

Public Targets

U.S. regulation of cross-border
business combinations



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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 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.

² Rule 162(a).

³ Rule 14d-1(c)(2).

⁴ Rule 14d-1(c)(2)(i).

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.

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.

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).

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.

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 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

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

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).

¹³ Rule 162(b).

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 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

¹⁴ Rule 14d-4(d).

¹⁵ Section 11(a).

¹⁶ Section 11(b)(3)(C).

¹⁷ Section 11(b)(3)(C).

¹⁸ Section 11(b)(3)(A).

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.

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.

Annex F

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 and
- instructions on how to tender the target company's shares.²

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

- 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 and
- 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

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.

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

⁴ Form F-4, Part II.

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

⁵ Rule 409.

⁶ Rule 437.

