

## Public Targets

U.S. regulation of cross-border  
business combinations



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# Tender or exchange offer avoiding U.S. jurisdictional means

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

- The bidder is a foreign private issuer.<sup>1</sup>
- The bidder is conducting a tender offer or exchange offer for the shares of a target company that is also a foreign private issuer.
- The target company's shares are **not** listed in the United States, but it has U.S. shareholders.
- The bidder cannot or chooses not to extend the offer to the shareholders of the target company in the United States.

The bidder may choose not to include U.S. shareholders for a number of reasons, including to avoid potential conflicts between local law and the U.S. requirements or because the U.S. rules would require the preparation of documentation that might not be required under local law. If U.S. shareholders are limited in number or the tender offer is for a relatively small percentage of the target company's shares, the success of the tender offer might not be contingent on the participation of U.S. shareholders.

However, the procedural requirements of the U.S. federal securities laws apply to any tender offer using U.S. jurisdictional means, regardless of whether the target company has U.S. shareholders or the bidder extends the offer to U.S. shareholders.<sup>2</sup> Jurisdictional means could include, for example, using the U.S. postal service or telephone, fax or internet connections to, in or from the United States. In order to mitigate the likelihood of having jurisdictional means, since documents posted on the internet are generally freely accessible from the United States, the bidder should take appropriate precautions to ensure that the tender offer documents are not accessible to U.S. shareholders. In addition, the bidder should put appropriate safeguards in place to ensure that U.S. shareholders that become aware of the tender offer despite the bidder's precautions are not able to tender their shares.

## Basis for avoiding U.S. jurisdictional means

The U.S. tender offer rules do not include an exemption or safe harbor for tender offers based on avoiding U.S. jurisdictional means, and there is no clear guidance from courts about the reach of U.S. authority.

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<sup>1</sup> A non-U.S. company will qualify as a foreign private issuer if it meets the following requirements:

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

<sup>2</sup> Sections 14(d) and 14(e) of the Securities Exchange Act of 1934, as amended.

The SEC has expressed concerns about the practice of excluding U.S. shareholders from cross-border tender offers and exchange offers, noting that in these situations, U.S. shareholders are denied the opportunity to tender their shares, often at a premium to the market price, and that movements in the share price as a result of the offer affect U.S. shareholders regardless of whether they are able to participate in the offer.<sup>3</sup> In particular, the SEC flagged the risk that avoiding U.S. jurisdictional means puts U.S. shareholders at a disadvantage compared to other shareholders, because they would not be aware of the announcement of the offer, and would not be able to use this information to trade their shares on the secondary market. The SEC adopted the Tier I and Tier II cross-border exemptions in 1999 and revised them in 2008 with the express purpose of encouraging bidders to permit U.S. shareholders to participate in tender offers and exchange offers on the same terms as other target company shareholders.<sup>4</sup>

### Common procedures for offers that exclude U.S. shareholders

In order to exclude U.S. shareholders and avoid using U.S. jurisdictional means, bidders must make that intent clear in the offer-related documents and communications about the tender offer or exchange offer and also put appropriate safeguards in place. Bidders commonly implement the following procedures in offers that exclude the target company's U.S. shareholders:

- Ensure that publicity concerning the offer does **not** go into the United States
- Ensure that the target's U.S. shareholders are **not** able to access offer-related materials
- Ensure that incoming inquiries from the United States are **not** accepted
- Ensure that incoming tenders from the United States are **not** accepted.

### Publicity restrictions

The bidder should **not** send any announcements regarding the offer into the United States. Press releases should include appropriate legends restricting release or publication in the United States, and the bidder and its intermediaries should put procedures in place to ensure that they are not in fact sent to publications in the United States. The bidder should not allow journalists or shareholders in the United States or from U.S. publications access to press conferences, analyst presentations, meetings or teleconferences.

### Restrictions on access to offer documents

The offer-related documents, including forms of acceptance and other ministerial documents, should include appropriate legends stating that the offer is **not** being made to shareholders in the United States. Any materials relating to the offer (including announcements) that are posted on the bidder's website should be placed behind appropriate gateposts that are designed to exclude U.S. shareholders and shareholders in the United States from accessing the materials. The bidder and its advisors and any intermediaries acting on their behalf in connection with the offer should put in place procedures to ensure that they do not send any offer-related materials to the target company's U.S. shareholders, or their brokers, nominees or other intermediaries, in either electronic or physical form.

### Restrictions on incoming inquiries

The bidder and its advisors and any intermediaries acting on their behalf in connection with the offer should put in place procedures to identify whether shareholders or journalists who contact them in connection with the offer (by email, telephone or otherwise) are physically present in the United States. The bidder and its advisors and intermediaries would generally put in place checklists or scripts for employees who field incoming inquiries so that they systematically

<sup>3</sup> Cross-Border Tender Offerings, Business Combinations, and Rights Offerings, SEC Release No. 33-7611 (November 18, 1998).

<sup>4</sup> Cross-Border amending release, (December 8, 2008).

<sup>5</sup> However, incoming tenders from U.S. persons outside the United States or from intermediaries with discretionary authority acting on behalf of U.S. shareholders would not trigger the use of U.S. jurisdictional means.

screen out questions from the United States. They would also screen incoming post so that they can exclude materials bearing U.S. postmarks or other signs of having originated in the United States.

### *Restrictions on incoming tenders*

The bidder and its advisors and any intermediaries acting on their behalf in connection with the offer should put in place procedures to track and identify where incoming tenders originate. In case shareholders of the target company in the United States manage to tender their shares, the bidder should not issue any cash (or shares, in the case of an exchange offer) to such shareholders.

### Potential complications

Under certain circumstances, it may be difficult for bidders to exclude U.S. shareholders from tender offers or exchange offers. The SEC views with skepticism any offer attempting to exclude U.S. shareholders if the offer relates to shares listed on a U.S. stock exchange or otherwise of a class of securities registered with the SEC or the bidder needs to acquire shares from the target's U.S. shareholders to meet the minimum acceptance condition.<sup>6</sup> The SEC or U.S. courts could take the view that a bidder's tender offer or exchange offer inappropriately attempted to exclude U.S. shareholders or did not effectively avoid U.S. jurisdictional means. The bidder should therefore consider the following factors in determining whether it should structure its offer to exclude U.S. shareholders:

- whether it is possible to exclude U.S. shareholders under local law
- the level of U.S. interest in the shares
- the extent to which the target company's U.S. shareholders are prejudiced by their inability to participate in the tender or exchange offer.

### *Local law considerations*

If applicable local law requires the tender offer to be extended to all shareholders, it would be difficult for the bidder to argue that it can successfully exclude the target company's U.S. shareholders. Similarly, if applicable local law requires the offer-related materials and announcements to be sent to all shareholders or posted on an unrestricted website that would be accessible to shareholders in the United States, as a practical matter, it would be difficult to enforce restrictions on access and the use of U.S. jurisdictional means.<sup>7</sup>

### *Level of U.S. interest in the target company's shares*

The bidder should consider the level of U.S. interest in the shares. For instance, the bidder should consider whether the target company has an ADR facility, and whether it is sponsored or unsponsored, and the proportion of trading in the target company's shares that occurs in the United States. It would be difficult to exclude U.S. shareholders from the tender offer if the bidder acquired any shares of the target company in the United States in advance of the tender offer to build a stake in the target company, since this would mean that some U.S. shareholders receive more favorable treatment. While the SEC has acknowledged that large institutional investors may at times receive differential treatment under the Securities Act of 1933, as amended, and may be able to participate in offshore securities offerings from which other investors in the United States are excluded, they believe that such differentiation is not appropriate under the U.S. tender offer rules, under which all target shareholders have a right to participate in tender offers on equal terms.<sup>8</sup>

### *Prejudicing U.S. shareholders*

The bidder should take into account the extent to which the target company's U.S. shareholders are prejudiced by their inability to participate in the tender or exchange offer. This could be affected by the size of the premium paid by the bidder and the level of liquidity in the target company's shares, before, during and after the tender offer.

<sup>6</sup> Cross-Border amending release, (December 8, 2008).

<sup>7</sup> Cross-Border amending release, (December 8, 2008).

<sup>8</sup> Cross-Border amending release, (December 8, 2008).



# Annexes

## Annex A

## Meaning of Tender Offer

A tender offer generally refers to a broad solicitation by a company or a third-party bidder to purchase a significant percentage of a company's securities over a limited period of time, generally at a premium to the market price for those securities as an incentive to tender. However, the term *tender offer* is not defined in the U.S. federal securities laws, in order to ensure that unconventional offer structures are covered under the regulations.<sup>1</sup> The following eight factors should be considered in determining whether a transaction or a series of transactions constitutes a tender offer:

- whether there is an active and widespread solicitation of public securityholders
- whether the solicitation is made for a substantial percentage of the issuer's securities
- whether the offer is made at a premium over the prevailing market price
- whether the terms of the offer are firm rather than negotiable
- whether the offer is contingent upon the tender of a fixed minimum and perhaps subject to the ceiling of a fixed maximum number of securities to be purchased
- whether the offer is open for a limited period of time
- whether the offerees are subjected to pressure to sell
- whether the public announcements of a purchasing program precede or accompany a rapid accumulation of large amounts of the target company's securities.<sup>2</sup>

The factors are guidelines; not all of them need be present for a transaction to be considered a tender offer.

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<sup>1</sup> Brad S. Grayson, *Problems in Defining "Tender Offer": The Decision in Hanson Trust PLC v. SCM Corp.*, 17 Loy. U. Chi. L. J. 693 (1986).

<sup>2</sup> *Wellman v. Dickinson* (475 F. Supp. 783 (S.D.N.Y. 1979)).



## Annex B

**Timetable of an equity tender offer**

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

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

*Public announcement of the tender offer*

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

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

*Commencement of the tender offer*

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

*Extension of the tender offer period*

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

*Completion of the tender offer (or initial offering period)*

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

*Payment for shares tendered*

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

*Subsequent offering period*

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

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

## Annex C

## Exceptions for purchases outside of an offer

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

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

There are a number of exceptions to this prohibition:

- transactions with respect to previously owned options or convertible or exchangeable securities
- certain transactions by employee benefit plans of covered persons
- odd-lot buybacks
- transactions by the dealer-managers on an agency basis for customers that are not covered persons, or riskless principal transactions (transactions to offset a sale after having received an unsolicited order to buy from a customer that is not a covered person), so long as the dealer-manager is not a market-maker
- purchases in connection with “basket” transactions in which the subject securities or related securities are a relatively small proportion of the overall basket
- transactions to cover a short sale or the exercise of an option
- transactions pursuant to unconditional pre-existing contractual obligations
- transactions by an affiliate of the dealer-manager, as long as the following conditions are satisfied:
  - appropriate fire-walls are in place to prevent the sharing of non-public information
  - the dealer-manager is a registered broker or dealer under Section 15(a) of the Exchange Act
  - the affiliate has no officers or employees in common with the dealer-managers that direct, effect or recommend transactions in securities
  - the transactions are not made to facilitate the tender offer
- certain transactions by U.K. market-makers
- purchases in cross-border tender offers qualifying as Tier I tender offers
- purchases in the non-U.S. portion of cross-border tender offers qualifying as Tier II tender offers that are structured as two separate tender offers, one in the United States and one in non-U.S. jurisdictions
- purchases outside the United States in accordance with the target’s home jurisdiction laws, in cross-border tender offers qualifying as Tier II tender offers.<sup>2</sup>

Transactions by U.K. market-makers are further described in Annex D.

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<sup>1</sup> Rule 14e-5(c)(3).

<sup>2</sup> Rule 14e-5(b).

## Annex D

## City Code

The City Code on Takeovers and Mergers regulates tender offers for public companies with registered offices in the United Kingdom, the Channel Islands or the Isle of Man, including companies that are not listed on any stock exchange but can have an unlimited number of shareholders.<sup>1</sup> The provisions of the City Code differ in many respects from the requirements under the U.S. tender offer rules, and in particular, permit dealer-managers in a tender offer to make purchases of the subject security in connection with market-making activities that are customary in the United Kingdom. For tender offers subject to the City Code, Rule 14e-5 provides a specific exemption for transactions by “connected exempt market makers” and “connected exempt principal traders”, if the following conditions are met:

- The target company is a foreign private issuer.<sup>2</sup>
- The connected exempt market maker or connected exempt principal trader complies with the applicable provisions of the City Code.
- The tender offer documents disclose the identity of the connected exempt market maker or connected exempt principal trader and disclose or describe how U.S. shareholders can obtain information regarding purchases by such market maker or principal trader, whether for market making purposes or as a principal purchaser, to the extent that this information is required to be made public in the United Kingdom.<sup>3</sup>

This exemption to Rule 14e-5 is separate from the Tier I and Tier II exemptions. It is not contingent upon the level of U.S. ownership of the securities that are the subject of the tender offer, so long as the conditions are met.

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<sup>1</sup> <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf?v=8Jan2018>

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

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

<sup>3</sup> Rule 14e-5(b)(9).

## Annex E

## Determination of the U.S. ownership level

*Timing*

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

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

***Securities to be included in the calculation***

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

***Procedure for calculation***

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

***The "look-through" test***

To calculate the level of U.S. ownership, the bidder must start by looking at the holders of record as of a given date. The bidder generally starts by looking at reports of beneficial ownership filed with respect to the target in the United States or in its home jurisdiction.<sup>6</sup> Shareholders in many jurisdictions are required to provide information about their shareholding once they cross certain thresholds.

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<sup>1</sup> SEC Compliance and Disclosure Interpretations on Cross-Border Exemptions, Question 101.08 (October 17, 2018).

<sup>2</sup> Instruction 2(i) to paragraphs (c) and (d) of Rule 14d-1.

<sup>3</sup> Instruction 2(i) to paragraphs (c) and (d) of Rule 14d-1.

<sup>4</sup> C&DI, Question 101.05 (October 17, 2018).

<sup>5</sup> Instruction 2(ii) to paragraphs (c) and (d) of Rule 14d-1.

<sup>6</sup> Instruction 2(v) to paragraphs (c) and (d) of Rule 14d-1.



The target may also include information about its shareholders in its own public filings. In many cases, the bidder also engages financial advisors that are able to access other non-public sources of information about shareholders.

The bidder cannot simply look at the record owners if they are brokers, dealers or banks, or nominees for such entities. For such entities, the bidder is required to “look through” the record ownership and determine the location of the underlying beneficial owners, particularly if the holders of record are located in any of the following jurisdictions:

- the United States
- the country in which the target is incorporated
- the primary trading market for the target’s shares (if this is different from its country of incorporation).<sup>7</sup>

The bidder (or the target, in a negotiated transaction) should send inquiries to brokers, dealers, banks and other nominee holders inquiring as to the aggregate amount of their holdings that are owned by beneficial owners in the United States. In many jurisdictions, nominees are under no obligation to respond to inquiries about the number of securities held for the benefit of customers in the United States, and may customarily fail to respond to such inquiries. However, the bidder is still required to undertake the “look-through” analysis in good faith.<sup>8</sup> If, after reasonable inquiry, the bidder is unable to obtain the required information, it may assume that the underlying beneficial owners are residents of the jurisdiction where the nominee in question has its principal place of business.<sup>9</sup>

#### *Average daily trading volume test*

If the bidder is unable to determine the level of U.S. ownership using the look-through test (which may be the case, for example, if the shares are held in bearer form or if the nominees are prohibited from disclosing the residence of the beneficial owners of the shares or choose not to disclose) the bidder may use an alternate test. However, the SEC has clarified that the alternate test is only available in very limited circumstances, and in particular, is intended to be used for non-negotiated transactions.<sup>10</sup>

The bidder is permitted to assume that U.S. shareholders hold fewer shares than the relevant threshold of 10% of the outstanding shares for the Tier I exemption or 40% for the Tier II exemption, *unless* one of the following is the case:

- Over a twelve-month period ending no more than 60 days before the announcement of the tender offer, the average daily trading volume of the subject shares in the United States as a percentage of the worldwide average daily trading volume is higher than the relevant threshold.
- The most recent annual report or other annual information filed with the regulator in the target’s home country or any other market in which the shares trade discloses that U.S. shareholders hold more than the relevant threshold of the subject shares.
- The bidder knows or has reason to know, prior to the announcement of the offering, that the level of U.S. ownership exceeds the relevant threshold.<sup>11</sup>

<sup>7</sup> Instruction 2(iii) to paragraphs (c) and (d) of Rule 14d-1.

<sup>8</sup> C&DI Question 101.04. (October 17, 2018).

<sup>9</sup> Instruction 2(iv) to paragraphs (c) and (d) of Rule 14d-1.

<sup>10</sup> SEC release no. 33-8957 (December 8, 2008). Commission Guidance and revisions to the cross-border tender offer, exchange offer, rights offerings, and business combination rules and beneficial ownership reporting rules for certain foreign institutions.

<sup>11</sup> Instruction 3 to paragraphs (c) and (d) of Rule 14d-1.

## Annex F

## Information Required in a Registration Statement on Form F-4

A registration statement on Form F-4 has two sections, the prospectus and information not required to be included in a prospectus.

The prospectus forms the bulk of the registration statement and must contain the following disclosure:

- risk factors about the bidder's business, the target company's business and the proposed transaction
- a description of the bidder's business
- description of the target company's business
- financial statements for the bidder and the target company<sup>1</sup>
- pro forma financial information showing the effects of the proposed transaction
- information about the proposed transaction, including the reasons for the transaction
- a description of any past, present or proposed material contacts between bidder and the target company
- a brief description of any material interest, direct or indirect, of affiliates of the bidder and of the target company in the proposed transaction
- information about the directors and executive officers of the surviving company, including remuneration and related party transactions
- information about the shares being registered, including any material differences in the rights shareholders in the target company and the rights of the holders of the newly issued shares of the bidder
- a discussion of any material differences in the corporate laws of the target company's jurisdiction and the bidder's jurisdiction
- information about the bidder's plan for the target company and
- instructions on how to tender the target company's shares.<sup>2</sup>

The information not required in the prospectus consists of the following:

- information about how controlling persons, directors or officers of the bidder are insured or indemnified against liability they may incur
- documents that are required to be furnished as exhibits to the registration statements<sup>3</sup> and
- certain undertaking from the bidder to ensure that the bidder will update the information in the registration statement if there are any changes to the disclosure after the registration statement goes effective and that it will respond to requests for any information incorporated by reference in the registration statement.<sup>4</sup>

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<sup>1</sup> The financial statements of the bidder and the target company must be presented in U.S. GAAP or IFRS as adopted by the IASB or local GAAP. If local GAAP is used, the financial information must be reconciled to U.S. GAAP.

<sup>2</sup> Form F-4, Part I.

<sup>3</sup> This includes the bidder's constitutional documents, material contracts, leases, indentures and other documents defining the rights of security holders, legal opinions and consents of experts and counsel.

<sup>4</sup> Form F-4, Part II.

## Information not available to the bidder

In the context of a hostile transaction, the bidder does not have access to all of the required information under Form F-4. In particular, for a target company that is not registered in the United States, it is unlikely that the bidder would have access to the target company's financial statements in the required format of U.S. GAAP or IFRS as issued by the IASB. Pursuant to Rule 409 under the Securities Act of 1933, as amended, the bidder is only required to provide information to the extent it is known or reasonably available to it. The bidder must provide any information it possesses or can acquire without unreasonable effort, and disclose the sources of such information. It must also include a statement in the registration statement either showing that unreasonable effort or expense would be involved in acquiring the required information or indicating that they are not affiliated with the target company or any party that has access to the required information, such as the target company's accountants. They must also make a request for such information from the relevant parties, and the statement in the registration statement must mention the result of this inquiry.<sup>5</sup>

If the bidder has access to financial statements or other relevant expertized material, but does not receive the required consents from the accountants or other experts, it can apply to the SEC to dispense with this requirement pursuant to Rule 437 under the Securities Act. The bidder must receive the SEC's approval to omit the required consent prior to the effective date of the registration statement.<sup>6</sup>

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<sup>5</sup> Rule 409.

<sup>6</sup> Rule 437.



