

Public Targets

U.S. regulation of cross-border
business combinations



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Cash Tender Offer in Compliance with Regulation 14E

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

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

The principal reason a bidder may choose not to rely on available exemptions is the difficulty of calculating the level of U.S. ownership. As discussed in more detail in Annex E, the calculation of U.S. ownership is complicated, because the rules mandate that the bidder must look through the holdings of intermediaries to determine whether the underlying account holders are U.S. residents.

In addition, if the level of U.S. ownership is known to be (or believed to be) above **ten** percent of the subject securities, the available exemptions are relatively limited and apply mostly in situations where there is a direct conflict between the U.S. rules and the laws of other jurisdictions. If no such conflict exists, a bidder may find it more straightforward to comply in full with the U.S. procedural requirements described below.

Procedural requirements under Regulation 14E

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

¹ Tender offer is explained in Annex A.

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

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

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

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

Duration; extensions of the tender offer period

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

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

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

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

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

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

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

In addition, the bidder has the option of starting a second tender offer after the initial tender offer has expired. However, the bidder will be required to pay for the shares it has received in the first tender offer, as discussed below, and the second tender offer will also need to comply with all of the procedural requirements under Regulation 14E, meaning that the bidder will need to keep it open for at least 20 U.S. business days. Under the U.S. rules, Regulation 14E would cease to apply after the completion of the initial tender offer, and the second offer would be regulated as a separate offer that could potentially have different terms from the initial offer. However, certain jurisdictions, such as

³ Rule 14e-1(a).

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

⁵ Rule 14e-1(d).

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

Italy, also regulate purchases by the bidder after the completion of the tender offer. If the target company's home country is such a jurisdiction, the bidder might not, for example, be allowed to offer a different price to bidders in the second tender offer.

Prompt payment

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

Purchases outside of the offer

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

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

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

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

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

⁷ Rule 14e-1(c).

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

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

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

¹¹ Rule 14e-5.

¹² Rule 14e-5(b)(9).

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

Response of target company

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

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

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

General anti-fraud considerations

Section 14(e) of the Exchange Act is a general anti-fraud provision, the language of which tracks Rule 10b-5. Under Section 14(e), the bidder and its agents are prohibited from making any material

misstatement or omission or engaging in any deceptive or manipulative practices. As a practical matter, this means that bidders should disclose certain information in the tender offer materials. For example, in a negotiated transaction or one in which the bidder has had the opportunity to conduct due diligence, the bidder must consider whether it has access to any material information about the target company that is not available to the shareholders of the target company. It might need to disclose any such information to the shareholders so that they can make an informed decision about whether to tender their shares.

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

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

¹³ Rule 14e-2.

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

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

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

Applicability of U.S. tender offer rules

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

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

¹⁷ Rule 14d-1(d).

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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