



US IMPLICATIONS OF TENDER OFFERS BEYOND THE TAKEOVER CODE

Peter Castellon of Proskauer Rose (UK) LLP and Malini Mukhopadhyay explain the implications in US securities law of tender offers for the equity securities of UK companies that are not eligible for Tier I or Tier II relief.

The US tender offer rules apply to any tender offer or exchange offer extended into the US. The applicable rules regulate the procedures on how to conduct a tender offer and also include a prohibition on purchases of the target shares outside of the tender offer. These rules can sometimes conflict with the rules around tender offers in the target company's home jurisdiction.

This article discusses the US tender offer rules that apply in a tender offer for the shares of a UK company. It looks at the accommodations available for tender offers for shares of non-US companies, depending on the level of US ownership of the target shares. It also discusses the relief from the rules that may be granted by the US Securities and Exchange Commission (SEC) in certain situations where the exceptions to the tender offer rules do not apply.

TENDER OFFERS INTO THE US

A tender offer generally refers to a broad solicitation by a company or a third-party bidder to buy a significant percentage of a company's securities over a limited period of time, generally at a premium to the market price for those securities as an incentive to tender. A third-party bidder can use a tender offer to acquire a target company, either through an offer recommended by the board and management of the target company in a negotiated transaction or in a hostile transaction.

If the third-party bidder offers securities as part of the consideration for the shares, the transaction is known as an exchange offer. A company can also use a tender offer to buy back its own shares through an invitation to shareholders to sell their shares to the

company (or, more typically, a financial intermediary) at either a fixed price or within a range of prices. This is often known as a self-tender offer.

Tender offers for the shares of UK companies that are not listed on a US exchange, such as Nasdaq or the New York Stock Exchange, or are not otherwise registered with the SEC, are subject to Section 14(e) of the US Securities Exchange Act of 1934, as amended (Exchange Act) (Section 14(e)), and Regulation 14E thereunder.

Many tender offers for the shares of UK companies are exempt from certain requirements of Regulation 14E under the following provisions of Regulation 14E:

- Tier I, which provides relief from almost all of the US rules, is available if fewer

Foreign private issuer

A company incorporated outside of the US will qualify as a foreign private issuer if it meets either of the following requirements:

- 50% or less of its outstanding voting securities are held by US residents.
- More than 50% of its outstanding voting securities are held by US residents and none of the following circumstances apply:
 - the majority of its executive officers or directors are US citizens or residents;
 - more than 50% of its assets are located in the US; and
 - its business is administered principally in the US.

than 10% of the target company's shareholders are in the US.

- Tier II, which provides limited exceptions from specific US procedural rules, is available if fewer than 40% of the target company's shareholders are in the US.
- Rule 14e-5(b)(9), which provides an exemption from the restrictions under the US rules on purchases outside of the offer, is available for tender offers that are subject to the Takeover Code.

If the percentage of the target company's shareholders in the US exceeds 40%, neither Tier I nor Tier II is available. In addition, Rule 14e-5(b)(9) is not available for tender offers that are not subject to the Takeover Code, which does not apply to all tender offers for shares of UK companies. In particular, even for UK companies whose shares are publicly traded, self-tender offers are not subject to the Takeover Code.

If the tender offer is not eligible for Tier I or Tier II and is not subject to the Takeover Code, the bidder will need to comply in full with the procedural requirements of Regulation 14E (see *"Procedural requirements under Regulation 14E" below*). To the extent that the procedural requirements or customary practices of the target company's home jurisdiction conflict with the requirements of Rule 14e-1 under Regulation 14E (Rule 14e-1), the bidder will need to obtain exemptive relief from the SEC.

The bidder, or intermediaries acting on its behalf, may also intend to buy target shares outside of the tender offer, which would not comply with the requirements of Rule 14e-5

under Regulation 14E (Rule 14e-5). Since these purchases are voluntary and are not required but rather are permitted under home country rules, these activities are not eligible for exemptive relief from the SEC, but rather no-action relief, which means that the SEC undertakes not to bring an action against the bidder for making those purchases (see *"No-action relief" below*).

ELIGIBILITY FOR TIER I OR TIER II

For a tender offer to be eligible for Tier I or Tier II, the target company must:

- Be a foreign private issuer (see box *"Foreign private issuer"*).
- Not be an investment company required to be registered under the US Investment Company Act of 1940, as amended.

Under Rule 14d-1(c) and (d) under the Exchange Act (Rule 14d-1), registered investment companies other than closed-end registered investment companies are also excluded from Tier I or Tier II. However, no registered investment company would also be a foreign private issuer.

In addition, to determine whether a tender offer qualifies for Tier I or Tier II, the bidder must calculate the percentage of shares held by US shareholders in accordance with Instruction 2 to paragraphs (c) and (d) of Rule 14d-1 (see box *"Calculating the percentage of US shareholders"*).

If the percentage of US shareholders is less than 10%, the tender offer qualifies for Tier I and it is exempt from almost all US procedural rules. If the percentage of US shareholders is

less than 40%, the tender offer qualifies for Tier II and limited relief is available for those specific US requirements that conflict with the target company's home country rules. If the percentage of US shareholders is higher than 40%, the bidder is required to comply with all of the US procedural requirements or to seek relief from the SEC in case of specific conflicts with the rules of the target company's home jurisdiction.

PROCEDURAL REQUIREMENTS UNDER REGULATION 14E

Section 14(e) is a broad anti-fraud provision regulating tender offers under which the SEC has adopted Regulation 14E. While Regulation 14E includes various anti-fraud and anti-manipulation measures, it also sets out in Rule 14e-1 certain procedural requirements that apply to all tender offers or exchange offers where any US jurisdictional means are used, whether for equity or debt securities, and regardless of whether the securities in question are issued by a US or non-US company. If a tender offer or an exchange offer is made using the US postal service or using telephone, fax or internet connections to, in or from the US, this would constitute the use of US jurisdictional means.

Under Regulation 14E, the following procedural requirements apply to all tender offers other than those that qualify for Tier I:

- The tender offer must have a minimum duration of 20 US business days and must be extended if there is a change to the terms of the tender offer.
- After the end of the tender offer, the bidder must promptly either pay for the tendered shares or return the shares.

Duration and extensions

All tender offers must remain open for at least 20 US business days from the start of the offer. There is no maximum period by which the offer period must be closed. This is in contrast to the rules in some other jurisdictions. For instance, under the Takeover Code in the UK, the minimum duration for a tender offer is 20 calendar days and the tender offer may not normally be extended beyond 60 days after the offer document is sent to shareholders, unless it has become or been declared unconditional as to acceptances or unless the Takeover Panel consents to the offer being extended.

Under the US rules, if there is a significant change in the terms of the tender offer, such as a change in the consideration offered, the percentage of the shares being sought or the dealer's soliciting fee, the offer period must remain open for at least ten US business days. For any other material change, practitioners generally consider an extension of five US business days to be sufficient. If there are frequent changes to the terms of a tender offer, which may be the case especially in a competitive tender offer with two or more bidders, the tender offer would need to be extended with each change, which could eventually mean that the tender offer would need to be extended beyond the maximum duration allowed under the rules of the target company's home jurisdiction.

The bidder must provide notice of these extensions with a press release or other public announcement no later than 9am Eastern Standard Time on the next US business day after the scheduled expiration date of the offer.

Prompt payment

After the end or withdrawal of the tender offer, the bidder must pay the consideration or return the shares promptly, which practitioners generally interpret to mean as being within three US business days. This can be a problem in many jurisdictions. For example, in the UK, under the Takeover Code, payment is required to be made within 14 days of the first closing date for acceptances of tenders or, if later, the date on which the offer becomes wholly unconditional.

In jurisdictions that permit later settlement, the settlement mechanics do not generally enable payment within three US business days, so bidders would breach this requirement, unless they rely on no-action relief from the SEC.

Tier I

If the tender offer qualifies for Tier I, the bidder is exempt from all of the procedural requirements of Rule 14e-1. However, the tender offer must meet certain criteria that are intended to ensure that shareholders in the US are treated at least as favourably as shareholders in other jurisdictions. There are a few exceptions that permit different treatment of US shareholders in limited circumstances.

For instance, if the bidder offers loan notes to the target company's shareholders

because of the tax advantages associated with them in certain jurisdictions, such as the UK, it is not required to offer them to US shareholders as well, provided that the loan notes are not listed on any organised securities market or registered under the US Securities Act of 1933, as amended. In addition, if the offer is structured as an exchange offer outside of the US, the bidder can offer cash instead of shares to US shareholders. The bidder must have a reasonable basis for believing that the amount of cash offered is substantially equivalent to the value of the consideration being offered to non-US shareholders.

To qualify for Tier I, the bidder is also required to send the documents, including amendments, about the tender offer to US shareholders in English and on a comparable basis to that provided to shareholders in the target company's home jurisdiction. If the bidder disseminates the information through publication in the target company's home jurisdiction, such as in a newspaper advertisement, the bidder must similarly publish it in the US, in a manner that is reasonably calculated to make US shareholders aware of the offer. This could mean placing an advertisement in a newspaper of national circulation in the US. However, the SEC has recognised that a newspaper advertisement is not required under all circumstances, and what is reasonable in a particular situation may vary depending on the number of US shareholders, their level of sophistication and where they are located.

The SEC has also recognised that the US advertisement may be less detailed than the one required by local law or practice, provided that it includes details about how shareholders can access the complete offer documents.

Tier II

If the tender offer qualifies for Tier II, the bidder can rely on targeted relief from specific procedural requirements under Rule 14e-1, but only to the extent that these requirements conflict with the rules of the target company's home jurisdiction.

For example, if the tender offer is extended, the bidder can follow the rules of the home jurisdiction rather than the procedure in Rule 14e-1(d). Similarly, in many jurisdictions, it is not possible in practice to meet the prompt payment requirement of Rule 14e-1(c). If the

tender offer qualifies for Tier II, payment in accordance with the laws or practice in the target company's home jurisdiction is sufficient. There are a number of more specific exemptions from other US procedural requirements, some of which are relevant only for tender offers or exchange offers for US-registered securities.

Exemptive relief from Rule 14e-1

In many cross-border tender offers, the rules of the target company's home jurisdiction or other relevant jurisdiction may conflict with the procedural requirements of Rule 14e-1. If the tender offer does not qualify for Tier I or Tier II, the bidder has two choices. It can avoid US jurisdictional means by excluding the target's US shareholders and ensuring that no communications relating to the tender offer are accessible from the US. If the target company has a large proportion of US shareholders, which may be the case given that the tender offer does not qualify for Tier II, this might not be a practical option because the bidder will need the US shareholders to participate in order for the tender offer to succeed.

Alternatively, the bidder can seek relief from the SEC with respect to the specific provisions of Rule 14e-1 with which it is not able to comply. In most cases, the relief granted will be in line with the accommodations under Tier II.

PURCHASES OUTSIDE OF THE TENDER OFFER

From the time that a tender offer is publicly announced until it expires, Rule 14e-5 prohibits a bidder from making purchases of the target company's securities outside of the offer, whether within or outside the US. This does not include any purchases made during a subsequent offer period, should a bidder structure the offer to have a subsequent offer period after the initial offer period ends, provided that the consideration paid is the same in amount and form as the consideration offered during the initial offer period.

The restriction under Rule 14e-5 is construed relatively broadly and applies to "covered persons" which include:

- The bidder and any of its affiliates.
- The dealer-managers acting for the bidder and any of their affiliates.

Calculating the percentage of US shareholders

In order to qualify for Tier I or Tier II relief, the bidder must calculate the percentage of US ownership in the target company. Even if a bidder is aware that its US ownership is likely to be higher than 40%, if the bidder intends to seek relief from any applicable US tender offer rules that are in conflict with the rules of the target's home jurisdiction, it must calculate the level of US ownership and provide this information to the US Securities and Exchange Commission (SEC) so that it can consider the level of US regulatory interest in the transaction and whether to grant the requested relief.

Timing of calculation

The percentage of US ownership can be calculated as at any date during the 90-day period starting no more than 60 days before, and no more than 30 days after, the initial public announcement of the tender offer. If the bidder is unable to calculate the percentage of US ownership as of a date within this timeframe, it can opt to make the calculation as of the most recent practicable date before the initial public announcement of the tender offer. However, the calculation must be made at a date no earlier than 120 days before the public announcement of the tender offer and must be completed before the start of the tender offer.

Securities included in the calculation

The bidder must count all of the issued and outstanding shares of the target company, excluding any of the target's shares that it already holds at the start of the tender offer. If the target has shares traded in the US in the form of American depositary shares, the bidder must include any shares underlying American depositary shares in the calculation. However, any warrants, options or other securities convertible or exchangeable into the shares that are the subject of the tender offer should be excluded.

Procedure for calculation

The instructions to Rule 14d-1 under the US Securities Exchange Act of 1934, as amended, provide for two alternative tests to calculate the level of US ownership. The "look-through" test is the primary method and should be the starting point for the bidder; however, in very limited circumstances, if the information required under

the look-through test is not available, the bidder is permitted to rely on the average daily trading volume test.

The "look-through" test

To calculate the level of US ownership, the bidder must start by looking at the holders of record as at a specific date. The bidder generally starts by looking at reports of beneficial ownership filed with respect to the target in the US or in its home jurisdiction. Shareholders in many jurisdictions are required to provide information about their shareholding once they cross certain percentage thresholds. The target may also include information about its shareholders in its own public filings. In many cases, the bidder also engages financial advisers that can access other non-public sources of information about shareholders.

If the company is conducting a self-tender, or if the tender offer is part of a negotiated transaction, the bidder will have access to the target company's shareholder register.

The bidder cannot simply look at the record owners if they are brokers, dealers or banks, or nominees for any of those. For these entities, the bidder is required to look through the record ownership and determine the location of the underlying beneficial owners, particularly if the holders of record are located in any of the following jurisdictions:

- The US.
- The country in which the target company is incorporated (or that of the bidder and the target company, in a business combination).
- The primary trading market for the target company's shares (if this is different from its country of incorporation).

In some jurisdictions, the shareholder register exclusively or primarily has information about recorded shareholders, the majority of which are brokers, dealers or nominees. In other jurisdictions, including the UK, the company or third-party intermediaries on the company's behalf regularly send enquiries to the nominee

- Any advisers to the bidder or dealer-managers whose compensation depends on the completion of the offer.
- Any person acting directly or indirectly in concert with any of the above parties in connection with a purchase or arrangement to buy the subject shares or any related securities.

There are a number of exceptions to the prohibition, most of which do not relate to purchases made to facilitate the tender offer (see box "Exceptions for purchases outside of

the tender offer"). However, there are some accommodations available for that type of purchase in cross-border tender offers, as the SEC recognises that these purchases are permitted and regulated under the rules of other jurisdictions.

Purchases under Tier I

If the tender offer qualifies for Tier I, under Rule 14e-5(b)(10), covered persons are not restricted from making purchases of shares, including purchases in furtherance of the tender offer, purchases within the US and purchases at a higher price than the tender offer price.

However, under the rules of many jurisdictions, including the UK, if purchases outside the tender offer are made at a price higher than the tender offer price, the price in the tender offer must be raised to match the higher price. The only requirements under Tier I are that the purchases must comply with the rules of the home jurisdiction, that the possibility of those purchases is clearly disclosed in the tender offer documents, and that US shareholders have access to any disclosures made in the target company's home jurisdiction regarding those purchases.

shareholders to request information about underlying beneficial shareholders and receive responses. Therefore, in the UK, bidders in a negotiated transaction or self-tender generally have a high level of certainty about the composition of the shareholder base of the target company.

If this information is not readily available, the bidder (or the target company, in a negotiated transaction) should send enquiries to brokers, dealers, banks and other nominee holders enquiring as to the aggregate amount of their holdings that are owned by beneficial owners in the US. In many jurisdictions, nominees are under no obligation to respond to these enquiries and may not respond. However, the bidder is still required to undertake the look-through analysis in good faith.

If, after reasonable enquiry, the bidder is unable to obtain the required information, the bidder must still complete the calculation on the basis of the assumption that, for any nominee that fails to respond, the underlying beneficial owners are residents of the jurisdiction where the nominee has its principal place of business.

Average daily trading volume test

If the bidder is unable to determine the level of US ownership using the look-through test, which may be the case, for example, if the shares are held in bearer form or if the nominees are prohibited from disclosing the residence of the beneficial owners of the shares or choose not to disclose, the bidder may use an alternate test. However, the SEC has clarified that the alternate test is only available in very limited circumstances and, in particular, is intended to be used for non-negotiated transactions.

In those circumstances, the bidder can assume that US shareholders hold fewer shares than the relevant threshold of 10% of the outstanding shares for the Tier I exemption or 40% for the Tier II exemption, unless one of the following is the case:

- Over a 12-month period ending no more than 60 days before the announcement of the tender offer, the average daily trading volume of the subject shares in the US as a percentage

of the worldwide average daily trading volume is higher than the relevant threshold.

- The most recent annual report or other annual information filed with the regulator in the target's home country, or any other market in which the shares trade, discloses that US shareholders hold more than the relevant threshold of the subject shares.
- The bidder knows or has reason to know, before the announcement of the offering, that the level of US ownership exceeds the relevant threshold.

Potential complications in calculating US ownership level

As the bidder is allowed to make assumptions regarding the underlying ownership by nominee shareholders if it uses the look-through test, or to rely on the alternative test in case of a hostile transaction, it should normally be able to calculate the level of US ownership and decide on the appropriate Tier. However, there may be circumstances in which, for technical reasons, it becomes difficult for the bidder to complete the calculation.

For instance, if the bidder does not receive timely information from certain nominees, it may be required, based on the instructions, to assume that the ultimate beneficial owners are located in the nominee's jurisdiction of incorporation. However, based on previous information, it may have reason to believe that the beneficial owners are actually in a different jurisdiction. For example, if a US-based nominee holds shares on behalf of non-US beneficial owners and does not respond to the bidder's inquiries in a timely manner, the bidder would be obliged to assume that the beneficial owners are in the US, even though it might have information from a previous inquiry suggesting that the ultimate beneficial owners are outside of the US. The bidder might therefore not be able to conclude for the purposes of the look-through test that the target company falls within Tier I or Tier II. Likewise, the average daily trading volume may lead to a misleading result if there is a large shareholding in a particular jurisdiction that is held by a strategic investor and is not publicly traded.

Purchases under Tier II

If the tender offer qualifies for Tier II, the bidder has two options under Rule 14e-5. Under Rule 14e-5(b)(11), the bidder can choose to bifurcate the tender offer into a two separate tender offers: one tender offer in the US that complies fully with Rule 14e-5, and one or more tender offers outside of the US that comply with the rules of the target company's home jurisdiction or any other relevant jurisdiction.

If the bidder chooses to bifurcate the tender offer, the consideration and economic terms

of the two tender offers must be the same, and the procedural terms of the US tender offer must be at least as favourable as those in the non-US tender offer. However, the bidder can only buy shares outside of the US as part of the non-US tender offer or offers, and is not permitted to make any open-market purchases or other negotiated purchases, even if these are permitted in the target company's home jurisdiction. Since this can be impractical and not in keeping with the usual practice in the target company's home jurisdiction, Tier II tender offers are usually not structured in this way.

Alternatively, the bidder can also choose to structure the tender offer as a single worldwide tender offer. In this situation, under Rule 14e-5(b)(12), the bidder, or other covered persons acting on its behalf, are permitted to buy shares outside of the tender offer outside the US. These share purchases must comply with the rules of the home jurisdiction, the possibility of those purchases must be clearly disclosed in the tender offer documents, and shareholders in the US must have access to any disclosures made in the target company's home jurisdiction regarding those purchases. In addition, in a Tier II tender offer, if the

bidder or its affiliates buy shares at a price greater than the tender offer price, the price in the tender offer must be raised to match the higher price.

Exceptions for dealer-managers

There are a number of other exceptions within Rule 14e-5 that are intended to enable a dealer-manager or its affiliates to continue their ordinary course activities (see box “Exceptions for purchases outside of the tender offer”). For instance, under Rule 14e-5(b)(4), the dealer-manager for the transaction can continue to act as an intermediary for other customers that are not covered persons for the purposes of the transaction in question, either on an agency basis or in riskless principal transactions.

Rule 14e-5(b)(8) is a wide-ranging exception under which affiliates, or separate departments, of the dealer-manager can make trades on their own account provided that there are appropriate firewalls in place between the officers in charge of that trading and those acting in the capacity of dealer-manager. Dealer-managers in domestic US tender offers generally rely on this exception to continue their trading activities while a tender offer is pending. However, this exception is only available if the entity acting as dealer-manager is registered as a broker or dealer under Section 15(a) of the Exchange Act.

A version of this exception is also available for dealer-managers in Tier II transactions under Rule 14e-5(b)(12)(G). Because the dealer-manager acting in a non-US-based transaction is unlikely to be a US-registered broker or dealer, this requirement is slightly modified. However, to be eligible for this exemption, the dealer-manager must have an affiliate that is a US-registered broker-dealer.

A separate exemption exists for tender offers that are subject to the Takeover Code. Market makers that are registered with the London Stock Exchange or principal traders that are member firms of the London Stock Exchange are exempt from certain restrictions on dealing in the shares that are subject to the offer under the Takeover Code.

Under Rule 14e-5(b)(9), even if these entities are participating in the tender offer and are “covered persons”, they are permitted to continue their activities provided that they comply with the restrictions under the Takeover Code and disclose how US

Exceptions for purchases outside of the tender offer

Under Rule 14e-5 of Regulation 14E under the US Securities Exchange Act of 1934, as amended (Exchange Act), bidders and other covered persons are not permitted to buy securities subject to a tender offer or any related securities outside of the tender offer from the time of the public announcement to the expiration of the tender offer, other than in the following circumstances:

- Transactions involving previously owned options or convertible or exchangeable securities.
- Certain transactions by employee benefit plans of covered persons.
- Odd-lot buybacks.
- Transactions by the dealer-managers on an agency basis for customers that are not covered persons, or riskless principal transactions, provided that the dealer-manager is not a market-maker. A riskless principal transaction is one that offsets a sale after having received an unsolicited order to buy from a customer that is not a covered person.
- Purchases in connection with “basket” transactions in which the subject shares or related securities are a relatively small proportion of the overall basket.
- Transactions to cover a short sale or the exercise of an option.
- Transactions under unconditional pre-existing contractual obligations.
- Transactions by an affiliate of the dealer-manager, provided that:
 - appropriate firewalls are in place to prevent the sharing of non-public information;
 - the dealer-manager is a registered broker or dealer under Section 15(a) of the Exchange Act;
 - the affiliate has no officers or employees in common with the dealer-managers that direct, effect or recommend transactions in securities; and
 - the transactions are not made to facilitate the tender offer.
- Certain transactions by UK market-makers.
- Purchases in cross-border tender offers qualifying as Tier I tender offers.
- Purchases in the non-US portion of cross-border tender offers qualifying as Tier II tender offers that are structured as two separate tender offers, one in the US and one in non-US jurisdictions.
- Purchases outside the US in accordance with the target’s home jurisdiction laws, in cross-border tender offers qualifying as Tier II tender offers.

shareholders of the target company can obtain information about their purchases on the same basis as UK shareholders. Given that principal traders acting on behalf of the bidder generally buy target shares on behalf of the bidder, this exemption effectively also permits bidders to make open-market

purchases of the shares in tender offers governed by the Takeover Code.

NO-ACTION RELIEF

If the bidder is not able to confirm that the tender offer qualifies for Tier I or Tier II or if

the tender offer is not subject to the Takeover Code, none of the covered persons would be able to buy any shares outside of the tender offer, other than in the limited circumstances permitted under the other exemptions to Rule 14e-5 (see box “Exceptions for purchases outside of the tender offer”).

While Rule 14e-5(b)(9) is a default option for tender offers for the shares of UK-incorporated target companies, these tender offers are not always subject to the Takeover Code. For instance, self-tender offers are not subject to the Takeover Code. In those circumstances, the bidder must either choose to forego the possibility of buying any shares outside of the tender offer, even if that is permitted or even customary in the target company’s home jurisdiction, or to apply for no-action relief from the SEC in order to buy the shares.

For intermediaries acting on behalf of the bidder, the issue is in some ways more stark. The investment bank representing the bidder in a self-tender offer may be a market-maker for the shares. Even if this is not the case, the broking arms of the financial institutions representing the bidder might routinely trade in the shares or other securities of the target company. Without relief from the SEC to trade in the target shares, the financial institutions acting for the bidder would need to restrict their public-side activities for an extended period of time while the tender offer is pending and would not be able to act in routine transactions on a principal basis.

There is no requirement for bidders and their financial intermediaries to buy target shares outside of the tender offer under the rules of the home jurisdiction but rather it is a possibility. Therefore, from the perspective of the SEC, these activities are not local requirements and so are not eligible for exemptive relief. However, the SEC routinely grants no-action relief in those circumstances, because it recognises that the customary practice varies widely in different jurisdictions and that the success of the tender offer in certain jurisdictions may depend on the availability of that relief.

As with the Tier I and Tier II exemptive relief, no-action relief from Rule 14e-5, if granted, often aligns with another exemption that may not be available for technical reasons. In many cases, the SEC has permitted bidders in tender offers that do not fit into Tier II to buy shares outside of the tender offer provided that they meet the following conditions,

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which track the conditions of Rule 14e-5(b)(12):

- No purchases of shares, or arrangements to buy shares, outside of the tender offer are made in the US.
- The bidder prominently discloses the possibility of buying shares outside of the offer in the tender offer materials, as well as the manner in which those purchases are required to be disclosed.
- To the extent that the bidder or other covered persons make public information about those purchases in the target company’s home jurisdiction, they must also publicly disclose the information in the US.
- To the extent that the shares are bought by or on behalf of the bidder, if the price paid is higher than the tender offer price, the tender offer price must be raised to match the higher price.

Bidders in these tender offers generally undertake to meet the following additional conditions:

- The bidder, and any representatives buying shares on its behalf, agree to comply with any applicable laws and regulations in the target company’s home jurisdiction, including rules prohibiting insider dealing and market abuse.
- The bidder or its representatives agree to disclose to the SEC within 30 days of any request a time-sequenced schedule of all shares bought during the tender offer period on a transaction-by-transaction basis, including a description of the size, time of execution, purchase price and the exchange, quotation system or other facility through which the purchase occurred.
- The bidder and its representatives agree to retain all documents and information

required to be maintained for at least two years after the offer closes and to respond to any questions from the SEC regarding those records.

- The bidder and its representatives agree to comply with Rule 14e-5 other than to the extent to which any exemptions apply.

In many cases, however, the relief requested from the SEC is in respect of share purchases on behalf of the bidder in furtherance of the tender offer. That relief does not cover the activities of the dealer-manager or other financial intermediary acting on a principal basis. The SEC has confirmed that relief is available to the financial intermediary in situations in which the tender offer does not fit into Tier II and is not governed by the Takeover Code.

The financial adviser can join the bidder or separately request relief from Rule 14e-5, which it may need if it is making purchases on behalf of the bidder in furtherance of the tender offer, which is typical in many UK self-tender offers, as well as its own public-side trading activity. In addition to the conditions set out above, the financial adviser might be asked to agree to the

following conditions with respect to its trading activities:

- The financial adviser and its affiliates and separately identifiable departments agree to maintain and enforce written policies and procedures to prevent any transfer of information that might result in a violation of US federal securities laws and regulations by establishing information barriers.
- The financial adviser confirms that it has no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) in common with the affiliated entity or departments that direct, effect or recommend transactions in the shares that would also be involved in providing the bidder with financial advice or dealer-manager services.
- The share purchases made by the financial advisers' affiliates or separately identifiable departments would not be made to facilitate the tender offer.
- The financial adviser confirms that it has an affiliate that is a US-registered

broker-dealer under Section 15(a) of the Exchange Act.

These conditions are in line with the requirements of Rule 14e-5(b)(12)(G) for Tier II tender offers.

Before this confirmation from the SEC, there were very few instances of relief being granted analogous to the relief that was needed by financial intermediaries, and only one instance that the authors could identify following the 2008 amendments that codified the relief available to dealer-managers or other financial intermediaries under Rule 14e-5(b)(12)(G) for tender offers eligible for Tier II relief.

On one previous occasion, the SEC granted relief to a large non-US investment bank for its public-side trading activities while it was in the midst of a corporate reorganisation structured in part as a tender offer due to local legal requirements. The tender offer in that case qualified for Tier II relief, but the investment bank requested relief from the SEC for certain routine public-side trading activities in the US.

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October 31, 2018

CASH TENDER OFFER IN COMPLIANCE WITH REGULATION 14E

This note outlines the requirements under the U.S. federal securities laws applicable in the following situation:

- The offer is a cash tender offer¹ for the equity securities of a target company that is a *foreign private issuer*.²
- The target company's shares are **not** listed in the United States, but the target company has U.S. shareholders.
- The bidder is not eligible to use, or chooses not to rely on, certain exemptions available under the U.S. cross-border tender offer rules.

The principal reason a bidder may choose not to rely on available exemptions is the difficulty of calculating the level of U.S. ownership. As discussed in more detail in Annex E, the calculation of U.S. ownership is complicated, because the rules mandate that the bidder must look through the holdings of intermediaries to determine whether the underlying account holders are U.S. residents. In addition, if the level of U.S. ownership is known to be (or believed to be) above **ten** percent of the subject securities, the available exemptions are relatively limited and apply mostly in situations where there is a direct conflict between the U.S. rules and the laws of other jurisdictions. If no such conflict exists, a bidder may find it more straightforward to comply in full with the U.S. procedural requirements described below.

Procedural requirements under Regulation 14E

Section 14(e) of the Exchange Act is a general anti-fraud provision regulating tender offers under which the SEC has adopted Regulation 14E, which sets out certain procedural requirements as well as anti-fraud and anti-manipulation measures. While Regulation 14E applies on its face to tender offers for both equity and debt securities, the SEC permits bidders to structure debt tender offers in ways that do not strictly comply with the procedural requirements set forth below under a series of no-action letters and through informal guidance to bidders.

The timeline of a typical tender offer under Regulation 14E is described in Annex B. Under Regulation 14E, neither the bidder nor the target company is required to file or furnish any information to the SEC. Regulation 14E does **not** mandate any disclosure requirements with respect to the bidder; however, the procedural requirements implicitly assume that target shareholders receive timely notice about the initial terms of the tender offer.

¹ Tender offer is explained in Annex A.

² A non-U.S. company will qualify as a *foreign private issuer* if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents **or**
- More than 50% of its outstanding voting securities are held by U.S. residents, and **none** of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

The procedural requirements for tender offers under Regulation 14E are as follows:

Duration; extensions of the tender offer period

All tender offers must remain open for at least twenty U.S. business days from commencement of the offer.³ A U.S. business day is any day other than a Saturday, Sunday or a U.S. federal holiday.⁴ There is ***no*** specified maximum period by which the offer period must be closed.

The bidder can extend the tender offer at any time while the offer is outstanding by publishing a press release or some other form of public announcement. The offer ***cannot*** be extended after it has expired.

The deadline to publish an announcement of extension is on the next U.S. business day after the scheduled expiration date of the offer, by 9:00 a.m. (New York time), meaning that if the last day that holders are allowed to tender shares into an offer is, for example, a Friday, the bidder has the option to extend the offer by publishing a press release at any time before 9:00 a.m. (New York time) the following Monday morning, if it is not a federal holiday in the United States. In any announcement of an extension, the bidder must disclose the approximate number of securities deposited in the offer as of the date of the announcement.⁵

In addition, a bidder may need to extend a tender offer if it makes certain changes to the terms of the offer. The offer period must remain open for at least ***ten*** U.S. business days from the date of the announcement of any of the following changes:

- any increase or decrease in the consideration offered
- a change in the percentage of the securities the bidder intends to purchase
- a change in the dealer's soliciting fee
- any other equally significant change.

For other material changes to the terms of the offer, an extension of ***five*** U.S. business days is sufficient.⁶ Other material changes could include changes to the conditions to the offer or a decision by the bidder to waive certain of the conditions.

As discussed in more detail in Annex B, the bidder may structure the offer to include a subsequent offering period after the termination of the initial tender offer but is not required to do so.

In addition, the bidder has the option of starting a second tender offer after the initial tender offer has expired. However, the bidder will be required to pay for the shares it has received in the first tender offer, as discussed below, and the second tender offer will also need to comply with all of the procedural requirements under Regulation

³ Rule 14e-1(a).

⁴ Rule 14Fi-1(a). A list of U.S. federal holidays is available on the SEC website at <https://www.sec.gov/info/edgar/fedholiday.htm>.

⁵ Rule 14e-1(d).

⁶ SEC Release No. 33-7760 (Oct. 22, 1999).

14E, meaning that the bidder will need to keep it open for at least 20 U.S. business days. Under the U.S. rules, Regulation 14E would cease to apply after the completion of the initial tender offer, and the second offer would be regulated as a separate offer that could potentially have different terms from the initial offer. However, certain jurisdictions such as Italy also regulate purchases by the bidder after the completion of the tender offer. If the target company's home country is such a jurisdiction, the bidder might not, for example, be allowed to offer a different price to bidders in the second tender offer.

Prompt payment

Once the initial tender offer period has expired, the bidder has a limited period of time within which it must pay tendering holders. Likewise, if the bidder decides to withdraw the tender offer, it must return any securities that have been tendered in a timely manner. The U.S. rules state simply that the payment must be paid or the securities returned "promptly."⁷ SEC guidance suggests that "promptly" means payment within *three* U.S. business days.⁸ In a cross-border context, the bidder can request the SEC for an exemption from this requirement in circumstances where longer payment periods are permitted under local law.⁹

Purchases outside of the offer

Bidders sometimes make open-market or negotiated purchases before the announcement of a tender offer and build up a position in the target securities.

In many jurisdictions, shareholders in a public company are required to disclose publicly their level of shareholding if it exceeds certain thresholds. In some cases, they are also required to disclose their intentions in making such an investment. Commonly, potential bidders or their intermediaries will choose to remain below the reporting thresholds in the relevant jurisdiction until they publicly announce their intention to make a tender offer.

The U.S. tender offer rules do ***not*** formally regulate purchases of the target's securities before the public announcement of the tender offer. However, in certain cases, U.S. courts have determined that a series of purchases in the form of either open-market purchases or negotiated purchases could be integrated to constitute a tender offer. Purchases before the formal commencement of a tender offer may be subject to scrutiny if shareholders considering participating in the tender offer object to preferential terms offered to certain shareholders.¹⁰

⁷ Rule 14e-1(c).

⁸ SEC Release No. 34-43069 (July 24, 2000). However, in certain contexts, the SEC permits longer periods, in particular for the transfer of limited partnership interests in private funds, as long as the bidder discloses the expected time frame for settlement in the offer materials. See Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers, July 31, 2000.

⁹ See Cash Offer by Stork Holdco L.P. for Songbird Estates Plc, SEC No-Action Letter, 2014 WL 7507325 (Dec. 19, 2014); Banco Santander, S.A., Exchange Offers, SEC No-Action Letter, 2014 WL 4827361 (Sept. 18, 2014).

¹⁰ See e.g., *Millionerrors Investment Club v. General Electric Co. PLC*, Fed. Sec. L. Rep. P 90, 944. (W.D. Pa. Mar. 21, 2000).

From the time that a tender offer is publicly announced until it expires, a bidder may only purchase the subject securities that are tendered as part of the offer. It is prohibited from purchasing the securities otherwise, whether in open-market transactions or privately negotiated transactions. The prohibition applies to any purchases, whether they are made within or outside the United States.¹¹ This rule is intended to ensure that all holders of the subject securities are treated equally, and the bidder does not offer preferential terms to certain holders once the tender offer has commenced.

There are a number of exceptions to the prohibition on purchases outside of the offer, which are described in Annex C. Most of the exceptions do not relate to purchases made to facilitate the tender offer. However, if the target company is incorporated in the United Kingdom and the offer is subject to the City Code on Takeovers and Mergers, and certain other conditions are met, intermediaries acting for the bidder may make purchases outside of the offer that are in compliance with the City Code.¹² The exception for purchases in tender offers regulated under the City Code is discussed in Annex D.

Purchases during any subsequent offering period are not regarded as purchases outside of the tender offer. The U.S. rules, therefore, require that the bidder pay the same consideration in amount and form during the subsequent offering period as the consideration offered during the initial tender offer.

Response of target company

The target company must publish or provide its shareholders with a statement responding to the offer, taking one of the following positions:

- recommend acceptance of the offer
- recommend rejection of the offer
- express no opinion and remain neutral towards the offer
- state that the target company is unable to take a position with respect to the offer.¹³

The response must also include the reasons for the position disclosed. If there is any change with respect to this position, the target company must notify its shareholders promptly. Enforcement of this requirement is unlikely for a non-U.S. target company, unless its securities are registered under the Exchange Act (for example, because they are listed on a U.S. exchange).¹⁴

General anti-fraud considerations

¹¹ Rule 14e-5.

¹² Rule 14e-5(b)(9).

¹³ Rule 14e-2.

¹⁴ U.S. Regulation of International Securities and Derivatives Markets (9-12). If the target securities are registered under the Exchange Act, the tender offer will be subject to the more stringent procedural requirements under Regulation 14D, which includes a separate obligation under Rule 14d-9 for the target company to take a position about the proposed offer in an SEC filing on Schedule 14D-9.

Section 14(e) of the Exchange Act is a general anti-fraud provision, the language of which tracks Rule 10b-5. Under Section 14(e), the bidder and its agents are prohibited from making any material misstatement or omission or engaging in any deceptive or manipulative practices. As a practical matter, this means that bidders should disclose certain information in the tender offer materials. For example, in a negotiated transaction or one in which the bidder has had the opportunity to conduct due diligence, the bidder must consider whether it has access to any material information about the target company that is not available to the shareholders of the target company. It might need to disclose any such information to the shareholders so that they can make an informed decision about whether to tender their shares.

If there are any conditions to the tender offer, these must be disclosed in the tender offer materials. In addition, any conditions must be based on objective criteria outside of the bidder's control. If one of the conditions is the bidder's ability to obtain external financing to pay for the tender offer, the bidder might need to disclose information about its source of funds in the tender offer materials so that target shareholders have sufficient information about the bidder's financial condition and the likelihood that it will be able to pay for the tendered shares.¹⁵

In addition, if the tender offer is for a portion of the target company's shares, rather than all shares, the bidder must disclose whether it will accept shares from tendering shareholders on a pro rata basis. If this is not the case and the bidder accepts tenders on a first-come-first-served basis, the SEC views this as effectively shortening the tender offer period to under twenty business days.¹⁶

Applicability of U.S. tender offer rules

If U.S. jurisdictional means are used in connection with any tender offer, the procedural requirements summarized above apply regardless of whether the securities in question are issued by a U.S. or non-U.S. company (unless the bidder is able to rely on the cross-border exemptions discussed in subsequent notes). Jurisdictional means include using the U.S. postal service or telephone, fax or Internet connections to, in or from the United States to make the offer.

In some cases, it might not be possible for a bidder to comply in full with the procedural requirements of Regulation 14E because of a conflict with the rules of another jurisdiction. For example, in certain jurisdictions, payment mechanics are such that bidders are unable to comply with the prompt payment requirements of Rule 14e-1(c). In such cases, bidders generally seek to rely on the cross-border exemptions discussed in subsequent notes. If these are not available, it may nevertheless be possible to seek relief from specific procedural requirements from the SEC on a case-by-case basis. Such relief will usually track the accommodations available for tender offers in which the target company is a *foreign private issuer* with less than 40% of the target securities held by U.S. holders, which is referred to as Tier II relief.¹⁷

¹⁵ Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers, July 31, 2000.

¹⁶ Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers, July 31, 2000.

¹⁷ Rule 14d-1(d).

January 14, 2019

CASH TENDER OFFER RELYING ON THE TIER I EXEMPTION

This note outlines the requirements under the U.S. federal securities laws applicable in the following situation:

- The bidder is a non-U.S. company.
- The transaction is a cash tender offer for the equity securities of a target company that is a foreign private issuer.¹
- The target company's shares are **not** listed in the United States, but it has U.S. shareholders.
- The target company is **not** an investment company as defined in the U.S. Investment Company Act of 1940, as amended.
- Fewer than 10% of the target company's shares are held by U.S. residents.

In this situation, the bidder is permitted to rely on the Tier I exemption, under which it is exempted from substantially all of the procedural requirements of Regulation 14E, as described below. However, the tender offer must meet certain requirements, intended to ensure that shareholders in the United States are treated at least as favorably as shareholders in other jurisdictions.

Determining the percentage of U.S. shareholders is not straightforward, because the rules mandate that if any shareholders are brokers, dealers or banks or their nominees, the bidder must look through the holdings of these intermediaries to determine whether the underlying account holders are U.S. residents. It is not always possible to obtain this information, especially within the time frame required under the rules. The procedure for determining the U.S. ownership level is described in Annex E.

Equal treatment

The principal requirement under the Tier I exemption is that U.S. shareholders be treated at least as favorably as shareholders in other jurisdictions.² There are a few exceptions to this requirement that allow disparate treatment of U.S. shareholders in limited circumstances. For a cash tender offer, the only relevant exception relates to loan notes. In certain jurisdictions, such as the United Kingdom, loan notes offer tax advantages to holders. If the bidder offers loan notes to the target company's shareholders in such jurisdictions, it is **not** obliged to offer

¹ A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents **or**
- More than 50% of its outstanding voting securities are held by U.S. residents, and **none** of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

² Rule 14d-1(c)(2).

them to U.S. shareholders as well, so long as the loan notes are not listed on any organized securities market or registered under the U.S. Securities Act of 1933, as amended.³

Informational documents

The bidder is required to send the informational documents, including amendments, about the tender offer to U.S. shareholders in English and on a comparable basis to that provided to shareholders in the target company's home jurisdiction.⁴ If the bidder disseminates the information through publication in the target company's home jurisdiction (for example through a newspaper advertisement) the bidder must similarly publish it in the United States, in a manner that is reasonably calculated to make U.S. shareholders aware of the offer.⁵ This could mean placing an advertisement in a newspaper of national circulation in the United States, although the SEC has recognized that a "newspaper advertisement is not required under all circumstances," and what is reasonable in a particular situation may vary depending on the number of U.S. shareholders, their level of sophistication or where they are located.⁶ The SEC has also recognized that the U.S. advertisement may be less detailed than the one mandated by local law or practice so long as it includes details about how shareholders can access the complete offering materials.⁷

Exemptions from the procedural requirements of Regulation 14E

As long as U.S. shareholders are treated equally to shareholders in other jurisdictions and they receive the informational documents on a comparable basis to other shareholders, the bidder need not comply with any of the procedural requirements of Regulation 14E.⁸ In particular, the following procedural requirements do *not* apply:

- the rules governing the duration of the tender offer and extensions
- the prompt payment requirement
- restrictions on purchases outside of the tender offer
- the rules governing the response of the target company.

Offer duration and extensions

In a Tier I tender offer, there is no restriction on the length of the offer period from a U.S. perspective. Under Regulation 14E, a tender offer must remain open for at least twenty U.S.

³ Rule 14d-1(c)(2)(iv).

⁴ Rule 14d-1(c)(3)(i).

⁵ Rule 14d-1(c)(3)(ii).

⁶ SEC Release No. 34-58597, Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (December 8, 2008).

⁷ SEC compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 104.03 (October 17, 2018).

⁸ Rule 14d-1(c).

business days.⁹ This requirement does **not** apply to Tier I tender offers, and accordingly, the bidder can structure the offer to remain open for a shorter period if that is permitted in the target company's home jurisdiction. In addition, if there are any material changes to the terms of the offer, the U.S. rules would normally require the offer to be extended by five or ten business days, depending on the level of materiality of the change.¹⁰ These rules do **not** apply in the case of a Tier I tender offer. Accordingly, the bidder may choose not to extend the tender offer period if and when it announces any changes to the terms of the offer if that is permitted in the target company's home jurisdiction. Alternatively, it may extend the offer for a shorter period in compliance with local requirements.

The prompt payment requirement

Regulation 14E requires that shareholders be paid "promptly" for the shares that they tender in the offer,¹¹ which practitioners usually interpret to mean payment within three U.S. business days. In many jurisdictions, tender offer mechanics are such that it is difficult to pay tendering shareholders for their shares within this time period, and in any case, the laws of many jurisdictions allow bidders a longer period of time to pay for the tendered shares. The prompt payment requirement does **not** apply to Tier I tender offers. Accordingly, bidders can pay for tendered shares in accordance with the rules or standard practice of the target company's home jurisdiction.

Purchases outside of the offer

Under Regulation 14E, bidders are generally prohibited from purchasing the securities subject to the tender offer (or any related securities) outside of the offer from the time of the public announcement of the offer by the bidder to the expiration of the offer, subject to certain exceptions that are described in Annex C.¹² Tier I tender offers are exempted from this prohibition.¹³ Accordingly, the bidder, any of its affiliates or any dealer-manager or financial advisor may make open-market purchases or privately negotiated purchases of the target company's shares (or any related securities) outside of the tender offer, including purchases **within** the United States,¹⁴ as long as they meet the following conditions:

- The offer documents provided to U.S. shareholders prominently disclose the possibility of such purchases.
- To the extent that the bidder discloses any information about any purchases of the shares (or any related securities) outside of the tender offer in the target company's home jurisdiction, it publicly discloses the same information in the United States.

⁹ Rule 14e-1(a).

¹⁰ Rule 14e-1(b).

¹¹ Rule 14e-1(c).

¹² Rule 14e-5.

¹³ Rule 14e-5(b)(10).

¹⁴ SEC Release No. 34-42054, Final Rule: Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings (October 26, 1999).

- The bidder's purchases comply with the applicable laws regulating tender offers in the target company's home jurisdiction.¹⁵

In a Tier I offer, the bidder is **not** required by U.S. rules to increase the tender offer price to match a higher price offered to a purchaser outside of the tender offer. However, many other jurisdictions, such as the United Kingdom, also have rules in place that require the bidder to increase the price in its tender offer to match the highest price at which it has purchased shares outside of the offer.

Response of target company

Under Regulation 14E, once a bidder announces a tender offer, the target company is required to communicate its position on the tender offer to its shareholders. This requirement does **not** apply in the case of Tier I tender offers.¹⁶

General anti-fraud provisions

Tier I tender offers are subject to general anti-fraud liability under Section 14(e) of the U.S. Securities Exchange Act of 1934, as amended. Under Section 14(e), the bidder and its agents are prohibited from making any material misstatement or omission or engaging in any deceptive or manipulative practices. As a practical matter, this means that shareholders can bring suit in the United States in connection with Tier I tender offers. Bidders should therefore consider whether the disclosure about the tender offer in the United States is comparable with the information that would be required to be provided in a similar tender offer for shares of a U.S. company. Bidders should also consider any practical considerations that are applicable only to shareholders in the United States and ensure that there is adequate disclosure on these points in the offer materials that are distributed to shareholders in the United States.

¹⁵ Rule 14e-5(b)(10).

¹⁶ Rule 14e-2.

CASH TENDER OFFER RELYING ON THE TIER II EXEMPTION

This note outlines the requirements under the U.S. federal securities laws applicable in the following situation:

- The bidder is a non-U.S. company.
- The offer is a cash tender offer for the equity securities of a target company that is a foreign private issuer.¹
- The target company's shares are **not** listed in the United States, but it has U.S. shareholders.
- The target company is **not** an investment company under the U.S. Investment Company Act of 1940, as amended.
- More than 10% but fewer than 40% of the target company's shares are held by U.S. residents.

In this situation, the bidder is permitted to rely on the Tier II exemption, which provides limited relief from certain procedural requirements under Regulation 14E, generally in circumstances in which the requirements of the target's home jurisdiction are in conflict with the U.S. rules.

Determining the percentage of U.S. shareholders is not straightforward, since the rules mandate that if the holders are brokers, dealers or banks or their nominees, the bidder must look through the holdings of the intermediaries to determine whether the underlying account holders are U.S. residents. It is not always possible to obtain this information, especially within the time frame required under the rules. The procedure for determining the U.S. ownership level is described in Annex E.

Exemptions from the procedural requirements of Regulation 14E

In a Tier II cash tender offer, the bidder need not comply with the following procedural requirements of Regulation 14E, as long as it complies with the procedural requirements of the target company's home jurisdiction or the standard practice in that jurisdiction.

- the rules governing notice of extensions
- the prompt payment requirement
- the prohibition on early termination of the tender offer period
- the prohibition on purchases outside of the offer.²

¹ A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents **or**
- More than 50% of its outstanding voting securities are held by U.S. residents, and **none** of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

² There are a other procedural accommodations available under Tier II that are relevant to tender offers of securities registered with the SEC. Many of these relate to the rights of shareholders to withdraw the tendered shares while the tender offer or the subsequent offering period is pending. There are also exemptions relating to the form of consideration that are relevant to exchange offers rather than tender offers.

Notice of extensions

The bidder is permitted to follow home country law or practice with respect to how it notifies shareholders of any extension of the tender offer period.³ It is not required to follow the process outlined in Rule 14e-1(d), under which the bidder must make a public announcement of the extension before 9:00 a.m. (New York time) on the next U.S. business day after the offer is scheduled to expire.

Prompt payment

The bidder will satisfy the prompt payment requirement under Rule 14e-1(c) if it follows the law or standard practice in the target company's home jurisdiction. However, if the tender offer includes a subsequent offering period, the bidder must pay for any shares tendered during that period within twenty business days of the date on which the shares are tendered, even if home jurisdiction rules allow later payment, in order to meet this requirement.⁴

Early termination

Under Regulation 14E, a tender offer must remain open for a minimum of **twenty** U.S. business days.⁵ Although it can be extended thereafter, it is generally inconsistent with the rules to terminate the tender offer earlier than the announced date. In addition, the bidder must ensure that the tender offer remains open, or extend the offer so that it remains open, for at least ten U.S. business days if certain significant changes are made to the terms of the offer, such as a change in the consideration offered, or for five U.S. business days for other material changes. If the offer period is extended for any of these reasons, it cannot be terminated before the minimum required period of five or ten U.S. business days.⁶

However, in certain jurisdictions, such as the United Kingdom, it is standard practice to terminate the tender offer once a sufficient number of shareholders have tendered their shares and all offer conditions have been satisfied. The bidder's incentive for early termination is that if the offer remains open, and shareholders have the right to withdraw the tendered shares, there is a possibility that by the end of the offer period, the number of tendered shares will have dropped below the required threshold.

In a Tier II tender offer, the bidder has the ability to terminate the tender offer before the announced date (which may be the date originally announced as the expiration date of the offer or, if the bidder voluntarily extended the offer period, the expiration date announced as part of the extension) and cutting off the right of shareholders to withdraw their tendered shares, so long as **all** of the following conditions are met:

- The tender offer remains open for **at least twenty** U.S. business days.

³ Rule 14e-1(d).

⁴ Rule 14d-1(d)(iv).

⁵ Rule 14e-1(a).

⁶ Rule 14e-1(b).

- The bidder discloses the possibility of early termination and its effect in the original offer materials.
- There is a subsequent offering period after the end of the initial tender offer period.⁷
- All conditions to the tender offer are satisfied or waived when the initial tender offer period is terminated.
- The bidder does not terminate the tender offer period during any mandatory extension required under the U.S. tender offer rules.⁸

Although the ability to terminate early applies in limited circumstances, it helps avoid uncertainty when a tender offer that may terminate early under the laws of the relevant jurisdiction would otherwise remain open even though there is no other reason under the U.S. rules (such as a mandatory extension) for it to remain open.

Purchases outside of the offer

Under Regulation 14E, once the tender offer is announced, the bidder is only permitted to purchase shares that are tendered as part of the offer. However, in many non-U.S. jurisdictions, it is customary for bidders or their intermediaries to make open market purchases while the tender offer is pending. If the bidder relies on the Tier II exemption, it can make purchases outside of the tender offer in certain limited circumstances.

If the tender offer is structured as a single offer to shareholders within and outside the United States, the bidder or its affiliates may nevertheless purchase the target company's shares outside of the tender offer if the following conditions are met:

- The bidder complies with the laws of the target company's home jurisdiction.
- The bidder does **not** purchase any shares outside of the tender offer ***within the United States***.
- The offer materials sent to shareholders in the United States prominently disclose the possibility or intention to make purchases of the shares or any related securities outside of the tender offer.
- If the bidder is required (or intends) to disclose publicly that it has made such purchases as and when they occur, the offer materials disclose the manner in which this information will be communicated.
- To the extent that the bidder discloses any information about any purchases of the shares or any related securities outside of the tender offer in the target company's home jurisdiction, it publicly discloses the same information in the United States.
- If the consideration paid by the bidder or its affiliates in any transaction after the public announcement of the tender offer is greater than the tender offer price, the tender offer price is increased to match that price.⁹

Affiliates of the bidder's financial advisor are also permitted to purchase the target company's shares as described in Annex C.

⁷ This allows shareholders that did not tender their shares because they were uncertain about the outcome of the offer to have the opportunity to tender their shares.

⁸ Rule 14d-1(d)(2)(ix).

⁹ Rule 14e-5(b)(12).

Separate U.S. and non-U.S. tender offers

Despite the procedural accommodations available under Tier II, the rules in the target's home jurisdiction or another relevant jurisdiction may be incompatible with the U.S. rules. In such a situation, under Tier II, the bidder has the option of structuring the tender offer as two or more separate offers, one made to U.S. shareholders (including holders of ADRs representing interests in the subject securities) and one or more offers made to shareholders outside the United States.¹⁰ The U.S. offer would be targeted at shareholders in the United States and would comply with the procedural requirements of Regulation 14E, while any non-U.S. offer would be comply with the regulations of the target company's home jurisdiction or any other jurisdiction that applies.

From the SEC's perspective, purchases made by the bidder pursuant to a non-U.S. tender offer are purchases outside of the regulated U.S. tender offer that are permitted pursuant to an exemption as long as the bidder complies with the following conditions:

- The bidder offers the same consideration in the U.S. and non-U.S. offers.¹¹
- The procedural terms of the U.S. tender offer are at least as favorable as those of the non-U.S. tender offer.¹²
- The bidder discloses in the U.S. offering documents its intention to make purchases in the non-U.S. tender offer or offers.
- The bidder does **not** purchase target company shares in open market transactions or privately negotiated transactions, and all its purchases outside the United States are pursuant to the non-U.S. tender offer or offers.¹³

If the bidder structures the tender offer as separate U.S. and non-U.S. offers, it is customary to exclude U.S. shareholders from tendering in a non-U.S. tender offer, **unless** this is not permitted under the rules of the applicable non-U.S. jurisdiction.

General anti-fraud provisions

Tier II tender offers are subject to general anti-fraud liability under Section 14(e) of the U.S. Securities Exchange Act of 1934, as amended. Under Section 14(e), the bidder and its agents are prohibited from making any material misstatement or omission or engaging in any deceptive or manipulative practices. As a practical matter, this means that shareholders can bring suit in the United States in connection with Tier II tender offers. Bidders should consider whether the disclosure about the tender offer in the United States is comparable with the information that would be required to be provided in a similar tender offer for shares of a U.S. company. Bidders should also consider any practical considerations that are applicable

¹⁰ Rule 14e-5(b)(11).

¹¹ If the consideration is in a different currency, it may be converted to U.S. dollars for purposes of the U.S. tender offer at an exchange rate that is disclosed in the U.S. tender offer documents.

¹² For example, if the non-U.S. tender offer remains open for longer than twenty U.S. business days to comply with the rules of the relevant jurisdiction, the U.S. offer must also remain open for the same period of time.

¹³ Rule 14e-5(b)(11).

only to shareholders in the United States and ensure that there is adequate disclosure on these points ¹⁴in the offer materials that are distributed to shareholders in the United States.

¹⁴ For example, if the non-U.S. tender offer remains open for longer than twenty U.S. business days to comply with the rules of the relevant jurisdiction, the U.S. offer must also remain open for the same period of time.

Tier I exchange offer

This note outlines the requirements under the U.S. federal securities laws applicable in the following situation:

- The bidder is a foreign private issuer.¹
- The bidder's shares are **not** listed in the United States.
- The bidder is **not** an investment company, as defined in the U.S. Investment Company Act of 1940, as amended.
- The offer is an exchange offer for the equity securities of a target company that is a foreign private issuer.
- The target company's shares are **not** listed in the United States, but it has U.S. shareholders.
- The target company is **not** an investment company, as defined in the U.S. Investment Company Act of 1940, as amended.
- Fewer than 10% of the target company's shares are held by U.S. shareholders.

In this situation, the bidder is permitted to rely on Tier I, in which case the U.S. rules applicable to the exchange offer are relatively straightforward. Tier I is available for tender offers and exchange offers in which U.S. shareholders hold fewer than 10% of the target company's shares.

However, determining the percentage of U.S. shareholders can be complicated, since the rules mandate that if the shareholders are brokers, dealers or banks or their nominees, the bidder must look through the holdings of these intermediaries to determine whether the underlying account holders are U.S. residents. It is not always possible to obtain this information, especially within the time frame required under the rules. The procedure for determining the U.S. ownership level is described in Annex E.

If the bidder is able to rely on Tier I, the exchange offer will be exempt from substantially all of the procedural requirements of Regulation 14E, as long as it meets certain requirements intended to ensure that shareholders in the United States are treated at least as favorably as shareholders in other jurisdictions.

The bidder will also be offering securities, which will need to be registered under the U.S. Securities Act of 1933, as amended, or offered pursuant to an exemption from the registration requirements. Rule 802 under the Securities Act is an exemption that tracks Tier I and allows the bidder to offer securities to the target company's shareholders, including shareholders in the United States, in exchange for the target company's shares as long as certain conditions are met. Rule 802 only provides an exemption under the **federal** securities laws, however, and the bidder may need to register or qualify the securities under the securities laws of the

¹ A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents **or**
- More than 50% of its outstanding voting securities are held by U.S. residents, and **none** of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

states where the target company's shareholders are located, unless exemptions are available under the laws of the relevant states.

If the bidder chooses *not* to rely on Rule 802 to offer shares in the United States, it also has the option of offering only cash consideration to the target company's U.S. shareholders, as long as the amount in cash is substantially equivalent to consideration being given to shareholders in other jurisdictions.

Procedural requirements under Rule 802

The procedural requirements under Rule 802 broadly track those under Tier I.

Equal treatment

Both Tier I and Rule 802 require the bidder to treat U.S. shareholders of the target company at least as favorably as shareholders in other jurisdictions. One exception to this requirement is that if the target company has shareholders in a state where the bidder would be required to register or qualify the offer shares under state law, the bidder is *not* required to extend the offer of securities to shareholders in that state.² However, bidders sometimes offer cash to shareholders in certain jurisdictions rather than securities, usually because of local law restrictions. If the bidder is offering this option to shareholders of the target company in any jurisdiction, the bidder would be required to offer the same cash alternative to shareholders in the state where the bidder is not offering shares rather than excluding such shareholders from the exchange offer altogether.³

Informational documents

Under Tier I, the bidder must make any informational documents available to U.S. shareholders in English on a comparable basis to that provided to the shareholders in the target company's home jurisdiction. If the bidder publishes the information in the target company's home jurisdiction, it is also required to publish the information in the United States in a manner reasonably calculated to inform U.S. shareholders of the offer.⁴ This could mean placing an advertisement in a newspaper of national circulation in the United States, although the SEC has recognized that a "newspaper advertisement is not required under all circumstances," and what is reasonable in a particular situation may vary depending on the number of U.S. shareholders, their level of sophistication or where they are located.⁵ The SEC has also recognized that the U.S. advertisement may be less detailed than the one mandated by local law or practice so long as it includes details about how shareholders can access the complete offering materials.⁶

² Rule 802(a)(2).

³ Rule 802(a)(2).

⁴ Rule 14d-1(c)(3).

⁵ SEC Release No. 34-58597, Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (December 8, 2008).

⁶ SEC compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 104.03 (October 17, 2018).

In addition to the above requirements, which also apply under Rule 802, the informational document must be furnished to the SEC in English on Form CB.⁷ This means that the document will be publicly accessible on the SEC website. The bidder will also need to appoint an agent for service of process in the United States and publish the information about this appointment on Form F-X on the SEC website.

Information provided on Form CB is “furnished” to rather than “filed” with the SEC. This means that the bidder does *not* have liability under Section 18 of the U.S. Securities Exchange Act of 1934, as amended, with respect to this information. However, the bidder will continue to have liability for the informational document under other provisions of the Exchange Act that are not dependent on the filing of documents with the SEC, and in particular, anti-fraud liability under Section 14(e) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder will apply.

If this is the first time that the bidder publishes information on the SEC website, it will need to complete certain technical formalities. While the information required is straightforward, the bidder will need to send a notarized copy of the application form to the SEC. In addition, it will need to engage a financial printer with the capacity to convert the informational document to the required format for posting on the SEC website.

Legend

Rule 802 also requires the informational document disseminated to U.S. shareholders to include a legend on the cover or other prominent location in the document. The rule includes prescriptive language for the legend, but also permits bidders to include an equivalent statement in clear, plain language. The legend prescribed in the rule is as follows:

This exchange offer or business combination is made for the securities of a foreign company. The offer is subject to disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.

It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of the U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment.

You should be aware that the issuer may purchase securities otherwise than under the exchange offer, such as in open market or privately negotiated purchases.⁸

As a practical matter, bidders generally include the prescribed language and only modify it to specify the jurisdiction(s) whose rules apply and the applicable accounting standard, if any.

⁷ Rule 802(a)(3)(i); Rule 14d-1(c)(3)(iii).

⁸ Rule 802(b).

Cash alternative for U.S. shareholders

In certain instances, the bidder may choose not to rely on Rule 802 to offer securities to the target company's shareholders in the United States. For instance, the number of U.S. shareholders may be so small as to make the requirement to publish and furnish the informational documents on the SEC website on Form CB unduly burdensome, or the U.S. shareholders may be located in states where the bidder would in any case be required to register the shares under the state securities laws.

In such a case, as an alternative to excluding U.S. shareholders from the exchange offer altogether, the bidder has the option under Tier I to offer cash instead of shares to U.S. shareholders, as long as the bidder has a reasonable basis for believing that the amount of cash offered is substantially equivalent to the value of the consideration offered to non-U.S. shareholders.⁹ If the bidder's shares are not "margin securities" under Regulation T, which effectively means that the shares do not have a "ready market" for net capital purposes,¹⁰ the bidder must undertake to provide an opinion from an independent expert stating that the cash-only consideration is substantially equivalent to the shares (or combination of cash and shares) being offered to shareholders outside the United States to the SEC staff or any U.S. shareholder should they request it. If they are margin securities, the bidder must undertake to provide the closing price and daily trading price of the shares on their principal trading market as of the last day of each of the six months prior to the announcement of the exchange offer and for each of the trading days after the announcement.

General anti-fraud provisions

Tier I exchange offers are subject to general anti-fraud liability under Section 14(e) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Under Section 14(e), the bidder and its agents are prohibited from making any material misstatement or omission or engaging in any deceptive or manipulative practices. As a practical matter, this means that shareholders can bring suit in the United States in connection with Tier I tender offers. Bidders should consider whether the disclosure about the tender offer in the United States is comparable with the information that would be required to be provided in a similar tender offer for shares of a U.S. company. Bidders should also consider any practical considerations that are applicable only to shareholders in the United States and ensure that there is adequate disclosure on these points in the offer materials that are distributed to shareholders of the target company in the United States.

⁹ Rule 14d-1(c)(2)(iii).

¹⁰ SEC Release No. 33-7759 (Oct. 22, 1999).

Tier I exchange offer without using Rule 802

This note outlines the requirements under the U.S. federal securities laws applicable in the following situation:

- The bidder is a foreign private issuer.¹
- The bidder is **not** an investment company, as defined in the U.S. Investment Company Act of 1940, as amended.
- The offer is an exchange offer for the shares of a target company that is a foreign private issuer.
- The target company's shares are **not** listed in the United States, but it has U.S. shareholders.
- The target company is **not** an investment company, as defined in the Investment Company Act.
- Less than 10% of the target company's shares are held by U.S. shareholders.
- The bidder cannot or chooses not to offer the target company's U.S. shareholders cash consideration instead of equity securities.
- The bidder cannot or chooses not to rely on the exemption under Rule 802 of the U.S. Securities Act of 1933, as amended, to issue securities to the target company's shareholders.

In this situation, the bidder is permitted to rely on Tier I for the exchange offer. However, it must also comply with the registration requirements of the U.S. Securities Act of 1933, as amended, unless an exemption from registration is available.

Tier I is available for tender offers and exchange offers in which U.S. shareholders hold less than 10% of the target company's shares. The U.S. rules applicable to a Tier I exchange offer are relatively straightforward.

However, determining the percentage of U.S. shareholders can be complicated, because the rules mandate that if any shareholders are brokers, dealers or banks or their nominees, the bidder must look through the holdings of these intermediaries to determine whether the underlying holders are U.S. residents. It is not always possible to obtain this information, especially within the time frame required under the rules. The procedure for determining the U.S. ownership level is described in Annex E.

If the shareholding is below 10% and the bidder is, therefore, able to rely on Tier I, the exchange offer will be exempt from substantially all of the procedural requirements of Regulation 14E, as long as it meets certain requirements intended to ensure that shareholders in the United States are treated at least as favorably as shareholders in other jurisdictions.

¹ A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents **or**
- More than 50% of its outstanding voting securities are held by U.S. residents, and **none** of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

Since the bidder will also be offering securities, they must be registered under the Securities Act or offered pursuant to an exemption from the registration requirements of the Securities Act.

If the bidder offers shares pursuant to a U.S. registration statement as consideration in the exchange offer, it must file a registration statement with the SEC, and the SEC will review and comment on the disclosure before it declares the registration statement effective. This process is more streamlined if the bidder already is already subject to the reporting requirements of the Securities Exchange Act. This would be the case if the bidder has previously conducted a registered offering in the United States or if its securities are listed on a securities exchange in the United States, such as the New York Stock Exchange or the Nasdaq Stock Market. In either case, however, the bidder must provide detailed disclosure about the target company, including audited financial information in a format accepted by the SEC. In a hostile transaction, the bidder must make the requisite effort to obtain this information from the target company or its advisors, if the target company is not an SEC registrant for which such information would be publicly available.

The bidder must file its registration statement with the SEC, and it must be declared effective by the SEC before the bidder can purchase any shares in the exchange offer.² Since the exchange offer documents may need to be reviewed by regulators in other jurisdictions in addition to the SEC, the bidder must take local law and practical considerations into account in deciding whether to launch the exchange offer before the registration statement is declared effective by the SEC. Since the bidder can rely on Tier I, it is broadly exempted from most procedural tender offer rules under Regulation 14E and Regulation 14D so long as it meets the requirements of Tier I that are described below. However, if the bidder chooses to commence the exchange offer before the SEC declares its registration statement effective, it must comply with certain additional requirements pursuant to Rule 162 under the Securities Act, including offering withdrawal rights to tendering shareholders, delivering the prospectus in connection with the exchange offer to tendering shareholders, and, if there are any changes to the material information disclosed to shareholders, extending the tender offer as required under the U.S. rules. These requirements, which normally only apply to tender and exchange offers for the shares of U.S.-registered companies, are intended to protect the target company's U.S. shareholders by ensuring that they have adequate information and the time and the opportunity re-evaluate their decision to tender their shares in light of any new information.

Conditions for Tier I

The bidder must structure the exchange offer to meet the conditions of Tier I. As long as these conditions are met, the bidder need not comply with the procedural requirements of Regulation 14E.

Equal treatment

The principal requirement under Tier I is that U.S. shareholders be treated at least as favorably as shareholders in other jurisdictions.³ There are a few exceptions to this

² Rule 162(a).

³ Rule 14d-1(c)(2).

requirement that allow disparate treatment of U.S. shareholders in limited circumstances. In a registered offering, the bidder need not offer the shares in any state or jurisdiction that prohibits the offer or sale of the shares after the bidder has made a good faith effort to register the shares in that state or jurisdiction.⁴ However, if the bidder is offering a cash alternative rather than shares to the target company's shareholders in any jurisdiction, whether inside or outside the United States, it must offer the same cash alternative to any shareholders in the state or jurisdiction where it is not offering the shares. Since the bidder is offering shares that are registered with the SEC, in most instances, it is not separately required to register or qualify the shares with state securities regulators. However, this requirement may be relevant if the shares are not listed on a U.S. stock exchange.

If the bidder offers loan notes⁵ to the target company's shareholders, it is **not** obliged to offer them to U.S. shareholders as well, so long as the loan notes are not listed on any organized securities market or registered under the Securities Act.⁶

Informational documents

Under Tier I, the bidder must make any informational documents available to U.S. shareholders in English on a comparable basis to that provided to the shareholders in the target company's home jurisdiction. In any case, the registration statement (including the prospectus) will be on file with the SEC and must be sent to the target company's shareholders, which fulfills the requirement under Tier I to make the informational documents available to U.S. shareholders.

If the bidder publishes any additional information in the target company's home jurisdiction (for example through a newspaper advertisement), it is also required to publish the information in the United States in a manner reasonably calculated to inform U.S. shareholders of the offer.⁷ The information must also be made available to the SEC as a prospectus supplement or free writing prospectus.

Filing the registration statement

Unless an exemption is available, the bidder must prepare and file a registration statement on Form F-4 with the SEC. The registration statement consists of the prospectus for the new shares issued by the bidder to the target company's shareholders (which also includes the offer to purchase the target company's shares), as well as some information not required in the prospectus. The prospectus includes information about both the bidder and the target company, including historical and pro forma financial information, and a description of the proposed transaction. The bidder, the target (in a negotiated transaction) and their U.S. and local lawyers and accountants would all be involved in the preparation of the registration statement. Annex F contains a summary of the information required in the registration statement on Form F-4.

⁴ Rule 14d-1(c)(2)(i).

⁵ In certain jurisdictions such as the United Kingdom, bidders offer loan notes as part of the consideration, because loan notes have certain tax advantages over cash.

⁶ Rule 14d-1(c)(2)(iv).

⁷ Rule 14d-1(c)(3).

If the bidder is an SEC reporting company with an annual report on file, information about the bidder could potentially be incorporated by reference in its registration statement. However, the bidder would still have to provide information about the target company and the transaction.

Under the SEC review process, interim drafts of the registration statement are available publicly on the SEC website while the SEC staff reviews and comments on the disclosure.⁸ When the bidder publicly files the registration statement, it must also pay filing fees to the SEC, based on the value of the registered shares.

Once the registration statement is submitted to the SEC, the SEC will start its initial review of the registration statement, which normally takes up to 30 days. The review is conducted by legal and accounting staff in the SEC Division of Corporation Finance, and focuses on the adequacy of the disclosure. Once the bidder receives SEC comments, the bidder must respond with the following:

- a revised version of the registration statement
- a response letter identifying the changes to the disclosure in response to the SEC's comment letter and otherwise responding to the SEC's questions
- any additional materials requested by the SEC.

The bidder will typically receive several rounds of comments from the SEC. It must also update the registration statement for any changes that occur in the disclosure due to the passage of time or due to comments from regulators in other relevant jurisdiction, which may trigger additional comments from the SEC.

Once the SEC is satisfied with the bidder's responses and amendments to the registration statement, and the bidder publicly files the registration statement, the bidder must request the SEC for a notice of acceleration to declare the registration statement effective. If the prospectus is still under review by regulators in any other jurisdiction, the bidder should wait until it resolves comments with other regulators before making its acceleration request. Normally, the SEC grants the bidder's request to declare the registration statement effective within 48 hours.

The SEC has committed to expediting the review process for exchange offers to make them a more attractive option for companies, but has not committed to specific time periods. In any case, the SEC notes that the review process may be longer in "cases involving somewhat

⁸ If the bidder's shares are listed in a non-U.S. securities exchange, as a foreign private issuer, the bidder may choose to submit its registration statement on Form F-4 on a confidential basis. However, the bidder must subsequently file the registration statement publicly before it can launch the exchange offer. The registration statement must be publicly filed before the SEC declares it effective. If the exchange offer is the bidder's first public offering of shares in the United States, it can also rely on the SEC's expanded non-public review process for all issuers. Under this process, the bidder must publicly file its registration statement and non-public draft submissions at least 15 days before the SEC declares the registration statement effective.

novel or unusually complex issues, such as exchange offers where the bidder is registering its initial public offering.”⁹

Once the registration statement is declared effective, the bidder must send the prospectus to the target company’s shareholders in the United States before purchasing any shares in the tender offer.

Additional requirements under Rule 162

If the bidder chooses to launch the exchange offer before the registration statement is declared effective, it must comply with certain additional requirements that do not otherwise apply to an exchange offer for the shares of a company that is not publicly filing reports with the SEC. These additional requirements do **not** apply if the bidder waits until the registration statement is declared effective to launch the tender offer.

If the bidder chooses to launch the exchange offer in reliance on Rule 162, it may not purchase any shares until after the registration statement is declared effective and the exchange offer has ended.¹⁰ In addition, the following requirements apply:

- The bidder must extend withdrawal rights for the duration of the exchange offer.
- The bidder must meet the prospectus delivery requirements of the Securities Act.
- The bidder must extend the exchange offer as required under Schedule 14D if there is a material change to the information provided to the target company’s shareholders, which is not otherwise required for Tier I exchange offers.

Withdrawal rights

Target company shareholders that tender shares in the exchange offer have the right to withdraw their shares while the exchange offer remains open.¹¹ To do so, a shareholder must provide timely written notice to the bidder’s depositary, specifying the names of the tendering shareholders, the number or amount of shares to be withdrawn and the names in which the shares are registered.¹² The bidder may also impose other reasonable requirements, including certificate numbers of the physical shares or a signed request for withdrawal, as conditions for releasing the withdrawn securities.

Since target company shareholders have the right to withdraw tendered shares while the exchange offer remains open, the bidder **cannot** purchase any shares (for example, on a rolling basis) during this period.

Prospectus delivery requirement

⁹ SEC Release No. 34-58597, Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (December 8, 2008).

¹⁰ Rule 162(a).

¹¹ Rule 14d-7(a)(1).

¹² Rule 14d-7(b).

The bidder must send the target company shareholders a prospectus that includes a letter of transmittal with instructions on how to tender its shares before it can launch the exchange offer.¹³ It must also send them any prospectus supplements with additional information about the offer and any revised prospectus, including the final prospectus.

Amendments to the term of the exchange offer

If there is a material change to the information given to the target company's shareholders in connection with the exchange offer, the bidder must disseminate a revised prospectus or prospectus supplement to the target company's shareholders, as discussed above. It must also extend the exchange offer if required. From the date that a prospectus supplement or revised prospectus is disseminated to the target company's shareholders, the exchange offer must remain open for at least the following time periods:

- ***five*** U.S. business days for a prospectus supplement containing a material change other than price or the amount of shares to be purchased in the offer
- ***ten*** U.S. business days for a prospectus supplement containing a change in the price, the amount of shares sought, the dealer's soliciting fee or other similarly significant change
- ***ten*** U.S. business days for a prospectus supplement included as part of a post-effective amendment ***and***
- ***twenty*** U.S. business days for a revised prospectus if the initial prospectus was materially deficient.¹⁴

Liability under the Securities Act

If the exchange offer is registered, the bidder is subject to liability under Section 11 of the Securities Act in addition to other anti-fraud rules, as noted below. In addition, directors, officers and controlling persons of the bidder are also subject to liability. If it is not registered, the general anti-fraud rules still apply.

Section 11

Section 11 of the Securities Act imposes strict liability on the bidder if the registration statement, at the time it is declared effective, contains an untrue statement of material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading. In addition to the bidder, liability extends to directors and any person who signs the registration statement. Liability also extends to underwriters and accountants or other experts that are named as having prepared or certified any part of the registration

¹³ Rule 162(b).

¹⁴ Rule 14d-4(d).

statement. Persons other than the bidder can rely on the due diligence defense to limit liability.¹⁵

The level of liability may depend on the role of the defendant in preparing the registration statement and the section of the document being challenged. Sections of the registration statement that are prepared by named experts, such as the financial statements or any valuation reports, are referred to as expertized sections, and the relevant experts have greater liability for these sections than non-expert defendants that relied on the experts.

For expertized sections of the registration statement, non-expert defendants can reasonably rely on the relevant experts, as long as they have “no reason to believe and did not believe” that the sections were materially misleading.¹⁶ The expert in question must have, “after reasonable investigation, reasonable ground to believe” and must actually believe that the relevant sections were not materially misleading, or be able to show that the relevant section of the registration statement did not fairly represent the expert’s view.¹⁷

For non-expertized sections, non-expert defendants must have, “after reasonable investigation, reasonable ground to believe” and must actually believe that the relevant sections were not materially misleading.¹⁸

General anti-fraud liability under the Exchange Act

As with any offer subject to the U.S. tender offer rules, registered Tier I exchange offers are also subject to general anti-fraud liability under Section 14(e) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, as well as Sections 12(a)(1) and (2) in the case of registered offerings. Under Section 14(e), the bidder and its agents are prohibited from making any material misstatement or omission or engaging in any deceptive or manipulative practices.

¹⁵ Section 11(a).

¹⁶ Section 11(b)(3)(C).

¹⁷ Section 11(b)(3)(C)

¹⁸ Section 11(b)(3)(A).

Tender or exchange offer avoiding U.S. jurisdictional means

This note outlines the requirements under the U.S. federal securities laws applicable in the following situation:

- The bidder is a foreign private issuer.¹
- The bidder is conducting a tender offer or exchange offer for the shares of a target company that is also a foreign private issuer.
- The target company's shares are **not** listed in the United States, but it has U.S. shareholders.
- The bidder cannot or chooses not to extend the offer to the shareholders of the target company in the United States.

The bidder may choose not to include U.S. shareholders for a number of reasons, including to avoid potential conflicts between local law and the U.S. requirements or because the U.S. rules would require the preparation of documentation that might not be required under local law. If U.S. shareholders are limited in number or the tender offer is for a relatively small percentage of the target company's shares, the success of the tender offer might not be contingent on the participation of U.S. shareholders.

However, the procedural requirements of the U.S. federal securities laws apply to any tender offer using U.S. jurisdictional means, regardless of whether the target company has U.S. shareholders or the bidder extends the offer to U.S. shareholders.² Jurisdictional means could include, for example, using the U.S. postal service or telephone, fax or internet connections to, in or from the United States. In order to mitigate the likelihood of having jurisdictional means, since documents posted on the internet are generally freely accessible from the United States, the bidder should take appropriate precautions to ensure that the tender offer documents are not accessible to U.S. shareholders. In addition, the bidder should put appropriate safeguards in place to ensure that U.S. shareholders that become aware of the tender offer despite the bidder's precautions are not able to tender their shares.

Basis for avoiding U.S. jurisdictional means

The U.S. tender offer rules do not include an exemption or safe harbor for tender offers based on avoiding U.S. jurisdictional means, and there is no clear guidance from courts about the reach of U.S. authority. The SEC has expressed concerns about the practice of excluding U.S. shareholders from cross-border tender offers and exchange offers, noting that in these situations, U.S. shareholders are denied the opportunity to tender their shares, often at a premium to the market price, and that movements in the share price as a result of the offer

¹ A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents **or**
- More than 50% of its outstanding voting securities are held by U.S. residents, and **none** of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

² Sections 14(d) and 14(e) of the Securities Exchange Act of 1934, as amended.

affect U.S. shareholders regardless of whether they are able to participate in the offer.³ In particular, the SEC flagged the risk that avoiding U.S. jurisdictional means puts U.S. shareholders at a disadvantage compared to other shareholders, because they would not be aware of the announcement of the offer, and would not be able to use this information to trade their shares on the secondary market. The SEC adopted the Tier I and Tier II cross-border exemptions in 1999 and revised them in 2008 with the express purpose of encouraging bidders to permit U.S. shareholders to participate in tender offers and exchange offers on the same terms as other target company shareholders.⁴

Common procedures for offers that exclude U.S. shareholders

In order to exclude U.S. shareholders and avoid using U.S. jurisdictional means, bidders must make that intent clear in the offer-related documents and communications about the tender offer or exchange offer and also put appropriate safeguards in place. Bidders commonly implement the following procedures in offers that exclude the target company's U.S. shareholders:

- Ensure that publicity concerning the offer does **not** go into the United States
- Ensure that the target's U.S. shareholders are **not** able to access offer-related materials
- Ensure that incoming inquiries from the United States are **not** accepted
- Ensure that incoming tenders from the United States are **not** accepted.⁵

Publicity restrictions

The bidder should **not** send any announcements regarding the offer into the United States. Press releases should include appropriate legends restricting release or publication in the United States, and the bidder and its intermediaries should put procedures in place to ensure that they are not in fact sent to publications in the United States. The bidder should not allow journalists or shareholders in the United States or from U.S. publications access to press conferences, analyst presentations, meetings or teleconferences.

Restrictions on access to offer documents

The offer-related documents, including forms of acceptance and other ministerial documents, should include appropriate legends stating that the offer is **not** being made to shareholders in the United States. Any materials relating to the offer (including announcements) that are posted on the bidder's website should be placed behind appropriate gateposts that are designed to exclude U.S. shareholders and shareholders in the United States from accessing the materials. The bidder and its advisors and any intermediaries acting on their behalf in connection with the offer should put in place procedures to ensure that they do not send any

³ Cross-Border Tender Offerings, Business Combinations, and Rights Offerings, SEC Release No. 33-7611 (November 18, 1998).

⁴ Cross-Border amending release, (December 8, 2008).

⁵ However, incoming tenders from U.S. persons outside the United States or from intermediaries with discretionary authority acting on behalf of U.S. shareholders would not trigger the use of U.S. jurisdictional means.

offer-related materials to the target company's U.S. shareholders, or their brokers, nominees or other intermediaries, in either electronic or physical form.

Restrictions on incoming inquiries

The bidder and its advisors and any intermediaries acting on their behalf in connection with the offer should put in place procedures to identify whether shareholders or journalists who contact them in connection with the offer (by email, telephone or otherwise) are physically present in the United States. The bidder and its advisors and intermediaries would generally put in place checklists or scripts for employees who field incoming inquiries so that they systematically screen out questions from the United States. They would also screen incoming post so that they can exclude materials bearing U.S. postmarks or other signs of having originated in the United States.

Restrictions on incoming tenders

The bidder and its advisors and any intermediaries acting on their behalf in connection with the offer should put in place procedures to track and identify where incoming tenders originate. In case shareholders of the target company in the United States manage to tender their shares, the bidder should not issue any cash (or shares, in the case of an exchange offer) to such shareholders.

Potential complications

Under certain circumstances, it may be difficult for bidders to exclude U.S. shareholders from tender offers or exchange offers. The SEC views with skepticism any offer attempting to exclude U.S. shareholders if the offer relates to shares listed on a U.S. stock exchange or otherwise of a class of securities registered with the SEC or the bidder needs to acquire shares from the target's U.S. shareholders to meet the minimum acceptance condition.⁶ The SEC or U.S. courts could take the view that a bidder's tender offer or exchange offer inappropriately attempted to exclude U.S. shareholders or did not effectively avoid U.S. jurisdictional means. The bidder should therefore consider the following factors in determining whether it should structure its offer to exclude U.S. shareholders:

- whether it is possible to exclude U.S. shareholders under local law
- the level of U.S. interest in the shares
- the extent to which the target company's U.S. shareholders are prejudiced by their inability to participate in the tender or exchange offer.

Local law considerations

If applicable local law requires the tender offer to be extended to all shareholders, it would be difficult for the bidder to argue that it can successfully exclude the target company's U.S. shareholders. Similarly, if applicable local law requires the offer-related materials and announcements to be sent to all shareholders or posted on an unrestricted website that would

⁶ Cross-Border amending release, (December 8, 2008).

be accessible to shareholders in the United States, as a practical matter, it would be difficult to enforce restrictions on access and the use of U.S. jurisdictional means.⁷

Level of U.S. interest in the target company's shares

The bidder should consider the level of U.S. interest in the shares. For instance, the bidder should consider whether the target company has an ADR facility, and whether it is sponsored or unsponsored, and the proportion of trading in the target company's shares that occurs in the United States. It would be difficult to exclude U.S. shareholders from the tender offer if the bidder acquired any shares of the target company in the United States in advance of the tender offer to build a stake in the target company, since this would mean that some U.S. shareholders receive more favorable treatment. While the SEC has acknowledged that large institutional investors may at times receive differential treatment under the Securities Act of 1933, as amended, and may be able to participate in offshore securities offerings from which other investors in the United States are excluded, they believe that such differentiation is not appropriate under the U.S. tender offer rules, under which all target shareholders have a right to participate in tender offers on equal terms.⁸

Prejudicing U.S. shareholders

The bidder should take into account the extent to which the target company's U.S. shareholders are prejudiced by their inability to participate in the tender or exchange offer. This could be affected by the size of the premium paid by the bidder and the level of liquidity in the target company's shares, before, during and after the tender offer.

⁷ Cross-Border amending release, (December 8, 2008).

⁸ Cross-Border amending release, (December 8, 2008).

MEANING OF TENDER OFFER

A tender offer generally refers to a broad solicitation by a company or a third-party bidder to purchase a significant percentage of a company's securities over a limited period of time, generally at a premium to the market price for those securities as an incentive to tender. However, the term *tender offer* is not defined in the U.S. federal securities laws, in order to ensure that unconventional offer structures are covered under the regulations.¹ The following eight factors should be considered in determining whether a transaction or a series of transactions constitutes a tender offer:

- whether there is an active and widespread solicitation of public securityholders
- whether the solicitation is made for a substantial percentage of the issuer's securities
- whether the offer is made at a premium over the prevailing market price
- whether the terms of the offer are firm rather than negotiable
- whether the offer is contingent upon the tender of a fixed minimum and perhaps subject to the ceiling of a fixed maximum number of securities to be purchased
- whether the offer is open for a limited period of time
- whether the offerees are subjected to pressure to sell
- whether the public announcements of a purchasing program precede or accompany a rapid accumulation of large amounts of the target company's securities.²

The factors are guidelines; not all of them need be present for a transaction to be considered a tender offer.

¹ Brad S. Grayson, *Problems in Defining "Tender Offer": The Decision in Hanson Trust PLC v. SCM Corp.*, 17 Loy. U. Chi. L. J. 693 (1986).

² *Wellman v. Dickinson* (475 F. Supp. 783 (S.D.N.Y. 1979)).

TIMETABLE OF AN EQUITY TENDER OFFER

The U.S. federal securities laws regulate a tender offer from the time it is publicly announced until its completion. A typical tender offer for a target's shares has the following stages:

- public announcement of the tender offer
- commencement of the tender offer
- extension of the tender offer period, if any
- completion of the tender offer (or initial offering period)
- payment for shares tendered
- commencement of subsequent offering period (if any)
- completion of subsequent offering period
- payment for shares tendered during subsequent offering period.

Public announcement of the tender offer

Before the commencement of a tender offer, a bidder generally makes a public announcement that it intends to launch a tender offer for the target's shares. The public announcement normally includes the offer price, the start and end dates of the tender offer and any other material terms. If the tender offer is structured to include a subsequent offering period, this would generally be disclosed in the public announcement. The announcement also generally refers target shareholders to the bidder and its advisors for additional information about the tender offer and directs them to the full informational documents in connection with the offer, which would include both disclosure about the terms of the tender offer and logistical information about the process of tendering shares.

While the tender offer rules come into effect at this time, the bidder cannot accept tendered shares until the commencement of the tender offer.

Commencement of the tender offer

The tender offer commences on the date previously announced. At this time, the bidder sends the tender offer documentation to the target's shareholders or appropriate intermediaries and makes them publicly available. After the start of the tender offer, the target's shareholders can tender their shares.

Extension of the tender offer period

Once the tender offer commences, the bidder has the option of extending the tender offer period. For example, it may choose to do so if not enough of the target's shareholders have tendered their shares. The bidder may also be required to extend a tender offer if it makes a material change in the terms of the tender offer, so that the target's shareholders have the opportunity to decide whether to tender shares.

Completion of the tender offer (or initial offering period)

Once the tender offer closes, the bidder normally announces the results of the tender offer, *i.e.*, the number and percentage of shares tendered. After the close of the tender offer, the target's shareholders are no longer able to tender their shares to the bidder. However, since the U.S. tender offer rules no longer apply after the completion of the offer, they may be able to sell their shares to the bidder in open market or privately negotiated transactions subject to any restrictions under the rules of the target's home jurisdiction.

Payment for shares tendered

Once the tender offer (or the initial offering period) closes, the bidder must pay for the shares tendered in the offer. Alternatively, if the tender offer was structured subject to a minimum tender condition, (for example, the bidder would only purchase the tendered shares) if a specified minimum percentage of the target's shareholders tendered their shares, and the condition threshold is not met, the bidder has the option of returning the tendered shares.

Subsequent offering period

Under the U.S. tender offer rules, the bidder may structure the offer to include a subsequent offering period after the termination of the initial tender offer, but is not required to do so. A subsequent offering period is a practice common in certain jurisdictions, such as Germany, that permits a bidder to acquire shares from holders that choose not to tender their shares during the initial tender offer (while the outcome is uncertain), but may choose to tender their shares once the initial tender offer is successful. If the bidder is successful in obtaining a majority of the target's shares in the initial tender offer, the subsequent offering period can be useful in allowing the bidder to reach the higher shareholding threshold required to effect a short-form merger and squeeze out any remaining shareholders. Regulation 14E contemplates the possibility of having a subsequent offering period so long as the consideration to be paid and the arrangements to purchase the shares are the same as in the initial offer, but does not set out any other procedural requirements.

The subsequent offering period normally commences shortly after the closing of the initial offer, and after shareholders that tendered in the initial offer receive payment for their shares. Shareholders that tendered their shares in the initial offer are ***not*** permitted to withdraw the shares during the subsequent offering period.

EXCEPTIONS FOR PURCHASES OUTSIDE OF AN OFFER

Rule 14e-5 generally prohibits bidders from purchasing securities subject to a tender offer (or any related securities) outside the offer from the time of the public announcement to the expiration of the offer. The restriction is construed relatively broadly and applies to the following parties, which are referred to as *covered persons*:

- the bidder and any of its affiliates
- the dealer-managers acting for the bidder and any of their affiliates
- any advisors to the bidder or dealer-managers whose compensation is dependent on the completion of the offer
- any person acting directly or indirectly in concert with any of the above parties in connection with a purchase or arrangement to purchase the subject securities or any related securities.¹

There are a number of exceptions to this prohibition:

- transactions with respect to previously owned options or convertible or exchangeable securities
- certain transactions by employee benefit plans of covered persons
- odd-lot buybacks
- transactions by the dealer-managers on an agency basis for customers that are not covered persons, or riskless principal transactions (transactions to offset a sale after having received an unsolicited order to buy from a customer that is not a covered person), so long as the dealer-manager is not a market-maker
- purchases in connection with “basket” transactions in which the subject securities or related securities are a relatively small proportion of the overall basket
- transactions to cover a short sale or the exercise of an option
- transactions pursuant to unconditional pre-existing contractual obligations
- transactions by an affiliate of the dealer-manager, as long as the following conditions are satisfied:
 - appropriate fire-walls are in place to prevent the sharing of non-public information
 - the dealer-manager is a registered broker or dealer under Section 15(a) of the Exchange Act

¹ Rule 14e-5(c)(3).

- the affiliate has no officers or employees in common with the dealer-managers that direct, effect or recommend transactions in securities
 - the transactions are not made to facilitate the tender offer
- certain transactions by U.K. market-makers
- purchases in cross-border tender offers qualifying as Tier I tender offers
- purchases in the non-U.S. portion of cross-border tender offers qualifying as Tier II tender offers that are structured as two separate tender offers, one in the United States and one in non-U.S. jurisdictions
- purchases outside the United States in accordance with the target's home jurisdiction laws, in cross-border tender offers qualifying as Tier II tender offers.²

Transactions by U.K. market-makers are further described in Annex D.

² Rule 14e-5(b).

CITY CODE

The City Code on Takeovers and Mergers regulates tender offers for public companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man, including companies that are not listed on any stock exchange but can have an unlimited number of shareholders.¹ The provisions of the City Code differ in many respects from the requirements under the U.S. tender offer rules, and in particular, permit dealer-managers in a tender offer to make purchases of the subject security in connection with market-making activities that are customary in the United Kingdom. For tender offers subject to the City Code, Rule 14e-5 provides a specific exemption for transactions by “connected exempt market makers” and “connected exempt principal traders”, if the following conditions are met:

- The target company is a foreign private issuer.²
- The connected exempt market maker or connected exempt principal trader complies with the applicable provisions of the City Code.
- The tender offer documents disclose the identity of the connected exempt market maker or connected exempt principal trader and disclose or describe how U.S. shareholders can obtain information regarding purchases by such market maker or principal trader, whether for market making purposes or as a principal purchaser, to the extent that this information is required to be made public in the United Kingdom.³

This exemption to Rule 14e-5 is separate from the Tier I and Tier II exemptions. It is not contingent upon the level of U.S. ownership of the securities that are the subject of the tender offer, so long as the conditions are met.

¹ <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf?v=8Jan2018>

² A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

- 50% or less of its outstanding voting securities are held by U.S. residents *or*
- More than 50% of its outstanding voting securities are held by U.S. residents, and *none* of the following circumstances apply:
 - The majority of its executive officers or directors are U.S. citizens or residents.
 - More than 50% of its assets are located in the United States.
 - Its business is administered principally in the United States.

³ Rule 14e-5(b)(9).

DETERMINATION OF THE U.S. OWNERSHIP LEVEL

Timing

Under paragraphs (c) and (d) of Rule 14d-1, the bidder must calculate the percentage of shares held by U.S. shareholders to determine whether the tender offer qualifies for the Tier I or Tier II exemptions. In addition, if the bidder intends to seek relief from any applicable U.S. tender offer rules that are in conflict with the rules of the target's home jurisdiction, it must calculate the level of U.S. ownership and provide this information to the SEC so that the staff can consider the level of U.S. regulatory interest in the transaction in its determination of whether to grant the requested relief.¹

The bidder can calculate this percentage as of any date during the 90-day period starting no more than 60 days before and no more than 30 days after the initial public announcement of the tender offer.² If the bidder determines that it is unable to calculate the percentage of U.S. ownership as of a date within this time frame, then it can opt to make the calculation as of the most recent practicable date before the initial public announcement of the tender offer. However, the determination must be made as of a date no earlier than 120 days before the public announcement.³ However, the calculation of U.S. ownership must be completed prior to the commencement of the tender offer.⁴

Securities to be included in the calculation

The bidder should **not** include in its calculation of U.S. ownership any of the target's shares that it already holds at the time of the commencement of the tender offer. If the target has securities traded in the United States in the form of American depositary shares, the bidder must include any shares underlying American depositary shares in the calculation of the U.S. ownership level.⁵ However, any warrants, options or other securities convertible or exchangeable into the shares that are the subject of the tender offer should be excluded from the calculation.

Procedure for calculation

The instructions to Rule 14d-1 provide for two alternative tests to calculate the level of U.S. ownership. The "look-through" test is the primary method of calculation and should be the starting point for the bidder; however, in very limited circumstances, if the information required under the look-through test is not available, the bidder is permitted to rely on the average daily trading volume test.

The "look-through" test

¹ SEC Compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 101.08 (October 17, 2018).

² Instruction 2(i) to paragraphs (c) and (d) of Rule 14d-1.

³ Instruction 2(i) to paragraphs (c) and (d) of Rule 14d-1.

⁴ C&DI, Question 101.05 (October 17, 2018).

⁵ Instruction 2(ii) to paragraphs (c) and (d) of Rule 14d-1.

To calculate the level of U.S. ownership, the bidder must start by looking at the holders of record as of a given date. The bidder generally starts by looking at reports of beneficial ownership filed with respect to the target in the United States or in its home jurisdiction.⁶ Shareholders in many jurisdictions are required to provide information about their shareholding once they cross certain thresholds. The target may also include information about its shareholders in its own public filings. In many cases, the bidder also engages financial advisors that are able to access other non-public sources of information about shareholders.

The bidder cannot simply look at the record owners if they are brokers, dealers or banks, or nominees for such entities. For such entities, the bidder is required to “look through” the record ownership and determine the location of the underlying beneficial owners, particularly if the holders of record are located in any of the following jurisdictions:

- the United States
- the country in which the target is incorporated
- the primary trading market for the target’s shares (if this is different from its country of incorporation).⁷

The bidder (or the target, in a negotiated transaction) should send inquiries to brokers, dealers, banks and other nominee holders inquiring as to the aggregate amount of their holdings that are owned by beneficial owners in the United States. In many jurisdictions, nominees are under no obligation to respond to inquiries about the number of securities held for the benefit of customers in the United States, and may customarily fail to respond to such inquiries. However, the bidder is still required to undertake the “look-through” analysis in good faith.⁸ If, after reasonable inquiry, the bidder is unable to obtain the required information, it may assume that the underlying beneficial owners are residents of the jurisdiction where the nominee in question has its principal place of business.⁹

Average daily trading volume test

If the bidder is unable to determine the level of U.S. ownership using the look-through test (which may be the case, for example, if the shares are held in bearer form or if the nominees are prohibited from disclosing the residence of the beneficial owners of the shares or choose not to disclose) the bidder may use an alternate test. However, the SEC has clarified that the alternate test is only available in very limited circumstances, and in particular, is intended to be used for non-negotiated transactions.¹⁰

⁶ Instruction 2(v) to paragraphs (c) and (d) of Rule 14d-1.

⁷ Instruction 2(iii) to paragraphs (c) and (d) of Rule 14d-1.

⁸ C&DI Question 101.04. (October 17, 2018).

⁹ Instruction 2(iv) to paragraphs (c) and (d) of Rule 14d-1.

¹⁰ SEC release no. 33-8957 (December 8, 2008). Commission Guidance and revisions to the cross-border tender offer, exchange offer, rights offerings, and business combination rules and beneficial ownership reporting rules for certain foreign institutions.

The bidder is permitted to assume that U.S. shareholders hold fewer shares than the relevant threshold of 10% of the outstanding shares for the Tier I exemption or 40% for the Tier II exemption, *unless* one of the following is the case:

- Over a twelve-month period ending no more than 60 days before the announcement of the tender offer, the average daily trading volume of the subject shares in the United States as a percentage of the worldwide average daily trading volume is higher than the relevant threshold.
- The most recent annual report or other annual information filed with the regulator in the target's home country or any other market in which the shares trade discloses that U.S. shareholders hold more than the relevant threshold of the subject shares.
- The bidder knows or has reason to know, prior to the announcement of the offering, that the level of U.S. ownership exceeds the relevant threshold.¹¹

¹¹ Instruction 3 to paragraphs (c) and (d) of Rule 14d-1.

INFORMATION REQUIRED IN A REGISTRATION STATEMENT ON FORM F-4

A registration statement on Form F-4 has two sections, the prospectus and information not required to be included in a prospectus.

The prospectus forms the bulk of the registration statement and must contain the following disclosure:

- risk factors about the bidder's business, the target company's business and the proposed transaction
- a description of the bidder's business
- description of the target company's business
- financial statements for the bidder and the target company¹
- pro forma financial information showing the effects of the proposed transaction
- information about the proposed transaction, including the reasons for the transaction
- a description of any past, present or proposed material contacts between bidder and the target company
- a brief description of any material interest, direct or indirect, of affiliates of the bidder and of the target company in the proposed transaction
- information about the directors and executive officers of the surviving company, including remuneration and related party transactions
- information about the shares being registered, including any material differences in the rights shareholders in the target company and the rights of the holders of the newly issued shares of the bidder
- a discussion of any material differences in the corporate laws of the target company's jurisdiction and the bidder's jurisdiction
- information about the bidder's plan for the target company
- instructions on how to tender the target company's shares.²

The information not required in the prospectus consists of the following:

¹ The financial statements of the bidder and the target company must be presented in U.S. GAAP or IFRS as adopted by the IASB or local GAAP. If local GAAP is used, the financial information must be reconciled to U.S. GAAP.

² Form F-4, Part I.

- information about how controlling persons, directors or officers of the bidder are insured or indemnified against liability they may incur
- documents that are required to be furnished as exhibits to the registration statements³
- certain undertaking from the bidder to ensure that the bidder will update the information in the registration statement if there are any changes to the disclosure after the registration statement goes effective and that it will respond to requests for any information incorporated by reference in the registration statement.⁴

Information not available to the bidder

In the context of a hostile transaction, the bidder does not have access to all of the required information under Form F-4. In particular, for a target company that is not registered in the United States, it is unlikely that the bidder would have access to the target company's financial statements in the required format of U.S. GAAP or IFRS as issued by the IASB. Pursuant to Rule 409 under the Securities Act of 1933, as amended, the bidder is only required to provide information to the extent it is known or reasonably available to it. The bidder must provide any information it possesses or can acquire without unreasonable effort, and disclose the sources of such information. It must also include a statement in the registration statement either showing that unreasonable effort or expense would be involved in acquiring the required information or indicating that they are not affiliated with the target company or any party that has access to the required information, such as the target company's accountants. They must also make a request for such information from the relevant parties, and the statement in the registration statement must mention the result of this inquiry.⁵

If the bidder has access to financial statements or other relevant expertized material, but does not receive the required consents from the accountants or other experts, it can apply to the SEC to dispense with this requirement pursuant to Rule 437 under the Securities Act. The bidder must receive the SEC's approval to omit the required consent prior to the effective date of the registration statement.⁶

³ This includes the bidder's constitutional documents, material contracts, leases, indentures and other documents defining the rights of securityholders, legal opinions and consents of experts and counsel.

⁴ Form F-4, Part II.

⁵ Rule 409.

⁶ Rule 437.