In another market-friendly step, the U.S. Securities and Exchange Commission (the “SEC”) recently updated its guidance, in the form of Compliance and Disclosure Interpretations (“C&DIs”), that will facilitate the tender offer process for non-U.S. companies.

In general, the U.S. tender offer rules under the U.S. Securities Exchange Act of 1934 (the “Exchange Act”) can apply broadly to offers around the world, even if the target company is incorporated outside the United States. Where the target company is not registered with the SEC, the U.S. tender offer rules are largely procedural, such as requiring a minimum tender offer period of 20 U.S. business days. If the target is U.S. listed, much more detailed disclosure and filing requirements are triggered. The SEC, starting in 1999, has eased the burden of complying with these rules for tender offers involving certain non-U.S. companies by adopting several cross-border exemptions from these requirements (generally for tender offers where the target company is a foreign private issuer\(^1\) and 40% or less of the class of securities subject to the tender offer are owned by U.S. holders).

The new C&DIs comprise the SEC’s Division of Corporation Finance’s interpretations of the cross-border exemptions, replacing guidance previously issued in the so-called Telephone Interpretations. Many of the changes to the prior guidance are technical revisions or non-substantive, but there are a few notable changes that will make it easier to conduct cross-border tender offers:

> **C&DI 101.03** – The earlier guidance had made clear that the initial calculation of a target’s U.S. ownership for purposes of relying on the cross-border exemptions is sufficient to determine eligibility for an exemption for any subsequent step of the transaction (such as a back-end merger). The new guidance adds that the offeror also has the option of recalculating the target’s U.S. ownership for the subsequent step of a transaction so that it can rely on an exemption where one was not available for the first step of the transaction. However, recalculation would not be appropriate for what is in effect a continuation of the first step transaction, such as an extended subsequent offering period.

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\(^1\) A foreign private issuer is any foreign issuer other than a foreign government, except for an issuer that (1) has more than 50% of its outstanding voting securities held of record by U.S. residents; and (2) any of the following: (i) a majority of its officers or directors are citizens or residents of the United States, (ii) more than 50% of its assets are located in the United States, or (iii) its business is principally administered in the United States.
> C&DI 104.05 – In the Telephone Interpretations, the SEC had said that a foreign private issuer conducting a third-party tender offer that excludes U.S. shareholders may voluntarily furnish tender offer materials to the SEC under cover of Form 6-K without becoming subject to the U.S. tender offer rules. The new C&DIs also provide that if such foreign private issuer is exempt from registration pursuant to Rule 12g3-2(b) under the Exchange Act, it may also post the tender offer materials on its website or send the materials through an electronic information delivery system without triggering the U.S. tender offer rules, as long as the bidder takes steps to ensure that the information is not used as a means to induce indirect participation by U.S. shareholders. This will enhance the ability of offerors to communicate about an offer without triggering the application of the U.S. tender offer rules.

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Although the changes to the guidance are incremental, we welcome any actions by the SEC that make it easier to conduct cross-border transactions. We will continue to monitor developments in this area and welcome any queries you may have.