

SECURITIES ALERT

SEC GRANTS LIMITED CLASS-WIDE RELIEF FOR DUAL OFFER STRUCTURES IN GLOBAL TENDER AND EXCHANGE OFFERS



On June 22, 2006, the SEC granted class-wide relief from Rule 14e-5 of the Securities Exchange Act of 1934, as amended, to allow dual tender or exchange offer structures as part of a global tender or exchange offer so long as six conditions are satisfied. The SEC granted the relief in connection with Mittal Steel's no-action request in which it sought relief from Rule 14e-5 to purchase stock and convertible bonds of Arcelor in dual U.S. and non-U.S. offers. See *Proposed Exchange Offer by Mittal Steel for Arcelor*, SEC No-Action Letter, File No. TP 06-76 (June 22, 2006).

Tender offers and exchange offers in the United States are governed primarily by SEC Regulation 14D (which regulates third-party tender offers and exchange offers for equity securities that are registered under the Exchange Act) and Regulation 14E (which applies to all tender offers and exchange offers regardless of whether the subject securities are debt or equity securities or are registered under the Exchange Act). These regulations place significant limitations on the timing, structure and disclosures concerning tender offers and exchange offers. In particular, the rules impose substantive restrictions on the terms of the offer and require that bidders, among other things, (1) keep the offer open for at least 20 business days, (2) extend the offer for at least 10 business days if the percentage of the class of securities being sought or consideration offered changes, (3) provide prompt notice of extension of an offer and (4) promptly pay the offered consideration or return the tendered securities at the expiration of the offer. With respect to registered equity securities, bidders must also (1) treat all target security holders equally, including offering the same price to all security holders (the so-called "all holders-best price" rule), (2) allow for withdrawal rights during the pendency of the offer and (3) allow withdrawal rights 60 days following commencement of the offer except during a subsequent offering period. Rule 14e-5, which is applicable to tender offers and exchange offers involving equity securities, prohibits bidders from purchasing or arranging to purchase the subject securities in transactions outside the tender offer during the pendency of the tender offer. This rule is contrary to the practice in many jurisdictions outside the United States that do not restrict purchases outside the tender offer.

In an effort to simplify and streamline SEC regulation of certain cross-border business combinations and rights offerings, and to discourage the exclusion of U.S. security holders from foreign tender offers and rights offerings, the SEC adopted its “cross-border” release in January 2000. Among other things, the cross-border rules provide for “Tier I” and “Tier II” exemptions from the tender offer rules. A Tier I classification exempts tender offers for a foreign private issuer’s securities from most of the provisions of the tender offer rules. Under the Tier I exemption, a tender offer may proceed in the U.S. with limited SEC oversight if (1) the bidder complies with the applicable rules of the target’s home jurisdiction, (2) 10 percent or less of the class of securities sought in the tender offer are held by U.S. holders and (3) certain other conditions are met. A Tier II classification offers bidders limited relief from U.S. requirements concerning (1) equal treatment of target security holders (the bidder may separate the offer into two offers: one made only to U.S. holders and the other only to non-U.S. holders so long as the terms of the U.S. offer are at least as favorable as those of the non-U.S. offer), (2) notice of extension of the offer (notices can be made in compliance with home jurisdiction law), (3) prompt payment for or return of tendered securities (payment can be made in compliance with home jurisdiction law) and (4) subsequent offering period/withdrawal rights (announcement of results and payment for shares can be made in compliance with home jurisdiction law, with subsequent offering period commencing immediately after announcement and withdrawal rights need not be given following close of offer and before start of subsequent offering period). For a bidder to be classified under the Tier II exemption, U.S. holders must hold at least 10 percent but no more than 40 percent of the securities sought in the tender offer. Notably, Rule 14e-5 was adopted as part of the cross-border rules and significantly modified a predecessor rule.

Notwithstanding the availability of the Tier II exemption, in many global tender offers bidders continue to conduct separate but simultaneous U.S. and non-U.S. offers in an effort to balance competing U.S. and non-U.S. regulatory requirements, tax concerns and other structural considerations. A rigid interpretation of Rule 14e-5 would prohibit a dual offer structure since the non-U.S. offer could be construed as an arrangement to purchase securities outside the U.S. offer. To overcome this hurdle, bidders often seek an SEC exemption from the provisions of Rule 14e-5. Under a long line of no-action letters, the SEC has frequently granted this relief in connection with a wide variety of global tender offers.

In *Mittal Steel*, the SEC eliminated the need to seek individual approval by granting a class-wide exemption from Rule 14e-5. Under the class-wide exemption, a bidder may offer to purchase securities pursuant to multiple simultaneous offers, so long as the consolidated transaction meets the following conditions:

1. The company that is the subject of the offers is a foreign private issuer as defined in Rule 3b-4(c) of the Exchange Act.
2. The multiple offer qualifies for Tier II exemptive relief under Rule 14d-1(d).
3. The economic terms and consideration of the offers are the same, except that cash consideration to U.S. security holders may be paid in U.S. dollars in the U.S. offer at the exchange rate disclosed in the U.S. offer documents.
4. The procedural terms of the U.S. offer are at least as favorable as the terms of the non-U.S. offer.
5. The intention of the offeror to make purchases pursuant to the non-U.S. offer must be disclosed in the U.S. offering documents to security holders participating in the U.S. offer.

- Purchases by the offeror in the non-U.S. offer must be made solely under the non-U.S. offer and not as part of any open market or private transaction.

Accordingly, bidders that satisfy these requirements no longer will be required to seek an SEC exemption from Rule 14e-5. Nonetheless, in granting class-wide relief, the SEC cautioned that the anti-fraud and anti-manipulation provisions of the federal securities laws will continue to apply even to transactions exempt from Rule 14e-5.

Certain dual offer structures may also require exemptive relief from other SEC rules. For example, Rule 14d-10(a)(1) prohibits a bidder from making a tender offer unless it is open to all security holders of the class of securities subject to the tender offer. Read literally, the rule prohibits dual offers in which, for example, non-U.S. persons cannot tender into the U.S. offer or U.S. holders cannot tender into the non-U.S. offer. Although the Tier II exemption provides some relief under Rule 14d-10, it requires that an offer be separated into one made only to U.S. holders of the subject securities and another offer made only to non-U.S. holders. A more typical structure is one in which one offer is open to any holders of American depositary receipts and U.S. holders of the underlying shares, and the other offer is open to non-U.S. holders of the underlying shares. Such a structure would not be wholly exempted under the *Mittal Steel* no-action letter, and the bidder would be required to seek a separate SEC exemption from Rule 14d-10.

Still, *Mittal Steel* is an encouraging development in that it represents the first noteworthy class-wide exemption under the cross-border rules. The SEC staff has recently taken a keen interest in improving the cross-border rules, and is studying whether it should make other recommendations to the SEC to revise them. In particular, the staff has been focusing on the cross-border rules for measuring ownership by U.S. security holders, which require a 30-day look-back period and require a look-through to the accounts of certain banks, brokers and nominees to determine beneficial ownership. The current share ownership rules are often difficult to comply with because they are inconsistent with local law and practice in many jurisdictions outside the United States. We continue to monitor these developments and intend to publish subsequent alerts with respect to future changes concerning these matters.

CONTACT INFORMATION

If you have questions or would like to learn more about this topic, please contact the partner who represents you, or:

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