

Cross-Border Tender Offers and Other Business Combination Transactions and the U.S. Federal Securities Laws: An Overview

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In structuring cross-border tender offers and other business combination transactions, parties must consider carefully the potential application of U.S. federal securities laws and regulations to their transaction. By understanding the extent to which a proposed transaction will be subject to the provisions of U.S. federal securities laws and regulations, parties may be able to structure their transaction in a manner that avoids the imposition of unanticipated or burdensome disclosure and procedural requirements and also may be able to minimize potential conflicts between U.S. laws and regulations and foreign legal or market requirements. This article provides a broad overview of U.S. federal securities laws and regulations applicable to cross-border tender offers and other business combination transactions, including a detailed discussion of Regulations 14D and 14E under the Securities Exchange Act and the principal accommodations afforded to foreign private issuers thereunder.

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INTRODUCTION

Many business combination transactions involving non-U.S. companies may be subject to U.S. laws and regulations. Even if none of the participant companies to the transaction is organized in the United States, U.S. federal securities laws and regulations may apply, depending on how the offer is structured and whether any of the companies' security holders are resident in the United States. This article provides an overview of U.S. federal securities laws and regulations applicable to cross-border tender offers and other business combination transactions¹ where, in the case of a tender offer, the "target" is a company organized under the laws of a country other than the United States and, in the case of a business combination transaction not involving a tender offer, the "subject company" is organized in a jurisdiction outside the United States. Our intention is not to provide a comprehensive analysis of all securities laws and regulations of consequence in such transactions, but to provide practitioners and other interested

1. In this article "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; references to a "business combination transaction" mean a combination of two entities' businesses by means of a tender offer or otherwise. *See also infra* note 23.

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.²

Application of U.S. Securities Laws

One of the fundamental goals of the U.S. securities laws is the protection of U.S. investors.³ The Securities and Exchange Commission (the "SEC") takes the view that U.S. securities laws potentially apply to any transaction that is conducted in the United States or that employs U.S. jurisdictional means.⁴ Specifically:

2. This article does not address all the legal, procedural and other issues related to a cross-border tender offer or business combination transaction. Among other things, this article does not address a tender offer by an issuer for its own securities governed by Rule 13e-4, 17 C.F.R. § 240.13e-4 (2005), under the Securities Exchange Act of 1934 (the "Exchange Act"), ch. 404, 48 Stat. 881; it does not discuss the so-called U.S. "proxy rules" applicable in the context of a solicitation of votes or consents of certain U.S. companies' shareholders under section 14(a) of the Exchange Act, 48 Stat. at 895 (codified as amended at 15 U.S.C. § 78n (2000 & Supp. III 2003)); it does not consider the regulation of tender offers and other business combination transactions pursuant to U.S. or foreign antitrust/competition laws (principally, the Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209; the Clayton Act of 1914, ch. 323, 38 Stat. 730; the Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717; and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, which amended the Clayton Act by adding the requirement that parties to certain transactions, including the acquisition of assets or shares, provide notification to both the U.S. federal Trade Commission and the Antitrust Division of the U.S. Department of Justice). This article also does not discuss the statutory and other restrictions applicable to business combination transactions involving regulated industries, such as communications, shipping, energy and defense-related businesses, and does not discuss U.S. Government review (pursuant to provisions of the Defense Production Act of 1950, ch. 932, 64 Stat. 798, as amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107) of the national security implications of business combination transactions whereby non-U.S. entities seek to gain control of U.S. entities and related actions to suspend or prohibit such transactions where U.S. national security cannot otherwise be protected. Additionally, U.S. federal laws such as the International Investment Survey Act of 1976, Pub. L. No. 94-472, 90 Stat. 2059, the Agricultural Foreign Investment Disclosure Act of 1978, Pub. L. No. 95-460, 92 Stat. 1263, and the Domestic and the Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 95-213, Title II, 91 Stat. 1494, 1498, may impose reporting requirements on foreign investors, which are not discussed. This article also does not address the specific accommodations afforded to Canadian companies under U.S. securities laws pursuant to the multi-jurisdictional disclosure system of the Securities and Exchange Commission ("SEC"), see *infra* note 192, and Canadian provincial securities regulators.

3. See, e.g., Exchange Act § 2, 48 Stat. at 881 (codified as amended at 15 U.S.C. § 78b (2000)) (describing the necessity for the enactment of the Exchange Act and the reasons why "transactions in securities . . . are affected with a national public interest"); Exchange Act § 14(d)(1), 48 Stat. at 895, as amended by Act of July 29, 1968, Pub. L. No. 90-439, § 2, 82 Stat. 454, 455 (codified as amended at 15 U.S.C. § 78n(d)(1) (2000 & Supp. III 2003)) (SEC is authorized, by rule or regulation, to prescribe such additional information "as necessary or appropriate in the public interest or for the protection of investors"). See also Final Rule: Cross-Border Tender and Exchange Offers Business Combinations and Rights Offerings, SEC Release Nos. 33-7759, 34-42054, 70 SEC Docket 2191 (Oct. 22, 1999) [hereinafter "Cross-Border Release"] (The SEC states in the tender offer context that its "exemptions balance the need to provide U.S. security holders with the protections of the U.S. securities laws against the need to promote the inclusion of U.S. security holders in these types of cross-border transactions").

4. See *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-208 (2d Cir. 1968) (reviewing the extraterritorial reach of the Exchange Act and holding that U.S. district courts have subject matter jurisdiction over violations of the Exchange Act "at least when the transactions involve stock registered and listed on a national securities exchange, and are detrimental to the interests of American investors," even

- the general anti-fraud provisions of the Securities Exchange Act of 1934, as amended (the “Exchange Act”),⁵ 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;⁶
- if a tender offer is made for securities of a class that is registered under the Exchange Act, it may be necessary for the bidder to comply with the tender offer provisions of the Exchange Act;
- 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 to any transaction that employs “U.S. jurisdictional means”; and
- if securities are to be offered to persons in the United States, it may be necessary to register such securities pursuant to the Securities Act of 1933, as amended (the “Securities Act”),⁷ or to confirm the availability of an exemption or exclusion from registration.

U.S. federal securities laws may 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. This approach contrasts with that taken in many European jurisdictions, where the nationality of the target, rather than the residency of the investors or the means by which the offer is made, may be determinative of the regulatory implications of the transaction.⁸

though the transactions took place outside of the United States), *cert. denied*, 395 U.S. 906 (1969); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975). *See also* footnote 2 of SEC Release No. 33-6866, 55 Fed. Reg. 23751 (June 12, 1990) (where the SEC states that the “tender offer provisions of the Williams Act are extraterritorial in scope” and suggests that jurisdictional means can be established where it is reasonably foreseeable that U.S. shareholders of a foreign issuer that have been excluded from an offshore offer, will sell their shares into the market in response to that offer).

5. Ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C.A. §§ 78a–78nn (West 1997 & Supp. 2006)).

6. The general anti-fraud provisions are set forth in Exchange Act § 10(b), 48 Stat. at 891 (codified as amended at 15 U.S.C. § 78j (2000)) and Rule 10b-5 thereunder (codified at 17 C.F.R. § 240.10b-5 (2005)). The “conduct” and “effects” tests have been recognized in a number of court decisions, including *Bersch*, *supra* note 4, and *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir. 1989), *amended*, 890 F.2d 569 (2d Cir. 1989), *cert. dismissed*, 492 U.S. 939 (1989). The U.S. Circuit Courts have not adopted uniform standards regarding the level of conduct or effects necessary to invoke U.S. jurisdiction.

7. Ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C.A. §§ 77a–77aa (West 1997 & Supp. 2006)).

8. For instance, the United Kingdom’s City Code on Takeovers and Mergers (2006), *available at* <http://www.thetakeoverpanel.org.uk/new/> [hereinafter the “City Code”] 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 (*see, e.g.*, the City Code at paragraph 3(a) of the Introduction); South African takeover regulations apply to companies that are deemed to be resident in South Africa (*see, e.g.*, South Africa’s Securities Regulation Code on Take-overs and Mergers at Section A(3) in *GUIDE TO THE COMPANIES ACT AND REGULATIONS* (Walter D. Geach ed., 1992), at 10-280); in France, the rules relating to tender offers generally apply only where the target company is a French entity

The Exchange Act

The Exchange Act governs reporting, disclosure and other obligations of public companies and certain persons having interests in such companies. In particular, tender offers to which U.S. securities laws apply are governed by the Exchange Act and by rules adopted by the SEC thereunder.⁹ Certain provisions of the Exchange Act¹⁰ are potentially applicable in respect of *any* tender offer extended to U.S. investors or that otherwise employs U.S. jurisdictional means.¹¹ Other provisions of the Exchange Act¹² apply only in respect of an offer for a class of securities registered under the Exchange Act.¹³ A business combination transaction that does not involve a tender offer is not regulated by the tender offer provisions of the Exchange Act.

The Securities Act

The Securities Act governs offers and sales of securities and, in general, requires the registration of offers and sales unless an exemption or exclusion from registration is available. The Securities Act applies to any tender offer using U.S. jurisdictional means involving the exchange of one security in consideration for the tender of another, whether the exchange security is newly-issued or already outstanding and whether the exchange security is issued or delivered by the bidder or a third party.¹⁴ Any such exchange security must be registered with the SEC under the Securities Act as part of the tender offer process unless an exemption or an exclusion applies.¹⁵

The Securities Act also applies in the context of a business combination transaction that does not involve a tender offer but pursuant to which a plan is sub-

listed in France; the residency of the shareholders of the target is irrelevant (*see, e.g.*, General Regulations of the French Autorité des marchés financiers at Article 231-1).

9. Tender offers were not regulated by U.S. federal securities laws until the adoption by the United States Congress in 1968 of the Williams Act amendments to the Exchange Act. Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C.A. § 78l - 78n (West 1997 & Supp. 2006)). The provisions of the Exchange Act added by the Williams Act, including sections 14(d) and 14(e), are consequently sometimes referred to as the "Williams Act", 15 U.S.C. § 78n(d)-(e) (2000 & Supp. III 2003).

10. In particular Exchange Act section 14(e) as added by the Williams Act, *supra* note 9, 82 Stat. at 457 (codified as amended at 15 U.S.C. § 78n(e) (2000 & Supp. III 2003)) and Regulation 14E thereunder (codified at 17 C.F.R. § 240.14e-1-.14f-1 (2005)).

11. A discussion of U.S. jurisdictional means is set forth in section 4 of this article, *infra*.

12. In particular, Exchange Act section 14(d), as added by the Williams Act, *supra* note 9, 82 Stat. at 456 (codified as amended at 15 U.S.C. § 78n(d) (2000 & Supp. III 2003)) and Regulation 14D thereunder (codified at 17 C.F.R. § 240.14d-1-.14d-101 (2005)).

13. Registration under the Exchange Act is discussed *infra* in section 5.1 of this article. Tender offers and business combinations involving companies organized in the United States are subject to a broader application of the Exchange Act requirements, including, in particular, the so-called "proxy rules" set forth in section 14(a) of the Exchange Act, 48 Stat. at 895 (codified as amended at 15 U.S.C. § 78n (2000 & Supp. III 2003)) and the reporting obligations under section 16 of the Exchange Act, 48 Stat. at 896 (codified as amended at 15 U.S.C. § 77o (2000)). A discussion of these rules is beyond the scope of this article. *See* Exchange Act Rule 3a12-3 (codified at 17 C.F.R. § 240.3a12-3 (2005)).

14. Securities Act § 5, 48 Stat. at 77 (codified at 15 U.S.C. § 77e (2000)).

15. *Id.* *See also* Securities Act § 4, 48 Stat. at 77 (codified at 15 U.S.C. § 77d (2000)). *See infra* section 3.1 of this article.

mitted to security holders asking such holders to vote on the combination or to elect whether to accept an exchange security for their existing security.¹⁶ Here again, such new securities must be registered with the SEC as part of the business combination transaction unless an exemption or exclusion applies.

State Securities Law Considerations

In addition to U.S. federal regulation, the “blue sky”¹⁷ securities laws of the several states of the United States may apply to tender offers in which the consideration offered consists at least in part of exchange securities. With the adoption of the National Securities Markets Improvement Act of 1996,¹⁸ the circumstances in which a bidder must register securities with state regulators were substantially reduced. In particular, section 18¹⁹ of the Securities Act provides that certain categories of “covered securities” are exempt from state securities law registration. Among the securities so exempted are securities that (i) are listed (or upon completion of the relevant transaction will be so listed) on the New York Stock Exchange, Inc. (“NYSE”) or another U.S. national securities exchange with listing standards substantially similar to those of the NYSE, or quoted (or upon completion of the relevant transaction will be so quoted) on The Nasdaq Stock Market, Inc. (“Nasdaq”) before Nasdaq becomes a national securities exchange, or (ii) are issued or placed in certain transactions exempt from the registration requirements of the Securities Act.²⁰

If the target in a tender offer or a participant in another business combination transaction is organized or conducts substantial operations in the United States,

16. See Securities Act Rule 145 (codified at 17 C.F.R. § 230.145 (2005)). Rule 145 provides that an “offer” or “sale” within the meaning of section 2(3) of the Securities Act occurs in connection with a business combination transaction pursuant to which the transaction is submitted to the vote of shareholders, with the effect that the registration provisions of the Securities Act may apply.

17. Most states of the United States have enacted legislation that requires securities to be registered prior to the public offer or sale of such securities in the state, including in connection with the offer of securities pursuant to an exchange offer. State securities laws are generally referred to as “blue sky” laws as a result of their initial objective of thwarting the actions of securities promoters who would sell interests with no more substance than “so many feet of blue sky.” *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550 (1917).

18. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (codified in scattered sections in 15 U.S.C.).

19. Securities Act § 18, 48 Stat. at 85, as amended by the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416, 3417 (codified as amended at 15 U.S.C. § 77f (2000)).

20. Securities Act § 18(b), 48 Stat. at 85, as amended by the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416, 3417 (codified as amended at 15 U.S.C. § 77f (2000)). For example, securities issued in private placements conducted in accordance with Rule 506 of Regulation D (17 C.F.R. § 230.506 (2005)) are covered securities. On February 28, 2006, Nasdaq petitioned the SEC to expand the scope of covered securities to designate securities listed on the Nasdaq Capital Market (previously known as “The Nasdaq Small Cap Market”) as covered securities (<http://www.sec.gov/rules/petitions/petn4-513.pdf>) and the SEC Advisory Committee on Smaller Public Companies has recommended that both National Capital Market and OTC Bulletin Board securities be designated as covered securities. See Recommendation IV.S.11 in the Final Report of the SEC Advisory Committee of Smaller Public Companies (April 23, 2006), available at <http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf>. See also *infra* note 202.

it may be subject to state laws designed to shield companies incorporated or operating in such states from unsolicited offers. Typically, these laws may prevent the consummation of certain transactions without board or shareholder approval, or may impose restrictions on the ability of an entity, in the absence of board or shareholder approval, to consummate a business combination transaction with the acquired company for a period of 1 or more years.²¹

GENERAL STRUCTURE OF OUR ARTICLE

Companies may, depending on the requirements of local law and the desired result, effect an acquisition or combination by means of a tender offer, a statutory merger, a corporate amalgamation or a court-approved combination transaction. We explore in sections 1, 2 and 3 below the application of the U.S. securities laws and regulations on the principal methods of effecting business combination transactions. In section 4 we discuss actions that may constitute "U.S. jurisdictional means" for purposes of U.S. federal securities laws and the effect that the existence of jurisdictional means would have on a business combination transaction; in section 5 we discuss certain related matters.

1 TENDER OFFERS

Background

A tender offer generally involves a broad solicitation by a company or an unaffiliated third party to purchase a substantial percentage of a company's securities for a limited period of time.²² As described in more detail below, tender offers are regulated in the United States pursuant to section 14(d) and (e) of the Exchange Act and the SEC's regulations thereunder.

The term "tender offer" is not defined in the U.S. securities laws.²³ Although a purchaser may acquire securities through a variety of means without triggering the tender offer rules, including in negotiated transactions with existing securities holders and through regular market transactions, offers structured in a manner that imposes pressure on security holders to tender their securities will likely fall within the definition. In *Wellman v. Dickinson*²⁴ the U.S. District Court for the

21. See, e.g., Delaware General Corporation Law Section 203, DEL. CODE ANN. tit. 8, § 203 (Michie 2001 & Supp. 2004) (restricting the ability of companies to engage in business combinations involving an interested shareholder for a period of 3 years following the time that such shareholder becomes an interested shareholder).

22. See, e.g., SEC's discussion of tender offers at <http://www.sec.gov/answers/tender.htm>. Consideration offered in a tender offer can be cash, securities or a combination of the two. A tender offer in which at least a portion of the consideration offered consists of securities is referred to in this article as an "exchange offer."

23. But see SEC Release No. 33-6159, Proposed Amendments to Tender Offer Rules, 1979 WL 182307 (Nov. 29, 1979) (proposing a definition of "tender offer" as, among other things, an offer extended to more than 10 persons, which proposed definition was withdrawn from the final rules adopted).

24. 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

Southern District of New York identified eight factors, the existence of one or more of which could indicate the existence of a tender offer. These factors are:

- the active and widespread solicitation of public shareholders for the shares of a company;
- a solicitation made for a substantial percentage of a company's shares;
- an offer to purchase made at a premium over the prevailing market price;
- the terms of the offer are firm rather than negotiable terms;
- the offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;
- the offer is open only for a limited period of time;
- the shareholders are subjected to pressure to sell their shares; and
- public announcements of a purchasing program precede or accompany rapid accumulation of large amounts of the target company's securities.

Application of Section 14(d) and (e) of the Exchange Act

Tender offers are governed principally by section 14(d) and (e) of the Exchange Act.²⁵ Section 14(d) of the Exchange Act and rules adopted by the SEC thereunder (referred to as "Regulation 14D")²⁶ set forth detailed disclosure obligations and procedural requirements. Section 14(d) and Regulation 14D apply in respect of a tender offer for a class of *equity* securities registered under section 12 of the Exchange Act (such securities are referred to as "Registered Securities"),²⁷ pursuant to which the bidder would, after completion of the offer, be the direct or indirect beneficial owner of more than 5 percent of such class of equity securities.

Section 14(e) of the Exchange Act and rules adopted by the SEC thereunder (referred to as "Regulation 14E")²⁸ contain certain anti-fraud and anti-manipulation rules, as well as procedural rules governing tender offers. Section 14(e) and Regulation 14E apply in respect of a tender offer for *any* security,²⁹ whether equity or

25. 15 U.S.C. § 78n(d), (e) (2000 & Supp. III 2003). *See also supra* notes 10 and 12.

26. Exchange Act section 14(d) and Regulation 14D, *supra* note 12, are discussed in detail below. *See* section 1.3 of this article, *infra*.

27. *See* Exchange Act § 12, 48 Stat. at 892 (codified as amended at 15 U.S.C.A. § 78l (West 1997 & Supp. 2006)). Registered Securities include: (i) securities listed on U.S. securities exchanges, such as the NYSE, or that are quoted on Nasdaq, (ii) equity securities not listed on a U.S. securities exchange or quoted on an inter-dealer quotation system, but which are "widely-held" by U.S.-resident investors, (iii) equity securities of certain insurance companies exempt from Exchange Act registration and (iv) equity securities issued by closed-end investment companies registered under the U.S. Investment Company Act of 1940, ch. 686, Title I, 54 Stat. 789 (codified as amended 15 U.S.C.A. §§ 80a-1–80a-64 (West 1997 & Supp. 2006)). *See* 17 C.F.R. § 240.14d-1 (2005). The registration status of a company's securities can be determined by consulting company filings available on public databases or by inquiring of the SEC (including reviewing company filings on the SEC's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") database).

28. Exchange Act § 14(e) and Regulation 14E, *supra* note 10, are discussed in section 1.2 of this article, *infra*.

29. Under U.S. securities laws, "security" is broadly defined and includes, among other instruments, any note, stock or share, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, investment contract, certificate of deposit for a security, as well as any put, call or option on a security. *See* Securities Act § 2(a)(1), 48 Stat. at 74 (codified as amended at 15 U.S.C. § 77b(a)(1) (2000)).

debt and whether issued by a U.S. company or a foreign company, made, directly or indirectly, using U.S. jurisdictional means.³⁰

Tender offers may be stand-alone efforts by a bidder to acquire a certain amount or percentage of a target's securities or, as is more common in the cross-border context, may be an initial step in a merger, acquisition or other combination of businesses or assets.

Registration Requirements of the Securities Act

Section 5 of the Securities Act provides that no security (whether outstanding or newly-issued and whether issued by the bidder or another person) may be offered using U.S. jurisdictional means unless a registration statement relating to the offer has been filed with the SEC, absent an available exemption or exclusion.³¹ A number of exemptions or exclusions may be available for the offer of exchange securities in the context of a tender offer or other business combination transaction, including (i) exclusions for offshore transactions, including offers and sales made outside of the United States pursuant to Regulation S under the Securities Act ("Regulation S"),³² (ii) exemptions for the non-public, private placement of securities to certain "sophisticated" investors,³³ (iii) exemptions for certain cross-border exchange offers and business combination transactions that fall within the exemption provided by Rule 802 under the Securities Act³⁴ and (iv) exemptions for securities issued in certain exchange transactions where, among other things, a court or authorized governmental entity approves the fairness of the terms and conditions of the exchange.³⁵ Registration of securities under the Securities Act may be a lengthy and disclosure-intensive process and in many cases may not be practicable³⁶ in the business combination transaction context for a bidder that has not previously registered securities with the SEC under the Securities Act or is not currently subject to the reporting requirements of the Exchange Act. The registration and other requirements of the Securities Act applicable in the context

30. U.S. jurisdictional means includes the use of the mails and any means or instrumentality of interstate or foreign commerce of the United States (including telephone, fax and the internet to, in or from the United States) or of any facility of a U.S. national securities exchange and is discussed in section 4 of this article, *infra*.

31. Securities Act § 5, 48 Stat. at 77 (codified as amended at 15 U.S.C. § 77e(2000)). See *infra* section 3.1 of this article.

32. Securities Act Regulation S Rules 901 to 905 (codified at 17 C.F.R. § 230.901–905 (2005)).

33. See 15 U.S.C. § 77d(2) (2000) (the "private placement" exemption of Securities Act § 4(2), 48 Stat. at 77, as amended by Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 12, 78 Stat. 565, 580); *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953) (applying section 4(2) with an emphasis on the sophistication and access of the particular group of investors); see also Securities Act Regulation D Rules 501 to 508 (codified at 17 C.F.R. §§ 230.501–508 (2005)).

34. 17 C.F.R. § 230.802 (2005).

35. See Securities Act § 3(a)(10), 48 Stat. at 76 as amended by the Exchange Act, ch. 404, § 202, 48 Stat. 881, 906 (codified as amended at 15 U.S.C.A. § 77c (West 1997 & Supp. 2006)).

36. Registration may be impractical due to timing considerations and for other reasons, including the burden of preparing U.S. GAAP or U.S. GAAP-reconciled financial statements and other disclosure as well as the significant on-going regulatory and disclosure burdens to which a registrant would be subject.

of business combinations are discussed in more detail in sections 2.4 and 3.2 below.

In light of the foregoing, many non-U.S. companies seeking to acquire other offshore companies with limited numbers of U.S. shareholders (or where the participation of U.S. shareholders is not otherwise critical to the success of the transaction) have historically sought to avoid the application of U.S. securities laws, including Regulations 14D and 14E, by excluding U.S. persons from their tender offers and otherwise avoiding U.S. jurisdictional means. The possibility of not involving U.S. jurisdictional means and thereby avoiding the application of U.S. securities laws is described in more detail in section 4 below.

1.1 THE CROSS-BORDER TENDER OFFER RULES

The SEC adopted amendments to the Exchange Act and the Securities Act regulations with effect as of January 2000³⁷ to (i) provide relief from certain of the disclosure and procedural requirements of the Exchange Act and the Securities Act in order to facilitate bidders' compliance with U.S. securities laws and (ii) reduce the circumstances in which bidders determine to exclude U.S. investors from participating in cross-border business combination transactions. Although certain of the provisions codified prior informal SEC guidance, no-action or exemptive relief and SEC interpretive positions, the rules included new, substantive exemptions. The rules do provide many helpful accommodations to participants in cross-border tender offers, but in some cases the rules have proven difficult to apply in practice. On the one hand, the SEC would like to encourage bidders to include U.S. shareholders in their offers; on the other hand, the SEC would like to extend the protections of U.S. federal securities laws to investors. The cross-border rules attempt to balance these competing concerns by focusing relief where U.S. ownership is smallest or where there is a direct conflict between U.S. and foreign regulations.³⁸

The cross-border rules make available certain exemptions from the application of many of the provisions of the Exchange Act and from the registration requirements of the Securities Act in circumstances in which U.S. security holders do not hold more than a specified percentage of the target company's securities. The exemptions provide two levels of relief in the Exchange Act context. Where U.S. security holders of a non-U.S. target hold 10 percent or less (calculated in the manner prescribed by the SEC³⁹ and described below in section 1.1.1 of this article) of the target's securities, the so-called "Tier I" exemption, a bidder may be exempt from substantially all U.S. tender offer regulation.⁴⁰ Where U.S. security holders of a non-U.S. target hold 40 percent or less (calculated in the manner

37. See 17 C.F.R. §§ 240.13e-4(h)(8), (i), 240.14d-1(c), (d), 240.14e-5(b)(10) (2005) (regulations promulgated under the Exchange Act); 17 C.F.R. §§ 230.800–.802 (2005) (regulations promulgated under the Securities Act).

38. See Cross-Border Release, *supra* note 3, at Part II.A.3(c); Part II.A.1.

39. See Exchange Act Rule 13e-4(h)(8), (i) (codified at 17 C.F.R. § 240.13e-4(h)(8), (i) (2005)).

40. See Exchange Act Rule 14d-1(c) (codified at 17 C.F.R. § 240.14d-1(c) (2005)).

prescribed by the SEC and described below) of the target's securities, the so-called "Tier II" exemption, limited relief from Regulations 14E and 14D may be available,⁴¹ but there is no exemption from the registration requirements of the Securities Act. In the Securities Act context, Rule 802 provides exemptions from the registration provisions of the Securities Act if criteria similar to the Tier I criteria are met.⁴² None of the cross-border provisions exempts a bidder from the general anti-fraud, anti-manipulation or civil liability provisions of U.S. securities laws.

The Tier I and Tier II exemptions are available to a bidder only where the target (i) is a *foreign private issuer*⁴³ with (ii) no more than the requisite limited number of U.S.-resident holders of the target's securities ("U.S. holders"). The Tier I exemption is available where U.S. holders hold 10 percent⁴⁴ or less of the target's shares; the Tier II exemption is available where U.S. holders hold 40 percent⁴⁵ or less of the target's shares, in each case calculated in the manner prescribed by the SEC and described in section 1.1.1 below.

1.1.1 DETERMINATION OF U.S. SHAREHOLDING

In order to determine the percentage of U.S. holders, bidders must "look through" the record ownership of certain brokers, dealers and banks (or nominees for any of them) holding securities of the target company for the accounts of their customers and must determine the residency of those customer accounts. Specifically, the obligation to look through record holdings applies to securities held of record by brokers, dealers, banks and nominees located: (i) in the United States, (ii) in the target's country of incorporation and (iii) in the country that is the primary trading market for the target's securities (if different from its home jurisdiction). In the case of business combination transactions not involving a tender offer, the "look through" obligation extends to securities held of record by brokers, dealers, banks and nominees in each country in which a participant to the transaction is organized. The inquiry need extend only to confirming the aggregate amount of the nominee's holding that corresponds to U.S. accounts. The obli-

41. See Exchange Act Rule 14d-1(d) (codified at 17 C.F.R. § 240.14d-1(d) (2005)).

42. Securities Act Rule 802 (codified at 17 C.F.R. § 230.802 (2005)).

43. A "foreign private issuer" is any corporation or other organization incorporated or organized under the laws of a country other than the United States, other than a corporation or other organization more than 50% of the voting securities of which are held of record directly or indirectly by U.S. residents, for which one of the following is true: (i) the majority of its executive officers or directors are U.S. citizens or residents, (ii) more than 50% of its assets are located in the United States or (iii) its business is administered principally in the United States. See Securities Act Rule 405 (codified at 17 C.F.R. § 230.405 (2005)); Exchange Act Rule 3b-4 (codified at 17 C.F.R. § 240.3b-4 (2005)). In calculating record shareholding for these purposes there is an obligation to inquire of broker-dealers, banks and their nominees located in (i) the United States, (ii) the jurisdiction of incorporation of the issuer and (iii) the country in which the primary trading market for the issuer's securities exists; in addition to any U.S. resident holders shown on records maintained by the issuer, securities held by financial intermediaries on behalf of U.S. residents must be counted.

44. See *supra* note 40.

45. See *supra* note 41.

gation to look through requires that “reasonable inquiry” be made of nominees to determine the residency of their account holder customers.⁴⁶

The bidder’s inquiry must include a review of any beneficial ownership reports filed with respect to the target in the United States (in particular, Schedules 13D and 13G and Form 13F)⁴⁷ and filed or available in the target’s home jurisdiction. The bidder should also review security ownership information contained in other materials publicly filed by the target, including, for instance, the target’s annual report on Form 20-F⁴⁸ if the target is subject to Exchange Act reporting obligations. If the tender offer is “friendly”, the bidder should send or request that the target send inquiry letters to brokers, dealers, banks and other nominee holders inquiring as to the aggregate amount of their holdings that correspond to U.S. accounts. If, after reasonable inquiry, the bidder is unable to obtain information about a nominee’s customer accounts, or a nominee’s charges for supplying the information are “unreasonable,” then the bidder may assume that beneficial owners are resident where the nominee has its principal place of business.⁴⁹ In the case of a hostile tender offer, or where the target is unaware of, or does not cooperate with, the bidder’s request, it may be difficult or impossible for the bidder to assess accurately the target’s U.S. shareholding. As discussed below under the caption “Hostile Tender Offers,” in the case of a hostile offer, the bidder may be entitled to rely on certain presumptions.

When to Calculate U.S. Ownership

The Tier I and Tier II exemptions incorporate a 30 calendar day “look back” period for the calculation of U.S. ownership to determine the availability of exemptions. A bidder must make the calculation of U.S. ownership as of 30 calendar days before the commencement of its offer.⁵⁰ In some cases the calculation of U.S. ownership at such time will not, as a practical matter, be possible; in certain cases, therefore, the staff of the SEC (“SEC”) has permitted the calculation to be made as of a date other than 30 calendar days before commencement of the offer. For instance, in a jurisdiction in which security holder information is prepared by third parties, the Staff may permit the U.S. ownership calculation to be based on the latest security holder list available by such parties or to be based on infor-

46. See Exchange Act Rule 14d-1(d), Instructions to Paragraphs (c) and (d) (codified at 17 C.F.R. § 240.14d-1(d) (2005)). A bidder may consider speaking to the Staff of the SEC [hereinafter the “Staff”] for guidance as to what constitutes a “reasonable inquiry” for purposes of Rule 14d-1, particularly in situations where third party brokers, dealers and banks are unaccustomed to inquiries made as to their clients’ holdings and may be prohibited by local law from responding (or not expressly authorized to respond) to such inquiries.

47. See Exchange Act Rule 14d-1, Instruction 2(v) to paragraphs (c) and (d) (codified at 17 C.F.R. § 240.14d-1 (2005)).

48. Form 20-F, available at http://www.sec.gov/about/forms/form_20-f.pdf (17 C.F.R. § 249.220f (2005)). Such reports would be available on the SEC’s EDGAR database.

49. See Exchange Act Rule 14d-1, Instruction 2(iv) to paragraphs (c) and (d) (codified at 17 C.F.R. § 240.14d-1 (2005)).

50. See Exchange Act Rule 14d-1, Instruction 2(i) to paragraphs (c) and (d) (codified at 17 C.F.R. § 240.14d-1 (2005)).

mation requested from such parties with a record date sufficiently in advance of the commencement date to permit the bidder to perform the necessary “look through” procedures;⁵¹ where obtaining U.S. ownership information on the 30th calendar day before commencement is impracticable for reasons outside of the bidder’s control, the Staff has indicated that the bidder may use information as of the closest practicable date to the 30th calendar day or the latest information available.⁵²

Holders of More Than 10 Percent; Bidder Securities

The securities of holders that hold in excess of 10 percent of the target’s securities and any securities held by the bidder are not included in the U.S. holder calculation—in either the numerator or the denominator of the fraction which yields the percentage of U.S. ownership—whether or not such greater than 10 percent shareholders and/or the bidder are U.S. residents.⁵³ Accordingly, a bidder need not inquire of nominees as to information regarding its customers that hold more than 10 percent of the target. On the other hand, the existence of one or more greater than 10 percent shareholders in the target will mean that fewer—and potentially many fewer—than 10 percent of the target’s security holders must be resident in the United States for the Tier I exemption to be available. For example, where there are two large holders who together hold 50 percent of the target’s outstanding securities, the 10 percent test under Tier I and Rule 802 will be assessed on the basis of the remaining 50 percent shareholding. Therefore, the exemptions provided by Tier I and Rule 802 would not be available if U.S. persons held over 10 percent of the remaining 50 percent, amounting to 5 percent of the target’s outstanding securities.

American Depositary Shares; Convertible or Exchangeable Securities

In many cases, securities of a foreign private issuer are represented in the United States by American Depositary Shares (“ADSs”). Each ADS represents a specific

51. See *Equant N.V.*, SEC No-Action Letter, 2005 WL 1173099, at *6 (April 18, 2005) (where an assessment of U.S. shareholders effected 52 days prior to solicitation related to a business combination “represented the nearest practicable date upon which to base the calculation . . . and any later date might not allow sufficient time to ensure proper calculation of U.S. ownership as required”).

52. See Telephone Interpretations, Third Supplement, July 2001 [hereinafter the “Third Supplement”], Questions II.E.7 and II.E.8, available at <http://www.sec.gov/interp/telephone/phonesupplement3.htm>. See also *Saipem SpA*, SEC No-Action Letter, 2002 WL 1841561 (July 29, 2002); *Equant N.V.*, *supra* note 51. With respect to business combinations involving a number of steps, see *infra* note 186 and accompanying text.

53. See *supra* note 52, Instruction 2(ii) to paragraphs (c) and (d). See also Third Supplement, *supra* note 52, Questions II.E.1 through II.E.5 regarding the calculation of U.S. ownership. The SEC expressed its concern that a foreign private issuer could have a significant majority of its securities held by controlling non-U.S. shareholders, as a result of which U.S. shareholders could represent a significantly greater percentage of the issuer’s non-affiliated public float. To address this, the SEC adopted provisions that exclude from U.S. beneficial ownership calculations all security holders holding in excess of 10 percent of the class of securities subject to the tender offer. See SEC Release No. 33-7611, 63 Fed. Reg. 69136, Part II.H.2 (Dec. 15, 1998).

number of shares of the issuer, held by a depositary on behalf of the ADS holders.⁵⁴ Bidders are required to examine the participant lists of depositaries for the target's American depositary receipt program, if any, and must make inquiries of brokers, dealers and other nominees appearing on those lists to determine the number of ADSs held by U.S. holders. Securities underlying ADSs must be counted in determining both the aggregate number of securities outstanding and the number of U.S. holders.⁵⁵ A bidder is not required to take into account securities other than ADSs that are convertible into, or exchangeable for, the securities to which the offer relates, including warrants, options, and convertible securities, unless such securities are themselves the subject of the tender offer.⁵⁶

Hostile Tender Offers

In the case of a hostile tender offer, a bidder is entitled to rely on a presumption that the issuer of the subject securities is a foreign private issuer and that the U.S. ownership percentage limits of the Tier I or Tier II exemption are not exceeded unless: (i) the aggregate trading volume on all U.S. national securities exchanges, Nasdaq or the OTC Bulletin Board ("OTCBB"), as reported to the National Association of Security Dealers ("NASD"), exceeds 10 percent (in the case of Tier I) or 40 percent (in the case of Tier II) of the worldwide trading volume of the class of securities subject to the tender offer over the 12-calendar month period ending 30 calendar days prior to commencement of the tender offer; (ii) the most recent annual report filed or submitted by the target (or security holders of the target's securities) with the SEC or regulators in the target's home jurisdiction indicates that U.S. holders hold more than 10 percent (in the case of Tier I) or 40 percent (in the case of Tier II) of the outstanding subject securities; or (iii) the bidder knows or has reason to know that the level of U.S. holding exceeds the applicable threshold.⁵⁷ In the absence of the availability of this presumption, the target shareholder information necessary to assess the bidder's ability to rely on the Tier I or Tier II exemptions may not be available without the express cooperation of the target. In a hostile transaction, therefore, in the absence of the presumption discussed above, a target may determine to withhold shareholder information, making Tier I or Tier II relief unavailable to the bidder, as a defensive mechanism.

Practical Difficulties

In practice, quantifying the number of U.S. holders has proven problematic for a number of reasons. First, non-U.S. companies may not be required to maintain

54. In common usage, an ADS refers to the security that represents the ownership interest in the underlying, deposited security; an "American Depositary Receipt" refers to the physical certificate that evidences an ADS. ADSs provide a number of benefits, including a U.S. transfer facility, an appropriate trading unit, the ability to obtain dividends and other distributions in U.S. currency, and in some instances the ability to avoid home jurisdiction transfer taxes.

55. See Exchange Act Rule 14d-1, Instruction 2(ii) to paragraphs (c) and (d) (codified at 17 C.F.R. § 240.14d-1 (2005)).

56. *Id.*

57. See Exchange Act Rule 14d-1, Instruction 3 to paragraphs (c) and (d) (codified at 17 C.F.R. § 240.14d-1 (2005)).

a share register of the record holders of their securities. Although there may be statutory procedures available to companies to obtain information from their shareholders as to their holdings (for instance, section 212 under the United Kingdom Companies Act 1985⁵⁸) or from the clearing systems through which the target's securities are settled,⁵⁹ such procedures may not result in an accurate snapshot of beneficial ownership as of a specified or even particular date.⁶⁰ Second, once the record ownership of a company's securities is established, it may take several weeks or more to complete the "look through" procedures mandated by the SEC's rules. In many cases, a company may need to rely on the voluntary cooperation of brokers, dealers and other nominees for information as to the residency of their customers and, in many cases, such cooperation may not be forthcoming. For instance, European bank secrecy and privacy laws⁶¹ may restrict the ability of nominees to cooperate with such requests. Third, in many cases, procedures required to be performed first to determine a company's record security holders and then to look through such record holders to determine the number of U.S. holders may take much longer than 30 calendar days, making it impossible for a bidder to quantify the number of U.S. holders 30 calendar days before the commencement of its offer.⁶² Fourth, instructing third parties in connection with effecting a count of U.S. holders on a date 30 calendar days prior to commencement may compromise the confidentiality of the transaction, forcing a bidder to make a premature announcement and commence its offer before it might otherwise seek to do so.⁶³ Finally, having to make an assessment as of a particular date may make planning for a cross-border transaction difficult. A bidder may be required to engage in a considerable undertaking to comply with the U.S. securities laws if a target's U.S. ownership is in excess of the applicable standards. Therefore, the bidder must have a clear understanding of the target's status as of a point in time significantly prior to 30 calendar days before commencement of the offer. In addition, the bidder should be confident that an exemption available at the time the transaction is planned will not subsequently cease to be available due to movements of securities holdings in the intervening period or due to new information having become available. The Staff has made allowances in certain

58. Companies Act 1985, c.40 (Eng.). Section 212 of the Companies Act permits a company by written notice to require a person to confirm whether s/he has in the 3 years preceding the date of notice whether s/he has an interest in the shares of the company and to provide certain other information as to her/his interest.

59. For instance, a report known as a *Titre au Porteur Identifiable* (a "TPI Report") can be requested from Euroclear Bank S.A./N.V. ("Euroclear"). The TPI Report sets forth, among other information, the names of persons that hold, either for themselves or as nominees, securities of a company through the Euroclear system.

60. For instance, nominees holding through Euroclear or Clearstream Banking AG may be unable or unwilling to provide information as to their beneficial owner customers as of a specified date.

61. Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), in No. L 281 OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES 31 (Nov. 23, 1995)

62. See *Equant N.V.*, *supra* note 51. The difficulties encountered in determining the U.S. ownership are also described in the counsel inquiry letters in connection with the SEC No-Action Letters relating to *Saipem SpA*, *supra* note 52, and *Alcan, Inc.*, SEC No-Action Letter, 2003 WL 22480558 (Oct. 8, 2003).

63. See, e.g., City Code, *supra* note 8, Rule 2.

circumstances.⁶⁴ In the absence of rulemaking in this area, parties to a business combination transaction may need to approach the Staff for guidance where they anticipate such issues.

1.1.2 THE TIER I EXEMPTION

Availability

The Tier I exemption is available where (i) the target is a foreign private issuer and (ii) U.S. holders hold 10 percent or less (calculated in the manner prescribed by the SEC) of the target's securities for which the tender offer is being made, whether or not the target's securities are Registered Securities.⁶⁵ Where the Tier I exemption is available, a bidder is generally able, subject to certain procedural requirements, to extend its offer to shareholders in the United States solely in compliance with substantive "home country" procedures and requirements. The bidder will not be subject to any of the specified disclosure, dissemination and SEC filing, minimum offer period or mandatory withdrawal rights obligations that are designed to ensure that security holders are provided with adequate disclosure and sufficient time to consider whether or not to participate in a tender offer. If an exchange offer is contemplated, an offer satisfying the Tier I exemption will generally also be exempt from the registration requirements of the Securities Act by Rule 802 described below in section 2.1 of this article.

Subsequent Bidder

In order to provide a level playing field in the case of competing offers, if an initial bidder relies on the Tier I exemption to make its offer, a subsequent, competing bidder will not be subject to the 10 percent ownership limitation condition of the Tier I exemption.⁶⁶ As a result, the subsequent bidder will not be disadvantaged by any movement of securities into the United States following the announcement of the initial bidder's offer.

Offering Materials

Offering materials, in English,⁶⁷ must be provided to shareholders in the United States on a basis comparable to that provided to shareholders in the home juris-

64. For instance, in order to provide certainty as to the availability of exemptions in the context of pre-conditional offers in the United Kingdom and certain other jurisdictions (i.e., where, pursuant to local regulation, an offer is announced, but commences only after certain regulatory approvals have been obtained), the Staff has indicated that it will permit the calculation of U.S. ownership to be made on the date that is 30 calendar days prior to announcement. See Third Supplement, *supra* note 52, Question II.E.6. See also Air Products and Chemicals, Inc., SEC No-Action Letter, 1999 WL 498543 (July 12, 1999).

65. Exchange Act Rule 14d-1(c) (codified at 17 C.F.R. § 240.14d-1(c) (2005)).

66. See Exchange Act Rule 14d-1(c)(1) (codified at 17 C.F.R. § 240.14d-1(c)(1) (2005)).

67. Such offering materials must be translated into English if they are not already in English. Exchange Act Rule 14d-1(c)(3)(i) (codified at 17 C.F.R. § 240.14d-1(c)(3)(i) (2005)) provides that "[t]he bidder must disseminate any informational document to U.S. holders, including any amendments thereto, in English, on a comparable basis to that provided to security holders in the home jurisdiction."

diction. These materials would typically contain certain customary or mandated legends advising U.S. shareholders as to the basis of their preparation.⁶⁸ Financial information can be presented in accordance with home jurisdiction generally accepted accounting principles without reconciliation to U.S. generally accepted accounting principles ("U.S. GAAP").⁶⁹

Equal Treatment; Exceptions

Shareholders in the United States must be permitted to participate in the tender offer on terms *at least as favorable* as those offered to other shareholders, subject to certain exceptions:

- *Cash-Only Alternative.* A bidder may offer U.S. shareholders only cash consideration if it has a reasonable basis⁷⁰ for believing that the amount of cash offered is substantially equivalent to the value of the shares or other consideration offered to non-U.S. holders, subject to certain conditions.⁷¹
- *Blue Sky Exemption.* In certain circumstances, a bidder may exclude shareholders in the United States resident in states of the United States that do not exempt the securities offered as consideration from state securities registration requirements. However, if a cash-only alternative is offered to a U.S. holder in any state, that consideration must be provided to all U.S. holders in every state.⁷²
- *Loan Notes Exception.* In the United Kingdom, it is customary for a bidder to offer a loan note alternative in an offer where at least a portion of the offer consideration consists of cash.⁷³ Loan notes afford certain tax benefits to holders subject to United Kingdom taxation. The Tier I exemption permits the issuance of a loan note alternative exclusively to non-U.S. security holders so long as the loan notes are not listed on an exchange, are not registered under the Securities Act and are offered solely to offer target shareholders tax advantages not available in the United States.⁷⁴

68. See, e.g., Securities Act Rule 802(a)(3) (codified at 17 C.F.R. § 230.802(a)(3) (2005)) (which mandates that certain legends be provided in the case of an exchange offer exempt from the registration requirements of the Securities Act).

69. See Cross-Border Release, *supra* note 3, at n.22.

70. As a practical matter, the opinion of an independent expert may be required to support the bidder's determination of substantial equivalence.

71. The exception is available if the offered security is a "margin security" or if, on request, an opinion is provided to the effect that the cash alternative is substantially equivalent to the value of the securities offered outside the United States. See Exchange Act Rule 14d-1(c)(2)(iii) (codified at 17 C.F.R. § 240.14d-1(c)(2)(iii) (2005)).

72. See Exchange Act Rule 14d-1(c)(2)(i) and (ii) (codified at 17 C.F.R. § 240.14d-1(c)(2)(i), (ii) (2005)).

73. See Cross-Border Release, *supra* note 3 (acknowledging the common use of loan notes in the United Kingdom). See also GARY EABORN, TAKEOVERS: LAW AND PRACTICE § 11.22 (LexisNexis Butterworths, 1st ed. 2005).

74. See Exchange Act Rule 14d-1(c)(2)(iv) (codified at 17 C.F.R. § 240.14d-1(c)(2)(iv) (2005)). In addition to the foregoing provisions regarding equal treatment, if a bidder commences a tender offer for securities of a foreign private issuer and initially excludes U.S. security holders but thereafter chooses to extend the offer into the United States during the pendency of the foreign offer, the equal

Filing Requirements

If the target's securities are Registered Securities, then, in addition to providing English language offering materials to shareholders in the United States, a bidder must submit offering materials in English to the SEC under cover of Form CB no later than the business day after the offering materials were published or disseminated in the home jurisdiction.⁷⁵ If the bidder is a non-U.S. company, the bidder must also file with the SEC a consent to service of process in the United States on Form F-X and appoint an agent for service of process in the United States.⁷⁶ There is no fee for submitting Form CB or Form F-X. If the target's securities are not Registered Securities, the bidder's offer document does not need to be submitted to the SEC. A bidder does not incur "prospectus liability"⁷⁷ in respect of offering materials submitted to the SEC under cover of Form CB, but may be liable under applicable anti-fraud rules.⁷⁸

Target's Response

The target company's management may distribute to its security holders its recommendation relating to the bidder's offer without complying with the disclosure requirements of Regulation 14E⁷⁹ and without filing its recommendation with the SEC on, or containing the specific disclosure mandated by, Schedule 14D-9.⁸⁰

Purchases Outside of the Tender Offer

Rule 14e-5 under the Exchange Act prohibits a bidder from purchasing or arranging to purchase, directly or indirectly, any security of the class that is subject to the bidder's offer otherwise than pursuant to the tender offer.⁸¹ The prohibition applies from the time the tender offer is publicly *announced* until it is terminated.⁸² Rule 14e-5 applies generally to the bidder, the bidder's advisers (so long as the advisers' compensation is dependent upon completion of the offer) and dealer-managers and their respective affiliates. The SEC has consistently taken the view

treatment provisions would generally require the U.S. offer to be open for at least as many days as the minimum period permitted by the foreign jurisdiction. The Staff has noted that because such treatment of U.S. holders may result in a violation of the foreign jurisdiction's rules, it will consider relief on a case-by-case basis. Third Supplement, *supra* note 52, Question II.B.1.

75. See Exchange Act Rule 14d-1(c)(3)(iii) (codified at 17 C.F.R. § 240.14d-1(c)(3)(iii) (2005)).

76. *Id.*

77. Securities Act §§ 11 and 12(a), 48 Stat. at 82–84 (codified as amended at 15 U.S.C. §§ 77k and 77l (2000)).

78. See *infra* section 2.4.2 of this article for a discussion of prospectus liability.

79. See Exchange Act Rule 14e-2(d) (codified at 17 C.F.R. § 240.14e-2(d) (2005)). Exchange Act Rule 14e-2 would otherwise require management to distribute to its security holders its recommendation relating to the bidder's offer no later than 10 U.S. business days from the date the offer was first published, sent or given to target security holders.

80. See Exchange Act Rule 14d-9 (codified at 17 C.F.R. § 240.14d-9 (2005)). Schedule 14D-9 requires disclosure relating to, *inter alia*, the relationship between the bidder and the target company, the bidder's interest in the securities of the target company, the target's position with respect to the offer and the purposes of the transaction. 17 C.F.R. § 240.14d-101 (2005).

81. See Exchange Act Rule 14e-5(b)(10) (codified at 17 C.F.R. § 240.14e-5(b)(10) (2005)).

82. 17 C.F.R. § 240.14e-5(a) (2005).

in discussions with practitioners that if a tender offer is made in the United States, Rule 14e-5 applies to all purchases, whether inside or outside of the United States, with the exceptions noted below.

There are a number of express exceptions to the broad prohibition on purchases outside of the tender offer.⁸³ In addition, the Tier I exemption provides blanket relief in respect of purchases outside of a tender offer during the offer, *including in the United States*, as long as each of the following conditions is satisfied:⁸⁴

- offering materials provided to U.S. holders disclose prominently the possibility of purchases or arrangements to purchase, or the intent to make such purchases, other than in accordance with the terms of the tender offer;
- offering materials explain how information about any such purchases will be disclosed;
- the bidder discloses in the United States information as to any such purchases or arrangements in a manner comparable to information provided by the bidder in the target's home jurisdiction; and
- all such purchases comply with applicable laws and regulations in the target's home jurisdiction.

In the United Kingdom and in other non-U.S. jurisdictions, there is an established practice whereby holders (including, in many cases, senior management) of target securities provide "irrevocable undertakings" to tender into the bidder's offer at the offer price for no additional consideration.⁸⁵ Such undertakings may be truly irrevocable or may be irrevocable subject only to a higher competing offer not being made.⁸⁶ Parties may seek to enter into such arrangements prior to commencement of the offer or subsequently. These undertakings are typically deemed to constitute tenders into the bidder's offer and hence are not restricted by Rule 14e-5's prohibition on purchases *outside* of the bidder's offer, but the form and method of soliciting such undertakings should be considered carefully to ensure that they fall within the scope of arrangements the Staff has approved in the past.⁸⁷

83. See Exchange Act Rule 14e-5(b) (codified at 17 C.F.R. § 240.14e-5(b) (2005)). For instance, Exchange Act Rule 14e-5(b)(6) (codified at 17 C.F.R. § 240.14e-5(b)(6) (2005)) provides express relief for purchases by connected market makers and connected exempt principal traders in connection with a tender offer subject to the City Code. Exchange Act Rule 14e-5(b)(7) (codified at 17 C.F.R. § 240.14e-5(b)(7) (2005)) provides express relief for purchases made after the public announcement of an offer pursuant to unconditional and binding contracts entered into before the announcement, the material terms of which are disclosed in the bidder's offering materials.

84. See Exchange Act Rule 14e-5(b)(10) (codified at 17 C.F.R. § 240.14e-5(b)(10) (2005)). See also Cross-Border Release, *supra* note 3, Part II.A.3(c) and Part II.C.1(a).

85. Such arrangements may help a bidder ensure the success of its offer. See, e.g., Profit Eagle Limited, SEC No-Action Letter, 2005 WL 3500565 (Dec. 20, 2005); Compagnie de Saint-Gobain, SEC No-Action Letter, 2005 WL 1878292 (Aug. 3, 2005); United Technologies Corporation for Kidde plc, SEC No-Action Letter, 2005 WL 38836 (Jan. 5, 2005); Harmony Gold Mining Company Limited, SEC No-Action Letter, 2004 WL 2809186 (Nov. 19, 2004).

86. See *Harmony Gold Mining Company Limited*, *supra* note 85; *id.*, St. David Capital plc, SEC No-Action Letter 2000 WL 462994 (Apr. 17, 2000); Third Supplement, *supra* note 52, Question I.L.4.

87. See Third Supplement, *supra* note 52, Question I.L.4. See also United Technologies SEC No-Action Letter, 2004 WL 326676 (Feb. 18, 2004); UCB S.A., SEC No-Action Letter, 2004 WL 1161232 (May 19, 2004); *St. David Capital plc*, *supra* note 86.

In addition, in the authors' experience, the Staff may provide informal oral "relief" under Rule 14e-5 in circumstances permitting a bidder to enter into arrangements to purchase the target's securities from a limited number of shareholders after announcement of the tender offer, but prior to the commencement thereof, so long as such arrangements are publicly disclosed and the consideration paid is identical to the consideration to be provided in the tender offer.

1.1.3 THE TIER II EXEMPTION

Availability

The Tier II exemption is available where (i) the target is a foreign private issuer and (ii) U.S. holders hold 40 percent or less⁸⁸ of the target's securities for which the tender offer is being made.⁸⁹ Although a bidder remains generally subject to the U.S. tender offer rules, certain accommodations are provided to address traditional areas of conflict between non-U.S. tender offer rules and U.S. tender offer rules. These accommodations are described in sections 1.2 and 1.3 below as part of the discussion of the substantive provisions of Regulation 14D and Regulation 14E. If an exchange offer is contemplated, an offer satisfying the Tier II exemption will not be exempt from the registration requirements of the Securities Act by virtue of Rule 802.⁹⁰

Loan Note Exception

As is the case with the Tier I exemption, the Tier II exemption permits the issuance of a loan note alternative to non-U.S. security holders only if the loan notes are not listed on an exchange, are not registered under the Securities Act and are offered solely to afford target shareholders tax advantages not available in the United States.⁹¹

Subsequent Bidder

Consistent with the relief provided by the Tier I exemption, a level playing field is provided in the case of competing offers. If an initial bidder relies on the Tier II exemption to make its offer, a subsequent, competing bidder will not be subject to the 40 percent ownership limitation condition of the Tier II exemption. As a result, the subsequent bidder will not be disadvantaged by any movement of securities into the United States following announcement of the initial bidder's offer.⁹²

88. Such percentage must be calculated in the manner prescribed by the SEC, as discussed in section 1.1.1 of this article *supra*.

89. See Exchange Act Rule 14d-1(d)(1)(i), (ii) (codified at 17 C.F.R. § 240.14d-1(d)(1)(i), (ii) (2005)).

90. See Securities Act Rule 802 (codified at 17 C.F.R. § 230.802 (2005)).

91. See Exchange Act Rule 14d-1(d)(2)(i) (codified at 17 C.F.R. § 240.14d-1(d)(2)(i) (2005)).

92. See *supra* note 89.

1.2 PROVISIONS APPLICABLE TO TENDER OFFERS FOR ALL SECURITIES

All tender offers that utilize U.S. jurisdictional means, including offers for non-Registered Securities (to which Exchange Act section 14(d) and Regulation 14D do not apply), are subject to Exchange Act section 14(e) and Regulation 14E. These requirements are described below, along with any express relief from such requirements afforded to transactions that fall within the Tier II exemption.⁹³

1.2.1 MINIMUM OFFER PERIOD

Rule 14e-1(a) provides that a tender offer must remain open for a minimum of 20 U.S. business days from the time the tender offer commences.⁹⁴ There is, however, no specified time by which a tender offer must be completed. The term “U.S. business day” means any day other than Saturday, Sunday or a U.S. federal holiday and consists of the time period from 12:01 a.m. through 12:00 midnight Eastern (New York City) time.⁹⁵

1.2.2 NOTICE OF EXTENSIONS

Rule 14e-1(b) provides that a tender offer must remain open for at least 10 U.S. business days after any announcement of a change in (i) the consideration offered, (ii) the percentage of the securities being sought or (iii) the dealer’s soliciting fee.⁹⁶ Under Rule 14e-1(d), a bidder may extend its offer by announcing such extension by a press release or other public announcement before the earlier of (i) 9:00 a.m. Eastern time or (ii) the opening of trading on the next business day.⁹⁷ The Tier II exemption permits a bidder to announce extensions to its offer in accordance with market practice in the target’s home jurisdiction instead.⁹⁸

The SEC permits⁹⁹ a bidder who qualifies for the Tier II exemption to reduce or waive the condition of the offer relating to the minimum number of shares tendered (the “minimum condition”)¹⁰⁰ without extending withdrawal rights during the remainder of the offer or keeping the offer open for 10 U.S. business days, as long as each of the following conditions is satisfied:

93. As discussed in section 1.1.2 of this article, *supra*, the Tier I exemption relieves bidders from complying with Rule 14e-1 and 14e-2 and, subject to certain conditions, Rule 14e-5, of Regulation 14E; the Tier II exemption, on the other hand, provides only limited relief from complying with Regulation 14E.

94. See Exchange Act Rule 14e-1(a) (codified at 17 C.F.R. § 240.14e-1(a)(2005)).

95. See Exchange Act Rule 14d-1(g)(3) (codified at 17 C.F.R. § 240.14d-1(g)(3)(2005)).

96. See Exchange Act Rule 14e-1(b) (codified at 17 C.F.R. § 240.14e-1(b)(2005)).

97. See Exchange Act Rule 14e-1(d) (codified at 17 C.F.R. § 240.14e-1(d)(2005)).

98. See Exchange Act Rule 14d-1(d)(2)(ii) (codified at 17 C.F.R. § 240.14d-1(d)(2)(ii) (2005)).

99. See Cross-Border Release, *supra* note 3, paragraph II.B.

100. In the United Kingdom, a tender offer is typically structured to enable a bidder to waive the minimum condition once it has received sufficient tenders to provide it with control of the target. Immediately upon receipt of sufficient shares to provide the bidder with control and waiver of the minimum condition, all offer conditions are deemed to have been satisfied, tendered securities are accepted and settlement commences. See, e.g., SERENA Software, Inc., SEC No-Action Letter, 2004 WL 842524 (Apr. 13, 2004).

- the bidder has announced that it may reduce the minimum condition at least 5 U.S. business days prior to the time that it reduces the condition;
- such announcement is disseminated through a press release and other methods reasonably designed to inform U.S. holders;
- the press release states the exact percentage to which the acceptance condition may be reduced and states that a reduction is possible; it must also advise security holders that have tendered their target securities to withdraw their tendered securities immediately if their willingness to tender would be affected by a reduction in the minimum condition;
- security holders that have tendered their securities must continue to have the right to withdraw their tenders for a 5 U.S. business day period following the announcement;
- the offer document must contain a description of the procedure for reducing the minimum condition; and
- the bidder must afford target security holders the opportunity to tender their shares for at least 5 U.S. business days after waiver of the minimum condition.

1.2.3 PROMPT PAYMENT OF CONSIDERATION

Rule 14e-1(c) provides that consideration be paid or securities be returned promptly after termination or withdrawal of the offer.¹⁰¹ In the authors' experience, "promptly" has generally been construed by practitioners to mean within 5 U.S. business days. The Tier II exemption permits a bidder to comply instead with the settlement requirements of the target's home jurisdiction, which may be materially in excess of 5 U.S. business days.¹⁰²

1.2.4 RESPONSE OF THE TARGET COMPANY

Pursuant to Rule 14e-2, within 10 U.S. business days after commencement, the target must publish or give its security holders a statement that it (i) recommends acceptance or rejection of the bidder's offer, (ii) expresses no opinion and is remaining neutral toward the bidder's offer or (iii) is unable to take a position with respect to the bidder's offer.¹⁰³

1.2.5 GENERAL ANTI-FRAUD PROVISIONS

The general anti-fraud provisions of the Exchange Act, including section 14(e), section 10(b) and Rule 10b-5¹⁰⁴ thereunder, prohibit, in connection with any

101. See Exchange Act Rule 14e-1(c) (codified at 17 C.F.R. § 240.14e-1(c) (2005)).

102. See Exchange Act Rule 14d-1(d)(2)(iv) (codified at 17 C.F.R. § 240.14d-1(d)(2)(iv) (2005)).

103. See Exchange Act Rule 14e-2(a) (codified at 17 C.F.R. § 240.14e-2(a) (2005)).

104. See Exchange Act § 14(e), 48 Stat. at 895 as added by the Williams Act, *supra* note 9, 82 Stat. at 457 (codified as amended at 15 U.S.C. § 78n (2000 & Supp. III 2003)); Exchange Act § 10(b), 48 Stat. at 891 (codified as amended at 15 U.S.C. § 78j (2000)); Exchange Act Rule 10b-5 (codified at 17 C.F.R. § 240.10b-5 (2005)).

tender offer, the bidder or its agents from making any untrue statement of a material fact or omitting to state any material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading. Similarly, bidders must not engage in any deceptive or manipulative practices and sufficient notice and time to react must be given to target shareholders in connection with any change in consideration or other material terms of the offer.¹⁰⁵ Rule 14e-3 establishes a “disclose or abstain from trading” requirement that prohibits a bidder and its directors, officers and agents from trading while in possession of material non-public information about the target.¹⁰⁶

1.2.6 PURCHASES OUTSIDE OF THE OFFER

Rule 14e-5 under the Exchange Act¹⁰⁷ prohibits a bidder from purchasing or arranging to purchase, directly or indirectly, any security of the class that is subject to the bidder’s offer otherwise than pursuant to the tender offer. This prohibition applies from the time the tender offer is announced until it is terminated.¹⁰⁸ In some European jurisdictions, market custom is such that several weeks or more may pass between the date on which an offer is announced and the date of commencement.¹⁰⁹ In such circumstances, Rule 14e-5 will restrict purchases by the bidder and its affiliates. The Tier II exemption does not provide any exemption from Rule 14e-5. Rule 14e-5 does, however, provide specific relief for certain market transactions customarily effected by participants in a U.K. tender offer, even in a transaction not falling within the Tier I exemption. In particular, in an offer subject to the City Code, connected exempt market-makers and connected exempt principal traders can continue to make markets in the target’s securities, subject to certain disclosure obligations.¹¹⁰ In addition, the SEC has granted relief under Rule 14e-5 in transactions not falling within the Tier I exemption on certain conditions¹¹¹ and has indicated it will

105. See Exchange Act § 14(e), *supra* note 104; Exchange Act Rule 14e-1 (codified at 17 C.F.R. § 240.14e-1 (2005)).

106. See Exchange Act Rule 14e-3 (codified at 17 C.F.R. § 240.14e-3 (2005)).

107. Exchange Act Rule 14e-5 (codified at 17 C.F.R. § 240.14e-5 (2005)).

108. See Exchange Act Rule 14e-5(a) (codified at 17 C.F.R. § 240.14e-5(a) (2005)).

109. In the United Kingdom, for example, Rule 30.1 of the City Code, *supra* note 8, provides that an offer document must be posted within 28 days from announcement of a bidder’s firm intention to make an offer.

110. See Exchange Act Rule 14e-5(b)(9) (codified at 17 C.F.R. § 240.14e-5(b)(9) (2005)).

111. See, e.g., Vodafone Group plc, SEC No-Action Letter, 2003 WL 1029613 (Mar. 11, 2003); CIBER (UK), SEC No-Action Letter, 2003 WL 202571 (Jan. 31, 2003); and DB Sechste Vermögensverwaltungsgesellschaft mbH, SEC No-Action Letter, 2002 WL 1880505, (Aug. 9, 2002). Conditions to the grant of an exemption include, *inter alia*, (i) that no purchases of shares or arrangements to purchase shares be made in the United States; (ii) that no purchases of shares be made at a price per share higher than that offered in the offer; (iii) that the offer document disclose prominently the intention to make such purchases; and (iv) that the bidder provide to the Staff, upon request, a detailed list of all such purchases. See also *Harmony Gold Mining Company Limited*, *supra* note 85, where in the context of bifurcated offers the Staff granted relief under Rule 14e-5 to permit purchases in the non-U.S. offer while the U.S. offer was pending. In *Mittal Steel Company N.V.* SEC No-Action Letter (June 22, 2006), available at <http://www.sec.gov/divisions/marketreg/mr-noaction/mittal062206.pdf>, the Staff granted blanked no-action relief in the multiple offer context, subject to certain conditions. See also section 1.3.5 of this article, *infra*.

continue to consider requests for relief from Rule 14e-5 on a case-by-case basis.¹¹²

In an exchange offer or other business combination transaction pursuant to which securities are offered in the United States, Regulation M¹¹³ under the Exchange Act may apply. Regulation M prohibits a bidder and its financial advisers from bidding for, purchasing or attempting to induce others to bid for or purchase any securities of the class offered in exchange for the target's securities¹¹⁴ from 1 or 5 U.S. business days before the date of commencement of the offer until the offer expires or the business combination transaction is completed. There are a number of exemptions to Regulation M, including in respect of "actively-traded reference securities."¹¹⁵

1.3 ADDITIONAL PROVISIONS APPLICABLE TO TENDER OFFERS FOR REGISTERED SECURITIES

A tender offer by a bidder for any Registered Securities that is not exempt pursuant to the Tier I exemption must comply not only with the requirements of Exchange Act section 14(e) and Regulation 14E, but also with Exchange Act section 14(d) and Regulation 14D. These requirements, and any express relief from such requirements afforded to transactions that fall within the Tier II exemption, are described below.

In addition to the foregoing obligations, if the tender offer or request for tenders is made by a bidder or an affiliate of a bidder for Registered Securities and is not eligible for the Tier I exemption, the transaction may also be subject to Exchange Act Rule 13e-3¹¹⁶, if the tender offer would result in the issuer "going private"¹¹⁷. If the transaction is subject to Exchange Act Rule 13e-3, a bidder or its affiliate would be required to file with the SEC a Schedule 13E-3¹¹⁸, setting forth information regarding the offer, and disclose certain information to security holders of

112. See Cross-Border Release, *supra* note 3, paragraph II.B (noting "[t]o the extent that an offerer needs additional relief from that provided in Tier II, the staff, pursuant to delegated authority, will consider applications for exemptions on a case-by-case basis").

113. Exchange Act Regulation M (codified at 17 C.F.R. §§ 242.100–105 (2005)). A full discussion of Regulation M in the context of an exchange offer or other business combination transaction is beyond the scope of this article.

114. "Covered securities" include other securities into which the reference securities may be converted or exchanged or for which the reference securities may be exercised. See Regulation M Rule 100(b) (codified at 17 C.F.R. § 242.100(b) (2005)).

115. See Regulation M Rule 102 (codified at 17 C.F.R. § 242.102(d)(1) (2005)).

116. Exchange Act Rule 13e-3 (codified at 17 C.F.R. § 240.13e-3 (2005)).

117. The effects referred to in Rule 13e-3 are causing any class of equity securities of the issuer that is subject to section 12(g) or 15(d) of the Exchange Act to be held of record by less than 300 persons, or causing any class of equity securities of the issuer that is either listed on a national securities exchange or authorized to be quoted in an inter-dealer quotation system of any registered national securities association to be neither so listed nor so authorized. Exchange Act Rule 13e-3(a)(ii) (codified at 17 C.F.R. § 240.13e-3(a)(ii) (2005)).

118. See Exchange Act Rule 13e-3(d) (codified at 17 C.F.R. § 240.13e-3(d) (2005)). Schedule 13E-3 is available at <http://www.sec.gov/about/forms/sched13e-3.pdf>.

the class of securities that is the subject of the transaction, as well as to comply with various anti-fraud provisions set forth in Rule 13e-3.¹¹⁹

1.3.1 ANNOUNCEMENTS AND TENDER OFFER DOCUMENTS

A bidder is deemed to have commenced a tender offer when the bidder first publishes, sends or gives to target security holders transmittal forms or discloses instructions as to how to tender securities into the offer.¹²⁰ A bidder must file with the SEC a tender offer statement on Schedule TO on the date of commencement of the offer.¹²¹ The U.S. "offer to exchange" forms a substantial part of Schedule TO¹²² and must be disseminated to the target's U.S. security holders as soon as practicable on the date of commencement of a tender offer.¹²³ Dissemination is typically effected by posting or other delivery of the offer to exchange to the target's shareholders and in certain circumstances by summary publication in a U.S. newspaper with national circulation. To facilitate such distribution, the target may elect either to provide the bidder with its shareholder list or to distribute the bidder's offer to exchange to its shareholders on behalf of the bidder.¹²⁴ In the case of an exchange offer, the offer to exchange will also constitute the bidder's preliminary prospectus under the Securities Act. After commencement of the offer, the bidder is obliged to report promptly on Schedule TO material changes to information previously filed with the SEC, including additional tender offer materials, such as press releases, investor presentations and similar materials relating to the tender offer.¹²⁵

A bidder must file on Schedule TO any press announcements and other written communications regarding a tender offer prior to its commencement no later than the date of first use of the communication.¹²⁶ Each pre-commencement written communication must include a prominent legend advising security holders to read the tender offer statement when it becomes available because it contains important information.¹²⁷ The legend must also advise security holders that they can obtain copies of the tender offer statement and other documents on the SEC's website and explain which documents may be obtained free of charge from the bidder.¹²⁸

119. Rule 13e-3 sets forth various exceptions and additional conditions. A detailed discussion of Exchange Act Rule 13e-3 is beyond the scope of this article.

120. See Exchange Act Rule 14d-2(a) (codified at 17 C.F.R. § 240.14d-2(a) (2005)).

121. See Exchange Act Rule 14d-3(a)(1) (codified at 17 C.F.R. § 240.14d-3(a)(1) (2005)). Schedule TO is found at 17 C.F.R. § 240.14d-100 (2005).

122. The contents of the bidder's Schedule TO and its related offer to exchange are discussed in section 1.5 of this article, *infra*.

123. See Exchange Act Rule 14d-4 (codified at 17 C.F.R. § 240.14d-4 (2005)).

124. See Exchange Act Rule 14d-5(b), (c) (codified at 17 C.F.R. § 240.14d-5(b), (c) (2005)).

125. See Exchange Act Rule 14d-3(b) (codified at 17 C.F.R. § 240.14d-3(b) (2005)).

126. See Exchange Act Rule 14d-2(b)(2) (codified at 17 C.F.R. § 240.14d-2(b)(2) (2005)).

127. Instruction 3 to paragraph (b)(2) of Exchange Act Rule 14d-2 (codified at 17 C.F.R. § 240.14d-2 (2005)) (providing that the legend must advise investors to read the tender offer statement when it is available and advise investors that they can obtain the tender offer statement and other filed documents for free at the SEC website).

128. *Id.*

1.3.2 TARGET'S RESPONSE DOCUMENT AND COMMUNICATIONS

The target must file with the SEC on Schedule 14D-9 as soon as practicable on the date of publication or dispatch any solicitation, recommendation or statement made in relation to the offer to its security holders,¹²⁹ including any information disseminated by the target pursuant to Rule 14e-2.¹³⁰

The target is also required to file with the SEC on Schedule 14D-9 from the time of the first public announcement of the transaction, on the date of release, press announcements and other written communications regarding a tender offer prior to commencement of the offer.¹³¹ Each pre-commencement communication must be accompanied by a legend advising shareholders of the target company to read the target's recommendation or solicitation statement when it becomes available.¹³² The legend must also advise security holders that they can obtain copies of filed documents on the SEC's website and explain which document may be obtained for free from the target.¹³³

1.3.3 WITHDRAWAL RIGHTS

Tendering shareholders have the right to withdraw tendered securities during the tender offer and, in any case, after the passing of 60 calendar days from the date of commencement of the tender offer if the tender offer remains open.¹³⁴ The SEC generally takes the view¹³⁵ that withdrawal rights must be available to target shareholders worldwide, not only to those shareholders resident in the United States.¹³⁶ In many jurisdictions, the provision of withdrawal rights during the offer period is not customary and may require express consent from home country regulators.¹³⁷

129. See Exchange Act Rule 14d-9(b)(1) (codified at 17 C.F.R. § 240.14d-9(b)(1) (2005)).

130. See Exchange Act Rule 14e-2 (codified at 17 C.F.R. § 240.14e-2 (2005)) (providing that within 10 U.S. business days of the publication of the tender offer, the target must publish, send to or give security holders a statement as to whether it recommends acceptance or rejection of the offer, expresses no opinion as to the offer, or is unable to take a position regarding the offer).

131. See Exchange Act Rule 14d-9(a) (codified at 17 C.F.R. § 240.14d-9(a) (2005)).

132. See Instruction 3 to Exchange Act Rule 14d-9(a) (codified at 17 C.F.R. § 240.14d-9(a) (2005)).

133. *Id.*

134. Exchange Act § 14(d)(5), as added by the Williams Act, *supra* note 9, 82 Stat. at 456 (codified as amended at 15 U.S.C. § 78n(d)(5) (2000 & Supp. III 2003)); Exchange Act Rule 14d-7 (codified at 17 C.F.R. § 240.14d-7 (2005)).

135. See Cross-Border Release, *supra* note 3 (providing that "equal treatment requires that the procedural terms of the tender offer . . . [including] withdrawal rights, must be the same for all security holders").

136. *But see Saipem SpA*, *supra* note 52 (providing an example where in the context of bifurcated offers, withdrawal rights were not afforded to holders tendering into the non-U.S. offer).

137. For instance, in the United Kingdom, where withdrawal rights would typically only apply from the 42nd day after commencement of an offer until the date the minimum condition has been satisfied, in the experience of the authors, the U.K. Panel on Takeovers and Mergers typically grants relief permitting withdrawal rights to subsist throughout the initial offering period, on the condition that the bidder does not declare its offer unconditional as to acceptances until the offer becomes wholly unconditional. In certain cases, the Staff has granted exemptions under Exchange Act section 14(d)(5) and Exchange Act Rule 14d-7, subject to conditions. See *Harmony Gold Mining Company*

1.3.4 SUBSEQUENT OFFERING PERIOD

A bidder may provide for a subsequent offering period immediately following the initial offering period of 3 to 20 U.S. business days after the termination of the initial offering period;¹³⁸ no Rule 14d-7 withdrawal rights apply during this subsequent offering period. All shares tendered in the subsequent offering period must be accepted and consideration promptly paid as the shares are tendered.¹³⁹ The subsequent offering period provides a U.S. statutory basis that accommodates takeover practice in a number of European jurisdictions, where tender offers are typically held open for a period (in some cases, significantly in excess of 20 business days) after all conditions have been satisfied to assist bidders in reaching the statutory minimum shareholding necessary to engage in a squeeze-out or other back-end merger with the target.¹⁴⁰ The subsequent offering period also provides target security holders who remain after all offer conditions have been satisfied with one last opportunity to tender into an offer and avoid the delay and illiquid market that can result after a completion of a tender offer and before a statutory squeeze-out is accomplished. To the extent that local market practice provides for a subsequent offering period in excess of 20 U.S. business days, express relief would be required from the Staff.¹⁴¹

The bidder is required to announce the results of its tender offer (including the number of shares tendered) no later than 9:00 a.m. Eastern time on the next business day after the expiration of the initial offering period and to pay promptly for the securities tendered in the initial offering period.¹⁴² The Tier II exemption provides that announcement and payment made in accordance with the requirements or practice of the home jurisdiction will satisfy Rule 14d-11;¹⁴³ and the Staff has granted analogous relief in transactions not strictly falling within the Tier II exemption.¹⁴⁴

Limited, *supra* note 85; *Alcan, Inc.*, *supra* note 62; Discount Investment Corporation Ltd., SEC No-Action Letter, 2004 WL 1626232 (June 14, 2004). *See also* Third Supplement, *supra* note 52, Question II.A.1.

138. *See* Exchange Act Rule 14d-11 (codified at 17 C.F.R. § 240.14d-11 (2005)).

139. *See* Exchange Act Rule 14d-11(e) (codified at 17 C.F.R. § 240.14d-11(e) (2005)).

140. In the United Kingdom, for instance, an offer must remain open for 14 days following the date on which the offer becomes unconditional as to acceptances. *See* City Code, *supra* note 8, Rule 31.4. In practice, transactions in the United Kingdom are often structured so as to provide for a subsequent offer period open for a period longer than the mandatory 14 calendar days and longer than the 20 U.S. business days provided for in Exchange Act Rule 14d-11, in many cases until further notice is given. *See* *SERENA Software, Inc.*, *supra* note 100.

141. The Staff has, however, granted such relief in a number of transactions, subject to certain conditions. *See* *Harmony Gold Mining Company Limited*, *supra* note 85 (providing for no-action relief with respect to a subsequent offering period in excess of 20 days but requiring that such period in no event exceed 42 days); *SERENA Software, Inc.*, *supra* note 100; *Alcan, Inc.*, *supra* note 62 (where no restriction was imposed); *Serono S.A.*, SEC No-Action Letter, 2002 WL 31116135 (Sept. 12, 2002).

142. *See* Exchange Act Rule 14d-11(d) (codified at 17 C.F.R. § 240.14d-11(d) (2005)).

143. *See* Exchange Act Rule 14d-1(d)(2)(v) (codified at 17 C.F.R. § 240.14d-1(d)(2)(v) (2005)).

144. *See* *Alcan, Inc.*, *supra* note 62; *Sanofi-Synthélabo S.A.*, SEC No-Action Letter, 2004 WL 1351302 (June 10, 2004); *Serono S.A.*, *supra* note 141.

1.3.5 ALL HOLDERS-BEST PRICE RULE

Rule 14d-10 under the Exchange Act sets forth the “all holders-best price” requirement, providing that the tender offer must be made to all holders of the target’s securities and all holders must be offered the highest consideration offered to any holder of the target’s securities.¹⁴⁵ The Tier II exemption permits a bidder to bifurcate its offer into two separate offers to accommodate logistical difficulties and potential points of conflict among U.S. tender offer rules, local rules and market practice—one offer made only to U.S. holders and another offer made only to non-U.S. holders, so long as the U.S. offer is made on terms at least as favorable as those offered to non-U.S. holders.¹⁴⁶ As a matter of practice, where the target’s securities trade in the form of ADSs in the United States, all holders of ADSs will typically be included in the U.S. offer. Although not specifically permitted pursuant to the Tier II exemption, the Staff has granted no-action relief permitting non-U.S. ADS holders to be included in the U.S. offer in a number of transactions.¹⁴⁷

Care must be taken in connection with the negotiation of certain compensation arrangements with executive officers of the target who also own target securities. In particular, certain courts in the United States have held that bonuses, non-competition payments and severance payments received by executives who tender their shares into the offer may violate Rule 14d-10 to the extent that such payments constituted additional consideration paid in connection with the offer.¹⁴⁸ On December 16, 2005, the SEC proposed amendments to Rule 14d-10 that would (i) clarify that the best-price rule applies only with respect to the consideration offered and paid for securities tendered in a tender offer and (ii) provide an exemption from the rule for the negotiation, execution and amendment of payments or benefits under employment compensation, severance or other employee benefit arrangements that are entered into by the bidder or the subject company with current or future employees or directors of the subject company.¹⁴⁹

145. See Exchange Act Rule 14d-10(a) (codified at 17 C.F.R. § 240.14d-10(a) (2005)).

146. See Exchange Act Rule 14d-1(d)(2)(ii) (codified at 17 C.F.R. § 240.14d-1(d)(2)(ii) (2005)). Rule 14d-1(d)(2)(i) provides the loan note exception, which is the only other express exception to the equal treatment rule under Tier II.

147. See *Harmony Gold Mining Company Limited*, *supra* note 85; *Sanofi-Synthelabo S.A.*, *supra* note 144 (in each case permitting the bidder to make the U.S. part of its offer available to both holders of the target’s ordinary shares located in the United States and all holders of the target’s ADSs, wherever located).

148. U.S. federal courts have been split on their approach to analyzing actions brought under Exchange Act Rule 14d-10, with certain courts following the so-called “bright-line” test, which effectively provides that arrangements entered into with an executive prior to commencement of a tender offer are not regulated by Exchange Act Rule 14d-10, and other courts following the so-called “integral part” test, where executive compensation arrangements related or integral to a tender offer may be restricted by Exchange Act Rule 14d-10. See e.g., *Gerber v. Computer Assocs. Int’l, Inc.*, 303 F.3d 126, 136 (2d Cir. 2002); *Walker v. Shield Acquisition Corp.*, 145 F. Supp. 2d 1360 (N.D. Ga. 2001) (finding that compensation paid after the close of the tender offer was not restricted by Exchange Act Rule 14d-10); *Epstein v. MCA, Inc.* 50 F.3d 644 (9th Cir. 1995) (finding that such compensation may violate Exchange Act Rule 14d-10 even though it was paid after the tender offer closed), *rev’d on other grounds*, 516 U.S. 367 (1996).

149. See SEC Release No. 34-52968, 70 Fed. Reg. 76116 (Dec. 22, 2005).

Pending adoption of final rules by the SEC, parties should exercise caution and, where such payments are contemplated, consider structuring and documenting such payments in a manner that cannot be construed as constituting an inducement to the recipients to tender their securities into the offer.

1.3.6 MIX-AND-MATCH ELECTIONS

A bidder may determine to offer target security holders a combination of cash and exchange securities with the total amount of cash and number of securities offered fixed, but affording target security holders the right to elect to vary the proportion of each form of consideration received.¹⁵⁰ In practice, to the extent that the elections of respective security holders do not offset each other, elections will be scaled back by a prorating factor determined when all elections have been received. Shareholders that make mix-and-match elections will not know the number of securities or the amount of cash received until settlement of the consideration under the offer. Exchange Act Rule 14d-10 provides that where a bidder offers more than one type of consideration in a tender offer, security holders must be afforded an equal right to elect among each of the types of consideration offered, and the highest consideration of each type paid to any security holder will be paid to any other security holder receiving that type of consideration.¹⁵¹ As a result of the elections and allocations pursuant to a mix-and-match election, some security holders may receive more cash or more securities of the bidder than other target security holders.

Exchange Act Rule 14d-11 provides that where a bidder offers target security holders a choice of different forms of consideration, the bidder may elect to provide a subsequent offering period only where (i) there is no ceiling on any form of consideration offered and (ii) the same form and amount of consideration is offered in both the initial and subsequent offering periods.¹⁵² In practice, a mix-and-match election typically provides for a maximum number of shares to be issued and/or cash to be paid. In addition, in order to set the prorating factor for payment of consideration in the initial offering period, the mix-and-match option is typically terminated on or shortly after expiration of the initial offering period and before expiration, and perhaps commencement, of the subsequent offering period, which may constitute a violation of Rule 14d-11(c). The Staff has, however, customarily granted exemptions from Rules 14d-10 and 14d-11 in these circumstances in order to permit the different allocation of cash and shares to target security holders and the termination of the mix-and-match election prior to the expiration of the subsequent offer, subject to certain conditions.¹⁵³

150. See *infra* note 153.

151. See Exchange Act Rule 14d-10(c) (codified at 17 C.F.R. § 240.14d-10(c) (2005)).

152. See Exchange Act Rule 14d-11(b), (f) (codified at 17 C.F.R. § 240.14d-11(b), (f) (2005)).

153. For examples of such mix-and-match provisions, see, e.g., *SERENA Software Inc.*, *supra* note 100, The Royal Bank of Scotland Group plc, SEC No-Action Letter, 1999 WL 1277041 (Dec. 30, 1999); Amerada Hess Corporation, SEC No-Action Letter, 2000 WL 33226265 (Dec. 13, 2000); Smith & Nephew Group plc, SEC No-Action Letter, 2003 WL 21005596 (Apr. 24, 2003); Zimmer Holdings, Inc., SEC No-Action Letter, 2003 WL 21462902 (June 19, 2003).

1.4 SPECIAL CONSIDERATIONS RELATING TO AMERICAN DEPOSITARY SHARES

Where the target is a non-U.S. company that has established an ADR program in the United States, it is necessary to consider, in facilitating the tender of ADSs into the bidder's offer, whether (i) to require ADS holders to withdraw the ordinary shares underlying their ADSs from the ADS depository facility and to tender such underlying shares in the offer or (ii) to appoint a U.S. exchange agent and establish separate tender mechanics for ADS holders.

From the bidder's perspective, the simpler approach is to require U.S. ADS holders to withdraw underlying ordinary shares from the ADS depository facility and to tender such shares in accordance with customary local law offer procedures. Under this approach, the bidder would supply the ADS holders with, in addition to offering materials, instructions explaining how to participate in the offer by withdrawing the shares underlying their ADSs and instructing a designated financial intermediary to tender such shares into the bidder's offer. In most cases, tendering ADS holders would be required to pay a withdrawal fee, which may act as a disincentive to tendering, particularly where target security holders are uncertain as to the success of the offer. Accordingly, this approach is usually considered only when the number of shares held in the form of ADSs is relatively small and the receipt of such securities is not necessary to ensure the success of the transaction.

Alternatively, a bidder may provide for separate ADS tender and acceptance procedures. This approach involves appointing a third party to act as U.S. exchange agent in the United States to accept tenders from ADS holders. Under this approach, separate forms of acceptance (typically in the form of a U.S.-style letter of transmittal) are distributed to ADS holders along with the offering materials. ADS holders who desire to accept the offer do so by completing the letter of acceptance indicating the number of ADSs to be tendered and delivering the letter along with the tendered ADSs (if in certificated form) to the exchange agent prior to the closing date of the offer. Such letters are deemed to be instructions to the depository (or a holder on the books of the depository, such as The Depository Trust Company or its nominee) with respect to the tendering of the underlying securities held by or on behalf of ADS holders. All such tenders are then counted as valid acceptances in the offer. After successful completion of the offer, the exchange agent distributes the requisite cash (typically converted into U.S. dollars, unless prior arrangement has been made) or share consideration to the tendering ADS holders, less any required withholding tax under U.S. law and, if borne by the ADS holder, the exchange agent's costs.

1.5 DISCLOSURE

In connection with a tender offer pursuant to which no exchange securities will be offered, other than as set forth in the next paragraph, there are no specific requirements as to the content of offering materials disseminated to target holders, whether or not such materials are required to be submitted to the SEC under

cover of Form CB. A bidder is, of course, subject to the anti-fraud provisions of Rule 14e-3 and Rule 10b-5, which will affect its determination as to what information ought to be disclosed.

In connection with an offer for Registered Securities, a filing on Schedule TO, if applicable, must include specified information, including a detailed summary of the bidder's past contacts, transactions and negotiations with the target and its advisers.¹⁵⁴ In the context of a recommended offer, this narrative section rarely poses problems. However, where negotiations for an agreed transaction have broken down or where an offer is otherwise hostile, the description of any breakdown in negotiations may create a sensitive disclosure issue. Furthermore, without the target's cooperation, certain mandated information may not be available. It is important for the bidder and its financial advisers to understand this requirement early in the process so that appropriate records of conversations and correspondence are kept to facilitate drafting and necessary inquiries of the bidder are made. Schedule TO also requires disclosure as to (i) the business and operations of the bidder and the target, (ii) the terms of the offer, (iii) the bidder's plans for the target, (iv) certain information as to the bidder's advisers, (v) information as to the bidder's interest in, and dealings in, the target's securities, (vi) material non-public information that may have been furnished to the bidder and (vii) a detailed explanation of the mechanics for tendering securities and procedures for acceptance and settlement.¹⁵⁵ There is often sensitivity in disclosing the intentions of a bidder as to the future management and ownership arrangements of the target and disclosed intentions consequently tend to be broad and somewhat generic.

When the bidder's financial condition is material to the decision by the target's shareholders of whether or not to tender, Schedule TO also requires that financial statements of the bidder be included.¹⁵⁶ Schedule TO provides that such financial statements will not be material when (i) only cash consideration is offered, (ii) the offer is not subject to any financing condition and (iii) either the bidder is a public reporting company filing reports on the SEC's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") database or the offer is for all of the target's outstanding securities of the subject class.¹⁵⁷

The bidder must provide the same financial information reconciled to U.S. GAAP as would be required under Item 17 of Form 20-F under the Exchange Act.¹⁵⁸ If financial statements are required in the context of a cash tender offer,

154. See Exchange Act § 14(d), as added by the Williams Act, *supra* note 9, 82 Stat. at 456 (codified as amended at 15 U.S.C. § 78n(d) (2000 & Supp. III 2003)); Schedule TO (Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005))).

155. See Schedule TO (Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005))).

156. See Instructions to Item 10, Schedule TO, Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005)).

157. See Instruction 2 to Item 10, Schedule TO, Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005)).

158. See Instruction 8 to Item 10, Schedule TO, Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005)). The financial statement requirements of Item 17 of Form 20-F (17 C.F.R. § 249.220f (2005)), available at <http://www.sec.gov/about/forms/form20-f.pdf>, are less burdensome than the requirements of Item 18. For example, the required reconciliation to U.S. GAAP is less extensive.

only two years of statements need to be provided and these can be incorporated by reference into the Schedule TO, as long as a summary is provided in the actual Schedule TO.¹⁵⁹ *Pro forma* financial information may also be required in negotiated third-party cash tender offers.¹⁶⁰

As discussed above in sections 1.2.4 and 1.3.2 of this article, a target company may have certain disclosure obligations pursuant to Rule 14d-9 and Rule 14e-2 under the Exchange Act.

2 EXCHANGE OFFERS

In addition to compliance with the tender offer rules described in section 1 above, tender offers pursuant to which exchange securities constitute at least part of the offer consideration are subject to the registration and other requirements of the Securities Act, unless an exemption or exclusion applies.¹⁶¹ There are a number of exemptions that may be available for the offer of securities in the exchange offer context, including Rule 802, which may be available in the case of a tender offer falling within the Tier I exemption.

2.1 RULE 802

A bidder may offer its shares in exchange for the shares of a non-U.S. target without having to register the shares being offered.¹⁶² The most significant implication of reliance on the Rule 802 exemption is that the bidder will not have to prepare and file the detailed disclosure specified in a registration statement on Form F-4 or Form S-4, nor will the transaction be subject to the timing constraints of the SEC's registration and review process.¹⁶³

Availability

The Rule 802 exemption is available where (i) the target is a foreign private issuer, (ii) U.S. holders hold 10 percent or less of the target's securities¹⁶⁴ and (iii) the bidder permits shareholders in the United States to participate in the tender offer on terms at least as favorable as those offered to other shareholders.¹⁶⁵ In most cases, where the Tier I exemption is available, Rule 802 will also be available. As in the case of calculating U.S. shareholding for purposes of the Tier I exemp-

159. See Instruction 3 to Item 10, Schedule TO, Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005)).

160. See Instruction 5 to Item 10, Schedule TO, Exchange Act Rule 14d-100 (codified at 17 C.F.R. § 240.14d-100 (2005)).

161. See *supra* note 15 and accompanying text. See also *infra* section 3.1 of this article.

162. See Securities Act Rule 802 (codified at 17 C.F.R. § 230.802 (2005)).

163. The registration and disclosure requirements flow from the application of section 5 of the Securities Act. Securities Act § 5, 48 Stat. at 77 (codified at 15 U.S.C. § 77e (2000)). See *infra* note 204 relating to Form F-4 and Form S-4.

164. Such percentage must be calculated in the manner prescribed by the SEC, which is substantially similar to the manner prescribed in Exchange Act Rule 14d-1, as discussed *supra* in section 1.1.1. of this article. See Securities Act Rule 800(h) (codified at 17 C.F.R. § 230.800(h) (2005)).

165. See Securities Act Rule 802(a)(1), (2) (codified at 17 C.F.R. § 230.802(a)(1), (2) (2005)).

tion, there is an obligation to look through the record ownership of certain brokers, dealers and banks, and the calculation is based on U.S. ownership of the target 30 calendar days prior to the commencement of the exchange offer.¹⁶⁶ It should be noted that Rule 802 is not available when there are *no* U.S. security holders of the target.¹⁶⁷

Other than in the case of an exchange offer by the issuer of the securities to which the offer relates (or the issuer's affiliate), there is a rebuttable presumption that the issuer of the securities is a foreign private issuer and that U.S. holders hold 10 percent or less of the outstanding securities.¹⁶⁸ The presumption will not hold where (i) the offer is made pursuant to an agreement with the issuer of the securities to which the offer relates, (ii) the trading volume on all U.S. national securities exchanges, Nasdaq or the OTCBB, as reported to the NASD, over the 12-calendar month period ending 30 calendar days prior to commencement of the exchange offer exceeds 10 percent of the worldwide trading volume of the class of securities subject to the tender offer, (iii) the most recent annual report filed or submitted by the target (or security holders of the target's securities) with the SEC or regulators in the target's home jurisdiction indicates that U.S. holders hold more than 10 percent of the outstanding subject securities, or (iv) the bidder knows or has reason to know that the level of U.S. holding exceeds 10 percent of the outstanding subject securities.¹⁶⁹

Offering Materials

Offering materials must be provided to shareholders in the United States on a basis comparable to the basis pursuant to which materials are provided to shareholders in the home jurisdiction.¹⁷⁰ Accordingly, if materials are mailed to non-U.S. holders, then materials should be mailed to U.S. holders; if notice of the offer is effected by publication outside of the United States, publication, rather than actual delivery of offering materials, would ordinarily be sufficient.¹⁷¹

Filing Requirements

Offering materials sent to shareholders in the United States must be submitted to the SEC under cover of Form CB.¹⁷² The Form CB must be submitted no later than the first business day after the offering materials have been published or

166. See Securities Act Rule 800(h) (codified at 17 C.F.R. § 230.800(h) (2005)).

167. See Third Supplement, *supra* note 52, Question II.C.1.

168. See Securities Act Rule 802(c) (codified at 17 C.F.R. § 230.802(c) (2005)).

169. *Id.*

170. See Securities Act Rule 802(a)(3)(ii), (iii) (codified at 17 C.F.R. § 230.802(a)(3)(ii), (iii) (2005)). Although foreign law may require a detailed advertisement, the Staff will permit a summary advertisement with a toll-free number for investors to use to obtain the complete disclosure document. See Third Supplement, *supra* note 52, Question II.D.1.

171. See Securities Act Rule 802(a)(3) (ii), (iii) (codified at 17 C.F.R. § 230.802(a)(3)(ii), (iii) (2005)).

172. Form CB is available at <http://www.sec.gov/about/forms/formcb.pdf>. Offering materials must be translated into English if they are not already in English. Securities Act Rule 802(a)(3)(i) (codified at 17 C.F.R. § 230.802(a)(3)(i) (2005)).

disseminated in the home jurisdiction.¹⁷³ There is no fee for submitting Form CB. If the bidder is a non-U.S. company, it must file with the SEC a consent to service of process in the United States on Form F-X and appoint an agent for service of process in the United States.¹⁷⁴ There is no filing fee for Form F-X. U.S. bidders do not need to file this form.

Blue Sky Exception

A bidder may exclude certain shareholders in the United States if the shareholders are in states of the United States that do not exempt the exchange securities from state registration requirements.¹⁷⁵ This exception is effectively a “blue sky” exception¹⁷⁶ and applies where a bidder has made a good faith effort to seek the registration of the exchange securities in such states.

Legends

Any document disseminated in the United States must bear a prominent legend stating that (i) the offer is being conducted pursuant to disclosure requirements of another jurisdiction, which may differ from the disclosure requirements in the United States, (ii) financial statements contained in the offer document have been prepared in accordance with accounting standards that may not be comparable to U.S. GAAP, if true, (iii) (in the case of a non-U.S. issuer) it may be difficult for investors to enforce their legal rights against the issuer and its officers and directors and (iv) the bidder may purchase securities otherwise than under the exchange offer, if true.¹⁷⁷

Transfer Restrictions

The securities offered by the bidder in exchange for those of the target will take on the same characterization as that of the target securities.¹⁷⁸ If the securities of the target are “Restricted Securities” within the meaning of the Securities Act—effectively meaning that they are not freely tradable in the United States—then the bidder’s securities offered in exchange will also be Restricted Securities.¹⁷⁹ If, however, the target’s securities are unrestricted (for instance, because they were issued in certain offshore transactions in compliance with Regulation S or pur-

173. See Securities Act Rule 802(a)(3)(i) (codified at 17 C.F.R. § 230.802(a)(3)(i) (2005)).

174. *Id.* Form F-X is available at <http://www.sec.gov/about/forms/formf-x.pdf>.

175. See Securities Act Rule 802(a)(2) (codified at 17 C.F.R. § 230.802(a)(2) (2005)).

176. See *supra* note 17.

177. See Securities Act Rule 802(b) (codified at 17 C.F.R. § 230.802(b) (2005)). The legend required by Rule 802 may be tailored to avoid confusion in the case of an offeror that is a domestic issuer incorporated in the United States. See Third Supplement, *supra* note 52, Question II.C.2.

178. See Cross-Border Release, *supra* note 3, Part II.D.2(c); General Note 8 to Securities Act Rules 800-802 (codified at 17 C.F.R. § 230.800-802 (2005)).

179. “Restricted Securities” are generally securities acquired by the issuer or an affiliate of the issuer of such securities in a transaction or chain of transactions not involving any public offering. Such securities are subject to restrictions as to resale. See Securities Act Rule 144 (codified at 17 C.F.R. § 230.144 (2005)).

suant to a registration statement under the Securities Act), then the bidder's securities offered in exchange will be freely tradable in the hands of a non-affiliate of the issuer of the securities.¹⁸⁰

Integration

An offer of securities pursuant to Rule 802 will not be integrated with any other exempt offer by the bidder, even if the other transaction occurs simultaneously.¹⁸¹ Accordingly, the use of the Rule 802 exemption will not render unavailable or otherwise prevent a bidder from relying on another exemption under the Securities Act in respect of the placement of securities pursuant to an exchange offer.

No Exchange Act Reporting Obligations

The use of the Rule 802 exemption will not result in the bidder incurring reporting obligations under section 15(d) of the Exchange Act.¹⁸² Nor does the use of Rule 802 preclude a foreign private issuer from relying on the exemption from SEC Exchange Act registration pursuant to Rule 12g3-2(b) under the Exchange Act.¹⁸³

Subsequent Bidder

If an initial bidder is able to rely upon Rule 802 to extend its exchange offer into the United States, a competing bidder will not be subject to the 10 percent ownership limitation condition of the Rule 802 exemption.¹⁸⁴ As a result, the subsequent bidder will not be precluded from relying on Rule 802 by any movement of securities into the United States following announcement of the initial bidder's offer.

Practical Difficulties

For the reasons enumerated in section 1.1.1 above, it may be difficult for a bidder to confirm its eligibility to rely on Rule 802. Furthermore, Rule 802 does

180. *Id.*

181. See General Notes to Securities Act Rules 800 to 802 (codified at 17 C.F.R. § 230.800–802 (2005)).

182. Exchange Act section 15(d) provides that any issuer that has had a registration statement declared effective by the SEC under the Securities Act with respect to any class of debt or equity securities shall have an obligation to file with the SEC the periodic reports that would otherwise be required to be filed had such class of securities been registered under Exchange Act section 12. Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)). No such obligation is incurred in the absence of the filing of a registration statement. See section 2.4 of this article *infra*.

183. The Exchange Act Rule 12g3-2(b) exemption is typically claimed by foreign private issuers whose securities are not traded on a U.S. securities exchange (including Nasdaq) but that have a class of equity security held by more than 300 security holders in the United States. See Exchange Act Rule 12g3-2(b) (codified at 17 C.F.R. § 240.12g3-2(b) (2005)). The securities of many foreign private issuers that have claimed the Rule 12g3-2(b) exemption are quoted on "services" such as the Pink Sheets. See <http://www.pinksheets.com>.

184. See Securities Act Rule 802(a)(1) (codified at 17 C.F.R. § 230.802(a)(1) (2005)).

not provide an express safe harbor in respect of a second step “squeeze-out” merger. For instance, in many European jurisdictions, a bidder has the right upon obtaining typically between 90 percent and 95 percent of the target’s securities to serve notice upon minority shareholders whereupon, by operation of law, such minority shareholders’ target securities will be cancelled and reissued to, or transferred directly to, the bidder.¹⁸⁵ Because securities held by the bidder are excluded from the U.S. holder calculation, a bidder that has relied upon Rule 802 to effect an exchange offer may find that when it seeks to effect statutory squeeze-out procedures it is ineligible to rely on Rule 802 on the basis that U.S. holders then hold in excess of 10 percent of outstanding securities. However, the Staff has stated that in the case of a business combination transaction involving multiple steps, a bidder’s initial determination of U.S. shareholding will be sufficient to determine eligibility for the use of the Rule 802 exemption in the subsequent transaction so long as (i) the disclosure document discloses the bidder’s intent to conduct a subsequent “clean-up” transaction and the terms of such transaction and (ii) the subsequent step is consummated within a reasonable time following the first step.¹⁸⁶ It is unclear what the Staff would consider a “reasonable time” in this regard. It may be prudent, therefore, to consult the Staff in connection with any particular transaction.

2.2 REGULATION S

In the context of an exchange offer, Regulation S provides a “safe harbor” exclusion from the registration requirements of the Securities Act for offers and sales of the bidder’s securities outside the United States, subject to certain conditions and selling restrictions contained therein.¹⁸⁷ Briefly, these require that the offer not be made in the United States (or to U.S. persons¹⁸⁸ in the case of a so-called

185. See, e.g., Companies Act 1985, c. 40 (Eng.) section 429, which provides a right for a bidder to buy out minority shareholders where nine-tenths of the class of securities to which the offer relates has been obtained. In France, Article 237-1 of the General Regulations of the French *Autorité des marchés financiers* provides for the transfer of securities not tendered by minority shareholders to the majority shareholder or shareholder group, provided that minority shareholders constitute no more than 5 percent of the equity or voting rights of the target company.

186. See Third Supplement, *supra* note 52, Question II.E.9.

187. See Securities Act Regulation S (codified at 17 C.F.R. §§ 230.901–905 (2005)).

188. “U.S. person” means, with certain exceptions;

(i) Any natural person resident in the United States; (ii) Any partnership or corporation organized or incorporated under the laws of the United States; (iii) Any estate of which any executor or administrator is a U.S. person; (iv) Any trust of which any trustee is a U.S. person; (v) Any agency or branch of a foreign entity located in the United States; (vi) Any non-discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary for the benefit or account of a U.S. person; (vii) Any discretionary account or similar account (other than an estate or trust) held by a dealer or other fiduciary organized, incorporated, or (if an individual) resident in the United States; and (viii) Any partnership or corporation if: (A) Organized or incorporated under the laws of any foreign jurisdiction; and (B) Formed by a U.S. person principally for the purpose of investing in securities not registered under the Act, unless it is organized or incorporated, and owned, by accredited investors (as defined in § 230.501(a)) who are not natural persons, estates or trusts.

17 C.F.R. § 230.902(k)(1) (2005).

“category 2”¹⁸⁹ transaction), except pursuant to the Rule 802 exemption or a “private placement” exemption.¹⁹⁰ In addition, the bidder cannot engage in “directed selling efforts”¹⁹¹ to condition the U.S. market for the bidder’s securities being offered. In a large cross-border exchange offer where the bidder has relied upon Rule 14d-1(d)(2)(ii) under the Exchange Act or otherwise determined to bifurcate its offer into separate U.S. and non-U.S. offers, the bidder will typically rely on Regulation S to avoid registering securities offered pursuant to the non-U.S. offer with the SEC.¹⁹²

2.3 CASHING OUT U.S. HOLDERS; VENDOR PLACING; PRIVATE PLACEMENTS

In the case of an offer falling within the Tier I exemption, a bidder may offer U.S. holders cash in place of the securities offered to target shareholders outside of the United States so long as the bidder has a reasonable basis for believing that the amount of cash is substantially equivalent to the value of the securities offered to non-U.S. holders.¹⁹³ In the case of an offer falling within the Tier II exemption, the Staff has indicated that it would consider requests for relief under the Rule

189. See Securities Act Rule 902(b)(2) (codified at 17 C.F.R. § 230.902(b)(2) (2005)).

190. See Securities Act Rule 802 (codified at 17 C.F.R. § 230.802 (2005)); Securities Act § 4(2), 48 Stat. at 77, as amended by Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 12, 78 Stat. 565, 580 (codified as amended at 15 U.S.C. § 77d(2) (2000)).

191. “Directed selling efforts” means:

any activity undertaken for the purpose of, or that could reasonably be expected to have the effect of, conditioning the market in the United States for any of the securities being offered in reliance on this Regulation S (§ 230.901 through § 230.905 and Preliminary Notes). Such activity includes placing an advertisement in a publication ‘with a general circulation in the United States’ that refers to the offering of securities being made in reliance upon this Regulation S.

17 C.F.R. § 230.902(c)(1) (2005). *But see* Preliminary Note 7 to Regulation S, in relation to certain offshore press activities conducted in accordance with Securities Act Rule 135e (codified at 17 C.F.R. § 230.135e (2005)).

192. See, e.g., Registration Statement on Form F-4 filed by Mittal Steel Company N.V. on March 23, 2006. The question has arisen whether the furnishing of tender offer materials under cover of Form 6-K could be viewed as a public announcement in the U.S. and an inducement to U.S. security holders to tender. See Third Supplement, *supra* note 52, Question II.G.1, in which the Staff stated that tender offer materials may be furnished to the SEC without triggering the U.S. tender offer rules so long as the issuer takes three steps to assure that the information is not used as a means to induce indirect participation by U.S. holders of the securities: (i) the materials must not include a transmittal letter or other means of tendering the securities, (ii) the materials 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 and (iii) the issuer must take precautionary measures to ensure that the offer is not targeted to person in the United States or to U.S. persons (citing Part II.G of the Cross-Border Release, *supra* note 3). The interpretation concludes “Alternatively, the issuer may choose not to submit these materials to the Commission.” Although an issuer may determine not to submit offering materials to the SEC, an issuer would nonetheless need to consider its U.S. securities law disclosure obligations regarding the transaction. See also Coral Gold, SEC No-Action Letter, 1991 WL 176737 (February 19, 1991), in which the Staff concurred that the furnishing of an offering circular under cover of Form 6-K containing only the information legally required in Canada (the jurisdiction in which a securities offering was made) and setting forth a restrictive legend in accordance with Regulation S would not constitute directed selling efforts for purposes of Regulation S.

193. See Exchange Act Rule 14d-1(c)(2)(iii) (codified at 17 C.F.R. § 240.14d-1(c)(2)(iii) (2005)).

14d-10 all-holders rule on a case-by-case basis to permit U.S. holders to be “cashed-out.”¹⁹⁴

In addition, the SEC has permitted a bidder offering securities to a target’s shareholders to allot the securities otherwise allocable to U.S. shareholders to a third-party “vendor” that causes such securities to be sold (“placed”) outside of the United States on behalf of U.S. holders and then remits the proceeds of such placement to U.S. holders, less costs.¹⁹⁵ In this way, no offer or sale of the bidder’s securities occurs in the United States and, accordingly, no registration under the Securities Act is required. So long as such securities are immediately resold in a deep and established secondary market, cashed-out U.S. holders would appear to bear little investment risk in connection with the exchange securities, to have no control over the disposition of such securities and generally to be divorced from any of the incidents of ownership pertaining to such securities. Although a vendor placement results in different treatment for shareholders that are able to receive securities and U.S. holders that receive only the proceeds from the sale of such securities, this different treatment has been permitted by the SEC¹⁹⁶ and by home country regulators.¹⁹⁷ Similarly, the SEC has found that such placements do not violate Section 5 of the Securities Act.¹⁹⁸ A vendor placement may be desirable from a bidder’s perspective to the extent that it permits the bidder to preserve cash in circumstances in which it is not practicable to issue securities to U.S. residents. Additionally, in jurisdictions with laws requiring a bidder to offer substantially identical consideration to all target shareholders, a vendor placement may afford a mechanism to provide cash to U.S. holders and shares to all other holders in compliance with such laws.

Finally, it may be possible to include certain U.S. shareholders in an unregistered exchange offer by relying on the private placement exemption afforded by section 4(2) of the Securities Act,¹⁹⁹ where an offer has been extended into the United States and U.S. security holders are generally limited to receiving cash consideration. In these circumstances, a practice has developed among European securities practitioners of placing the bidder’s securities with a limited number of “qualified institutional buyers,”²⁰⁰ in compliance with certain private placement

194. See Cross-Border Release, *supra* note 3. Moreover, home country laws or regulations may, in many cases, restrict a bidder from withholding share consideration from a portion of its security holders including, for instance, security holders resident in the United States.

195. See Singapore Telecommunications Limited, SEC No-Action Letter, 2001 WL 533462 (May 15, 2001); TABCORP Holdings Limited, SEC No-Action Letter, 1999 WL 766087 (Aug. 27, 1999); Durban Roodepoort Deep, SEC No-Action Letter, 1999 WL 1578786 (June 22, 1999). In each of the placings described in these letters, procedures were established to ensure that U.S. resident target security holders would not be entitled to any of the incidents of ownership of the bidder’s securities.

196. See the SEC No-Action Letters cited *supra* note 195.

197. See *supra* note 194.

198. See the SEC No-Action Letters cited *supra* note 195.

199. Securities Act § 4(2), 48 Stat. at 77, as amended by Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 12, 78 Stat. 565, 580 (codified as amended at 15 U.S.C. § 77d(2) (2000)).

200. The term “qualified institutional buyer” is defined in Securities Act Rule 144A and includes, broadly, certain institutional investors with at least \$100 million in securities under management. Securities Act Rule 144A (codified at 17 C.F.R. § 230.144A (2005)). Pursuant to such practice, however, any such offers would not typically be made in reliance upon Rule 144A.

procedures, including the receipt of investor letters of representation and the avoidance by the bidder and its advisers of any "general solicitation or general advertising"²⁰¹ in the United States. Securities placed privately with qualified institutional buyers pursuant to Section 4(2) are considered Restricted Securities for purposes of the Securities Act. In practice, reliance on private placement procedures to permit certain institutional or sophisticated investors to participate in an exchange offer will be limited generally to circumstances where the number of U.S. shareholders and/or the monetary value of the shares issued in the exchange offer is limited or where the bidder requires the participation of only a limited number of a wider group of U.S. target shareholders who are eligible to rely on a private placement exemption.

2.4 REGISTRATION UNDER THE SECURITIES ACT

If Rule 802 or another exemption or exclusion from the registration requirements of the Securities Act is unavailable, the issuer must file a registration statement with the SEC in connection with an exchange offer. In practice, because of the expense and time involved in preparing an initial registration statement and responding to Staff comments, the filing of a registration statement is generally reasonable in the context of an exchange offer only when the bidder (and the target, in the case of a hostile transaction) is already subject to the reporting requirements of the Exchange Act and has filed at least one annual report with the SEC. This would be the case, for example, where the bidder has previously offered its securities publicly in the United States or where the bidder's securities trade on a U.S. securities exchange, such as the NYSE, or Nasdaq.²⁰²

A foreign private issuer undertaking a registered exchange offer in the United States must prepare and file with the SEC a registration statement on Form F-4;²⁰³ a U.S. bidder would use Form S-4. Both Forms consolidate the Exchange Act requirements of Schedule TO and the Securities Act requirements for the registration of securities and include the prospectus/offer to exchange to be distributed to target shareholders. The registration statement contains detailed information about the bidder and the target, the exchange offer transaction, the securities being registered, the bidder's plans with respect to the target, the means and effects of tendering shares, audited financial statements of both the bidder and target and *pro forma* financial information showing the effects of the tender

201. Such prohibited solicitation and advertising includes, but is not limited to, "(1) [a]ny advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio; and (2) [a]ny seminar or meeting whose attendees have been invited by any general solicitation or general advertising," with certain exceptions provided. Securities Act Rule 502(c) (codified at 17 C.F.R. § 230.502(c) (2005)).

202. Nasdaq is expected to become a national securities exchange during 2006. See <http://www.nasdaq.com/about/FAQsExchange.stm>.

203. Where the bidder intends to issue securities in the form of ADSs, the bidder would need to register ADSs with the SEC on Form F-6, available at <http://www.sec.gov/about/forms/formf-6.pdf>, unless sufficient ADSs have already been so registered. See General Instruction II to Form F-6 with respect to the calculation of the amount of securities to be registered, available at <http://www.sec.gov/about/forms/formf-6.pdf>.

offer.²⁰⁴ Financial statements must be prepared under U.S. GAAP or be reconciled to U.S. GAAP.²⁰⁵ In the case of a hostile exchange offer, certain mandated information may not be made available by the target.²⁰⁶ In such a case, a bidder may need to request that the Staff grant relief under Rule 409²⁰⁷ of the Securities Act or otherwise in respect of the unavailable information.²⁰⁸ Relief under Rule 437²⁰⁹ may be required in respect of any consents required, but unavailable.

To the extent that audited financial statements are required to be included in an SEC filing, it is important that the bidder confirm, at an early stage, that audits were conducted in accordance with the auditing standards required by the Public Company Accounting Oversight Board (the “PCAOB”),²¹⁰ that the auditors satisfy the PCAOB’s and the SEC’s independence criteria and that the financial statements comply with the applicable SEC requirements.²¹¹ Should any issue concerning the ability to comply with these requirements arise, it may be prudent for bidders and their legal counsel to initiate discussions with the Staff at the earliest practicable time.

The preparation of Form F-4 or S-4 (and the prospectus/offer to exchange contained within) can take several months, and the Form F-4 or S-4 containing a prospectus/offer to exchange must be filed before commencement of the exchange offer. If the Staff determines to review the registration statement, it will so notify the bidder and will provide comments on the registration statement to the bidder. If the Staff’s comments result in any material changes to the preliminary prospectus/offer to exchange and such document has already been distributed to the target security holders, a supplement to the prospectus/offer to exchange would need to be re-circulated to the target’s security holders and the offer would

204. Securities Act Form S-4, available at <http://www.sec.gov/about/forms/forms-4.pdf>; Form F-4, available at <http://www.sec.gov/divisions/corpfin/forms/f-4.htm>.

205. See, e.g., Items 10–17 of Form F-4, available at <http://www.sec.gov/about/form/formf-4.pdf>; Instruction 2 to Item 14 of Form S-4, available at <http://www.sec.gov/about/forms/forms-4.pdf>.

206. In particular, in an exchange offer, U.S. GAAP financial information of the target satisfying the staleness requirements of Item 8.A of Form 20-F, available at <http://www.sec.gov/about/forms/form20-f.pdf>, may not be publicly available.

207. Securities Act Rule 409 (codified at 17 C.F.R. § 230.409 (2005)) (providing relief for information unknown or not reasonably available).

208. *Id.* See, e.g., Registration Statement on Form F-4 filed by Mittal Steel Company N.V. on March 23, 2006, at page 8 under “Note on Arcelor Information”; Registration Statement on Form F-4 filed by Gas Natural SDG SA, on February 28, 2006, at page 15 under “Presentation of Certain Financial and Other Information—Endesa Information”; Registration Statement on Form F-4 filed by Harmony Gold Mining Company Limited on October 21, 2004, at page vi under “Presentation of Certain Financial and Other Information—Goldfields Information,” all available at the SEC’s EDGAR website, http://searchwww.sec.gov/EDGARFSCClient/jsp/EDGAR_MainAccess.jsp.

209. Securities Act Rule 437 (codified at 17 C.F.R. § 230.437 (2005)).

210. The PCAOB was created to establish auditing and related attestation, quality control, ethics, and independence standards and rules to be used by registered public accounting firms in the preparation and issuance of audit reports as required by the U.S. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 and scattered sections of Title 15 and 18 of U.S.C. (Supp. III 2003)) [hereinafter the “Sarbanes-Oxley Act”], or the rules of the SEC. See <http://www.pcaob.org/Standards/index.aspx>.

211. See SEC Division of Corporation Finance, *International Reporting and Disclosure Issues in the Division of Corporation Finance* (November 1, 2004, updated February 24, 2005), available at <http://www.sec.gov/divisions/corpfin/international/cfirdissues1104.htm>.

need to be kept open, and possibly extended, for an additional period of at least 5 U.S. business days, depending on the changes to the prospectus.²¹² Before a bidder may accept and settle any tendered securities, the SEC must have declared the registration statement effective. Effectiveness occurs at the bidder's request after all of the SEC's comments and questions have been resolved. The registration process can take anywhere from four to eight weeks or more from first filing, depending on a variety of factors, including whether the bidder currently files reports under the Exchange Act and whether the Staff affords the bidder's registration statement limited review treatment. In virtually all instances where the bidder is not subject to SEC reporting, a full SEC review should be anticipated.

Subject to local law timing requirements and practical considerations, a bidder may (i) launch its exchange offer upon the filing of its registration statement with the SEC, (ii) await an initial round of SEC comments prior to launching the offer or (iii) wait until all SEC comments are resolved and the SEC has declared the bidder's registration statement effective.²¹³ To the extent that the bidder's disclosure is being reviewed by, and subject to comments from, other regulators (in foreign jurisdictions or U.S. states), it is generally necessary and advisable to await the resolution of these comments prior to the finalization of the SEC registration statement.²¹⁴

Exchange Act section 15(d)²¹⁵ provides that any issuer that has had a registration statement declared effective by the SEC under the Securities Act with respect to any class of debt or equity securities shall have an obligation to file with the SEC the periodic reports that would otherwise be required to be filed had such class of securities been registered under Exchange Act section 12. An issuer's Exchange Act section 15(d) obligations may be suspended (but not terminated) in any year other than the year such obligation arose (*i.e.*, the year in which the relevant registration statement was filed) at any time that the issuer has fewer than 300 shareholders (300 holders resident in the United States, if the issuer is a foreign private issuer).²¹⁶ An issuer's Exchange Act section 15(d) obligation will be suspended automatically if and so long as the issuer has any class of securities

212. See Exchange Act Rule 14d-4(d)(2) (codified at 17 C.F.R. § 240.14d-4(d)(2) (2005)), which mandates the prompt dissemination to security holders of material changes in information previously provided and that the offer remain open for at least 5 additional U.S. business days from the date such materials are so disseminated.

213. Prior to the amendment of Exchange Act Rule 14d-1 in January 2000, an offer could not be launched until the registration statement had been declared effective by the SEC. See Securities Act Rule 162 (codified at 17 C.F.R. § 230.162 (2005)).

214. Ordinarily an issuer will want to avoid finalizing the disclosure document with one regulator until it is confident it has received and resolved all material comments from all regulators.

215. Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)).

216. *Id.* Exchange Act section 15(d) does not distinguish among securities held by persons resident in the United States for purposes of the automatic suspension of an issuer's Exchange Act section 15(d) reporting obligations (*but see*, Super-Sol Ltd., SEC No-Action Letter, 1982 WL 29995 (January 4, 1982). Exchange Act Rule 12h-3 (codified at 17 C.F.R. § 240.12h-3 (2005)) permits the voluntary suspension of Exchange Act section 15(d) reporting obligations where securities of a foreign private issuer are held of record by less than 300 persons resident in the United States.

registered under Exchange Act section 12.²¹⁷ In calculating record shareholding for purposes of Exchange Act Rule 12h-3, there is an obligation to inquire of broker-dealers, banks and their nominees; any U.S.-resident holders shown on records maintained by the issuer must be added securities held by financial intermediaries on behalf of U.S. residents.²¹⁸

2.4.1 DISCLOSURE

In the case of a registered exchange offer (for Registered Securities or non-Registered Securities), in addition to the disclosure mandated by the Exchange Act and Regulation 14D, extensive information will need to be disclosed to target security holders and filed with the SEC pursuant to the Securities Act. Substantially all of the information required in a bidder's Schedule TO will be incorporated by reference to the preliminary prospectus/offer to exchange filed on Form F-4 or S-4, as the case may be.

In the case of an exchange offer exempt from the registration requirements of the Securities Act pursuant to Rule 802, there are no specific requirements as to the content of offering materials disseminated to target holders other than legends mandated by Rule 802, and the form of the offer document will generally conform to local law disclosure requirements and/or local law market practice. A bidder will, of course, be subject to the anti-fraud provisions of Rule 14e-3 and Rule 10b-5.²¹⁹

2.4.2 PROSPECTUS LIABILITY

In the context of an unregistered exchange offer, as in the case of any tender offer, a bidder (and its directors and officers) may have liability under Section 10(b)²²⁰ of, and Rule 10b-5²²¹ under, the Exchange Act, which prohibit manipulative or deceptive practices in connection with the purchase or sale of securities. Effectively, the bidder and its officers, directors and controlling persons may be liable under Rule 10b-5 in respect of a material misstatement or omission contained in offering materials to the extent that the material misstatement or omission was made with "scienter"—which means that the defendant knew that the published information was false or misleading or acted with willful, deliberate or reckless disregard for the truth.²²² Although extreme recklessness may be sufficient

217. See Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)).

218. See Exchange Act Rule 12h-3(b)(2) (codified at 17 C.F.R. § 240.12h-3(b)(2) (2005)), which states that the number of persons resident in the United States should be determined in accordance with Exchange Act Rule 12g3-2(a) (codified at 17 C.F.R. § 240.12g3-2(a) (2005)).

219. See Exchange Act Rules 10b-5; 14e-3 (codified at 17 C.F.R. §§ 240.10b-5 and 240.14e-3 (2005)).

220. Exchange Act § 10(b), 48 Stat. at 891 (codified at 15 U.S.C. § 78j (2000)).

221. Exchange Act Rule 10b-5 (codified at 17 C.F.R. § 240.10b-5 (2005)).

222. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (holding that private actions brought under Rule 10b-5 (now codified at 17 C.F.R. § 240.10b-5 (2005)) must show that the defendant acted with scienter in order to succeed); *Aaron v. SEC*, 446 U.S. 680 (1980). In *Ernst & Ernst*, scienter is described as "a mental state embracing intent to deceive, manipulate or defraud." 425 U.S. at 193.

to establish liability under Rule 10b-5, negligence is not.²²³ A private party bringing an action under Rule 10b-5 must prove that he or she relied on such misstatement or omission to his or her detriment.²²⁴

In the case of a registered exchange offer, the bidder and its directors, officers and controlling persons will be subject to liability under section 11²²⁵ and section 12(a)²²⁶ of the Securities Act in respect of material misstatements and omissions in the prospectus/offer to exchange, in addition to liability under Rule 10b-5. Section 11 of the Securities Act creates a right of action against the bidder, its directors and every person who signs the registration statement (including director nominees who consent to be named in the registration statement), if the registration statement, at the time it is declared effective, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.²²⁷ The right of action is imposed by the mere status of a person as described above and not as a result of any action taken or omitted to be taken.²²⁸ Unlike Rule 10b-5, no “scienter” is required under section 11.²²⁹ The liability of the bidder under section 11 is therefore effectively strict liability. Directors and persons who have signed the registration statement may avoid liability if they can establish that they met an appropriate standard of due diligence, generally, the “reasonable investigation” standard,²³⁰ in connection with the preparation of the registration statement.

Section 12(a) of the Securities Act provides that a person who offers or sells a security in violation of the registration requirements of the Securities Act²³¹ or offers or sells a security by means of a prospectus or an oral communication that

223. See *Sanders v. John Nuveen & Co., Inc.*, 619 F.2d 1222 (7th Cir. 1977) (holding that recklessness, but not negligence, meets the scienter requirement of Exchange Act Rule 10b-5), *cert. denied*, 450 U.S. 1005 (1981); *Broad v. Rockwell International Corp.*, 642 F.2d 929, 961–962 (5th Cir. 1981) (finding that “severe recklessness” suffices for purposes of Exchange Act Rule 10b-5, provided that it is “not merely simple or even inexcusable negligence but an extreme departure from the standards of ordinary care”), *cert. denied*, 454 U.S. 965 (1981).

224. See *List v. Fashion Park Inc.*, 340 F.2d 457 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965); *AUSA Life Insurance Co. v. Ernst & Young*, 206 F.3d 202 (2d Cir. 2000).

225. Securities Act § 11, 48 Stat. at 82 (codified as amended at 15 U.S.C. § 77k (2000)).

226. Securities Act § 12(a), 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77l(a) (2000)).

227. See Securities Act § 11(a), 48 Stat. at 82 (codified as amended at 15 U.S.C. § 77k(a) (2000)).

228. *Id.* (providing the right to sue those individuals identified in Securities Act section 11 without conditioning the right on a link to any specific action on their part). Under Securities Act section 11, the issuer (the bidder, in this context) is strictly liable for any material misstatements or omissions in the registration statement, while the other individuals identified in Securities Act section 11 have a due diligence defense. See *Escott v. BarChris Construction Co.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

229. Securities Act § 11, 48 Stat. at 82 (codified as amended at 15 U.S.C. § 77k (2000)).

230. Generally, a defendant has a due diligence defense if he or she can establish that “he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” Securities Act § 11(b), 48 Stat. at 82 (codified as amended at 15 U.S.C. § 77k(b) (2000)). A slightly lower standard of due diligence applies with respect to “expertised” portions of the registration statement (those prepared by or on the authority of an expert). *Id.*

231. See Securities Act § 12(a)(1), 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77l (a)(1) (2000)).

contains an untrue statement of a material fact or omits to state a material fact²³² will be liable to the person purchasing the security unless the seller can sustain the burden of proof that the seller did not know, and in the exercise of reasonable care could not have known, of such untruth or omission. It should be noted that the Securities Act defines “prospectus” extremely broadly so that it effectively includes any written communication (including radio and television communications and any communication that is available on a company’s website) used in connection with an offer or sale of securities.²³³ As in the case of section 11, section 12(a)(2) provides a due diligence defense, the “reasonable care” standard,²³⁴ for any person (including the bidder) who can sustain the burden of proving that he or she did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.²³⁵ Unlike Rule 10b-5, no “scienter” is required under section 12.²³⁶

The potential liability that a bidder has for the contents of its offering materials is, of course, in addition to its potential liability under Exchange Act section 14(e) and Rule 14e-3 thereunder, which are discussed above in section 1.2.5.

2.4.3 GUN-JUMPING ISSUES

Section 5 of the Securities Act generally prohibits the making of (i) offers by an issuer prior to the time that its registration statement has been filed with the SEC (the making of which is commonly referred to as “gun-jumping”), and (ii) after a registration statement has been filed with the SEC, offers other than pursuant to the preliminary prospectus/offer to exchange then filed.²³⁷ Public announcements and shareholder communications relating to an exchange offer would be restricted, therefore, from the time of first public announcement of the transaction until the registration statement has been declared effective by the SEC. Rules 165²³⁸ and 425²³⁹ under the Securities Act, however, permit free written

232. See Securities Act § 12(a)(2), 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77l(a)(2) (2000)).

233. The term “written communication” is defined in Securities Act Rule 405 (codified at 17 C.F.R. § 230.405 (2005)). “Prospectus” is defined, with certain exceptions, as “any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security.” Securities Act § 2(a)(10), 48 Stat. at 75 (codified as amended at 15 U.S.C. § 77b(a)(10) (2000)).

234. Under Securities Act section 12(a)(2), the defendant has a due diligence defense if he or she can establish that he or she “did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.” Securities Act § 12(a)(2), 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77l(a)(2) (2000)).

235. See *Sanders*, 619 F.2d at 1228 (7th Cir. 1977) (delving into congressional intent behind Securities Act section 12(a)(2) and comparing the “reasonable care” standard thereunder to the “reasonable investigation” standard under Securities Act section 11).

236. See Securities Act § 12, 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77l (2000)).

237. See Securities Act § 5, 48 Stat. at 77 (codified as amended at 15 U.S.C. § 77e (2000)). The SEC’s concern with respect to “gun-jumping” activity is the prevention of activity by issuers, underwriters and dealers that could condition the public and create public interest in the lead-up to a public offering. See, for example, Publication of Information Prior to or After the Effective Date of a Registration Statement, SEC Release No. 33-3844, 22 Fed. Reg. 8359 (October 24, 1957).

238. Securities Act Rule 165 (codified at 17 C.F.R. § 230.165 (2005)).

239. Securities Act Rule 425 (codified at 17 C.F.R. § 230.425 (2005)).

and oral communications in the context of an exchange offer before the filing of the bidder's registration statement, provided that written communications are filed with the SEC on the day first used and contain a legend advising recipients to read the prospectus/offer to exchange when filed. These rules also permit the use of written communications other than in the form of the statutory prospectus/offer to exchange after the filing of the bidder's registration statement, subject to certain conditions.²⁴⁰

2.4.4 SECURITY OFFERING REFORMS

In 2005, the SEC enacted amendments that reform many offering procedures under the Securities Act, including changes to the registration, communication and public offering process in the United States.²⁴¹ In its adopting release, the SEC made clear that the reforms do not apply to business combination transactions.²⁴² However, the reforms may nonetheless be relevant to foreign issuers, insofar as they may make entry into the U.S. markets more attractive, and provide means for foreign issuers already subject to U.S. reporting obligations, especially well-known seasoned issuers, to raise capital that may be used to finance acquisitions.²⁴³

3 BUSINESS COMBINATION TRANSACTIONS NOT INVOLVING A TENDER OFFER

As an alternative to effecting an acquisition by means of a tender offer, parties may, particularly in the case of a negotiated transaction, elect to combine their businesses via a statutory merger, a corporate amalgamation, a "synthetic merger"²⁴⁴ or a "scheme of arrangement" (or other court-approved combination transaction) pursuant to which shareholders of the participating companies vote to approve the transaction. The form of the transaction is generally a function of the legal requirements of the jurisdictions in which the constituent companies are orga-

240. *Supra* notes 238 and 239.

241. See SEC Release No. 33-8591, 70 Fed. Reg. 44722 (Aug. 3, 2005) [hereinafter "Reform Release"].

242. See, e.g., footnotes 160, 203 and 514 of the Reform Release, *supra* note 241.

243. Well-known seasoned issuers are entitled to file registration statements with the SEC that are automatically effective. See, for example, General Instruction I.C. of Form F-3, available at <http://www.sec.gov/about/forms/formf-3.pdf> and General Instruction I.D. of Form S-3, available at <http://www.sec.gov/about/forms/forms-3.pdf>. It is beyond the scope of this article to address these securities offering reforms.

244. The phrase "synthetic merger" generally refers to a transaction or series of related transactions that have substantially the same effects as a statutory merger and may be employed where no statutory merger procedures exist. A synthetic merger could include, for instance, the acquisition by a "successor" company of substantially all of the assets of a "target" company, in exchange for a combination of cash, securities and/or the assumption of all or a portion of the target company's liabilities. See, e.g., Shareholders' Circular, dated April 22, 2005, attached as Exhibit 3 to the Form 6-K submitted by Equant N.V. to the SEC on April 25, 2005, S.E.C. Filing 05769962.

nized,²⁴⁵ as well as tax, regulatory and other practical considerations. A business combination transaction involving such a vote and the issuance of new securities is subject to the Securities Act if U.S. jurisdictional means are utilized. Hence, any securities issued pursuant to such a transaction must be registered under the Securities Act unless an exemption or exclusion is available.²⁴⁶ Although the Exchange Act regulates the solicitation of votes of a company's shareholders,²⁴⁷ such rules are applicable only in connection with the solicitation of votes in respect of Registered Securities and do not apply, in any case, with respect to the securities of a foreign private issuer.²⁴⁸ Business combination transactions that do not constitute tender offers for purposes of U.S. securities laws are not subject to section 14(d) or section 14(e) of the Exchange Act or Regulation 14D or Regulation 14E thereunder, which by their terms only apply to tender offers.

In the context of a business combination transaction not comprising a tender offer, as in the case of an exchange offer, the various private placement exemptions and the Regulation S safe harbor may be available as an alternative to Securities Act registration.²⁴⁹ Rule 802 provides an exemption from the registration requirements of the Securities Act with respect to the issuance of securities to shareholders for foreign private issuers with a limited U.S. shareholder base. Section 3(a)(10)²⁵⁰ of the Securities Act provides an exemption with respect to securities issued in connection with a business combination transaction in which the exchange of securities has been approved by a court after a hearing on the fairness of the exchange.²⁵¹ In the absence of such an exemption or exclusion, however, any securities issued would have to be registered under the Securities Act.

245. The availability of statutory merger procedures varies from jurisdiction to jurisdiction. In jurisdictions in which a statutory merger procedure applies, applicable law generally permits only entities organized under the laws of such jurisdiction to merge. In other countries, such as the United Kingdom, no such procedure is available, but other procedures, such as a court-mediated scheme of arrangement, are available and there is a statutory procedure available to "squeeze out" minority shareholders subsequent to a tender offer. See Companies Act 1985, c.40 (Eng.) sections 428-430f.

246. See Securities Act Rule 145 (codified at 17 C.F.R. § 230.145 (2005)).

247. Regulation 14A, Exchange Act Rules 14a-1-14b-2 (codified at 17 C.F.R. § 240.14a-1-14b-2 (2005)) [hereinafter the "proxy rules"].

248. See Exchange Act Rule 3a12-3 (codified at 17 C.F.R. § 240.3a12-3 (2005)). See also *supra* note 116 and accompanying text. Pursuant to Exchange Act Rule 13e-3 (codified at 17 C.F.R. § 240.13e-3 (2005)), a going private transaction by a bidder or its affiliate not exempt pursuant to Rule 802 or the Tier I exemption may require the filing with the SEC of Schedule 13E-3 and compliance with the other provisions of Rule 13e-3. Even though foreign private issuers are exempt from the proxy rules, the disclosure documents prepared by foreign private issuers in Rule 13e-3 going private transactions are subject to filing with, and review by, the SEC. See, e.g., the Schedule 13E-3 filed with the SEC by Kerzner International Limited on May 24, 2006, S.E.C. Filing 005-48645.

249. See *supra* section 2.2 of this article.

250. Securities Act § 3(a)(10), 48 Stat. at 76 as amended by the Exchange Act, ch. 404, § 202, 48 Stat. 881, 906 (codified as amended at 15 U.S.C.A. § 77c(a)(10) (West 1997 & Supp. 2006)). Securities Act section 3(a)(10) is discussed in more detail in section 3.1.2 of this article, *infra*.

251. In the cross-border context, see *infra* note 260.

3.1 EXEMPTIONS AND EXCLUSIONS TO THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT

3.1.1 RULE 802

Reliance on Rule 802 permits the successor in a business combination transaction (or the surviving company in an amalgamation) to offer its shares in exchange for the shares of a non-U.S. target without having to register the shares being offered. This avoids the need to prepare and file the detailed disclosure specified in Form F-4 or Form S-4.²⁵² Rule 802 may be available where (i) the target is a foreign private issuer with some U.S. holders and (ii) U.S. holders hold 10 percent or less of the target's securities.²⁵³ In the case of a business combination transaction such as a merger where the securities are issued by the acquiring company, the calculation will be based on U.S. ownership of the company to be acquired as calculated 30 calendar days prior to the date of solicitation for the merger.²⁵⁴ In business combination transactions such as an amalgamation, where the securities are issued by a successor company to all participating companies, the calculation must be made as if measured immediately after completion of the business combination transaction.²⁵⁵ In this case, the calculation would be made based on U.S. holder information available 30 calendar days prior to solicitation, but applied on a *pro forma* basis as if measured immediately after completion of the transaction.²⁵⁶

3.1.2 SCHEMES OF ARRANGEMENT—SECTION 3(A)(10)

In many jurisdictions, acquisitions or business combinations are effected by schemes of arrangement, or similar statutory arrangements involving both vote of affected security holders and a court determination regarding the fairness of the transaction. Schemes of arrangement conducted so as to fall within the Securities Act section 3(a)(10) exemption may provide significant advantages over tender offers to the extent that the timing, disclosure and other requirements of the Exchange Act and registration requirements of the Securities Act will not apply. Schemes of arrangement may afford additional advantages under local law, including, for instance, the ability to structure a transaction to avoid security transfer tax, provide roll-over tax relief and to eliminate objecting/minority investors as part of the scheme transaction.²⁵⁷

252. Securities Act Form S-4, available at <http://www.sec.gov/about/forms/forms-4.pdf>; Form F-4, available at <http://www.sec.gov/about/forms/formf-4.pdf>.

253. As described *supra* in section 1.1.1 of this article, certain "look through" provisions apply in the context of assessing the availability of Rule 802 (codified at 17 C.F.R. § 230.802 (2005)).

254. See *supra* section 2.1 of this article.

255. See Securities Act Rule 802 (codified at 17 C.F.R. § 230.802 (2005)).

256. See Cross-Border Release, *supra* note 3, at paragraph II.F1.

257. Under the laws of certain jurisdictions, such as the United Kingdom, not only is the approval of a minimum percentage in value of the relevant class of securities required, but the approval of a majority in number is also required. See Companies Act 1985, c.40 (Eng.) section 425. If the subject company has an ADS program, the record holder of securities underlying the ADSs (effectively the custodian of the ADS depositary) will typically be treated as a single holder of record. Companies may

Section 3(a)(10) of the Securities Act provides an exemption from the registration requirements of the Securities Act for

any security which is issued in exchange for one or more *bona fide* outstanding securities, claims or property or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court . . . expressly authorized by law to grant such approval.²⁵⁸

The Staff has identified the following conditions that must be satisfied in order for an issuer to be entitled to rely on the exemption provided by section 3(a)(10):

- the securities must be issued in exchange for securities, claims or property—they cannot be offered for cash;
- a court or authorized governmental entity (which can be a non-U.S. court or entity) must approve the fairness of the terms and conditions of the exchange;
- the reviewing court or authorized entity must (i) find, before approving the transaction, that the terms and conditions of the exchange are fair to those to whom securities will be issued and (ii) be advised before the hearing that the issuer will rely on the Section 3(a)(10) exemption based on the court's or authorized entity's approval;
- the court or authorized governmental entity must hold a hearing before approving the fairness of the terms and conditions of the transaction;
- a governmental entity must be expressly authorized by law to hold the hearing, although it is not necessary that the law require the hearing;
- the fairness hearing must be open to everyone to whom securities would be issued in the proposed exchange;
- adequate notice of the hearing must be given to all those persons; and
- there cannot be any improper impediments to the appearance by those persons at the hearing.²⁵⁹

The section 3(a)(10) exemption has been relied upon in numerous cross-border business combination transactions, including “schemes of arrangement” under Section 425 of the United Kingdom Companies Act 1985 and in jurisdictions such as South Africa, Australia and Hong Kong²⁶⁰ with similar procedures pro-

want to consult with the relevant depository and their legal counsel to determine whether a means exists, through a temporary custodianship or otherwise, to permit the record or beneficial owners of ADSs to be counted as record holders for the purpose of satisfying the test based on approval by a specified percentage of the number of security holders.

258. *Supra* note 250.

259. Revised Staff Legal Bulletin No. 3 (CF) (Oct. 20, 1999), available at <http://www.sec.gov/interp/legal/cfslb3r.htm>.

260. See General Electric Company and GE Investments, Inc., SEC No-Action Letter, 2004 WL 362330 (Feb. 24, 2004); Constellation Brands, Inc., SEC No-Action Letter, 2003 WL 215032 (Jan. 29, 2003); Ashanti Goldfields Company Limited, SEC No-Action Letter, 2002 WL 1359408 (June 19, 2002); China Light & Power Company Limited, SEC No-Action Letter, 1998 WL 2443 (Jan. 2, 1998). It is not clear that the Staff would grant no-action relief under Securities Act section 3(a)(10) in connection with a scheme of arrangement or similar proceeding in a civil law jurisdiction.

viding for a court-convened meeting of shareholders, followed by a ruling on the fairness of the transaction.

Securities issued pursuant to section 3(a)(10) may be subject to restrictions on their transfer to the extent that the holder of such securities was affiliated with any party to the business combination transaction prior to the transaction.²⁶¹

3.2 REGISTRATION UNDER THE SECURITIES ACT

Registration of securities by foreign private issuers to be issued in connection with business combination transactions are effected on Form F-4.²⁶² As in the case of an exchange offer, public announcements and shareholder communications relating to a business combination transaction are restricted, except as permitted by Rules 165 and 425 under the Securities Act. These rules permit free written and oral communications before the filing of the bidder's registration statement and permit the use of written communications other than the statutory prospectus after the filing of the bidder's registration statement, subject to certain conditions.²⁶³ The potential liability issues discussed above in section 2.4.2 of this article in relation to registered exchange offers apply in the case of a registered business combination transaction.

4 TRANSACTIONS NOT INVOLVING U.S. JURISDICTIONAL MEANS

Notwithstanding the accommodations available pursuant to the cross-border tender offer rules, in some instances bidders making offers for securities of non-U.S. targets that do not constitute Registered Securities determine not to extend their offers to the target's U.S. shareholders. It is the understanding of the authors that some of the reasons cited to justify this practice include:

- a desire to reduce the prospect of litigation in U.S. courts;
- a desire to minimize procedural complexities;
- a desire to avoid conflicts between U.S. and non-U.S. regulatory schemes;
- a desire to reduce the length of time the offer must remain open;
- a desire to reduce costs;
- the desire of the bidder to avoid becoming a "reporting company";
- the inability of the bidder to prepare the financial information that would be required in an offer; and
- U.S. shareholders represent a small percentage of the target's shareholders or are otherwise not necessary to complete the transaction.

In seeking to exclude offers from the reach of the tender offer rules under the Exchange Act, bidders have structured offshore transactions to avoid the use of

261. See *supra* note 259, Revised Staff Legal Bulletin No. 3 (CF).

262. See *supra* section 2.4 of this article.

263. See *supra* notes 238 and 239.

U.S. jurisdictional means.²⁶⁴ Although this approach has been challenged in U.S. courts,²⁶⁵ U.S. courts have generally taken the view that tender offers made outside the United States are not subject to the procedural or registration requirements of U.S. securities laws.²⁶⁶ The anti-fraud provisions of the U.S. securities laws may, however, apply to misstatements or omissions affecting U.S. purchasers or sellers.²⁶⁷

In order to avoid the use of U.S. jurisdictional means, an offer by its terms may not be made, directly or indirectly, in the United States. To reduce the chance that the offer could be deemed to have been made in the United States indirectly, procedures are often implemented to avoid the use, by the offeror or any transaction participant, of U.S. jurisdictional means (including telephone, fax and internet to, in or from the United States). Such procedures may include, among others, placing legends on offer documents, prohibiting the distribution of offer documents into the United States and placing restrictions on publicity and communications regarding the offer in the United States (including submissions or filings required to be made by the bidder pursuant to its extant Exchange Act reporting obligations).

No statutory or administrative “safe harbor” exists as to the avoidance of U.S. jurisdiction. There can be no assurance, therefore, that compliance with the procedures described herein or other procedures would preclude either a judicial finding that the U.S. federal securities laws apply to an offer or the imposition of a judicial remedy, such as an injunction against the offer, for failure to comply with such laws. Moreover, in many cross-border offer situations, particularly where the number of U.S. holders of the target’s securities is relatively significant,²⁶⁸ the SEC has encouraged the bidder to extend its offer into the United States by informal means. In its 1990 concept release, the SEC took the position, notwithstanding the views of the Delaware court in *Plessey Co. plc v. General Electric Co. plc*,²⁶⁹ that “U.S. jurisdictional means” exist whenever it is reasonably foreseeable that excluded U.S. shareholders of a foreign issuer who have not been

264. The jurisdictional reach of the tender offer rules is provided by section 14(d) of the Exchange Act, which ties potential liability to “the use of the mails or . . . any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise.” Exchange Act § 14(d), as added by the Williams Act, *supra* note 12, 82 Stat. at 455 (codified as amended at 15 U.S.C. § 78n(d) (2000 & Supp. III 2003)). Bidders therefore may seek to avoid the use of any such means to avoid the application of the Exchange Act tender offer rules. Websites accessible in the United States must not be used to entice U.S. investors to participate in offshore offerings. The Staff has stated, however, that a company using Regulation S to allow participation in a business combination offshore (such as a merger or other voting transaction, but not a tender or exchange offer) may put the prospectus/offer to exchange on an unrestricted website, and need not prevent the U.S. holders from receiving the transaction consideration. The company should not, however, engage in any further activities such as sending the disclosure document used in connection with a business combination to U.S. holders. See Third Supplement, *supra* note 52, Question II.F.1.

265. See *supra* note 4.

266. See, e.g., Exchange Act § 30(b), 48 Stat. at 904 (codified at 15 U.S.C. § 78dd (2000)). It should be noted that the SEC has never adopted any rules to implement section 30(b).

267. See *supra* notes 4 and 6; *Plessey Co. plc v. General Electric Co. plc*, 628 F. Supp. 477 (D. Del. 1986); *Bersch*, *supra* note 4; *Schoenbaum*, *supra* note 4.

268. “Significant” for these purposes could be in the order of 5 to 10 percent of all shareholders.

269. See *supra* note 267.

included in the offer will sell their securities into the secondary market in response to that offer.²⁷⁰ Moreover, the authors believe that the Staff may be less willing to accept jurisdictional arguments in support of the exclusion of U.S. holders since the adoption of its cross-border tender offer rule amendments, which have facilitated the inclusion of U.S. holders in cross-border tender offers in certain contexts.

Summarized below are the procedures customarily followed in European tender offers in which the offer is not extended in the United States. These procedures are based on U.S. court decisions and statements of the SEC to date and take into account past practice in other similar offer situations.²⁷¹ Although these procedures have been implemented in many European offers,²⁷² compliance with such procedures has often been difficult or impossible because of U.S. shareholders' interest in the transaction and the significant practical problems of such compliance.

- The offer documents, form of acceptance, proxy materials or circulars to shareholders and press releases should include legends stating in effect that the materials do not constitute an extension of the offer into the United States; that no money, securities or other consideration is being solicited from U.S. residents and, if sent, will not be accepted; and if the bidder subsequently determines to extend the tender offer into the United States, the procedural and filing requirements of the SEC will be satisfied at such time. No means to tender securities (or forms that could be returned to indicate interest in participating in the tender offer) may be provided as part of any press materials.
- The bidder and its advisers and agents should avoid any physical distribution of the offer documentation to persons in the United States, including to the target's shareholders with registered addresses in the United States.
- The bidder and its advisers and agents (including the institution(s) receiving acceptances) should ensure that they do not accept under any circumstances the delivery of any written communication relating to the offer (including a form of acceptance) that is postmarked in, bears a return address from, or otherwise appears to have been dispatched from the United States.
- The bidder and its advisers and agents should establish procedures to handle telephone and e-mail inquiries in and from the United States. Generally, if the telephone caller is in the United States or intends to disseminate information concerning the offer in the United States, the caller should be informed that the offer is not being made in the United States or by any U.S. jurisdictional means, and that no information concerning the offer may be so conveyed to or by the caller in the United States, and

270. See SEC Release No. 33-6866, 55 Fed. Reg. 23751 n.2 (June 12, 1990).

271. See generally SEC Release No. 34-29275, 56 Fed. Reg. 27582 (June 14, 1991).

272. See Edward F. Greene et al., *Toward a Cohesive International Approach to Cross-Border Takeover Regulation*, 51 U. MIAMI L. REV. 823, 825-26 (1997) (citing examples of this practice and the common procedures employed to effect this result). See also *Consolidated Gold Fields PLC*, *supra* note 6.

the telephone call should be terminated. E-mail inquiries from U.S. residents should be handled in a similar manner.

- Publicity concerning the offer should be conducted in a manner to minimize contact with U.S. electronic and print media and U.S.-based financial analysts, both preceding and during the term of the offer. No press or analyst conferences, meetings or telephone calls to discuss the offer should be held in the United States at any time during the offer.
- Appropriate click-through, certification or other restrictions and procedures must be incorporated on the bidder's website to ring-fence offer-related materials from U.S. holders.
- Representatives of the U.S. media may be invited to briefings outside the United States regarding the offer in accordance with Rule 14d-1(e) if (i) access is provided to both U.S. and non-U.S. journalists and (ii) any offer documentation, press releases or any other related materials provided by the bidder or its advisers and agents to such journalists contains a legend to the effect that the materials do not constitute an extension of a tender offer in the United States for a class of equity securities of the target company.

From a business perspective, the restrictions on U.S. press and analyst contact may be very difficult or impossible for a U.S. bidder to comply with. In U.S.-excluded offers where the U.S. holdings of the target's securities are quite small, this business and legal dilemma has been resolved by the bidder preparing a short descriptive U.S. press release and/or by the bidder filing a brief descriptive statement with the SEC in a periodic report, providing a copy to the NYSE, if applicable, and refusing all further comment in the United States during the term of the offer.²⁷³ Such press releases or SEC filings or submissions would typically be prepared in consultation with the bidder's U.S. legal counsel.²⁷⁴

5 CERTAIN RELATED MATTERS

5.1 EXCHANGE ACT REGISTRATION

A bidder in an exchange offer (or the surviving entity in a business combination transaction) may determine to list or arrange for the quotation of its securities on a U.S. securities exchange or on Nasdaq, respectively, at the time that the bidder makes its offer to ensure that a liquid U.S. trading market develops for its securities upon completion of the transaction and thereby potentially increase the attractiveness of the transaction to security holders.²⁷⁵ In the case of a listing on a U.S. securities exchange or, before Nasdaq becomes a national securities exchange,

²⁷³ See *supra* note 192.

²⁷⁴ In addition to not directing the offer into the United States or to U.S. residents, bidders may also want to consider avoiding the use of any U.S. jurisdictional means in connection with the planning or implementation of the offer, in order to minimize the risk of the application of U.S. anti-fraud provisions. See *Bersch*, *supra* note 4.

²⁷⁵ Other potential benefits of a U.S. listing or quotation could include enhanced liquidity, broader research coverage and a currency for U.S. acquisitions.

quotation on Nasdaq, the bidder's securities must be registered under section 12(b)²⁷⁶ or 12(g),²⁷⁷ respectively, of the Exchange Act, and the requisite listing/quotation formalities must be completed before such securities can be eligible to be listed or quoted. Registration under section 12 of the Exchange Act will subject the registrant not only to the periodic reporting obligations under the Exchange Act, but also to applicable provisions of the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act")²⁷⁸ to the extent that such provisions are not already applicable.

In certain circumstances, as discussed in section 5.2 below, a bidder or surviving entity may succeed to the Exchange Act registration of the target or predecessor entity. Where succession does not occur, in the case of a registered exchange offer or other business combination transaction, registration under the Exchange Act in connection with a listing or quotation may be effected at the election of the bidder or surviving entity by filing a relatively simple Form 8-A²⁷⁹ with the SEC during the Securities Act registration process. In the case of the issuance of securities in connection with an exchange offer or a business combination transaction conducted pursuant to an exemption or exclusion from registration by a foreign private issuer under the Securities Act, registration under the Exchange Act would be effected by filing a registration statement on Form 20-F with the SEC.²⁸⁰

A bidder or surviving entity that initially determines that it is not required to register its securities under the Exchange Act and is not otherwise subject to an Exchange Act reporting obligation under section 15(d)²⁸¹ of the Exchange Act (as a result of succession or having had a registration statement declared effective by the SEC) will nevertheless incur an obligation to register its securities under the Exchange Act. Registration will be required (i) in connection with a subsequent listing or quotation of its securities or (ii) upon its equity securities being held by 500 or more holders, at least 300 of which are resident in the United States²⁸²

276. Codified as amended at 15 U.S.C.A. § 78l(b) (West 1997 & Supp. 2006).

277. Codified as amended at 15 U.S.C.A. § 78l(g) (West 1997 & Supp. 2006).

278. Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201-7266 and scattered sections of Title 15 and 18 of U.S.C. (Supp. III 2003)).

279. Form 8-A, available at <http://www.sec.gov/about/forms/form8-a.pdf>.

280. See, e.g., General Instruction A of Form 20-F, available at <http://www.sec.gov/about/forms/form20-f.pdf>.

281. Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)).

282. For purposes of determining the number of U.S.-resident holders, securities are deemed to be held by those holders identified as owners of such securities on records maintained by or on behalf of the issuer, except in the case of securities held by broker-dealers, banks and their nominees, where the issuer must make inquiries of such financial intermediaries and its securities will be deemed to be held by the number of U.S.-resident holders for which any such financial intermediary holds. See Exchange Act § 12(g), as added by Securities Acts Amendments of 1964, Pub. L. No. 88-467, § 3(c), 78 Stat. 565, 566 (codified as amended at 15 U.S.C.A. § 78l(g) (West 1997 & Supp. 2006)); Exchange Act Rules 12g3-2(a), 12g5-1 (codified at 17 C.F.R. §§ 240.12g3-2(a), 240.12g5-1 (2005)). An exemption from the registration requirements of the Exchange Act may be available if timely claimed by a foreign private issuer pursuant to Exchange Act Rule 12g3-2(b) (codified at 17 C.F.R. § 240.12g3-2(b) (2005)). Such exemption is not available, however, if securities are listed on a U.S. securities exchange (or, before Nasdaq becomes a national securities exchange, quoted on Nasdaq), if the issuer

and the bidder's having total assets equal to, or in excess of, \$10 million,²⁸³ unless the bidder is able to rely upon the exemption from registration provided by Rule 12g3-2(b)²⁸⁴ under the Exchange Act.²⁸⁵

5.2 SUCCESSION

Pursuant to Rule 12g-3 under the Exchange Act,²⁸⁶ if in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or similar transaction, securities of a bidder not already registered under the Exchange Act are issued to holders of securities of the target that were registered under the Exchange Act, then, upon consummation of the transaction, the bidder's securities will generally be deemed registered under the Exchange Act. Pursuant to Rule 15d-5 under the Exchange Act,²⁸⁷ if in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets or similar transaction, securities of a bidder not required to file reports under section 15(d) of the Exchange Act are issued to holders of a target that is required to file reports under section 15(d) of the Exchange Act, then the duty to file such reports shall be assumed by the bidder.

For purposes of Rule 12g-3 and Rule 15d-5, "succession" occurs only in connection with a *direct acquisition of the assets comprising a going business*.²⁸⁸ Succession is not triggered merely by gaining control of a company, unless such control is accompanied by the direct acquisition of assets.²⁸⁹ Succession is potentially applicable to a business combination transaction effected by way of a tender offer, if the tender offer comprises the acquisition of assets of the target as a going business, statutory merger, corporate amalgamation, transfer of assets or court-approved merger, such as a scheme of arrangement, among others.²⁹⁰

Succession for purposes of Rule 12g-3 will not occur if (i) upon consummation of the business combination transaction, the bidder has fewer than 300 record holders of its securities, or, in the case of a foreign private issuer bidder, fewer

has in the past offered securities publicly in the United States or if the issuer otherwise has or had any securities registered under Exchange Act section 12 during the prior eighteen months. See Exchange Act Rule 12g3-2(b) (codified at 17 C.F.R. § 240.12g3-2(b) (2005)). In December 2005, the SEC proposed amendments to the conditions for claiming the Rule 12g3-2(b) exemption. SEC Release No. 34-53020, International Series Release No. 1295, 2005 WL 3629022 (December 23, 2005).

283. In this later case, a bidder must register such class of securities under the Exchange Act within 120 days of the end of the fiscal year in which the relevant threshold has been exceeded. See *supra* note 277.

284. 17 C.F.R. § 240.12g3-2(b) (2005).

285. See Exchange Act Rule 12g3-2(d) (codified at 17 C.F.R. § 240.12g3-2(d) (2005)), which limits the availability of the Exchange Act Rule 12g3-2(b) exemption, in particular in the context of an exchange offer for Registered Securities.

286. 17 C.F.R. § 240.12g-3 (2005).

287. 17 C.F.R. § 240.15d-5 (2005).

288. Succession is defined in Exchange Rule 12b-2 (codified at 17 C.F.R. § 240.12b-2 (2005)).

289. *Id.*

290. In the authors' experience, participants in a business combination transaction effected as a tender offer may conclude that the requisite acquisition of assets occurs upon completion of a second step, squeeze-out transaction, if contemplated.

than 300 holders resident in the United States or (ii) the class of securities issued by the bidder or surviving entity is exempt from registration under Exchange Act registration requirements, other than pursuant to Rule 12g3-2 thereunder.²⁹¹ A bidder or surviving entity will succeed to a target's or predecessor entity's obligations under section 15(d) of the Exchange Act,²⁹² unless the bidder or surviving entity is exempt from filing reports under section 15(d) or the duty to file such reports is suspended under section 15(d) of the Exchange Act.²⁹³

The principal benefit of succession is that a bidder need not file an Exchange Act registration statement with the SEC in order to effect the required or desired registration under the Exchange Act of its securities. The bidder need only file with the SEC a notice of succession on Form 8-K.²⁹⁴ Another benefit of succession is that it facilitates the continuous listing or quotation of the target shareholders' securities in the United States without the need on the part of the bidder to coordinate the filing and declaration of effectiveness of a new Exchange Act registration statement.²⁹⁵ Finally, a successor bidder may, in limited circumstances, be able to take advantage of certain short-form registration statements in connection with capital raising under the Securities Act, notwithstanding its recent incorporation and/or recently incurred obligation to file reports under the Exchange Act.²⁹⁶

The operation of succession may, however, have unintended consequences for a successor bidder. The bidder may become subject to the periodic reporting and other obligations under the Exchange Act, notwithstanding the fact that it may never have accessed U.S. capital markets and/or sought a listing or quotation of its securities on a U.S. securities exchange or on Nasdaq. A successor issuer will

291. See Exchange Act Rule 12g3-2(a) (codified at 17 C.F.R. § 240.12g3-2(a) (2005)).

292. Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)).

293. *Id.*

294. Notwithstanding Exchange Act Rule 12g-3(f) (codified at 17 C.F.R. § 240.12g-3(f) (2005)), the Staff has permitted foreign private issuers to provide notification of succession under Rule 12g-3 on Form 6-K, (*available at* <http://www.sec.gov/about/forms/form6-k.pdf>), rather than Form 8-K (*available at* <http://www.sec.gov/about/forms/form8-k.pdf>). See Royal Dutch Petroleum Company N.V., SEC No-Action Letter, 2005 WL 1266414 (May 17, 2005); Six Continents PLC, SEC No-Action Letter, 2003 WL 1883711 (Mar. 28, 2003); British Telecommunications plc, SEC No-Action Letter, 2001 WL 1230261 (Oct. 11, 2001); The Bank of Tokyo-Mitsubishi Ltd, SEC No-Action Letter, 2001 WL 428449 (Mar. 28, 2001). Pursuant to Staff interpretive guidance, the target must publish notice of the succession by filing a certificate of termination of its registration with the SEC on Form 15. See Exchange Act Interpretation 4S, Supplement to the Division of Corporation Finance Telephone Interpretations, March 1999, *available at* <http://www.sec.gov/interps/telephone/phonesupplement1.htm>.

295. Securities may not be traded or quoted, as the case may be, on NYSE or Nasdaq until a company's Exchange Act registration statement has been declared effective. Effectiveness of a bidder's Exchange Act registration statement, in the case of a simultaneous Securities Act registration, will occur in coordination with declaration of effectiveness of the Securities Act registration statement pursuant to Exchange Act Rule 12d1-2 (codified at 17 C.F.R. § 240.12d1-2 (2005)).

296. The Securities Act provides for several short forms of registration, including Form S-3, *available at* <http://www.sec.gov/divisions/corpfin/forms/s-3.htm>, and Form F-3, *available at* <http://www.sec.gov/about/forms/formf-3.pdf>, which permit an issuer to incorporate by reference materials filed with the SEC pursuant to its Exchange Act reporting obligations. A successor bidder's ability to use such forms is limited, however. See, e.g., General Instruction I.A.4 to Registration Statement for Securities of Certain Foreign Private Issuers, Securities Act Form F-3.

also become liable for filings made by the predecessor entity and will be obliged to make or correct filings that were not made or were made and are required to be corrected.²⁹⁷

Were the bidder or surviving entity to desire to list its securities on a U.S. securities exchange subsequent to succession, it would do so by completing the requisite listing application and filing a short form Exchange Act registration statement with the SEC on Form 8-A.²⁹⁸ Were the bidder to desire to secure a quotation of its securities on Nasdaq subsequent to succession (prior to the time that Nasdaq becomes a national securities exchange), only a listing application would be required; by reason of succession, no separate Exchange Act registration would be required.

Parties' specific filing and other obligations in the context of succession will depend on many factors, including the nature of the relevant business combination transaction, the Exchange Act reporting status of the parties to the transaction, the intended timing, if any, of the listing or quotation of the bidder's or surviving entity's securities, the total number of shareholders of the parties (and the number of shareholders resident in the United States) at the time of succession and the total number of shareholders of the target or predecessor entity resident in the United States at the target's financial year end.

A bidder or surviving entity that is deemed to have registered a class of securities under section 12 of the Exchange Act or incurs a reporting obligation under section 15(d) of the Exchange Act, in each case by succession, will become subject to the periodic reporting obligations under the Exchange Act, as well as to applicable provisions of the Sarbanes-Oxley Act.²⁹⁹

5.3 DE-REGISTRATION

A bidder or surviving entity in a business combination transaction that (i) has succeeded to another party's section 12(b) or section 12(g) Exchange Act registration or (ii) has taken steps to register a class of securities under the Exchange Act in connection with the listing or quotation of such securities, will continue to be subject to the periodic reporting requirements and other provisions of the Exchange Act until such registration is terminated.³⁰⁰ A bidder or surviving entity

297. See Keir D. Gumbs, *Understanding Succession under the Federal Securities Laws*, 19 INSIGHTS 17 (April 2005).

298. See *supra* note 279.

299. See *infra* section 5.5 of this article. The Staff has considered, and granted relief in connection with, a number of other issues in transactions involving succession, including (i) the ability of the successor to file post-effective amendments to the predecessor's registration statements pursuant to Securities Act Rule 414 (codified at 17 C.F.R. § 230.414 (2005)), (ii) the ability of the successor to take into account the reporting history of the predecessor in determining the eligibility of the successor to use Forms S-3, S-4 and S-8 under the Securities Act and in determining whether the successor meets the "current public information" requirements of Securities Act Rule 144(c) and (iii) the obligation of beneficial owners that have filed ownership reports on Schedules 13D or 13G to file additional or amended Schedules 13D or 13G as a result of the reorganization. See, e.g., Shire Pharmaceuticals Group plc, SEC No-Action Letter, 2005 WL 3115788 (Nov. 17, 2005).

300. See Exchange Act Rule 12d2-2(d) (codified at 17 C.F.R. § 240.12d2-2(d) (2005)); Exchange Act Rule 12g-4(b) (codified at 17 C.F.R. § 240.12g-4(b) (2005)).

that has filed a registration statement to register securities with the SEC under the Securities Act, including in connection with an exchange offer, or has succeeded to another party's section 15(d) Exchange Act reporting obligations pursuant to Rule 15d-5, will thereafter always have either an active reporting obligation or a suspended reporting obligation under section 15(d) of the Exchange Act.³⁰¹

If a class of securities of a bidder or surviving entity is listed on a U.S. national securities exchange, the bidder or surviving entity could seek to terminate its registration under section 12(b) of the Exchange Act by delisting its securities from such exchange.³⁰² Such delisting and termination would be effected by filing with the SEC a notification of removal from listing and registration on Form 25.³⁰³ However, if following such delisting the entity has a class of equity securities held by 300 or more holders resident in the United States,³⁰⁴ the class will be deemed registered under section 12(g) of the Exchange Act.³⁰⁵ Were the number of holders of its securities resident in the United States subsequently to fall below 300, the bidder could then seek to terminate its registration under section 12(g) by filing with the SEC a certification and notice of termination on Form 15; Form 15 can also be used to terminate any obligation to file reports pursuant to section 15(d) of the Exchange Act.³⁰⁶ Upon the filing of the certification, the obligations of the bidder to file reports with the SEC would cease. However, under current SEC rules, the issuer may again become subject to reporting obligations if the number of holders of any class of equity securities, at the end of any fiscal year, were 300 or more.³⁰⁷ A company that does not have a class of securities registered under section 12 of the Exchange Act, and whose section 15(d) reporting obligations have been suspended, is not deemed to be an "issuer" under the Sarbanes-Oxley

301. Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)).

302. See Exchange Act Rule 12d2-2 (codified at 17 C.F.R. § 240.12d2-2 (2005)). If a bidder's securities are quoted on Nasdaq, its securities will have been registered under Exchange Act section 12(g). Upon termination of its quotation (and upon confirmation that the number of its U.S. resident holders is below 300), the bidder could seek to terminate its registration under Exchange Act section 12(g) by filing with the SEC a certification and notice of termination on Form 15. See Exchange Act Rule 12g-4 (codified at 17 C.F.R. § 240.12g-4 (2005)).

303. See Exchange Act Rule 12d2-2 (codified at 17 C.F.R. § 240.12d2-2 (2005)). Form 25, available at <http://www.sec.gov/about/forms/form25.pdf>.

304. The calculation is based on the "look through" requirements of Rule 12g3-2(a) under the Exchange Act (codified at 17 C.F.R. § 240.12g3-2(a) (2005)).

305. See Exchange Act Rule 12g-2 (codified at 17 C.F.R. § 240.12g-2 (2005)).

306. See Exchange Act Rule 12g-4 (codified at 17 C.F.R. § 240.12g-4 (2005)). See also Exchange Act Rule 12h-3 (codified as 17 C.F.R. § 240.12h-3 (2005)). Form 15, available at <http://www.sec.gov/about/forms/form15.pdf>.

307. Although issuers without a prior U.S. listing may be eligible to claim the exemption from Exchange Act registration and reporting obligations set forth in Exchange Act Rule 12g3-2(b), pursuant to Exchange Act Rule 12g3-2(d) this exemption is not available for securities of a foreign private issuer that has or has had during the prior 18 months any securities registered under Exchange Act section 12 or has an active or suspended reporting obligation under Section 15(d) of the Exchange Act. 17 C.F.R. § 240.12g3-2(d) (2005). See *supra* note 297.

Act.³⁰⁸ It is generally understood that a company that is an “issuer” under the Sarbanes-Oxley Act by reason of the registration of its securities under section 12 of the Exchange Act, and that it is not subject to section 15(d) of the Exchange Act, will cease to be an “issuer” under the Sarbanes-Oxley Act upon termination of such registration.³⁰⁹

A party’s obligation to file reports under section 15(d) of the Exchange Act, if any, is automatically suspended for so long as its securities are registered pursuant to section 12(b) or section 12(g) of the Exchange Act.³¹⁰ Any obligation to file reports under section 15(d) of the Exchange Act that is reinstated upon the termination of an issuer’s registration under section 12 of the Exchange Act can be suspended, but not terminated, by filing with the SEC a certification and notice of suspension on Form 15, where the number of holders of a bidder’s securities resident in the United States falls below 300.³¹¹ Hence, under current SEC rules, a foreign private issuer may again become subject to reporting obligations if the number of U.S. resident holders of any class of its equity securities at the end of any fiscal year is 300 or more.³¹²

On December 23, 2005, the SEC published proposed rule amendments³¹³ to address concerns regarding the difficulties many foreign private issuers have encountered in seeking to deregister under the Exchange Act and to terminate their reporting obligations. Such proposals would permit deregistration based upon compliance with various tests based, among other things, on the percentage of U.S. resident holders of the issuer’s securities, in addition to the tests based on the number of holders of securities, and would allow the permanent termination, rather than suspension only, of a foreign private issuer’s section 15(d) reporting obligations.³¹⁴ The proposed rules do not clearly address, however, the extent to which the relief proposed would apply to successor issuers.

Bidders that seek to acquire U.S. companies that have (or have had) securities registered pursuant to section 12 of the Exchange Act or a reporting obligation pursuant to section 15(d) of the Exchange Act should consult with their legal counsel to consider the implications, under the Exchange Act, of the proposed acquisition, and the issues they may need to address should they desire to cease their reporting obligations.

308. SEC, Division of Corporation Finance, *Sarbanes-Oxley Act of 2002—Frequently Asked Questions* November 8, 2002 (revised November 14, 2002), available at <http://www.sec.gov/divisions/corpfina/faqs/soxact2002.htm>, Question 1. If the company elects to file reports voluntarily, it will be subject to certain of the SEC rules adopted pursuant to the Sarbanes-Oxley Act. *Id.* Question 9.

309. To the authors’ knowledge, the SEC has not issued written guidance on the point.

310. Exchange Act § 15(d), as added by Act of May 27, 1936, ch. 462, § 3, 49 Stat. 1375, 1377 (codified as amended at 15 U.S.C. § 78o (2000 & Supp. III 2003)).

311. See Exchange Act Rule 12h-3 (codified at 17 C.F.R. § 240.12h-3 (2005)).

312. Because Exchange Act Rule 12g3-2(b) is currently unavailable if an issuer has a reporting obligation (suspended or active) under Exchange Act section 15(d), an issuer in this category would never be able to terminate permanently its obligation. 17 C.F.R. § 240.12g3-2(b) (2005).

313. See SEC Release No. 34-53020, 70 Fed. Reg. 77688 (Dec. 30, 2005).

314. *Id.*

5.4 REPORTING OF BENEFICIAL OWNERSHIP

Section 13(d) of the Exchange Act provides that entities that alone or in concert with other entities acquire, directly or indirectly, the beneficial ownership of more than 5 percent of a class of Registered Securities must file a beneficial ownership report with the SEC.³¹⁵ “Beneficial ownership” exists where a person has or shares the power to vote or dispose of a security, either directly or indirectly through a contract, arrangement, relationship, understanding or otherwise, whether formal or informal.³¹⁶ More than one person may be deemed to be the beneficial owner of the same securities.³¹⁷ Beneficial ownership also exists and must be reported where a person has the *right to acquire* securities if the right is exercisable within 60 calendar days or the right was acquired with the purpose or effect of changing or influencing control of the issuer.³¹⁸ For instance, parties to an irrevocable undertaking granted in connection with a tender offer may have a section 13(d) reporting obligation in respect of the shares that are the subject of such undertaking if such shares are Registered Securities. The reporting obligation applies regardless of whether the target or the acquirer (or both) are non-U.S. entities and/or whether the interest in the securities was acquired in the United States or abroad.

In the context of a tender offer, a beneficial ownership report would need to be filed by the bidder on Schedule 13D.³¹⁹ Schedule 13D requires, among other things, a description of the identity of the acquirer, including directors, officers and controlling persons, the purpose of the transaction and plans that the acquirer may have for the target or for accumulating additional target shares, the source and amount of funds used to acquire the securities, the percentage of the target’s share capital acquired, details about transactions in the target’s securities in the preceding 60 calendar days and the nature of any arrangements to which the acquirer is a party relating to the target’s securities.³²⁰ An initial filing on Schedule 13D must be made within 10 calendar days of the acquisition; amendments must be made promptly—in the authors’ experience, generally interpreted by the securities bar to mean on the same day as the date on which the transaction to which the filing relates has occurred.

5.5 THE SARBANES-OXLEY ACT AND CORPORATE GOVERNANCE ISSUES

Under the Sarbanes-Oxley Act,³²¹ a bidder that has filed a registration statement under the Securities Act with the SEC or has an obligation to file reports under

315. See Rule 13d-1(a) under the Exchange Act (codified at 17 C.F.R. § 240.13d-1(a) (2005)).

316. See Rule 13d-3 under the Exchange Act (codified at 17 C.F.R. § 240.13d-3 (2005)).

317. Pursuant to Rule 13d-3, *supra* note 316, a beneficial owner of a security includes any person who, directly or indirectly, has or shares voting power or investment power with respect to a security. If two or more persons share voting power or investment power over the same security, they may each be deemed a beneficial owner for purposes of Rule 13d-3.

318. See Rule 13d-3(d)(1) under the Exchange Act (codified at 17 C.F.R. § 240.13d-3(d)(1) (2005)).

319. Exchange Act, Schedule 13D, 17 C.F.R. § 240.13d-101 (2005).

320. *Id.*

321. Pub. L. No. 107-204, 116 Stat. 745 (codified at 15 U.S.C. §§ 7201–7266 and scattered sections of Title 15 and 18 of U.S.C. (Supp. III 2003)).

section 15(d) of the Exchange Act (or has securities registered under section 12 of the Exchange Act) will be subject to certain corporate governance and other requirements. Among the requirements of the Sarbanes-Oxley Act applicable to a *foreign private issuer* bidder that becomes subject to such Act are the following:³²²

- a bidder whose securities are, prior to the time that Nasdaq becomes a national securities exchange, quoted on Nasdaq or are listed a national securities exchange will be subject to certain requirements applicable to its audit committee, including (i) the requirement that its audit committee members be independent, properly funded and vested with authority to engage independent legal counsel;³²³ (ii) the requirement that its audit committee establish certain whistleblower procedures to deal with complaints and concerns relating to auditing matters (and a prohibition on the termination or harassment of whistleblowers);³²⁴ (iii) the requirement that its audit committee pre-approve services provided by the company's auditors, subject to certain *de minimis* exceptions;³²⁵ (iv) the requirement that its directors and officers not exert improper influence in relation to the audit process;³²⁶ (v) restrictions on the services that can be provided by its auditors;³²⁷ (vi) the mandatory rotation of lead, reviewing and concurring audit partners³²⁸ and (vii) the requirement that the audit committee disclose whether it has an "audit committee financial expert";³²⁹
- the bidder must disclose whether it has adopted a "code of ethics" for its principal executive officer, principal financial officer, principal accounting officer or controller and persons performing similar functions and, if it has adopted such a code, the bidder must make such code available on its website and must disclose changes and waivers to the code;³³⁰

322. A foreign private issuer listed on the NYSE or quoted on Nasdaq will have to comply with additional corporate governance requirements; certain accommodations may be available to foreign private issuers, however. *See, e.g.*, NYSE COMPANY MANUAL § 303A.00; Nasdaq Marketplace Rule 4350(a)(1). A description of such requirements is beyond the scope of this article.

323. *See* Exchange Act § 10A(g), (h), as added by Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 301(a), 109 Stat. 737, 762 (codified as amended at 15 U.S.C. § 78j-1(g), (h) (2000 & Supp. III 2003)); Sarbanes-Oxley Act § 303, 116 Stat. at 778 (codified at 15 U.S.C. § 7242 (Supp. III 2003)).

324. *See* Exchange Act § 10A(j), as added by Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 301(a), 109 Stat. 737, 762 (codified as amended at 15 U.S.C. § 78j-1(j) (2000 & Supp. III 2003)); NEW YORK STOCK EXCHANGE RULE 303(A)(7)(c)(iii), *available at* <http://rules.nyse.com/NYSE/>. The whistleblower provisions have proven particularly controversial in Europe, where such provisions may fall foul of home country or E.U. privacy and employment legislation.

325. *See* Exchange Act § 10A(i), as added by Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 301(a), 109 Stat. 737, 762 (codified as amended at 15 U.S.C. § 78j-1(i) (2000 & Supp. III 2003)).

326. *See* Sarbanes-Oxley Act § 303, 116 Stat. at 778 (codified at 15 U.S.C. § 7242 (Supp. III 2003)).

327. *See* Exchange Act § 10A(g), (h), *supra* note 323; Sarbanes-Oxley Act § 201(b), 116 Stat. at 771-72 (codified at 15 U.S.C. § 7231 (Supp. III 2003)).

328. *See* Exchange Act § 10A(j), *supra* note 324.

329. *See* Sarbanes-Oxley Act § 407, 116 Stat. at 790 (codified at 15 U.S.C. § 7265 (Supp. III 2003); 17 C.F.R. § 229.401(h) (2005)).

330. *See* Sarbanes-Oxley Act § 406, 116 Stat. at 789 (codified at 15 U.S.C. § 7264 (Supp. III 2003)).

- the bidder's chief executive officer and chief financial officer must certify the bidder's compliance with the Exchange Act and the fair presentation of the bidder's financial condition and results of operations in annual and periodic reports that contain financial statements;³³¹
- the bidder must establish and maintain, and its principal executive and principal financial officers must review and disclose, their conclusions with respect to disclosure controls and procedures that are designed to ensure that information required to be disclosed in the bidder's reports under the Exchange Act is recorded, processed, summarized and timely reported;³³²
- in respect of its fiscal year ending on or after July 15, 2006, if it is an "accelerated filer",³³³ or otherwise for its fiscal year beginning on or after December 16, 2006,³³⁴ a bidder will be required, with the participation of its principal executive and principal financial officers, to evaluate annually the effectiveness of its internal controls over financial reporting (including any changes thereto) and report on such controls in its annual report; such report must (i) include a statement of management's responsibility for establishing and maintaining adequate internal controls over financial reporting, (ii) identify the framework used by management to evaluate the effectiveness of its internal control procedures, (iii) assess the effectiveness of such internal controls and (iv) include a statement that the company has issued an attestation report on management's assessment of the bidder's internal controls;³³⁵
- in respect of its fiscal year ending on or after July 15, 2006, if it is an "accelerated filer" or otherwise for its fiscal year beginning on or after December 16, 2006, a bidder will be required to include in each annual report an attestation from its auditors on their assessment of the bidder's internal controls over financial reporting;³³⁶
- directors and officers of the bidder may not make equity trades in the bidder's securities during certain "black-out" periods under the bidder's share-based retirement (or bonus, incentive or profit-sharing) plans, if any, subject to certain exceptions;³³⁷

331. See Sarbanes-Oxley Act § 906(a), 116 Stat. at 806 (codified at 18 U.S.C. § 1350 (Supp. III 2003)).

332. See Sarbanes-Oxley Act § 302, 116 Stat. at 777 (codified at 15 U.S.C. § 7241 (Supp. III 2003)).

333. See Exchange Act Rule 12b-2 (codified at 17 C.F.R. § 240.12b-2 (2005)).

334. See SEC Release No. 33-8618, 70 Fed. Reg. 56825 (September 29, 2005); SEC Release No. 33-8545, 70 Fed. Reg. 11528 (March 8, 2005); SEC Release No. 33-8392, 69 Fed. Reg. 9722 (March 1, 2004); SEC Release No. 33-8238, 68 Fed. Reg. 36636 (June 18, 2003); SEC Press Release No. 2006-75 (May 17, 2006), available at <http://www.sec.gov/news/press/2006/2006-75.htm>.

335. Exchange Act Rules 13a-15(c), 15d-15(c) (codified at 17 C.F.R. §§ 240.13a-15(c), 240.15d-15(c) (2005)); Regulation S-K Item 308, 17 C.F.R. § 229.308 (2005); Sarbanes-Oxley Act § 404, 116 Stat. at 789 (codified at 15 U.S.C. § 7262 (Supp. III 2003)).

336. See Sarbanes-Oxley Act § 404, 116 Stat. 789 (codified at 15 U.S.C. § 7262 (Supp. III 2003)); SEC Press Release No. 2006-75 *supra* note 334.

337. See Sarbanes-Oxley Act § 306(a), 116 Stat. at 779 (codified at 15 U.S.C. § 7244 (Supp. III 2003)); Regulation BTR, 17 C.F.R. § 245.100-104 (2005).

- the bidder cannot extend loans or other credit to its directors or executive officers, subject to certain exceptions;³³⁸ and
- the bidder's chief executive officer and chief financial officer are required to repay to the bidder certain bonus and other incentive-based compensation and certain trading profits following a restatement of the bidder's accounts due to material noncompliance as a result of misconduct, with any financial reporting requirement under U.S. federal securities laws.³³⁹

A full description of Sarbanes-Oxley Act (and, in particular, the application of such Act to domestic companies) is beyond the scope of this article. However, in view of the significance of these matters, bidders should discuss these matters in detail with legal counsel prior to structuring an offering.

CONCLUSION

Many business combination transactions involving non-U.S. companies are subject to U.S. securities laws and regulations. These laws and regulations may impose significant substantive, disclosure and procedural obligations and, as a result, may have significant effects upon the timing, structure and consequences of such transactions. By understanding the extent to which a proposed transaction may be subject to U.S. securities laws and regulations, a party may be able to structure its transaction in a manner that avoids unanticipated or undesirable effects and minimizes potential conflicts between U.S. and home country regulation. Early consideration of potentially applicable U.S. federal securities laws may also assist a party in assessing the need for formal exemptive or other relief from the Staff or home country regulators. The early involvement of knowledgeable legal counsel should increase the likelihood that parties will achieve their business objectives in compliance with U.S. federal and local securities laws.



³³⁸. See Exchange Act § 13(k), as added by Sarbanes-Oxley Act § 402(a), 116 Stat. at 787 (codified at 15 U.S.C. § 78m(k) (2000 & Supp. III 2003)).

³³⁹. See Sarbanes-Oxley Act § 304, 116 Stat. at 778 (codified at 15 U.S.C. § 7243 (Supp. III 2003)).

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