

## SEC Grants Class Relief under Rule 14e-5 for Purchases by Offeror Outside of Tender Offer in Certain Circumstances

New York  
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Rule 14e-5 under the Securities Exchange Act of 1934 generally prohibits any person that has announced a tender offer for equity securities (and certain related persons, advisors, agents and others acting in concert with them) from directly or indirectly purchasing or arranging to purchase the securities subject to the tender offer (or other securities convertible into, or exchangeable or exercisable for, the subject securities) outside of the tender offer. While there are clear policy reasons for this Rule (including ensuring that the offeror treat all shareholders of the subject company equally), many other jurisdictions, notably the United Kingdom, allow purchases by the offeror outside of the tender offer so long as, among other conditions, the offeror raises the tender offer price to match the highest price paid to any shareholder outside the tender offer. In this way, the offeror is able to benefit from lower market prices that often exist prior to the expiration of the tender offer and to more quickly approach satisfaction of the tender offer's minimum acceptance condition.<sup>1</sup> Moreover, those shareholders that do not wish to wait until the close of the tender offer to sell their shares will have another source of liquidity in the market allowing them to do so. Given the potential cost savings and strategic benefits to the offeror, making such purchases is sometimes viewed as an important part of the offeror's strategy in non-US acquisitions.

The SEC recognized this conflict when, in late 1999, it adopted a broad set of rules designed to encourage bidders to extend tender and exchange offers to US securityholders of

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<sup>1</sup> Of course, the offeror can take advantage of this only if it is not subject to a standstill agreement with, or privy to material inside information of, the target, and if its buying program can continue prior to the closing of the tender offer without running afoul of any takeover defenses that the target may have in place. Presumably, freedom from these restrictions is something that the offeror can negotiate with the target in a friendly deal and any material inside information would be disclosed in the offer documents.

foreign private issuers. Under these rules, an offer that qualified for “Tier I”<sup>2</sup> relief was expressly exempt from the Rule 14e-5 prohibitions on purchases outside the tender offer (subject to limited conditions). Until very recently, however, no-action relief from the SEC was required on a case-by-case basis to permit a bidder to make such purchases in connection with offers for foreign private issuers that did not qualify for Tier I relief. The SEC was requested to, and did, grant such case-by-case relief in a fairly long line of no-action letters.

As part of its continuing efforts to harmonize US and foreign rules, the SEC has recently decided that Rule 14e-5’s prohibition on purchases that are permitted under the rules of a target’s home jurisdiction is not fully consistent with the SEC’s policy of encouraging bidders to extend tender and exchange offers to US securityholders. In a letter dated March 2, 2007, the SEC granted class-wide exemptive relief under Rule 14e-5 to offerors that wish to purchase shares of a foreign private issuer target outside of the tender offer in certain prescribed circumstances<sup>3</sup>. To qualify for this relief, the offeror must reasonably intend to rely on “Tier II” exemptive relief under Rule 14d-1(d) of the Exchange Act, which means essentially that the target must be a foreign private issuer with no more than 40% of the subject class of securities held by US residents.<sup>4</sup> Additionally, the laws of the target’s “home jurisdiction” (*i.e.*, both the jurisdiction of the target’s incorporation and the principal non-US market in which the target’s securities are listed or quoted, if different) must permit purchases outside of the tender offer and provide that the tender offer price be increased to match any consideration paid outside of the tender offer that is higher than the tender offer price. The SEC and the home jurisdiction(s) must be parties to a bilateral or multilateral memorandum of understanding regarding consultation and cooperation in the administration and enforcement of securities laws, and the US offering materials must prominently disclose the possibility of purchases being made outside the tender offer. Significantly, no such purchases may be made in the United States. Finally, there are a number of other requirements regarding disclosure of purchases to the public and the SEC.

In sum, the SEC continues to encourage bidders in cross-border tender offers for the securities of foreign private issuers to extend those offers to US securityholders. Where this latest class-wide relief is not available, we understand that the SEC will continue to consider

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<sup>2</sup> Generally, an offer qualifies for “Tier I” relief when the target is a foreign private issuer with 10% or less of the class of the subject securities held by US residents (in calculating such ownership, the holdings of the offeror and any securityholder that owns more than 10% of the class are excluded).

<sup>3</sup> See Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc, File No. TP 07-48.

<sup>4</sup> Again, the calculation is made excluding the holdings of the offeror and any securityholder that owns more than 10% of the subject security.

requests for relief on a case-by-case basis and may provide such relief in appropriate circumstances.<sup>5</sup>

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<sup>5</sup> See Cash Offer by Singapore Technologies Semiconductors Pte Ltd. for STATS Chip PAC Ltd., where no-action relief from Rule 14e-5 was recently obtained by this firm in connection with a tender offer for the securities of a target that did not meet Tier II criteria.

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