

801.1(g)

**Verne, B. Michael**

**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,

NOT A CTO FOR HSR  
PURPOSES

BM

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