



TENDER OFFERS

UK COMPANIES WITH US LISTINGS

Peter Castellon of Proskauer Rose (UK) LLP and Malini Mukhopadhyay discuss the US tender offer rules that apply in a tender offer for the shares of a UK company with shares listed on a US exchange.

US tender offer rules allow certain accommodations for companies that are not domestic US companies, even if those companies are listed in the US. These accommodations are significant for acquirers and targets because the US tender offer rules can sometimes conflict with the rules governing tender offers in the target company's home jurisdiction.

This article discusses the US tender offer rules that apply in a tender offer for the shares of a UK company with shares listed on a US exchange, whether that is the Nasdaq Stock Market or the New York Stock Exchange (NYSE). The available accommodations depend on the level of US ownership of the target shares. However, in certain situations, relief from the applicable rules may be granted by the US Securities and Exchange Commission (SEC) even when the exceptions to the tender offer rules do not apply.

TENDER OFFERS INTO THE US

A tender offer is a broad solicitation by a company or third-party bidder to buy a significant percentage of the company's securities over a limited period of time. Generally, the bidder offers a premium to the market price of those securities as an incentive to tender. Tender offers can be used in hostile transactions or in negotiated transactions where the offer is recommended to the target company's shareholders by the board.

If the third-party bidder offers securities as part of the consideration for the shares, the transaction is known as an exchange offer. The rules governing tender offers described in this article also apply to an exchange offer. In addition, if the securities offered in the exchange offer do not fall into an exemption under the US Securities Act of

1933, as amended (the Securities Act), the offered securities will need to be registered with the SEC, which is a time-consuming process and requires the SEC to review the prospectus. A company can also use a tender offer to buy back its own shares through an invitation to shareholders to sell their shares to the company or, more typically, a financial intermediary, at either a fixed price or within a range of prices. This is often known as a self-tender offer.

Tender offers for the shares of a UK company that is listed in a US exchange, such as Nasdaq or the NYSE, are subject to Sections 14(d) and 14(e) of the US Securities Exchange Act of 1934, as amended (the Exchange Act) (Section 14(d)) (Section 14(e)), and Regulations 14D and 14E thereunder (Regulation 14D) (Regulation 14E). Regulation 14E applies to tender offers for the shares of any UK company, while Regulation 14D is

only applicable to tender offers for shares of UK companies listed on Nasdaq or the NYSE (in each case, other than the Tier I and Tier II exemptions described below).

ELIGIBILITY FOR TIER I OR TIER II

A tender offer for the shares of a UK company may be exempt from certain requirements of Regulations 14D and 14E, under the following provisions of Regulation 14D:

- Tier I, which provides relief from almost all of the US rules, is available if fewer than 10% of the UK target company's shares are held by US shareholders (see "Tier I" below).
- Tier II, which provides limited exceptions from specific US procedural rules, is available if fewer than 40% of the UK target company's shares are held by US shareholders (see "Tier II" below).
- Rule 14e-5(b)(9), which provides an exemption from the restrictions under the US rules on purchases outside of the offer, is available for tender offers that are subject to the Takeover Code (the Code).

If more than 40% of the UK target company's shares are held by US shareholders, neither Tier I nor Tier II is available. In addition, Rule 14e-5(b)(9) is not available for tender offers that are not subject to the Code, which does not apply to all tender offers for shares of UK companies. In particular, even for UK companies whose shares are publicly traded, self-tender offers are not subject to the Code.

If the tender offer is not eligible for Tier I or Tier II and is not subject to the Takeover Code, the bidder will need to comply in full with the procedural requirements of Regulation 14E (see "Procedural requirements of Regulation 14E" below) and Regulation 14D (see "Structure of the tender offer" and "Publication of the tender offer" below). To the extent that the procedural requirements or customary practices in the UK conflict with these requirements, the bidder will need to obtain exemptive relief from the SEC.

To obtain exemptive relief, the bidder must write to the SEC and describe the facts and circumstances of the transaction. Usually, the bidder will also undertake to comply with the accommodations that would be available if the transaction were eligible for Tier II. The

SEC will grant such relief if it concludes that the relief is necessary or appropriate in the public interest and consistent with the protection of investors. In the case of a cross-border tender offer, if relief is not granted for provisions that conflict with English law, the alternative is usually to exclude US shareholders from the tender offer, which the SEC is likely to conclude is not in the public interest.

The bidder, or intermediaries acting on its behalf, may also intend to buy target shares outside of the tender offer, which would not comply with the requirements of Rule 14e-5. Since these purchases are voluntary and are not required, but rather are permitted, under UK rules, these activities are not eligible for an exemption from the SEC. Instead, the bidder would need to seek no-action relief, which means that the SEC undertakes not to bring an action against the bidder for making those purchases.

For a tender offer to be eligible for Tier I or Tier II, the UK target company must meet the following requirements:

- Be a foreign private issuer (see box "Foreign private issuer").
- Not be an investment company that is required to be registered under the US Investment Company Act of 1940, as amended.

In addition, to determine whether a tender offer qualifies for Tier I or Tier II, the bidder must calculate the percentage of the UK target company's shares held by US shareholders in accordance with instruction 2 to Rules 14d-1(c) and (d) (see box "Calculating the percentage of US shareholders").

PROCEDURAL REQUIREMENTS UNDER REGULATION 14E

Section 14(e) is a general anti-fraud provision that regulates tender offers under which the SEC has adopted Regulation 14E, which sets out certain procedural requirements as well as anti-fraud and anti-manipulation measures.

The procedural requirements for tender offers under Regulation 14E that are described below apply to all tender offers that are extended to shareholders in the US, other than those that are eligible for Tier I relief. If the tender offer is eligible for Tier II relief,

Foreign private issuer

A company that is incorporated outside of the US will qualify as a foreign private issuer if it meets either of the following requirements:

- 50% or fewer of its outstanding voting securities are held by US residents.
- More than 50% of its outstanding voting securities are held by US residents and none of the following circumstances apply:
 - the majority of its executive officers or directors are US citizens or residents;
 - more than 50% of its assets are located in the US; or
 - its business is administered principally in the US.

certain limited accommodations may be available to the bidder in situations where the applicable regulations, such as the Code, conflict with US requirements. Most tender offers in the UK are structured in such a way as to comply with these requirements to the extent possible.

Duration and extensions

Tender offers (other than those under Tier I) must remain open for at least 20 US business days from the start of the offer. A US business day is any day other than a Saturday, Sunday or a US federal holiday. There is no specified maximum period by which the offer period must be closed.

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

The deadline to publish an announcement of extension is by 9am (New York time) on the next US business day after the scheduled expiration date of the offer. For example, if the last day that holders are allowed to tender shares into an offer is a Friday, the bidder has the option to extend the offer by publishing a press release at any time before 9am the following Monday morning,

assuming it is not a US federal holiday. In any announcement of an extension, the bidder must disclose the approximate number of securities deposited in the offer as of the date of the announcement. In a Tier II tender offer, the bidder can follow the UK rules for extending the tender offer to the extent that they conflict with this procedure.

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

- Any increase or decrease in the consideration offered.
- A change in the percentage of the securities that the bidder intends to buy.
- A change in the dealer's soliciting fee.
- Any other equally significant change.

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

The bidder may structure the offer to include a subsequent offering period after the termination of the initial tender offer but is not required to do so (see "Structure of the tender offer" below).

Prompt payment

Once the initial tender offer period has expired (other than under Tier I), the bidder has a limited period of time within which it must pay the tendering shareholders. Likewise, if the bidder decides to withdraw the tender offer, it must return any securities that have been tendered in a timely manner. The US rules state simply that the payment must be paid or the securities returned promptly. SEC guidance suggests that "promptly" means payment within three US business days. In a cross-border context, if the transaction is eligible for Tier II relief, the bidder can follow local law or practice with regard to payment. If Tier II is not available, the bidder can request exemptive relief from the SEC from this requirement in circumstances where longer payment periods are permitted under local law and payment within three US business days is impractical.

Calculating the percentage of US shareholders

In order to qualify for Tier I or Tier II relief, the bidder must calculate the percentage of US ownership in the UK target company.

The percentage of US ownership can be calculated as at any date during the 90-day period starting no more than 60 days before, and no more than 30 days after, the initial public announcement of the tender offer. If this is not possible, the bidder can opt to make the calculation as of the most recent practicable date before the announcement, but this must still be no earlier than 120 days before the announcement and must be completed before the start of the tender offer.

The bidder must count all of the issued and outstanding shares of the UK target company, excluding any of the target's shares that it already holds at the start of the tender offer.

To calculate the level of US ownership, the bidder should use the "look-through" test set out in Rule 14d-1 under the US Securities Exchange Act of 1934, as amended. The bidder must look at the holders of record as at a specific date. The bidder generally starts by looking at public reports of beneficial ownership filed with respect to the UK target in the US or in the UK. In most cases, the bidder also engages financial advisers that can access other non-public sources of information about the target's shareholders.

If the company is conducting a self-tender offer, or if the tender offer is part of a negotiated transaction, the bidder will have access to the UK target company's shareholder register. For brokers, dealers or banks, or nominees for any of those, the bidder is required to look through the record ownership and determine the location of the underlying beneficial owners. In the UK, the company, or third-party intermediaries on the company's behalf, regularly send enquiries to nominee shareholders to request information about underlying beneficial shareholders and receive responses. Therefore, in the UK, bidders in a negotiated transaction or self-tender offer generally have a high level of certainty about the composition of the shareholder base of the target company. If this information is not readily available, the bidder (or the target company, in a negotiated transaction) should send enquiries to those parties enquiring as to the aggregate amount of their holdings that are owned by beneficial owners in the US. Depending on the jurisdiction, nominees may not be obliged to respond, however, the bidder is still required to undertake the look-through analysis in good faith.

For nominees that fail to respond or for which the bidder is unable to obtain the information, the bidder can assume that the underlying beneficial owners are residents of the jurisdiction where the nominee has its principal place of business.

If the bidder is unable to determine the level of US ownership using the look-through test, the bidder may use the alternate test that looks at average daily trading volume. However, the US Securities and Exchange Commission has clarified that the alternate test is only available in very limited circumstances and, in particular, is intended to be used for non-negotiated transactions.

Purchases outside of the offer

Sometimes bidders will make open-market or negotiated purchases and build up a position in the target securities before announcing a tender offer. In many jurisdictions, including the US and the UK, shareholders in a public company are required to disclose publicly their level of shareholding if it exceeds certain thresholds. In the UK, this disclosure is required for shareholders of companies

listed on the Main Market of the London Stock Exchange under the Disclosure and Transparency Rules. Where the target is a US-listed company, disclosure is also required under Schedules 13D or 13G under the Exchange Act. In some cases, shareholders are also required to disclose their intentions in making that investment. Commonly, potential bidders or their intermediaries will choose to remain below the relevant reporting

thresholds until they publicly announce their intention to make a tender offer.

The US tender offer rules do not formally regulate purchases of the UK target company's shares before the tender offer is publicly announced. However, in certain cases, US courts have held that a series of purchases in the form of either open-market purchases or negotiated purchases could be construed as being part of a creeping tender offer. Purchases that occur before the formal start of a tender offer may be subject to scrutiny if shareholders that are considering participating in the tender offer object to any preferential terms that were offered earlier to certain shareholders.

From the time that a tender offer is publicly announced until it expires, a bidder may only buy target shares that are tendered as part of the offer. It is prohibited from buying the shares otherwise, whether in open-market transactions or privately negotiated transactions, and whether they are made within or outside the US. This ensures that all target shareholders are treated equally and the bidder does not offer preferential terms to certain shareholders once the tender offer has started.

There are a number of exceptions to the prohibition on purchases outside of the offer (see feature article "*US implications of tender offers: beyond the Takeover Code*", www.practicallaw.com/w-026-4853). Most of the exceptions do not relate to purchases made to facilitate the tender offer.

However, for UK target companies where the offer is subject to the Code, and certain other conditions are met, intermediaries acting for the bidder may make purchases outside of the offer provided that they comply with the Code. Proposed changes to the Code may involve limiting the application of the Code to companies that are not UK listed (see *News brief "New Takeover Code jurisdictional framework: grey zoning out"*, www.practicallaw.com/w-043-4221). If these changes are adopted, a tender offer for the shares of a UK target company whose shares are only listed on NYSE or Nasdaq might not be covered by the Code, and so the exception for purchases outside of the offer might not be available to a bidder.

Purchases during any subsequent offering period are not regarded as purchases

outside of the tender offer. The US rules, therefore, require the bidder to pay the same consideration in amount and form during any subsequent offering period as the consideration that was offered during the initial tender offer.

STRUCTURE OF THE TENDER OFFER

In addition to the requirements under Regulation 14E, the bidder must comply with the following additional procedural requirements under Regulation 14D for the tender offer for the shares of a UK target company with shares listed in the US, unless the Tier I exemption applies.

Shareholders have the right to withdraw their shares at all times while the tender offer remains open, including during any extension of the offer. However, if there is a subsequent offering period, the bidder does not need to extend withdrawal rights during that period.

In order to withdraw its shares, a shareholder must provide timely written notice to the bidder's depository, specifying the name of the shareholder, the number or amount of shares to be withdrawn, and the name on the certificates on which they are registered, if different. The bidder may impose additional reasonable conditions, such as including certificate numbers or a signed request for withdrawal.

If the tender offer is for less than all of the shares of a particular class, and if a greater number of shares are deposited than the bidder is committed or willing to accept, the bidder must accept and pay for shares on a pro rata basis or as close to a pro rata basis as possible, disregarding fractions, according to the number of shares deposited by each shareholder while the tender offer is open.

The bidder is also bound by equal treatment requirements under Rule 14d-10. Specifically, the bidder must open the tender offer to all shareholders of the relevant class of shares, and each shareholder must receive consideration equal to the highest that was paid to any other shareholder tendering their shares in the tender offer. The bidder is permitted to offer more than one type of consideration, provided that:

- Shareholders have an equal right to select the type of consideration.

- The bidder pays the same amount of consideration to all shareholders who choose the same type of consideration.

The bidder is, however, permitted to exclude shareholders in any US state where the bidder is prohibited under local law from making the tender offer, provided that the bidder made a good faith effort to comply with the local law. In an exchange offer in which the bidder is offering securities as all or part of the consideration and is unable, after a good faith effort, to register or qualify the securities in the relevant US state, the bidder can offer an alternative form of consideration to shareholders in that state without being obliged to offer the alternative to shareholders in other locations.

There may be circumstances in which the bidder is not able to comply with the requirement to treat all shareholders equally and is not required to do so under UK requirements. In such cases, if the bidder seeks exemptive or no action relief, the SEC reserves the right to decide whether compliance with the equal treatment requirements is required in any tender offer, either conditionally or unconditionally, if it determines that compliance is not necessary or appropriate in the public interest or for the protection of shareholders.

The bidder may elect to structure the tender offer to include a subsequent offering period of at least three business days during which shares will be accepted if the following conditions are met:

- The initial offering period of at least 20 business days has expired.
- The offer is for all outstanding shares of a particular class and, if shareholders have a choice of consideration, there is no ceiling on any particular form of consideration.
- The bidder promptly accepts and pays for shares tendered during the initial offering period.
- The bidder announces the results of the tender offer, including the approximate number and percentage of shares accepted, by 9am on the next business day after the expiration of the initial period of the tender offer, and immediately starts the subsequent offering period.

Information required on Schedule TO

The bidder must include the following information in the tender offer materials filed with the US Securities and Exchange Commission (SEC) on Schedule TO:

- A summary term sheet describing in bullet point format the most material terms of the proposed transaction.
- The UK target company's name and address, the exact title of the shares subject to the offer, the number of shares subject to the offer as of the most recent practicable date, the principal trading market of the shares, and the high and low sales prices of the shares for each quarter in the past two years in that market.
- The name and business address of each bidder and the nature of any affiliation with the UK target company. If the bidder is a company, the principal business of the bidder and the place of incorporation. If the bidder is a natural person, their current principal occupation or employment, name and address of the employer, and material occupations over the last five years, with dates and addresses. In either case, a statement as to whether the bidder has been convicted in any criminal proceeding in the previous five years, or has been found to be in violation of US federal or state securities laws, or been enjoined from future such violations or activities subject to US federal or state securities laws.
- The material terms of the offer, as specified in the summary advertisement.
- Past contacts between the bidder and the UK target company, including the following:
 - the nature and dollar amount of any transaction between the bidder and the UK target company or any of its affiliates within the past two years if the transaction is more than 1% of the target company's revenues for the relevant year;
 - the nature and dollar amount of any transaction between the bidder and any executive officer, director or affiliate of the UK target company if the aggregate value of the transaction or series of similar transactions exceeds \$60,000; and
 - any negotiations, transactions or material contacts between the bidder or any of its subsidiaries and the UK target company and its affiliates concerning any merger, consolidation, acquisition, tender offer, election of the UK target company's

directors or sale or other transfer of a material amount of the UK target company's assets.

- Information about the purposes of the transaction and plans or proposals, including the use of the acquired shares of the UK target company, or any plans or proposals for an extraordinary transaction such as a merger, reorganisation or liquidation, any purchase, sale or transfer of a material amount of the UK target company's assets, any material change in the dividend policy, indebtedness or capitalisation of the target company or any of its subsidiaries, any change in the UK target company's board of directors or management, any material change in its corporate structure, or any plans for its shares to be delisted from the New York Stock Exchange, Nasdaq or any other exchange, or any plans for such shares to become eligible for deregistering from the SEC.
- Information about the bidder's sources of funds to buy the maximum amount of shares sought in the tender offer, including any material financing conditions, information about the terms on which any funds have been borrowed, and disclosure of any plans to repay such borrowings, or the lack thereof.
- The aggregate number and percentage of the UK target company's shares owned by the bidder and any transactions in the shares in the last 60 days, disclosing the date of the transaction, the amount of shares, the price per share, and where and how the transaction was effected.
- The identity of all persons directly or indirectly engaged to make solicitations or recommendations in connection with the tender offer, and their terms of employment or compensation.
- If material, the financial statements of the bidder. The financial statements are not considered material if the tender offer consideration is cash only, there is no financing condition, and either the bidder is a reporting company under the US Securities Exchange Act of 1934, as amended, or the offer is for all shares of a particular class of the UK target company. The financial statements of the bidder may be incorporated by reference. Under certain circumstances, pro forma financial information may be required.

In addition, Schedule TO requires a number of exhibits to be filed with the SEC, including any pre-commencement and post-commencement announcements by the bidder, and any amendments to the terms of the tender offer.

- The bidder immediately accepts and pays for shares tendered during the subsequent offering period.
- The bidder offers the same amount and type of consideration to shareholders in both the initial and the subsequent offering period.

PUBLICATION OF THE TENDER OFFER

A tender offer subject to Regulation 14D (including a tender offer for the shares of a UK company with shares listed on NYSE or Nasdaq) is deemed to have started on the date when the bidder has first published, or sent to shareholders, the means to tender

their shares. Any previous communications, such as announcements about the intention to launch a tender offer for the shares of the UK target company, are not regarded as the start of the tender offer provided that they do not include instructions for how shareholders can tender their shares. However, the bidder is required to file these pre-commencement

announcements with the SEC on a form known as Schedule TO, on which all tender offer-related communications are required to be filed, no later than the date of the announcement, and the first communication must be delivered to the UK target company and any competing bidders for the same target (see box "Information required on Schedule TO").

Under Rule 14d-3, if the UK target company is registered with the SEC, the bidder must file a tender offer statement on Schedule TO, along with the associated exhibits, as soon as practicable on the date when the tender offer starts. The bidder must also send a copy of the Schedule TO to the UK target company at its principal executive office, and to any other bidder for the same target. The bidder must also notify any exchange on which the UK target company's securities are listed.

Following the announcement of the transaction, the bidder must continue to file amendments to the Schedule TO with the SEC, setting out any material changes to the information previously filed, and must include any additional tender offer materials as exhibits to the Schedule TO. In addition, at the end of the tender offer, the bidder must promptly file a final amendment to Schedule TO reporting the results.

If the bidder is offering cash, under Rule 14d-4(a) the bidder is permitted to disseminate information about the tender offer by publishing a long-form version of the tender offer document in a newspaper. A long-form publication must include all of the information required in Schedule TO, or a fair and adequate summary of that information, other than the required exhibits.

Except in certain limited circumstances, the bidder can also publish a summary advertisement of the tender offer and share the tender offer documents by first class post or otherwise with reasonable promptness to any shareholder that requests them.

The bidder must include the following information in any summary advertisement:

- The identity of the bidder and the UK target company.
- The total number and class of shares sought in the offer.
- The scheduled expiration date.

- Whether a subsequent offering period will be available.

- Whether the offer could be extended and, if so, how.

- The dates before and after which the shareholders may withdraw shares tendered in the offer.

- Procedures for tendering and withdrawing shares.

- The manner in which shares will be accepted for payment.

- If the offer is for less than all of the shares in a class, the periods for accepting shares on a pro rata basis and the bidder's current intention if the offer is oversubscribed.

- An explanation of any material differences in the rights of the shareholders after the offer, as a result of the transaction.

- A brief statement of the accounting treatment of the transaction, if material.

- The federal income tax consequences of the transaction, if material.

- If the tender offer is for less than all of the outstanding shares of a particular class, a statement as to whether the purpose of the offer is to acquire influence or control over the business of the target company.

- A statement that the summary advertisement contains the required information.

- Appropriate instructions on how shareholders may obtain the tender offer materials promptly at the bidder's expense.

A tender offer that is published, sent or given to shareholders by the use of shareholder lists and security position listings must include a statement that a request is being made for those lists and listings. The summary publication also must state that tender offer materials will be posted to shareholders of record and will be furnished to brokers, banks and similar persons whose name appears or whose nominee appears on the list of shareholders or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal

to beneficial owners of those shares. If the list furnished to the bidder also included beneficial owners and tender offer materials will be posted directly to beneficial owners, the summary publication must include a statement to that effect.

The summary advertisement should not include a transmittal letter; that is, a letter for the purposes of transmitting the shares sought in the tender offer. This is only available as part of the complete tender offer materials, so that the target company's shareholders have access to the full information about the tender offer before making the decision to tender their shares.

If the transaction is an exchange offer for securities required to be registered under the Securities Act, in addition to the Schedule TO, the bidder must file a registration statement with the SEC that includes all of the required information, including pricing information, and must send a prospectus, including a letter of transmittal (that contains detailed information on how to tender the shares) to the UK target company's shareholders. Preparing the registration statement and prospectus is a significant task for the bidder, and the transaction timetable must take into account the fact that the SEC will review and comment on these documents.

Under Rule 14d-5, the UK target company is required to co-operate with the bidder with respect to the dissemination of tender offer materials, even if the bidder is conducting a hostile tender offer. In requesting this information, the bidder must disclose the following information to the UK target company:

- The identity of the bidder.
- The title of the class of securities that is the subject of the tender offer.
- A statement that the bidder is making a request under Section 14d-5(a) for the purpose of disseminating tender offer materials to shareholders.
- A statement that the bidder is aware of, and will comply with, its own obligations (see below).
- A statement as to whether or not it has elected to disseminate amendments disclosing material changes to the tender offer materials.

- The name and address of the person whom the UK target company should contact about the mailings.

The UK target company must prepare a shareholder list, with names, addresses and security positions of beneficial owners as of the most recent practicable date, which must not be more than ten days before the date of the bidder's request. It must also promptly contact each participant on the most recent security position listing of any clearing agency that it can access and enquire about the approximate number of beneficial owners of the shares held by that participant.

The UK target company can disclose the shareholder list, as well as the names and addresses of participants identified on the most recent security position listing of any clearing agency that the target company is able to access with the bidder within three days of its request, in the format requested by the bidder, to the extent that the format is available to the target without undue burden or expense. Alternatively, the UK target company has the option to disseminate the tender offer materials to its shareholders itself, at the expense of the bidder, in which case it must disclose the number of shareholders to whom the materials must be sent. Either party has the option of using other reasonably prompt methods of distribution of the tender offer materials, instead of using first class post.

If the UK target company elects to post the tender offer materials itself, the bidder must provide the appropriate number of copies of the tender offer materials and envelopes. The UK target company must send by first class post a copy of the bidder's tender offer materials to each record holder of the shares on the most recent shareholder list and transmit the materials to the participants named in the security position listings, starting by the third day after it received delivery of the materials. It must use its best efforts to complete the process in a timely manner.

The UK target company may not include in the envelopes any materials other than those provided by the bidder. In no event should the process take substantially longer than the target takes to post shareholders its own materials relating to the tender offer. The UK target company must also provide oral notification to the bidder, confirmed in

writing, that it has started the process. The UK target company also has an obligation to update the shareholder list and post the materials to any newly identified shareholders of record.

If the UK target company elects to post the tender offer materials itself, the bidder is required to deliver promptly the tender offer materials to the target on receipt of notification, and must promptly notify it of, and deliver, any amendments. The bidder is also required to pay the UK target company in advance the approximate cost of conducting the mailings (and the mailings of any amendments), which includes all direct costs, but not indirect costs such as employee time.

If the actual costs exceed the approximate cost advanced, the bidder must promptly transfer the difference to the UK target company. Conversely, after the tender offer, the target must reimburse any excess amount provided by the bidder.

The UK target company and its agents will not be deemed to have made a solicitation through a tender offer or a recommendation, or be deemed to be an underwriter for the purposes of the Securities Act, as a result of having sent out the tender offer materials, or any non-compliance with the above requirements. The UK target company has no liability with respect to the contents of the bidder's tender offer materials. It will also not have liability under federal securities laws as a result of any inaccuracy in the shareholder list, unless this resulted from a lack of reasonable care by the target.

If the UK target company elects to disclose the shareholder list and the security position listings with the bidder instead of posting the materials itself, the bidder must use those lists exclusively for the dissemination of the tender offer materials. The bidder must maintain confidentiality in accepting, handling and returning the lists and must not retain them, or any information derived from them, after the end of the tender offer.

If the UK target company chooses not to post the materials itself, the bidder is responsible for posting by first class post a copy of the bidder's tender offer materials to each record holder of the shares on the most recent shareholder list, and transmit the materials to the participants named in the security position listings.

The bidder is required to elect whether it will require the UK target company to disseminate any amendments disclosing material changes to the tender offer materials and its choice will not be revocable.

In a cash tender offer, the bidder must comply with the requirement under Rule 14d-4(a)(3) regarding publication of the tender offer on or before the date on which it contacts the UK target company with regard to the dissemination of materials.

UK TARGET COMPANY'S RESPONSE

After the bidder announces the tender offer, the UK target company usually makes a recommendation to shareholders as to whether they should accept or reject it. Significant shareholders or affiliates of the target or the bidder may also make similar statements. When the UK target company's shares are listed on a US stock exchange and therefore registered with the SEC, that communication is required to be filed with the SEC on Schedule 14D-9.

If the UK target company or an affiliate makes a recommendation, it must also hand deliver a copy of the Schedule 14D-9 to the bidder at its principal registered office or the address of the person who is authorised to receive notices and communications, and give telephonic notice to Nasdaq or NYSE, where the UK target company's shares are listed. If any other person makes a recommendation, it must post a copy to the bidder and the subject company.

If the tender offer has not started, a communication will not be regarded as a recommendation or solicitation, but will still need to be filed with the SEC on Schedule 14D-9 no later than the date it is made. That communication must include a legend directing shareholders to read the company's recommendation or solicitation because it contains important information, and that the information will be available for free on the SEC website.

Once the tender offer has started, the UK target company is permitted to make a holding announcement to its shareholders, which does not need to be filed with the SEC. The holding communication can only include the following information:

- A statement that the tender offer by the bidder is under consideration by the UK

target company's board of directors or its management.

- A statement that on or before a specified date (within ten days of the start of the tender offer), the UK target company will advise its shareholders whether it recommends that they accept or reject the offer, whether it remains neutral or whether it is unable to take a position on the tender offer. The statement will also include the target's reasons for its recommendation or inability to make a recommendation.
- A statement requesting shareholders to defer making a determination with respect to the tender offer until they have been advised of the UK target company's position.

Once the UK target company, or any affiliate or significant shareholder, determines its position on the tender offer, it must file the following with the SEC on Schedule 14D-9:

- The UK target company's name and address, and the exact title of the shares subject to the offer, as well as the number of shares subject to the offer as of the most recent practicable date. This may be based on the most recent publicly available information, unless the filing person has more current information.
- The identity and background of the filer.
- Past contacts, negotiations and agreements between the relevant parties.
- The solicitation or recommendation.
- Information regarding persons employed, retained, compensated or used in making the recommendation.
- The filer's interest in the shares of the UK target company.
- The purposes of the transaction and plans or proposals.
- Certain additional information, including information about any agreements, legal proceedings or regulatory requirements that might be relevant to a shareholder's decision on the transaction.

To the extent that there is any change in the recommendation or solicitation or any of the

required information, the UK target company or other filer must also update the Schedule 14D-9.

TIER I

If the UK target company has fewer than 10% of its shares held by US shareholders, it can rely on Tier I and the tender offer or exchange offer will be exempt from substantially all of the procedural requirements of Regulation 14E and Regulation 14D set out above. There are, however, certain requirements that it must meet which are intended to ensure that US shareholders are treated at least as favourably as shareholders in other jurisdictions.

If the bidder is conducting a tender offer, US shareholders must receive the same cash consideration as all of the other shareholders of the UK target company.

If the bidder is conducting an exchange offer, the securities offered in the exchange will either need to be registered under the Securities Act or offered under an exemption from the registration requirements. If the securities are registered, the bidder will need to prepare a registration statement, including a prospectus that will need to be reviewed by the SEC. However, Rule 802 under the Securities Act (Rule 802) is an exemption that tracks Tier I and allows the bidder to offer securities to the UK target company's shareholders, including US shareholders, in exchange for the UK target company's shares, provided that certain conditions are met.

Rule 802 only provides an exemption under the federal securities laws, however, and the bidder may still need to register or qualify the securities under the local laws of the US states where the UK target company's shareholders are located, unless exemptions are available.

If the bidder chooses not to register the offered securities or rely on Rule 802 to offer shares in the US, it also has the option of offering only cash consideration to the UK target company's US shareholders, provided that the amount is substantially equivalent to the consideration being offered to shareholders in other jurisdictions, even if it offers shares as consideration outside of the US.

If the offered security is a publicly traded security, the bidder must undertake to provide to the SEC or any US shareholder the closing price and daily trading volume on

the principal trading market for the security as of the last trading day of each of the six months preceding the announcement of the offer and each of the trading days thereafter. If the offered security is not publicly traded, the bidder must undertake to provide the opinion of an independent expert stating that the cash consideration offered to US shareholders is substantially equivalent to the value of the consideration offered to shareholders outside the US.

There are certain exceptions to the equal treatment requirement under Tier I. One exception is that if the UK target company has shareholders in a US state where the bidder would be required to register or qualify the offer shares under state law, the bidder is not required to extend the offer of securities to shareholders in that state. However, bidders sometimes offer cash to shareholders in certain non-US jurisdictions rather than securities, usually because of local law restrictions. If the bidder is offering a cash alternative in any US or non-US jurisdiction, the bidder would be required to offer the same cash alternative to shareholders in the US state where the bidder is not offering shares, rather than excluding those shareholders from the exchange offer altogether.

Similarly, if the bidder offers loan notes, which offer tax advantages in certain jurisdictions including the UK, to the UK target company's shareholders, it is not obliged to also offer them to US shareholders, provided that the loan notes are not listed on any organised securities market or registered under the Securities Act.

Under Tier I, the bidder is also required to send the information documents, including amendments, about the tender offer or exchange offer to US shareholders in English and on a comparable basis to that provided to shareholders in the UK. If the bidder disseminates the information through publication in the UK, such as through a newspaper advertisement, the bidder must similarly publish it in the US in a manner that is reasonably calculated to make US shareholders aware of the offer. This could mean placing an advertisement in a US newspaper of national circulation, although the SEC has recognised that a newspaper advertisement is not always required and what is reasonable in a particular situation may vary depending on the number of US shareholders, their level of sophistication or where they are located. The SEC has also

recognised that the US advertisement may be less detailed than the one mandated in the UK, provided that it includes details about how shareholders can access the complete offering materials.

If the bidder relies on Rule 802, the bidder is exempt from the procedural requirements under Regulation 14D requiring the preparation and filing of Schedule TO, but it must furnish the information to the SEC in English on Form CB. This means that the document will be publicly accessible on the SEC website. The bidder will also need to appoint an agent for service of process in the US and publish the information about this appointment on Form F-X on the SEC website.

Information provided on Form CB is “furnished to” rather than “filed with” the SEC. This means that the bidder is not liable for this information under Section 18 of the Exchange Act. However, the bidder will continue to be liable for the information document under other provisions of the Exchange Act that do not depend on filing documents with the SEC and, in particular, anti-fraud liability under Section 14(e) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder will apply.

TIER II

If the UK target company has fewer than 40% of its shares held by US shareholders, then the tender offer qualifies for Tier II. While Tier I provides blanket relief from the US tender offer rules as long as certain conditions are met, under Tier II, the bidder is generally required to comply with the procedural requirements under Regulations 14D and 14E. Only targeted relief is available in specific situations in which these requirements conflict with applicable UK rules.

For example, if the bidder structures the tender offer to have a subsequent offering period, the bidder may have a gap for counting securities between the end of the initial offering period and the subsequent offering period, during which it need not extend withdrawal rights. This is allowed provided that the initial offering period was at least 20 US business days and all offer conditions have been satisfied or waived, other than a minimum acceptance condition, which may be confirmed after counting is completed.

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The bidder must announce the result of the tender offer, including the approximate number of securities tendered to date, and pay for the tendered shares in accordance with UK requirements, and the subsequent offering period must start immediately following this announcement. If the UK requires the payment of interest on securities tendered during the subsequent offering period, this will not violate the equal treatment requirement.

In addition, if the bidder offers a choice between different forms of consideration, under Tier II, the bidder may impose a ceiling on a particular type of consideration. The bidder may offset elections of tendering shareholders against each other and use proration to ensure that it is able to satisfy the choice made by shareholders to the greatest extent possible. The bidder may also separately offset and prorate tendered shares between the initial offering period and the subsequent offering period.

In the UK, under the Code, the bidder may terminate the initial offering period early once

the offer conditions are satisfied. This practice is permitted under Tier II, provided that the following conditions are met:

- The initial offering period has been open for at least 20 business days.
- The bidder discusses the possibility and impact of early termination in the original tender offer materials.
- The bidder offers a subsequent offering period after the initial offering period has ended.
- All offer conditions are satisfied before the initial offering period ends.
- The bidder does not terminate the initial offering period during any mandatory extension required by the US tender offer rules (for example, due to a material change in the terms of the offer).

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