

E-mail: [REDACTED]

801.1(g)

From: [REDACTED]

Sent: Tuesday, June 17, 2008 11:30 AM

To: 'Verne, B. Michael'

Subject: Foreign Issuer / "Scheme of Arrangement"

Mr. Verne:

I'm troubling you with lots of questions this week. Sorry for the deluge. I am always grateful for your assistance.

Here's another.

I have a transaction in which a U.S. issuer is making an all-cash offer to buy 100% of the outstanding voting securities of a foreign issuer. The transaction does not qualify for the 801.51 exemption because the target has too much in the way of U.S. assets, so an HSR filing will be required. The offer is conditioned on expiration of the HSR waiting period and expiration of waiting periods for antitrust filings in various European countries.

What I am trying to determine is whether the transaction constitutes a cash tender offer (within the meaning of Rule 801.1(g)) that would make it subject to the 15-day waiting period as an 801.30 transaction, or whether the full 30-day period would apply. The transaction is structured as a "scheme of arrangement" under English law (the target is a publicly traded English company). Because it is a scheme of arrangement, it is not subject to Section 14 of the Exchange Act. It is my understanding, however, that the PNO takes the view (per Informal Interpretation 71 in the Premeger Notification Practice Manual) that cash tender offers for control of a foreign issuer which are not subject to Section 14 of the Exchange Act are nevertheless entitled to the 15-day waiting period.

This begs the question of whether a "scheme of arrangement" constitutes a de facto "cash tender offer," which raises the underlying question of what a "tender offer" is. From my research, I understand that the term "tender offer" has no established regulatory or statutory meaning. Many courts have followed an eight-factor test, the elements of which are considered to be characteristic of a "tender offer." It appears that a number of these factors are present in the transaction I am working on. The primary difference is that pursuant to the "scheme of arrangement," a vote of the target's shareholders would be taken on the transaction based on a positive recommendation from the target's board of directors.

Does the PNO have a current position on whether "schemes of arrangement" of this type under English law are, in effect, cash tender offers entitled to the 15-day waiting period?

Thank you and best regards,

6/18/2008

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, June 18, 2008 9:08 AM
To: Verne, B. Michael
Subject: FW: Foreign Issuer / "Scheme of Arrangement"

Mr. Verne,

Further to my question of yesterday, I would note some of the differences between a "scheme of arrangement" and the alternative UK structure for takeover of a public company, called an "offer."

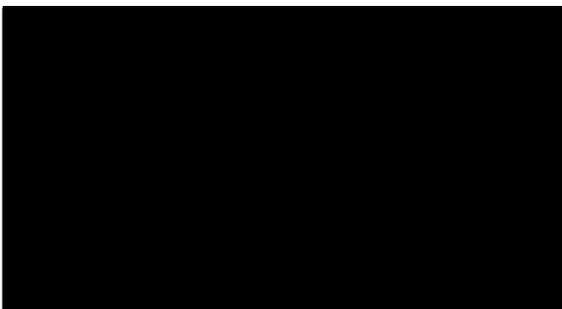
From what I understand, a "scheme of arrangement" requires a petition to an English court to order a meeting of target shareholders at which the transaction is voted on in similar fashion to a US merger. The acquiror works with management of the target to secure an agreement by which the board of directors of the target recommends the transaction to its shareholders. 75% of the shares of each class approve the scheme for it to pass. After the shareholder vote, the court approves the scheme and the scheme becomes binding on all shareholders.

A second method of takeover of a UK public company is an "offer." Like a US tender offer, in an "offer" the acquiror deals directly with the target shareholders. The target itself is not a party to the acquiror's agreement with the shareholders. The acquiror must receive acceptances from at least 50% of the target's voting shares for the offer to be accepted.

Again, the key question seems to be whether a "scheme of arrangement" where the acquiror is offering all cash for the target's shares is sufficiently similar to a US "cash tender offer" to be treated as such for purposes of HSR (and specifically, whether the 15-day waiting period for US cash tender offers applies). Does the fact that a court proceeding and shareholder vote are required in a "scheme of arrangement" make the distinction such that this is not really a cash tender offer within the meaning of 801.1(g), so that the waiting period would be 30 days?

I look forward to your thoughts.

Thank you and best regards,



THIS IS NOT A CTO
FOR PURPOSES OF THE
15-DAY WAITING-PERIOD.
BV
6/18/08

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17