ABSTRACT

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Even though tender offers and other business combination transactions may involve only non-U.S. companies, such transactions may nonetheless be subject to various U.S. laws and regulations, including U.S. federal securities laws and regulations. The application of U.S. federal securities laws and regulations generally depends on how the transaction is structured, whether any of the companies is subject to U.S. securities law reporting obligations, and whether any of the companies’ security holders are located or resident in the United States. This panel will provide an overview of U.S. federal securities laws and regulations applicable to cross-border tender offers and other business combination transactions involving, in the case of a tender offer, a "target" or, in the case of a business combination transaction not involving a tender offer, a "subject company" that is organized in a jurisdiction outside the United States. This panel will provide practitioners and other interested persons with a general guide regarding the substance and scope of the principal U.S. federal securities laws and regulations a practitioner might encounter in such transactions.

“Tender offer” refers generally to an offer by a bidder company to acquire shares of another company, whether for cash, securities, or a combination of the two, which is made directly to security holders of the target company and may or may not be supported by management of the target company; references to a “business combination transaction” mean a combination of two entities’ businesses by means of a tender offer or otherwise.

A fundamental goal of the U.S. securities laws is the protection of U.S. investors. The Commission has historically taken the view that U.S. securities laws potentially apply to any transaction that is conducted in the United States or that employs U.S. jurisdicational means. Specifically, U.S. securities laws may be implicated as follows:

• The general anti-fraud provisions of the Exchange Act may be violated, where fraudulent conduct occurs in the United States, or where the effects of the fraudulent conduct are felt in the United States.

• If a tender offer is made for securities of a class that is registered under the Exchange Act, it is generally necessary for the bidder to comply with the tender offer provisions of the Exchange Act, subject to available exemptions, if any.

• Even where the target company does not have a class of securities registered under the Exchange Act, the Exchange Act proscribes certain “fraudulent, deceptive, or manipulative” acts or practices in connection with tender offers that are potentially applicable.

• If securities are to be offered to persons in the United States, it may be necessary to register such securities pursuant to the U.S. Securities Act of 1933, as amended, or to confirm the availability of an exemption from registration.

U.S. federal securities laws apply to a tender offer or other business combination transaction notwithstanding the nationality of the bidder or target or the protections afforded by their respective home market regulators if extended to holders in the United States. This approach contrasts with the approach taken in many European jurisdictions, where the jurisdiction of
the organization of the target or the jurisdiction of its primary listing, rather than the residency of the investors or the means by which the offer is made, will determine the regulatory implications of the transaction. For instance, the United Kingdom’s *City Code on Takeovers and Mergers*, applies to offers for all public companies and *societas europaea*, whether listed or unlisted, resident in the United Kingdom, the Channel Islands, or the Isle of Man; South African takeover regulations apply to companies that are deemed to be resident in South Africa; and, in France, the rules relating to tender offers generally apply only where the target company is a French entity listed in France – the residency of the shareholders of the target is irrelevant.

The exemptions from registration are known as Tier I and Tier II. Tier I applies to target that is a foreign private issuer with a U.S. shareholding of less than ten percent. Tier II applies to target that is a foreign private issuer with a U.S. shareholding between ten percent and forty percent. Rule 802 is an exemption for the issuance of shares in an exchange offer. To qualify, the target must be a foreign private issuer with a U.S. shareholding of less than ten percent. There are also exemptions for Canadian companies in the Multi-Jurisdictional Disclosure System. Section 3(a)(10) of the Securities Act provides an exemption for the issuance of shares in connection with a business combination pursuant to a court order.

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SPECIAL CONSIDERATIONS FOR CANADIAN COMPANIES IN CROSS-BORDER TENDER OFFERS UNDER THE MULTI-JURISDICTIONAL DISCLOSURE SYSTEM

In 1991, Canada and the United States adopted the Multijurisdictional Disclosure System ("MJDS") as a way to facilitate cross-border financings and tender offers, by reducing unnecessary duplication of regulatory requirements in eligible transactions. MJDS is a collection of rules and forms under the Securities Act of 1933, as amended (the "1933 Act") and under the Securities Exchange Act of 1934, as amended (the "Exchange Act") available for certain transactions that involve Canadian parties and conducted under the oversight of applicable Canadian securities regulatory authorities.

For Canadian parties to a tender offer, where available, Rule 14d-1(b) under the Exchange Act provides relief from a number of requirements under the Exchange Act that would otherwise apply to a tender offer, in addition to any relief that may be available for foreign private issuers generally under Rule 14d-1(c), which is referred to as the Tier 1 Exemption, or under Rule 14d-1(d), which is referred to as the Tier 2 Exemption.

Where the consideration offered in the tender offer includes securities, Registration Statement Form F-8 and Form F-80 under MJDS may be available to register those securities on an automatically effective basis, and without triggering ongoing reporting obligations for the registrant under the Exchange Act if the registrant would not otherwise already be subject to Exchange Act reporting. These registration statement forms under MJDS are in addition to the registration statement exemption that may be available for foreign private issuers generally under Rule 802 of the 1933 Act.

CANADIAN “TAKE-OVER BIDS”

Overview

Under Canadian securities laws, a “take-over bid” is defined as a transaction in which one party acquires outstanding voting or equity securities of a target, that, when combined with any securities of the same class already held by the buyer, would result in the buyer holding more than 20% of that class of securities.

An offer to purchase a target’s shares that is made in compliance with the requirements for a formal “take-over bid” under Canadian law will almost certainly also be a “tender offer” under U.S. federal securities laws if the offer is made to any beneficial owner of shares of the target in the United States.
A buyer making a take-over bid in Canada may offer the shareholders of the target company cash consideration, or may offer its own securities as full or partial consideration for the target’s shares. While the disclosure requirements under Canadian securities laws are more stringent if the buyer is offering shares instead of cash, and the buyer must provide “prospectus level” disclosure regarding itself and its securities, there is no need for the buyer to prepare and file a prospectus under Canadian securities laws to qualify the distribution of its securities to the shareholders of the target. National Instrument 45-106 Prospectus Exemptions of the Canadian Securities Administrators provides an automatic exemption from Canadian prospectus requirements for shares of a buyer that are being issued as consideration to target shareholders in Canada. However, if any shares of the buyer are being issued to any target shareholder in the United States, those shares will have to be registered under the 1933 Act and also registered or qualified under state securities laws unless an exemption is available.

A. EXCHANGE ACT REQUIREMENTS AND THE MJDS EXEMPTION

There are two different groups of U.S. federal securities law requirements relating to public tender offers to purchase securities that must be considered and, if necessary, complied with in connection with any Canadian take-over bid where the target has, or may have, any security holders in the United States. These are: (1) the requirements under Section 14(e) of the Exchange Act and Regulation 14E under the Exchange Act (which will be referred to as the “14E Requirements”); and (2) the requirements under Section 14(d) of the Exchange Act and Regulation 14D under the Exchange Act (which will be referred to as the “14D Requirements”).

REQUIREMENTS

(i) 14E Requirements

The 14E Requirements are procedural requirements for a tender offer that are intended to prevent abusive or fraudulent practices. These anti-fraud provisions apply to every tender offer made to target shareholders in the United States, unless an exemption is available. It does not matter whether the securities are registered under the Exchange Act or not, and it does not matter whether the securities are equity securities or debt securities.

Canadian take-over bid requirements do not apply to non-convertible debt securities. As a result, a public offer to purchase non-convertible debt securities of a Canadian issuer are not subject to the Canadian take-over bid requirements, but will be subject to the 14E Requirements.

(ii) 14D Requirements

The 14D Requirements are the substantive provisions governing tender offers for a class of equity securities that has been registered with the SEC under Section 12 of the Exchange Act, including the rules governing the disclosure required in a tender offer document. Unlike the 14E Requirements, the 14D Requirements only apply if the target class of securities are equity securities that have been registered under the Exchange Act.
It is not necessary to comply with, or seek to be able to rely on any other exemption from complying with, the 14D Requirements if the target has never registered any class of securities under the Exchange Act. Further, even if the target has registered one class of equity securities under the Exchange Act, a tender offer for a different class of equity securities that has not been registered under the Exchange Act will not be subject to the 14D Requirements, even though the corresponding rules for an issuer self-tender (issuer bid) apply to every class of equity securities if any class of equity securities is registered. A tender offer for a class of convertible debt securities (which qualify as equity securities for this purpose) will be subject to the 14D Requirements only if the convertible debt securities themselves have been registered under Section 12 of the Exchange Act, and will not be subject to the 14D Requirements if the class of convertible debt has not be registered under the Exchange Act, even if the convertible debt is convertible into a class of equity security that has been registered under the Exchange Act. Finally, the 14D Requirements will not apply to a tender offer for debt securities that are not convertible into equity securities.

If a Canadian take-over bid is subject to the 14D Requirements and there is no exemption available, then it will be necessary to structure the bid so that it fully complies with both Canadian provincial securities laws and U.S. federal securities law requirements (often referred to as a “dual compliant” bid). This will include ensuring that the terms of the tender offer and the contents of the disclosure in the tender offer documents comply with the 14D Requirements (in addition to the 14E Requirements), filing the tender offer documents with the SEC and undergoing the SEC’s review and comment process.

While a “dual compliant” bid requires careful attention to compliance with both Canadian and U.S. legal requirements, the requirements for a Canadian take-over bid and U.S. tender offer are sufficiently similar that it is possible, in most respects, to comply with both sets of rules concurrently, by following the stricter requirement on any point where the requirements differ. There is, however, one point on which the Canadian take-over bid rules and the 14D Requirements conflict. Under the Canadian rules, a buyer may waive a condition to a bid and extend the bid for a further period of time, so long as the buyer first takes up and pays for any securities that have already been tendered to the bid. In contrast, the 14D Requirements prohibit taking up and paying for any of the securities that have been tendered to the bid until after the bid has expired. The 14D Requirements do, however, allow a buyer to provide a “subsequent offering period” during which additional securities may be tendered for the same consideration, so long as certain conditions are met. If the use of a “subsequent offering period” does resolve the inconsistency in the circumstances of a particular take-over bid, it will be necessary for the buyer conducting the dual-compliant bid to apply to the Canadian securities regulatory authorities for an exemption from the requirement to take up and pay for securities before extending the offer period, in order to permit compliance with the corresponding 14D Requirements.

**MJDS EXEMPTION – Rule 14d-1(b)**

The exemptions provided the Tier 1 Exemption (Rule 14d-1(c) under the Exchange Act) and the Tier 2 Exemption (Rule 14d-1(d) under the Exchange Act) provide relief from certain of the 14D Requirements and 14E Requirements, generally based on the target having U.S. shareholder ownership below 10% in the case of the Tier 1 Exemption and below 40% in the case
of the Tier 2 Exemption. To the extent available, these exemptions may be relied on in connection with Canadian take-over bids, just as in the case of any eligible foreign tender offer.

However, in addition to the Tier 1 Exemption and the Tier 2 Exemption, a Canadian take-over bid may be eligible for an additional exemption under MJDS found in Rule 14d-1(b) under the Exchange Act (the “MJDS Exemption”). When it is available, Rule 14d-1(b) provides a complete exemption from the 14D Requirements, as well as from Rule 14e-1 of the 14E Requirements.

Conditions for Reliance on the MJDS Exemption

The MJDS Exemption will be available to a Canadian takeover bid that is otherwise subject to the 14D Requirements if:

- the target is incorporated or organized under the laws of Canada or any Canadian province or territory (note that it does not matter whether the buyer is Canadian, U.S. or any other nationality);
- the target is a “foreign private issuer”;
- the target is not an investment company that is registered, or required to be registered, under the Investment Company Act of 1940;
- less than 40% of the class of securities outstanding that is the subject of the tender offer is held by U.S. holders, calculated on the basis described below; and
- the tender offer is subject to, and the buyer complies with, the laws, regulations and policies of Canada and any relevant province governing the conduct of the offer (unless the buyer has received an exemption from, and the tender offer does not comply with, requirements that would otherwise be prescribed by Regulation 14D or 14E, unless the SEC, by order, determines to allow reliance on the Rule 14d-1(b) exemption notwithstanding the exemption having been granted in Canada).

If the Rule 14d-1(b) exemption is available, where the consideration for the tender offer consists solely of cash, the entire disclosure document or documents required to be furnished to holders of the class of securities to be acquired must be filed with the SEC on Schedule 14D-1F and disseminated to shareholders of the subject company residing in the United States in accordance with Canadian laws, regulations and policies. Schedule 14D-1F is a simple and straightforward form that consists of a short “wrap-around” document covering the Canadian take-over bid circular. It does not impose any additional disclosure obligations above and beyond what is required by Canadian law, and is not reviewed by the SEC. Where the consideration for a tender offer using the Rule 14d-1(b) exemption includes securities of the buyer to be issued pursuant to the offer, any registration statement and/or prospectus relating thereto must be filed with the SEC along with the Schedule 14D-1F and must be disseminated to shareholders residing in the United States in accordance with Canadian laws, regulations and policies.
Under the MJDS exemption, the target company will be presumed to be a foreign private issuer, and U.S. holders will be presumed to hold less than 40% of the outstanding securities of the subject class of securities, unless:

- the trading volume of the target securities on national securities exchanges in the United States exceeded its trading volume in Canada and on the Canadian Dealing Network Inc. over the twelve months prior to the commencement of the offer (or, in a competitive bid, the commencement of the initial offer);

- the most recent annual report or annual information form filed by the issuer with Canadian securities regulators or the SEC indicates that U.S. holders hold 40% or more of the outstanding shares of the target class; or

- the buyer has actual knowledge that the level of U.S. ownership equals or exceeds 40%.

The 40% ownership test is based on beneficial ownership of the target class of shares at the time the tender offer is commenced or, in the case of a competing bid, at the time the initial tender offer was commenced. Although Rule 14d-1(b) does not expressly state so, it is also a condition of the exemption that the 40% ownership test be made as of the end of the target’s last quarter or, if that quarter terminated within 60 days of the date the tender offer is commenced, as of the end of the target’s preceding quarter. This last requirement is a stated eligibility requirement for the filing of a Schedule 14D-1F, effectively making it a requirement for use of the MJDS exemption.

All of the requirements of Rule 14e-1 are deemed to be satisfied if the conditions of the MJDS exemption in Rule 14d-1(b) are met. However, Rule 14d-1(b) does not provide an exemption from the other 14E Requirements. If the offer is eligible for the Rule 14d-1(b) exemption, then the requirements of Rule 14e-2 can be satisfied by filing a directors’ circular, prepared in compliance with Canadian securities laws, with the SEC utilizing an MJDS form called Schedule 14D-9F. A Schedule 14D-9F is a shell document wrapped around the Canadian directors’ circular, with no supplemental disclosure required, and is not subject to SEC review. Note that unless another exemption is available in the circumstances, proceeding in this manner will require filing the Canadian directors’ circular with the SEC (and concurrently in Canada) within the 10 business day deadline required by Rule 14e-2 instead of within 15 calendar days of the commencement of the offer as required under the Canadian rules.

It is important to remember that, even if an offer is not subject to any 14D Requirements because the target securities are not equity securities registered under Section 12 of the Exchange Act, and even if the offer does not fall within the definition of a take-over bid under the Canadian rules (such as an offer for non-convertible debt securities), the 14E Requirements will still apply and compliance with them must be addressed, absent an available exemption.
B.  1933 ACT REQUIREMENTS AND THE MJDS REGISTRATION FORMS

REQUIREMENTS

In addition to the Exchange Act requirements discussed above, which apply whether the consideration offered is solely cash, or solely securities, or a combination of cash and securities, tender offers involving the issuance of securities by the buyer as consideration for the target’s securities will also be subject to the registration requirements of the 1933 Act and applicable state securities laws.

Absent an exemption, Section 5 of the 1933 Act requires that no securities (including the buyer’s shares or other securities issued as consideration in a tender offer) may be offered until a registration statement registering the offered securities has been filed with the SEC. The offered securities may not be sold until the registration statement is declared effective by the SEC. These additional requirements under the 1933 Act will be referred to as the “1933 Act Requirements”.

In addition to the need to register its securities under the 1933 Act unless an exemption is available, the issuance of equity securities to shareholders of the target in a tender offer may have other implications for the buyer, such as requirements applicable under the SEC’s mandatory requirements for the registration of equity securities under the Exchange Act, or the potential application of the Investment Company Act of 1940, as amended, either to the bidder, the target or the combined entity following the transaction.

In any case where the 1933 Act Requirements apply, it is also necessary to consider the application of, and if necessary, take steps to comply with, the state “blue sky” securities laws of any state where target shareholders are located, unless these laws are pre-empted by the federal securities laws. If target holders are offered a class of securities in a tender offer that are or will be listed on the NYSE or NASDAQ, the application of state “blue sky” securities laws will be pre-empted under Section 18 of the 1933 Act.

MJDS REGISTRATION STATEMENT FORMS F-8 AND FORM F-80

In an eligible cross-border transaction involving offers and sales of securities, Rule 802 may be available to provide any foreign private issuer, including a Canadian foreign private issuer, with an exemption from 1933 Act registration requirements. In addition, Canadian foreign private issuers may be able to take advantage of MJDS Form F-8 or Form F-80.

Form F-8 and Form F-80 each consist of the disclosure document of the buyer used to offer the buyer’s securities in Canada in accordance with Canadian disclosure requirements, supplemented by a small number of U.S. informational legends.

Form F-8 is only available if the buyer is preparing a take-over bid circular under Canadian requirements, and is not available for a take-over bid that is exempt under Canadian laws. There are restrictions on the buyer’s ability to register derivative securities, although securities such as
warrants and convertible debt are generally eligible for registration on Form F-8. Form F-8 will be available if the buyer:

- is incorporated under the laws of Canada or a province or territory of Canada;
- is a “foreign private issuer”;
- has had a class of securities listed on the Toronto Stock Exchange for the 12 months immediately preceding the filing of the Form F-8, and has been subject to Canadian continuous disclosure requirements for at least 36 months immediately preceding the filing of the Form F-8 and is currently in compliance with obligations arising from such listing and reporting;
- has an aggregate market value of its public float of Cdn. $75 million or more (i.e., securities held by persons other than “affiliates”, within the meaning of the Exchange Act, of the buyer). The market value of the buyer’s public float is computed by using the price at which its shares were last sold, or the average of the bid and ask prices of its shares, on the principal market for the buyer’s shares as of any date within 60 days prior to filing the Form F-8; and
- is not an investment company that is registered or required to be registered under the Investment Company Act of 1940.

The target must also be a foreign private issuer incorporated under the laws of Canada or a province or territory of Canada, and less than 25% of the target class of securities must be held by U.S. holders. For the purposes of determining the target’s status as a foreign private issuer, and whether less than 25% of the target class is held by U.S. holders, the buyer will be entitled to rely on certain presumptions.

The securities registered on Form F-8 must be offered to U.S. holders on terms and conditions not less favorable than those offered to any other holder of the same class of subject securities.

Form F-80 is available on all of the same terms and conditions as Form F-8, except for one: Form F-8 refers to a 25% U.S. ownership limit for the target, whereas Form F-80 refers to the same 40% ownership level as prescribed in Rule 14d-1(b). The reason for the difference relates to state “blue sky” securities laws. Unless the buyer’s shares are listed on a U.S. national stock exchange, state “blue sky” securities laws will not be preempted by registering the buyer’s securities on an MJDS registration statement. Some, but not all, states have adopted MJDS exemptions at the 25% ownership level but not at the 40% ownership level. If Form F-8 is available, it should be used in preference to Form F-80 because state securities administrators in states where there is a 25% MJDS exemption will immediately know that the transaction fits within their state exemption by virtue of the use of the Form F-8 registration statement. However, regardless of whether the offering is being registered on Form F-8 or Form F-80, if the buyer’s securities will not be listed on a U.S. stock exchange, it will still be necessary to conduct a “blue sky” survey to ensure
compliance with all applicable state securities laws, as many states do not have any exemption at either the 25% or 40% level.

Under Exchange Act Rule 12h-4, a registrant is exempt from reporting obligations under Section 15(d) of the Exchange Act with respect to securities registered under the 1933 Act on Form F-8 or Form F-80, so long as the registrant is exempt from Section 12(g) of the Exchange Act pursuant to Rule 12g3-2(b) under the Exchange Act.

August 2019
Osler, Hoskin & Harcourt LLP
Public Targets

U.S. regulation of cross-border business combinations
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 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 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.

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

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3 Rule 14e-1(a).
5 Rule 14e-1(d).
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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.” SEC guidance suggests that “promptly” means payment within **three** U.S. business days. 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.

**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.

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.

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. The exception for purchases in tender offers regulated under the City Code is discussed in Annex D.

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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.
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.


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).
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.

² Wellman v. Dickinson (475 F. Supp. 783 (S.D.N.Y. 1979)).
Public Targets: U.S. regulation of cross-border business combinations

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.
Public Targets: U.S. regulation of cross-border business combinations

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.

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\(^1\) Rule 14e-5(c)(3).
\(^2\) Rule 14e-5(b).
City Code

The City Code on Takeovers and Mergers regulates tender offers for public companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man, including companies that are not listed on any stock exchange but can have an unlimited number of shareholders. 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.

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\(^2\) 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).
Decision 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.

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\(^1\) 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(ii) 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).  

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. 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. 

**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.

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.

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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.
Public Targets: U.S. regulation of cross-border business combinations
Public Targets

U.S. regulation of cross-border business combinations
Cash Tender Offer Relying on The Tier I Exemption

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

- The bidder is a non-U.S. company
- The transaction is a cash tender offer for the equity securities of a target company that is a foreign private issuer¹
- The target company’s shares are not listed in the United States, but it has U.S. shareholders.
- The target company is not an investment company as defined in the U.S. Investment Company Act of 1940, as amended.
- Fewer than 10% of the target company’s shares are held by U.S. residents.

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

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

Equal treatment

The principal requirement under the Tier I exemption is that U.S. shareholders be treated at least as favorably as shareholders in other jurisdictions.² There are a few exceptions to this requirement that allow disparate treatment of U.S. shareholders in limited circumstances. For a cash tender offer, the only relevant exception relates to loan notes. In certain jurisdictions, such as the United Kingdom, loan notes offer tax advantages to holders. If the bidder offers loan notes to the target company’s shareholders in such jurisdictions, it is not obliged to offer them to U.S. shareholders as well, so long as the loan notes are not listed on any organized securities market or registered under the U.S. Securities Act of 1933, as amended.³

¹ A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:
- 50% or less of its outstanding voting securities are held by U.S. residents or
- More than 50% of its outstanding voting securities are held by U.S. residents, and none of the following circumstances apply:
  - The majority of its executive officers or directors are U.S. citizens or residents.
  - More than 50% of its assets are located in the United States.
  - Its business is administered principally in the United States.

² Rule 14d-1(c)(2).

³ Rule 14d-1(c)(2)(iv).
Public Targets: U.S. regulation of cross-border business combinations

Informational documents

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

Exemptions from the procedural requirements of Regulation 14E

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

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

Offer Duration and extensions

In a Tier I tender offer, there is no restriction on the length of the offer period from a U.S. perspective. Under Regulation 14E, a tender offer must remain open for at least twenty U.S. business days.\(^9\) This requirement does not apply to Tier I tender offers, and accordingly, the bidder can structure the offer to remain open for a shorter period if that is permitted in the target company’s home jurisdiction. In addition, if there are any material changes to the terms of the offer, the U.S. rules would normally require the offer to be extended by five or ten business days, depending on the level of materiality of the change.\(^10\) These rules do not apply in the case of a Tier I tender offer. Accordingly, the bidder may choose not to extend the tender offer period if and when it announces any changes to the terms of the offer if that is permitted in the target company’s home jurisdiction. Alternatively, it may extend the offer for a shorter period in compliance with local requirements.

The prompt payment requirement

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

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\(^4\) Rule 14d-1(c)(3)(i).
\(^5\) Rule 14d-1(c)(3)(ii).
\(^6\) SEC Release No. 34-58597, Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (December 8, 2008).
\(^7\) SEC compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 104.03 (October 17, 2018).
\(^8\) Rule 14d-1(c).
\(^9\) Rule 14e-1(a).
\(^10\) Rule 14e-1(b).
\(^11\) Rule 14e-1(c).
Purchases outside of the offer

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

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

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

Response of target company

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

General anti-fraud provisions

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

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\(^2\) Wellman v. Dickinson (475 F. Supp. 783 (S.D.N.Y. 1979)).
Timetable of an equity tender offer

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

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

Public announcement of the tender offer

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

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

Commencement of the tender offer

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

Extension of the tender offer period

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

Completion of the tender offer (or initial offering period)

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

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

Subsequent offering period

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

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

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

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

There are a number of exceptions to this prohibition:

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

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\(^1\) Rule 14e-5(c)(3).
\(^2\) Rule 14e-5(b).
City Code

The City Code on Takeovers and Mergers regulates tender offers for public companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man, including companies that are not listed on any stock exchange but can have an unlimited number of shareholders. 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.\(^1\)
- 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.

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\(^2\) A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:
- 50% or less of its outstanding voting securities are held by U.S. residents or
- More than 50% of its outstanding voting securities are held by U.S. residents, and none of the following circumstances apply:
  - The majority of its executive officers or directors are U.S. citizens or residents.
  - More than 50% of its assets are located in the United States.
  - Its business is administered principally in the United States.

\(^3\) Rule 14e-5(b)(9).
Determination of the U.S. ownership level

Timing

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

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

Securities to be included in the calculation

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

Procedure for calculation

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

The “look-through” test

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(ii) to paragraphs (c) and (d) of Rule 14d-1.
⁴ C&DI, Question 101.05 (October 17, 2018).
⁵ Instruction 2(iii) to paragraphs (c) and (d) of Rule 14d-1.
⁶ Instruction 2(iv) 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

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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.
Public Targets: U.S. regulation of cross-border business combinations
Public Targets

U.S. regulation of cross-border business combinations
Public Targets: U.S. regulation of cross-border business combinations

Cash Tender Offer Relying on The Tier II Exemption

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

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

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

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

Exemptions from the procedural requirements of Regulation 14E

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

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

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1 A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:
- 50% or less of its outstanding voting securities are held by U.S. residents or
- More than 50% of its outstanding voting securities are held by U.S. residents, and none of the following circumstances apply:
  - The majority of its executive officers or directors are U.S. citizens or residents.
  - More than 50% of its assets are located in the United States.
  - Its business is administered principally in the United States.

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

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

Prompt payment

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

Early termination

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

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

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

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

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

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3 Rule 14e-1(d).
4 Rule 14d-1(d)(v).
5 Rule 14e-1(a).
6 Rule 14e-1(b).
7 This allows shareholders that did not tender their shares because they were uncertain about the outcome of the offer to have the opportunity to tender their shares. Subsequent offering period is explained in Annex B.
8 Rule 14d-1(d)(2)(ix).
**Purchases outside of the offer**

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

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

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

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

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

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

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

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

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9 Rule 14e-5(b)(12).
10 Rule 14e-5(b)(11).
11 If the consideration is in a different currency, it may be converted to U.S. dollars for purposes of the U.S. tender offer at an exchange rate that is disclosed in the U.S. tender offer documents.
12 For example, if the non-U.S. tender offer remains open for longer than twenty U.S. business days to comply with the rules of the relevant jurisdiction, the U.S. offer must also remain open for the same period of time.
13 Rule 14e-5(b)(11).
If the bidder structures the tender offer as separate U.S. and non-U.S. offers, it is customary to exclude U.S. shareholders from tendering in a non-U.S. tender offer, unless this is not permitted under the rules of the applicable non-U.S. jurisdiction.

General anti-fraud provisions

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

² Wellman v. Dickinson (475 F. Supp. 783 (S.D.N.Y. 1979)).
Timetable of an equity tender offer

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

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

Public announcement of the tender offer

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

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

Commencement of the tender offer

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

Extension of the tender offer period

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

Completion of the tender offer (or initial offering period)

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

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

Subsequent offering period

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

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

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

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

There are a number of exceptions to this prohibition:

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

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\(^1\) Rule 14e-5(c)(3).

\(^2\) Rule 14e-5(b).
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.

² A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:
  - 50% or less of its outstanding voting securities are held by U.S. residents or
  - More than 50% of its outstanding voting securities are held by U.S. residents, and none of the following circumstances apply:
    - The majority of its executive officers or directors are U.S. citizens or residents.
    - More than 50% of its assets are located in the United States.
    - Its business is administered principally in the United States.
³ Rule 14e-5(b)(9).
Determination of the U.S. ownership level

Timing

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

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

Securities to be included in the calculation

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

Procedure for calculation

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

The “look-through” test

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.

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1 SEC Compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 101.08 (October 17, 2018).
2 Instruction 2(j) to paragraphs (c) and (d) of Rule 14d-1.
3 Instruction 2(j) to paragraphs (c) and (d) of Rule 14d-1.
4 C&DI, Question 101.05 (October 17, 2018).
5 Instruction 2(j) 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).  

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. 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.

**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.

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.

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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.
Public Targets: U.S. regulation of cross-border business combinations
Cross-Border Exemptions

Last Update: October 17, 2018

These Compliance and Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the cross-border exemptions. They replace the interpretations published in Section II of the July 2001 Interim Supplement to Publicly Available Telephone Interpretations (the "Telephone Interpretations"). In particular, C&DIs 101.03, 103.01, 104.02, 104.03, and 104.05 reflect substantive changes to the Telephone Interpretations. C&DIs 100.04 and 101.01 reflect technical revisions to the Telephone Interpretations. C&DIs 100.01, 101.09, 104.04, and 105.01 reflect only non-substantive changes to the Telephone Interpretations. The remaining C&DIs reflect newly published interpretations. The bracketed date following each C&DI is the latest date of publication or revision.

Section 100. General

Question 100.01

Question: Are Securities Act Rules 801 and 802 available when there are no U.S. security holders of the issuer (in a rights offering) or subject company (in an exchange offer or business combination), or the offer is not extended to U.S. security holders?

Answer: No. See General Note 2 to Rules 800, 801 and 802. These exemptions are intended to create an incentive to include U.S. security holders in the offering, not to provide an exemption for offerings made only to foreign security holders. [October 17, 2018]

Question 100.02

Question: A foreign private issuer seeks to do a "warrant flush" whereby it will reduce the exercise price of its outstanding warrants for a set period of time in an effort to induce warrant holders to exercise. Under U.S. rules, this may be considered an issuer tender offer; under the laws of the subject company’s home jurisdiction, it is not subject to tender offer regulation, although other provisions of the home jurisdiction’s securities laws apply. Can the issuer rely on the Tier I exemption in Exchange Act Rule 13e-4(h)(8) where the transaction is not subject to tender offer regulation in the home jurisdiction?

Answer: Yes. The cross-border exemptions are not premised on the applicability of specific rules in the home jurisdiction that are directly comparable to U.S. rules, but on the presence of an applicable foreign regulatory regime in the home jurisdiction that provides a regulatory framework for the offer. In this case, while the warrant flush is not regulated as a tender offer in the home jurisdiction, other provisions of the home jurisdiction’s securities laws do apply to the transaction and provide protection to subject security holders. [October 17, 2018]
Question 100.03

**Question:** Securities Act Rule 802(a)(1) states that in a business combination in which the securities are to be issued by a “successor registrant,” U.S. holders may hold no more than 10 percent of the class of securities of the successor registrant immediately after the completion of the business combination. Does the reference to “successor registrant” mean that the acquiror must be an Exchange Act reporting company after the completion of the business combination?

**Answer:** No. The term is used generically to refer to the surviving entity, whether or not it is an Exchange Act reporting company after the completion of the business combination, and is unrelated to the concept of being a successor registrant for purposes of Exchange Act Rule 12g-3. [October 17, 2018]

Question 100.04

**Question:** May a bidder exclude U.S. security holders from an exchange offer made in a foreign jurisdiction at a time when U.S. ownership exceeds 10 percent and then later extend the same offer to U.S. security holders when U.S. ownership falls to 10 percent or below and qualifies for the Tier I exemption?

**Answer:** This scenario would raise concerns if the facts and circumstances indicate that the bidder excluded U.S. security holders from the exchange offer either with the purpose or intent of causing a migration of securities from the United States to the foreign jurisdiction so that an exemption from Securities Act registration would then become available. An offer conducted with this purpose or intent could be viewed to be a part of a plan or scheme to evade Securities Act registration, thereby rendering the cross-border exemptions unavailable. See General Note 2 to Securities Act Rules 800, 801 and 802. See also Release No. 33-8957 (September 19, 2008), Section II.G.2 (discussing the exclusion of U.S. target security holders in a cross-border tender offer). [October 17, 2018]

**Section 101. Calculation of U.S. Ownership**

**Question 101.01**

**Question:** Are the securities held by the acquiror excluded from the calculation of U.S. ownership for purposes of determining eligibility under the cross-border exemptions?

**Answer:** Yes. See, e.g., Securities Act Rule 800(h)(2); Instruction 2.ii to paragraphs (c) and (d) of Exchange Act Rule 14d-1. The amendments adopted by the Commission in 2008 eliminated the requirement to exclude greater than 10 percent target holders from the calculation of U.S. ownership. The requirement to exclude target securities held by the acquiror remains unchanged, however. [October 17, 2018]

**Question 101.02**

**Question:** A bidder is making a tender offer for the securities of the subject company, which is a foreign private issuer. One of the subject company’s shareholders, Shareholder A, is an entity incorporated outside the United States. The bidder, however, is aware that investment and dispositive authority over the shares held in the name of Shareholder A rests with a parent company located in the United States. Should Shareholder A’s shares be deemed to be held by a U.S. holder for purposes of calculating eligibility to rely on the cross-border exemptions?

**Answer:** Yes. Where the bidder knows or has reason to know that investment and dispositive power, within the meaning of Exchange Act Rule 13d-3, over the securities held in the name of a
foreign entity are exercised by a U.S. holder, those securities should be counted as part of the U.S. ownership base. [October 17, 2018]

**Question 101.03**

**Question:** A business combination frequently involves multiple steps (e.g., a tender offer followed by a clean-up or “back end” merger to acquire any remaining target company securities not tendered in the offer). If an offeror relies on the tender offer exemptions under Tier I or Tier II or the Securities Act exemption under Rule 802 for the first step, must the offeror, for purposes of determining its eligibility under the exemptions, recalculate the U.S. ownership in the target company for the subsequent step in the transaction?

**Answer:** No. The initial calculation of U.S. ownership made for the first step of the transaction is sufficient to determine eligibility for the use of the exemption in the subsequent step of the transaction, so long as: (1) the disclosure document for the first step discloses the offeror’s intent to conduct the subsequent step and the terms of the subsequent transaction; and (2) the subsequent step is consummated within a reasonable time following the first step.

The offeror, however, has the option of recalculating the U.S. ownership for the subsequent step transaction so it can rely on an exemption for the subsequent step transaction that was not available for the first step. In doing so, the offeror must recalculate the U.S. ownership as of the time periods specified in the applicable exemption and it should state in the offering materials for the first step transaction that it may recalculate U.S. ownership for the subsequent step transaction. Recalculation would not be appropriate for what is in effect a continuation of the first step transaction, such as an extended subsequent offering period following a tender offer that is common in some foreign jurisdictions. [October 17, 2018]

**Question 101.04**

**Question:** The cross-border exemptions specify the manner in which an acquiror or an issuer must calculate U.S. ownership for purposes of determining eligibility to rely on the exemptions. See, e.g., Instructions to Exchange Act Rules 14d-1(c) and (d) and Securities Act Rule 800(h). Pursuant to these instructions and rules, an acquiror or issuer must query certain record holders, nominees and financial intermediaries holding subject securities as to the number of securities held by customers resident in the United States. When an acquiror or issuer is unable to conduct this “look through” analysis of U.S. ownership, an alternate test based in part on average daily trading volume of the subject securities and other factors may be used. See, e.g., Instruction 3 to Rules 14d-1(c) and (d), and Rule 800(h)(7). Where record holders such as brokers or other intermediaries in a given jurisdiction are under no obligation, and in fact do not customarily respond to inquiries about the number of securities held for the benefit of customers in the U.S., may an issuer or acquiror eliminate the required “look through” analysis and use the alternate test based in part on trading volume to determine U.S. ownership?

**Answer:** No. “Reasonable inquiry” for purposes of these instructions and rules dictates that a good faith inquiry, including queries to nominees, must be made even where responses are not likely to be forthcoming or may be incomplete. The instructions and rules address situations where nominees do not respond to “look through” inquiries. They specify what assumptions can be made regarding customer accounts, depending on the location of the nominee record holder. For example, if after reasonable inquiry, an acquiror or issuer is unable to obtain information about the amount of securities represented by accounts of customers resident in the United States, it may assume that customers are resident in the jurisdiction in which the nominee has its principal place of business. See, e.g., Instruction 2.iv to Rules 14d-1(c) and (d), and Rule 800(h)(4). [October 17, 2018]
Question 101.05

**Question:** In calculating U.S. ownership of the subject securities in a tender offer or rights offering, the bidder or issuer may generally calculate as of a date no more than 60 days before or 30 days after public announcement of the transaction. See Instruction 2.i to Exchange Act Rules 13e-4(h) (8) and (i), Instruction 2.i to Exchange Act Rules 14d-1(c) and (d), and Securities Act Rule 800(h) (1). Can the calculation be done as of a date after commencement of the transaction if the commencement occurs less than 30 days after announcement?

**Answer:** Bidders or issuers should calculate U.S. ownership and thereby have a basis to know which U.S. rules apply to a cross-border transaction before commencing the transaction. While the cross-border exemptions were revised in 2008 to provide a range of dates for calculating U.S. ownership and to key the calculation on public announcement of the transaction, it did not change the staff’s longstanding view that the calculation of U.S. ownership should be conducted before commencement of the transaction. [October 17, 2018]

Question 101.06

**Question:** Securities of an acquiror are excluded in the calculation of U.S. ownership for determining eligibility for the cross-border exemptions. See, e.g., Instruction 2.ii to Exchange Act Rules 14d-1(c) and (d) and Securities Act Rule 800(h)(2). In a form of business combination common in certain countries, Company A and Company B would form a new holding company, HoldCo. HoldCo would then issue its shares to the shareholders of Company A and Company B in exchange for their existing shares. In this type of amalgamation, U.S. ownership would be calculated based on the “pro forma” shareholder base of HoldCo assuming the business combination transaction has already taken place. If Company A is considered the acquiror for accounting purposes, can the HoldCo shares to be held by former Company A shareholders be excluded from the calculation of U.S. ownership in the above scenario?

**Answer:** No. In requiring the exclusion of securities held by the acquiror from the U.S. ownership calculation, the Commission explained that such exclusion would be appropriate because the acquiror would not be participating in the transaction in the same manner as the security holders of the target company. See Release No. 33-8957 (September 19, 2008). This would not be true for the shareholders of Company A because HoldCo will, in fact, issue its shares to Company A shareholders as a result of the amalgamation. Therefore, exclusion of the HoldCo shares to be held by former Company A shareholders from the U.S. ownership calculation is not appropriate even though Company A is considered the accounting acquiror. [October 17, 2018]

Question 101.07

**Question:** Assume the same factual scenario as described in C&DI 101.06 above but with applicable foreign law requiring the transaction to be announced at a time when the ratio for the share exchange of Company A and Company B shares is not known. The exchange ratio will not be known until about four months after announcement, well beyond the range of permissible dates for calculating U.S. ownership for purposes of Securities Act Rule 800(h)(1). Since the exchange ratio will determine the “pro forma” ownership of HoldCo after the amalgamation transaction and thus the level of U.S. ownership of HoldCo, how can a “pro forma” U.S. ownership be calculated under these facts?

**Answer:** Where the parties do not know the exchange ratio in an amalgamation at announcement and therefore cannot determine the “pro forma” U.S. ownership for the new holding company within the time frames set forth in Rule 800(h)(1), the staff will not object if the comparative market capitalizations of the parties to the transaction are used instead when calculating U.S. ownership.
In this case, the respective U.S. ownership levels of Company A and Company B and their respective market capitalization figures would determine the “pro forma” U.S. ownership for HoldCo after completion of the amalgamation. The market capitalization figures used should be determined as of the date range provided in Rule 800(h)(1). Where the parties have a good faith estimate of the exchange ratio within the permissible date range, the staff will not object if such estimate is used. [October 17, 2018]

Question 101.08

**Question:** A bidder in a potential cross-border tender offer knows from market intelligence that U.S. ownership of the subject company exceeds 40 percent and that the offer will therefore not qualify for the prompt payment relief set forth in Exchange Act Rule 14d-1(d)(2)(iv). Because payment practice in the subject company’s home jurisdiction does not comport with U.S. standards in a tender offer, the bidder will seek relief from the staff. Although the bidder is not seeking to rely on the Tier I or Tier II cross-border exemptions, should it still conduct the U.S. ownership inquiry in the manner specified for those exemptions in connection with approaching the staff for relief?

**Answer:** Yes. A party seeking relief should provide the staff with information about the U.S. ownership of the subject securities, calculated in accordance with the requirements of the cross-border exemptions, so that the staff can consider the level of U.S. regulatory interest in the cross-border transaction in its determination of whether to grant relief. [October 17, 2018]

Question 101.09

**Question:** If an offeror is unable to calculate the U.S. ownership in the subject company in an exchange offer, can the offeror first file a Securities Act registration statement to avoid violating Securities Act Section 5 and then later withdraw the registration statement and rely on Rule 802 if it determines that U.S. ownership is no more than 10 percent and that it qualifies for the Tier I exemption?

**Answer:** Yes. Securities Act Rule 477 describes the procedures for withdrawing a registration statement. [October 17, 2018]

Section 102. Determination of the Subject Class

**Question 102.01**

**Question:** A foreign private issuer has ordinary shares that are registered under Exchange Act Section 12. The ordinary shares trade on a U.S. national securities exchange in the form of American Depositary Receipts, or ADRs. The issuer also has an outstanding class of convertible debentures that convert into the ordinary shares. The debentures, which are not registered under Exchange Act Section 12, and the ordinary shares trade as separate securities on an exchange in the home jurisdiction. The issuer will make an issuer tender offer to repurchase the ordinary shares, but not the debentures. However, holders of debentures can convert their securities into ordinary shares which may then be tendered into the offer. In calculating U.S. ownership of the relevant class for purposes of determining eligibility to rely on the cross-border exemptions in Rule 13e-4(h)(8) or 13e-4(i), should the issuer look to the U.S. ownership of the shares on an “as converted” basis, whereby it assumes conversion of the debentures into shares? Or should it determine U.S. ownership based on the holders of the ordinary shares only?

**Answer:** Rules 13e-4(h)(8)(i) and 13e-4(i)(1)(ii) state that in determining eligibility for these exemptions, the issuer must identify the percentage of securities “sought in the offer” that are held by U.S. holders. Under this fact pattern, the subject class is the ordinary shares because only the
ordinary shares may be tendered into the offer. U.S. ownership for purposes of the cross-border exemptions should therefore be calculated based on the current holders of the ordinary shares, including ordinary shares held in the form of ADRs, without regard to the convertible debentures.

[October 17, 2018]

Question 102.02

**Question:** A target company is a foreign private issuer with two classes of securities outstanding: preference and ordinary shares. Neither class is registered under Exchange Act Section 12. The target company entered into a merger agreement with a foreign acquiror pursuant to which the foreign acquiror will exchange its shares for both classes of target company securities, subject to a vote of the target company's security holders. For purposes of the vote on the merger with acquiror, the preference and ordinary shares vote as a single class with the same voting rights. However, the two classes of securities vote separately on most other matters. The preference shares and ordinary shares also differ in liquidation preferences, tax treatment and trading liquidity (the ordinary shares trade on an exchange in the target company's home jurisdiction while the preference shares do not). For purposes of the merger, the exchange ratio for the preference and ordinary shares will be different, reflecting the different rights associated with each class.

For purposes of calculating U.S. ownership for eligibility to rely on Securities Act Rule 802, should the preference and ordinary shares be considered a single class simply because they vote together on the transaction for which the exemption is sought?

**Answer:** No. The fact that holders of both the ordinary shares and preference shares have the same voting rights for the transaction and will vote together is not dispositive as to whether securities are a single class for purposes of calculating U.S. ownership. Other relevant factors that should be considered in determining whether the ordinary and preference shares should be viewed as separate classes for the U.S. ownership test include: the fact that the shares are priced differently in the business combination; one class is publicly traded and the other is not; and the two classes of securities vote separately on matters other than the transaction in question.

[October 17, 2018]

Question 102.03

**Question:** Securities Act Rule 801 exempts a rights offering from Securities Act registration as long as, among other conditions, U.S. holders hold no more than 10 percent of the outstanding class of securities that is the subject of the rights offering. Rule 801(a)(5) requires that, in order to be eligible for the Rule 801 exemption, the securities offered in the rights offering must be equity securities of the same class as those held by the U.S. offerees either directly or through American Depositary Receipts, or ADRs. A foreign private issuer meets the conditions of Rule 801 except that its U.S. holders hold equity securities through Global Depositary Receipts, or GDRs, rather than ADRs. May this issuer extend the rights offering to its U.S. holders without registering the offering in reliance on Rule 801?

**Answer:** Yes. The requirement in Rule 801(a)(5) that the securities offered in the rights offering be equity securities of the same class as those held by the U.S. offerees is intended to limit the offering to those who have already made the decision to invest in that class. See Release No. 33-7759 (October 22, 1999). Although GDRs are not specifically mentioned in Rule 801(a)(5), they serve the same purpose as ADRs in evidencing ownership of the underlying equity securities.

[October 17, 2018]

**Section 103. Equal Treatment**
**Question 103.01**

**Question:** A bidder commences a tender offer for the securities of a foreign private issuer. The bidder initially excludes U.S. subject security holders. While this foreign offer is ongoing, the bidder chooses to extend the offer into the United States and include U.S. subject security holders. How long must the U.S. offer remain open?

**Answer:** The equal treatment requirement in the Tier I and Tier II exemptions means that the U.S. offer generally must be open for at least as many days as the minimum period required by the laws of the jurisdiction governing the foreign offer. In addition, offers conducted under the Tier II exemption must satisfy the minimum twenty U.S. business day requirement in Exchange Act Rule 14e-1(a). Where either of these requirements could cause the bidder to violate the foreign jurisdiction’s laws, such as a limit on the maximum allowable length of the offering period, the staff will consider requests for relief on a case-by-case basis. This position also applies to an issuer tender offer. [October 17, 2018]

**Question 103.02**

**Question:** The subject company is a foreign private issuer with ordinary shares listed on a foreign exchange and American Depositary Shares, or ADSs, listed on a U.S. national securities exchange. U.S. shareholders hold 25 percent of the subject company’s ordinary shares. The bidder will make a cash tender offer for shares of the subject company in reliance on the Tier II cross-border exemptions and will rely on the exemption in Exchange Act Rule 14d-1(d)(2)(ii) to conduct separate U.S. and foreign offers. The U.S. offer will be open to all U.S. holders of shares in direct share form and all holders of ADSs. The foreign offer will be open to all other subject company shareholders. Holders tendering into the U.S. offer will receive U.S. dollars for their subject company shares. Holders tendering into the foreign offer will be permitted to choose between U.S. dollars and the currency of the subject company’s foreign home jurisdiction. Does this satisfy the equal treatment requirement in Rule 14d-1(d)(2)(ii)?

**Answer:** No. To conduct a dual offer in reliance on Rule 14d-1(d)(2)(ii), the U.S. offer must be made on terms at least as favorable as the terms offered to all other holders of the subject securities. Providing tendering shareholders in the foreign offer with a choice between the two different types of currencies, but not extending the same opportunity to tendering shareholders in the U.S. offer, is inconsistent with this purpose of the equal treatment requirement. [October 17, 2018]

**Question 103.03**

**Question:** In a cross-border tender offer not subject to Regulation 14D, where U.S. ownership in the subject company is above 10 percent as calculated in accordance with Instructions 2 and 3 to Exchange Act Rules 14d-1(c) and (d), can the bidder offer cash to U.S. holders of the subject company and shares to all other holders of the subject company?

**Answer:** Given that the offer is not subject to Regulation 14D and its “all holders” and “best price” requirements, this structure would be permissible, assuming it is acceptable under the laws of the home jurisdiction. [October 17, 2018]

**Question 103.04**

**Question:** A bidder conducts a cross-border tender offer for a class of securities registered under Exchange Act Section 12 and intends to rely on the Tier I exemption. In the subject company’s home jurisdiction, the offer includes a cash/stock election feature, whereby tendering holders can elect to receive either cash or stock, with no ceiling or cap on either the cash or stock
consideration. The bidder would like to rely on Exchange Act Rule 14d-1(c)(2)(iii) to offer cash-only consideration to U.S. holders while offering the cash/stock election feature to holders in the subject company’s home jurisdiction. Can it do so? If yes, what should be the amount of the cash consideration offered to U.S. holders?

**Answer:** Yes, a bidder can rely on Rule 14d-1(c)(2)(iii) to offer cash to U.S. holders while offering a choice between cash and stock consideration to non-U.S. holders. Rule 14d-1(c)(2)(iii) requires the bidder to have a reasonable basis to believe that the cash consideration offered to U.S. holders is “substantially equivalent” to the value of the consideration offered to non-U.S. holders so that U.S. holders are treated at least as favorably as their foreign counterparts. This requirement is satisfied where the cash consideration offered under the election feature is equal to or greater than the value of the stock consideration offered under the feature and the bidder offers the same amount of cash to U.S. holders. Accordingly, if the cash consideration offered under the election feature is valued at a premium to the stock consideration, U.S. holders should be offered at least the same amount of cash as non-U.S. holders.

The “substantially equivalent” requirement would not be satisfied, however, where the value of the cash consideration offered under the election feature is less than the value of the stock consideration offered under the feature. In that case, the amount of cash that the bidder must offer to U.S. holders should be at least equivalent to the value of the stock consideration offered to the holders in the subject company’s home jurisdiction. The value of the cash consideration and the stock consideration is determined at commencement of the offer and is not re-evaluated during the term of the offer. See fn. 26 in Release No. 33-7759 (October 22, 1999). Where the bidder increases the value of the stock consideration of the offer after commencement so that the stock consideration is greater than the cash consideration offered under the feature, the amount of the cash offered to U.S. holders would need to be increased as well in order to satisfy the “substantially equivalent” requirement of the rule. [October 17, 2018]

**Section 104. Filing, Publication, and Dissemination of Offer Materials**

**Question 104.01**

**Question:** A foreign private issuer plans to conduct a rights offering without Securities Act registration in reliance on Securities Act Rule 801. The issuer, however, must file a registration statement for this offering with the regulator in its home jurisdiction via an electronic document retrieval system similar to the EDGAR system in the United States. The registration statement is also posted on the issuer’s website. Pursuant to the home jurisdiction’s rules, the registration statement will incorporate by reference certain disclosure documents, such as annual and quarterly reports, previously filed by the issuer with the regulator in the home jurisdiction through its electronic data gathering system and similarly posted on the issuer’s website. Do these incorporated documents need to be translated into English and furnished to the Commission under cover of Form CB?

**Answer:** Yes. Part I, Item 1(a) of Form CB requires a filer to attach an English translation of the entire disclosure document delivered to security holders. While the Item allows exclusion of documents incorporated by reference, it allows exclusion only where those incorporated documents are “not published or distributed to holders of securities.” Where documents are required to be incorporated by reference into a registration statement pursuant to the rules of the home jurisdiction, and those documents have been filed electronically via the home jurisdiction regulator’s website or posted on an issuer’s website and are therefore publicly available, an
English translation is necessary to ensure that U.S. holders have the same access to information as their foreign counterparts. [October 17, 2018]

**Question 104.02**

**Question:** The ability to rely on the exemption in Securities Act Rule 802 is conditioned on including the legend required by Rule 802(b), which, among other things, advises security holders of the difficulties with enforcing claims that may arise under the federal securities laws because the issuer is located in a foreign country and some or all of its officers and directors may be residents of a foreign country. If the offeror is located in the United States, with officers and directors also resident in the United States, must the Rule 802(b) legend still be included in its entirety, even though this part of the legend is technically not applicable?

**Answer:** No. Rule 802(b) specifically provides that the legend must be included only "to the extent applicable." Offerors relying on Rule 802 should tailor the legend as needed so that it is not confusing or misleading for security holders. [October 17, 2018]

**Question 104.03**

**Question:** Under the laws of a foreign jurisdiction, an offeror commencing by publication must publish a detailed advertisement that includes an extensive discussion of all terms in a merger agreement. Securities Act Rule 802(a)(3)(iii) states that if an offeror disseminates by publication in its home jurisdiction, it must publish the information in the United States in a manner reasonably calculated to inform U.S. holders of the offer. Would publication of a less detailed summary advertisement in a publication with national circulation in the United States that specifies the means (such as an email address, website, or a toll-free telephone number) through which U.S. holders can get a complete copy of the offering materials translated into English satisfy this requirement?

**Answer:** Yes. [October 17, 2018]

**Question 104.04**

**Question:** Websites accessible in the United States must not be used to entice U.S. investors to participate in an offshore offering. Section II.G.2 of Release No. 33-7759 (October 22, 1999) states that "reliance on Regulation S to allow participation by U.S. persons offshore would not be appropriate with respect to tender or exchange offers posted on an unrestricted web site." The release then states that business combinations present different issues from tender or exchange offers because participation by U.S. security holders is not voluntary in business combinations. (Note: “business combinations” as defined in this release refers to mergers and other transactions requiring shareholder approval, as distinct from tender or exchange offers.) The release also states that “[n]o special precautions should be taken to prevent U.S. holders from receiving the merger consideration in a business combination involving a foreign company merely because the proxy statement/prospectus was posted on a web site available in the United States.” Since this statement implies that the website does not have to be restricted in the United States in a business combination where U.S. security holders are excluded, can the disclosure document then be sent to U.S. security holders?

**Answer:** No. The discussion does not contemplate sending the proxy statement/prospectus to those U.S. security holders. The release merely points out that there should be no precautions taken to prevent U.S. security holders from receiving the merger consideration even when they are excluded from the business combination, since participation in a business combination that is approved by shareholders is not voluntary for the U.S. security holders. Accordingly, a company
using Regulation S to allow participation in a business combination offshore (but not a tender or exchange offer) may put the proxy statement/prospectus on a website that makes clear that the offer is directed only to shareholders in countries other than the United States. This will not be viewed as “directed selling efforts” in the United States. However, the company should not engage in any further activities such as sending the material to U.S. security holders. [October 17, 2018]

**Question 104.05**

**Question:** If a foreign private issuer conducts a third party tender offer that excludes U.S. security holders, can it voluntarily furnish the tender offer materials under cover of Form 6-K without becoming subject to the U.S. tender offer rules? Similarly, can a foreign private issuer that is exempt from Exchange Act Section 12 pursuant to Exchange Act Rule 12g3-2(b) post the tender offer materials on its website or send the materials through an electronic information delivery system? Would such steps be viewed as a public announcement in the United States and an inducement for U.S. security holders to tender?

**Answer:** The tender offer materials may be voluntarily furnished to the Commission, posted on the website of a foreign private issuer relying on the Rule 12g3-2(b) exemption, or sent through an electronic information delivery system, without triggering the applicability of the U.S. tender offer rules so long as the bidder takes steps to ensure that the information is not used as a means to induce indirect participation by U.S. security holders. For example, the materials must not include a transmittal letter or other means of tendering the securities. The materials also must prominently disclose that the offer is not available to U.S. persons or is being made only in countries other than the United States. Further, the issuer must take precautionary measures that are reasonably designed to ensure that the offer is not targeted to U.S. persons. See Release No. 33-8957 (September 19, 2008); Release No. 33-7759 (October 22, 1999). [October 17, 2018]

**Section 105. Withdrawal Rights**

**Question 105.01**

**Question:** In Release No. 33-7759 (October 22, 1999), the Commission stated that it “will not object if bidders meeting the requirements for the Tier II exemption reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer” if certain identified conditions are met. May a bidder terminate withdrawal rights during the offer even though the offer has not been declared wholly unconditional?

**Answer:** No. In order to terminate withdrawal rights, all conditions must be satisfied or waived and the bidder must declare the offer wholly unconditional. In adopting the Tier II exemption, the Commission intended to codify previous staff interpretations regarding waivers or reductions of minimum conditions in cross-border transactions. In prior no-action letters and exemptive orders the Commission and the staff have typically permitted, with five days’ advance notice to security holders, a reduction in the minimum condition and termination of withdrawal rights once all other conditions to the offer are satisfied. The reference in the release to “the remainder of the offer” refers to a subsequent offering period. Pursuant to Exchange Act Rules 14d-7(a)(2) and 14d-11, the bidder may include a subsequent offering period during which withdrawal rights are not provided. [October 17, 2018]

**Question 105.02**

**Question:** Can a bidder rely on the Commission’s position allowing for termination of withdrawal rights immediately after waiving or reducing a minimum tender condition during the time that the tender offer must remain open, e.g., after a material change under Exchange Act Rule 14e-1(b)?
Answer: No. The Commission’s position is unavailable under such circumstances. See, e.g., fn. 229 in Release No. 33-8957 (September 19, 2008) (“Our position on reduction or waiver was never intended to allow a bidder to terminate withdrawal rights required under a mandatory extension of the offer period, i.e., an extension required under Rule 14e-1.”). [October 17, 2018]
Public Targets

U.S. regulation of cross-border business combinations
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

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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.
Public Targets: U.S. regulation of cross-border business combinations

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

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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)(ii).
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).
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.
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.

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\(^2\) 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.
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).
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.


\(^{2}\) A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:
- 50% or less of its outstanding voting securities are held by U.S. residents or
- More than 50% of its outstanding voting securities are held by U.S. residents, and none of the following circumstances apply:
  - The majority of its executive officers or directors are U.S. citizens or residents.
  - More than 50% of its assets are located in the United States.
  - Its business is administered principally in the United States.

\(^{3}\) Rule 14e-5(b)(9).
Determination of the U.S. ownership level

Timing

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

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

Securities to be included in the calculation

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

Procedure for calculation

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

The “look-through” test

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.

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1 SEC Compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 101.08 (October 17, 2018).
2 Instruction 2(ii) to paragraphs (c) and (d) of Rule 14d-1.
3 Instruction 2(ii) 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.\(^11\)

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\(^7\) 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. 33-9957 (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.