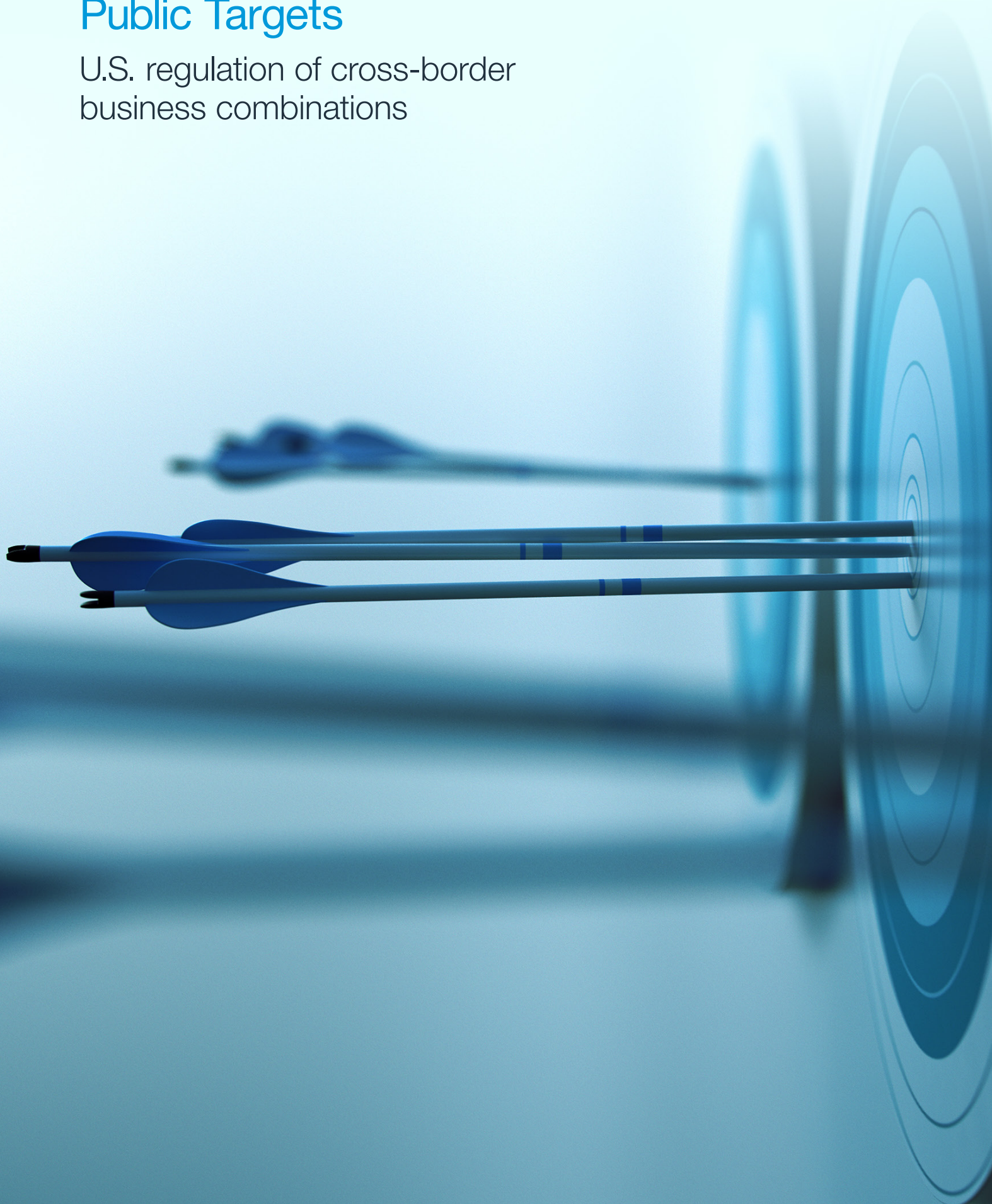


Public Targets

U.S. regulation of cross-border
business combinations



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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

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.

laws, however, and the bidder may need to register or qualify the securities under the securities laws of the **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

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

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).

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

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.

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

⁸ Rule 802(b).

⁹ Rule 14d-1(c)(2)(iii).

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

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.

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.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)).

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.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
 - 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.

¹ Rule 14e-5(c)(3).

² 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.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).

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.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

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.

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.

⁶ 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).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

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

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.

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

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