PAUL, WEISS, RIFKIND, WHARTON & GARRISON

# U.S. SECURITIES LAW ISSUES RAISED BY ACQUISITIONS BY NON-U.S. COMPANIES OF COMPANIES WITH U.S. SHAREHOLDERS

MARK S. BERGMAN

SEPTEMBER 2000

## I. INTRODUCTION

Securities to be issued in the United States in a tender offer, exchange offer, merger or acquisition must be registered under the U.S. Securities Act of 1933 (the "Securities Act") unless an exemption from registration is available. In addition, if the transaction is structured as a tender offer rather than as a merger, the tender offer for any class of securities, debt or equity, held by U.S. residents, whether or not that class of securities is listed in the United States, may have to comply with procedural and/or disclosure rules contained in the U.S. Securities Exchange Act of 1934 (the "Exchange Act").

This memorandum summarizes the various U.S. securities law issues that a foreign private issuer should consider in structuring a stock-for-stock business combination. The memorandum covers:

- how to register the securities to be issued to security holders of the target;
- the exemptions from registration of such securities that may be available;
- alternative structures to avoid registration, where an exemption is unavailable;
- the rules that will apply where the acquisition is based on a tender offer to the security holders of the target (as opposed to a merger to be voted upon by such security holders); and
- the parties' disclosure obligations during the transaction.

In addition, the memorandum also covers which financial statements will have to be included in the acquiror's other registration statements (for example, if it plans to fund any cash portion of an acquisition through a public offering). These requirements would also apply to any registration statement used when a cash acquisition is pending or recently has been completed.

## II. REGISTRATION UNDER THE SECURITIES ACT

### A. Registration Statement on Form F-4

Generally, in order to issue securities to U.S. persons on a broad basis (*e.g.*, to security holders of a public target) in connection with a merger, acquisition, tender offer or exchange offer, the securities to be issued must be registered under the Securities Act. Registration would be required even where the target with US shareholders is also a foreign company. Foreign private issuers generally file a registration statement on Form F-4 to register the securities under the Securities Act. Eligible Canadian companies may be able to register the securities through the Multijurisdictional Disclosure System ("MJDS"). (*See* "II.D. Registration under the Multijurisdictional Disclosure System" below.) If the target is required to circulate a proxy statement under the Exchange Act (because it is a U.S. reporting company), such proxy statement would typically be jointly filed on the Form F-4 and the disclosure document that is distributed to target security holders would be a joint proxy statement and prospectus.

The Form F-4 is prepared and filed after the signing of the definitive documents for the merger or acquisition, but prior to the commencement of an exchange offer or vote solicitation. The disclosure and financial statements of both the acquiror and the target contained in the registration statement are subject to review by the U.S. Securities and Exchange Commission (the "SEC"). If the acquiror is a reporting company in the United States and the target is also a reporting company in the United States, such a registration statement would generally take approximately three to six weeks to prepare. If either company is not a reporting company in the United States, preparation of

such registration statement may take substantially longer. The registration statement would be reviewed by the SEC in a process that could take an additional six weeks, assuming no major issues are raised. (The SEC has undertaken to respond in 30 days with comments on Form F-4s filed in connection with exchange offers, in order to put stock deals on an equal footing with cash deals, which do not require registration.)

Once the registration statement has been reviewed and declared effective, the target will be able to mail the exchange offer or proxy statement to its shareholders and the acquiror will be able to issue its securities at the closing of the transaction upon delivery of the prospectus (which forms a part of the Form F-4). The Form F-4 will permit non-affiliates of the target to freely resell the securities they receive in the business combination. Affiliates of the target, however, will be subject to limitations on resales pursuant to Rule 145 under the Securities Act.

The key disclosure requirements of the Form F-4 include:

- a detailed description of the terms of the offer;
- business descriptions of the acquiror and the target;
- historical financial statements for the acquiror (in U.S. GAAP or in local GAAP with U.S. GAAP reconciliation) (if required);
- historical financial statements of the target for the applicable periods (in U.S. GAAP or in local GAAP with U.S. GAAP reconciliation);
- the relevant auditors' opinions and their consent to be named in the prospectus; and
- pro forma financial information for the applicable periods (if required).

If either the acquiror or the target is eligible to use Form F-3 or Form S-3 (because they are "seasoned issuers"), such eligible issuer may incorporate by reference the information disclosed in its previous SEC filings in order to satisfy the Form F-4 disclosure requirements. In order to use Form F-3 or Form S-3, an issuer must have been subject to the requirements of the Exchange Act and filed all the material required to be filed under the Exchange Act for at least twelve calendar months immediately preceding the filing.

**B. Financial Information Requirements**

The Form F-4 will include financial statements of the acquiror and its consolidated subsidiaries, consolidated financial statements for the target and pro forma financial statements presenting the acquiror's financial condition had the business combination transaction occurred at an earlier date.

*Financial Statements of the Acquiror*. The Form F-4 requires the inclusion of the following for the acquiror and its consolidated subsidiaries:

- audited balance sheets as of the end of the two most recent fiscal years;
- audited statements of income and cash flows for each of the three fiscal years preceding the date of the most recent audited balance sheet being filed;

- an unaudited interim balance sheet as of the end of the first six months of the acquiror's fiscal year or as of a more recent date if the date of the Form F-4 is more than nine months after the end of the acquiror's last fiscal year;

- unaudited statements of income and cash flow for at least the first six months of the acquiror's fiscal year if the date of the Form F-4 is more than nine months after the end of the acquiror's last fiscal year; and

- five years of unaudited selected financial data.

At the time the Form F-4 becomes effective, the last audited financial statements may be no older than 15 months. In addition, if the acquiror has published interim financial information that covers a period more current than that required by the SEC rules, the more current financial information must be presented in the Form F-4. The acquiror's financial statements can be presented in accordance with U.S. GAAP or in accordance with local GAAP with a reconciliation to U.S. GAAP.

*Financial Statements of the Target*. In general, if the target has a reporting obligation with the SEC, the Form F-4 must contain for the target the same type of financial statements as are included for the acquiror. If the target does not have such a reporting obligation, the Form F-4 must include the financial statements that would be required to be included in an annual report for the target (on Form 20-F, in the case of a non-U.S. company, or on Form 10-K, in the case of a U.S. company), five years of selected financial data and unaudited interim financial statements based on the age of financial statement rules. Target financial statements for the most recent fiscal year are to be audited to the extent practicable. Prior years need not be audited if they were not previously audited.

If the target does not have an SEC reporting obligation and the acquiror's security holders are *not* voting on the transaction, if none of the target measures (referred to in Part VII) exceeds 20% of the applicable acquiror measures, no target financial statements (including pro forma statements) are required. If any of the target measures exceeds 20% of the applicable acquiror measure, an audited balance sheet, income statement and cash flow statement of the target are required for at least the most recent fiscal year in addition to unaudited financial statements for any interim periods. However, if target security holders were previously provided with financial statements (whether audited or unaudited) for either or both of the two fiscal years before the latest fiscal year, such financial statements are also required.

The required financial statements of a foreign target must be prepared in accordance with U.S. GAAP or in accordance with local GAAP with a reconciliation to U.S. GAAP. However, if a foreign target does not have an SEC reporting obligation and does not have U.S. GAAP statements, the historical annual and interim statements need not be reconciled to U.S. GAAP if a reconciliation is unavailable or not obtainable without unreasonable cost or expense (in which case a narrative description of the material differences between local GAAP and U.S. GAAP must be provided). The financial statements of a non-reporting foreign target for the fiscal years before the latest year need not be audited if not previously audited. If the audit was not in accordance with the U.S. GAAS and the statements were published for general distribution locally, such statements must be audited in accordance with US GAAS and included. Relief may be available on a case-by-case basis.

*Pro Forma Financial Information*. Pro forma financial information presents what the acquiror's financial condition would have looked like had the transaction occurred as of an earlier date. Pro forma financial information must be presented.

If the transaction is accounted for by purchase method of accounting, the acquiror must provide pro forma financial information consisting of:

- a pro forma condensed balance sheet as of the end of the most recent period for which a consolidated balance sheet of the acquiror is required; and

- pro forma condensed statements of income for the most recent fiscal year and for the period from the most recent fiscal year end to the most recent interim date for which a balance sheet is required.

If the business combination is accounted for by the pooling-of-interests method of accounting, the acquiror must provide pro forma financial information consisting of:

- a pro forma condensed balance sheet as of the end of the most recent period for which a consolidated balance sheet of the acquiror is required; and

- pro forma condensed statements of income for all periods for which historical statements of the acquiror are required.

A foreign issuer's pro forma financial information must be prepared on a U.S. GAAP basis or be accompanied by quantified reconciliations to U.S. GAAP. This rule applies even in cases where separate financial statements of a non-reporting foreign target may be omitted.

**C. Use of "Acquisition Shelf" Registration Statements**

The acquiror may elect to file an "acquisition shelf" registration statement in order to register securities that the acquiror reasonably expects to issue in business combination transactions during the two years following the initial effective date of the registration statement. Once that registration statement has been reviewed and declared effective by the SEC, the acquiror will be able to issue the securities registered under that registration statement in certain transactions to effect acquisitions by filing a prospectus supplement or a post-effective amendment describing the acquisition and the issuance.

Acquisition shelf registration statements may be used to register the initial issuance of securities by the acquiror in the acquisition. In addition, acquisition shelf registration statement may be used to permit affiliates of the target who receive securities under the registration statement (and who would otherwise be subject to certain resale limitations pursuant to Rule 145 of the Securities Act) to freely resale their shares. In general, an acquisition shelf registration statement will be useful to the acquiror only after it becomes eligible to use Form F-3 and is able to incorporate by reference the acquiror's Exchange Act filings (*e.g.*, Form 20-F and Form 6-K filings) in order to update the registration statement.

By having an acquisition shelf registration statement on file, the acquiror would be able to issue securities without any SEC delay in acquisitions that are immaterial to the acquiror and in material acquisitions where the target stockholders are limited to a small number of knowledgeable insiders. If the transaction is material to the acquiror, and if the security holders of the target are a relatively small group of insiders all of whom are knowledgeable about the target, securities may be issued off the acquisition shelf registration statement to effect the acquisition without any delay as long as the prospectus is delivered to the target security holders at the commencement of negotiations. In such circumstances, information required about the target, including historical and pro forma financial information, would be filed with the SEC by post-effective amendment after the closing of the acquisition. The post-effective amendment would be subject to review by the SEC

and must be declared effective before the shelf registration statement can be used for subsequent acquisitions.

If the transaction is material and if the target security holders are not limited to knowledgeable insiders, the acquisition shelf registration statement will not be particularly useful because a post-effective amendment containing all the required information about the target, including historical and pro forma financial statements, would need to be filed with the SEC and cleared before the transaction can close (which would be the same process required for the Form F-4).

### D. Registration under the Multijurisdictional Disclosure System

Under the MJDS, eligible Canadian companies are permitted to proceed with certain cross-border cash tender and exchange offers for securities of Canadian targets in accordance only with Canadian disclosure requirements.

Under the MJDS, the Canadian materials prepared for the offer to purchase is filed with the SEC. The materials are not subject to review by the SEC and become effective immediately upon filing. There are three forms of registration statements used in the context of business combination transactions under the MJDS.

*Form F-8 and Form F-80.* Form F-8 was adopted to permit the registration of exchange offerings by Canadian issuers to the shareholders of other Canadian issuers so long as less than 25% of the shares of the target are held by U.S. persons (since the Blue Sky Commissioners would only go along with a 25% test, the SEC also adopted Form F-80 to cover exchange offerings where U.S. holders have more than 25%, but less than 40%, of the shares of the target; that is the only difference between the two forms). To be eligible to use Form F-8 and Form F-80, the acquiror must have a three-year reporting history in Canada and a one-year listing history on a Canadian Exchange and a public float of Cdn.$75,000,000. Form F-8 and Form F-80 may be used for business combinations as long as less than 40% of the securities to be issued by the successor corporation will be received by U.S. persons. It also may be used for hostile takeovers using securities.

*Form F-10.* A Canadian acquiror may also utilize another MJDS registration Form, Form F-10. Form F-10 permits the registration of any kind of securities by a Canadian issuer, including securities issued in exchange offers, but the requirements are more stringent — a twelve-month reporting history in Canada, a public float of at least U.S.$75,000,000 plus the requirement that the financial statements be reconciled to U.S. GAAP. In addition, the target must be a Canadian company and qualify as a "foreign private issuer" under the Securities Act. (*See* "III.B. Issuance to U.S. Securities Holders of a Foreign Target — Foreign Private Issuer" below for a discussion of the SEC's definition of "foreign private issuer.")

## III. EXEMPTIONS FROM REGISTRATION

### A. Issuance to Non-U.S. Security Holders of a Target

The issuance of securities by an acquiror to non-U.S. security holders of a target may be exempt from registration under the Securities Act. Regulation S under the Securities Act provides an exemption from registration under the Securities Act for offshore transactions. In order to comply with Regulation S, the following restrictions should be observed:

- no directed selling efforts are made in the United States;
- certain offering restrictions are implemented; and

- the offer is not made to a U.S. person or for the account or benefit of a U.S. person.

*Transfer Restrictions.* Depending on whether the acquiror is a reporting foreign issuer or has a substantial U.S. market interest, non-U.S. security holders of the target, who receive the acquiror's securities pursuant to Regulation S, will be subject to restrictions on their ability to resell such securities in the United States.

**B. Issuance to U.S. Security Holders of a Foreign Target**

If an acquiror wishes to issue securities to U.S. security holders of a target which is a "foreign private issuer," the issuance will be exempt from the registration requirements under the Securities Act if U.S. security holders hold no more than 10% of the subject class of securities. The terms of the offers must generally be the same for U.S. and non-U.S. security holders.

*Foreign Private Issuer.* The SEC defines a "foreign private issuer" as an issuer which is incorporated or organized under the laws of a foreign country, except an issuer meeting any of the following conditions:

- more than 50% of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and

- any of the following: (i) the majority of the executive officers or directors are United States citizens or residents; (ii) more than 50% of the assets of the issuer are located in the United States; or (iii) the business of the issuer is administered principally in the United States.

*Determining U.S. Ownership.* Securities held by all persons (U.S. and non-U.S.) owning more than 10% of the outstanding securities, as well as securities held by the acquiror, are excluded from the calculation of the percentage of the class held by U.S. security holders. Subject securities underlying American Depositary Shares are to be included in the calculation of securities outstanding, as well as the number of securities held by U.S. holders.

The acquiror must "look through" the record ownership of certain brokers, dealers, banks or nominees holding securities of the target for the accounts of their customers to determine the percentage of the securities held in nominee accounts that have U.S. addresses. This analysis need be made only with respect to securities held of record in the United States, the acquiror's home jurisdiction and the primary trading market for the securities if different from the home jurisdiction. To accommodate pre-planning, the SEC has adopted a 30-day "look back" rule (measurement 30 days before the offer or solicitation for a merger).

In an unsolicited or "hostile" tender offer, the acquiror may rely on the presumption that the U.S. ownership percentage limitations of the Rule 802 exemptions are not exceeded, based on the relative level of trading volume in the United States.

*Disclosure Obligations*. There is no specific information that must be provided to claim the exemption under Rule 802. If any document, notice or other information is provided to offerees, an English version must be provided to the SEC (for notice purposes only) on Form CB. Financial statements prepared in accordance with local GAAP that are submitted under Form CB need not be reconciled to U.S. GAAP. Information must be disseminated to U.S. holders in English (with certain mandated legends) on at least a comparable basis to that provided to security holders in the home jurisdiction. If the acquiror disseminates by publication in its home jurisdiction, it must publish the information in the United States in a manner reasonably calculated to inform U.S. holders.

*Transfer Restrictions*. If the securities that are the subject of a Rule 802 transaction were "unrestricted" for purposes of Rule 144, the new securities will also be unrestricted. If the securities were "restricted," the new securities issued under Rule 802 will also be restricted. (*See* "II.C. Private Placement to U.S. Security Holders of a Target — Transfer Restrictions" below for a discussion of the transfer restrictions on "restricted securities.")

### C. Private Placement to U.S. Security Holders of a Target

Section 4(2) of the Securities Act exempts private placement transactions — transactions by an issuer not involving any public offering — from the registration requirements of the Securities Act. Rule 506 of Regulation D provides that an offer and sale of securities by an issuer that satisfy the following conditions shall be deemed to be a transaction not involving any "public offering" within the meaning of Section 4(2) of the Securities Act if:

- there is no general advertising or general solicitation;
- there are no more than (or the issuer reasonably believes that there are no more than) 35 purchasers (excluding "accredited investors" as defined in Rule 501(a) of Regulation D) of securities from the issuer; and
- each purchaser who is not an accredited investor either alone or with his designated representatives has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

In order to conclusively determine that the issuance of securities in a merger or acquisition does not involve a "public offering" under Rule 506 and is, therefore, exempt from registration, the acquiror must either (i) establish the identities of the U.S. security holders of the target (which may not be possible), or (ii) require that all U.S. security holders who tender their securities in connection with the merger or acquisition certify that they are accredited investors in order to receive the acquiror's securities (failing which they can only receive cash). If the acquiror issues securities to non-accredited investors as part of the transaction, the acquiror should consider having a sophisticated representative designated by all such non-accredited investors in order to insure the acquiror complies with the requirement that all such non-accredited investors are capable of evaluating the merits and risks of holding the acquiror's securities.

*Disclosure Obligations.* If *all* of the security holders of the target are accredited investors, the issuance of securities will not be subject to any disclosure requirements (other than the general anti-fraud provisions). If there is at least one non-accredited investor in the target security holder group, the acquiror will be required to provide disclosure meeting the requirements of a full prospectus to the non-accredited investor(s) (and, to avoid selective disclosure issues, to all other target security holders). The acquiror will be able to satisfy such disclosure obligations with respect to itself by providing its annual report and quarterly reports (plus any supplements to update the information contained therein). It should be noted that the acquiror may be required to simultaneously make public any material information provided to the target security holders in order to avoid any selective disclosure issues.

In addition to the information about the acquiror, information about the target (including the target's audited financial statements depending on the size of the target) and information with respect to the transaction (including pro forma financial information depending on the size of the target), in both cases meeting the requirements of a full prospectus, must be provided to the target security holders.

*Transfer Restrictions.* The securities issued to target security holders in a private placement under Regulation D will be "restricted securities." Holders of restricted securities may resell their securities only pursuant to a registration statement covering their securities or pursuant to Rule 144 or in an offshore transaction pursuant to Regulation S.

Rule 144 imposes a minimum one-year holding period. Sales by non-affiliates of the acquiror could be effected following lapse of the holding period, subject to volume limitations, manner of sale conditions and notice requirements. Once two years have elapsed, sales of restricted securities can be made freely in the United States by non-affiliates under Rule 144.

Rule 904 of Regulation S permits holders of restricted securities to resell their securities to purchasers outside the United States or through certain offshore securities markets without imposing any holding periods. In other words, holders of restricted securities will be able to resell their securities by executing their trades through an offshore stock exchange so long as the transaction has not been pre-arranged with a purchaser in the United States.

It is common in stock-for-stock acquisition transactions effected on a private placement basis for the target's security holders to seek registration rights. Registration rights would enable the target security holders to resell their shares received as consideration pursuant to a registration statement filed at the expense of the acquiror. There may be various reasons why the acquiror may not wish to grant registration rights. First, if the acquiror is unable to file a Form F-3, putting a registration statement in place can impose burdensome updating requirements where the registration is an "evergreen" shelf registration statement. In any event, having a "live" registration statement may impose on the acquiror obligations to disclose information earlier than might otherwise be the case.

**D. Exemption under Section 3(a)(10)**

Section 3(a)(10) of the Securities Act provides that the registration requirements of the Securities Act do not apply to an issuance and exchange of securities satisfying the following conditions:

- the securities must be issued in exchange for securities, claims, or property interests;
- a court (U.S. or non-U.S.) or authorized governmental entity must approve the fairness of the terms and conditions of the exchange;
- the reviewing court or authorized governmental entity must (a) find, before approving the transaction, that the terms and conditions of the exchange are fair to those who will be issued securities and (b) be advised before the hearing that the acquiror will rely on the Section 3(a)(10) exemption based on the court's or authorized governmental entity's approval of the transaction;
- before approval, the court or authorized governmental entity must hold a hearing to approve the fairness of the terms and conditions of the transaction;
- a governmental entity must be expressly authorized by law to hold the hearing, although it is not necessary that the law require the hearing;
- the fairness hearing must be open to everyone who is proposed to be issued securities in the exchange;
- adequate notice must be given to all those persons; and

- there cannot be any improper impediments to the appearance by those persons at the hearing.

Although Section 3(a)(10) provides an exemption for the initial issuance of options, warrants or other convertible securities in court-approved reorganizations, the subsequent exercise or conversion must be registered or be covered by another exemption. For this reason, options, warrants and convertible securities issued in transactions intended to qualify under Section 3(a)(10) are often structured so that they may not be exercised for a year or more, relying on the general view that the issuance of such a option, warrant or convertible security does not involve the present or concurrent offering of the underlying security.

## IV. ALTERNATIVE STRUCTURES

### A. Exclusion of U.S. Security Holders

If the number of shares owned by U.S. holders is sufficiently small, making tender of the shares held by such persons unnecessary to the successful conclusion of the acquiror's tender offer or exchange offer, the acquiror may elect to avoid the cost and difficulty of compliance with the U.S. securities laws in connection with the acquisition by making an offer that is not open to U.S. residents. This is frequently done by non-U.S. bidders. In fact, the SEC has observed that this exclusion of U.S. investors is the non-U.S. bidder's method of choice in situations in which U.S. share holdings are not necessary for the success of the acquisition. The non-U.S. bidder, in this way, is able to avoid application of U.S. securities laws, because the laws and regulations only apply to offers made in the United States.

In order to exclude U.S. security holders, it is advisable for the acquiror to, among other things:

- not mail offering documents into the United States; and

- not accept tenders made from addresses within the United States.

U.S. investors, who are barred from tendering their shares to the acquiror directly but want to tender their shares, may arrange to have them tendered from outside the United States or sell them into the international arbitrage market, if there is one.

### B. Cash Offers

In structuring stock-for-stock transactions, acquiror companies generally wish to minimize the cash consideration paid in connection with the transaction. Nonetheless, the acquiror may wish to offer cash consideration to the U.S. security holders of the target if the acquiror determines that only a limited number of target security holders are U.S. holders. By extending a cash only offer to the U.S. holders, the acquiror will be able to avoid the cost and difficulty of preparing a registration statement under the Securities Act.

It should be noted, however, that the home jurisdiction laws of the acquiror or the target may prohibit different treatment of the target's security holders — with some offered the acquiror's securities and others (*i.e.*, the U.S. holders) offered cash. In addition, although the registration requirements of the Securities Act may not apply, the acquiror may have to comply with the tender offer rules of the Exchange Act with respect to the cash tender offer extended to U.S. holders. (*See* "V. Compliance with Tender Offer Rules" below for a discussion of the tender offer rules.)

### C. Vendor Placements

The acquiror may be able to acquire the target securities from U.S. security holders without filing a registration statement by use of a "vendor placement" if the acquiror concludes that a substantial number of target securities are held by U.S. holders who are not "accredited investors" and that the acquisition of the target securities from such U.S. non-accredited investors is necessary for a successful acquisition.

In a vendor placement, the acquiror will issue its securities (that would otherwise be issued to the U.S. security holders of the target) to a trustee that is a non-U.S. financial institution. The trustee will be instructed by the acquiror to pool the acquiror's securities in respect of all such U.S. security holders of the target and to sell such securities through an offshore market as soon as practicable. After such sale, the trustee will forward to each such U.S. security holder the proceeds from the sale of the acquiror's securities which would have been issuable to such U.S. security holders net of all applicable expenses in respect of such sale. A vendor placement requires that the non-U.S. trading market for the acquiror's securities will be able to provide sufficient liquidity for the sale by the trustee.

As part of the vendor placement, the acquiror should provide a guaranteed "floor price" to the U.S. security holders, and agree to provide the trustee with any additional cash if the sale proceeds are insufficient to meet the floor price.[1] A guaranteed "floor price" reduces the risks inherent in an investment in the acquiror's securities, and allows the acquiror to enhance its position that the vendor placement does not constitute a "sale."

The concept of vendor placement is well known to the SEC. The SEC has issued a number of no-action letters on prospective vendor placements based on the reasoning that vendor placements are functionally indistinguishable from providing cash consideration. Based on the structure of the vendor placement, the acquiror may wish to first obtain a no-action letter from the SEC. The SEC is not obligated to issue such a no-action letter, and may refuse to do so because it is not satisfied with the transaction structure or for various other reasons.

## V. COMPLIANCE WITH TENDER OFFER RULES

The acquiror may conclude that it wishes to launch a tender offer or exchange offer for the securities of a target instead of proceeding with a merger following shareholder approval. The Exchange Act will impose various obligations on the acquiror in a tender offer or exchange offer for securities of a company with U.S. security holders. Such obligations vary depending on whether the target's securities are registered under Section 12 of the Exchange Act (*i.e.*, listed or widely held in the United States) and the level of U.S. ownership in the case of a non-U.S. target. When the target is a U.S. company, the tender offer rules under the Exchange Act clearly will apply. If the target is a non-U.S. company, the acquiror has the option of excluding the U.S. security holders of the target (if their participation is unnecessary to the successful conclusion of the tender offer), and thereby avoid the requirements of the tender offer rules under the Exchange Act. (*See* "IV.A. Exclusion of U.S. Security Holders" above.)

### A. Section 14(d) Rules

[1] The SEC has granted no-action relief with respect to a small number of vendor placement transactions that did not provide a floor price. The deciding factor for the SEC in allowing the vendor placement with no floor price was the applicability of the Aall holders rule≅ which mandates that the same offer be made to all target shareholders. However, the SEC has granted such no-action relief only in unusual circumstances.

Section 14(d) of the Exchange Act and Regulation 14D promulgated thereunder (the "Section 14(d) Rules") govern tender offers where a target's securities are registered under Section 12 of the Exchange Act (*i.e.*, listed or widely held in the United States). The Section 14(d) Rules impose certain substantive and procedural requirements on the terms of a tender offer, as follows:

- the acquiror must commence a tender offer within five days of its public announcement;
- the acquiror must file with the SEC on the day of the offer's commencement a statement on Schedule TO making detailed disclosure with respect to, among other things, the target, the acquiror, the purpose of the tender offer, the acquiror's holdings in the target's securities and any transactions made by the acquiror in such securities during the 60 days prior to the offer's commencement, and financial information of the acquiror (if such information is material to a selling security holder);
- any material change in the information previously disclosed to the target's security holders must be promptly disclosed in additional tender offer materials and must be filed with the SEC as amendments to the acquiror's Schedule TO;
- the target must issue a statement of its position on the offer on a Schedule TO within 10 business days after the announcement of the offer, stating whether it advises its security holders to accept or reject the tender offer or to take other action with respect to the tender offer and, if so, furnishing a description of such other action being recommended;
- a security holder who has tendered during the minimum offering period under the Section 14(e) Rules is allowed to withdraw his or her tendered securities at any time prior to the expiration of the offer. Accordingly, the acquiror may not purchase the tendered shares prior to the offer's expiration;
- when, in the case of a tender offer for less than all the outstanding securities of a class, a greater number of securities have been tendered than the acquiror has offered to purchase, the acquiror must purchase the tendered securities on a pro rata basis; and
- a tender offer must be open to all holders of the class of securities being sought in the offer and the same price must be paid to all such holders whose securities are purchased.

Schedule TO may require disclosure of financial information for the bidder in a tender offer. Generally, financial statements must be included if material. There are various qualifications and exceptions, including:

- A non-reporting foreign bidder in a fully financed, all cash offer for all the securities of a US reporting company need not include its financial statements. However, if the bidder includes local GAAP financial statements solely to comply with local law, it must also include a US GAAP reconciliation. If the reconciliation is not available, a preamble to the local financial statements should explain that the financial statements are being furnished in accordance with local law, they are not requirement by SEC rules and they do not include all disclosures required by SEC rules. A textual description of the differences between local and US GAAP may, but need not, be included.
- A foreign bidder may incorporate financial statements by reference from its Exchange Act reports, in which case it must provide summarized financial information in its tender offer material.

- A foreign bidder need not provide interim information, unless it has filed such information on a Form 6-K with the SEC or made it publicly available locally (in which case it must be provided in the tender offer material or incorporated by reference and a summary provided).

- If financial statements are required, a reporting foreign bidder must include audited statements covering the two fiscal years included in its most recent annual report on Form 20-F. A non-reporting foreign bidder making a bid shortly after its year end would include, if the mailing date is within 6 months after year end, financial statements as of the previous year end (unless the statements as of the year then ended are available); where the mailing date is beyond 6 months after year end, audited statements for the year then ended must be included.

**B. Section 14(e) Rules**

Section 14(e) of the Exchange Act and Regulation 14E thereunder apply to all tender offers and exchange offers for any security held by U.S. holders. Section 14(e) of the Exchange Act makes it unlawful for any person "to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer." Regulation 14E under the Exchange Act prescribes the timing and procedures of all tender offers and exchange offers involving U.S. holders, as follows:

- the procedural rules under Section 14(e) require the acquiror to hold the tender offer open for (i) at least 20 business days from the date when the tender offer is first published, sent or given to security holders and (ii) at least 10 days from the date of any material change in the terms of the offer, including notice of an increase in the offered consideration;

- upon termination or withdrawal of the tender offer, the acquiror must promptly pay the consideration offered or promptly return the securities deposited; and

- if the tender offer is extended, the acquiror must issue notice thereof by 9:00 a.m. on the next business day after the scheduled expiration date of the offer.

**C. Tier I Exemption**

Tender offers for the securities of foreign private issuers will be exempt from most of the tender offer provisions of the Exchange Act where U.S. security holders hold 10% or less of the subject securities (the "Tier I" exemption). The "Tier I" exemption will exempt tender offers from the disclosure, filing, dissemination, minimum offering period, withdrawal rights and proration requirements of the Exchange Act. The "Tier I" exempt offers will be subject only to the applicable rules of the target's home jurisdiction (meaning both the jurisdiction of organization and the jurisdiction of the principal trading market for the target's securities). The acquiror will be required to provide English-language offering information to the U.S. security holders on a comparable basis to that provided to any other security holders and, if the home jurisdiction permits dissemination by publication, the acquiror will be required to publish the offer simultaneously in the United States. If the materials are disseminated by publication, the acquiror must publish the materials in a manner reasonably calculated to inform U.S. holders of the offer.

The acquiror will be required to permit U.S. security holders to participate on terms (including procedural terms) at least as favorable as those offered to other security holders. The

acquiror will be permitted to offer cash in the United States and securities outside the United States, provided there is a "reasonable basis to believe the values are substantially equivalent."

*SEC Filings*. If the target's securities are registered under the Exchange Act and the acquiror is relying on the Tier I exemption, the acquiror will be required to submit to the SEC (for notice purposes only) any offering materials prepared under non-U.S. law on Form CB. Target companies, as well as any officer, director or other person with an obligation to file a recommendation in respect of an offer, may satisfy the obligation by filing the recommendation on Form CB. Form CB must be received by the SEC by the next business day after the tender offer is commenced. In addition, the acquiror will be required to file a Form F-X (appointing an agent for service of process in the United States) concurrently with the Form CB.

**D. Tier II Exemption**

Limited exemptive relief from the U.S. tender offer rules, to eliminate frequent areas of conflict between U.S. rules and foreign regulatory requirements, will be available to the acquiror in cases where U.S. security holders hold more than 10%, but not more than 40%, of the subject securities (the "Tier II" exemption). Eligible offers will continue to be subject to the disclosure, filing and most of the procedural and equal treatment requirements of the U.S. tender offer rules that otherwise apply to tender offers, as well as going private disclosure and procedural requirements.

Although bidders will continue to be subject, among other things, to keeping an offer open for at least 20 business days, making an SEC filing, disseminating offering material and providing withdrawal rights, the Tier II exemption will provide some relief, as follows:

- the rules of the foreign target's home jurisdiction will apply to the determination of the date by which payment for (or return of) tendered securities must be undertaken and when extensions of the offer may be announced;

- the acquiror may provide for a "subsequent offering period" without withdrawal rights; and the acquiror may satisfy the conditions for making use of the "subsequent offering period" if the acquiror pays for tendered securities and announce the number and percentage of securities deposited in accordance with the requirements of the home jurisdiction;

- an offer may be divided into two separate offers (one that complies with U.S. law and is available to U.S. securities holders only, and one that complies with the laws of the home jurisdiction, from which U.S. securities holders will be excluded); and

- the minimum tender condition may be reduced or waived without extension of withdrawal rights, in certain circumstances.

The exception to the equal treatment rules available for Tier I offers for a cash alternative in the United States is not available for Tier II offers. These, as well as vendor placements, will be considered on a case-by-case basis. In addition, no Form CB or F-X filing will be required as the acquiror will be required to file Schedule TO, which is to be required in connection with tender offerors involving U.S. target companies as well.

Certain additional conditions and technical and procedural requirements must be satisfied in order for the exemption to be applicable. Relief in additional areas and relief for tender offers where U.S. security holders hold more than 40% of the targeted securities are available on a case-by-case basis, where there is direct conflict between U.S. laws and practice and foreign laws and practice.

### E. Rule 14e-5 Exceptions

Tender offers for the securities of foreign private issuers will be exempt from Rule 14e-5 of the Exchange Act, thus allowing purchases outside the tender offer, so long as U.S. security holders hold 10% or less of the subject securities. Pursuant to the exception, purchases outside the tender or exchange offer that comply with the tender offer regulations of the home jurisdiction (which often will require that the tendering security holders receive the benefit of any higher prices paid for securities outside the offer) will be permitted in a Tier I tender offer if the U.S. offering documentation discloses the possibility of such purchases and the acquiror discloses to U.S. security holders information regarding the purchases in a manner comparable to disclosure made in the home jurisdiction.

### F. Exemption under the Multijurisdictional Disclosure System

The MJDS permits tender offers for Canadian companies to be made in compliance with Canadian tender offer rules, so long as the target is less than 40% U.S. owned. If the only consideration offered in the tender offer is cash, the acquiror need not be U.S. or Canadian — anyone can use this exemption from the U.S. tender offer rules, so long as the target is Canadian and less than 40% U.S. owned.

The SEC's position is that the Section 14(d) Rules and Rule 14e-1 under the Exchange Act do not apply to an offer made for the shares of a Canadian company so long as the offer is made in accordance with Canadian tender offer rules even if no filing is made with the SEC. Nonetheless, the other anti-fraud rules of Regulation 14E under the Exchange Act (in particular Rule 14e-3 under the Exchange Act) will be applicable to all tender offers.

## VI. DISCLOSURE OBLIGATIONS WITH RESPECT TO A BUSINESS COMBINATION

The parties to a negotiated stock-for-stock business combination transaction usually announce their transaction immediately after reaching a definitive agreement. This announcement generally takes the form of a written joint press release.

*Registered Transactions.* If the transaction requires filing a registration statement under the Securities Act, the acquiror will be permitted to deliver written and oral public communications (in addition to the registration statement or proxy statement) after the initial public announcement of the transaction, so long as the acquiror complies with the requirements of Rules 165 and 425 under the Securities Act and Rule 14a-12 under the Exchange Act. Rule 425 under the Securities Act requires all written communications (*e.g.*, press releases and roadshow presentation materials) to be publicly filed with the SEC on the date of first use.

*Transactions Exempt from Registration.* As noted previously in this memorandum, if the acquiror wishes to issues its securities in a transaction exempt from the registration requirements of the Securities Act, the acquiror must not make any general advertisement or general solicitation in the United States with respect to the transaction. Accordingly, the acquiror's announcement of the transaction in the United States must be limited to the following:

- the names of the acquiror and the target;
- the title, amount and basic terms of the acquiror's securities offered in the transaction;
- the title of the target's securities;
- the timing of the transaction;

- a brief statement of the manner and purpose of the transaction;
- the basis upon which an exchange may be made; and
- any statement or legend required by law.

*Forward Looking Statements.* Public announcements made in connection with a business combination transaction generally contain forward looking statements. All forward-looking statements must be identified as such and should be accompanied by meaningful cautionary language in order for the acquiror to rely on the safe harbor for forward looking statements provided by the U.S. Private Securities Litigation Reform Act of 1995.

## VII. FINANCIAL INFORMATION REQUIRED IN CONCURRENT REGISTRATION STATEMENTS

An acquiror may need to raise capital to finance an acquisition, or may be accessing the capital markets for other purposes shortly prior to or following one or more acquisitions. In general, the acquiror will be required to include a target's financial statements and related pro forma financial information (even if the acquisition is for cash or is made on a private placement basis) in any concurrent registration statement (relating to acquisition financings or otherwise), subject to some important exceptions discussed below, if:

- the transaction has closed, or has not closed but is "probable";
- a "business" is being acquired; and
- the transaction is "significant" to the acquiror.

*Probable Transaction.* Whether a transaction is "probable" depends on the facts and circumstances of the particular transaction. A business combination transaction will generally be deemed probable when a definitive agreement has been executed and is often deemed probable when a letter of intent without significant qualifications is signed.

*Acquisition of a Business.* Financial statements of an acquired entity are required only when a "business" is being acquired. The term "business" is evaluated in light of the facts and circumstances involved. The key factor is whether there is sufficient continuity of the target's operations prior to and after the transaction so that disclosure of prior financial information is material to an understanding of future operations.

*Financial Statements of the Target.* The number of years of audited financial statements (if any) of the target required will depend on the significance of the transaction.

The significance of a transaction is measured by making the following four comparisons:

- the acquiror's investments in and advances to the target ("target measure 1") *compared to* the total assets of the acquiror and its consolidated subsidiaries ("acquiror measure 1") as of the end of the most recently completed fiscal year;
- if the proposed combination is to be accounted for by the pooling-of-interests method, the number of common shares to be issued by the acquiror in the transaction ("target measure 2") *compared to* the total common shares outstanding at the date the combination is effectuated ("acquiror measure 2");

- the total assets of the target ("target measure 3") *compared to* the total assets of the acquiror and its consolidated subsidiaries ("acquiror measure 3") as of the end of the most recent fiscal year; and

- the income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principles of the target ("target measure 4") *compared to* such income of the acquiror and its consolidated subsidiaries ("acquiror measure 4") as of the end of the most recently completed fiscal year.

Based on the four comparisons described above, financial statements for the target must be presented as follows:

- if none of the target measures exceeds 20% of the applicable acquiror measures, no target financial statements are required;

- if any of the target measures exceeds 20% but not 40% of the applicable acquiror measure, an audited balance sheet, income statement and cash flow statement of the target are required for at least the most recent fiscal year in addition to unaudited financial statements for any interim periods;

- if any of the target measures exceeds 40% but not 50% of the applicable acquiror measure, audited balance sheets, income statements and cash flow statements of the target are required for the two most recent fiscal years in addition to unaudited financial statements for any interim periods;

- if any of the target measures exceeds 50% of the applicable acquiror measure, audited income statements and cash flow statements of the target for the three most recent fiscal years and audited balance sheets of the target for the two most recent fiscal year-ends must are required in addition to unaudited financial statements for any interim periods. Financial statements for the earliest of the three fiscal years may be omitted, however, if net revenues reported by the target in its most recent fiscal year are less than U.S.$25 million; and

- if any of the target measures on an aggregated basis of all individually insignificant businesses acquired since the date of the most recent audited balance sheet of the acquiror exceeds 50% of the applicable acquiror measure, financial statements covering at least a majority of the acquired businesses must be furnished for at least the most recent fiscal year and any interim period.

The financial statements of the target must be prepared in accordance with U.S. GAAP or in accordance with local GAAP with a reconciliation to U.S. GAAP. In addition, the SEC requires that audited financial statements for the target be audited by an "independent" public or certified public accountant.

*Exceptions.* Notwithstanding the general rules, there are a number of special circumstances in which a target's financial statements need not be included in a concurrent registration statement, as follows:

- the concurrent registration statement need not include financial statements for the acquired business if none of the target measures exceed 50% of the applicable acquiror measures *and* (i) the transaction has not been consummated yet; *or* (ii) the date of the prospectus is no more than 74 days after the acquisition is consummated and the

financial statements of the business acquired have not yet been filed with the SEC by the acquiror;

- separate financial statements of an acquired business need not be provided once the operating results of the acquired business have been reflected in the audited balance sheet of the acquiror for a complete fiscal year, unless (i) such financial statements have not previously been filed, or (ii) the acquired business is of such significance to the acquiror that omission would materially impair an investor's ability to understand the historical financial results of the acquiror; and

- a separate audited balance sheet of an acquired business is not required when the acquiror's most recent audited balance sheet is for a date after the acquisition is consummated.

If the acquiror has completed a significant business combination transaction in the most recent fiscal year, has already announced a probable business combination transaction, or expects to have a probable acquisition prior to the effectiveness of a registration statement, the acquiror must consider the general requirement that the registration statement contain all material information. Even though, as a technical matter, it may be possible to omit the target's financial statements (and thus pro forma information as well) from a registration statement, from a disclosure standpoint, it may be necessary to include the financial information of the target (and the pro forma reflecting the transaction) in the registration statement. The underwriters in a concurrent offering will often request such information be included in the registration statement.

## VIII. U.S. STATE SECURITIES ("BLUE SKY") LAW ISSUES

If the acquiror's securities to be issued in the merger, acquisition, tender offer or exchange offer are listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq National Market, the shares will be "covered securities" for purposes of the federal securities laws. Consequently, no action for the registration or qualification of the acquiror's securities will be required to be taken pursuant to U.S. state securities or "blue sky" laws because the states are preempted from regulating "covered securities." Nonetheless, the acquiror may be required to make certain notice filings depending on the transaction structure.

The federal securities laws do not preempt U.S. state laws governing broker-dealers and agents. As a result, depending on the nature of the transaction, the acquiror may be required to make notice filing in certain jurisdictions to address the broker-dealer and agent issues.

If the acquiror's securities are not listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq National Market, the acquiror may have to take certain additional actions in the various jurisdictions depending on the transaction structure. Such actions may include filing a registration statement with the state securities commissions to register the securities to be issued in the transaction, registering as an issuer-dealer in certain jurisdictions, and/or obtaining the services of a registered broker-dealer in certain jurisdictions.

## IX. STOCK EXCHANGE OR NASDAQ SHAREHOLDER APPROVAL REQUIREMENTS

If the acquiror's securities are listed on the New York Stock Exchange, the American Stock Exchange or the Nasdaq National Market, the acquiror may be required to obtain shareholder approval prior to the issuance of its securities in connection with a significant transaction. Generally, the issuance of more than 20% of the listed class of securities requires shareholder approval. In certain circumstances, the acquiror, as a non-U.S. issuer, may have requested in connection with its listing application that the shareholder approval requirement be waived on the

basis that such shareholder approval requirement is contrary to a law, rule or regulation of any public authority exercising jurisdiction over the acquiror or is contrary to generally accepted business practices in the acquiror's country of domicile.

* * *

This memorandum provides only a general description of the various U.S. securities law issues that can arise in mergers, acquisitions, tender offers and exchange offers, and should not be considered to be, or relied upon as, legal advice. Questions with regard to the matters discussed in this memorandum should be directed to any of the following persons:

New York:

- Andrew J. Foley (1-212-373-3078, afoley@paulweiss.com)
- Edwin S. Maynard (+1-212-373-3024; emaynard@paulweiss.com);
- Tong Yu (+1-212-373-3569; tyu@paulweiss.com).

London:

- Mark S. Bergman (44-207- ; mbergman@paulweiss.com);
- David K. Lakhdhir (44-207- ; dlakhdhir@paulweiss.com);

Paris:

- Steven L. Wolfram (331-5343-1400; swolfram@paulweiss.com); or

Hong Kong:

- John E. Lange (852-2846-0888; jlange@paulweiss.com);

Tokyo:

- Russell Colwell, Tokyo (813-3597-6301, rcolwell@paulweiss.com);

For further information on this subject, please consult our website (www.paulweiss.com).

**PAUL, WEISS, RIFKIND, WHARTON & GARRISON**


1285 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6064