies. *Id.* § 230.800(a). It is also defined to include a short form merger that does not require a vote of security holders. *Id.*

⁷¹ *Id.*

⁷² See undesignated center heading to *id.* §§ 230.800–802 (“Attempted compliance with [Rule 802] does not act as an exclusive election; an issuer making an offer or sale of securities in reliance on [Rule 802] may also rely on any other applicable exemption from the registration requirements of the [Securities] Act.”).

⁷³ The SEC indicated in the Cross-Border Release that it would consider an exchange offer or rights offering to be a sham if it was conducted solely as a pretext for distributing securities in the United States (if, for example, the acquiror does not have a bona fide expectation that non-U.S. holders would participate in the offering to a similar extent as U.S. holders). Cross-Border Release, *supra* note 9, at 82,542. See also undesignated center heading to 17 C.F.R. §§ 230.800–802 (“The exemptions provided by [Rule 802] are not available for any securities transaction or series of transactions that technically complies with [Rule 802] but are part of a plan or scheme to evade the registration provisions of the [Securities]

3.1.3. Tier II Exemption

Under the Tier II exemption, qualifying tender and exchange offers receive only limited exemptions from the Williams Act and Rule 14e-5 of the Exchange Act to harmonize SEC-perceived common areas of conflict with non-U.S. regulatory takeover schemes. The reason for differing treatment under the Tier I exemption and the Tier II exemption stems, in part, from the view that the greater the extent of U.S. ownership, the greater the extent to which U.S. investors need the protection of the U.S. securities rules. The Tier II exemption is available for both issuer and third party tender and exchange offers when the acquiree is a foreign private issuer and U.S. holders of the acquiree hold more than 10% and less than or equal to 40% of the securities subject to the cross-border takeover offer.⁷⁴

The Tier II exemptions are, in the words of the SEC, simply “codifications of exemptive and interpretive positions” that currently apply in cross-border acquisitions.⁷⁵ These exemptions include harmonizing relief under the prompt payment rule and notice rule, an exemption under the all-holders/best price rule for the common cross-border dual-offer structure, and the adoption of a rule with respect to waiver or reduction of minimum conditions in cross-border takeovers.⁷⁶ Takeover offers qualifying for the Tier II exemption are still subject to the substantive rules set forth in the

Act.”). To date, there has been no SEC action on this statement or attempt to take issue with reliance under the Cross-Border Rules due to actions of this nature. However, the question of market purchases or other acquiror actions that have the effect of bringing the number below 10% has not fully been fleshed out. For example, it is common practice for an acquiror to purchase acquiree securities prior to announcement of a takeover offer. If an acquiror makes such purchases solely for stake accumulating purposes but it has the effect of bringing the applicable percentage below 10% would that bar reliance on the Tier I or Rule 802 exemptions? Most likely the SEC would take a strict approach here—it has stated that an acquiror may not exclude security holders and then subsequently include them when the U.S. percentage is below 10% and still rely on the exemptions under the Cross-Border Rules. Third Supplement, *supra* note 10, at § II.E. This belies an unconfirmed SEC predisposition to act strictly towards any acquiror that takes an action which affects the “number”. In addition, the penalty if there is no reliance on Rule 802—rescission of the offer under Section 12 of the Securities Act—is so harsh that acquirors are justifiably loathe to take a risk on this issue. 15 U.S.C. § 771(e)(2) (2000).

⁷⁴ 17 C.F.R. § 240.14d-1(d).

⁷⁵ Cross-Border Release, *supra* note 9, at 82,539.

⁷⁶ *See id.* at 82,544–45 (detailing the Tier II exemption). This exemption is discussed further *infra* Section 3.

Williams Act, including the disclosure and filing requirements thereof.⁷⁷ It should be noted that these are only the codified exemptions. Since the adoption of the Cross-Border Rules, the SEC has been amenable to providing other harmonizing relief as necessary and stated as such in the Cross-Border Release.⁷⁸

However, it is still uncertain as to the SEC staff's willingness to provide exemptive relief in substantive circumstances where the Tier I exemptions are inapplicable and the Tier II exemptions or full compliance are otherwise the only available options. For example, the availability and scope of relief for vendor placings and Rule 13e-3 "going private" transactions in these circumstances is still unknown.⁷⁹ It would be helpful to practitioners if the SEC could outline the parameters and requisites of available substantive relief in these circumstances for common, non-exempt cross-border structures in light of the Cross-Border Release.

3.2. Equal Treatment

One of the fundamental principles underlying regulation of U.S. tender offers is the requirement that an acquiror treat all secu-

⁷⁷ *Id.* at 82,544.

⁷⁸ *Id.* at 82,545-46 n.41. See also *supra* note 10 for a discussion of post-Cross-Border Release SEC no-action and exemptive relief letters.

⁷⁹ In a vendor placing, a trustee is appointed to receive and sell in an offshore market the security consideration that the U.S. security holders would otherwise receive directly. The net cash proceeds of the sale are then remitted to the U.S. holder by the trustee. Such a procedure requires relief from the Securities Act registration requirements, and if applicable, Rule 14d-10. In the Cross-Border Release, the SEC stated that relief for vendor placings would still be available on a case-by-case basis and has subsequently granted exemptive relief for such a placing in at least one circumstance. Cross-Border Release, *supra* note 9, at 82,543. See generally Singapore Telecommunications Limited, SEC No-Action Letter, 2001 WL 533462 (May 15, 2001) (granting exemptive relief by the SEC under the Securities Act to permit a vendor placing in the cross-border takeover of Cable & Wireless Optus Limited, a company organized under the laws of Australia, by Singapore Telecommunications Limited, a company organized under the laws of Singapore). However, the SEC has, at least in one instance, orally informed a practitioner that this relief would not be available if U.S. holders comprised greater than 20% of the outstanding subject securities. In the case of going-private transactions subject to Rule 13e-3, acquirors have found compliance with certain fairness requirements under Rule 13e-3 difficult where the local non-U.S. jurisdiction did not have similar requirements. Prior to the adoption of the Cross-Border Release, the SEC had granted relief from certain of the fairness determination requirements under Rule 13e-3. See Cross-Border Proposing Release, *supra* note 6, at 81,062. See also Cross-Border Concept Release, *supra* note 5, at 80,873-74 (discussing the grant in the Pharmacia offer of exemptive relief from Rule 13e-3 along these lines).

rity holders equally.⁸⁰ This principle of equal treatment is reflected in the Cross-Border Rules through the requirement that acquirors under the Tier I and Rule 802 exemptions permit U.S. holders to participate in cross-border takeovers on terms at least as favorable as those offered to any security holders of the acquiree.⁸¹ The equal treatment provisions under the Cross-Border Rules are subject to only limited exceptions and have been interpreted strictly by the SEC. For example, the SEC has stated that equal treatment extends to the procedural aspects of a cross-border takeover offer, including duration, prorationing, and withdrawal rights.⁸²

In addition, under the equal treatment rule, the SEC requires that the U.S. offer component of a cross-border takeover offer must generally be open for at least as many days as the minimum period required by the applicable non-U.S. law.⁸³ Thus, in the case where

⁸⁰ This principle is embodied in the "all holders/best price" provisions included in Rule 14d-10 under the Exchange Act which require that an acquiror's tender offer be open to all holders of the class of securities subject to the tender offer and that each security holder be paid the highest consideration paid to any other security holder in the tender offer. 17 C.F.R. § 240.14d-10 (2005). See generally Amendments to Tender Offer Rules, *supra* note 18, at 84,017 (discussing the principle of non-discriminatory treatment among security holders in takeover offers).

⁸¹ 17 C.F.R. § 240.14d-1(c)(2). There is an exception to this Rule. Rule 802 contains a "blue sky" provision which stipulates that the issuer need not extend the offer to security holders in those states or jurisdictions that require registration or qualification, except that the issuer must offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction. A similar exemption is provided under the Tier I exemption. *Id.* § 240.14d-1(c)(2)(ii). For a definition of blue sky laws and a discussion of the various issues associated with these provisions see *infra* notes 146-150 and accompanying text.

⁸² Cross-Border Release, *supra* note 9, at 82,542-43. The SEC in the Cross-Border Release also adopted an exception to the equal treatment provision which permits an acquiror relying upon the Tier I or Tier II exemptions to exclude U.S. holders from any "loan note" alternative. 17 C.F.R. § 240.14d-1(c)(2)(iv). Loan notes are used in certain jurisdictions such as the United Kingdom and Ireland and are issued instead of cash consideration to acquiree security holders at their option in order for the holder to defer recognition of income and capital gains on the consideration received. The gain is deferred until the loan notes come due, typically 18 months later, and the cash consideration is paid. These tax benefits are not generally available to U.S. persons under the Internal Revenue Code, and therefore, since they provide no benefit vis-à-vis U.S. persons, the typical practice is to exclude U.S. persons so that the notes, a security, do not need to be registered in the United States. The exception under the Cross-Border Rules simply codified SEC practice to routinely grant exemptive relief to permit this practice. Cross-Border Release, *supra* note 9, at 82,544.

⁸³ 17 C.F.R. § 240.14d-1(c).

an acquiror commences an exclusionary offer and then, while the offer is pending, extends the offer into the United States, the offer would be obligated to be open for at least the number of days required by the applicable non-U.S. law. If this is not feasible due to requirements under non-U.S. law that limit the number of days an offer could be pending, the SEC has stated that the acquiror would need to petition for SEC exemptive relief.⁸⁴

3.3. *Anti-fraud and Civil Liability*

In the Cross-Border Release, the SEC concluded that the U.S. anti-fraud provisions and civil liability provisions⁸⁵ relating thereto would continue to apply to cross-border takeovers.⁸⁶ Some commentators were critical of this position. The basis for their challenge was that acquirors, who feared litigation in the United States, would loathe extending a cross-border takeover into the United States if they had increased liability exposure. However, the SEC decided that the continuing applicability of the anti-fraud rules was necessary to protect U.S. investors and outweighed any countervailing considerations.⁸⁷ The rationale for this may not prevail

⁸⁴ Third Supplement, *supra* note 10, § II.A.

⁸⁵ The relevant anti-fraud and civil liability provisions of the Securities Act are set forth in Section 10(b), 15 U.S.C. §§ 78j(b) (2000), and related Rule 10b-5, under the Exchange Act, 17 C.F.R. § 240.10b-5, and in the Exchange Act in Section 14(e) of the Exchange Act, 15 U.S.C. § 78n(e), and related Rule 14e-3 under the Exchange Act, 17 C.F.R. § 240.14e-3. Participants may also be exposed to liability under the informational requirements of Rule 12b-20 under the Exchange Act, 17 C.F.R. § 240.12b-20. For an overview of these provisions, see 2 EDWARD F. GREENE ET AL., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS 14-47 to -50 (4th. ed. 1998) (setting forth potential grounds for liability under the U.S. securities rules in takeover offers involving either stock or cash consideration).

⁸⁶ For a discussion of the SEC treatment of the anti-manipulation rules under Regulation M in the context of the Cross-Border Rules, see *infra* note 152. Interestingly, in the Cross-Border Proposing Release the SEC specifically discussed the case of the anti-fraud provisions of Section 14(e) trumping the exemptions afforded by Tier I and Tier II. The SEC cited the paradigm where the acquiror relied upon the Tier I exemption to avoid compliance with the notice requirements of Rule 14e-1, but still fell afoul of the anti-fraud requirements in Section 14(e) by, for example, "fail[ing] to provide any notice to U.S. holders that it has extended the duration of the offer." Cross-Border Proposing Release, *supra* note 6, at 81,060. To date, however, there has been no SEC enforcement action of Section 14(e) in the context of a cross-border transaction relying upon the exemptions set forth in the Cross-Border Release.

⁸⁷ See Cross-Border Release, *supra* note 9, at 82,540 ("[I]t is necessary that the anti-fraud provisions continue to provide a basic level of protection for U.S. security holders participating in these transactions.").

in most non-U.S. jurisdictions since corresponding rules are already in place, albeit without the perceived spectre of U.S. litigation.⁸⁸ However, there are a number of good reasons for such application. First, if there are similar rules, the application of the U.S. anti-fraud rules in these circumstances should not be overly burdensome and the economic impact should be minimal. Second, the SEC has historically been more vigorous and capable of enforcement of these rules than certain non-U.S. regulators. The supplemental ingredient of SEC enforcement in this context provides another, perhaps warranted, compliance incentive. Additionally, from the corporate point of view, the likelihood of private litigation is exaggerated, as U.S. litigation in the context of cross-border takeovers has been a rarity.⁸⁹ One reason for this is that materiality has typically been assessed in the cross-border context in light of the applicable non-U.S. disclosure requirements and practices.⁹⁰ As a result, it is more difficult for a U.S. plaintiff to assert a disclosure-based violation of the U.S. anti-fraud and civil liability provisions.⁹¹ As the burden on non-U.S. acquirors may be overstated

⁸⁸ See 2 GREENE ET AL., *supra* note 85, at 14-58 to -64 (discussing the law enforcement mechanisms that the SEC can employ to enforce securities laws).

⁸⁹ Although security holders and other interested parties are widely considered to have a private right of action under the Williams Act, this typically manifests itself as an injunctive request for corrective disclosure. See, e.g., *infra* note 90 (describing the corrective disclosure litigation between Aventis and Sanofi related to Sanofi's unsolicited offer for Aventis). U.S. courts have restricted the circumstances in which private litigants have been able to obtain monetary damages in takeover offers. See 2 GREENE ET AL., *supra* note 85, at 14-47 to -50 (outlining the enunciated Exchange Act requirements for a plaintiff to obtain a monetary damage remedy in the takeover offer context).

⁹⁰ The SEC expressly reserved this point in the Cross-Border Release. After noting that, "[t]he omission of the information called for by U.S. forms in the context of foreign disclosure requirements and practices would not necessarily violate the U.S. disclosure requirements," the SEC went on to state, "[a]n antifraud action could be brought by the Commission and investors if the omitted information is material in the context of the transaction and the disclosure provided is misleading as a result of the omission of the information." Cross-Border Release, *supra* note 9, at 82,540.

⁹¹ For example, as part of its defense against Sanofi's 2004 initially unsolicited U.S.-inclusionary cross-border takeover offer, Aventis filed a lawsuit in the United States District Court for the District of New Jersey seeking an injunction to force Sanofi to provide additional disclosure about its takeover offer. Complaint at 4-5, *Aventis S.A. v. Sanofi-Synthelabo S.A.*, No. 04-01780 (D.N.J. April 19, 2004). Aventis alleged, among other things, that Sanofi's offer documents contained material omissions in violation of the U.S. tender offer rules. *Id.* at 3. The offer document sent by Sanofi to Aventis's shareholders had been prepared on the basis of French and U.S. disclosure requirements. The issue was never adjudicated before

and the protection to U.S. security holders obvious, the wholesale application of the U.S. anti-fraud rules to cross-border takeovers seems appropriate.⁹²

3.4. Acquiror Eligibility

A threshold issue considered by the SEC in the proposing and adopting releases for the Cross-Border Rules was whether the exemptions under the rules should only be available for non-U.S. acquirors.⁹³ The SEC concluded that there was no compelling reason for such a limitation, since any takeover of a non-U.S. acquiree company would be subject to the takeover rules of the non-U.S. jurisdiction. From this point of view, the SEC deemed irrelevant the acquiror's domicile or reporting status as a foreign private issuer.⁹⁴

The SEC's position on acquiror eligibility is an extension of the SEC's implicit and explicit justification for limited U.S. regulation under the Tier I and Rule 802 exemptions. Specifically, U.S. investors have substitute protection in the form of regulatory oversight in the acquiree's non-U.S. jurisdiction.⁹⁵ Accordingly, the natural conclusion is to apply the exemptions based upon the identity of the acquiree rather than the acquiror. The SEC's calculus appears sound on this point and it is buttressed by another consideration: basing the exemption on the jurisdiction of the acquiror would unduly disadvantage U.S. acquirors vis-à-vis non-U.S. acquirors.

Equal treatment for acquirors is a concept and a principle that appears elsewhere in the Cross-Border Rules. Under the Cross-

Aventis's order to show cause could be heard. The parties agreed to dismiss all of their claims and the Court, by order of Judge Stanley R. Chesler, dismissed Aventis's action and all claims therein with prejudice. See *Aventis S.A. v. Sanofi-Synthélabo S.A.*, No. 04-1780 (D.N.J. May 3, 2004) (dismissing case by stipulation). For a discussion of the history and mechanics of the Sanofi offer, see the Sanofi Letter, *supra* note 10.

⁹² For further discussion of the SEC's strong preference for extraterritorial application of the anti-fraud and anti-manipulation laws, see Kun Young Chang, *Multinational Enforcement of the U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 *FORDHAM J. CORP. & FIN. L.* 89, 99-100 (2003).

⁹³ Cross-Border Release, *supra* note 9, at 82,541.

⁹⁴ *Id.*

⁹⁵ *Id.* Takeover regulation is, except in the United States, generally applied on the basis of the acquiree's jurisdiction of organization. See Cross-Border Concept Release, *supra* note 5, at 80,873 (stating that in the United States takeover offers are regulated on the basis of domestic market interest or holdings, but in the majority of other jurisdictions takeover offers are regulated principally on place of domicile).

Border Rules, if a transaction is pending, a second acquiror is eligible to use the same exemption under the Cross-Border Rules as the first acquiror provided that the second acquiror meets all the conditions of exemption other than the 10% ownership limitation.⁹⁶ The purpose of this rule is to establish a level playing field and not disadvantage the second acquiror due to post-takeover announcement movement of securities.⁹⁷

3.5. Disclosure and Dissemination

The Tier I and Rule 802 exemptions require that an acquiror submit an English language translation of its offering materials under Form CB and, in the case of an acquiror who is a non-U.S. issuer, submit to service of process in the United States through the filing of a Form F-X.⁹⁸ Submission of required documents on Form CB must be made within one business day of their dissemination, publication, or initial display in the home jurisdiction.⁹⁹ If required, the Form F-X must also be filed with the initial Form CB.¹⁰⁰ Under the Tier I and Rule 802 exemptions, the acquiror must disseminate, "on a comparable basis to that provided to security

⁹⁶ 17 C.F.R. § 240.14d-1(c)(1), (d)(1)(ii) (2005).

⁹⁷ Cross-Border Release, *supra* note 9, at 82,541.

⁹⁸ 17 C.F.R. §§ 240.14d-1(c)(3)(iii), 230.802(a)(3)(iii). For a discussion of this filing requirement, see Cross-Border Release, *supra* note 9, at 82,542, 82,551. Although this should not be necessary, the requirement to file a Form F-X applies even if the non-U.S. issuer has previously filed a Form F-X with the SEC. 17 C.F.R. §§ 239.42 (Form F-X), 240.14d-1(c)(3)(iii). Under the Cross-Border Rules, documents submitted to the SEC under cover of Form CB are deemed "furnished" rather than "filed" with the SEC. *Id.* §§ 249.480 (Form CB) at General Instructions, Part I. Eligibility Requirements for the Use of Form CB, Sections A and B; 230.802(a)(3), 240.14d-1(c)(3)(iii); see also *id.* § 240.13e-4(h)(8)(iii) (requiring that upon the issuer's dissemination of informational documentation regarding the tender offer to the security holders, the issuer must also furnish that same documentation in English to the SEC on Form CB by the first business day after publication or dissemination). Consequently, the acquiror does not have potential liability under Section 18 of the Exchange Act to the SEC for such documents. 15 U.S.C. §78r (2000) (setting forth standard of liability for material misstatements and omissions in any application or document filed with the SEC). See generally 2 GREENE ET AL., *supra* note 85, at 14-36 to -38 (discussing the parameters of Section 18 liability and the distinction thereunder between documents "filed" versus "furnished" to the SEC); BARTOS, *supra* note 49, at 148-156 (containing a similar discussion). The acquiror still has liability under the anti-fraud and civil liability provisions of the Exchange Act for material misstatements or omissions made in such documents. See *supra* notes 85-92 and accompanying text.

⁹⁹ 17 C.F.R. § 240.13e-4(h)(8)(iii).

¹⁰⁰ Cross-Border Release, *supra* note 9, at 82,542.

holders in the foreign subject company's home jurisdiction," any informational document to U.S. holders, including any amendments thereto, in English.¹⁰¹

These publication and filing requirements are applicable only to takeover offers eligible for the Tier I and Rule 802 exemptions.¹⁰² There is no filing requirement for offers which are only subject to Regulation 14E and which consist only of cash and therefore not subject to Securities Act registration provisions ("14E Offers").¹⁰³ Consequently, for such 14E Offers qualifying for Tier I there are no filing requirements under the Cross-Border Rules and the only U.S. procedural obligations that are applicable are the equal treatment and dissemination requirements of the Tier I exemption.¹⁰⁴

4. ANALYSIS AND ASSESSMENT

4.1. U.S. Ownership Limitation

4.1.1. Tier I Exemption

The ability of participants to rely on the Tier I exemption turns on whether the percentage of securities held by U.S. holders is at or below 10%. Historically, the appropriateness of 10% as the right threshold for the Tier I exemption has been subject to dispute and uncertainty. Comment letters submitted to the SEC on the Cross-

¹⁰¹ 17 C.F.R. §§ 230.802(a)(3)(ii), 240.14d-1(c). If an acquiror disseminates by publication in the acquiree's home jurisdiction it must disseminate by publication in the United States in a manner reasonably calculated to inform U.S. holders of the cross-border takeover offer on a comparable basis. Cross-Border Release, *supra* note 9, at 82,542. In the Third Supplement, the SEC stated that where non-U.S. law required a long-form offer publication (i.e., the entire offer document must be printed in a newspaper or similar publicly printed format rather than mailed) the acquiror need not make similar disclosure in the United States. Instead, it is sufficient for the acquiror to publish a less-detailed advertisement in the United States in a publication of national circulation that includes a toll-free number for U.S. investors to obtain the full offer documentation. Third Supplement, *supra* note 10, § II.D. See generally Celanese Letter, *supra* note 10 (discussing German takeover rules and practice and conflicts between it and the U.S. takeover rules).

¹⁰² With respect to offers qualifying for the Tier II exemption, an acquiror is eligible only for limited harmonizing exemptions from Exchange Act and Securities Act requirements and therefore must file its tender offer and securities registration documents using the general SEC tender offer schedules and/or applicable registration statement. Cross-Border Release, *supra* note 9, at 82,544.

¹⁰³ *Id.* at 82,542-43.

¹⁰⁴ *Id.* at 82,542.

Border Rules generally argued that the threshold percentage be set higher than the 10% limitation.¹⁰⁵ However, after consideration, the SEC set 10% as the bar at which U.S. ownership was, in the SEC's opinion, sufficiently low that on balance the protection of the U.S. tender offer rules was unneeded. In the Cross-Border Release, the SEC stated: "[t]he exemptions balance the need to provide U.S. security holders with the protections of the U.S. securities laws against the need to promote the inclusion of U.S. security holders in these types of cross-border transactions."¹⁰⁶

The reality is that there is an element of subjectivity and arbitrariness in any number—it depends upon the level at which one concludes U.S. shareholder ownership is or should be significant. Additionally, no empirical research has been conducted to ascertain the number of cross-border takeover offers qualifying for the Tier I exemption under a 20%, 15% or other percentage as opposed to a 10% threshold.¹⁰⁷ Until this research is undertaken, there is insufficient data to appropriately determine the right threshold. In any event, although such research would provide needed guidance, the research would arguably occur in the wrong arena; the SEC's focus in setting this number has mainly been on U.S. ownership and at what level U.S. protection can be alleviated or removed, rather than on the investment decision of the U.S. security holder.

However, in offers for non-U.S. issuers, U.S. ownership levels are certainly a subjective and arguably an irrelevant factor. A better foundation could perhaps be built by focusing upon the initial investment decision (and choice) of the acquiree's U.S. security holders. U.S. security holders of a non-U.S. issuer have made the decision to invest in such an entity and therefore have accepted that they will be governed, to varying extents, by rules of a non-U.S. jurisdiction and will not have the full protections of the Ex-

¹⁰⁵ *Id.* at 82,541.

¹⁰⁶ *Id.* at 82,539. At U.S. ownership levels below 10%, U.S. participation is typically not essential for a successful takeover offer. The SEC steadfastly resisted increasing the threshold level above 10% in the context of Rule 802, as it believed that at any percentage above 10% acquirors would effectively be required to include U.S. holders since many non-U.S. transactions require greater than 90% security holder participation to be fully successful. *Id.* at 82,548. While this justification has merit for its inclusionary force, it appears divorced from the underlying principle of balancing this inclusion with the need to apply the protections of the U.S. takeover rules, and therefore does not appear to be a persuasive reason for setting the threshold at 10%.

¹⁰⁷ See *infra* note 118 and accompanying text.

change Act that are applicable to U.S. domestic reporting companies.

This is particularly true for securities of a non-U.S. company that are not registered under Section 12 of the Exchange Act. These securities are not registered either because there are less than 300 holders resident in the United States,¹⁰⁸ or because there are greater than 300 holders but the non-U.S. issuer is relying upon Rule 12g3-2(b) to avoid the periodic reporting requirements under the Exchange Act.¹⁰⁹ In the vast majority of instances, these securities are not listed on the NYSE or quoted on Nasdaq, but instead only on a non-U.S. exchange.¹¹⁰ In addition, because these securities are not registered under Section 12 of the Exchange Act, U.S. security holders have never benefited from the protections of the periodic reporting requirements of the Exchange Act applicable to non-U.S. companies, nor have these securities been issued pursuant to a registration statement filed with and reviewed by the SEC.¹¹¹ Finally, these are 14E Offers: only the procedural tender offer rules embodied in Regulation 14E of the Williams Act are applicable to these takeovers.¹¹² In particular, the filing, dissemination and other requirements of Regulation 14D do not apply.¹¹³

Having wilfully forgone the full protections of the Exchange Act, it is difficult to see why even the limited protections of the Williams Act should apply to protect investors in this cross-border

¹⁰⁸ 17 C.F.R. § 240.12g3-2(a) (2005).

¹⁰⁹ *Id.* § 240.12g3-2(b). This rule exempts a foreign private issuer who otherwise would be required to register under section 12 of the Exchange Act if the foreign private issuer (i) is not listed on an exchange or quoted on the Nasdaq, and (ii) furnishes to the SEC all information that it (A) has made or is required to make public pursuant to the law of the country of its domicile or in which it is incorporated or organized, (B) has filed or is required to file with a stock exchange on which its securities are traded and which was made public by such exchange, or (C) has distributed or is required to distribute to its security holders. *Id.* § 240.12g3-2(b)(1)(i).

¹¹⁰ Issuers with securities listed on the NYSE or quoted on the Nasdaq before October 5, 1983 can still rely upon Rule 12g-3(2)(b) and maintain such listing or quotation. *Id.* § 240.12g3-2(d)(3).

¹¹¹ *Id.* § 240.12g3-2(b).

¹¹² See *supra* note 15 for a discussion of 14E Offers.

¹¹³ See Cross-Border Release, *supra* note 9, at 82,549 ("With respect to the tender offer provisions, offers involving less than 300 U.S. holders are likely to be subject only to Regulation 14E, not the filing and procedural requirements of Regulation 14D, and thus will not need exemptive relief beyond that adopted today."). See also 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (2000) (describing the requirements applicable to takeover offers not subject to Regulation 14D).

takeover paradigm. The U.S. investor has consciously made the decision to invest in a non-U.S. entity without the full protections of the U.S. federal securities laws; to apply the relevant Williams Act rules at this juncture seems inapposite and unduly burdensome and the level of U.S. shareholdings seemingly irrelevant.¹¹⁴ This is especially true in jurisdictions such as the United Kingdom that have similar shareholder protections with respect to equal treatment and accounting requirements.

The difficulty with this argument is that it could perhaps also be used to justify applying all of the protections of the U.S. takeover rules and removing the Tier I exemption for any cross-border takeover offer involving securities of a non-U.S. company registered under Section 12. Here, the non-U.S. company has sought access to the U.S. markets and U.S. holders have invested in that company on the presumption that the full protections of the U.S. takeover and securities rules will apply, as they did in the initial offering of those securities. It could be argued that in these circumstances depriving a U.S. holder of the protection of the U.S. takeover rules is anomalous, regardless of the level of U.S. ownership. However, this argument, if adopted by the SEC, would likely only encourage the exclusion of U.S. holders in cross-border takeovers. Until further research about an appropriate alternative threshold can be conducted, there is some logic in continuing to base the Tier I exemption on the 10% threshold even if there is an element of arbitrariness in doing so.

4.1.2. *Rule 802 Exemption*

A similar though distinct issue arises with respect to the appropriate threshold for the Rule 802 exemption. Here, it is worth

¹¹⁴ A grey area exists with respect to non-U.S. issuers who are exempt from the filing and other obligations of Section 12 of the Exchange Act under Rule 12g-3(2)(b). See 17 C.F.R. § 240.12g3-2(b) (setting forth certain exemptions from Exchange Act reporting requirements under Section 12(g) thereof for the securities of eligible foreign private issuers). In addition to an obligation to furnish home jurisdiction documents to the SEC, these companies often have ADS programs for the trading of their securities in the United States on the over-the-counter market. In these instances, U.S. investors can and could have bought in the United States, and are subject to more limited protections under the Exchange Act. Accordingly, a higher level of protection may be appropriate and a risk-benefit analysis of U.S. persons being simply excluded from offers and/or possible detriment due to lack of application of the U.S. takeover rules is necessary. Weighing the balance falls back into subjectivity, but it would appear that the suggested thresholds in the context of the Tier I exemption, such as 10% or 20%, would be a suitable balance.

noting that the SEC, based on the suggestion of commentators who proposed a range from 10%–30%, increased the threshold level for qualification for the Rule 802 exemption from 5% in the Cross-Border Proposing Release to 10%, the same level as the Tier I exemption.¹¹⁵ The SEC stated that this level was appropriate for exchange offers (and presumably business combinations) since security holders having in the aggregate 10% or more of the securities sought in the offer may have an ability to block, at least partially by forestalling a squeeze-out, the success of the offer.¹¹⁶ The SEC also believed that the Tier I and Rule 802 registration exemption should be at the same percentage in order to create a level playing field for stock and cash tender offers.¹¹⁷

As with the Tier I exemption, the 10% number appears to have an arbitrary component. The SEC itself noted that the setting of this number for the Rule 802 exemption was not based on statistics, since comprehensive analysis was not available on transactions that excluded U.S. persons.¹¹⁸

In the Cross-Border Proposing Release the SEC also addressed certain arguments by commentators that the Rule 802 exemption should depend on whether there are 300 or fewer U.S. shareholders rather than a 10% threshold. The 300 number is derived from the Exchange Act periodic reporting requirements under Section 12(g) which, as noted *supra*, are triggered for non-U.S. issuers once they have more than 300 U.S. holders.¹¹⁹ The SEC rejected this proposition:

We do not believe that it is necessary or appropriate to exempt an offering of securities to up to 300 U.S. investors from the Securities Act registration requirements, in what may be a predominantly U.S. transaction, based solely on

¹¹⁵ Cross-Border Release, *supra* note 9, at 82,548.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 82,549.

¹¹⁸ Instead, the SEC cited a limited sample of offers compiled from no-action and exemptive relief requests. *Id.* at 82,548 n.53 *see also* Cross-Border Proposing Release, *supra* note 6, at 81,060 n.26 (“Since 1990, bidders in 54 transactions sought exemptive relief from the staff to facilitate including U.S. shareholders. Twenty of those transactions would have been eligible for the Tier I exemption proposed today and 31 would have been eligible to use the Tier II exemption. Three of these transactions would have been ineligible for either Tier I or Tier II exemptions . . .”).

¹¹⁹ 17 C.F.R. § 240.12g3-2(a) (2005).

the foreign status of the subject company. U.S. investors in cross-border exchange offers should be provided with the protections of the Securities Act registration, unless application of those provisions likely would result in the exclusion of U.S. holders from the transaction. Where U.S. participation is not incidental to the transaction, those requirements should continue to apply.¹²⁰

This is consistent with the SEC's approach to Section 5—which is that a presence test, whether it is sophistication in the case of Regulation D or 144A offerings, or percentage in cross-border offerings, should apply to determine applicability of the U.S. securities rules.¹²¹ It is most likely for this reason that the SEC also rejected a *per se* exemption under the Cross-Border Rules for securities offerings where the proceeds were below an aggregate dollar amount.¹²²

When securities are offered in a cross-border takeover, the acquiree shareholder is faced with a decision as to whether to make a new investment in the acquiror. The nature and type of this new investment will vary depending upon the jurisdiction and status of the acquiror. Accordingly, setting the Rule 802 exemption based on the extent of the acquiree's U.S. ownership (as in the Tier I Exemption) appears misplaced, even if it is on a graduated basis dependent on the acquiree's Exchange Act status. At the same time, setting the threshold based on the jurisdiction, Exchange Act or other status of the acquiror would disadvantage certain acquirors (and certainly U.S. acquirors) to the benefit of competing acquirors, and, in certain circumstances, result in reduced protection for U.S. investors as a result of the takeover offer.¹²³

¹²⁰ Cross-Border Release, *supra* note 9, at 82,548–49.

¹²¹ See *supra* note 5 for a discussion of the presence standard in the context of the U.S. takeover rules. A logical disconnect in this approach is existent since a numbers test is acceptable for the periodic reporting requirements under the Exchange Act but not the securities offering requirements under the Securities Act. One possible justification for this is that investors need more information when they decide to invest than when they decide to sell or hold securities in the secondary market. One of the difficulties with this argument is that the vast majority of non-institutional investors purchase their securities in the secondary market.

¹²² By spurning this form of safe harbor, the SEC reversed its prior support for this approach in the International Release. The SEC did, however, in the Cross-Border Proposing Release, solicit comment on the appropriateness of this position. Cross-Border Proposing Release, *supra* note 6, at 81,062.

¹²³ For example, if the subject securities of the takeover offer were registered

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Ultimately, the rationale for any Rule 802-type exemption becomes reduced to the SEC-enunciated rationale of expediency and balance. Since the Securities Act registration requirements are triggered by even minimal amounts of public participation and the requirements of registration can be quite burdensome, particularly for non-U.S. companies, most if not almost all acquirors offering securities as consideration (particularly those without securities already registered under Section 12) have the incentive to exclude U.S. persons or otherwise structure the transaction to avoid triggering the Securities Act registration requirements. In these circumstances, it would appear that a threshold is appropriate and, again, until further research is conducted, the 10% threshold appears to strike an acceptable balance under the level playing field and inclusionary principles established in the Cross-Border Release.

4.2. Determination of U.S. Ownership

One of the principal difficulties acquirors have experienced in applying the Cross-Border Rules is the determination of U.S. ownership. In both negotiated or "friendly" transactions (rather than unsolicited or "hostile" transactions), acquirors are required to "look through" the acquiree's record ownership to determine the level of U.S. beneficial ownership. Specifically, an acquiror is required to look through the record ownership of brokers, dealers, banks and other nominees appearing on the acquiree's books or those of its transfer agents and depositories.¹²⁴ This look-through analysis is required to be undertaken with respect to securities held of record in nominee accounts with addresses in (i) the United States, (ii) the acquiree's home jurisdiction and (iii) the primary trading market of the acquiree's securities (in the event the primary trading market is not located in the home jurisdiction).¹²⁵ The re-

under Section 12 of the Exchange Act and the acquiror did not have any securities so registered, U.S. holders would be deprived of the added protection of the periodic reporting requirements under the Exchange Act—protection they had assumed they would be entitled to at the time of their investment decision.

¹²⁴ 17 C.F.R. §§ 230.800(h), 240.14d-1 (2005).

¹²⁵ *Id.* §§ 230.800(h), 240.14d-1. In discussions with practitioners, the staff of the SEC has indicated that a non-U.S. investment manager may be considered a U.S. holder by the SEC if the ultimate decisionmaking power with respect to investments (*e.g.*, to vote or dispose of securities) is held by a U.S. entity (*e.g.*, a U.S. parent company). This analysis is similar to that required to determine who is a "beneficial owner" of stock under Rule 13d-3 for purposes of determining a need to file a Schedule 13D or 13G. *Id.* § 240.13d-3. Because of limited information on the internal workings of such investment managers, such securities are often pre-

quirement that U.S. ownership be based on beneficial rather than record ownership makes it more difficult for transaction participants to qualify for the exemptions under the Cross-Border Rules.¹²⁶

The look-through rule appears to be alluringly straightforward and, in fact, is based upon the SEC-mandated determination for the applicability of Section 12's reporting requirements.¹²⁷ In addition, an acquiror is not required to obtain the number of U.S. holders or the names of those security holders, but only the aggregate amount of a nominee's holdings that are represented by U.S. accounts.¹²⁸ However, in many jurisdictions security holders and nominees are subject to legal restrictions with respect to the disclosure of shareholder information, or are otherwise opposed to disclosing information that is perceived to be confidential. This is particularly true when bearer securities are the primary form of share ownership, such as in Germany, where it is difficult to even determine relevant nominees.¹²⁹ The SEC in the Cross-Border Rules acknowledged this issue. Under the Cross-Border Rules, if, after reasonable inquiry, an acquiror is unable to obtain the necessary information from a nominee, it can assume the securities held by the nominee are held by security holders resident in the nominee's principal place of business.¹³⁰ However, as most investment banks are

sumed by acquirors in cross-border takeovers to be U.S.-owned, thereby overstating the actual percentage held by U.S. holders.

¹²⁶ Cross-Border Release, *supra* note 9, at 82,552-53.

¹²⁷ The determination is based upon Rule 12g3-2(a) under the Exchange Act. 17 C.F.R. § 240.12g3-2(a). Rule 12g3-2(a) follows the definition of "securities held of record" in Rule 12g5-1, but requires the offeror to "look through" the record ownership of brokers, dealers, banks or nominees appearing on the issuers' books or those of transfer agents, depositaries, or others acting on the issuer's behalf. If those record owners hold securities for the accounts of customers, the issuer must determine the residency of those customers. Cross-Border Release, *supra* note 9, at 82,552.

¹²⁸ Cross-Border Release, *supra* note 9, at 82,552.

¹²⁹ The look-through process in Germany typically takes approximately three to six weeks and often does not generate the quality of information necessary to allow an acquiror to rely upon the exemptions set forth in the Cross-Border Rules. See Celanese Letter, *supra* note 10 (discussing look-through procedures in Germany and the difficulties inherent in relying on such information); *infra* note 130 (discussing the peculiar difficulties inherent in determining ownership of bearer securities).

¹³⁰ Cross-Border Release, *supra* note 9, at 82,552. With respect to bearer securities, the SEC stated that "[s]ince neither a U.S. residence nor the name of an offshore nominee will appear on the records of the issuer for the holder of the bearer securities, these securities will not be treated as being held by U.S. residents,

headquartered in the United States and since such banks are often nominee holders, there is a "U.S.-bias" to this rule.

Another problematic issue that acquirors have in determining whether they are eligible for the Tier I or Rule 802 exemption is that the look-through determination is required to be made exactly thirty days prior to commencement of the offer.¹³¹ There are a number of inherent difficulties with this requirement. First, it is often quite difficult, if not impossible, in many jurisdictions to obtain a shareholder count at such a point in time.¹³² Second, France, and many other Western European jurisdictions, does not have a shareholder clearing and accounting system that is organized to provide shareholder information within this time frame. This prevents the acquiror from ascertaining in a timely manner whether it qualifies for the exemptions under the Cross-Border Rules.¹³³

unless the acquiror knows or has reason to know that these securities are held by U.S. residents." *Id.* at 82,553 n.75. In Germany, where the majority of securities are held in bearer form, this has led to a developing practice of retaining a financial advisor or information agent to make blind inquiries of depositary banks (nominees) as part of the required look-through analysis. However, as noted, such a survey is necessarily incomplete and produces only a limited picture of security holder residences. See Axel Springer AG Offer for ProSiebenSat.1 Media AG, SEC No-Action Letter, 2005 WL 2291629, at *3 (Sept. 12, 2005) ("The Offeror has not performed a 'look-through' analysis required for purposes of establishing the availability of the cross-border exemptions under Rule 14d-1(d) under the Exchange Act . . . because, given the limited information available as to the holders of bearer shares of German companies, it is unlikely to yield comprehensive or complete results."); 91 Profi-Start 2004, SEC No-Action Letter, 2004 WL 1780985, at *2 (June 24, 2004) (describing the accepted practice for a look-through analysis in Germany for an acquiree with outstanding bearer securities).

¹³¹ 17 C.F.R. §§ 230.800(h), 240.14d-1 (2005).

¹³² The SEC has, however, stated that "[i]f the 30th day is impracticable for reasons outside of the acquiror's control, the acquiror should use the date within the 30-day period as close to the 30th day as practicable." Third Supplement, *supra* note 10, at § I.E. How strictly the SEC will interpret this requirement still remains uncertain.

¹³³ The look-through process in France typically takes six to eight weeks and involves a survey ("Titres au Porteur Identifiés," or a "TPI") undertaken through Euroclear France. These timing difficulties in conjunction with the French offer process have forced at least one acquiror to seek SEC relief instead of reliance upon the Cross-Border exemptions because it could not conduct the necessary look-through analysis in sufficient time before commencement of the acquiror's offer. Saipem SpA, 2002 WL 1841561 (July 29, 2002) [hereinafter Saipem Letter]. See also Sanofi Letter, *supra* note 10 (providing a detailed discussion of the look-through procedures in France); Alcan Letter, *supra* note 10 (setting forth certain issues and difficulties inherent in the required look-through analysis in France); Serono Letter, *supra* note 10 (providing another description of the look-through process in France).

Third, the timing of the count—thirty days before commencement of the takeover—can require that the acquiror begin the necessary inquiry before public announcement of the transaction, thereby increasing the risks of preliminary disclosure. For example, in jurisdictions where reports can be requested from nominees under statutory procedures, such as in the United Kingdom, the acquiree and acquiror will often resist initiating these procedures for fear of alerting the market to the transaction.¹³⁴ Finally, there is often a significant delay, sometimes months, between the announcement and commencement of a takeover.¹³⁵ The announcement of a takeover offer results in a substantial alteration of the acquiree shareholder base because securities typically move into the hands of hedge funds and other institutional investors that consider the transaction to be an arbitrage opportunity. In these circumstances, the shareholder base does not reflect the true historical shareholdings of the acquiree, making it nearly impossible for the acquiror to determine in advance whether it can rely on a Cross-Border Rule exemption.

In calculating the overall percentage of securities held by U.S. holders, the acquiror is required to exclude from the numerator and denominator securities held by all persons owning 10% or more of the outstanding securities, as well as securities held by the acquiror.¹³⁶ The exclusion of 10% holders can have a significant distorting effect, such that an acquiree with a nominal number of overall securities held by U.S. holders may nevertheless be above the 10% threshold once the look-through analysis has been completed.¹³⁷ For example, a non-U.S. acquiree company may have

¹³⁴ Consequently, some acquirors have sought SEC relief prior to announcement of their transaction and only partially complied, if at all, with the look-through analysis rules. *See, e.g.*, Cinven Limited, SEC No-Action Letter, 2003 WL 1969293 (April 9, 2003) [hereinafter Cinven Letter] (granting an exemption under Rule 14e-5 to an acquiror prior to announcement of a takeover offer and without the acquiror having conducted the full look-through analysis required under the Cross-Border Rules).

¹³⁵ For example, in the United Kingdom and Ireland pre-conditional offers are quite common. In a pre-conditional offer, certain prior conditions, such as antitrust clearances, must be satisfied before the takeover offer even commences. The SEC has acknowledged this issue but still insists that the count must occur prior to commencement. Third Supplement, *supra* note 10, at § I.L. Q.1.

¹³⁶ 17 C.F.R. §§ 230.800(h), 240.14d-1 (2005).

¹³⁷ The SEC is aware of this distorting effect but does not deem it significant. In the Cross-Border Release, the SEC stated that such exclusions “will provide greater assurance of an accurate assessment of the significance to the offer of the participation by U.S. public investors.” Cross-Border Release, *supra* note 9, at

only 1% of its securities held by U.S. holders. However, if the acquiror holds 5% of its securities and a handful of security holders (each with more than 10%) hold 86% of the outstanding securities, the offer would not be eligible for the Tier I exemption.¹³⁸ This example illustrates a logical disconnect since the U.S. presence is small, and the Cross-Border Rules normally inapplicable, but the exemptions are not available. Note that the SEC's Cross-Border Release also considered allowing acquirors to exclude institutional holders.¹³⁹ The idea was rejected because the determination of these holdings would both increase the difficulty of the calculation and increase the potential for a distorting effect.

The result of these cumulative complications is that the current look-through rule, unfortunately, does not work well in practice.¹⁴⁰ First, it is difficult for acquirors to determine whether any exemptions are available under the Cross-Border Rules. Second, penalties for non-compliance; such as rescission in the case of a non-compliant Rule 802 offering, are potentially quite harsh. Consequently, acquirors unable to make a certain determination as to qualification for the exemptions under the Cross-Border Rules are more likely to structure cross-border takeovers to exclude participation by U.S. security holders.¹⁴¹ Alternatively, acquirors have submitted prospective no-action and exemptive relief requests to the staff of the SEC for relief along the lines of the Tier I or Tier II

82,554. The SEC has, however, stated that "[i]f the 30th day is impracticable for reasons outside of the acquiror's control, the acquiror should use the date within the 30-day period as close to the 30th day as practicable." Third Supplement, *supra* note 10, at § I.E. How strictly the SEC will interpret this requirement still remains uncertain.

¹³⁸ Securities held by 10% holders are excluded from both the numerator and denominator of the U.S. holder calculation. Third Supplement, *supra* note 10, at § II.E. Q.1.

¹³⁹ Cross-Border Release, *supra* note 9, at 82,553-54.

¹⁴⁰ See, e.g., Serono Letter, *supra* note 10, at *6 (noting acquiror's inability to perform necessary look-through analysis in accordance with the Cross-Border Rules due to inapposite requirements and practices in France); Saipem Letter, *supra* note 133, at *4 (same).

¹⁴¹ In fact, in the least U.S. regulated cross-border takeovers, 14E Offers, acquirors often decide to comply with the minimal requirements of Regulation 14E rather than rely on the Tier I exemption due to the expense and problems associated with the look-through analysis. Alternatively, offerors in the United Kingdom and other eligible jurisdictions may choose to structure a transaction as a scheme of arrangement under Section 3(a)(10) of the Securities Act in order to similarly avoid reliance upon the exemptions under the Cross-Border Rules while still minimizing compliance with the U.S. takeover rules and avoiding triggering the Securities Act's registration requirements.

exemptions without undertaking the required look-through analysis, thereby vitiating the purpose of the Cross-Border Rules.¹⁴²

The Cross-Border Rules could be improved significantly by allowing acquirors in negotiated transactions to rely on the same presumption currently available to acquirors in "hostile" or unsolicited transactions. Specifically, in an unsolicited transaction, the acquiror may presume that the cross-border takeover is eligible under the Tier I, Rule 802, or Tier II exemptions provided the aggregate trading volume of the securities within the United States does not exceed 10% or 40%, respectively, of the worldwide aggregate trading volume over the twelve-month period ending thirty days before commencement of the offer.¹⁴³ As mentioned earlier, given the delay that often exists between announcement and commencement of the offer and the extent to which share ownership may change following announcement, the Cross-Border Rules could be further improved for both negotiated and hostile acquirors if the determination was based on relative trading volumes prior to announcement, rather than on the commencement of or so-

¹⁴² *E.g.*, Cinven Letter, *supra* note 134; SABMiller plc, SEC No-Action Letter, 2004 WL 1117167 (May 10, 2004); Anheuser-Busch Companies, Inc., SEC No-Action Letter, 2004 WL 1489579 (May 7, 2004).

¹⁴³ 17 C.F.R. § 240.14d-1 (2005). In addition, the presumption does not apply if: (1) the takeover offer is made pursuant to an agreement with the issuer of the subject securities; (2) the most recent annual report or other informational form filed or submitted by the acquiree or security holders to securities regulators in its home jurisdiction or elsewhere (including with the SEC) indicates that U.S. holdings exceed the applicable threshold; or (3) the acquiror knows or has reason to know from other sources that the level of U.S. ownership of the subject class of securities exceeds the applicable thresholds. Cross-Border Release, *supra* note 9, at 82,554. It is worth noting that the SEC has already adopted this type of approach to certain friendly cross-border takeovers—specifically, those subject to the Canada-U.S. Multijurisdictional Disclosure System ("MJDS"). Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, Securities Act Release No. 6902, Exchange Act Release No. 29,354, Investment Company Act Release No. 18,210 [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,812, at 81,860 (July 21, 1991) [hereinafter MJDS Release]. Under MJDS, a non-U.S. acquiror is entitled to conclusively presume that an exchange offer or business combination is MJDS eligible unless: (1) the aggregate U.S. trading volume exceeds the aggregate Canadian trading volume over a prior 12-month period; (2) the acquiree has disclosed in its most recent annual report that the applicable U.S. ownership threshold has been exceeded; or (3) the acquiror has actual knowledge that the applicable U.S. ownership threshold has been exceeded. *See, e.g.*, 17 C.F.R. § 239.38(g) ("In the case of an exchange offer, the issuer of the subject securities shall be incorporated or organized under the laws of Canada or any Canadian province or territory and be a foreign private issuer, and less than 25 percent of the class of subject securities outstanding shall be held by U. S. holders.").

licitation with respect to the takeover offer.¹⁴⁴ Finally, excluding 10% holders seems like a sound approach, yet the consequent exclusion of these holdings from both the numerator and denominator of the eligibility count¹⁴⁵ results in a distortive application, or rather inapplication, of the exemptions under the Cross-Border Rules. A better, less bizarre approach would be to simply exclude shares held by the 10% holders from the numerator of the count.

4.3. State Blue Sky Laws

One of the major defects in the Cross-Border Rules is the lack of preemption afforded for state securities laws (so-called Blue Sky laws). The United States is a federal system with rules governing takeovers and securities offerings that exist alongside those of fifty state governments.¹⁴⁶ The U.S. courts have held that federal takeover rules do not preempt state rules except where state regulations materially interfere with an acquiror's ability to comply with the federal rules.¹⁴⁷ In the case of takeovers involving security consideration, Blue Sky laws may also restrict the ability of an acquiror to offer securities as consideration to residents of particular states. This may result in another layer of regulation in cross-border takeovers, the logic of which is often baffling to non-U.S. acquirors unfamiliar with a federal legal system.

Instead of preempting state Blue Sky laws, the SEC created a sub-exemption under the Tier I exemption through which an acquiror offering securities under the Rule 802 exemption could exclude security holders residing in any state that did not provide an exemption from registration or qualification under applicable Blue

¹⁴⁴ This would also comport better with the requirements of Rule 14e-5 since restrictions on purchases outside a tender offer would be triggered upon announcement, and not commencement, of a tender offer. See *infra* note 153 and accompanying text.

¹⁴⁵ See *supra* note 138.

¹⁴⁶ See generally Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229 (2003) (discussing the origins and content of Blue Sky laws).

¹⁴⁷ See, e.g., *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 85-87 (1987) (holding that, given the long standing prevalence of state regulation of corporations, the Williams Act did not necessarily preempt any state corporate laws which delayed the consummation of a takeover offer). But see *Edgar v. MITE Corp.*, 457 U.S. 624, 643-46 (1982) (holding the Illinois Business Takeover Act invalid since it purported to directly regulate interstate commerce, including commerce wholly outside the state).

Sky laws.¹⁴⁸ In addition, if the acquiror offers securities registered under the Securities Act, the acquiror may rely on the Tier I exemption but still exclude any holders in any state that refuses to register or qualify the offer and sale of such security consideration in that state after a good faith effort by the acquiror.¹⁴⁹ In both instances, the acquiror is required to offer a cash alternative instead of excluding the affected security holders if the acquiror is offering an all-cash (not partial-cash) alternative as part of the takeover consideration.¹⁵⁰

The nature of this exemption and, ultimately, the SEC's failure to preempt, theoretically requires any acquiror offering consideration consisting of securities to perform a Blue Sky analysis in all 50 states each time security consideration is offered. While this is common practice in other contexts in the United States, it is alien to non-U.S. acquirors and a burden and cost that again is likely to act as a deterrence to inclusionary takeover offers. In addition, to the extent that the Blue Sky laws of a state do not permit post-offering qualification, the acquiror is effectively forced to qualify under the Blue Sky laws of fifty different states. This is an extreme solution since an acquiror will not necessarily know the location of holders to whom it will be issuing securities until the time of issuance. To date, there has been no solution to this problem. Further, until the Cross-Border Rules preempt state Blue Sky laws, it is probable that no solution will be found. At least one acquiror has responded to this dilemma by qualifying the relevant takeover under Blue Sky laws in fifty states. However, it appears that the bulk of acquirors have either ignored these laws and assumed the risk of enforcement or attempted to shift the burden of enforcement upon the acquiree shareholder by including notices in the offer document indicating that the offer is not being made in any state where it is not legally permitted to do so.

4.4. *Purchases Outside the Offer – Rule 14e-5*

One means through which the SEC has historically protected selling acquiree security holders in tender offers is to restrict the

¹⁴⁸ 17 C.F.R. § 240.14d-1(c)(2)(ii). There is a similar exemption under Rule 802. See *id.* § 230.802(a)(2) ("The issuer[s] . . . need not extend the offer to security holders in those states or jurisdictions that require registration or qualification . . .").

¹⁴⁹ *Id.* § 240.14d-1(c)(2)(i).

¹⁵⁰ *Id.* § 240.14d-1(c)(2)(i)-(ii).

ability of acquirors to purchase securities outside of the subject tender offer, such as in privately negotiated transactions with key security holders. This protection was initially embedded in Rule 10b-13 under the Exchange Act.¹⁵¹ However, on the same day that the SEC adopted the Cross-Border Rules, the SEC also amended Rule 10b-13 in the M&A Release. The amendment re-designated the Rule as new Rule 14e-5 and modified and clarified the scope of the Rule.¹⁵² As adopted, Rule 14e-5 prohibits from the date of announcement of the offer, in connection with a tender offer for securities, a covered person from purchasing or arranging to purchase any subject securities or any related securities except as part of a tender offer.¹⁵³

In the M&A Release, the SEC adopted two new exceptions to Rule 14e-5 relating to cross-border takeovers. New Rule 14e-5, as adopted, permits purchases outside the offer under the Tier I exemption either within or outside the United States provided that certain disclosure procedures are adhered to and the purchases comply with the applicable tender offer laws and regulations of the home jurisdiction.¹⁵⁴ The SEC explicitly stated its rationale for this exception:

¹⁵¹ See 17 C.F.R. § 240.10b-13(a) (1999) ("No person who makes a cash tender offer or exchange offer for any equity security shall, directly or indirectly, purchase, or make any arrangement to purchase, any such security, otherwise than pursuant to such tender offer or exchange offer . . .").

¹⁵² See M&A Release, *supra* note 10, at 82,608-12 (redesignating former Rule 10b-13 as Rule 14e-5 and outlining revisions to the rule). It is worth noting that the SEC did not propose or adopt any exemptions to Regulation M under the Securities Act in the Cross-Border Release. Regulation M serves a similar purpose as Rule 14e-5 in the context of securities offerings in takeover offers by, among other things, prohibiting issuers, selling security holders, underwriters, broker-dealers, and other distribution participants from directly or indirectly bidding for, purchasing, or attempting to induce any person to bid for or purchase any security that is the subject of the distribution during an applicable restricted period. 17 C.F.R. § 242.100-105 (2005). However, in the Cross-Border Proposing Release the SEC requested comment on whether such an exemption was necessary to accommodate the Rule 802 exemption. The SEC decided to continue application of Regulation M to such exempt offerings since it was uncertain whether an exemption was needed, given the limited number of requests for such exemptions for relief in these contexts. The SEC pledged to monitor the situation and evaluate the need for such an exemption once it had observed practice under the Cross-Border Rules. See Cross-Border Release, *supra* note 9, at 82,547 ("We are not changing Regulation M in this release."). To date, the SEC has taken no action in this regard.

¹⁵³ 17 C.F.R. § 240.14e-5(a).

¹⁵⁴ *Id.* § 240.14e-5(b)(10).

Many foreign jurisdictions do not expressly prohibit an offeror from purchasing or arranging to purchase the subject security outside the terms of the offer. . . . [A] strict application of Rule 14e-5 in some cases could disadvantage U.S. security holders where the offeror decides not to extend the offer in the United States because of the rule's restrictions.¹⁵⁵

However, the SEC declined to extend this exception to offers under the Tier II exemption due to the "greater U.S. interest in those offers."¹⁵⁶ Instead, the SEC stated in the Cross-Border Release that it would continue to consider requests for exemptive relief for such offers on a "case-by-case" basis.¹⁵⁷ To determine the need for such relief the SEC indicated that it would consider factors such as proportional ownership of U.S. holders of the subject security in relation to the total number of securities outstanding and the public float, whether the takeover offer would be for "any-and-all" securities or would involve prorationing, whether the offered consideration would be cash or securities, whether the takeover offer would be subject to a non-U.S. jurisdiction where the conduct of tender offers provided comparable protection to Rule 14e-5, and whether the principal trading market for the subject security was outside the United States.¹⁵⁸

The automatic exception within Rule 14e-5 under the Tier I exemption facilitates the inclusion of U.S. security holders in cross-border takeovers. However, the rationale for the failure to extend this exemption to takeover offers qualifying for the Tier II exemption or otherwise does not appear to be wholly borne out by experience or logic. Since the Cross-Border Release, the SEC has regularly and on a pro forma basis granted exemptive relief from Rule 14e-5 for takeover offers under the Tier II exemption in certain jurisdictions, such as the United Kingdom, where there are procedures in place, such as a best price rule, that provide sufficient protection to acquiree security holders when an acquiror makes such market or other outside purchases.¹⁵⁹ While the relief

¹⁵⁵ Cross-Border Release, *supra* note 9, at 82,546.

¹⁵⁶ *Id.* at 82,547.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See U.S. Securities and Exchange Commission, Division of Market Regulation, Exemptive Order and Exemptive, Interpretive, and No-Action Letters, Published by Penn Law: Legal Scholarship Repository, 2014

is regularly granted the need itself to seek exemptive relief is a disincentive to including U.S. holders.¹⁶⁰ Consequently, the need for Rule 14e-5 in offers qualifying for the Tier II exemption seems particularly unclear in jurisdictions such as the United Kingdom. A better, limited solution would perhaps be to provide an exemption to Rule 14e-5 for takeover offers in selected jurisdictions previously identified by the SEC through the exemptive relief process as providing adequate protection.¹⁶¹ Extrapolating from this, there would be some merit in taking this approach, without regard to U.S. ownership thresholds, when determining whether to apply Rule 14e-5.¹⁶²

The second exception to Rule 14e-5 adopted by the SEC in the M&A Release is for purchases by connected exempt market makers and connected exempt principal traders in the United Kingdom in offers subject to the City Code. This exception is applicable in all such offers, whether or not they qualify for the Tier I or Tier II exemption, as the SEC determined that the regulatory oversight afforded by the City Code was sufficiently protective of U.S. investors.¹⁶³

<http://www.sec.gov/divisions/marketreg/mr-noaction.shtml> (last visited Oct. 22, 2005) (listing exemptive letters under which this type of relief was granted).

¹⁶⁰ This is particularly true since the SEC has orally taken the position that it will not grant such relief unless, if able, the acquiror first undertakes a look-through analysis to determine whether it is eligible for the Tier I exemption. This often leads acquirors to exclude U.S. persons rather than undertake the expense and time of a look-through analysis.

¹⁶¹ This proposed exemption could logically be extended to offers that do not qualify for the Tier I or Tier II exemption, as the focus is on the protection offered rather than the U.S. ownership level. However, this would conflict with the SEC's preference to base these exemptions on the size of the U.S. shareholding rather than on the quality of the local jurisdiction's regulation. See Cross-Border Release, *supra* note 9, at 82,546 (stating that the exception adopted for takeover offers eligible for the Tier I exemption "only extends to offers where U.S. persons hold of record 10 percent or less of the class of securities sought in the offer.").

¹⁶² Prior to the issuance of the Cross-Border Release, the SEC had in fact granted, in at least one instance, exemptive relief under old Rule 10b-13 in circumstances where the acquiree U.S. shareholder base comprised greater than 40% of the outstanding subject securities. See *In the Matter of Trinity Acquisition's Offer to Purchase the Ordinary Shares and Am. Depository Shares of Willis Corroon Group plc*, Exchange Act Release No. 40,246, 67 SEC Docket 1320 (July 22, 1998) (granting Rule 10b-13 exemptive relief where 45.46% of the outstanding subject securities were held by U.S. persons).

¹⁶³ This exception permits purchases or arrangements to purchase if they are effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the City Code; the issuer of the relevant security is a foreign private issuer; the takeover offer is subject to the City Code; the con-

An exception to Rule 14e-5, that the SEC inexplicably did not adopt, was to permit separate U.S. and non-U.S. offers in cross-border takeover offers, a structure common in cross-border takeover offers. The exception is necessary since the purchase of securities in a non-U.S. offer is technically a purchase outside a U.S. offer and vice versa.¹⁶⁴ This failure is inexplicable since the SEC did adopt under the Tier II exemption such an exception under Rule 14d-10.¹⁶⁵ The result is to render the Tier II exemption to Rule 14d-10 for dual-offer structures meaningless as acquirors are still required to request exemptive relief from Rule 14e-5 to permit this structure. This lack of harmony seems inappropriate given the commonality of this type of offer structure, corresponding exemption under the all-holders rule, technicality of the violation, and the SEC's willingness to grant pro forma relief with respect to this

nected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the City Code; and the takeover offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose how U.S. holders can obtain information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom. 17 C.F.R. § 240.14e-5(b)(9) (2005).

¹⁶⁴ The rationale is simple—with two different offer rules and disclosure requirements, acquirors have found it easier to address the differences by preparing two separate documents and conducting each of the offers under the relevant jurisdictional rules. It is worth noting that, in practice, the terms and conditions and procedures under the U.S. and non-U.S. offers are often harmonized to the greatest extent possible in order to minimize the possibility that security holders in one jurisdiction will be advantaged over security holders in the other jurisdiction through the application of the applicable rules. In addition, in certain jurisdictions such as the United Kingdom, the practice has developed to have only one offer document and offer complying with the disclosure and procedural rules of the United States and the non-U.S. jurisdiction; although, even in these jurisdictions, it is often necessary to request exemptive and no-action relief from the staff of the SEC. In non-English speaking jurisdictions, however, this is a harder task, and the practice is still to have separate offers with separate offer documents. This can be quite complicated. See generally Sanofi Letter, *supra* note 10 (outlining the tri-partite nature of Sanofi's cross-border takeover offer for Aventis: one offer in Germany under the German code, one U.S. offer, and a main French offer, all subject to different disclosure documents and different rules); Alcan Letter, *supra* note 10 (providing an example of a dual-offer structure in France); Celanese Letter, *supra* note 10 (offering a further example of a dual-offer structure in Germany).

¹⁶⁵ See discussion *infra* Section 4.5. The reason for this disjunction is unknown, but perhaps can be attributed to divisions within the SEC itself. Rule 14e-5 is administered by the Division of Market Regulation, while Rule 14d-10 is administered by the Office of Mergers and Acquisition, Division of Corporate Finance. Perhaps the two divisions simply did not agree on this exemption, but that is mere speculation.

point. It would seem sensible to at least amend Rule 14e-5 to per se permit the dual-offer structure along the lines of the similar Tier II exemption under Rule 14d-10.

The net effect of these deficiencies is to burden the staff of the SEC with an excessive number of Rule 14e-5 exemptive requests.¹⁶⁶ These legal impediments under Rule 14e-5 are juxtaposed by the SEC staff's practice of routinely, on a pro forma basis, granting these requests in most jurisdictions where the issues arise. The result is that, in such jurisdictions at least, an acquiror is forced to go through a regulatory process that appears to be unnecessary, burdensome and time consuming, which only encourages U.S. exclusionary practices.

4.5. Equal Treatment/Rule 14d-10

Rule 14d-10 of the Exchange Act, commonly referred to as the "all-holders/best-price" rule, requires that an acquiror keep open a tender or exchange offer to all the holders of a class of securities and pay each of them the highest consideration paid to any other shareholder during the tender offer.¹⁶⁷ The Tier II exemption provides for two limited exemptions to Rule 14d-10.¹⁶⁸

As already noted, the practice in cross-border takeovers is to split the offer into both a U.S. offer and a non-U.S. offer. However, the practice of having separate offers open only to U.S. or non-U.S. holders runs afoul of Rule 14d-10's requirement that the offer be open to all holders.¹⁶⁹ The Tier II exemption contains a limited exception to this rule. It provides an exemption from the all-holders rule for an acquiror to conduct its offer in two separate offers: one offer made only to U.S. holders and another offer only to non-U.S. holders, provided that the offer to U.S. holders is on terms at least as favorable as those offered any other acquiree shareholder.¹⁷⁰

This exemption does not, unfortunately, provide fully for legal

¹⁶⁶ As of October 17, 2005, post-adoption of the Cross-Border Rules, a West-law search of SEC No-Action Letters reveals that there have been more than forty published requests for no-action and exemptive relief with respect to cross-border takeovers, of which at least half requested exemptive relief under Rule 14e-5.

¹⁶⁷ 17 C.F.R. § 240.14d-10.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 240.14d-1(d). Unlike the Tier I exemption, the Tier II exemption does not permit an acquiror to offer cash to U.S. holders while offering securities to non-U.S. holders. *Id.*

practice. Typically in a cross-border takeover, when the offer is split, the practice is to split the offer into one bid that goes to U.S. holders and holders of acquiree ADSs wherever they are located, and another bid that goes to the remaining, non-U.S. security holders.¹⁷¹ The reason holders of ADSs are included in the U.S. offer is mechanical and practical. ADS holders are most likely to be U.S. holders, and to build in dual mechanics for ADSs in the non-U.S. offer documentation is inefficient and, while workable, difficult.¹⁷² However, the Tier II exemption does not permit an offer of this nature since, by its terms, the U.S. offer must be limited to only U.S. holders. Nonetheless, the SEC has, since adoption of the Cross-Border Rules, repeatedly granted relief to permit an offer on this basis.¹⁷³ As a technical clean up, and to avoid repeated need for pro forma exemptive relief, the SEC should amend the exemption to encompass this type of offer structure.

As noted in the discussion earlier in Section 3.2, there is also an exception to the equal treatment rule under the Tier I exemption to provide a cash alternative for U.S. holders when all or part of the offer consideration consists of securities.¹⁷⁴ However, the exception permits U.S. holders to be offered cash only so long as the acquiror has a reasonable basis to believe that the cash consideration is substantially equivalent to the value of the consideration offered to other holders.¹⁷⁵ To establish this, the Cross-Border Rules require that if the offered security is not a "margin security" within the meaning of Regulation T, the acquiror must provide, upon the request of the SEC or any U.S. holder, an opinion from an independent expert to this effect.¹⁷⁶ If the offered security is a "margin

¹⁷¹ See, e.g., *supra* notes 35 and 164 (commenting on the practice of separate U.S. and non-U.S. offers in cross-border takeovers).

¹⁷² Typically, upon the consummation of an offer, the ADS agent tenders all of the securities underlying tendered ADSs directly into the non-U.S. offer. Including the non-U.S. ADS holders in this tender simply eases the logistical burden of tracking the differing tenders. See Sanofi Letter, *supra* note 10 (providing an example of such inclusion).

¹⁷³ See, e.g., Alcan Letter, *supra* note 10 (granting SEC exemptive relief to permit a cross-border takeover offer structured as a U.S. offer open to all U.S. holders and holders of ADSs wherever located and a non-U.S. offer open to all remaining shareholders); Celanese Letter, *supra* note 10 (granting exemptive relief in a similar situation).

¹⁷⁴ 17 C.F.R. § 240.14d-1(c)(2)(iii).

¹⁷⁵ *Id.*

¹⁷⁶ According to the SEC:

security," an opinion is not required; instead the acquiror must undertake to provide the SEC or any holder, upon request, information on recent trading prices.¹⁷⁷ The SEC rationale for this difference is that the SEC believes that margin securities, as it defines them, are sufficiently liquid that their market value can be readily fixed.¹⁷⁸

The requirement to obtain an opinion for non-margin securities has proven to be a commercially unviable option. First, the assessment of liquidity on the U.S. markets is not always a valid one. If the issue is liquidity, there is no reason not to assess this on a more global numerical basis; liquidity is liquidity, and so long as it is there, arbitrageurs can smooth out the differences. Second, and perhaps more consequentially, there is liability exposure associated with giving the required opinion. In today's current corporate environment, to find an investment bank willing to make this judgment and assume liability exposure for such an opinion without a substantial, and perhaps inordinate, fee is problematical.¹⁷⁹ This is borne out by the fact that, to date, there does not appear to have occurred any cross-border takeover offer that has relied upon this exception with respect to non-margin securities.

the Board of Governors of the Federal Reserve System pursuant to the Exchange Act, includes 'foreign margin stock.' 'Foreign margin stock' comprises both securities on the Federal Reserve Board's List of Foreign Margin Stocks and those deemed to have a 'ready market' for net capital purposes under Rule 15c3-1 (17 CFR 240.15c3-1) under the Exchange Act. All stocks that appear on the Financial Times/Standard & Poor's World Actuaries Indices (FT/S&P Indices) are effectively treated as having a 'ready market' for net capital purposes.

Cross-Border Release, *supra* note 9, at 82,543 n.27.

¹⁷⁷ 17 C.F.R. § 240.14d-1(c)(2)(iii).

¹⁷⁸ Cross-Border Release, *supra* note 9, at 82,543.

¹⁷⁹ For example, an investment bank typically is paid a fee for delivery of a fairness opinion, the exact amount of which varies according to the size of the deal. A sizable portion of this compensation is attributable to compensation for the liability exposure of the investment bank in delivering this opinion. See Michael J. Kennedy, *Functional Fairness – The Mechanics, Functions and Liabilities of Fairness Opinions*, in TECHNOLOGY & EMERGING GROWTH M&As 2002 217, 270–280 (PLI Corp. Law and Practice Course, Handbook Series No. B-1316, 2002) (outlining the state of liability for investment banks with respect to the provision of financial opinions).

4.6. Procedural Issues

4.6.1. Withdrawal Rights

The procedural safeguards in the U.S. tender offer rules protect investors by giving them time to assess material information and make informed investment decisions. For example, Rule 14d-7 under the Exchange Act provides that tendering security holders be given withdrawal rights during the pending status of a tender offer.

Unfortunately, in cross-border takeovers, compliance with this rule is sometimes not possible due, among other things, to the fragmented nature of the non-U.S. tendering process. Unlike the United States, where there is typically one central tendering agent, in many countries, such as France, Sweden and Germany, tenders can be made at banks and other agencies. These entities only make their subsequent tenders once the offer has closed. In France, for example, the process of certifying the results is then taken on by the *Autorité des Marchés Financiers*.¹⁸⁰ The end result is that it is sometimes impossible to know the number of securities tendered at the time an offer is completed and/or extended.

In France the results of a takeover offer are not announced until 14 days after the expiration of the initial offer period. It is possible that the minimum condition of the takeover offer will not be met. The result could then be that on day 14 the acquiror decides to extend the offer to allow for more tenders and the chance to reach the minimum acceptance condition. The delayed notice is permitted under the Tier II exemption. However, during this time period, the tendering acquiree security holders do not have withdrawal rights as required under Rule 14d-7. It is a strange situation as the tender offer is neither open nor closed and permitting withdrawal rights would obviously not work with the French offer system. In effect, the satisfaction of the minimum condition becomes a condition subsequent, which is announced after the closing of the tender offer.¹⁸¹ In order to avoid repeated requests for no-action relief on this point the SEC may want to consider adopting a blanket ex-

¹⁸⁰ For a discussion of the tendering process in French offers, see Alcan Letter, *supra* note 10, and Sanofi Letter, *supra* note 10.

¹⁸¹ See Alcan Letter *supra* note 10 and Sanofi Letter *supra* note 10 (granting SEC exemptive relief to account for this circumstance and any conflict with Rule 14d-7 which may consequently arise).

emption that addresses this conflict.¹⁸²

4.6.2. *Prompt Payment*

A similar issue arises in relation to prompt payment. Rule 14e-1(c) under the Exchange Act requires an acquiror to pay the consideration offered or to return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of a tender offer.¹⁸³ Prompt payment in the United States is generally considered three business days in order to coincide with T+3 settlement procedures. Without this protection, tendering security holders could find themselves trapped, unable to withdraw their tendered share after the tender offer has closed in order to sell into the market and at the mercy of the acquiror in terms of when they will receive the offered consideration. While this rule protects U.S. investors, it is also at odds with the delayed counting process in some non-U.S. jurisdictions. The SEC has addressed this issue in the Cross-Border Rules by providing that, for cross-border takeovers under the Tier I and Tier II exemptions, an acquiror will be deemed to satisfy the prompt payment rule if it makes payment in accordance with the requirements of the acquiree's home jurisdiction.¹⁸⁴ Note, however, that this is not a blanket release: in the Cross-Border Proposing Release the SEC stated that the strictures of Section 14(e) may still apply to any prolonged or imprudent payment delay. The exemption further provides that the rule does not prohibit an acquiror electing to offer a subsequent offering period under Exchange Act Rule 14d-11 from paying for securities during the subsequent offering period in accordance with these requirements.¹⁸⁵

4.6.3. *Subsequent Offering Period*

As part of the M&A Release, the SEC adopted new Rule 14d-11 under the Exchange Act which provides that an acquiror conduct-

¹⁸² Prior to the issuance of the Cross-Border Release, the SEC had issued exemptive letters addressing a similar point in the context of Swedish cross-border takeover transactions. In the Matter of Incentive AB Offer to Purchase the Class B Shares and American Depositary Shares of Gambro AB, SEC Release No. 36793, [1995-1996 Transfer Binder] Fed. Sec. L. Rep (CCH) ¶ 85,734, at 87,423 (January 31, 1996); Pharmacia Release, *supra* note 39, at 80,583-92.

¹⁸³ 17 C.F.R. § 240.14e-1(c) (2005).

¹⁸⁴ *Id.* § 240.14d-1(d).

¹⁸⁵ Cross-Border Proposing Release, *supra* note 6, at 81,061.

ing a cross-border takeover offer may provide a subsequent offering period of three business days to twenty business days upon the expiration of the initial offer period and the satisfaction of certain other conditions.¹⁸⁶ By its terms, during a subsequent offering period, no withdrawal rights apply in accordance with Rule 14d-7(a)(2) of the Exchange Act.¹⁸⁷

The SEC had proposed in the Cross-Border Release that an acquiror qualifying for the Tier II exemption be permitted to offer a subsequent offering period provided all of the conditions to the offer were satisfied or waived and certain other requirements were met. The SEC opted not to adopt this proposed rule on the grounds that Rule 14d-11 addressed the issue. However, a gap remains in that many cross-border takeover offers have subsequent offering periods that last well beyond twenty business days, sometimes extending into months. Takeover offers in the United Kingdom that are subject to the City Code are an example of this. Certain acquirors have received exemptive relief from the SEC to permit longer periods in these circumstances.¹⁸⁸ However, there appears to be no reason why the rule should not be modified to countenance a longer period in the acquiree jurisdiction and in accordance with the rules of that jurisdiction provided that the other qualifications for the Tier II exemption are met.

4.7. *Disclosure and Dissemination (EDGAR)*

4.7.1. *Form CB Documents*

As noted previously in Section 3.1., the Tier I and Rule 802 exemptions require that the acquiror submit an English language translation of its offering materials under cover of Form CB. However, under the Cross-Border Rules there is some vagueness as to which documents must be furnished and consequent uncertainty as to the timing of the first mandatory Form CB filing.

The Tier I and Rule 802 exemptions require that if the acquiror disseminates, publishes or displays any "informational document"

¹⁸⁶ M&A Release, *supra* note 10, at 82,602-03.

¹⁸⁷ 17 C.F.R. § 240.14d-11.

¹⁸⁸ See, e.g., Harmony Letter, *supra* note 10 (describing a cross-border takeover offer under South African law with a subsequent offering period that extended for a period greater than twenty business days); UCB Letter, *supra* note 10 (describing a cross-border takeover offer under the City Code with a subsequent offering period greater than 20 business days).

then the acquiror must furnish this document to the SEC under cover of Form CB.¹⁸⁹ What an informational document is, however, has never been defined by the SEC. Possibly, this includes press releases, web-site postings, and other publicity associated with the cross-border takeover. However, it can be further extended to tombstones, statements of intention, and other written statements that are either minor or released prior to formal commencement of solicitation with respect to a cross-border takeover. While an informational document is clearly not simply the offer document, a broad reading of the term "informational documents" can conceivably encompass any document that provides information concerning the cross-border takeover, without regard to the materiality of that information.

This issue is relevant for at least two reasons. The first is that a broad reading of the term informational document would require that virtually every public document concerning the cross-border takeover be translated into English and furnished to the SEC under cover of Form CB. Obviously, this increases the burden for acquirors relying upon the Tier I or Rule 802 exemptions. Nonetheless, this may be the SEC's intent, as similar filing requirements for publicly distributed written materials apply in any tender or exchange offer for securities registered under Section 12, an exchange offer or business combination involving an offer of securities, or business combination involving a shareholder vote of a U.S. issuer.¹⁹⁰ Both intent and reality are uncertain. The second reason is that the wider interpretation triggers an acquiror's Form CB filing substantially sooner in the offer process than the publication of an offer document and perhaps even earlier than a formal announcement of the offer itself, such as at the time of an acquiror's issuance of a statement of intentions which is practiced in some jurisdictions.

In addition, Form CB's requirement that all information made publicly available in connection with the cross-border takeover be furnished to the SEC under Part II of Form CB¹⁹¹ can be unduly burdensome. In certain jurisdictions, such as the United Kingdom, the acquiror is required to make available at its offices or those of its law firm a voluminous number of display documents (such as

¹⁸⁹ 17 C.F.R. §§ 230.802(a)(3), 240.14d-1(c)(2)(iii).

¹⁹⁰ See M&A Release, *supra* note 10, at 82,584-92 (describing similar filing requirements).

¹⁹¹ Cross-Border Release, *supra* note 9, at 82,575 (Part II of Form CB).

its charter).¹⁹² The Form CB requirement to furnish these materials can result in a mass furnishing to the SEC of several boxes worth of documents. There would also be a need to Edgarize these documents if Form CB were required to be filed electronically,¹⁹³ or if the documents are not in English, a requirement to translate summaries of numerous documents. While the SEC's presumed goal, to make this information available in the United States, is understandable and laudable, the utility of the Form CB filing of these documents is far from clear. Perhaps a better approach would be for the acquiror to undertake in the Form CB to make these documents available in the United States upon request.

4.7.2. EDGAR

One of the concerns articulated by the SEC in the Cross-Border Release was that U.S. investors have public access to information concerning cross-border takeovers.¹⁹⁴ Initially, both the Form CB and Form FX could be furnished through a paper filing with the SEC. However, effective November 4, 2002, the SEC adopted in the Mandated EDGAR Filing For Foreign Issuers release ("EDGAR Release") new rules ("EDGAR Rules") which require that certain acquirors relying upon the Tier I and Rule 802 exemptions submit Form CB and file Form F-X through the SEC's Electronic Data Gathering, Analysis and Retrieval system ("EDGAR").¹⁹⁵ This requirement only applies to acquirors who are already reporting companies under Section 12 of the Exchange Act.¹⁹⁶ Acquirors who are not Exchange Act reporting companies may at their option use EDGAR or continue to submit Form CB and Form FX as a paper filing.¹⁹⁷

In comment letters submitted to the SEC in response to the 1998 proposing release for the EDGAR Rules, the majority of practitioners and commentators objected to any type of EDGAR filing

¹⁹² City Code, *supra* note 33, Rule 26.

¹⁹³ See *infra* notes 194–203 and accompanying text (describing the Edgarization requirements).

¹⁹⁴ Cross-Border Release, *supra* note 9, at 82,539.

¹⁹⁵ Mandated EDGAR Filing for Foreign Issuers, Securities Act Release No. 8099, Exchange Act Release No. 45,922 [2001–2002 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,640, at 85,481 (May 14, 2002) [hereinafter EDGAR Release].

¹⁹⁶ *Id.* at 85,481.

¹⁹⁷ *Id.*

requirement for Form CB and Form FX.¹⁹⁸ The general consensus was that requiring Form CBs to be filed electronically would chill reliance on the Cross-Border Rules by increasing the burden on acquirors in cross-border takeovers. However, in the EDGAR Release, the SEC adopted a requirement that current EDGAR filers file Form CB and Form FX by EDGAR.¹⁹⁹ The SEC concluded that these entities would be unlikely to find electronic filing of the Form CB objectionable as they were already such filers familiar with the system, and the benefits of easier shareholder access to these filings outweighed any burden on these filers.²⁰⁰

At a minimum, this position marks a clear step away from the level playing field principle throughout the Cross-Border Rules. In addition, however, the SEC sidestepped the main point of the commentators' contention. Under the EDGAR Rules, with only limited exception, acquirors must furnish full English translations of non-English language documents under cover of Form CB, including all documents incorporated by reference into the offer document.²⁰¹ In many circumstances this creates a large number of documents that must be translated for filing of the Form CB. The exceptions are some categories of documents that are put on display but not sent directly to security holders (for which an English summary may be submitted) and documents that are incorporated by reference into informational documents sent to security holders (which may be submitted in the local language).²⁰² Form SE can be used to furnish unabridged local language documents to the Commission in the circumstances described above.²⁰³

The main criticism of the commentators was that the EDGAR Rules, even mitigated to permit summaries, would place a major translation burden on acquirors, a burden that could conceivably tip the balance in these types of takeover offers away from utilization of the Tier I or Rule 802 exemptions and towards an exclusionary approach.²⁰⁴ As noted, the SEC attempted to mitigate this

¹⁹⁸ *Id.*

¹⁹⁹ This was a modification to the rules in response to commentators who wanted to permit rather than require the filing of Form CB and Form FX by EDGAR. *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 85,484.

²⁰² *Id.* at 85,484-85.

²⁰³ *Id.* at 85,485.

²⁰⁴ *Id.* at 85,483-84.

burden by allowing acquirors to elect to furnish English summaries of documents or the documents themselves on Form SE rather than full translations that in accordance with the requirements of the home jurisdiction must be made publicly available in connection with the transaction, but need not be disseminated to security holders.²⁰⁵ However, the translation burden (even of summaries) is significant if the acquiree's documents are not already in English.

5. CONCLUSION

Cross-border takeovers are complicated beasts set amongst the convergence and conflict of the United States' takeover and securities rules and the corresponding rules of a non-United States jurisdiction. The SEC has made an admirable and needed step in the Cross-Border Release in facilitating its dual goal of including U.S. holders in such takeovers while simultaneously creating a regime that anticipates and addresses potential and historical conflicts between jurisdictions. Five years on, the SEC should take the opportunity of experience and further practice to revise the Cross-Border Rules to address issues and problems with the rules themselves and other related conflicts and omissions in order to further encourage the inclusion of U.S. holders. As we have stated, the general purpose of the Cross-Border Rules and their broad outline are sensible. It is in the details that change may be fruitful.

²⁰⁵ An English language summary is not permitted if the documents are: (i) articles of incorporation, memoranda of association, bylaws and other comparable documents, whether original or restated; (ii) instruments defining the rights of security holders, including indentures qualified or to be qualified under the Trust Indenture Act of 1939; (iii) voting agreements, including voting trust agreements; (iv) contracts to which directors, officers, promoters, voting trustees or security holders named in a registration statement are parties; (v) contracts upon which a filer's business is substantially dependent; and (vi) audited annual or interim consolidated financial information. *Id.* at 85,484.