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 of 1934 and the principal accommodations afforded to foreign private issuers in these regulations.

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Introduction

Even though tender offers and other business combination transactions may involve only non-U.S. companies, such transactions may nonetheless be subject to various U.S. laws and regulations, including U.S. federal securities laws and regulations. The application of U.S. federal securities laws and regulations generally depends on how the transaction is structured, whether any of the companies is subject to U.S. securities law reporting obligations, and whether any of the companies' security holders are located or resident in the United States. This article provides an overview of U.S. federal securities laws and regulations applicable to cross-border tender offers and other business combination transactions involving, in the case of a tender offer, a "target" or, in the case of a business combination transaction not involving a tender offer, a "subject company" that is organized in a jurisdiction outside the United States.[1] This article is not intended to provide a comprehensive analysis of all securities laws and regulations of consequence in such transactions, but to provide practitioners and other interested persons with a general guide regarding the substance and scope of the principal U.S. federal securities laws and regulations a practitioner might encounter in such transactions.[2]

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, which is made directly to security holders of the target company and may or may not be supported by management of the target company; references to a "business combination transaction" mean a combination of two entities' businesses by means of a tender offer or otherwise. *See also infra* note 21; *infra* section 3.

2. This article does not address all the U.S. 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 (2015), under the Securities Exchange Act of 1934, as amended, ch. 404, 48 Stat. 881 (the "Exchange Act"); 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, 15 U.S.C. § 78n (2012); it does not address the regulation of so-called "going-private" transactions under Exchange Act Rule 13e-3, 17 C.F.R. § 240.13e-3 (2015); 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, 1390, which amended the Clayton Act by adding the requirement that parties to certain transactions, including the acquisition of assets or shares, provide "pre-merger" notification to both the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice), which require deferring consummation of the transaction until the expiration or termination of a waiting period. This article does not address laws of the various states of the United States, for instance, laws designed to shield companies incorporated or operating in such states from unsolicited offers, which may prevent the consummation of certain transactions without board or shareholder approval. 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, 1425) 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 Domes-

Application of U.S. Securities Laws

A fundamental goal of the U.S. securities laws is the protection of U.S. investors.[3] The Commission has historically taken the view that U.S. securities laws potentially apply to any transaction that is conducted in the United States or that employs U.S. jurisdictional means.[4] Specifically, U.S. securities laws may be implicated as follows:

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tic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 95-213, tit. 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 U.S. Securities and Exchange Commission (the "Commission") and Canadian provincial securities regulators. This article also does not discuss relief that the staff of the Commission ("Staff") has historically granted in respect of cash tender offers for investment grade debt, as set forth in Abbreviated Tender or Exchange Offers for Non-Convertible Debt Securities, SEC No-Action Letter, 2015 WL 295011 (Jan. 23, 2015); Salomon Brothers Inc., SEC No-Action Letter, 1990 WL 286946 (Oct. 1, 1990); Goldman, Sachs & Co., SEC No-Action Letter, 1986 WL 66561 (Mar. 26, 1986); and Salomon Brothers Inc., SEC No-Action Letter, 1986 WL 65340 (Mar. 12, 1986).

3. *See*, *e.g.*, Exchange Act § 2, 15 U.S.C. § 78b (2012) (describing the necessity for the enactment of the Exchange Act and the reasons why "transactions in securities . . . are effected with a national public interest"); *id.* § 14(d)(1), 15 U.S.C. § 78n(d)(1) (2012) (Commission 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: Commission Guidance and Revisions to the Cross-border Tender Offer, Exchange Offer, Rights Offering, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, 73 Fed. Reg. 60050, 60052 (Oct. 9, 2008) (to be codified at 17 C.F.R. pts. 230, 231, 232, 239, 240, 241 & 249) [hereinafter 2008 Cross-border Release] (revisions "balance the need to protect U.S. investors through the application of protections afforded by U.S. law, while facilitating transactions that may benefit all security holders, including those in the United States"); Final Rule: Cross-border Tender and Exchange Offers, Business Combinations and Rights Offerings, 64 Fed. Reg. 61382, 61383 (Nov. 10, 1999) (to be codified at 17 C.F.R. pts. 200, 230, 239, 240, 249 & 260) [hereinafter 1999 Cross-border Release] (in the tender offer context, "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, 206–08 (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 though the transactions took place outside of the United States); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 988–89 (2d Cir. 1975), abrogated by Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010); Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972); *see also* Concept Release on Multinational Tender and Exchange Offers, 55 Fed. Reg. 23751, 23752 n.2 (proposed June 12, 1990) (to be codified at 17 C.F.R. pts. 230 & 240) [hereinafter 1990 Concept Release] (Commission noting that tender offer provisions of the Williams Act are "extraterritorial in scope" and suggesting 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"). While the authors believe that this remains the view of the Commission, it is uncertain whether, in light of [*Morrison v. National Australia Bank Ltd.*, 561 U. S. 247 (2010)], courts would find that U.S. securities laws, including the Williams Act, are extraterritorial in scope: conduct that fails to meet the jurisdictional means test is not subject to the securities laws but other conduct that meets the test may also be excluded from the scope of the law depending on how courts apply *Morrison*. *See infra* notes 5 & 310. For more background on the Williams Act, see *infra* note 9.

- the general anti-fraud provisions of the Exchange Act may be violated where fraudulent conduct occurs in the United States, or where the effects of the fraudulent conduct are felt in the United States;[5]
- if a tender offer is made for securities of a class that is registered under the Exchange Act, it is generally necessary for the bidder to comply with the tender offer provisions of the Exchange Act subject to available exemptions, if any;
- even where the target company does not have a class of securities registered under the Exchange Act, the Exchange Act proscribes certain "fraudulent, deceptive, or manipulative" acts or practices in connection with tender offers that are potentially applicable; 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"),[6] or to confirm the availability of an exemption from registration.

U.S. federal securities laws apply to a tender offer or other business combination transaction notwithstanding the nationality of the bidder or target or the protections afforded by their respective home market regulators if extended to holders in the United States. This approach contrasts with the approach taken in many European jurisdictions, where the jurisdiction of the organization of the target or the jurisdiction of its primary listing, rather than the residency of the investors or the means by which the offer is made, will determine the regulatory implications of the transaction.[7]

5. These tests are sometimes referred to as the "conduct test" and the "effects test." The general anti-fraud provisions are set forth in Exchange Act § 10(b), 15 U.S.C. § 78j (2012); Rule 10b-5, 17 C.F.R. § 240.10b-5 (2015); and, in the case of a tender offer, Exchange Act Rule 14e-3, 17 C.F.R. § 240.14e-3 (2015). *But see Morrison*, 561 U.S. at 247 (holding that the anti-fraud provisions of the Exchange Act do not cover the claims of "foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges"). The court rejected the conduct and effects tests, stated that whether a statute has extraterritorial application turns on whether there is "an affirmative indication" in the statute that it applies extraterritorially, and held that Exchange Act Section 10(b) applies only to transactions in securities listed on domestic exchanges and domestic transactions in other securities. *Id.* at 248. The U.S. Circuit Courts have responded to the test applied in *Morrison* and are developing parameters to satisfy the definition of "domestic" transactions in light of the Supreme Court's ruling. *See* Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60 (2d Cir. 2012) (holding that transactions involving securities that are not traded on domestic exchanges are "domestic" and subject to Section 10(b) and Rule 10b-5 if irrevocable liability is incurred or if title passes within the United States). Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), 15 U.S.C. §§ 77v(c), 78aa(b) (2012), which restored U.S. federal court jurisdiction over actions or proceedings brought by the Commission and the U.S. Department of Justice (but not private litigants) pursuant to the anti-fraud provisions of the securities laws based on the conduct and effects tests, adds confusion to the principle stated in *Morrison*. *See infra* note 310.

6. 15 U.S.C. §§ 77a–77aa (2012).

7. For instance, the United Kingdom's *City Code on Takeovers and Mergers*, Takeover Panel (2013), http://www.thetakeoverpanel.org.uk [hereinafter 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* City Code at paragraph 3(a) of the Introduction); South African take-

The Exchange Act

The Exchange Act governs reporting, disclosure, and other obligations of "reporting companies"[8] and certain persons having interests in such companies. The Exchange Act and the rules adopted by the Commission under that Act also govern tender offers.[9] Certain provisions of the Exchange Act[10] potentially apply to *any* tender offer that is extended to U.S. investors or that otherwise employs U.S. jurisdictional means.[11] Other provisions of the Exchange Act[12] apply only to 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 securities in connection with offers and sales unless an exemption from registration is available or an exclusion applies. The Securities Act potentially applies to any tender offer involving the exchange of one security in consideration for the tender of another, whether the exchange security

over regulations apply to companies that are deemed to be resident in South Africa (*see South Africa's Securities Regulation Code on Take-overs and Mergers* § A(3), *in* Guide to the Companies Act and Regulations 10-280 (Walter D. Geach ed., 1992)); and, in France, the rules relating to tender offers generally apply only where the target company is a French entity listed in France—the residency of the shareholders of the target is irrelevant (*see*, *e.g.*, Takeover Bids, ION 2006-387 (Mar. 31, 2006) (published as Law No. 2006-387 of Mar. 31, 2006, J.O. Apr. 1, 2006, p. 4882)).

8. As used in this article, "reporting company" refers to a U.S. domestic issuer or a foreign private issuer that is required to file reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act.

9. Tender offers were not regulated under 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 (1968) (codified as amended at 15 U.S.C. § 78*l*–78n (2012)). The provisions of the Exchange Act added by the Williams Act, including Sections 14(d) and 14(e), 15 U.S.C. § 78n(d)–(e), are consequently sometimes referred to as the "Williams Act."

10. *See* Exchange Act § 14(e), 15 U.S.C. § 78n(e); Regulation 14E, 17 C.F.R. §§ 240.14e-1 to .14f-1 (2015).

11. The extraterritorial application of the Exchange Act and rules adopted by the Commission under that Act is not expressly delineated by statute or regulation, but depends on the scope of U.S. authority generally, as well as the intended or expressed extraterritorial application of the relevant statute or regulation. In the context of exclusionary offers, the Commission has provided guidance as to the avoidance of U.S. jurisdictional means. *See infra* section 4; *see also* Alan P.W. Konevsky & Jessica King, *America Sans Frontières? Cross-border Business Deals: Excluding U.S. Shareholders After* Morrison, M&A J., at 18, 18–19 Nov. 2010.

12. *See* Exchange Act Section 14(d), 15 U.S.C. § 78n(d); Regulation 14D, 17 C.F.R. §§ 240.14d-1 to .14d-101 (2015).

13. Registration under the Exchange Act is discussed in *infra* section 5.1. Tender offers and business combinations involving companies organized in the United States or companies that fall outside the definition of "foreign private issuer," *discussed in infra* note 40, 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), 15 U.S.C. § 78n, and the reporting obligations under Section 16, 15 U.S.C. § 77o (2012). A discussion of these rules is beyond the scope of this article. Exchange Act Rule 3a12-3, 17 C.F.R. § 240.3a12-3 (2015), provides an exemption from the proxy rules and certain other requirements for securities of certain foreign issuers.

is newly issued or already outstanding and whether the exchange security is issued or delivered by the bidder or a third party.[14]

The Securities Act also applies to a business combination transaction that does not involve a tender offer but pursuant to which a plan is submitted to security holders to vote on the transaction or to elect whether to accept an exchange security for their existing security.[15] Here again, such new securities must be registered with the Commission 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"[16] 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. Most states of the United States require securities to be registered or qualified prior to the public offer or sale of such securities in the state, including in connection with the offer or sale of securities pursuant to an exchange offer. With the adoption of the National Securities Markets Improvement Act of 1996,[17] the circumstances in which a bidder must register or qualify securities with state regulators were substantially reduced. In such circumstances, U.S. federal law effectively "preempts" the application of state blue sky laws. Section 18[18] of the Securities Act provides that certain categories of "covered securities" are exempt from state securities law registration or qualification. Among the securities so exempted are securities that (i) are listed (or that are authorized for listing, or upon completion of the relevant transaction will be so listed) on the New York Stock Exchange, Inc. ("NYSE"), the NASDAQ Stock Market ("NASDAQ"), or another U.S. securities exchange with listing standards substantially similar to those of the NYSE or NASDAQ, or (ii) are issued or placed in certain transactions exempt from the registration requirements of the Securities Act.[19]

General Structure of Our Article

Depending on the requirements of local law and the desired result, companies may effect an acquisition or combination by means of a tender offer, a statutory

14. Securities Act § 5, 15 U.S.C. § 77e (2012).

15. *See* Securities Act Rule 145, 17 C.F.R. § 230.145 (2015). Rule 145 provides that an "offer" or "sale" within the meaning of Section 2(3) of the Securities Act occurs in connection with certain business combination transactions pursuant to which the transaction is submitted to the vote of shareholders, implicating the registration provisions of the Securities Act.

16. 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).

17. Pub. L. No. 104-290, 110 Stat. 3416 (codified in various sections of 15 U.S.C.).

18. Securities Act § 18, 15 U.S.C. § 77r (2012).

19. For example, securities issued in private placements conducted in accordance with Rule 506 of Regulation D under the Securities Act, 17 C.F.R. § 230.506 (2015), are covered securities, as are securities placed by reporting companies in reliance on Rule 144A, 17 C.F.R. § 230.144A (2015).

merger, a corporate amalgamation, or a court-approved combination transaction. We discuss in sections 1, 2, and 3 below the application of the U.S. securities laws and regulations to the principal methods of effecting tender offers and other 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 may have on the regulation of a business combination transaction. In section 5, we discuss certain related matters, including Exchange Act registration and deregistration, succession, certain registration exemptions for foreign private issuers, beneficial ownership reporting, and corporate governance.

1 Tender Offers

Background

A tender offer generally involves a broad solicitation by a bidder (i.e., a company or other entity) to purchase a substantial percentage of a target company's securities for a limited period of time.[20] 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 Commission's regulations under that section.

The term "tender offer" is not defined in the U.S. securities laws.[21] 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 sell their securities will likely fall within the definition. In *Wellman v. Dickinson*,[22] the U.S. District Court for the Southern District of New York identified eight factors, the existence of one or more of which could indicate the existence of a tender offer:

- 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;
- the offer is contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased;

20. *See, e.g.*, *Tender Offers*, U.S. Sec. & Exch. Commission (Jan. 16, 2013), 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."

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

22. 475 F. Supp. 783, 823–25 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982).

- the offer is open only for a limited period of time;
- the shareholders are subjected to pressure to sell their shares; and
- public announcement(s) 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 Section 14(e) of the Exchange Act.[23] Section 14(d) of the Exchange Act and rules adopted by the Commission under that section (referred to as "Regulation 14D")[24] set forth detailed disclosure obligations, procedural requirements, and substantive provisions. Section 14(d) and Regulation 14D apply to a tender offer for a class of *equity* securities[25] registered under Section 12 of the Exchange Act, as a result of 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.[26] We refer to equity securities registered under Section 12 of the Exchange Act in this article as "Registered Securities."[27]

Section 14(e) of the Exchange Act and rules adopted by the Commission under that section (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 to a tender offer for any security,[29] whether equity or debt and whether issued by a U.S. company or a foreign company, made directly or indirectly.

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23. 15 U.S.C. § 78n(d), (e) (2012).

24. Exchange Act Section 14(d) and Regulation 14D are discussed in detail below. *See infra* section 1.3.

25. The term "equity security" is defined in Rule 3a11-1, 17 C.F.R. § 240.3a11-1 (2015), under the Exchange Act.

26. *See* 17 C.F.R. § 240.14d-1 (2015).

27. *See* Exchange Act § 12, 15 U.S.C. § 78*l* (2012). Registered Securities include: (i) securities listed on U.S. securities exchanges, such as the NYSE or NASDAQ; (ii) equity securities not listed on a U.S. securities exchange, but which are "widely held" by U.S.-resident investors and are not exempt under Rule 12g3-2(a) of the Exchange Act, 17 C.F.R. § 240.12g3-2(a), (b) (2015); (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, tit. I, 54 Stat. 789 (codified as amended at 15 U.S.C. §§ 80a-1 to 80a-64 (2012)) [hereinafter Investment Company Act]. The registration status of a company's securities can be determined by consulting company filings available on public databases (including reviewing company filings on the Commission's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") database) or by inquiring of the Commission.

28. Exchange Act Section 14(e) and Regulation 14E are discussed in detail below. *See infra* section 1.2.

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), 15 U.S.C. § 77b(a)(1) (2012).

Tender offers may be stand-alone efforts by a bidder to acquire a certain amount or percentage of a target's securities, may be triggered by local mandatory offer provisions,[30] or 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 or sold using U.S. jurisdictional means, unless a registration statement relating to the offer has been filed with the Commission, absent an available exemption or exclusion.[31] An exclusion and a number of exemptions may be available for the offer of exchange securities in the context of a tender offer or other business combination transaction, including (i) an exclusion 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 offers and sales not involving any public offering of securities,[33] (iii) an exemption for certain cross-border exchange offers and business combination transactions that fall within the exemption provided by Rule 802 under the Securities Act,[34] and (iv) an exemption 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 practicable for a bidder that has not previously registered securities with the Commission under the Securities Act or is not currently a reporting company.[36] The registration and other requirements of the Securities Act applicable in the context of business combinations are discussed in more detail in section 2.4 below.

30. *See, e.g.*, City Code, *supra* note 7, r. 9 (among other things, compelling a person to make a mandatory offer when it acquires an interest in shares, which, together with shares in which it is already interested, carry 30 percent or more of the voting rights of a target company).

31. Securities Act § 5, 15 U.S.C. § 77e (2012); *see infra* section 3.1.

32. Securities Act Regulation S Rules 901–905, 17 C.F.R. § 230.901–.905 (2015).

33. *See* Securities Act § 4(a)(2), 15 U.S.C. § 77d(a)(2) (2012) (the "private placement" exemption); *see also* SEC v. Ralston Purina Co., 346 U.S. 119 (1953) (applying Section 4(2) (the predecessor of the current Section 4(a)(2)), with an emphasis on the sophistication and access of the particular group of investors); *see also* Securities Act Regulation D Rules 501–508, 17 C.F.R. §§ 230.501–.508 (2015). A detailed discussion of the regulatory basis of private placements under the Securities Act, and related market practice, is beyond the scope of this article.

34. Security Act Rule 802, 17 C.F.R. § 230.802 (2015); *see infra* section 2.1.

35. *See* Securities Act § 3(a)(10), 15 U.S.C. § 77c (2012); *see Staff Legal Bulletin No. 3A (CF)*, U.S. Sec. & Exch. Commission (June 18, 2008), https://www.sec.gov/interps/legal/cfslb3a.htm.

36. Registration may be impractical due to timing considerations and for other reasons, including the burden of preparing financial statements under U.S. generally accepted accounting principles ("U.S. GAAP"), international financial reporting standards maintained by the International Accounting Standards Board ("IASB IFRS"), or U.S. GAAP-reconciled financial statements, as well as the significant ongoing regulatory and disclosure burdens to which a registrant would be subject.

In light of the foregoing, many non-U.S. companies seeking to acquire other offshore companies with limited numbers of U.S. security holders (or where the participation of U.S. security holders is not otherwise critical to the success of the transaction) historically have sought to avoid the application of U.S. securities laws by excluding U.S. persons from their tender offers and avoiding U.S. jurisdictional means. These so-called "exclusionary offers" conducted to exclude U.S. jurisdictional means or otherwise avoid application of U.S. laws and regulations are described in more detail in section 4 below.

1.1 The Cross-border Tender Offer Rules

Due at least partially to concerns that U.S. investors were routinely being excluded from cross-border tender offers and other business combination transactions, the Commission adopted regulations under the Exchange Act and the Securities Act in October 1999[37] to address conflicts between U.S. and foreign regulation, to provide relief from certain disclosure and procedural requirements of the Exchange Act and the Securities Act, and to facilitate inclusion of U.S. investors in such transactions. These regulations codified prior informal Commission guidance, no-action or exemptive relief, and Commission interpretive positions, and also included new substantive accommodations. The Commission sought to encourage bidders to include U.S. security holders in their transactions while also extending the protections of U.S. federal securities laws to all investors. The 1999 cross-border regulations attempted to balance competing concerns by focusing relief where U.S. ownership was smallest or where there was a direct conflict between U.S. and foreign regulations.[38] The 1999 cross-border regulations provided many helpful accommodations to participants in cross-border tender offers, but in some cases the rules proved difficult or impractical to apply.

In September 2008, the Commission adopted revised regulations and interpretive guidance under the Exchange Act and the Securities Act to (i) address recurring issues that arose with the adoption of the 1999 cross-border regulations or continued to exist after such adoption, (ii) expand and enhance the utility of the exemptions available for cross-border business combination transactions with regard to certain disclosure and procedural requirements, and (iii) limit further the circumstances in which bidders decide to exclude U.S. investors from participating in cross-border business combination transactions.[39]

The cross-border amendments provide for two tiers of relief from applicable provisions of the Exchange Act and the Securities Act, based broadly on the

37. The 1999 cross-border regulations became effective as of January 24, 2000. *See supra* note 3; *see also* 17 C.F.R. §§ 240.13e-4(h)(8), 240.14d-1(c)–(d), 240.14e-5(b)(10) (2015) (regulations promulgated under the Exchange Act); 17 C.F.R. §§ 230.800–.802 (2015) (regulations promulgated under the Securities Act).

38. *See* 1999 Cross-border Release, *supra* note 3, at 61384–85 (Part II.A.1); *see also supra* note 3.

39. *See supra* note 3. The 2008 cross-border regulations became effective as of December 8, 2008. Related interpretive guidance became effective upon publication of the 2008 Cross-border Release in the Federal Register on October 9, 2008.

level of U.S. interest in a transaction. The "Tier I" exemption provides relief from substantially all U.S. tender offer regulation if U.S. security holders of a "foreign private issuer"[40] target hold no more than 10 percent of the target's securities (calculated in the manner prescribed by the Commission and described below in section 1.1.1).[41] The "Tier II" exemption provides limited relief from Regulations 14D and 14E where U.S. security holders of a foreign private issuer target hold more than 10 percent but no more than 40 percent of the target's securities.[42] In the Securities Act context, Rule 802 provides exemptions from the registration provisions of the Securities Act if criteria substantially similar to the Tier I criteria are met.[43] None of the cross-border regulations exempts a bidder from the general anti-fraud, anti-manipulation, or civil liability provisions of U.S. securities laws.[44] In this article, we refer to U.S. security holders determined in accordance with instructions to paragraphs (c) and (d) of Rule 14d-1 as "U.S. holders." The Commission has expressed its view that U.S. beneficial ownership of the target's securities is "most closely tied to U.S. interest" in the target company's securities and, consequently, the best measure of the extent to which U.S. rules should apply to the transaction.[45]

1.1.1 Determination of U.S. Ownership

Look-through Analysis

To determine the percentage of U.S. holders, a bidder 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 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 (or that of each participant in a business combination transaction not involving a tender offer), and (iii) in the country that is

40. 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 percent of the outstanding voting securities of which are held of record directly or indirectly by residents of the United States, for which any of the following is also true: (i) the majority of its executive officers or directors are United States citizens or residents, (ii) more than 50 percent 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, 17 C.F.R. § 230.405 (2015); Exchange Act Rule 3b-4, 17 C.F.R. § 240.3b-4 (2015). The Staff has granted relief under Regulation 14E where the target was incorporated outside of the United States, but did not qualify as a foreign private issuer under Rule 3b-4(c). *See* Tender Offer for Shares of Chemoil Energy Limited, SEC No-Action Letter, 2009 WL 4811441 (Dec. 14, 2009); Offer by SAP for Any and All Ordinary Shares, including Ordinary Shares Represented by ADSs, Warrants and Convertible Bonds, of Business Objects, SEC No-Action Letter, 2007 WL 4603213 (Dec. 5, 2007) [hereinafter SAP letter]; Offer for Shares of ProSiebenSat.1 Media AG by Laven Holding 4 GmbH, SEC No-Action Letter, 2007 WL 491128 (Jan. 30, 2007); Axel Springer AG Offer for ProSiebenSat.1 Media AG, SEC No-Action Letter, 2005 WL 2291629 (Sept. 12, 2005).

41. *See* Exchange Act Rule 14d-1(c), 17 C.F.R. § 240.14d-1(c) (2015).

42. *See* Exchange Act Rule 14d-1(d), 17 C.F.R. § 240.14d-1(d) (2015).

43. *See supra* note 34.

44. *See infra* section 1.2.5.

45. *See* 2008 Cross-border Release, *supra* note 3, at 60054–60 (Part II.A).

the primary trading market for the target's securities (if different from its home jurisdiction).[46] The inquiry need extend only to confirming the aggregate amount of a nominee's holdings that correspond to U.S. accounts. The obligation to look through requires that "reasonable inquiry" be made of nominees to determine the residency of the underlying account holder.[47]

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)[48] and filed or available in the target's home jurisdiction. The bidder also should review security ownership information contained in other materials publicly filed by the target, including, for instance, the target's annual report on Form 20-F[49] if the target is a reporting company.[50] If the tender offer is conducted pursuant to an agreement between the target and the bidder (i.e., a "friendly" offer), 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,"[51] a bidder may assume that beneficial owners are resident where the nominee has its principal place of business.[52]

In the case of a non-negotiated, or "hostile," transaction, where the bidder is not an affiliate[53] of the target and is not conducting the tender offer pursuant to an agreement between the target and the bidder, the bidder may presume that U.S. holders do not hold in excess of 10 percent or 40 percent (as the case may be) of the target's securities unless the results of the inquiries summarized above indicate otherwise. In a hostile business combination transaction, a bidder may be

46. *See* Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (2015) (instructions to paragraphs (c) and (d)); Securities Act Rule 801(h)(3), 17 C.F.R. § 230.801(h)(3) (2015); *see also* Exchange Act Rules 12g3-2(a) & 12g5-1, 17 C.F.R. §§ 240.12g3-2, 240.12g5-1 (2015).

47. *See* Exchange Act Rule 14d-1(d), 17 C.F.R. § 240.14d-1(d) (instructions to paragraphs (c) and (d)). A bidder may consider speaking to 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 or are prohibited from responding to such inquiries by local law or contractual restrictions.

48. Schedule 13D, 17 C.F.R. § 240.13d-101 (2015); Schedule 13G, 17 C.F.R. § 240.13d-102 (2015); *see also infra* section 5.4.

49. Form 20-F, 17 C.F.R. § 249.220f (2015).

50. *See* Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (instruction 2(v) to paragraphs (c) and (d)). Such reports would be available on EDGAR. For Canadian issuers, information on U.S. ownership reported on Form 40-F would be relevant. *See* Form 40-F, 17 C.F.R. § 249.240f (2015).

51. *See* 1999 Cross-border Release, *supra* note 3, at 61392–93 (Part II.F.1). However, in the 2008 Cross-border Release, the Commission stated that "the need to dedicate time and resources to the look-through analysis alone will not support a finding that a bidder is unable to conduct the analysis." 73 Fed. Reg. at 60057 (Part II.A.1.c).

52. *See* Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (instruction 2(iv) to paragraphs (c) and (d)).

53. An "affiliate" of, or a person "affiliated" with, a specified person is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified. *See* Exchange Act Rule 12b-2, 17 C.F.R. § 240.12b-2 (2015).

able to rely alternatively on the average daily trading volume ("ADTV") test discussed below to assess U.S. ownership.

When to Calculate U.S. Ownership

The Tier I and Tier II exemptions incorporate a ninety-day window to calculate U.S. ownership to determine the availability of the exemptions. A bidder must calculate U.S. ownership as of a date no more than sixty days before and no more than thirty days after the "public announcement"[54] of its offer.[55] If calculation of U.S. ownership within the ninety-day window is not possible, it may be made as of the most recent practicable date before the public announcement, but no earlier than 120 days before the announcement.

American Depositary Shares; Convertible or Exchangeable Securities; Securities Held by Bidder

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 number of shares of the issuer, which are held by a depositary on behalf of the ADS holders.[56] To assess U.S. ownership in relation to ADSs, bidders are required to examine the participant lists of depositaries for the target's ADR program 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. Shares underlying ADSs must be counted in determining both the aggregate number of securities outstanding and the number of U.S. holders.[57]

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 tender offer relates, such as warrants, options, and convertible securities, unless such securities are also the subject of the tender offer.[58]

54. The Commission considers a public announcement to be "any oral or written communication by the bidder or any party acting on its behalf, which is reasonably designed to inform or has the effect of informing the public or security holders in general about the transaction." *See* Exchange Act Rule 14d-2, 17 C.F.R. § 240.14d-2 (2015) (instructions to paragraph (b)(2)); 2008 Cross-border Release, *supra* note 3, at 60055–56; *see also supra* note 3.

55. *See* Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (instruction 2(i) to paragraphs (c) and (d)). By allowing a range of dates within a ninety-day window to be used by a bidder to assess U.S. ownership, the Commission addressed a conflict, expressed in a number of no-action letters preceding the 2008 Cross-border Release, such as Equant N.V., SEC No-Action Letter, 2005 WL 1173099 (Apr. 18, 2005), and Saipem SpA, SEC No-Action Letter, 2002 WL 1841561 (July 29, 2002) [hereinafter Saipem letter], between U.S. regulation, which required U.S. ownership to be assessed on the thirtieth day prior to commencement of the offer, and local practice, which did not permit completion, or completion on a confidential basis, of a look-through analysis as of a specific date or in a period as short as thirty days.

56. In common usage, an ADS refers to the security that represents the ownership interest in the underlying, deposited security and an American Depositary Receipt ("ADR") refers to the physical certificate that evidences an ADS.

57. *See* Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (instruction 2(ii) to paragraphs (c) and (d)).

58. *Id.*

It is important to note that target securities held by the bidder are excluded from the calculation of U.S. holders.[59]

Average Daily Trading Volume Test

There are two circumstances in which a bidder may rely on an alternate ADTV test to assess U.S. ownership: (i) when the bidder is *unable* to conduct the look-through analysis and there is a "primary trading market"[60] for the subject securities outside of the United States and (ii) when the bidder is not an affiliate of the target and is not conducting the tender offer pursuant to an agreement between the target and the bidder (the so-called "hostile presumption").[61] In these circumstances, a bidder may rely on the ADTV test to presume that the percentage of subject securities held by U.S. holders is no more than 10 percent or 40 percent (as the case may be) of outstanding subject securities unless any of the following applies:

- the ADTV of the target's securities in the United States in a recent twelve-month period ending no more than sixty days before the public announcement of the transaction exceeds 10 percent or 40 percent (as the case may be) of the worldwide ADTV of the subject securities;
- the most recent annual report or annual information filed or submitted by the target "with securities regulators in its home jurisdiction or with the Commission or any jurisdiction in which the target's securities trade" before the public announcement of the transaction indicate that U.S. holders hold more than 10 percent or 40 percent (as the case may be) of all outstanding subject securities; or
- the bidder knows or has reason to know before public announcement of the transaction[62] that the level of U.S. ownership exceeds 10 percent or

59. *Id.*

60. "Primary trading market" means at least 55 percent of the trading in a foreign private issuer's securities takes place in, on, or through the facilities of a securities market or markets in a single foreign jurisdiction or in no more than two foreign jurisdictions during a recent twelve-month period and if a foreign private issuer aggregates the trading of its securities in two foreign jurisdictions, the trading for the issuer's securities in at least one of the two foreign jurisdictions must be larger than the trading in the United States for the securities. *See* Exchange Act Rule 12g3-2, 17 C.F.R. § 240.12g3-2 (2015) (note 1 to paragraph (b)(1)).

61. *See* Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (instruction 3 to paragraphs (c) and (d)).

62. *See id*. (instruction 3(iii) to paragraphs (c) and (d) for a non-exclusive list). While the Commission notes in the 2008 Cross-border Release that it "do[es] not intend this language to mean that an issuer or acquiror must take into account information publicly available from any source, no matter how obscure or costly," 2008 Cross-border Release, *supra* note 3, at 60059, the provision acts to attribute to a bidder specific sources of knowledge and consequently places a substantial onus on a bidder to consider relevant publicly available data and, in friendly transactions, information in the possession of the target. It is doubtful in the authors' view that the Commission intended to retain Instruction 3(iv), which was adopted pursuant to the 1999 cross-border regulations, but differs from Instruction 3(iii) adopted pursuant to the 2008 cross-border regulations, insofar as it does not limit the time at which the bidder's knowledge is relevant. There is, for example, no analogous instruction in relation to Rule 802, 17 C.F.R. § 230.800(h) (2015), and the opinion of most practi-

> 40 percent (as the case may be) of all outstanding subject securities. The bidder will be deemed to know information about U.S. ownership available from the target or obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers.

Outside of the context of a hostile transaction, the Commission provided a non-exhaustive list of circumstances in which a target may be justified in relying on the ADTV test. These circumstances include the following: (i) security holder lists are generated only at fixed intervals during the year and a security holder list is not available at the time it would be required to conduct a look-through analysis, (ii) when the subject securities are in bearer form, and (iii) where nominees may be prohibited by law from disclosing information about the beneficial owners on whose behalf they hold. The Commission warns, however, that the need to dedicate time and resources to the look-through analysis alone will not support a finding that a bidder is unable to conduct the analysis, nor would concerns about the completeness and accuracy of the information obtained.[63]

Practical Difficulties

Although the 2008 cross-border regulations were intended to make the ownership calculation process easier, quantifying the number of U.S. holders remains problematic for a number of reasons. First, companies in many jurisdictions outside the United States are not required to maintain 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 in the context of a non-hostile transaction (for instance, section 793 under the United Kingdom Companies Act 2006[64]) or from the clearing systems through which the target's securities are settled, such procedures may not result in an accurate assessment of beneficial ownership as of a specified or even any single date.[65] Second, non-U.S. companies in most cases will need to rely on

tioners, supported by the views of the Commission expressed in the 2008 Cross-border Release, is that Instruction 3(iv) should be ignored.

63. *See supra* note 51.

64. Companies Act 2006, c. 46 (Eng.). Section 793 of the Companies Act permits a company by written notice to require a person to confirm if that person has in the three years preceding the date of notice had an interest in the shares of the company and to provide certain other information as to that person's interest. This right allows the target to identify the beneficial owners underlying the nominees registered in the CREST system (which acts as the United Kingdom's central securities depositary). The target effectively sends a cascading set of notices, tracing ownership from the registered position of an intermediary down to the ultimate beneficial owner. Each party in the ownership chain is required to provide the identity of the person on whose behalf it holds its interest in the shares. However, this process presents a number of challenges: it is manual, with requests being sent in writing or by email, there is no standard template for response, response times can vary widely, and it is extremely difficult to obtain compliant responses where ultimate beneficial ownership extends outside the United Kingdom.

65. For instance, in France, a report known as a *Titre au Porteur Identifiable* (a "TPI Report") can be requested by the target from Euroclear (which acts as France's central securities depositary). The TPI

the cooperation of brokers, dealers, or other nominees for information as to the residency of their customers and, in many cases, such cooperation may not be forthcoming.[66] In Germany and Spain, for example, such intermediaries are not subject to a legal duty to disclose information regarding the underlying owners. Even if the information is provided voluntarily, it may be unreliable.[67] European bank secrecy and privacy laws also may restrict the ability of nominees to cooperate with such requests.[68] In situations where a determination of U.S. ownership cannot be made or there is uncertainty as to the percentage of U.S. holders, in certain circumstances, the Staff may nevertheless be willing to provide no action or exemptive relief.[69]

1.1.2 The Tier I Exemption

The Tier I exemption provides exemptive relief from the provisions of Section 14(d)(1) through 14(d)(7) of the Exchange Act, Rules 14d-1 to 14d-11 under Regulation 14D (including Schedule 14D-9 and Schedule TO), and Rules 14e-1 and 14e-2 under Regulation 14E.[70] Bidders for targets that fall within the Tier I exemption may also be eligible for relief under Rules 14e-5 and 13e-3 under the Exchange Act.[71]

Availability

The Tier I exemption is available if (i) the target is a foreign private issuer, (ii) the target is not an investment company registered or required to be registered under the Investment Company Act, other than a closed-end investment company,[72] and (iii) U.S. holders hold 10 percent or less (calculated in the manner prescribed by the Commission) of the target's securities for which the tender

Report sets forth, among other information, the names of persons that hold, either for themselves or as nominees, securities of a company through Euroclear. Upon receiving the TPI Report, the target (but not the bidder) may request that a nominee identified in the TPI Report that holds shares on behalf of clients disclose the identity of the beneficial owners. However, information set forth in the TPI Report is confidential and disclosure to the bidder could result in criminal sanctions.

66. For instance, nominees holding through Euroclear or Clearstream (the two principal EU central securities depositaries) may be unable or unwilling to provide information as to their beneficial owner customers as of a specified date.

67. In the authors' experience, many third-party financial analysts engaged by bidders to assist with the look-through analysis are unfamiliar with the requirements of the 2008 cross-border regulations described in this article and the materials that they produce vary widely in scope.

68. Directive 95/46/EC of the European Parliament and of the Council, 1995 O.J. (L 281) 31.

69. *See* Kraft Foods, Inc., Offer for Ordinary Shares and ADSs of Cadbury plc, SEC No-Action Letter, 2009 WL 4728032 (Dec. 9, 2009) [hereinafter Kraft Foods letter].

70. *See* 17 C.F.R. § 240.14d-1(c) (2015); *see also infra* note 91.

71. *See id.* §§ 240.13e-4(h)(8), 240.14e-5(b)(10).

72. Exchange Act Rule 14d-1(c)(4), 17 C.F.R. § 240.14d-1(c)(4); *see* Cross-border Tender Offers, Business Combinations and Rights Offerings, 63 Fed. Reg. 69136, 69151 n.127 (proposed Dec. 15, 1998) (to be codified at 17 C.F.R. pts. 200, 230, 239, 240, 249 & 260) [hereinafter 1999 Cross-border Proposing Release] (Commission "has not received requests for relief in connection with a tender offer for a foreign investment company. To keep the proposed exemptions as narrow as possible . . . the tender offer exemptions would not extend to tender offers for foreign investment companies.").

offer is being made, whether or not the target's securities are Registered Securities.[73]

If the Tier I exemption is available, a bidder is generally able, subject to certain procedural requirements described below, to extend its offer to shareholders in the United States solely in compliance with substantive procedures and requirements of its home jurisdiction. The bidder will not be subject to any of the specified disclosure, dissemination, and Commission 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 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 pursuant to Rule 802.[74] The target company's board may distribute to its security holders its recommendation relating to the bidder's offer without complying with the disclosure requirements of Regulation 14E[75] and, in relation to Registered Securities, without filing its recommendation with the Commission on, or making the specific disclosures mandated by, Schedule 14D-9.[76]

Subsequent Bidder

To provide a level playing field for 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 if its offer is made while the initial bidder's offer is pending.[77] 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.

Conditions—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[78]:

- *Blue sky exemptions.* In connection with an exchange offer conducted pursuant to Rule 802, a bidder need not extend its offer to shareholders in

73. Exchange Act Rule 14d-1(c), 17 C.F.R. § 240.14d-1(c).
74. *See supra* note 34.
75. *See* Exchange Act Rule 14e-2(d), 17 C.F.R. § 240.14e-2(d) (2015). 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 ten U.S. business days from the date the offer was first published, sent, or given to target security holders.
76. *See* Exchange Act Rule 14d-9, 17 C.F.R. § 240.14d-9 (2015). 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 (2015).
77. *See* Exchange Act Rule 14d-1(c)(1), 17 C.F.R. § 240.14d-1(c)(1).
78. *See* Exchange Act Rule 14d-1(c)(2)(iv), 17 C.F.R. § 240.14d-1(c)(2)(iv).

states of the United States that require registration or qualification, so long as any cash alternative offered in any other jurisdiction is offered to holders in such state.[79] Similarly, if a bidder offers securities registered under the Securities Act in circumstances where Section 18 of that Act does not preempt state blue sky laws, the bidder need not extend its offer to holders in states that prohibit the offer or sale of securities after the bidder has made a good-faith effort to register or qualify the offer and sale of the exchange securities in that state.[80]

- *Cash-only alternative.* A bidder may offer U.S. security holders only cash consideration if it has a reasonable basis 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.[81]
- *Loan note 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.[82] A loan note is effectively a short-term debt instrument that may be redeemed in whole or in part for cash at par on a future date and affords 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 allow target shareholders tax advantages not available in the United States.

Conditions—Offering Materials

Offering materials, in English, must be provided to shareholders in the United States on a basis comparable to that provided to shareholders in the home jurisdiction.[83] Offering materials typically contain certain customary or mandated legends advising U.S. security holders as to the basis of their preparation.[84] If

79. *See* Exchange Act Rule 14d-1(c)(2)(ii), 17 C.F.R. § 240.14d-1(c)(2)(ii).

80. *See* Exchange Act Rule 14d-1(c)(2)(i), 17 C.F.R. § 240.14d-1(c)(2)(i). Although U.S. federal law preempts state blue sky laws in respect of exchange securities that are listed on the NYSE and NASDAQ for example, exchange securities registered under the Securities Act, but which are not so listed, are generally subject to state blue sky laws.

81. *See* Exchange Act Rule 14d-1(c)(2)(iii), 17 C.F.R. § 240.14d-1(c)(2)(iii). The cash-only alternative is available if the offered security is a "margin security" or if, on request from the Commission or a U.S. holder, 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. In any case, as a practical matter, the opinion of an independent expert may be required to support the bidder's determination of substantial equivalence.

82. *See* 1999 Cross-border Release, *supra* note 3, at 61386 (acknowledging the common use of loan notes in the United Kingdom); *see also* GARY EABORN, TAKEOVERS: LAW AND PRACTICE § 11.22 (LexisNexis Butterworths, 2d ed. 2014).

83. *See* Exchange Act Rule 14d-1(c)(3)(i), 17 C.F.R. § 240.14d-1(c)(3)(i).

84. *See*, *e.g.*, Securities Act Rule 802(a)(3), 17 C.F.R. § 230.802(a)(3) (2015) (mandating that certain legends be provided in the case of an exchange offer exempt from the registration requirements of the Securities Act).

the Tier I exemption applies and securities offered as consideration will not be registered under the Securities Act, there is no mandated disclosure, and financial information, if any, can be presented in accordance with home jurisdiction generally accepted accounting principles without reconciliation to U.S. GAAP.[85]

Conditions—Submission/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 Commission under cover of Form CB no later than the next U.S. business day after the offering materials are published or disseminated in the home jurisdiction.[86] If the bidder is a non-U.S. company, the bidder must also file with the Commission 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.[87] There is no fee for submitting Form CB or Form F-X. Forms CB and F-X must be submitted or filed, as the case may be, on EDGAR.[88] If the target's securities are not Registered Securities, the bidder's offer document does not need to be submitted to the Commission under Regulation 14D or 14E, although a bidder may be required to furnish its informational document, in English, to the Commission on Form CB in the context of a cross-border exchange offer conducted pursuant to Rule 802. A bidder does not incur "prospectus liability" in respect of offering materials submitted to the Commission under cover of Form CB, but may be liable under applicable anti-fraud rules.[89]

1.1.3 The Tier II Exemption

The Tier II exemption provides limited relief from Regulations 14D and 14E.[90] Bidders for targets that fall within the Tier II exemption may also be eligible for limited relief under Rule 14e-5.[91]

85. *See* 1999 Cross-border Release, *supra* note 3, at 61385 n.22; *see also supra* note 3.

86. *See* Exchange Act Rule 14d-1(c)(3)(iii), 17 C.F.R. § 240.14d-1(c)(3)(ii).

87. *Id.*

88. The paper filing exception for companies that are not Exchange Act reporting companies was eliminated as part of the 2008 cross-border regulations. *See* Rule 101(a)(1)(vi) of Regulation S-T, 17 C.F.R. § 232. 101(a)(1)(vi) (2015).

89. See *infra* section 2.4.2 for a discussion of prospectus liability. The distinction between "filing" and "submitting" materials in this paragraph and elsewhere in this article relates to potential liability for the contents of such materials. Materials that are filed with the Commission are subject to the liability provisions of Section 18 of the Securities Act, which do not apply to materials that are submitted.

90. *See* 17 C.F.R. § 240.14d-1(d) (2015).

91. *See id.* §§ 240.14e-5(b)(11), (12), 240.13e-3(g)(6).

Availability

The Tier II exemption is available if (i) the target is a foreign private issuer, (ii) the target is not an investment company registered or required to be registered under the Investment Company Act, other than a closed-end investment company, and (iii) U.S. holders hold 40 percent or less of the target's securities for which the tender offer is being made.[92] 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.[93] These accommodations are described in sections 1.2 and 1.3 below as part of the discussion of the substantive provisions of Regulations 14D and 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.[94]

Subsequent Bidder

Consistent with relief provided by the Tier I exemption, if an initial bidder is able to rely on the Tier II exemption to make its offer, a subsequent bidder making an offer that commences while the initial bidder's offer is still pending will not be subject to the 40 percent ownership limitation condition of the Tier II exemption.[95]

1.2 Provisions Applicable to Tender Offers for All Securities

All tender offers, including offers for debt securities and equity securities that are not 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. As discussed in section 1.1.2, the Tier I exemption relieves bidders from complying with Rule 14e-1, Rule 14e-2, and, subject to certain conditions, Rule 14e-5 of Regulation 14E and Rules 14d-1 to 14d-11 under Regulation 14D. The Tier II exemption, on the other hand, provides only limited relief from complying with Regulations 14D and 14E.

92. *See* Exchange Act Rule 14d-1(d)(1), 17 C.F.R. § 240.14d-1(d)(1).

93. Although the Tier II exemptions are contained in Rule 13e-4, 17 C.F.R. § 240.13e-4 (2015), and Regulation 14D, the exemptions have always also been available for a tender offer subject to the provisions of Regulation 14E only. *See* 2008 Cross-border Release, *supra* note 3, at 60061 (Part II.C.1) (Commission seeking to clarify confusion (largely created by commentators) by revising the Rule 14d-1(d) and Rule 13e-4 exemptions); *see also supra* note 3. Similarly, the Tier I exemptions contained in Rule 13e-4 and Regulation 14D also apply in the context of a tender offer subject to the provisions of Regulation 14E only.

94. *See* Securities Act Rule 802, 17 C.F.R. § 230.802 (2015).

95. *See* Exchange Act Rule 14d-1(d)(1)(ii), 17 C.F.R. § 240.14d-1(d)(1)(ii).

1.2.1 Minimum Offer Period; Notice

A tender offer must remain open for a minimum of twenty U.S. business days[96] from the time the tender offer commences.[97] There is, however, no specified time by which a tender offer must be completed. The primary reason for the minimum offer period is to provide investors with sufficient time to make a well-informed investment decision.[98]

The Staff has granted relief from the requirements of Rule 14e-1(a) when there is a conflict between mandatory local law requirements and the requirements of that Rule, or when the Staff has found that international policy considerations apply, both in the context of transactions that met the requirements of the Tier II exemption and transactions that were unable to meet those requirements due to the extent of U.S. ownership of the target's securities. In those circumstances, the bidder has assured the Staff that protections afforded by Rule 14e-1(a) will otherwise be provided to target shareholders.[99]

A tender offer must remain open for at least ten U.S. business days after notice of a change is published, sent, or given in relation to any of the following: (i) the consideration offered, (ii) the percentage of the securities being sought, or (iii) the dealer's soliciting fee.[100] In addition, a Commission interpretive release states that a tender offer should remain open for at least ten U.S. business days in respect of a material change as significant as a change to the consideration offered or the percentage of the securities being sought and for at least five U.S. business days in respect of any other material change.[101]

The Staff has provided relief under Rule 14e-1(b) in the context of transactions where local law required an upward adjustment to consideration paid on tendered securities, reflecting interest payable on such securities accruing to the time of tender (and thus increasing continually during the pendency of the offer). The Staff has specifically granted such relief in the context of a subsequent offering period for transactions that were unable to meet the require-

96. 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) Standard Time. *See* Exchange Act Rule 14d-1(g)(3), 17 C.F.R. § 240.14d-1(g)(3) (2015).

97. Exchange Act Rule 14e-1(a), 17 C.F.R. § 240.14e-1(a) (2015).

98. *See* Tender Offers by Issuers, SEC Release No. 33-6618, 1986 WL 703831 (Jan. 14, 1986).

99. *See* Partial Cash Tender Offer for Shares of Patni Computer Systems Limited, SEC No-Action Letter, 2011 WL 643329 (Feb. 9, 2011) [hereinafter Patni letter]; Tech Mahindra Limited regarding an Open Public Offer for the Shares of Satyam Computer Services Limited, a Public Company Organized under the Laws of India, SEC No-Action Letter, 2009 WL 1206401 (Apr. 28, 2009) [hereinafter Tech Mahindra letter]; Cash Tender Offer by SoFFin for Ordinary Shares and ADRs of Hypo Real Estate Holding AG, SEC No-Action Letter, 2009 WL 1112793 (Apr. 15, 2009).

100. *See* Exchange Act Rule 14e-1(b), 17 C.F.R. § 240.14e-1(b) (2015).

101. *See* Interpretive Release Relating to Tender Offers Rules, SEC Release No. 34-24296, 1987 WL 847536 (Apr. 3, 1987); *see also* Exchange Act Rule 14d-4(d)(2), 17 C.F.R. § 240.14e-4(d)(2) (2015) (establishing minimum time periods during which an exchange offer must remain open after notice of a material change in its terms is communicated to target holders). Although by its terms Rule 14d-4(d)(2) applies only to early commencement exchange offers, the Staff has stated that it views the time periods set forth in Rule 14d-4(d)(2) as generally applicable to all tender offers. *See* 2008 Cross-border Release, *supra* note 3, at 60068 nn.245 & 251; *see also supra* note 3.

ments of the Tier II exemption.[102] Where the Tier II exemption is available, Rule 14d-1(d)(2)(vi) provides that the payment of interest in a subsequent offering period will not breach the provisions of Rule 14d-11(f) and Rule 14d-10(a)(2) and, by implication, Rule 14e-1(b).

Under Rule 14e-1(d), a bidder must provide notice of any extension by a press release or other public announcement before the earlier of (i) 9:00 a.m. Eastern Standard Time on the next U.S. business day after the scheduled expiration of the offer and (ii) the opening of trading on the next business day after the scheduled expiration of the offer. The notice must include disclosure of the approximate number of securities tendered to date.[103] The Tier II exemption permits a bidder to provide notice of extensions in accordance with the requirements of local law or market practice.[104] In addition, the Staff has granted relief from the requirements of Rule 14e-1(d) in the context of transactions that were unable to meet the requirements of the Tier II exemption where due to local practice or logistical requirements related to the conduct of a cross-border tender offer (for instance, relating to the tender of ADSs and withdrawal of underlying shares), the bidder was unable to disclose the number of securities that had been tendered when it announced the end of the initial offering period.[105]

1.2.2 Early Termination of an Initial Offering Period

The Commission takes the position that once the time at which a tender offer will expire has been announced, whether at the outset of the offer or subsequently, any change to the time of expiration constitutes a material change to the offer, requiring a public announcement and a formal extension of the offer.[106] The Commission has justified its position on the basis that an extension would permit security holders that have already tendered into the offer time to react to the change by withdrawing their tendered securities in response to the change, and those that have not tendered time to choose to tender in response to the change.[107]

These announcement and mandatory extension requirements have historically conflicted with law and practice in a number of non-U.S. jurisdictions, such as

102. *See* BHG S.A.-Brazil Hospitality Group, SEC No-Action Letter, 2015 WL 3441243 (Mar. 27, 2015); Offer by Empresa Brasileira de Telecomunicações S.A.—Embratel for Preferred Shares of Net Serviços de Comunicação S.A., SEC No-Action Letter, 2010 WL 4635127 (Oct. 15, 2010) [hereinafter Embratel letter]; Cash tender offer by UnitedHealth Group Inc. for all outstanding shares of Amil Participações S.A., SEC No-Action Letter, 2012 WL 6107369 (Nov. 20, 2012) [hereinafter UnitedHealth letter].

103. *See* Exchange Act Rule 14e-1(d), 17 C.F.R. § 240.14e-1(d) (2015).

104. *See* Exchange Act Rule 14d-1(d)(2)(iii), 17 C.F.R. § 240.14e-1(d)(2)(iii).

105. *See* EGS Acquisition Co. LLC—Offer for All Outstanding Common Shares and ADSs of eTelecare Global Solutions, Inc., SEC No-Action Letter, 2008 WL 4916424 (Nov. 5, 2008); Cash Tender Offer by International Business Machines Corporation for Ordinary Shares and ADSs of ILOG S.A., SEC No-Action Letter, 2008 WL 4917795 (Oct. 9, 2008); Vimpelcom Ltd., Altimo Holdings & Investments Ltd. and Telenor ASA Offer for All Outstanding Common Shares, Preferred Shares and American Depositary Shares, SEC No-Action Letter, 2010 WL 619604 (Feb. 5, 2010) [hereinafter Vimpelcom letter]; Patni letter, *supra* note 99, 2011 WL 643329.

106. *See* Interpretive Release Relating to Tender Offers Rules, *supra* note 101, 1987 WL 847536.

107. *See* 2008 Cross-border Release, *supra* note 3, at 60066–67 (Part II.C.5).

the United Kingdom, Hong Kong, Singapore, and South Africa, where bidders typically are required to terminate an offer immediately upon all offer conditions being satisfied. In other jurisdictions, bidders may be required to accept and pay for tendered securities as soon as all offer conditions are satisfied, even if this occurs before the scheduled expiration date of the initial offering period. The 2008 cross-border regulations codify exemptive relief that the Staff had historically granted on a case-by-case basis.[108] Accordingly, the Tier II exemption permits a bidder to terminate an initial offering period, including a voluntary extension of that period, if at the time the initial offering period ends:

- the initial offering period has been open for at least twenty U.S. business days and all offer conditions have been satisfied;
- the bidder has adequately disclosed the possibility and the impact of the early termination in the original offer materials;
- the bidder provides a subsequent offering period after the termination of the initial offering period;
- all offer conditions are satisfied as of the time when the initial offering period ends; and
- the bidder does not terminate the initial offering period or any extension of that period during any mandatory extension required under U.S. tender offer rules.[109]

1.2.3 Prompt Payment of Consideration

Consideration must be paid or securities returned promptly after termination or withdrawal of an offer.[110] "Promptly" in this context is generally construed to mean within three U.S. business days.[111]

108. *See* Offer by RWE Aktiengesellschaft for Innogy Holdings plc, SEC No-Action Letter, 2002 WL 1603139 (July 22, 2002); Offers by Harmony Gold Mining Company Limited for all Ordinary Shares, including Ordinary Shares represented by ADSs, of Gold Fields Limited, SEC No-Action Letter, 2005 WL 3719972 (Mar. 10, 2005) [hereinafter Harmony letter]; Cash Offer by Singapore Technologies Semiconductors Pte Ltd. for STATS ChipPAC Ltd., SEC No-Action Letter, 2007 WL 945186 (Mar. 15, 2007); Tender Offer by PetroChina Company Limited for H Shares of Jilin Chemical Industrial Company Ltd., SEC No-Action Letter, 2005 WL 3533262 (Dec. 21, 2005); Offer by AstraZeneca PLC for all Ordinary Shares, including Ordinary Shares represented by ADSs, of Cambridge Antibody Technology Group plc, SEC No-Action Letter, 2006 WL 1686633 (May 23, 2006).

109. *See* Exchange Act Rule 14d-1(d)(2)(ix), 17 C.F.R. § 240.14d-1(d)(2)(ix) (2015). These provisions effectively codify the previous interpretive position taken by the Staff. *See* Revisions to the Cross-border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, SEC Release No. 33-8917, 2008 WL 1989775, at *35–37 (May 6, 2008) [hereinafter 2008 Cross-border Proposing Release]; 2008 Cross-border Release, *supra* note 3, at 60068–69 (Part II.C.6).

110. *See* Exchange Act Rule 14e-1(c), 17 C.F.R. § 240.14e-1(c) (2015).

111. *See also* 1999 Cross-border Proposing Release, *supra* note 72, at 69144 ("'prompt' payment standard is satisfied if payment is made in accordance with normal [U.S.] settlement periods").

The Tier II exemption permits a bidder to comply instead with the legal or market practice settlement requirements of the target's home jurisdiction, which may be materially in excess of three U.S. business days.[112] In addition, the Staff has granted relief from the requirements of Rule 14e-1(c) in the context of transactions that that were unable to meet the requirements of the Tier II exemption where, due to local practice or requirements unique to the conduct of a cross-border tender offer, such as government currency exchange approvals, consideration is paid less promptly than in three U.S. business days. For instance, in the United Kingdom, payment must be made within fourteen calendar days after the later of the date on which the offer has become or is declared wholly unconditional or receipt of a valid tender. If an offer is terminated or withdrawn, a bidder is required to return tendered securities within fourteen calendar days and payment for securities tendered in any subsequent offering period is made on a rolling basis, within fourteen calendar days of a valid tender. Generally, payment for tendered securities is effected in the United Kingdom in seven to ten calendar days. The Staff has also granted relief from the requirements of Rule 14e-1(c) to permit consideration to be paid, or tendered securities returned, in accordance with local law in the context of transactions that were unable to meet the requirements of the Tier II exemption.[113]

1.2.4 Response of the Target Company

Within ten 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, including the reasons for the position disclosed.[114] There is no mandated form of disclosure if the target is not a reporting company and the statement is neither submitted to, nor filed with, the Commission. For an offer for Registered Securities, refer to the discussion regarding Schedule 14D-9 in section 1.3.2 below.

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-5[115] under Section 10(b), prohibit, in connection with any tender offer, the bidder or its agents from making any untrue statement

112. *See* Exchange Act Rule 14d-1(d)(2)(iv), 17 C.F.R. § 240.14d-1(d)(2)(iv) (2015).

113. *See* Cash Offer by Stork Holdco L.P. for Songbird Estates Plc, SEC No-Action Letter, 2014 WL 7507325 (Dec. 19, 2014); Banco Santander, S.A., Exchange Offers, SEC No-Action Letter, 2014 WL 4827361 (Sept. 18, 2014) [hereinafter Banco Santander letter]; Echo Pharma Acquisition Limited Offer for All Ordinary Shares of Elan Corporation, plc, SEC No-Action Letter, 2013 WL 1927457 (May 1, 2013) [hereinafter Echo Pharma letter]; Patni letter, *supra* note 99, 2011 WL 643329; Vimpelcom letter, *supra* note 105, 2010 WL 619604; Kraft Foods letter, *supra* note 69, 2009 WL 4728032.

114. *See* Exchange Act Rule 14e-2(a), 17 C.F.R. § 240.14e-2(a) (2015).

115. *See* Exchange Act § 14(e), 15 U.S.C. § 78n(e) (2012); *id.* § 10(b), 15 U.S.C. § 78j(b) (2012); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (2015).

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.[116] Rule 14e-3 under Section 14(e) establishes a "disclose or abstain from trading" requirement that prohibits any person, other than the bidder and its agents, who is in possession of material non-public information relating to the tender offer, from trading in the securities of the target company.[117]

1.2.6 Purchases Outside of the Offer

Rule 14e-5

Rule 14e-5 under the Exchange Act generally prohibits purchases or arrangements to purchase securities of the subject class outside of a tender offer.[118] The rule aims to protect investors by preventing a bidder "from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms."[119] In the Commission's view, "the rule prohibits the disparate treatment of security holders, prohibits the avoidance of proration requirements, and guards against the dangers posed by a bidder's purchases outside an offer that may involve fraud, deception and manipulation."[120]

This prohibition applies from the time the tender offer is publicly announced until it expires.[121] Subject to ensuring that activities conducted prior to announcement do not themselves constitute a tender offer, no restrictions under Rule 14e-5 then apply.[122] Rule 14e-5 applies generally to the bidder and its affiliates, the bidder's advisers (as long as the advisers' compensation is dependent upon completion of the offer), the bidder's dealer-manager and its affiliates, and any person acting in concert with any of the foregoing (collectively, "covered persons"). The Commission has consistently taken the view 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, subject to the exceptions noted below.

In many cases, however, the restrictions under Rule 14e-5 conflict with market practice in jurisdictions outside of the United States, where purchases out-

116. *See* Exchange Act § 14(e), 15 U.S.C. § 78n(e); Exchange Act Rule 14e-1, 17 C.F.R. § 240.14e-1 (2015); *see also supra* note 100.

117. Exchange Act Rule 14e-3, 17 C.F.R. § 240.14e-3 (2015).

118. *See* Exchange Act Rule 14e-5, 17 C.F.R. § 240.14e-5 (2015).

119. *See* 2008 Cross-border Release, *supra* note 3, at 60069–70 (Part II.C.7).

120. *Id.*

121. *See* Exchange Act Rule 14e-5(a), 17 C.F.R. § 240.14e-5(a).

122. *See* Wellman v. Dickinson, 475 F. Supp. 783, 823–25 (S.D.N.Y. 1979), *aff'd*, 682 F.2d 355 (2d Cir. 1982). Rule 14e-5(b)(7) permits purchases or arrangements to purchase outside of a tender offer pursuant to an unconditional and binding contract entered into before public announcement of the tender offer.

side the offer (both open market purchases and privately negotiated purchases) may be permitted and are customary, particularly in jurisdictions were market practice, mandated disclosures related to certain mandatory offer requirements, and other factors may mean that a significant amount of time passes from announcement to commencement of a tender offer.[123]

Blanket Tier I exemption. The Tier I exemption provides blanket relief under Rule 14e-5 for purchases outside of a tender offer during the pendency of the offer, *including in the United States*, as long as each of the following conditions is satisfied: (i) offering materials provided to U.S. holders must disclose prominently the possibility of such purchases or arrangements to purchase, or the intent to make such purchases, (ii) offering materials must explain how information about any such purchases will be disclosed, (iii) the bidder must disclose 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 (iv) all such purchases must comply with applicable laws and regulations in the target's home jurisdiction.[124]

Relief for market making activities under the City Code. Rule 14e-5 expressly permits purchases or arrangements to purchase by "connected exempt market makers" and "connected exempt principal traders" in an offer subject to the City Code if (i) the target is a foreign private issuer, (ii) the connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the City Code, and (iii) tender offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose, or describe how U.S. security holders can obtain information regarding, market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom. This exemption effectively permits a bidder's dealer-managers and advisers to continue to conduct customary market-making activities in respect of the target's securities. Subject to satisfying the conditions, such purchases may be made in any tender offer, not just tender offers eligible for Tier I or Tier II relief.[125]

Relief for separate offers in Tier II offer. A Tier II tender offer is often structured as two concurrent, but separate offers in order to facilitate a bidder's compliance with conflicting regulatory requirements and market practice. One offer is made to the target's U.S. security holders, and another is made to target security holders outside the United States.[126] Technically, purchases made pursuant to a for-

123. In the United Kingdom, where Rule 30.1 of the City Code, *supra* note 7, provides that an offer document must be posted within twenty-eight days from announcement of a bidder's firm intention to make an offer, an announcement often proceeds commencement of an offer by several weeks. In other jurisdictions, such as India, commencement of the tender offer may be subject to review and approval of documentation by the relevant securities regulator and outside the control of the bidder.

124. *See* Exchange Act Rule 14e-5(b)(10), 17 C.F.R. § 240.14e-5(b)(10) (2015); *see also* 1999 Cross-border Release, *supra* note 3, at 61388 (Part II.C.1.a); *supra* note 3.

125. *See* Exchange Act Rule 14e-5(b)(9), 17 C.F.R. § 240.14e-5(b)(9) (2015); *see also* 1999 Cross-border Release, *supra* note 3, at 61388 (Part II.C.1.b); *supra* note 3.

126. *See infra* section 1.3.6.

eign offer made during the pendency of the U.S. offer would breach Rule 14e-5. The 2008 cross-border regulations codified prior class exemptive relief[127] provided by the Staff to permit purchases or arrangements to purchase in a foreign offer made concurrently or substantially concurrently with a U.S. offer where: (i) the U.S. and foreign offers meet the conditions for reliance on the Tier II exemption, (ii) the economic terms and consideration in the U.S. offer and foreign offer are the same (provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign offer to U.S. dollars at an exchange rate disclosed in the U.S. offer document), (iii) the procedural terms of the U.S. offer are at least as favorable as the terms of the foreign offer, (iv) the intention of the bidder to make purchases pursuant to the foreign offer is disclosed in U.S. offering documents, and (v) purchases by the bidder not made in the U.S. offer are made solely pursuant to the foreign offer, and not pursuant to open market transactions, private transactions, or other transactions.[128] The Staff has also granted exemptive relief under Rule 14e-5 permitting purchases in the context of a tender offer structured as separate U.S. and non-U.S. offers where all conditions of Rule 14e-5(b)(11) were satisfied other than the condition that the offers qualified for the Tier II exemption.[129]

Relief for purchases outside the United States in Tier II offers. The 2008 cross-border regulations also codified class exemptive relief permitting purchases or arrangements to purchase outside of a tender offer by the bidder and its affiliates and by the bidder's financial advisor, subject to certain conditions designed to promote the fair treatment of tendering security holders. Purchases outside the tender offer are permitted if: (i) the target is a foreign private issuer, (ii) the covered person reasonably expects that the offer meets the conditions for reliance on the Tier II exemption, (iii) no purchases or arrangements to purchase other than pursuant to the tender offer are made in the United States, (iv) U.S. offering materials disclose prominently the possibility of, or the intention to make, purchases or arrangements to purchase outside of the tender offer, (v) disclosure of such purchases is made in the United States to the extent that such information is made public in the home jurisdiction, and (vi) the tender offer price must be increased to equal any higher price paid outside of the tender offer.[130]

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127. *See* Proposed Exchange Offer by Mittal Steel Company N.V. for Arcelor, SEC No-Action Letter, 2006 WL 4121749 (June 22, 2006).

128. *See* Exchange Act Rule 14e-5(b)(11), 17 C.F.R. § 240.14e-5(b)(11) (2015). These rules effectively codify the interpretive position taken by the Staff. *See* 2008 Cross-border Proposing Release, *supra* note 109, 2008 WL 1989775, at *37–41 (Part II.C.7); 2008 Cross-border Release, *supra* note 3, at 60069–70 (Part II.C.7).

129. *See* Banco Santander letter, *supra* note 113, 2014 WL 4827361; Coca-Cola Hellenic Bottling Company S.A. & Coca-Cola HBC AG, SEC No-Action Letter, 2013 WL 1177933 (Mar. 14, 2013) [hereinafter Coca-Cola Hellenic letter]; Vimpelcom letter, *supra* note 105, 2010 WL 619604; Exchange Offer by America Movil, S.A.B. de C.V. for all outstanding shares of Teléfonos de México, S.A.B. de C.V. ("TMX"), SEC No-Action Letter, 2011 WL 5041892 (Oct. 3, 2011) [hereinafter America Movil letter].

130. *See* Exchange Act Rule 14e-5(b)(12), 17 C.F.R. § 240.14e-5(b)(12) (2015). These rules effectively codify the interpretive position taken by the Staff in Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc, SEC No-Action Letter, 2007 WL 913246 (Mar. 2,

If an affiliate of a financial advisor purchases or arranges to purchase outside of a tender offer, (i) the financial advisor and the affiliate must implement and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws, (ii) the financial advisor must have an affiliate that is registered as a broker or dealer under Section 15 of the Exchange Act, (iii) the affiliate must have no officers or employees (other than clerical, administrative, or support staff) in common with the financial advisor that direct, effect, or recommend transactions in the target securities (or related securities) who also will be involved in providing the bidder or the target with financial advisory services or dealer-manager services, and (iv) purchases or arrangements to purchase may not be made to facilitate the tender offer.[131]

The Staff has also granted exemptive relief under Rule 14e-5 permitting purchases or other arrangements to purchase outside of the tender offer where all conditions of Rule 14e-5(b)(12) were satisfied other than the condition that the offers qualify for the Tier II exemption.[132] The Staff has also granted exemptive relief in circumstances where technical compliance with Rule 14e-5(a) may not be possible.[133]

Irrevocable undertakings. In the United Kingdom, there is an established practice in recommended offers whereby a bidder will seek to obtain a firm commitment to accept the offer from key target shareholders before announcing the offer. Such "irrevocable undertakings" constitute a commitment to tender into a bidder's offer at the offer price for no additional consideration.[134] Such undertakings may be truly irrevocable or may be irrevocable subject only to a higher competing offer not being made.[135] Bidders typically seek to enter into such ar-

2007), and Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors, SEC No-Action Letter, 2007 WL 1299257 (Apr. 4, 2007). *See* 2008 Cross-border Proposing Release, *supra* note 109, 2008 WL 1989775, at *37–41 (Part II.C.7); 2008 Cross-border Release, *supra* note 3, at 60069–70 (Part II.C.7.b).

131. *See* Exchange Act Rule 14e-5(b)(12)(i)(G), 17 C.F.R. § 240.14e-5(b)(12)(i)(G).

132. *See* Cash Offer by Stork Holdco L.P. for Songbird Estates Plc, SEC No-Action Letter, 2014 WL 7507325 (Dec. 19, 2014); UnitedHealth Group Inc., SEC No-Action Letter, 2012 WL 6107369 (Nov. 20, 2012); BHP Billiton Ltd., BHP Billiton plc and BHP Billiton Development 2 (Canada) Ltd., SEC No-Action Letter, 2010 WL 3450179 (Aug. 26, 2010); Vimpelcom letter, *supra* note 105, 2010 WL 619604; Kraft Foods letter, *supra* note 69, 2009 WL 4728032.

133. *See* UnitedHealth letter, *supra* note 102, 2012 WL 6107369; Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933.

134. Such arrangements typically help a bidder to 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 (July 29, 2005); Tender Offer by United Technologies Corporation for Kidde plc, SEC No-Action Letter, 2005 WL 38836 (Dec. 15, 2004); Harmony letter, *supra* note 108, 2005 WL 3719972. An irrevocable undertaking in the United Kingdom typically obliges a shareholder (i) to accept the offer within a specified period after the sending of the offer document, (ii) not to withdraw his or her acceptance of the offer (unless the offer was not then unconditional as to acceptances twenty-one days after the first closing date), (iii) not to transfer or encumber the shares except under the offer, (iv) not to requisition any shareholder meeting of the target without the consent of the bidder, and (v) not to acquire any interest in any other shares in the target.

135. *See* Kraft Foods letter, *supra* note 69, 2009 WL 4728032; Harmony letter, *supra* note 108, 2005 WL 3719972; Cash Offer by Campanhia Siderúrgica Nacional for Corus Group plc, SEC No-Action Letter, 2006 WL 3677817 (Dec. 1, 2006); UCB S.A., SEC No-Action Letter, 2004 WL

rangements prior to announcement of the offer, but irrevocable undertakings can be agreed to at any time. 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.[136]

Subsequent offering period. Rule 14e-5(a)[137] expressly permits purchases or arrangements to purchase made outside of a tender offer during the time of any subsequent offering period if consideration paid is in the same form and amount as the consideration offered in the initial offering period.

Regulation M

In an exchange offer or other business combination transaction pursuant to which securities are offered in the United States, Regulation M under the Exchange Act may apply.[138] Regulation M prohibits bidders and target companies (in negotiated transactions), distribution participants (principally underwriters, brokers, dealers, and other persons that have agreed to participate in a distribution of securities), and their affiliated purchasers, directly or indirectly, from bidding for, purchasing, or attempting to induce others to bid for or purchase any securities of the subject class[139] during the period of one or five U.S. business days before the date of commencement of the offer until the offer expires or the business combination transaction is completed. Bidders, targets, and other distribution participants that are financial institutions will generally need to request relief from the Staff under Regulation M to allow them to engage in ordinary course business activities, such as market making, asset management activities, unsolicited brokerage, and stock borrowing and lending. While there are a number of exemptions to Regulation M, including in respect of "actively-traded reference securities,"[140] in the context of a cross-border tender offer these exemptions are unlikely to apply. The Commission declined to propose or adopt changes to Regulation M with respect to cross-border tender offers or similar transactions,[141] but the Staff has granted relief under Regulation M on a case-by-case basis.[142]

1161232 (May 19, 2004); Letter re St David Capital plc Offer for Hyder plc to John M. Basnage, Esq. (Apr. 17, 2000) [hereinafter St David Capital letter]; WPD Limited Offer for Hyder plc, SEC No-Action Letter, 2000 WL 768067 (May 30, 2000); *see also Manual of Publicly Available Telephone Interpretations, Third Supplement*, U.S. SEC. & EXCH. COMMISSION (July 2001), http://www.sec.gov/interps/telephone/phonesupplement3.htm [hereinafter Third Supplement] (Q. I.L.4).

136. *See supra* note 135.

137. *See* Exchange Act Rule 14e-5(a), 17 C.F.R. § 240.14e-5(a) (2015).

138. Exchange Act Regulation M, 17 C.F.R. §§ 242.100–.105 (2015). Regulation M is highly technical and a full discussion of the regulation is beyond the scope of this article.

139. "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), 17 C.F.R. § 242.100(b).

140. *See* Regulation M Rule 102, 17 C.F.R. § 242.102.

141. *See* 2008 Cross-border Release, *supra* note 3, at 60069–70 & n.274 (Part II.C.7.b).

142. *See* UBS AG, SEC No-Action Letter, 2008 WL 1952022 (Apr. 22, 2008); ABN AMRO Holding N.V., SEC No-Action Letter, 2007 WL 2593550 (Aug. 7, 2007); Barclays PLC, SEC No-

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 these obligations, if the tender offer 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 will also be subject to Exchange Act Rule 13e-3,[143] if the tender offer would result in the target "going private."[144] If the transaction is subject to Exchange Act Rule 13e-3, a bidder or its affiliate would be required to file with the Commission a Schedule 13E-3,[145] setting forth information regarding the offer, and disclose certain information to security holders of the subject class of securities, as well as to comply with various anti-fraud provisions set forth in Rule 13e-3.[146]

1.3.1 Announcements and Tender Offer Documents for Registered Securities

A tender offer is commenced 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.[147] A bidder must file with the Commission a tender offer statement on Schedule TO on the date of commencement of the offer.[148] The U.S. "offer to exchange" forms a substantial part of Schedule TO[149] and must be disseminated to the target's U.S. holders as soon as practicable on the date of commencement of a tender offer.[150] Dissemination is typically effected by mailing or other delivery of the offer to exchange to the target's share-

Action Letter, 2007 WL 2296054 (Aug. 7, 2007); The Royal Bank of Scotland Group plc, SEC No-Action Letter, 2007 WL 2317453 (July 23, 2007); Banco Bilbao Vizcaya Argentaria, S.A., SEC No-Action Letter, 2007 WL 2011053 (June 25, 2007).

143. Exchange Act Rule 13e-3, 17 C.F.R. § 240.13e-3 (2015).

144. The "going private" effects referred to in Rule 13e-3 are causing any class of equity securities of the target 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 in certain cases, 300 persons in the United States), or causing any class of equity securities of the issuer that is listed on a U.S. securities exchange not to be so listed. *See* Exchange Act Rule 13e-3(a)(ii), 17 C.F.R. § 240.13e-3(a)(ii).

145. *See* Exchange Act Rule 13e-3(d), 17 C.F.R. § 240.13e-3(d); Schedule 13E-3, 17 C.F.R. § 240.13e-100 (2015).

146. 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.

147. *See* Exchange Act Rule 14d-2(a), 17 C.F.R. § 240.14d-2(a) (2015).

148. *See* Exchange Act Rule 14d-3(a)(1), 17 C.F.R. § 240.14d-3(a)(1) (2015). Schedule TO is found at 17 C.F.R. § 240.14d-100 (2015).

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

150. *See* Exchange Act Rule 14d-4, 17 C.F.R. § 240.14d-4 (2015).

holders and in certain circumstances by summary publication in a U.S. newspaper with national circulation. In addition, the U.S. tender offer rules provide the bidder with the right to have its tender offer materials disseminated pursuant to the target company's shareholder lists. Under Rule 14d-5, 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.[151] In the case of an exchange offer, the offer to exchange will also constitute the bidder's prospectus under the Securities Act.[152] After commencement of the offer, the bidder must report promptly on Schedule TO material changes to information previously filed with the Commission, including additional tender offer materials, such as press releases, investor presentations, and similar materials relating to the tender offer.[153]

The tender offer rules also require the filing of pre-commencement communications regarding the tender offer. A bidder must file on Schedule TO press announcements and other written communications prior to commencement of a tender offer no later than the date of first use of the communication.[154] 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.[155] The legend must also advise security holders that they can obtain copies of the tender offer statement and other documents on the Commission's website and explain which documents may be obtained free of charge from the bidder.[156]

1.3.2 Target's Response Document and Communications

The target must file with the Commission 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,[157] including any information disseminated by the target pursuant to Rule 14e-2.[158]

The target also is required to file any pre-commencement communications (such as press releases) regarding the tender offer with the Commission on Schedule 14D-9 no later than the date of release.[159] Each pre-commencement

151. *See* Exchange Act Rule 14d-5(b), (c), 17 C.F.R. § 240.14d-5(b), (c) (2015).

152. The offer to purchase would nevertheless be required to be filed with the Commission on Form F-4 or S-4. *See infra* section 2.4.

153. *See* Exchange Act Rule 14d-3(b), 17 C.F.R. § 240.14d-3(b) (2015).

154. *See* Exchange Act Rule 14d-2(b)(2), 17 C.F.R. § 240.14d-2(b)(2) (2015).

155. *See* Exchange Act Rule 14d-2, 17 C.F.R. § 240.14d-2 (2015) (instruction 3 to paragraph (b)(2)) (providing that the legend must advise investors to read the tender offer statement when it is available and that they can obtain the tender offer statement and other filed documents for free at the Commission's website).

156. *Id.*

157. *See* Exchange Act Rule 14d-9(b)(1), 17 C.F.R. § 240.14d-9(b)(1) (2015).

158. *See* Exchange Act Rule 14e-2, 17 C.F.R. § 240.14e-2 (2015) (providing that within ten 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).

159. *See* Exchange Act Rule 14d-9(a), 17 C.F.R. § 240.14d-9(a) (2015).

communication must be accompanied by a prominent legend advising shareholders of the target company to read the target's recommendation or solicitation statement when it becomes available.[160] The legend must also advise security holders that they can obtain copies of the recommendation and other filed documents on the Commission's website and explain which documents may be obtained for free from the target.[161]

1.3.3 Withdrawal Rights

Tendering shareholders have the right to withdraw tendered securities during the initial offering period of a tender offer under Rule 14d-7[162] and after the passing of sixty calendar days from the date of commencement of the tender offer if the tender offer remains open under Section 14(d)(5) of the Exchange Act (we refer to the latter as "back-end withdrawal rights").[163] The Commission generally takes the view[164] that withdrawal rights must be available to target shareholders worldwide, not only to those shareholders resident in the United States.[165] As a consequence of the requirement for withdrawal rights, a bidder cannot purchase any tendered securities until the expiration of the initial offering period.

In many jurisdictions, withdrawal rights are not customary and may require express consent from regulators in the home jurisdiction.[166] The requirement to provide back-end withdrawal rights may also conflict with the centralization and counting of tendered securities in non-U.S. jurisdictions. A bidder in a Tier II transaction is expressly permitted to suspend back-end withdrawal rights during the initial offering period or a subsequent offering period provided that: (i) it has provided an offer period including withdrawal rights for a period of at least twenty U.S. business days; (ii) at the time that the withdrawal rights are suspended, all offer conditions, other than the minimum acceptance condition, have been satisfied or waived; and (iii) withdrawal rights are suspended only

160. *See id.* (instruction 3).

161. *Id.* (instruction 3).

162. Exchange Act Rule 14d-7, 17 C.F.R. § 240.14d-7 (2015).

163. Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (2012).

164. *See* 1999 Cross-border Release, *supra* note 3, at 61385 (providing that "equal treatment requires that the procedural terms of the tender offer . . . [including] withdrawal rights, must be the same for all security holders").

165. *But see* Saipem letter, *supra* note 55, 2002 WL 1841561 (providing an example where in the context of separate U.S. and non-U.S. offers, withdrawal rights were not afforded to holders tendering into the non-U.S. offer).

166. For instance, in the United Kingdom, where withdrawal rights would typically only apply from the forty-second day after commencement of an offer until the date the minimum condition has been satisfied, in the experience of the authors, the Panel on Takeovers and Mergers (the body that regulates offers pursuant to the City Code) 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 Russia, withdrawal rights do not exist, but since under Russian law only a shareholder's last tender offer is deemed to be valid, the shareholder is afforded some scope to change his or her election in the initial offering period. The Staff has provided relief in such circumstances. *See* Offer by Pepsi-Cola (Bermuda) Ltd. for Ordinary Shares and American Depositary Shares of Wimm-Bill-Dann Foods OJSC, SEC No-Action Letter, 2011 WL 1142774 (Mar. 18, 2011) [hereinafter Pepsi-Cola Letter].

until tendered securities are counted and are reinstated immediately thereafter to the extent that they are not automatically cancelled by the acceptance of tendered securities.[167] In a Tier II transaction, a bidder is also not required to provide back-end withdrawal rights from the close of the initial offering period to the commencement of the subsequent offering period.[168]

The Staff has also provided relief in the context of transactions that were unable to meet the requirements of the Tier II exemption. For instance, in the United Kingdom, once an offer becomes or is declared unconditional as to acceptances, withdrawals are not permitted, as tendering shareholders' shares become the beneficial property of the bidder at the time the offer becomes or is declared unconditional as to acceptances (and, in any case, permitting withdrawals at such time could reverse satisfaction of the minimum acceptance condition). After an offer becomes or is declared unconditional as to acceptances, a subsequent offering period is commenced. While withdrawal rights are not required in the subsequent offering period under Rule 14d-7, back-end withdrawal rights under Section 14(d)(5) could apply after the sixtieth calendar day from the date of commencement of the tender offer and would conflict with U.K. market practice.[169]

In some jurisdictions, local laws and procedures for centralizing and counting tendered securities, particularly in relation to ADSs or where the offer is separated into two or more separate offers, may in effect require that withdrawal rights are terminated prior to the end of the initial offering period and the Staff has also provided relief in such circumstances.[170]

1.3.4 Terminating Withdrawal Rights After Reducing or Waiving the Minimum Acceptance Condition

In the United Kingdom, it is common for a bidder to reduce the minimum condition from 90 to 50 percent plus one share, once all other conditions to the offer are satisfied, and immediately purchase the tendered securities. Under the City Code, the offer then must remain open for fourteen days in a subsequent offering period. During the subsequent offering period, the offer is open for acceptances, but not withdrawals. Bidders anticipate that during the subsequent offering period, sufficient tenders will come in to satisfy the 90 percent minimum condition.[171] (The 90 percent minimum condition is important to achieve because 90 percent is the threshold for conducting a compulsory acquisition in the United Kingdom.[172]) A similar practice exists in certain other juris-

167. *See* Exchange Act Rule 14d-1(d)(2)(vii), 17 C.F.R. § 240.14d-1(d)(2)(vii) (2015).

168. *See* Exchange Act Rule 14d-1(d)(2)(v), 17 C.F.R. § 240.14d-1(d)(2)(v) (2015).

169. *See* Kraft Foods letter, *supra* note 69, 2009 WL 4728032; Echo Pharma letter, *supra* note 113, 2013 WL 1927457; Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933.

170. *See* Patni letter, *supra* note 99, 2011 WL 643329; Vimpelcom letter, *supra* note 105, 2010 WL 619604; Kraft Foods letter, *supra* note 69, 2009 WL 4728032; Tech Mahindra letter, *supra* note 99, 2009 WL 1206401.

171. *See* City Code, *supra* note 7, r. 32.1.

172. Companies Act 2006, c. 46, § 979 (Eng.); *see, e.g.*, SERENA Software, Inc., SEC No-Action Letter, 2004 WL 842524 (Apr. 13, 2004) [hereinafter SERENA letter]. Other member states of the EU

dictions.[173] While waiving or reducing the minimum acceptance condition is considered a material change in the terms of the offer that would trigger an obligation to keep the offer open for ten U.S. business days with withdrawal rights, the Commission adopted an interpretive position, which it expressed in the 1999 Cross-border Release, permitting a bidder that qualifies for the Tier II exemption to reduce or waive the minimum condition of the offer without extending withdrawal rights during the remainder of the offer or keeping the offer open for ten U.S. business days, subject to certain conditions. In the 2008 Cross-border Release, the Staff reaffirmed this interpretive position, with some further modifications. The Staff indicated that it would not object to a bidder conducting a cross-border tender offer under the Tier II exemption waiving or reducing a minimum acceptance condition without providing withdrawal rights, as long as each of the following conditions were satisfied:

- the bidder must announce that it may reduce the minimum condition at least five U.S. business days prior to the time that it reduces the condition;
- the announcement must be disseminated through a press release and other methods reasonably designed to inform U.S. holders;
- the press release must state the exact percentage to which the acceptance condition may be reduced and that a reduction is possible; the bidder must announce its actual intention regarding waiver or reduction as soon as required under the rules of its home jurisdiction;
- during the five-day period after the announcement of a possible waiver or reduction, withdrawal rights must be provided;
- the announcement must 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;
- the procedure for waiving or reducing the minimum acceptance conditions must be described in the offering materials;
- the offer must remain open for at least five U.S. business days after the waiver or reduction of the minimum acceptance condition;
- all offer conditions must be satisfied or waived when withdrawal rights are terminated;

and EEA have implemented analogous squeeze-out provisions pursuant to Directive 2004/25/EC of the European Parliament and of the Council on Takeover Bids.

173. Netherlands law and practice allows a bidder to reduce or waive a minimum acceptance condition at or after the end of the initial offering period without providing tendering holders with the ability to withdraw their securities after the reduction or waiver.

- the potential impact of the waiver or reduction of the minimum acceptance condition must be fully discussed in the initial offering materials or any supplemental materials; and
- the bidder may not waive or reduce the minimum acceptance condition below the percentage required for the bidder to control the target company after the tender offer under applicable law and, in any case, may not reduce or waive the minimum acceptance condition below a majority of the outstanding securities of the subject class.[174]

1.3.5 Subsequent Offering Period

A bidder may provide for a subsequent offering period of at least three U.S. business days immediately following the initial offering period after the termination of the initial offering period if (i) the initial offering period of at least twenty U.S. business days has expired, (ii) the offer is for all outstanding securities of the subject class and if the bidder is offering security holders a choice of form of consideration, there is no ceiling on any form of consideration, (iii) the bidder immediately accepts and promptly pays for all securities tendered during the initial offering period, (iv) the bidder announces the results of the tender offer, including the approximate number and percentage of securities deposited, no later than 9:00 a.m. Eastern Standard Time on the next business day after expiration of the initial offering period and immediately begins the subsequent offering period, (v) the bidder immediately accepts and promptly pays for all securities as they are tendered during the subsequent offering period, and (vi) the bidder offers the same form and amount of consideration to security holders in both the initial and the subsequent offering period.[175] No withdrawal rights apply during the subsequent offering period.[176]

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 after all conditions have been satisfied to assist bidders in reaching the statutory minimum number of shares necessary to engage in a compulsory acquisition or other squeeze-out transaction with the target.[177] The subsequent offering period also provides target security holders that remain after all offer conditions have been satisfied with another opportunity to tender into an offer and avoid the delay in receiving squeeze-out consid-

174. *See* 2008 Cross-border Release, *supra* note 3, at 60066–67 (Part II.C.5).

175. *See* Exchange Act Rule 14d-11, 17 C.F.R. § 240.14d-11 (2015).

176. *See* Exchange Act Rule 14d-7(a)(2), 17 C.F.R. § 240.14d-7(a)(2) (2015).

177. In the United Kingdom, for instance, an offer must remain open for fourteen days following the date on which the offer becomes unconditional as to acceptances. *See* City Code, *supra* note 7, r. 31.4; *see also supra* note 7. In practice, transactions in the United Kingdom are often structured so as to provide for a subsequent offering period open for a period longer than the mandatory fourteen calendar days and longer than the twenty U.S. business days provided for in Exchange Act Rule 14d-11, in many cases until further notice is given. *See* SERENA letter, *supra* note 172, 2004 WL 842524.

eration and selling into the illiquid market that can result after a completion of a tender offer and before a statutory squeeze-out is accomplished.

A number of the Commission's requirements regarding subsequent offering periods have proven problematic for non-U.S. bidders. For instance, Rule 14d-11(c) conditions the launch of a subsequent offering period on the *immediate acceptance* and *prompt payment* of securities tendered in the initial offering period. In certain jurisdictions, such as the United Kingdom, Ireland, France, and Spain, payment of consideration in compliance with local law or market practice would not constitute "prompt" payment. In such circumstances, the Staff has granted relief to permit a subsequent offering period notwithstanding a bidder's inability to comply with the requirements of Rule 14d-11(c).[178]

Rule 14d-11(d) requires that a bidder *announce the results of the tender offer*, including the approximate number and percentage of securities tendered, no later than 9:00 a.m. Eastern Standard Time on the next U.S. business day after expiration of the initial offering period and immediately begin the subsequent offering period. The Tier II exemption provides that if the bidder announces the results of the tender offer, including the approximate number of securities tendered to date, and pays for tendered securities in accordance with the requirements of the home jurisdiction law or practice then the subsequent offering period commences immediately following such announcement.[179] The Staff has granted analogous relief in transactions not strictly falling within the Tier II exemption.[180]

Rule 14d-11(e) provides that securities tendered during a subsequent offering period *must be paid for as soon as they are tendered, on a "rolling" basis*. Since the transaction is no longer subject to any conditions, the Commission deems it appropriate for tendering security holders to be paid immediately upon tender. In many cases, local law or market custom is such that securities tendered during a subsequent offering period are paid for within a certain number of days after the expiration of the subsequent offering period or "bundled up" and paid for on specified periodic take-up dates. The Tier II exemption permits a bidder to pay for securities tendered in the subsequent offering period within twenty

178. *See* Cash tender offer by Gemalto S.A. for all Shares, ADSs and Convertible Bonds of Wavecom S.A., SEC No-Action Letter, 2008 WL 5063730 (Nov. 7, 2008) [hereinafter Gemalto letter]; Proposed offer by Sierra Wireless France SAS for all Shares, ADSs and Convertible Bonds of Wavecom S.A., SEC No-Action Letter, 2009 WL 198517 (Jan. 5, 2009) [hereinafter Sierra letter]; Kraft Foods letter, *supra* note 69, 2009 WL 4728032; Echo Pharma letter, *supra* note 113, 2013 WL 1927457; Oak Leaf B.V., Acorn B.V. and Acorn Holdings B.V. offer for all ordinary shares of D.E. Master Blenders 1753 N.V., SEC No-Action Letter, 2013 WL 2365501 (May 21, 2013); Banco Santander letter, *supra* note 113, 2014 WL 4827361.

179. *See* Exchange Act Rule 14d-1(d)(2)(v), 17 C.F.R. § 240.14d-1(d)(2)(v) (2015). The rule effectively codifies relief granted by the Staff in prior no-action letters. *See, e.g.*, Offer by Sanofi-Synthélabo for Ordinary Shares and ADSs of Aventis Division of Corporation Finance, SEC No-Action Letter, 2004 WL 1351302 (June 10, 2004) [hereinafter Aventis letter].

180. *See* Gemalto letter, *supra* note 178, 2008 WL 5063730; Sierra letter, *supra* note 178, 2009 WL 198517; Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933.

U.S. business days of the date of tender.[181] The Staff has granted analogous relief in transactions not strictly falling within the Tier II exemption.[182]

Rule 14d-11(f) provides that a bidder must offer the *same form and amount of consideration* to security holders in both the initial and the subsequent offering period. In some foreign jurisdictions, such as Germany, bidders are legally obligated to pay interest on securities tendered during a subsequent offering period at a rate set by law. Interest may accrue from the date of tender or a fixed date unrelated to the date of tender. Paying interest on securities tendered during a subsequent offering period would violate Rule 14d-11(f), which mandates that security holders that tender in a subsequent offering period receive the same consideration as those that tender during the initial offering period. The Tier II exemption permits a bidder to pay interest on securities tendered during a subsequent offering period if required under applicable foreign law.[183] The Staff has granted analogous relief in transactions not strictly falling within the Tier II exemption[184] and has also permitted an upward adjustment to consideration paid on tendered securities in the subsequent offering period, reflecting interest payable on such securities accruing to the time of tender (and thus increasing continually during the pendency of the subsequent offering period).[185] The Staff has also permitted different consideration to be offered where mandated by local law and where such arrangements are not "coercive, do not serve as an inducement to tendering and do not otherwise conflict with the purposes of U.S tender offer rules."[186]

Rule 14d-11(f) also has the effect, with Rule 14d-11(b), of prohibiting "mix and match" offers, where a bidder offers a specified mix of cash and securities in exchange for each target security, but permits tendering holders to request a different proportion of cash and securities. Rule 14d-11(b) prohibits a "ceiling" on any form of consideration offered if target securities holders are offered a choice of different forms of consideration. In mix and match offers, elections by tendering holders are satisfied to the extent that other tendering security holders make offsetting elections, subject to a maximum amount of cash or securities that the bidder is willing to make available or issue. A bidder in a mix and match offer typically would employ separate proration and offset pools for the initial offering period and the subsequent offering period, with the result that different consideration likely would be payable in the initial offering period and the subsequent offering period to shareholders requesting the same proportion of cash and securities. The Tier II exemption expressly permits bidders to offset and prorate separately securities tendered during

181. *See* Exchange Act Rule 14d-1(d)(2)(iv), 17 C.F.R. § 240.14d-1(d)(2)(iv) (2015). The rule effectively codifies relief granted by the Staff in prior no-action letters. *See* Aventis letter, *supra* note 179, 2004 WL 1351302.

182. *See* Gemalto letter, *supra* note 178, 2008 WL 5063730; Sierra letter, *supra* note 178, 2009 WL 198517, Kraft Foods letter, *supra* note 69, 2009 WL 4728032; America Movil letter, *supra* note 129, 2011 WL 5041892; Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933; Echo Pharma letter, *supra* note 113, 2013 WL 1927457; Banco Santander letter, *supra* note 113, 2014 WL 4827361.

183. *See* Exchange Act Rule 14d-1(d)(2)(vi), 17 C.F.R. § 240.14d-1(d)(2)(vi) (2015).

184. *See* Kraft Foods letter, *supra* note 69, 2009 WL 4728032.

185. *See* Embratel letter, *supra* note 102, 2010 WL 4635127.

186. *See* Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933.

the initial and subsequent offering periods.[187] The Tier II exemption also expressly permits a bidder to establish a ceiling on one or more forms of consideration offered for offsetting the elections of target shareholders.[188] The Staff has granted analogous relief in transactions not strictly falling within the Tier II exemption.[189]

1.3.6 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 paid the highest consideration paid to any other holder of the target's securities.[190]

Rule 14d-10(a)(1) requires that a tender offer be *open to all target security holders wherever located*. However, a bidder may find it difficult or impracticable to conduct its tender offer as a single global tender offer, due to procedural and technical conflicts between U.S. and foreign tender offer rules and market practice. To afford bidders with maximum flexibility to comply with two (or more) sets of regulatory regimes and to accommodate frequent conflicts in tender offer practice between U.S. and foreign jurisdictions, the Tier II exemption permits the separation of a bidder's offer into multiple offers: one offer made to U.S. holders, including all holders of ADSs representing interests in the subject securities, if any, and one or more offers made to non-U.S. holders (including U.S. holders where the laws of the jurisdiction governing such foreign offers expressly preclude the exclusion of U.S. holders). The U.S. offer must be made on terms at least as favorable as those offered to any other holder of the same class of securities as the foreign offers. U.S. holders may be included in the foreign offer only if the laws of the jurisdiction governing the foreign offer expressly preclude the exclusion of U.S. holders and if the offer materials distributed to U.S. holders fully and adequately disclose the risks of participating in the foreign offers.[191] The Staff has granted analogous relief in transactions not strictly falling within the Tier II exemption[192] and has also provided relief where in the context of separate offers for shares and underlying ADSs, local law did not permit the U.S. offer to include an offer for shares.[193]

As discussed above in the discussion of Rule 14d-11(f), in some foreign jurisdictions, bidders may be legally obligated to pay interest on securities tendered

187. *See* Exchange Act Rule 14d-1(d)(2)(viii), 17 C.F.R. § 240.14d-1(d)(2)(viii) (2015).

188. *Id.*

189. *See* Kraft Foods letter, *supra* note 69, 2009 WL 4728032; Alamos Gold, Inc. Exchange Offer for All Outstanding Shares of Aurizon Mines Ltd., SEC No-Action Letter, 2013 WL 1144763 (Mar. 7, 2013) [hereinafter Alamos letter].

190. *See* Exchange Act Rule 14d-10(a), 17 C.F.R. § 240.14d-10(a) (2015).

191. *See* Exchange Act Rule 14d-1(d)(2)(ii), 17 C.F.R. § 240.14d-1(d)(2)(ii) (2015). 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.

192. *See* Vimpelcom letter, *supra* note 105, 2010 WL 619604; America Movil letter, *supra* note 129, 2011 WL 5041892; Banco Santander letter, *supra* note 113, 2014 WL 4827361; Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933; SAP letter, *supra* note 40, 2007 WL 4603213.

193. *See* Pepsi-Cola letter, *supra* note 166, 2011 WL 1142774.

during a subsequent offering period. Paying interest on securities tendered during a subsequent offering period would violate Rule 14d-10(a)(2), which provides that the *consideration paid to any security holder for securities tendered is the highest consideration paid to any other security holder for securities tendered.* The Tier II exemption allows a bidder to pay interest on securities tendered during a subsequent offering period if required under the applicable foreign law.[194] The Staff has also granted relief in transactions not strictly falling within the Tier II exemption.[195]

As mentioned above in the discussion of Rule 14d-11(f), it is customary for a bidder in some foreign jurisdictions to offer a loan note alternative to foreign holders in an offer where at least a portion of the offer consideration consists of cash. Providing a loan note alternative could violate Rule 14d-10(a)(2) and (c). The Tier II exemption, however, expressly permits a bidder to offer loan notes to foreign holders to grant such holders tax advantages not available in the United States, provided that the notes are neither listed on any organized securities market nor registered under the Securities Act.[196] The Staff has also granted relief in transactions not strictly falling within the Tier II exemption.[197]

The proration features of "mix and match" offers discussed above, where separate proration pools are created in the initial and subsequent offering periods and tendering security holders' elections may result in the receipt of a different mix of consideration in the initial and subsequent offering periods, could also violate Rule 14d-10(a)(2). The Tier II exemption however, expressly permits bidders to conduct "mix and match" offers where securities are separately offset and prorated in the initial and subsequent offering periods.[198]

1.4 Special Considerations Relating to ADSs

A bidder for a non-U.S. target that has established an ADR program in the United States should consider whether, in order to facilitate the tender of ADSs into the offer, to appoint a U.S. exchange agent and establish separate tender mechanics for ADS holders so that ADS holders are not required to withdraw the shares underlying their ADSs from the ADS depositary facility in order to tender the underlying shares into the offer.

From the bidder's perspective, the simpler approach is to require U.S. ADS holders to withdraw underlying ordinary shares from the ADS depositary facility and to tender such shares in accordance with customary tender offer procedures under local law. 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

194. *See* Exchange Act Rule 14d-1(d)(2)(vi), 17 C.F.R. § 240.14d-1(d)(2)(vi) (2015).
195. *See* Embratel letter, *supra* note 102, 2010 WL 4635127.
196. *See* Exchange Act Rule 14d-1(d)(2)(i), 17 C.F.R. § 240.14d-1(d)(2)(i) (2015).
197. *See* Embratel letter, *supra* note 102, 2010 WL 4635127.
198. *See* Kraft Foods letter, *supra* note 69, 2009 WL 4728032; Alamos letter, *supra* note 189, 2013 WL 1144763.

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 offer.

Alternatively, a bidder may provide for separate ADS tender and acceptance procedures. This approach involves appointing a U.S. exchange agent 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 that 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 to the U.S. exchange agent prior to the closing date of the offer. Such letters are deemed to be instructions to the depositary and its custodian 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 of the offer. After successful completion of the offer, the U.S. 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 fees of the U.S. exchange agent and the depositary.

1.5 Disclosure

For a tender offer not involving Registered Securities, there are no specific requirements governing the content of offering materials disseminated to target holders, whether or not such materials are required to be submitted to the Commission under cover of Form CB.[199] A bidder is, of course, subject to the antifraud provisions of Rule 14e-3 and Rule 10b-5, which will affect decisions about what information to disclose.

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.[200] In the context of any offer, U.S. shareholders and their counsel may scrutinize this narrative section for evidence of an unfair transaction process, failure to maximize price, and other potential violations of fiduciary duties in support of legal action against the bidder and the target. Where negotiations for an agreed transaction have broken down or where an offer is otherwise hostile, the description of any breakdown in negotiations may also 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 ap-

199. *But see infra* note 221.

200. *See* Exchange Act § 14(d), 15 U.S.C. § 78n(d) (2012); Schedule TO, Exchange Act Rule 14d-100, 17 C.F.R. § 240.14d-100 (2015).

propriate records of conversations and correspondence are kept and inquiries of the bidder are timely made and recorded. Schedule TO also requires disclosure about (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 about the bidder's advisers, (v) information about 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.[201] Disclosed intentions about the bidder's future plans for the target tend to be broad and somewhat generic due to the inherent sensitive and uncertain nature of potential ownership, management, and operational changes.

Financial statements of the bidder are required to be included with Schedule TO when the bidder's financial condition is material to the decision by the target's shareholders of whether to tender.[202] Financial statements are not considered 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 reporting company that files reports electronically on EDGAR or (iv) the offer is for all of the target's outstanding securities of the subject class.[203]

If financial statements are required, the bidder must provide the same financial information as would be required under Item 17 of Form 20-F.[204] If financial statements are required in the context of a cash tender offer, only two years of statements need to be provided and can be incorporated by reference into the Schedule TO, as long as a summary is provided in the actual Schedule TO.[205] *Pro forma* financial information may also be required in negotiated third-party cash tender offers when securities are intended to be offered in a subsequent merger or other transaction in which remaining target securities are acquired and the acquisition of the subject company meets certain "significance" tests.[206]

As discussed in sections 1.2.4 and 1.3.2 above, 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 require-

201. *See* Schedule TO, Exchange Act Rule 14d-100, 17 C.F.R. § 240.14d-100.

202. *See id.* (instructions to Item 10).

203. *See id.* (instruction 2 to Item 10).

204. *See id.* (instruction 8 to Item 10). The financial statement requirements of Item 17 of Form 20-F, 17 C.F.R. § 249.220f (2015), are less burdensome than the requirements of Item 18. *See also* Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards Without Reconciliation to U.S. GAAP, SEC Release No. 33-8879, 2007 WL 4481505, at *29 (Dec. 21, 2007) (Part III.E.3).

205. *See* Schedule TO, Exchange Act Rule 14d-100, 17 C.F.R. § 240.14d-100 (instruction 3 to Item 10).

206. *See id.* (instruction 5 to Item 10).

ments of the Securities Act, unless an exemption or exclusion applies.[207] A number of exemptions 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.[208] Relying on the Rule 802 exemption allows the bidder to avoid preparing and filing the detailed disclosure specified in a registration statement on Form F-4 or Form S-4 and frees the transaction from the timing constraints of the Commission's registration and review process.[209]

Availability

The Rule 802 exemption is available if (i) the target or the entity whose securities will be exchanged is a foreign private issuer and is not an investment company registered or required to be registered under the Investment Company Act, other than a closed-end investment company,[210] (ii) U.S. holders hold no more than 10 percent of the target's securities,[211] and (iii) the bidder permits U.S. holders to participate in the tender offer on terms at least as favorable as those offered to other shareholders.[212] Where the Tier I exemption is available, Rule 802 should generally also be available. As in the case of assessing U.S. ownership for purposes of the Tier I exemption, there is an obligation to look through the record ownership of certain brokers, dealers, banks, and other nominees, and the calculation is based on U.S. ownership of the target as of a date no more than sixty calendar days before and thirty days after public announcement of the exchange offer.[213] If calculation of U.S. ownership within such time period is not possible, it may be made as of the most recent practicable date before the public announcement, but no earlier than 120 days before the announcement.[214] Rule 802 is not available when there are *no* U.S. security holders of the target.[215]

Other than in the case of an exchange offer conducted (i) by the issuer of the securities to which the tender offer relates (or the issuer's affiliate) or (ii) pursuant

207. *See supra* notes 14–15 and accompanying text; *see also infra* section 3.1.

208. *See* Securities Act Rule 802, 17 C.F.R. § 230.802 (2015).

209. The registration and disclosure requirements flow from the application of Section 5 of the Securities Act. 15 U.S.C. § 77e (2012). *See infra* section 2.4.

210. *See* General Note 9 to Securities Act Rules 800–802, 17 C.F.R. §§ 230.800–.802 (2015); *see also* 1999 Cross-border Proposing Release, *supra* note 72, at 69147–50 (Part II.E); *see also supra* note 3.

211. The method of calculating the percentage is substantially similar to the method prescribed in Exchange Act Rule 14d-1, as discussed in *supra* section 1.1.1. *See* Securities Act Rule 800(h), 17 C.F.R. § 230.800(h).

212. *See* Securities Act Rule 802(a)(1), (2), 17 C.F.R. § 230.802(a)(1), (2).

213. *See* Securities Act Rule 800(h)(1), 17 C.F.R. § 230.800(h)(1).

214. *Id.*

215. *See* Third Supplement, *supra* note 135 (Q II.C.1); *see also supra* note 135.

to an agreement with the issuer of the subject securities, 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.[216] The presumption will not be available where (i) the ADTV of the subject securities in the United States over the twelve-calendar-month period ending sixty calendar days prior to the public announcement of the exchange offer exceeds 10 percent of the worldwide trading volume of the subject class of securities, (ii) the most recent annual report filed or submitted by the target (or security holders of the target's securities) with the Commission or regulators in the target's home jurisdiction, before public announcement of the offer, indicates that U.S. holders hold more than 10 percent of the outstanding subject securities, or (iii) the bidder knows or has reason to know, before public announcement of the offer, that the level of U.S. holding exceeds 10 percent of the outstanding subject securities.[217] The bidder will be deemed to know information about U.S. ownership available from the target or obtained or readily available from any other source that is reasonably reliable, including from persons it has retained to advise it about the transaction, as well as from third-party information providers.[218]

Offering Materials

The bidder must disseminate offering materials to U.S. holders in English on a comparable basis to those provided to shareholders in the home jurisdiction. If the bidder disseminates by publication in its home jurisdiction, it must publish the information in the United States in a manner "reasonably calculated" to inform U.S. holders of the offer.[219] 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.[220]

Filing Requirements

Offering materials sent to shareholders in the United States must be submitted to the Commission under cover of Form CB.[221] The Form CB must be submitted no later than the first business day after the offering materials have been published or disseminated in the home jurisdiction.[222] There is no fee for submitting Form CB. If the bidder is a non-U.S. company, it must file with the Commission a con-

216. *See* Securities Act Rule 800(h)(6), 17 C.F.R. § 230.800(h)(6).

217. *See* Securities Act Rule 800(h)(7), 17 C.F.R. § 230.800(h)(7); *see also supra* note 62.

218. *See supra* note 217.

219. *See* Securities Act Rule 802(a)(3)(ii), (iii), 17 C.F.R. § 230.802(a)(3)(ii), (iii). 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 135 (Q II.D.1); *see also supra* note 135.

220. *See* Securities Act Rule 802(a)(3)(ii), (iii), 17 C.F.R. § 230.802(a)(3)(ii), (iii).

221. Form CB, 17 C.F.R. § 239.800 (2015). Offering materials must be translated into English if they are not already in English. Securities Act Rule 802(a)(3)(i), 17 C.F.R. § 230.802(a)(3)(i).

222. *See* Securities Act Rule 802(a)(3)(i), 17 C.F.R. § 230.802(a)(3)(i).

sent to service of process in the United States on Form F-X and appoint an agent for service of process in the United States.[223] There is no filing fee for Form F-X.

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.[224] This exception is effectively a "blue sky" exception[225] and applies where a bidder has made a good-faith effort to seek the registration of the exchange securities in such states. A bidder must, however, offer the same cash alternative to security holders in any such state that it has offered to security holders in any other state or jurisdiction.

Legends

Any document disseminated in the United States must include the following prominent legend, or equivalent statement in clear, plain language, on the cover page or other prominent portion of the document:

> This exchange offer or business combination is made for the securities of a foreign company. The offer is subject to disclosure requirements of a foreign country that are different from those of the United States. Financial statements included in the document, if any, have been prepared in accordance with foreign accounting standards that may not be comparable to the financial statements of United States companies.
>
> It may be difficult for you to enforce your rights and any claim you may have arising under the federal securities laws, since the issuer is located in a foreign country, and some or all of its officers and directors may be residents of a foreign country. You may not be able to sue a foreign company or its officers or directors in a foreign court for violations of U.S. securities laws. It may be difficult to compel a foreign company and its affiliates to subject themselves to a U.S. court's judgment. You should be aware that the issuer may purchase securities otherwise than under the exchange offer, such as in open market or privately negotiated transactions.[226]

Transfer Restrictions

The securities offered by the bidder in exchange for those of the target will be characterized the same as that of the target securities.[227] If the securities of the target are "restricted securities" within the meaning of the Securities Act, then the bidder's securities offered in exchange will also be restricted securities.[228] If,

223. *Id.* Form F-X, 17 C.F.R. § 249.250 (2015).

224. *See* Securities Act Rule 802(a)(2), 17 C.F.R. § 230.802(a)(2); *see also supra* note 79.

225. *See supra* note 17.

226. *See* Securities Act Rule 802(b), 17 C.F.R. § 230.802(b). 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 135 (Q II.C.2); *see also supra* note 135.

227. *See* 1999 Cross-border Release, *supra* note 3, at 61390 (Part II.D.2.c); Note 8 to Securities Act Rules 800–802, 17 C.F.R. §§ 230.800–.802; *see also supra* note 3.

228. "Restricted securities" are 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, including

however, the target's securities are unrestricted (for instance, because they were issued in certain offshore transactions in compliance with Regulation S or pursuant 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.[229]

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.[230] 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 offer and sale of securities contemporaneous with or in close proximity to the 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, as no registration under the Securities Act is implicated.[231] Nor does the use of Rule 802 preclude a foreign private issuer from relying on the exemption from Exchange Act registration pursuant to Rule 12g3-2(b) under that Act.[232]

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.[233] 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.

securities acquired pursuant to certain exemptions from registration, and are subject to restrictions as to resale. *See* Securities Act Rule 144(a)(3), 17 C.F.R. § 230.144(a)(3) (2015); General Note 8 to Securities Act Rules 800–802, 17 C.F.R. §§ 230.800–.802.

229. *See supra* note 228; Securities Act § 4(a)(3), 15 U.S.C. § 77d (2012) (may restrict resales by a dealer taking place prior to the expiration of forty calendar days from the time the shares were first offered to the public).

230. *See* General Notes to Securities Act Rules 800–802, 17 C.F.R. §§ 230.800–.802.

231. Exchange Act Section 15(d) provides that any issuer that has had a registration statement declared effective by the Commission under the Securities Act with respect to any class of debt or equity securities shall have an obligation to file with the Commission the periodic reports that would otherwise be required to be filed had such class of securities been registered under Exchange Act Section 12. 15 U.S.C. § 78o(d) (2012). No such obligation is incurred in the absence of the filing of a registration statement. *See infra* section 2.4.

232. *See* Exchange Act Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (2015); *see also infra* section 5.1.1. The securities of many foreign private issuers that rely on the Rule 12g3-2(b) exemption are quoted on "services" such as the OTC Markets. *See* OTC Markets, http://www.otcmarkets.com (last visited Jan. 18, 2016).

233. *See* Securities Act Rule 802(a)(1), 17 C.F.R. § 230.802(a)(1).

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 not provide an express safe harbor for 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.[234] 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 assessment of U.S. ownership 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.[235] 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 may provide a "safe harbor" from the application of the registration requirements of the Securities Act for offers and sales of a foreign private issuer bidder's securities outside the United States, subject to certain conditions and selling restrictions.[236] Briefly, these conditions and restrictions require that an offer of securities be made in "offshore transactions." Certain other conditions apply depending on the status of the issuer and the interest of U.S. investors in the subject class of securities. For instance, the bidder cannot engage in "directed selling efforts"[237] to condition the U.S. market for the bidder's securities being offered. In a large cross-border exchange offer where

234. *See, e.g.*, Companies Act 2006, c. 46, § 979 (Eng.) (providing 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.

235. *See* Third Supplement, *supra* note 135 (Q II.E.9); *see also supra* note 135.

236. *See* Securities Act Regulation S, 17 C.F.R. §§ 230.901–.905 (2015).

237. "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 Regulation S. 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). *But see* Prelim-

the bidder has relied upon Rule 14d-1(d)(2)(ii) under the Exchange Act or otherwise determined to conduct separate U.S. and non-U.S. offers, a non-U.S. bidder would typically rely on Regulation S to avoid registering securities offered pursuant to the non-U.S. offer with the Commission. Reliance on Regulation S in the context of exclusionary offers may, however, be problematic.[238]

2.3 Vendor Placements

For 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, subject to certain conditions.[239] The Tier II exemption does not provide similar relief.

Historically, however, the Staff was willing to consider requests for relief under the Rule 14d-10 all-holders best-price provisions on a case-by-case basis[240] to permit U.S. holders to be cashed out in the context of an exchange offer, such that the bidder was not required to register consideration shares under the Securities Act.[241] Typically this would be achieved by a bidder allotting securities otherwise allocable to U.S. security holders to a third-party "vendor" that causes such securities to be "placed" outside of the United States on

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inary Note 7 to Regulation S, in relation to certain offshore press activities conducted in accordance with Rule 135e under the Securities Act, 17 C.F.R. § 230.135e (2015).

238. *See, e.g.*, Mittal Steel Co. N.V., Form F-4 (Mar. 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 United States and an inducement to U.S. security holders to tender. *See* Third Supplement, *supra* note 135 (Q II.G.1) (stating that tender offer materials may be furnished to the Commission 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 persons in the United States or to U.S. persons). 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 Commission, an issuer would nonetheless need to consider its U.S. securities law disclosure obligations regarding the transaction. *See also* Coral Gold Corp., SEC No-Action Letter, 1991 WL 176737 (Feb. 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.

239. *See* 2008 Cross-border Release, *supra* note 3, at 60076–77 (Part II.G.2); *supra* section 2.3.

240. *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.

241. *See* 1999 Cross-border Release, *supra* note 3, at 61388. Moreover, laws or regulations of the home jurisdiction 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.

behalf of U.S. holders and then remitting the proceeds of such placement to U.S. holders, less costs. Bidders argued that as no offer or sale of the bidder's securities occurs in the United States, no registration under the Securities Act is required. Vendor placements were often desirable from a bidder's perspective because they permitted a bidder to issue non-cash consideration only. Additionally, in jurisdictions with laws requiring a bidder to offer the same or 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.

The Commission indicated in the 2008 Cross-border Release that the Staff would no longer issue vendor placement no-action letters regarding registration under Section 5 of the Securities Act, but provided a number of factors that it suggested should be considered in analyzing whether registration under Section 5 would be required. These include the following:

- the level of U.S. ownership in the target company;
- the quantum of securities to be issued in the offer, as a proportion of the quantum of bidder securities outstanding before the offer;
- the quantum of securities to be issued to tendering U.S. holders and subject to the vendor placement, as a proportion of the amount of bidder securities outstanding before the offer;
- the existence of a highly liquid and robust trading market for the bidder's securities;
- the likelihood that the vendor placement can be effected within a very short period of time after the termination of the offer and the bidder's acceptance of shares tendered in the offer;
- the likelihood that the bidder plans to disclose material information around the time of the vendor placement sales;
- the process used to effect the vendor placement sales and whether sales of a bidder's securities in the vendor placement can be accomplished within a few business days of the close of the offer and whether the bidder announces any material information in such time; and
- whether the vendor placement involves special selling efforts by bidders or their agents (any such efforts could result in the cash value of securities sold differing from the historical value).

The Commission also expressed its view that in the context of an analysis under Rule 14d-10, it would not be permissible (i) to exclude from the tender offer all but a limited class of U.S. holders, such as large institutional investors (for whom an exemption from Section 5 of the Securities Act may be available);[242] or (ii) to

242. *E.g.*, Securities Act § 4(a)(2), 15 U.S.C. § 77d(a)(2) (2012).

include all U.S. holders in the tender offer, but issue securities only to some U.S. holders, such as U.S. institutions on a private placement basis, while providing cash to all others pursuant to a vendor placement arrangement.[243]

In circumstances where the all-holders best-price provisions of Rule 14d-10 do not apply,[244] it may be possible to include certain U.S. security holders in an unregistered exchange offer by relying on the private placement exemption afforded by Section 4(a)(2) of the Securities Act,[245] where an offer has been extended into the United States and U.S. security holders are generally limited to receiving cash consideration. A practice developed in Europe such that a bidder's consideration securities were placed with a limited number of "qualified institutional buyers,"[246] in compliance with certain private placement procedures. Securities placed privately with qualified institutional buyers pursuant to Section 4(a)(2) are restricted securities for purposes of the Securities Act.[247] 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. security holders 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 that are eligible to rely on a private placement exemption.

2.4 Registration Under the Securities Act in the Context of an Exchange Offer

If the registration requirements of the Securities Act apply and Rule 802 or another exemption is unavailable, the bidder must file a registration statement with the Commission 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 Commission. This occurs, for example, when the bidder has previously offered its securities publicly in the United States or when the bidder's securities trade on a U.S. securities exchange, such as the NYSE or NASDAQ.

243. *See* 2008 Cross-border Release, *supra* note 3, at 60077–78 (Part II.G.3).

244. For instance, in a transaction not subject to Regulation 14D, or subject to Regulation 14D but within the parameters of the Tier I exemption. The Commission suggests that the practice of offering securities only to certain target shareholders on a private placement basis is not consistent with the all-holders best-price provisions of Rule 14d-10. *See id.* at 60078 & n.367.

245. Securities Act § 4(a)(2), 15 U.S.C. § 77d(a)(2).

246. 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. 17 C.F.R. § 230.144A (2015). However, such offers would not typically be made in reliance upon Rule 144A, which is a resale exemption and not available for use by an issuer itself.

247. *See supra* note 227.

A foreign private issuer undertaking a registered exchange offer in the United States must prepare and file with the Commission a registration statement on Form F-4.[248] 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 offer.[249] The financial statements of foreign private issuers may be presented in U.S. GAAP, IASB IFRS, or local home-country generally accepted accounting principles ("local GAAP"). No reconciliation to U.S. GAAP is required for foreign private issuers that use IASB IFRS. However, if local GAAP or non-IASB IFRS is used, financial information must be reconciled to U.S. GAAP.[250] In the case of a hostile exchange offer, certain mandated information may not be made available by the target.[251] In such a case, a bidder may need to request that the Staff grant relief under Rule 409[252] of the Securities Act or otherwise in respect of the unavailable information.[253] Relief under Rule 437[254] may be required in respect of any consents required, but unavailable.

To the extent that audited financial statements are required to be included in a Commission filing, the bidder should 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"),[255] that the auditors satisfy the PCAOB's and the Commission's independence criteria, and that the financial statements comply with the applicable Commission requirements.[256]

248. Where the bidder intends to issue securities in the form of ADSs, the bidder would also separately need to arrange for ADSs to be registered with the Commission on Form F-6, unless sufficient ADSs have already been so registered. *See* General Instruction II to Form F-6.

249. *Securities Act Form S-4*, U.S. Sec. & Exch. Commission, http://www.sec.gov/about/forms/forms-4.pdf (last visited Jan. 18, 2016); *Securities Act Form F-4*, U.S. Sec. & Exch. Commission, https://www.sec.gov/about/forms/formf-4.pdf (last visited Jan. 18, 2016).

250. *See* Item 17 of Form 20-F, 17 C.F.R. § 249.220f (2015).

251. In particular, in an exchange offer, U.S. GAAP or IASB IFRS financial information of the target satisfying the staleness requirements of Item 8.A of Form 20-F.

252. Securities Act Rule 409, 17 C.F.R. § 230.409 (2015) (providing relief for information unknown or not reasonably available).

253. *Id. See, e.g.*, Mittal Steel Co. N.V., Form F-4 (Mar. 23, 2006), at 8; Gas Natural SDG SA, Form F-4 (Feb. 28, 2006), at 15; Harmony Gold Mining Co. Ltd., Form F-4 (Oct. 21, 2004), at vi.

254. Securities Act Rule 437, 17 C.F.R. § 230.437 (2015).

255. 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 as amended in scattered sections of 15 U.S.C. and 18 U.S.C.) [hereinafter Sarbanes-Oxley Act].

256. *See International Reporting and Disclosure Issues in the Division of Corporation Finance*, U.S. Sec. & Exch. Commission (Feb. 24, 2005), https://www.sec.gov/divisions/corpfin/internatl/cfirdissues1104.htm.

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 a registration statement (and the prospectus/offer to exchange contained within) can take several months and must be filed before commencement of the exchange offer. If the Staff decides 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 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 need to be kept open, and possibly extended, for an additional period of at least five U.S. business days, depending on the changes.[257] Before a bidder may accept and settle any tendered securities, the Commission must have declared the registration statement effective. Effectiveness occurs at the bidder's request after all of the Commission's comments and questions have been resolved. While the Staff has undertaken to expedite the review of a registration statement filed in an early commencement offer, the registration process can ordinarily take anywhere from four to eight weeks or more from first filing, depending on a variety of factors, including whether the bidder is a reporting company and whether the Staff affords the bidder's registration statement limited review treatment. Where the bidder is not subject to Commission reporting, a full Commission 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 Commission, (ii) await an initial round of Commission comments prior to launching the offer, or (iii) wait until all Commission comments are resolved and the Commission has declared the bidder's registration statement effective.[258] 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 resolve those comments prior to finalizing the Commission registration statement.[259]

Registering securities under the Securities Act will subject the issuer to substantial periodic reporting obligations. Exchange Act Section 13(a)[260] provides

257. *See* Exchange Act Rule 14d-4(d)(2), 17 U.S.C. § 240.14-4(d)(2) (2015) (mandating the prompt dissemination to security holders of material changes in information previously provided and that the offer remain open for at least five additional U.S. business days from the date such materials are so disseminated).

258. Prior to the amendment of Exchange Act Rule 14d-1 with the adoption of the 1999 cross-border regulations, an exchange offer could not be launched until the registration statement had been declared effective by the Commission. Rule 162 was amended again with the adoption of the 2008 cross-border regulations to permit a bidder to commence early an exchange offer that is subject only to Regulation 14E, subject to it providing certain protections to target security holders. *See* Securities Act Rule 162, 17 C.F.R. § 230.162 (2015).

259. 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.

260. *See* Exchange Act § 13(a), 15 U.S.C. § 78m(a) (2012).

that every issuer of a security registered under Section 12 of the Exchange Act must file certain annual and other periodic reports with the Commission. Exchange Act Section 15(d)[261] provides that any issuer that has had a registration statement declared effective by the Commission under the Securities Act with respect to any class of debt or equity securities shall have an obligation to file with the Commission 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) obligation will be suspended automatically if and so long as the issuer has any class of securities registered under Exchange Act Section 12 pursuant to Section 13(a).[262] A foreign private issuer may subsequently deregister its securities and terminate its Exchange Act reporting obligations under Exchange Act Section 15(d) as set forth below in section 5.3. An issuer that is subject to Exchange Act Section 15(d) will also be subject to applicable provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act.

As discussed above, in addition to U.S. federal regulation, the blue sky 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 and to tender offers conducted in reliance on Rule 802. Although U.S. federal law preempts state blue sky laws in respect of exchange securities that are listed on the NYSE, NASDAQ, and certain other U.S. securities exchanges or are issued in certain transactions exempt from the registration requirements of the Securities Act, exchange securities registered under the Securities Act, but which are not so listed, or are issued in reliance on Rule 802 and on the Section 3(a)(10) exemption are generally subject to state blue sky laws.[263]

2.4.1 Disclosure

For a registered exchange offer, extensive information will need to be disclosed to target security holders and filed with the Commission pursuant to the Securities Act. Substantially all of the information required in a bidder's Schedule TO will be included in the prospectus/offer to exchange filed on Form F-4 or S-4, as the case may be.

For 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. The form of 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.[264]

261. *Id.* § 15(d), 15 U.S.C. § 78o (2012).
262. *Id.*
263. *See supra* notes 17 & 80 and accompanying text; *see also Staff Legal Bulletin No. 3A (CF)*, U.S. Sec. & Exch. Commission (June 18, 2008), https://www.sec.gov/interps/legal/cfslb3a.htm.
264. *See* Exchange Act Rules 10b-5 & 14e-3, 17 C.F.R. §§ 240.10b-5, 240.14e-3 (2015).

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)[265] of, and Rule 10b-5[266] under, the Exchange Act, which prohibit manipulative or deceptive practices in connection with the purchase or sale of securities. Effectively, the bidder and any person who acted as a "maker" of the statements contained in the offering materials[267] (e.g., by signing the offering materials[268]) may be liable under Rule 10b-5 in respect of a material misstatement or omission contained in the offering materials to the extent that the material misstatement or omission was made with "scienter"[269]—which means that the defendant knew that the published information was false or misleading or acted with reckless disregard for the truth.[270] Although "deliberate"[271] or "conscious"[272] recklessness may be sufficient to establish liability under Rule 10b-5, negligence is not.[273] 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.[274]

In the case of a registered exchange offer, the bidder and its directors, officers, and controlling persons will be subject to liability under Section 11[275] and possibly Section 12(a)[276] of the Securities Act in respect of material misstatements and omissions in the prospectus/offer to exchange, in addition to potential 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

265. Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2012).

266. Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5.

267. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) (liability under Rule 10b-5 for material misstatements is limited to "makers" of a misstatement, who are those persons and entities "with ultimate authority over the statement, including its content and whether and how to communicate it").

268. *See, e.g.*, City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc., 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) (signatories of a registration statement satisfied *Janus* definition of "maker" for Rule 10b-5 purposes).

269. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 (2007) (private actions brought under Rule 10b-5 must show that the defendant acted with scienter in order to succeed). Scienter has been described as "a mental state embracing intent to deceive, manipulate or defraud." *Id.*

270. Although the U.S. Supreme Court has "reserved the question whether reckless behavior is sufficient for civil liability" under Rule 10b-5, it has acknowledged that "[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required." *Tellabs*, 551 U.S. at 319 n.3.

271. *See* Oregon Pub. Emps.' Ret. Fund v. Apollo Grp., Inc., 774 F.3d 598, 607 (9th Cir. 2014) (scienter established through proof of "deliberate recklessness").

272. *See* Novak v. Kasaks, 216 F.3d 300, 312 (2d Cir. 2000) (scienter may be alleged by pleading "'conscious recklessness'—i.e., a state of mind 'approximating actual intent, and not merely a heightened form of negligence'" (internal citations omitted)).

273. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) ("actions under Section 10(b) require proof of scienter and do not encompass negligent conduct").

274. *See* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014).

275. Securities Act § 11, 15 U.S.C. § 77k (2012).

276. *Id.* § 12(a), 15 U.S.C. § 77*l*(a) (2012).

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.[277] 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.[278] Unlike Rule 10b-5, no "scienter" is required under Section 11.[279] 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,[280] 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 Act[281] or offers or sells a security by means of a prospectus or an oral communication that contains an untrue statement of a material fact or omits to state a material fact necessary to avoid rendering the statements, under the circumstances made, misleading[282] will be liable to the person purchasing the security.[283] 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.[284] As in

277. *See* Securities Act § 11(a), 15 U.S.C. § 77k(a).

278. *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 Huddleston*, 459 U.S. at 382 ("Liability against the issuer of a security is virtually absolute, even for innocent misstatements. Other defendants bear the burden of demonstrating due diligence.").

279. Securities Act § 11, 15 U.S.C. § 77k.

280. 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), 15 U.S.C. § 77k(b). A slightly different standard of due diligence applies with respect to "expertized" portions of the registration statement (those prepared by or on the authority of an expert). *Id.*

281. *See* Securities Act § 12(a)(1), 15 U.S.C. § 77*l*(a)(1).

282. *See* Securities Act § 12(a)(2), 15 U.S.C. § 77*l*(a)(2).

283. Section 12(a)(2) has been construed to permit claims to be brought only by "those persons who purchased securities pursuant to public offerings made via a prospectus" and only against a "person who passes title or interest in a security to a buyer for value or solicits an offer to buy a security." *In re* Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 401 (D. Md. 2004). Consistent with those limitations, persons who acquired securities in a private offering or in a post-offering, secondary market transaction are beyond the scope of protection afforded by Section 12(a)(2). Similarly, when an issuer sells all of its securities to an underwriting syndicate in a "firm commitment" underwriting, the issuer will likely not be deemed to have directly passed title to a public investor and consequently will not be liable under Section 12(a)(2). *Id.*

284. The term "written communication" is defined in Securities Act Rule 405, 17 C.F.R. § 230.405 (2015). "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

the case of Section 11, Section 12(a)(2) provides a due diligence defense, the "reasonable care" standard,[285] 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.[286] Unlike Rule 10b-5, no "scienter" is required under Section 12.[287]

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 adopted by the Commission under that section, 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 Commission (the making of which is commonly referred to as "gun-jumping"), and (ii) after a registration statement has been filed with the Commission, offers other than pursuant to the prospectus/offer to exchange then filed.[288] Public announcements and shareholder communications relating to an exchange offer are restricted, from the time of first public announcement of the transaction until the registration statement has been declared effective by the Commission, except as permitted by Rules 165[289] and 425[290] under the Securities Act, which permit free written 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 Commission 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.

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or confirms the sale of any security." Securities Act § 2(a)(10), 15 U.S.C. § 77b(a)(10) (2012). Despite the breadth of that definition, the Supreme Court has held that the term "prospectus" as used in Section 12(a)(2) has the same meaning as the identical term in Section 10(a) of the Securities Act and is limited to those documents that, unless subject to a statutory exception, "must include the 'information contained in the registration statement'" and is "confined to documents related to public offerings by an issuer or its controlling shareholders." Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995).

285. 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), 15 U.S.C. § 77*l*(a)(2).

286. *See* Sanders v. John Nuveen & Co., 619 F.2d 1222, 1228 (7th Cir. 1979) (considering congressional intent behind Securities Act Section 12(a)(2) and comparing the "reasonable care" standard under that section to the "reasonable investigation" standard under Securities Act Section 11).

287. *See* Securities Act § 12, 15 U.S.C. § 77*l* (2012).

288. *See* Securities Act § 5, 15 U.S.C. § 77e (2012). The Commission'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, e.g.*, Publication of Information Prior to or After the Effective Date of a Registration Statement, 22 Fed. Reg. 8359 (Oct. 24, 1957) (to be codified at 17 C.F.R. pt. 231).

289. Securities Act Rule 165, 17 C.F.R. § 230.165 (2015).

290. Securities Act Rule 425, 17 C.F.R. § 230.425 (2015).

3 Business Combination Transactions Not Involving a Tender Offer

There are alternatives 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,"[291] 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 organized,[292] as well as tax, regulatory, and other practical considerations. A business combination transaction involving a vote by shareholders of the participating companies to approve the transaction 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.[293] Although the Exchange Act regulates the solicitation of votes of a company's shareholders,[294] relevant rules adopted by the Commission 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.[295] 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 under those sections, which by their terms only apply to tender offers.

For a business combination transaction not comprising a tender offer, the various exemptions and the Regulation S safe harbor may be available as an alternative to Securities Act registration.[296] Rule 802 provides an exemption from

291. 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.*, Equant N.V., Form 6-K (Apr. 25, 2005) (shareholders' circular, dated April 22, 2005, attached as Exhibit 3 to the Form 6-K).

292. 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 2006, c. 46, §§ 979–982 (Eng.).

293. *See* Securities Act Rule 145, 17 C.F.R. § 230.145 (2015); *supra* note 15.

294. Regulation 14A, Exchange Act Rules 14a-1 to 14b-2, 17 C.F.R. § 240.14a-1 to .14b-2 (2015).

295. *See* Exchange Act Rule 3a12-3, 17 C.F.R. § 240.3a12-3 (2015); *see also supra* note 143 and accompanying text. Pursuant to Exchange Act Rule 13e-3, 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 Commission 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 Commission. *See, e.g.*, Kerzner Int'l Ltd., Schedule 13E-3 (May 24, 2006).

296. *See supra* section 2.2.

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. security holder base. Section 3(a)(10)[297] of the Securities Act exempts 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. In the absence of such an exemption or exclusion, however, any securities issued would have to be registered under the Securities Act.

3.1 Exemptions and Exclusions to the Registration Requirements of the Securities Act

3.1.1 Rule 802

As discussed above, 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. Without having to comply with the registration requirement, the bidder avoids the need to prepare and file the detailed disclosure specified in the Form F-4 or Form S-4. Rule 802 may be available if (i) the target or the entity whose securities will be exchanged is a foreign private issuer and is not an investment company registered or required to be registered under the Investment Company Act, other than a closed-end investment company, (ii) U.S. holders hold no more than 10 percent of the target's securities, and (iii) the bidder permits U.S. holders to participate in the tender offer on terms at least as favorable as those offered to other shareholders, calculated substantially as set forth above in section 1.1.1.[298]

3.1.2 Schemes of Arrangement—Section 3(a)(10)

In many jurisdictions, acquisitions or business combinations may be effected by schemes of arrangement, or similar statutory arrangements involving both a vote of affected security holders and a court determination regarding the fairness of the transaction. Schemes of arrangement structured to comply with the Securities Act Section 3(a)(10) exemption may provide significant advantages over tender offers because 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.[299]

297. Securities Act § 3(a)(10), 15 U.S.C. § 77c(a)(10) (2012). Securities Act Section 3(a)(10) is discussed in more detail in *infra* section 3.1.2.

298. As described in *supra* section 1.1.1, certain "look-through" provisions apply in the context of assessing the availability of Rule 802.

299. 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

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

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 governmental entity authorized by statute (which can be a non-U.S. court or entity) must approve the fairness of the terms and conditions of the exchange to security holders;
- the reviewing court or authorized governmental 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.[300]

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majority in number is also required. *See* Companies Act 2006, c. 46, § 899 (Eng.). 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 want to consult with the relevant depositary 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.

300. *See Staff Legal Bulletin No. 3A (CF)*, U.S. Sec. & Exch. Commission (June 18, 2008), https://www.sec.gov/interps/legal/cfslb3a.htm; *see also supra* note 35.

No mandated information disclosure provisions apply, although the anti-fraud requirements of Rule 10b-5 are applicable.

The Section 3(a)(10) exemption has been relied upon in numerous cross-border business combination transactions, including "schemes of arrangement" under section 899 of the United Kingdom Companies Act 2006 and in jurisdictions such as Canada, South Africa, Australia, Bermuda, and Hong Kong[301] with similar procedures providing for a court-convened meeting of shareholders, followed by a ruling on the fairness of the transaction. Many transactions conducted under Section 3(a)(10) proceed without "no-action" relief from the Staff; however, the Staff may be consulted and may be willing to issue "no-action" relief in novel circumstances or where it is otherwise uncertain as to whether Section 3(a)(10) is available.

Securities issued pursuant to Section 3(a)(10) are not "restricted securities" within the meaning of Rule 144 and may generally be resold without regard to Rule 144 if the sellers are not affiliates of the issuer of the securities and have not been affiliates within ninety days of the date of the Section 3(a)(10)–exempt transaction.[302] If securities are held by affiliates of the issuer, holders may be able to resell the securities in accordance with the provisions of Rule 144.

As discussed above in the context of an exchange offer, in addition to U.S. federal regulation, the blue sky securities laws of the several states of the United States may apply to schemes of arrangement and other transactions structured to comply with Section 3(a)(10).[303]

3.2 Registration Under the Securities Act for Business Combinations Not Involving an Exchange Offer

Registration of securities by foreign private issuers to be issued in connection with business combination transactions are effected on Form F-4.[304] 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 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

301. *See* Nabi Biopharmaceuticals, SEC No-Action Letter, 2012 WL 2339264 (June 20, 2012); Weatherford International Ltd., SEC No-Action Letter, 2009 WL 142326 (Jan. 14, 2009); 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). 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.

302. *See* Revisions to Rules 144 and 145, SEC Release No. 33-8869, 92 S.E.C. Docket 110 (Dec. 6, 2007); *Staff Legal Bulletin No. 3A (CF)*, U.S. Sec. & Exch. Commission (June 18, 2008), https://www.sec.gov/interps/legal/cfslb3a.htm; *see also supra* note 35.

303. *See supra* section 2.4; *see also supra* notes 17 & 80 and accompanying text; *Staff Legal Bulletin No. 3A (CF)*, U.S. Sec. & Exch. Commission (June 18, 2008), https://www.sec.gov/interps/legal/cfslb3a.htm.

304. *See supra* section 2.4.

conditions.[305] The potential liability issues discussed above in section 2.4.2 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 under 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 decide not to extend their offers to the target's U.S. security holders for a variety of reasons, including the following:

- reducing the prospect of private litigation in U.S. courts or Commission enforcement proceedings;
- minimizing procedural complexities;
- avoiding conflicts between U.S. and non-U.S. regulatory schemes;
- reducing the length of time the offer must remain open;
- reducing costs;
- avoiding becoming a reporting company;
- avoiding preparing *pro forma* documents and other financial information; and
- where only a small percentage of the target's shareholders are U.S. security holders or are otherwise not necessary to complete the transaction.

To exclude offers from the reach of U.S. tender offer rules, bidders have structured offshore transactions to avoid the use of U.S. jurisdictional means.[306] Although this approach has been challenged in U.S. courts,[307] and the Commission has expressed a restrictive view as to the circumstances in which "exclusionary offers" are justified, U.S. courts have generally taken the view that tender offers made outside the United States are not subject to the procedural or registration

305. *See supra* notes 288 & 289.

306. 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." 15 U.S.C. § 78n(d) (2012); *see also supra* note 12. 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 135 (Q II.F.1).

307. *See supra* note 4.

requirements of U.S. securities laws[308] and the Commission has "recognized that bidders who are not U.S. persons may structure a tender offer to avoid the use of the means or instrumentalities of interstate commerce or any facility of a U.S. securities exchange in making its offer and thus avoid triggering application of our rules."[309] The anti-fraud provisions of the U.S. securities laws may, however, apply to misstatements or omissions affecting U.S. purchasers or sellers.[310]

To avoid the use of U.S. jurisdictional means, an offer 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 implemented to avoid the use of U.S. jurisdictional means (including telephone, fax, and internet to, in, or from the United States) by the bidder or any other participant in the transaction. 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 any extant Exchange Act reporting obligations it may have).

No statutory or administrative "safe harbor" exists to avoid U.S. jurisdiction. There can be no assurance, therefore, that compliance with the procedures de-

308. *See, e.g.*, Exchange Act § 30(b), 15 U.S.C. § 78dd (2012) ("The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title."). It should be noted that the Commission has never adopted any rules to implement Section 30(b).

309. *See* 2008 Cross-border Proposing Release, *supra* note 109, 2008 WL 1989775, at *50–53 (Part II.G.2).

310. *See* Plessey Co. plc v. Gen. Elec. Co. plc, 628 F. Supp. 477 (D. Del. 1986) (where an exclusionary offer for a target with only a small U.S. float in the form of ADRs listed on U.S. securities exchange was deemed not subject to the procedural, disclosure, or substantive requirements of U.S. tender offer rules); John Labatt Ltd. v. Onex Corp. LBT, 890 F. Supp. 235, 245 (S.D.N.Y. 1995) (where the court found no tender offer was present due to the efficacy of the exclusionary measures implemented by the bidder); *see also* Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir. 1975), abrogated by Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010)]; Schoenbaum v. Firstbrook, 405 F.2d 200, 206–08 (2d Cir. 1968). However, private suits asserting a claim under the anti-fraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder would be subject to the jurisdictional limits of the statute defined by the U.S. Supreme Court in [*Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)]. In addition, at least one commentator has contended that, although *Morrison* focused solely on claims brought under Section 10(b), its holding restricting the extraterritorial reach of Section 10(b) is equally applicable to other claims brought under the Exchange Act, including Section 14(e). *See* Vladislava Soshkina, *Beyond* Morrison: The Effect of the "Presumption Against Extraterritoriality" and the Transactional Test on Foreign Tender Offers, 54 WM. & MARY L. REV. 263, 281 (2012). At the same time, the test adopted in *Morrison* to determine whether conduct falls within or without the jurisdictional reach of Section 10(b) was driven by the Court's interpretation of Congress's intended scope for Section 10(b) based on the statute's specific language. That test has no application to the statutory language of Sections 14(d) or (e) or any other distinct provisions of the Securities Act or Exchange Act and it remains to be seen what tests the courts will craft to apply the teaching of *Morrison* to the extraterritorial limits of the securities laws. Furthermore, any extraterritorial limits that might apply to private suits under Section 14(e) would not preclude claims by the Commission or the U.S. Department of Justice under the Exchange Act's anti-fraud provisions, which would be subject to the "conduct" and "effects" jurisdictional test codified by the Dodd-Frank Act. *See supra* note 5.

scribed in this article 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,[311] the Commission has encouraged by informal means the bidder to extend its offer into the United States. While the Commission has supported exclusionary offers in the past,[312] in the 1990 Concept Release, the Commission took the position, notwithstanding the views of the Delaware court in *Plessey Co. plc v. General Electric Co. plc*,[313] that "U.S. jurisdictional means" exist whenever it is reasonably foreseeable that excluded U.S. security holders of a foreign issuer will sell their securities into the secondary market in response to that offer.[314] The Staff appears to be less willing to accept jurisdictional arguments in support of the exclusion of U.S. holders since the adoption of the cross-border amendments.[315] The Commission will view with skepticism a purported exclusionary offer for Registered Securities.[316] The Commission has further suggested that "a legend or disclaimer stating that the offer is not being made into the United States, or that the offer materials may not be distributed there, is not likely to be sufficient in itself to avoid U.S jurisdiction because, if the bidder wants to support a claim that the offer has no jurisdictional connection to the United States, it also will need to take special precautions to prevent sales or tenders from U.S. target holders,"[317] and noted that in the future it would more closely monitor exclusionary offers.[318]

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 observations of the Commission and take into account past practice in other similar offer situations.[319]

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311. "Significant" for these purposes could be in the order of 5 to 10 percent of all shareholders.

312. *See* Amendments to Tender Offer Rules; All-Holders and Best-Price, SEC Release No. 34-23421, 51 Fed. Reg. 25873, 25877 (July 17, 1986) (to be codified at 17 C.F.R. pts. 200 & 240) (stating that certain tender offers are "for lack of use of jurisdictional means . . . not subject to . . . the Exchange Act").

313. *See supra* note 310.

314. *See* 1990 Concept Release, *supra* note 4, at 23751.

315. For instance, in the 1999 Cross-border Release, the Commission stated that "the purpose of the exemptions adopted today is to allow U.S. holders to participate on an equal basis with foreign security holders. In the past, some jurisdictions have permitted exclusion of U.S. holders. The rules adopted today are intended to eliminate the need for such disadvantageous treatment of U.S. investors." 1999 Cross-border Release, *supra* note 3, at 61382–83.

316. *See* 2008 Cross-border Release, *supra* note 3, at 60076–77 (Part II.G.2) (stating "[e]xclusionary offers for securities of foreign private issuers that trade on a U.S. exchange will be viewed with skepticism where the participation of those U.S. holders is necessary to meet the minimum acceptance condition in the tender offer"); *see also supra* note 4.

317. *See supra* note 310.

318. *Id.*

319. *See generally* International Tenders and Exchange Offers, 56 Fed. Reg. 27582 (proposed June 14, 1991) (to be codified at 17 C.F.R. pts. 200, 230, 239, 240 & 260).

- The offer documents, forms of acceptance, other shareholder communications, press releases, and offer-related materials may not be made available to U.S. security holders (or their brokers, nominees, or other intermediaries); all offer-related materials must include legends stating 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 Commission 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 or on any website.
- Appropriate legends, click-through certifications, or other filtering procedures must be incorporated on the bidder's website (and any other relevant website) to ring-fence offer-related materials from U.S. holders.[320]
- The bidder and its advisers and agents (including the institution(s)) receiving acceptances, brokers, nominees, depositaries, and other intermediaries must be instructed not to, and must 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.
- No cash, and in the case of an exchange offer no new securities, should be issued to holders in the United States.[321]
- The bidder and its advisers and agents should avoid any physical distribution of the offer documentation to persons resident or otherwise in the United States, including to the target's shareholders with registered addresses in the United States. Efforts must be made to prohibit the forwarding of offer documents, shareholder communications, press releases, and offer-related materials by brokers, nominees, depositaries, and other intermediaries to U.S. holders or the acceptance by such persons of the offer on behalf of U.S. holders.
- The bidder and its advisers and agents should establish procedures to identify whether security holders are resident or otherwise in the United

320. *But see* Third Supplement, *supra* note 135 (Q II.F.1) (stating that "a company using Regulation S to allow participation in a business combination offshore (but not a tender or exchange offer) may put the proxy statement/prospectus on an unrestricted web site").

321. U.S. holders should generally be barred from voting in an exclusionary offer requiring the approval of security holders (the vote may be deemed to constitute an investment decision), though they may be permitted to receive securities if the transaction is approved and is effected by operation of law. *See* Securities Act Rule 145, 17 C.F.R. § 230.145 (2015); *supra* note 15.

States and to handle telephone, e-mail, and other inquiries from such persons. Generally, if an inquiry is made by a U.S. resident, or a security holder or intermediary that intends to disseminate information concerning the offer in the United States, the inquirer 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 inquirer.

- In certain circumstances, bidders may require a representation or certification from tendering holders that they are not U.S. holders.
- 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. Ordinary course communications may continue in accordance with prior practice.
- 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,[322] although in many cases bidders determine not to provide such access to U.S. journalists on the basis that access may undermine its argument that it has avoided U.S. jurisdictional means.

These procedures have been implemented in many European offers, where the target is not listed on a U.S. securities exchange, is not a reporting company, the percentage of the target's securities in the hands of U.S. holders is small, and the bidder does not need to acquire U.S. holders' securities to meet the minimum acceptance condition or effect a mandatory squeeze-out threshold.[323]

322. In the case of an exchange offer, Rule 135e under the Securities Act, 17 C.F.R. § 230.135e (2015), provides an exemption from Section 5 of the Securities Act for certain offshore press conferences and the offshore release of press-related materials, including to members of the U.S. press. There is an analogous safe harbor exemption in Regulation 14D, which appears to be available for exclusionary offers. However, in the authors' experience, most bidders conducting an exclusionary offer determine to prohibit U.S. journalists from attending offshore press conferences. *See* Exchange Act Rule 14d-1(e), 17 C.F.R. § 240.14d-1(e) (2015).

323. *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* Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262 (2d Cir. 1989), *on remand to* 713 F. Supp. 1457 (S.D.N.Y. 1989) & *amended by* 890 F.2d 569 (2d Cir. 1989).

Compliance with such procedures may be difficult or impossible however. Certain factors may increase the risk of courts or the Commission challenging a bidder's assertion that its exclusionary offer was appropriate or effectively conducted. In the authors' experience, these factors include, in addition to the target's nexus to the United States and the relevance of U.S. holders' securities to the success of the bidder's offer, the following:

- Whether under applicable local law, a bidder is permitted to conduct an exclusionary offer (if local law requires that the bidder's offer is made to all holders, it may be difficult to argue that an offer that purports to exclude U.S. holders is effective).
- The existence and size of the target's ADR program, and whether the program is sponsored or unsponsored.
- The proportion of trading in the target's securities that occurs in the United States, on a U.S. securities exchange, over the counter, or off-market.
- Whether, as a matter of local law, offer documents, forms of acceptance, other shareholder communications, press releases, and offer-related materials will be posted on an unrestricted website accessible to U.S. holders.
- The means by which any pre-offer stake-building was conducted, particularly if target securities were acquired in the United States or from U.S. holders.
- The premium implied by the bidder's offer and the size and liquidity of the trading markets for the target's securities (and U.S. holders' access to such markets), which may affect the extent to which U.S. holders are prejudiced by being excluded from the bidder's offer.

From a business perspective, it may be difficult or impossible for a U.S. bidder to comply with the restrictions on U.S. press and analyst contact. 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 Commission 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.[324] Such press releases or Commission filings or submissions would typically be prepared in consultation with the bidder's U.S. legal counsel.[325]

324. *See supra* note 237.

325. 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 v. Drexel Firestone, Inc., 519 F.2d 992–93 (2d Cir. 1975).

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 decide to list its securities on a U.S. securities exchange 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.[326] To list on a U.S. securities exchange, the bidder's securities must be registered under Section 12(b)[327] of the Exchange Act and the requisite listing formalities must be completed before such securities are eligible to be listed. A bidder in an exchange offer also may become subject to the reporting obligations under the Exchange Act by reason of its securities being held by more than a specified number of persons (Section 12(g) of the Exchange Act[328]), as a result of registering securities issued as consideration under the Securities Act (Section 15(d) of the Exchange Act[329]), or via succession (Rule 12g-3 under the Exchange Act[330]).

A foreign private issuer must register a class of equity securities under Section 12(g) of the Exchange Act within 120 days after the last day of the fiscal year in which the foreign private issuer has assets in excess of $10 million and the class is held of record by either (i) 2,000 persons or (ii) 500 persons who are not "accredited investors"[331] (and, in both cases, held by 300 or more persons resident in the United States),[332] subject to look-through procedures similar to those discussed above in section 1.1.1.[333]

Registration under Section 12 of the Exchange Act will subject the registrant not only to the periodic reporting obligations under the Exchange Act pursuant to Section 13(a) of that Act, but also to applicable provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act to the extent that such provisions are not already applicable.

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

327. 15 U.S.C. § 78(b) (2012).

328. Exchange Act § 12(g), 15 U.S.C. § 78(g) (2012).

329. Exchange Act § 15(d), 15 U.S.C. § 78o(d) (2012).

330. 17 C.F.R. § 240.12g-3 (2015).

331. *See* Securities Act Rule 501(a), 17 C.F.R. § 230.501(a) (2015). The Commission stated that it is not proposing to adopt a new definition of "accredited investor" for purposes of Section 12(g)(1) of the Exchange Act and rules adopted under that section. Changes to Exchange Act Registration Requirements to Implement Title V and Title VI of the JOBS Act, SEC Release No. 33-9693, 2014 WL 7533958, at *3 (Dec. 17, 2014) [hereinafter Section 12(g) Proposing Release].

332. *See* Exchange Act § 12(g)(1), 15 U.S.C. § 78(g)(1); Exchange Act Rule 12g3-2(a), 17 C.F.R. § 240.12g3-2(a).

333. The definition of "held of record" is set forth in Rule 12g5-1 under the Exchange Act. However, pursuant to Rule 12g3-2(a), there is an obligation to "look through" securities held of record by a broker, dealer, bank, or nominee for beneficial owners resident in the United States. Note that the Commission has proposed amendments to Rule 12g5-1 that would exclude persons that received securities pursuant to an employee compensation plan in transactions exempt from registration under the Securities Act. *See* Section 12(g) Proposing Release, *supra* note 331, 2014 WL 7533958, at *3.

In certain circumstances, as discussed in section 5.2 below, a bidder or surviving entity may be deemed to "succeed" to the Exchange Act registration of the target or predecessor entity. Where succession does not occur, registration under the Exchange Act in connection with a listing on a U.S. securities exchange is effected by the bidder or surviving entity filing a relatively simple Form 8-A[334] with the Commission during the Securities Act registration process. For securities in connection with an exchange offer or a business combination transaction conducted pursuant to an exemption from Securities Act registration by a foreign private issuer not already subject to Section 13 or 15(d) reporting obligations, registration under the Exchange Act would be effected by filing with the Commission a registration statement on Form 20-F (or Form 40-F in the case of a Canadian issuer).[335]

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) of the Exchange Act may nevertheless become obligated to register its securities under the Exchange Act. Registration would be required (i) in connection with a subsequent listing of its securities on a U.S. securities exchange or (ii) upon its equity securities being held by more than the requisite number of U.S. residents if it is unable to rely upon the exemption from registration provided by Rule 12g3-2(b).

5.1.1 Rule 12g3-2(b)

Rule 12g3-2(b) under the Exchange Act[336] provides an exemption to foreign private issuers from the "held of record" registration requirements under Section 12(g) the Exchange Act, even if the foreign private issuer's equity securities are traded on the over-the-counter market in the United States. The exemption is automatically available[337] for a class of securities issued by a foreign private issuer under Rule 12g3-2(b) if:

- the foreign private issuer is not required to file or furnish reports under Section 13(a) or Section 15(d) of the Exchange Act;
- the foreign private issuer maintains a listing of the relevant securities on at least one non-U.S. securities exchange, which, individually or in combination with the trading of the same securities in another foreign jurisdiction, constitutes the "primary trading market for those securities"; and

334. *Form 8-A*, U.S. Sec. & Exch. Commission, http://www.sec.gov/about/forms/form8-a.pdf (last visited Jan. 18, 2015).

335. *See, e.g.*, *Form 20-F, General Instruction A*, U.S. Sec. & Exch. Commission, http://www.sec.gov/about/forms/form20-f.pdf (last visited Jan. 18, 2015).

336. *See supra* note 232.

337. *See* Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, SEC Release No. 34-58465, 2008 WL 4108124 (Sept. 5, 2008) [hereinafter Rule 12g3-2(b) Release] (amending Rule 12g3-2(b), *inter alia*, to eliminate the written application and paper submission requirements under Rule 12g3-2(b) by automatically exempting from Exchange Act Section 12(g) a foreign private issuer that meets specified conditions).

- the foreign private issuer has published, in English, on its website or through an electronic information delivery system, information material to an investment decision that it (i) has made public or been required to make public, (ii) has filed or has been required to file with the stock exchange on which its securities are listed (and has been made public by the exchange), or (iii) has distributed or been required to distribute to its security holders (including, whether or not material, its annual and any interim reports, along with financials, press releases and any communications distributed directly to security holders) since the beginning of its fiscal year.

To constitute a "primary trading market," at least 55 percent of the ADTV of the relevant class of securities must take place on or through the facilities of a securities exchange in no more than two non-U.S. jurisdictions in the most recently completed fiscal year.[338]

The exemption remains in effect until the issuer (i) no longer maintains a listing of the class of securities on at least one non-U.S. securities exchange that constitutes a primary trading market, (ii) fails to publish electronically the specified information, (iii) registers the class of securities under Section 12 of the Exchange Act, or (iv) incurs a reporting obligation under Section 15(d) of the Exchange Act.

5.2 Succession

Pursuant to Rule 12g-3 under the Exchange Act, if in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets, or similar transaction, securities of an entity not already registered under Section 12(b) or 12(g) of the Exchange Act are issued to holders of securities of an entity that was registered under the Exchange Act, then, upon consummation of the transaction, the securities issued by the bidder or surviving entity will generally be deemed registered under the Exchange Act. In addition, pursuant to Rule 15d-5 under the Exchange Act,[339] if in connection with a succession by merger, consolidation, exchange of securities, acquisition of assets, or similar transaction, securities of an entity not required to file reports under Section 15(d) of the Exchange Act are issued to holders of an entity that was 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 or the surviving entity.

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*.[340] Succession is not triggered merely by gaining control of a company, unless such control is accompanied by the direct acquisition of assets.[341] Succession is potentially applicable to a business combination transaction effected by way of a tender

338. *See* Rule 12g3-2(b), 17 C.F.R. § 240.12g3-2(b) (2015) (note 1 to paragraph (b)(1); Rule 12h-6(f)(5), 17 C.F.R. § 240.12h3-6(f)(5) (2015).

339. 17 C.F.R. § 240.15d-5 (2015).

340. Succession is defined in Exchange Rule 12b-2, 17 C.F.R. § 240.12b-2 (2015).

341. *Id.*

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.[342] We refer to a bidder or surviving entity that has succeeded to the Exchange Act registration or reporting obligations via the operation of Rule 12g-3 as a "successor."

Succession for purposes of Rule 12g-3 will not occur if (i) upon consummation of the business combination transaction, the bidder or surviving entity has fewer than 300 record holders of its securities or, in the case of a foreign private issuer bidder, fewer than 300 holders resident in the United States,[343] or (ii) the class of securities issued by the bidder or surviving entity is exempt from registration pursuant to Rule 12g3-2.[344]

The principal benefit of succession, particularly in the context of a corporate reorganization, is that a bidder or the surviving entity need not file an Exchange Act registration statement with the Commission in order to effect registration under the Exchange Act of its securities (which it might be obliged to do if its securities are widely held or if it seeks to list or maintain a listing on a U.S. securities exchange). Another benefit of succession is that it facilitates the continuous listing of the target shareholders' securities in the United States without requiring the bidder to coordinate the filing and declaration of effectiveness of a new Exchange Act registration statement.[345] Succession may also permit a bidder to take advantage of certain short-form registration statements[346] available to certain issuers in

342. 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.

343. *See* Exchange Act Rule 12g-3(b)(2), 17 C.F.R. § 240.12g-3(b)(2) (2015). Pursuant to rules proposed by the Commission, the threshold would be increased to 1,200 for certain U.S. banks, savings and loan holding companies, and bank holding companies. *See* Section 12(g) Proposing Release, *supra* note 331, 2014 WL 7533958, at *4. As of the date of this article final rules have not been adopted by the Commission.

344. *See* Exchange Act Rule 12g3-2(a), 17 C.F.R. § 240.12g3-2(a) (2015). Prior to September 2008, a successor issuer could not rely on the Rule 12g3-2(b) exemption. *See also* Rule 12g3-2(b) Release, *supra* note 337, 2008 WL 4108124, at *16.

345. Securities may not be traded on the 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 a declaration of the effectiveness of the Securities Act registration statement pursuant to Exchange Act Rule 12d1-2.

346. The Securities Act provides for several short forms of registration, including Form S-3, U.S. Sec. & Exch. Commission, https://www.sec.gov/about/forms/forms-3.pdf (last visited Jan. 18, 2015), and Form F-3, U.S. Sec. & Exch. Commission, http://www.sec.gov/about/forms/formf-3.pdf (last visited Jan. 18, 2016), which permit an issuer to incorporate by reference materials filed with the Commission 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 Form F-3. *See also* Medtronic, Inc., Medtronic Holdings Limited and Covidien plc, SEC No-Action Letter, 2015 WL 310164 (Jan. 23, 2015); Pentair Limited and Pentair plc, SEC No-Action Letter, 2014 WL 1724869 (May 1, 2014) [hereinafter Pentair Letter]; Perrigo Company, Perrigo Company Limited and Elan Corporation, SEC No-Action Letter, 2013 WL 6665444 (Dec. 17, 2013) [hereinafter Perrigo Letter]. In these no-action letters, the SEC, in the context of a reorganization, permitted the successor entity to take into account the predecessor's Exchange Act reporting history for purposes of assessing its eligibility to use a short form Securities Act registration statement and was able to adopt the successor entity's "large accelerated filer" status for purposes of Exchange Act Rule 12b-2.

connection with capital raising under the Securities Act, notwithstanding its recent incorporation and/or recently incurred obligation to file reports under the Exchange Act, and may facilitate re-sales of its securities under Rule 144.[347] The Staff has permitted the use of a predecessor company's Exchange Act reporting history when determining a successor's compliance with the current public information requirements of Securities Act Rule 144(c)(1) and trading volume limitations under Rule 144(e).[348]

Succession may, however, have unintended consequences for a bidder or surviving entity, particularly where it was not previously subject to periodic reporting under the Exchange Act. Where succession operates, the successor becomes subject to the predecessor entity's 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 to list its securities on a U.S. securities exchange. A successor will 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 amended.[349] If succession has occurred, as discussed in section 5.3, the successor may seek to terminate its registration or reporting obligations pursuant to Exchange Act Rule 12h-6(d).[350]

Foreign private issuers provide notice of succession by submitting a Form 6-K to the Commission.[351] Were the bidder or surviving entity to desire a new listing of 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 Commission on Form 8-A.[352]

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 of the bidder's or surviving entity's securities, the total number of shareholders of the parties (and the number of

347. *See* Securities Act Rule 144, 17 C.F.R. § 230.144 (2015). Rule 144 provides a safe harbor exemption from the registration requirements of the Securities Act for the sale of restricted securities and the sale of "control securities" by or for the account of affiliates of an issuer.

348. *See* Pentair Letter, *supra* note 346, 2013 WL 6665444; Perrigo Letter, *supra* note 346, 2013 WL 6665444; *see also* UBS AG—Holding Company Reorganization, SEC No-Action Letter, 2014 WL 5336762 (Sept. 29, 2014).

349. *See* Keir D. Gumbs, *Understanding Succession Under the Federal Securities Laws*, Insights, Apr. 2005, at 17.

350. 17 C.F.R. § 240.12h-6(d) (2015).

351. Notwithstanding Exchange Act Rule 12g-3(f), the Staff has permitted foreign private issuers to provide notification of succession under Rule 12g-3 on Form 6-K rather than Form 8-K. *See* UBS AG and UBS Group AG, SEC No-Action Letter, 2014 WL 4980286 (Oct. 1, 2014); Hungarian Telephone and Cable Corp. and Invitel Holdings A/S, SEC No-Action Letter, 2009 WL 914355 (Feb. 27, 2009); Coca-Cola Hellenic letter, *supra* note 129, 2013 WL 1177933; Reuters Group PLC Thomson Reuters PLC, SEC No-Action Letter, 2008 WL 756687 (Mar. 20, 2008); Royal Dutch Petroleum Company N.V., SEC No-Action Letter, 2005 WL 1266414 (May 17, 2005). Pursuant to Staff interpretive guidance, the predecessor entity must publish notice of the succession by filing a certificate of termination of its registration with the Commission on Form 15. *See Exchange Act Compliance and Disclosure Interpretations*, U.S. Sec. & Exch. Commission (Dec. 2012), http://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm.

352. *See supra* note 334.

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[353] and the Dodd-Frank Act.

5.3 Deregistration/Termination of Reporting Obligations

A bidder or surviving entity in a business combination transaction that (i) has succeeded to another entity's Section 12(b) or Section 12(g) Exchange Act registration or (ii) has previously registered a class of securities under the Exchange Act in connection with the listing of such securities (for instance, in the context of an exchange offer involving equity securities registered under the Securities Act), will continue to be subject to the periodic reporting requirements and other provisions of the Exchange Act until such registration is terminated.[354]

A bidder or surviving entity that has filed a registration statement to register securities with the Commission under the Securities Act (including, in particular, 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 have an active reporting obligation under Section 15(d) of the Exchange Act,[355] unless (in the case of a U.S. domestic issuer) such obligation is suspended or (in the case of a foreign private issuer) the obligation is suspended or terminated.

Delisting. If a class of securities of a bidder or surviving entity is listed on a U.S. securities exchange, the bidder or surviving entity may seek to terminate its registration under Section 12(b) of the Exchange Act by delisting its securities from the exchange.[356] Delisting and termination would be effected by the relevant exchange filing with the Commission a notification of removal from listing and reg-

353. *See infra* section 5.5. 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, 17 C.F.R. § 230.414 (2015), (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 F-3, F-4, 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.*, Gastar Exploration, Inc. and Gastar Exploration USA, Inc., SEC No-Action Letter, 2013 WL 6235096 (Nov. 26, 2013).

354. *See* Exchange Act Rules 12d2-2(d) & 12g-4(b), 17 C.F.R. §§ 240.12d2-2(d), 240.12g-4(b) (2015).

355. Exchange Act § 15(d), 15 U.S.C. § 78o(d) (2012).

356. *See* Exchange Act Rule 12d2-2, 17 C.F.R. § 240.12d2-2.

istration on Form 25.[357] An application to withdraw from listing on a U.S. securities exchange on Form 25 will become effective ten days after the form is filed with the Commission. An application to withdraw registration of a class of securities under Section 12(b) will become effective within ninety days after the form is filed. A foreign private issuer must satisfy and certify in its Form 25 that:

- it is in compliance with all applicable laws in effect in the state in which it is incorporated and with the applicable U.S. securities exchange's rules governing an issuer's voluntary withdrawal of a class of securities from listing and/or registration;
- it has provided written notice to the Commission of its determination to withdraw the class of securities from listing on such exchange; and
- it has simultaneously published via a press release (and, if it has a publicly accessible website, on that website) notice of such intention, along with its reasons for such withdrawal.[358]

Once the applicable U.S. securities exchange receives written notice of the foreign private issuer's intention to delist, the exchange must provide notice on its website of the foreign private issuer's intention by the next business day. Such notice must remain posted on the exchange's website until the delisting on Form 25 is effective. Deregistration under Section 12(b) of the Exchange Act will not, however, result in the termination of the bidder's or surviving entity's obligations to file reports under Section 13(a) (if Section 12(g) applies) or 15(d) of the Exchange Act.

Exchange Act Rule 12h-6. A foreign private issuer whose securities are not registered under Section 12(b) of the Exchange Act may terminate[359] both the registration of a class of equity securities registered pursuant to Section 12(g) of the Exchange Act and its Section 15(d) reporting obligations, by filing a Form 15F with the Commission pursuant to Exchange Act Rule 12h-6.

A foreign private issuer may deregister a class of equity securities under Section 12(g) and terminate its obligations under Section 15(d) by certifying to the Commission on a Form 15F:

- that it (taking into account the predecessor entity) was subject to the reporting obligations under Section 13(a) or Section 15(d) of the Exchange Act for at least the twelve months preceding the filing of the Form 15F, has filed or furnished all reports required for the period, and has filed at least one annual report pursuant to Section 13(a) of the Exchange Act;

357. *See id.*; *Form 25*, U.S. Sec. & Exch. Commission, http://www.sec.gov/about/forms/form25.pdf (last visited Jan. 18, 2015).

358. *See supra* note 357.

359. Prior to amendments to the Commission's rules, which took effect in June 2007, the obligation to file reports could only be suspended, but not terminated. *See* Termination of a Private Issuer's Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, SEC Release No. 34-55540, 2007 WL 907996 (Mar. 27, 2007).

- its securities have not been sold in the United States in a registered offering under the Securities Act during the twelve months preceding the filing of the Form 15F, subject to certain exceptions; and
- it has maintained a listing of the subject class of securities for at least the twelve months preceding the filing of the Form 15F on one or more exchanges outside of the United States that, either singly or together with the trading of the same class of the issuer's securities in another foreign jurisdiction, constitute the "primary trading market" for those securities[360] and either:
  - the foreign private issuer's U.S. ADTV over a recent twelve-month period has been 5 percent or less of the ADTV of that class of securities on a worldwide basis for the same period; or
  - on a date within 120 days before the filing date of the Form 15F, the foreign private issuer's securities were held by no more than 300 shareholders worldwide or no more than 300 persons resident in the United States.

The counting method used for determining the number of U.S. holders is substantially similar to the counting method that the Commission adopted for assessing the availability of the Tier I and Tier II exemptions.[361]

The deregistration provisions of Rule 12h-6 are, however, unavailable to a foreign private issuer for one year after it has (i) had its class of equity securities delisted from a U.S. securities exchange or (ii) terminated a sponsored ADR program, unless it had 5 percent or less of its ADTV in the United States at the time of delisting or termination.

In most cases, all reporting obligations are suspended immediately upon the filing of Form 15F, pending the ninety days permitted for the Commission to approve deregistration. If the Commission does not object to the filing of the Form 15F within ninety days (or such shorter period as it may determine), the bidder or surviving entity's (1) termination of the registration of securities under Section 12(g) shall become effective and (ii) termination of its duty to file reports under Section 15(d) shall be effective.[362]

Rule 12h-6(d) provides that following a merger, consolidation, exchange of securities, acquisition of assets or otherwise, a foreign private issuer that has succeeded to the registration of a class of equity securities under Exchange Act Section 12(g) pursuant to Rule 12g-3, or to the reporting obligations of another issuer under Exchange Act Section 15(d) pursuant to Rule 15d-5, may file a Form 15F to terminate those reporting obligations if the successor issuer meets the conditions

360. *See supra* note 60.
361. *See supra* note 47.
362. If the Form 15F is subsequently withdrawn or denied, the foreign private issuer must, within sixty days after the date of the withdrawal or denial, file with or submit to the Commission all reports that would have been required had the issuer not filed the Form 15F. *See* Exchange Act Rule 12h-6, 17 C.F.R. § 240.12h-6 (2015).

under Rule 12h-6(a). When determining whether it meets the prior reporting condition under Rule 12h-6, a successor issuer may take into account the reporting history of the issuer whose reporting obligations it has assumed pursuant to Rule 12g-3 or 15d-5. This enables a foreign private issuer that is not a reporting company and that acquires a foreign private issuer that is a reporting company in a transaction that does not involve the registration of securities under the Securities Act (for instance, in reliance on Rule 802 or Section 3(a)(10)) to terminate its successor Exchange Act reporting obligations under Rule 12h-6 immediately (as long as the successor issuer meets the rule's foreign listing, dormancy and quantitative conditions, and the acquired company's reporting history fulfills Rule 12h-6's prior reporting condition).

Exchange Act Rules 12g-4 and 12h-3. A foreign private issuer whose securities are not registered under Section 12(b) of the Exchange Act may also terminate its registration under Section 12(g) of the Exchange Act pursuant to Rule 12g-4 and suspend (but not terminate) its reporting obligations under Section 15(d) pursuant to Rule 12h-3 by filing a Form 15 with the Commission. Deregistration pursuant to Rule 12h-6, however, will generally offer advantages to an issuer that are not available under Rules 12g-4 and 12h-3, and consequently, in the authors' experience, most foreign private issuers now rely on Rule 12h-6 to effect deregistration. A detailed discussion about deregistration under Exchange Act Rules 12g-4 and 12h-3 is beyond the scope of this article.

Foreign private issuers that deregister a class of securities pursuant to Rule 12h-6 may immediately be eligible for the exemption from registration under Rule 12g3-2(b), subject to meeting the conditions of that rule.[363]

Deregistration may implicate the going-private rules set forth in Rule 13e-3, although as discussed above, there are certain accommodations (outside the scope of this article) provided in the case of Tier I transactions.

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 Commission.[364] "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.[365] More than one person may be deemed to be the beneficial owner of the same security.[366] Beneficial ownership also exists and must be reported where a person has the *right to acquire* securities

363. *See supra* section 5.1.1.
364. *See* Exchange Act Rule 13d-1(a), 17 C.F.R. § 240.13d-1(a) (2015).
365. *See* Exchange Act Rule 13d-3, 17 C.F.R. § 240.13d-3 (2015).
366. Pursuant to Rule 13d-3, 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.

if the right is exercisable within sixty calendar days or the right was acquired with the purpose or effect of changing or influencing control of the issuer.[367] 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 bidder (or both) are non-U.S. entities and/or whether the interest in the securities was acquired in the United States or abroad.

If a bidder acquires more than 5 percent of the target company's Registered Securities, it must file a beneficial ownership report on Schedule 13D.[368] Schedule 13D requires, among other things, a description of the identity of the bidder, including directors, officers, and controlling persons, the purpose of the transaction and plans that the bidder 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 sixty calendar days, and the nature of any arrangements to which the bidder is a party relating to the target's securities.[369] An initial filing on Schedule 13D must be made within ten calendar days of the acquisition; amendments must be made promptly—in the authors' experience, generally interpreted by the Staff to mean within one or two days after the date on which the transaction to which the filing relates has occurred.[370] Failure to comply with the Section 13(d) disclosure requirements may result in litigation or enforcement actions and could delay the consummation of a transaction.

5.5 Corporate Governance Issues

Under the Sarbanes-Oxley Act, a bidder that has filed a registration statement under the Securities Act with the Commission or has an obligation to file reports under Section 13(a) or 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. A foreign private issuer bidder that becomes subject to the Sarbanes-Oxley Act must comply with certain requirements, including the following[371]:

367. *See* Exchange Act Rule 13d-3(d)(1), 17 C.F.R. § 240.13d-3(d)(1) (2015).

368. Exchange Act Schedule 13D, 17 C.F.R. § 240.13d-101 (2015). *See* Schedule TO, Instruction H, *supra* note 201, which provides that the final amendment to a bidder's Schedule TO will satisfy the reporting requirements of Section 13(d) of the Exchange Act with respect to all securities acquired by the bidder in the tender offer.

369. Exchange Act Schedule 13D, 17 C.F.R. § 240.13d-101.

370. It should be noted that although Section 13(d) relates to an "equity security," under Rule 13d-1, the term does not include securities of a class of non-voting securities. Care must be taken, however, insofar as a security referred to as "non-voting" may still be considered a voting security if it has the right to vote in certain special circumstances under home country law. *See* Exchange Act Rule 13d-1(i), 17 C.F.R. § 240.13d-1(i) (2015).

371. A foreign private issuer listed on the NYSE or 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 (2015); NASDAQ Marketplace r. 4350(a)(1) (2015). A description of such requirements is beyond the scope of this article.

- a bidder whose securities are listed on a U.S. securities exchange will be subject to certain requirements applicable to its audit committee, including that (i) its audit committee members be independent, properly funded, and vested with authority to engage independent legal counsel;[372] (ii) 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);[373] (iii) its audit committee pre-approve services provided by the company's auditors, subject to certain *de minimis* exceptions;[374] (iv) its directors and officers not exert improper influence in relation to the audit process;[375] (v) its auditors are restricted from providing certain services;[376] (vi) its lead, reviewing, and concurring audit partners must rotate periodically;[377] and (vii) the audit committee must disclose whether it has an "audit committee financial expert";[378]

- 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;[379]

- 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;[380]

- 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;[381]

- a bidder will be required, with the participation of its principal executive and principal financial officers, to evaluate annually the effectiveness of

372. *See* Exchange Act § 10A(g), (h), 15 U.S.C. § 78j-1(g), (h) (2012); Sarbanes-Oxley Act § 303, 15 U.S.C. § 7242 (2012).

373. *See* Exchange Act § 10A(j), 15 U.S.C. § 78j-1(j) (2012); N.Y. Stock Exchange r. 303(A)(7)(c)(iii) (2015), http://rules.nyse.com/NYSE/. The whistleblower provisions have proven particularly controversial in Europe, where such provisions may run afoul of national or EU privacy and employment legislation.

374. *See* Exchange Act § 10A(i), 15 U.S.C. § 78j-1(i) (2012).

375. *See* Sarbanes-Oxley Act § 303, 15 U.S.C. § 7242.

376. *See* Exchange Act § 10A(g), (h), 15 U.S.C. § 78j-1(g), (h); Sarbanes-Oxley Act § 201(b), 15 U.S.C. § 7231 (2012).

377. *See* Exchange Act § 10A(j), 15 U.S.C. § 78j-1(j).

378. *See* Sarbanes-Oxley Act § 407, 15 U.S.C. § 7265 (2012).

379. *See id.* § 406, 15 U.S.C. § 7264 (2012).

380. *See id.* § 906(a), 18 U.S.C. § 1350 (2012).

381. *See id.* § 302, 15 U.S.C. § 7241 (2012).

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;[382]

- 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;[383]
- 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;[384]
- the bidder cannot extend loans or other credit to its directors or executive officers, subject to certain exceptions;[385] 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.[386]

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. 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 significantly impact the timing, structure and consequences of such transactions. By understanding the extent to which a proposed transaction

382. Exchange Act Rules 13a-15(c) & 15d-15(c), 17 U.S.C. §§ 240.13a-15(c), 240.15d-15(c) (2015); Regulation S-K Item 308, 17 C.F.R. § 229.308 (2015); Sarbanes-Oxley Act § 404, 15 U.S.C. § 7262 (2012).

383. *See* Sarbanes-Oxley Act § 404, 15 U.S.C. § 7262.

384. *See id.* § 306(a), 15 U.S.C. § 7244 (2012); Regulation BTR, 17 C.F.R. §§ 245.100–.104 (2015).

385. *See* Exchange Act § 13(k), 15 U.S.C. § 78m(k) (2012).

386. *See* Sarbanes-Oxley Act § 304, 15 U.S.C. § 7243 (2012).

may be subject to U.S. securities laws and regulations, the transaction may be structured in a manner that avoids unanticipated or undesirable effects and minimizes potential conflicts between U.S. and home jurisdiction regulation. Early consideration of potentially applicable U.S. federal securities laws also may help assess the need for formal exemptive or other relief from the Staff or regulators in other jurisdictions. 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.