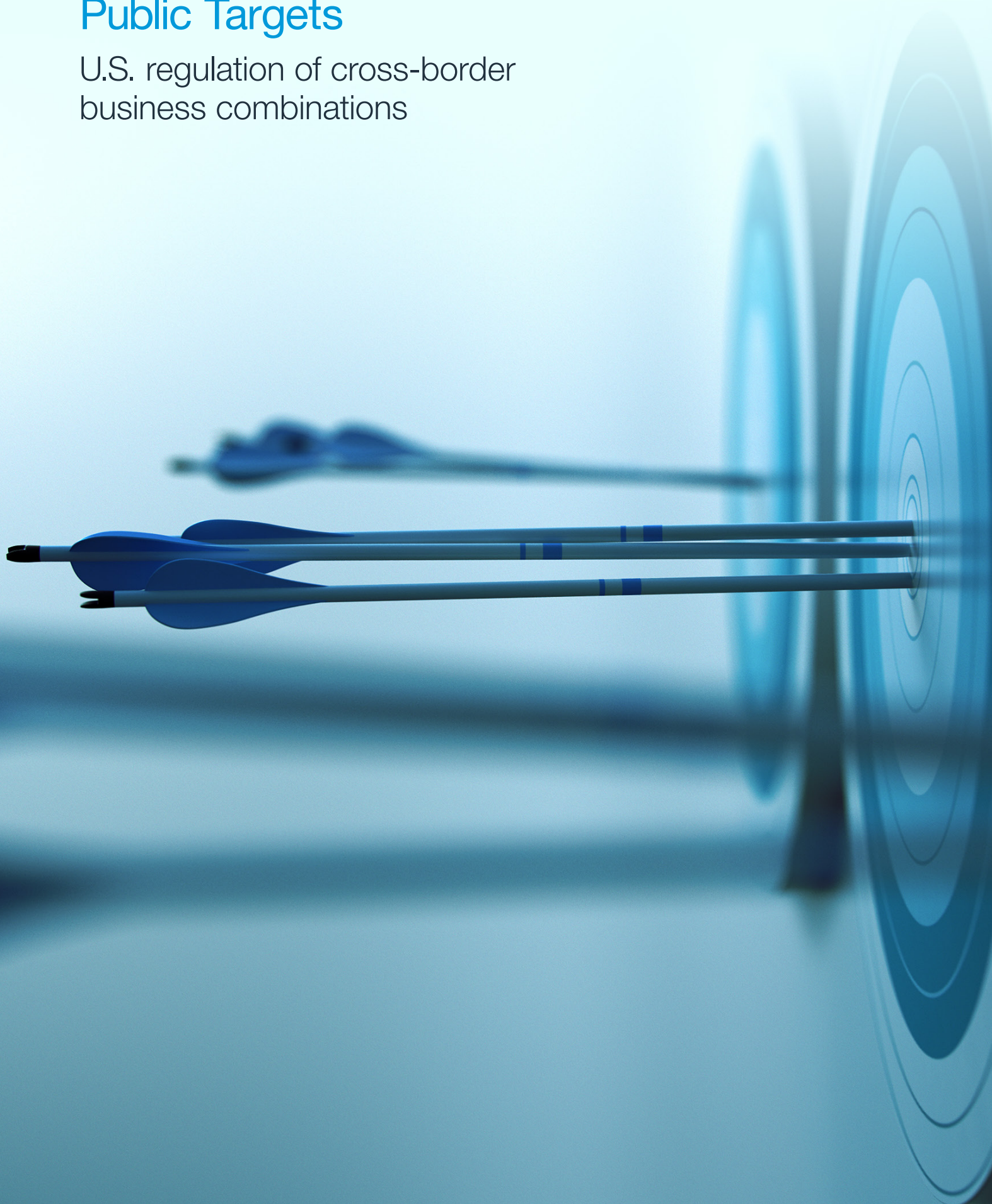


## Public Targets

U.S. regulation of cross-border  
business combinations



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# 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.<sup>1</sup>
- 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.<sup>2</sup>

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<sup>1</sup> 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:
  - o The majority of its executive officers or directors are U.S. citizens or residents.
  - o More than 50% of its assets are located in the United States.
  - o Its business is administered principally in the United States.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

### *Early termination*

Under Regulation 14E, a tender offer must remain open for a minimum of **twenty** U.S. business days.<sup>5</sup> 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.<sup>6</sup>

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.
- 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.<sup>7</sup>
- 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.<sup>8</sup>

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.

<sup>3</sup> Rule 14e-1(d).

<sup>4</sup> Rule 14d-1(d)(iv).

<sup>5</sup> Rule 14e-1(a).

<sup>6</sup> Rule 14e-1(b).

<sup>7</sup> 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. Subsequent offering period is explained in Annex B.

<sup>8</sup> Rule 14d-1(d)(2)(ix).

### *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.<sup>9</sup>

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

### [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. 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.<sup>11</sup>
- The procedural terms of the U.S. tender offer are at least as favorable as those of the non-U.S. tender offer.<sup>12</sup>
- 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.<sup>13</sup>

<sup>9</sup> Rule 14e-5(b)(12).

<sup>10</sup> Rule 14e-5(b)(11).

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> Rule 14e-5(b)(11).

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 only to shareholders in the United States and ensure that there is adequate disclosure on these points<sup>13</sup> in the offer materials that are distributed to shareholders in the United States.

# Annexes

## Annex A

## 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.<sup>1</sup> 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.<sup>2</sup>

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

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<sup>1</sup> 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).

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



## Annex B

**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.

## Annex C

## 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.<sup>1</sup>

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
  - 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.<sup>2</sup>

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

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<sup>1</sup> Rule 14e-5(c)(3).

<sup>2</sup> Rule 14e-5(b).

## Annex D

## 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.<sup>1</sup> 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.<sup>2</sup>
- 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.<sup>3</sup>

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.

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

<sup>2</sup> 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.

<sup>3</sup> Rule 14e-5(b)(9).

## Annex E

## 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> However, the calculation of U.S. ownership must be completed prior to the commencement of the tender offer.<sup>4</sup>

***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.<sup>5</sup> 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***

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.<sup>6</sup> Shareholders in many jurisdictions are required to provide information about their shareholding once they cross certain thresholds.

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

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

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

<sup>4</sup> C&DI, Question 101.05 (October 17, 2018).

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

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



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).<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

#### *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.<sup>10</sup>

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.<sup>11</sup>

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

<sup>8</sup> C&DI Question 101.04. (October 17, 2018).

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

<sup>10</sup> 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.

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



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