SEC Rules for Cross-Border Tender Offers, Exchange Offers, and Business Combinations

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I. Introduction

U.S. security holders are often excluded from tender offers and business combinations involving the securities of foreign private issuers. Bidders frequently exclude U.S. security holders from these transactions to avoid the application of the U.S. securities laws because of conflicts between U.S. regulation and the regulation of the home jurisdiction or the burden of complying with multiple regulatory regimes. This is especially so when U.S. security holders own a small amount of the securities of the foreign private issuer.1 The consideration paid in an international tender offer, merger, or similar transaction typically contains a premium to tendering security holders. Consequently, when bidders exclude U.S. security holders from international tender offers, they deny U.S. security holders the opportunity to receive a premium for their securities and to participate in investment opportunities equally with foreign security holders. Further, U.S. security holders that are excluded from international tender offers may be exposed to a risk that the consideration they receive in a back-end merger or business combination may not equal the consideration being paid in the tender offer. Last, U.S. security holders that are excluded from international tender offers must react to these transactions, which may significantly affect their existing investment in the foreign private issuer, without the disclosure or other protections afforded by U.S. or foreign law.2 Consequently, the SEC has stated that it has jurisdiction

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2. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,539, 82,558 & n.96, 82,561. The market for the class of securities that is the subject of the international tender offer may not be liquid enough to permit U.S. security holders to buy or sell the securities at comparable prices. Id. at 82,558. Thus, the excluded U.S. security holders would lose the opportunity to obtain a significant premium for their securities.
to apply the tender offer provisions of section 14(d) and (e) of the Exchange Act whenever
U.S. security holders of a foreign issuer have been excluded from an offshore offer and it
is reasonably foreseeable that the U.S. security holders will respond by selling their secu-
rities into the secondary market. The SEC has also stated that the antifraud provisions
of the U.S. securities laws, including section 14(e), apply whenever significant conduct occurs
in the United States or conduct occurs outside the United States that has a significant effect
within the United States or on the interests of U.S. investors. Nevertheless, the SEC has
concluded that U.S. security holders would be better served if the SEC facilitated the
participation of U.S. security holders and did not insist on compliance with U.S. regulations
for all tender offers extended into the United States (which would result in the continued
exclusion of U.S. security holders from international tender offers).

Accordingly, the SEC has adopted exemptions intended to encourage bidders to extend
tender offers (and business combinations) to U.S. security holders of foreign private issuers.
These exemptions are intended to allow U.S. security holders to participate equally with
foreign security holders. In the past, some jurisdictions have permitted the exclusion of U.S.
security holders, despite domestic requirements to treat all security holders equally, based
on the impracticality of requiring the bidder to include U.S. security holders. The exemp-
tions discussed below are intended to eliminate the need for this disadvantageous treatment
of U.S. investors by removing U.S. regulatory barriers. Specifically, the exemptions are
intended to reduce the U.S. tender offer and registration requirements for international
tender offers (and business combinations), and are expected to reduce the costs and other
burdens (i.e., time and effort) of extending these types of offers to U.S. security holders of
foreign private issuers. However, to balance the need to promote the inclusion of U.S.
security holders in these types of international transactions against the need to provide U.S.
security holders the protections of the U.S. securities laws, the exemptions focus relief in
the areas where U.S. ownership is smallest or where there are direct conflicts between U.S.
and foreign regulations or offering practices. However, even where relief is available,
U.S. security holders still receive the protections of the antifraud provisions of the U.S.
securities laws.

II. Tender Offer Exemptions

There are several exemptions from the tender offer requirements of the Exchange Act.
First, there are the Tier I and Tier II exemptions for tender offers by third-party bidders

securities because they must either: (a) sell their securities into the secondary market, where they will receive
less than the full offering price and incur transactional costs that would not be imposed on a tender; or
(b) remain minority security holders and risk being cashed out in a subsequent “freeze-out” merger. Cross-
¶ 84,606, at 80,871 (June 6, 1990) [hereinafter Cross-Border Concept Release].
4. Id. at 80,872 n.2.
Cross-Border Reproposing Release, Exchange Act Release No. 40,678, supra note 1, at 81,057-60. Cross-
¶ 84,803, at 81,744 (June 5, 1991) [hereinafter Cross-Border Proposing Release].
82,557-58, 82,560-61; Cross-Border Reproposing Release, Exchange Act Release No. 40,678, supra note 1, at
81,060.
for the securities of foreign target companies. Second, there are two exceptions to Rule 14e-5 (which prohibits purchases of target securities and related securities outside a tender offer)—one for tender offers eligible for the Tier I exemption, and another that permits eligible traders to continue their U.K. market making activities during tender offers for the securities of foreign target companies for tender offers subject to the U.K. City Code.

A. TIER I EXEMPTION: RULE 14d-1(c)

1. Introduction

Rule 14d-1(c) under the Exchange Act exempts tender offers for a foreign private issuer’s securities from most of the provisions of the Exchange Act and its rules governing tender offers. Under the exemption, a tender offer may proceed in the United States based on the bidder complying with the tender offer rules of the target company’s home jurisdiction if 10 percent or less of the class of securities sought in the tender offer are held by U.S. security holders (“U.S. holders”) and certain other conditions (discussed below) are met. In addition to the bidder, the target company of a third-party tender offer exempt under Rule 14d-1(c), or any officer, director, or other person that otherwise would be required to file Schedule 14D-9 under the Exchange Act may also rely on the rules of the target company’s home jurisdiction to meet that obligation. This is called the “Tier I” exemption.

There are some provisions common to both the Tier I and Tier II exemptions of Rule 14d-1(c) and (d). First, “home jurisdiction” means both: (a) the jurisdiction of the target company’s formation (i.e., incorporation, organization, or chartering); and (b) the principal foreign market where the target company’s securities are listed or quoted.

Second, “U.S. holder” means any security holder residing in the United States. Except for hostile third-party tender offers (which are discussed below), to determine the percentage of subject securities held by U.S. holders:

(a) The bidder would calculate U.S. ownership as of thirty days before commencement of the tender offer;
(b) When calculating the number of subject securities outstanding (the denominator), and the number of subject securities held by U.S. holders (the numerator), the bidder includes securities underlying ADRs (or Global Depositary Receipts (GDRs)) convertible or exchangeable into the subject securities, but excludes: (i) other securities that are convertible or exchangeable into the subject securities (e.g., warrants, options, and convertible securities); (ii) securities held by any holder (whether U.S. or foreign) of more than 10 percent of the subject securities; and (iii) securities held by the bidder (or bidding group).

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10. Instruction 1 to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002).
11. Instruction 2(i) to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002).
12. See Instruction 2(ii) to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-
(c) The bidder must use the "look through" method of calculating record ownership in Rule 12g3–2(a) under the Exchange Act, except that its inquiry as to the amount of securities held in accounts of U.S. residents may be limited to voting securities held of record by broker-dealers, banks, and other nominees located in: (i) the United States, (ii) the target company's jurisdiction of incorporation (or that of each participant in a business combination), and (iii) the primary trading market for the subject securities, if different than the target company's jurisdiction of incorporation;¹³

(d) If, after reasonable inquiry, the bidder cannot obtain information from the nominee about the amount of securities represented by accounts of U.S. residents, including where the nominee's charge for supplying this information would be unreasonable, the bidder may presume that the customers are residents of the jurisdiction where the nominee has its principal place of business;¹⁴ and


Because 10 percent holders are affiliates for purposes of calculating U.S. ownership, they presumably would be "affiliates" for purposes of Rule 144 under the Securities Act as well (i.e., the securities they receive in the offer would be treated as "control securities," and therefore, they would be subject to limitations on the amount of securities received in the offer that they could resell). Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,554.

¹³ Instruction 2(iii) to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,552, 82,560, 82,562. Thus, under Tier I (and Tier II and Rule 802 under the Securities Act), the starting point is Rule 12g3–2(a). Rule 12g3–2(a) states that: (a) "securities held of record" by U.S. residents is determined by Rule 12g5–1 under the Exchange Act, except that securities held of record by a broker-dealer, bank, or nominee for any of them for the accounts of U.S. residents must be counted as held in the United States by the number of separate accounts for which the securities are held; and (b) the issuer may rely in good faith on the number of those separate accounts supplied by all owners of the class of its securities that are brokers-dealers, banks, or a nominee for any of them. Thus, Rule 12g3–2(a) follows the definition of "securities held of record" in Rule 12g5–1, but requires the bidder to "look through" the record ownership of broker-dealers, banks, and other nominees appearing on the books of the target company and those of transfer agents, depositaries, and others acting on the target's behalf. If those record owners hold securities for the accounts of customers, the target must determine the residency of those customers. However, under Tier I (and Tier II and Rule 802 under the Securities Act), the method of calculating U.S. ownership is a modified "look through" based on Rule 12g3–2(a). Specifically, the bidder must look through the record ownership of nominees located in a jurisdiction listed in (i)-(iii) in the text above. For example, a German foreign private issuer traded solely on the Frankfurt Stock Exchange would have to ask banks and broker-dealers that are either registered owners with the target company or appear on participant lists of depositaries and that are based in the United States or Germany. The target would request information on the number of shares held by customer accounts that indicate a U.S. address for the customer. See 17 C.F.R. § 240.12g3–2(a)(1); Instruction 2(iii) to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release Act Release No. 42,054, supra note 1, at 82,540, 82,552 & n.73, 82,560.

The bidder would not ask nominees for the number of U.S. security holders or the names of those security holders, but only the aggregate amount of the nominee's holdings represented by U.S. accounts. Thus, the bidder would not have to ask the nominees for information concerning possible 10 percent holders. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,552.

Where the target securities trade as ADRs in the U.S. markets, the target must examine the participant lists of ADR depositaries and ask U.S. and home country broker-dealer and bank nominees appearing on those lists to determine the amount of ADRs held by U.S. investors. The target may not presume that the securities deposited in the ADR program are held solely by U.S. residents. Id. at 82,553.

For bearer securities, since neither a U.S. residence nor the name of an offshore nominee will appear on the records of the target for the holder of the securities, bearer securities will not be treated as being held by U.S. residents unless the bidder knows, or has reason to know, that those securities are held by U.S. residents. Id. at 82,553 n.75.
(e) The bidder must count securities as beneficially owned by U.S. residents as stated in beneficial ownership reports that are provided to the target or filed publicly, whether in the United States or in other countries (e.g., in the home jurisdiction), and based on beneficial ownership information otherwise provided to the target or bidder.15

Third, if a bidder commences a tender offer (or a business combination) during an ongoing tender offer (or business combination) for securities of the same class, the subsequent bidder may use the same exemption (Tier I, Tier II, or Rule 802 under the Securities Act) as the initial bidder, provided that all the conditions of the exemption, other than the limitation on U.S. ownership, are met by the subsequent bidder. This rule is intended to provide a level playing field for competing offers.16 Thus, if the initial bidder relied on the Tier I exemption to make its tender offer, a subsequent competing bidder will not be subject to the 10 percent U.S. ownership limitation condition of the Tier I exemption.17 Additionally, if the subsequent bidder chooses to rely on a different exemption from the initial bidder, the subsequent bidder is entitled to calculate the percentage of U.S. ownership as of thirty days before commencement of its tender offer (or commencement of the solicitation for the merger). Accordingly, the subsequent bidder should not be disadvantaged by any movement of securities into the United States after the announcement of the initial offer.18

Fourth, in an unsolicited or “hostile” tender offer by a third-party (i.e., a tender offer by a bidder other than the target company or an affiliate of the target, where the offer is not made under an agreement, whether written or unwritten, with the target), it will be difficult for the bidder to determine whether the Tier I (or Tier II) exemption is available without information on the target’s U.S. ownership.19 It will be even more difficult for persons other than the issuer to obtain information from nominees, including information on 10 percent holders.20 Accordingly, a third-party bidder in an unsolicited or hostile tender offer may presume that the target is a foreign private issuer and that U.S. holders hold either 10 percent or less (for Tier I offers) or 40 percent or less (for Tier II offers), as the case may be, of the outstanding subject securities, unless:

(a) The aggregate trading volume of the subject class of securities on U.S. securities exchanges, in NASDAQ, or in the OTC market, as reported to the NASD, over the twelve-calendar-month period ending thirty days before commencement of the tender offer, exceeds 10 percent or 40 percent, as the case may be, of the worldwide aggregate trading volume of that class of securities over the same period;

(b) The most recent annual report or other annual information filed or submitted by the target or its security holders with securities regulators in the home jurisdiction or else-

14. See Instruction 2(iv) to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,552, 82,560.
15. See Instruction 2(v) to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,552, 82,560.
17. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,542. Consistently, if the initial bidder relied on the Tier II exemption to make its tender offer, the subsequent competing bidder will not be subject to the 40 percent U.S. ownership limitation condition of the Tier II exemption. Id. at 82,544.
18. Id. at 82,542, 82,553.
19. See Instruction 3 to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,552 n.74, 82,554 & n.80.

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where (including with the SEC) indicates that U.S. holders hold more than 10 percent or 40 percent, as the case may be, of the outstanding subject class of securities;21 or

(c) The bidder knows or has reason to know, from other sources, that the level of U.S. ownership exceeds 10 percent or 40 percent, as the case may be, of the subject class of securities.22

Even if the above presumption concerning the level of U.S. ownership is not available, the bidder may nevertheless rely on the Tier I (or Tier II or Rule 802 under the Securities Act) exemption if it can demonstrate that U.S. ownership is in fact less than the relevant threshold or, in the case of competing bids, if the bidder chooses to rely on the same exemption (Tier I, Tier II, or Rule 802 under the Securities Act) as that used by a prior bidder.23

For example, if a hostile bidder makes a tender offer under the Tier I exemption, it may rely on the presumption. If the hostile bid is then followed by a subsequent bid, whether by the target, its affiliate, or a hostile or friendly third-party bidder, the subsequent bidder also may use the Tier I exemption provided that it meets all the conditions of the Tier I exemption other than the ownership limitation condition. However, if the subsequent bidder wants to rely on Rule 802 to make an exchange offer (or business combination), it must meet the ownership limitation of Rule 802 as well as Rule 802's other conditions even though both Rule 802 and the Tier I exemption each use a 10 percent ownership threshold. In this situation, if the subsequent bidder is a hostile bidder, it may use the presumption discussed above if all the conditions of the presumption are met to commence a Rule 802 offer in response to the initial Tier I offer. Even if the above presumption is not available, the bidder may nevertheless rely on the Rule 802 exemption if it can demonstrate that U.S. ownership is in fact less than the relevant threshold. The bidder will be entitled to calculate the percentage of U.S. ownership as of thirty days before commencement of its exchange offer (or commencement of the solicitation for the merger). Another example would be where a third-party in a negotiated transaction wants to make an exchange offer (or business combination) under Rule 802. The third-party bidder may not rely on the above presumption because it is not a hostile party. If, after calculating the percentage of the target's securities held by U.S. holders, the friendly party commences an exchange offer (or business combination) under Rule 802, then a subsequent bidder also may rely on Rule 802 provided that all the conditions of Rule 802, other than the ownership limitation condition, are met.24

The bidder may presume the foreign target is a foreign private issuer and rely on the Tier I (or Tier II or Rule 802) exemption if the target files reports with the SEC under the foreign integrated disclosure system (e.g., on Forms 20-F and 6-K) or has claimed the Rule 12g3-2(b) exemption from Exchange Act reporting, unless the bidder knows the target is

21. See id. at 82,554 n.83.
22. See Instruction 3 to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,540, 82,554.

As discussed earlier, the above presumption concerning the level of U.S. ownership is not needed where the hostile bidder commences its offer after a prior competing tender offer (or business combination) for securities of the same class and chooses to rely on the same exemption (Tier I, Tier II, or Rule 802) as the prior bidder. However, the presumption is needed where the hostile bidder either: (a) makes the initial offer, or (b) is the subsequent bidder but chooses to rely on a different exemption from that used by a prior bidder. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,554 n.79.

24. Id. at 82,555 n.86.
not a foreign private issuer. Conversely, if the foreign target is reporting on the SEC’s forms for domestic issuers, the bidder would have reason to believe that the target is not a foreign private issuer.

Fifth, “United States’ means the United States of America, its territories and possessions, any state of the United States, and the District of Columbia.”

Sixth and last, the Tier I exemption (and the Tier II exemption) is not available for any transaction or series of transactions that technically complies with the exemption, but is part of a plan or scheme to evade the provisions of Regulations 14D or 14E (i.e., the tender offer provisions of the Exchange Act).

2. The Tier I Ten Percent Exemption

For the Tier I ten percent exemption, qualifying third-party (and issuer) tender offers are exempt from most provisions of the Exchange Act and its rules governing tender offers (i.e., to section 14(d)(1) through (7) of the Exchange Act, Regulation 14D (Rules 14d-1 through 14d-11) and Schedules TO and 14D-9 thereunder, Rules 14e-1 and 14e-2 of Regulation 14E under the Exchange Act (and Rules 13e-3 and 13e-4 under section 13(e) of the Exchange Act). These provisions contain disclosure, filing, dissemination, minimum offering period, withdrawal rights, and pro-ration requirements that are intended to provide security holders with equal treatment and adequate time and information to make a decision whether to tender into the offer. Instead of complying with the U.S. tender offer rules, a bidder taking advantage of the Tier I exemption must comply with any applicable rules of the foreign target company’s home jurisdiction or exchange. Nevertheless, the antifraud, anti-manipulation, and civil liability provisions of the U.S. securities laws, including sections 10(b) and 14(e) of the Exchange Act, and Rules 10b-5 and 14e-3 thereunder, remain applicable.

25. Id. at 82,554 & n.84.
27. Instruction 4 to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002).
28. Instruction 5 to Exchange Act Rule 14d-1(c) and (d), 17 C.F.R. § 240.14d-1(c)-(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,542. “For example, if an initial offer is commenced solely as a pretext for making a subsequent offer automatically eligible for the Tier I exemption, the Tier I exemption would not be available.” Id.
29. 17 C.F.R. §§ 240.13e-3(g)(6), 240.13e-4(b)(8), 240.14d-1(c), 240.14e-2(d) (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,539 & n.9, 82,541, 82,559. Rule 13e-3 governs going-private transactions by certain issuers or their affiliates. Rule 13e-4 governs issuer self-tenders. The Tier I exemption (and the Tier II and Rule 802 exemptions) do not affect the beneficial ownership reporting requirements of § 13(d), (f), and (g) of the Exchange Act. Id. at 82,544.
31. Id. at 82,540; Cross-Border Reproposing Release, Exchange Act Release No. 40,678, supra note 1, at 81,060, 81,063 & n.39. However, the application of the antifraud provisions of the U.S. securities laws may be different in the context of foreign disclosure requirements and practices. The SEC considers the information that is required to be disclosed by its forms or schedules generally to be important in investment decisions. The omission of the information called for by U.S. forms in the context of foreign disclosure requirements and practices would not necessarily violate the U.S. disclosure requirements. Nevertheless, an antifraud action could be brought by the SEC or investors if the omitted information is material in the context of the transaction and the disclosure provided is misleading as a result of the omission of the information. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,540.

Further, even though Tier I exempts bidders from the duration, notice, and payment requirements of Rule 14e-1, a bidder that, for example, does not provide any notice to U.S. holders that it has extended the duration of an offer and materially increased the amount of the consideration, or that it may not pay the consideration for an unreasonably long time, might violate the antifraud provisions, including § 14(e). Cross-Border Reproposing Release, Exchange Act Release No. 40,678, supra note 1, at 81,060-61.

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exemption is available to both U.S. and foreign bidders, regardless of the domicile or reporting status of the bidder.\footnote{32}

The following conditions must be met to rely on the Tier I exemption. First, as discussed above, except for a tender offer commenced during a tender offer made by a prior bidder (whether the target company, its affiliate, or a third-party) under the Tier I exemption, no more than 10 percent of the class of securities subject to the offer may be held by U.S. holders.\footnote{33}

Second, the target company must be a foreign private issuer and "not an investment company registered or required to be registered under the Investment Company Act, other than a registered closed-end investment company."\footnote{34}

Third, subject to four exceptions (discussed below) for exchange offers, the bidder must permit U.S. holders to participate in the offer on terms at least as favorable as those offered any other holder of the class of securities subject to the offer.\footnote{35} Additionally, equal treatment requires that the procedural terms of the tender offer (i.e., duration, pro-rationing, and withdrawal rights) must be the same for all security holders.\footnote{36}

3. Exceptions to Equal Treatment

Under the first exception to the equal treatment condition of the Tier I exemption (the "cash alternative" exception), the bidder may offer U.S. holders cash-only consideration for the tender of the subject securities, even though the bidder is offering security holders outside the United States consideration that consists wholly or partially of securities of the bidder. However, to do so, the bidder must have a reasonable basis for believing that the amount of cash offered to U.S. holders is substantially equivalent to the value of the consideration offered to non-U.S. holders (i.e., to the value of the securities and any cash or other consideration).\footnote{37} If the offered security is not a "margin security" under Regulation T, the bidder must undertake to provide, on the request of a U.S. holder or the SEC, a valuation opinion of an independent expert stating that the cash consideration being offered to U.S. holders is substantially equivalent to the value of the consideration being offered to security holders outside the United States. If the offered security is a "margin security" under Regulation T, a valuation opinion is not required. Instead, the bidder must provide,
on request, information on recent trading prices of the offered security. Specifically, the bidder must undertake to provide, on the request of a U.S. holder or the SEC, the closing price and daily trading volume of the offered security 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.\(^39\)

In many cases foreign jurisdictions will not permit a bidder to offer U.S. holders cash if that option is not provided in all other jurisdictions. Additionally, a bidder may not have enough cash to fund such an offer. In that case, some bidders have used a "vendor placement," in which U.S. holders agree to appoint an independent agent to receive the securities offered in an exchange offer and sell them immediately into an existing offshore trading market. The agent would then remit the proceeds, minus expenses, to the U.S. holders. The SEC has granted no-action relief under the Securities Act registration requirements and the equal treatment requirement of Rule 14d-10 under the Exchange Act to qualifying vendor placements.\(^40\) That procedure continues to be available in appropriate circumstances.\(^41\)

Under the second exception to the equal treatment condition of the Tier I exemption, if the bidder offers securities under the Rule 802 exemption from Securities Act registration for exchange offers and has not offered a cash-only alternative in any state or jurisdiction (whether inside or outside the United States), the bidder may exclude U.S. holders residing in those states or jurisdictions that do not provide a corresponding exemption from registration or qualification under the state "blue sky" laws (i.e., those states or jurisdictions that would require registration or qualification). However, if the bidder has offered a cash-only alternative anywhere, it must offer the same cash alternative to U.S. holders residing in those states or jurisdictions that would require registration or qualification.\(^42\)

Similarly, under the third exception, if the bidder offers securities registered under the Securities Act and has not offered a cash-only alternative in any state or jurisdiction (whether inside or outside the United States), the bidder may exclude U.S. holders residing in any state or jurisdiction that prohibits the offer and sale of the securities in that state or jurisdiction after a good faith effort by the bidder to register or qualify the offer and sale of the securities in that state or jurisdiction. However, if the bidder has offered a cash-only alternative anywhere, it must offer the same cash alternative to U.S. holders residing in those states or jurisdictions that prohibit the offer and sale of the securities.\(^43\)

Under the fourth and last exception, if the bidder offers "loan notes" solely to offer sellers tax advantages not available in the United States and the notes are neither listed on any organized securities market nor registered under the Securities Act, the bidder need not offer loan notes to U.S. holders.\(^44\)


\(^{43}\) 17 C.F.R. § 240.14d-1(c)(2)(i); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,543-44.

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The Tier I exemption contemplates that the bidder may have to comply with the regulations of more than one jurisdiction (i.e., the target’s chartering jurisdiction and principal foreign market) and that the bidder will extend the protections and disclosures required by each of those jurisdictions to U.S. security holders. If the bidder does not do so, Tier I exemptive relief is not available and the bidder must apply to the SEC for any needed relief from the tender offer requirements of the Exchange Act.44

Fourth, the bidder must disseminate any tender offer circular or other informational document (and any amendments) to U.S. security holders in English on a comparable basis to that provided to security holders in the foreign target’s home jurisdiction.45 If the foreign target’s home jurisdiction permits dissemination solely by publication, the bidder likewise must publish the offering materials simultaneously in the United States, although it may also mail the materials directly to U.S. holders. If the materials are disseminated by publication, the bidder must publish the materials in a manner reasonably calculated to inform U.S. holders of the offer.46

Fifth, for a tender offer for securities described in section 14(d)(1) of the Exchange Act (i.e., generally, a tender offer for a class of equity securities registered under section 12 of the Exchange Act), the bidder must submit to (but not file with) the SEC for notice purposes only, under cover of Form CB, an English language translation of any tender offer document (and any amendments) the bidder disseminates to holders of the subject securities (Form CB is merely a cover sheet that incorporates the offering documents sent to security holders under the requirements of the country of incorporation of the target). Form CB must be received by the SEC by the first business day after dissemination (i.e., by the first business day after the offering circular or disclosure document being submitted under cover of Form CB is first published, sent, or given to security holders).47 Thus, instead of filing

44. 17 C.F.R. § 240.14d-1(c)(2)(iv). Loan notes are short-term notes that may be redeemed in whole or in part for cash at par on any interest date in the future. Common in the United Kingdom, loan notes are intended to defer the recognition of income and capital gains on the sale of securities under foreign tax laws. Because this tax benefit is not available to U.S. security holders, a bidder need not offer loan notes to U.S. security holders. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,544.


Because materials submitted under cover of Form CB are not deemed “filed” with the SEC, the person submitting the materials is not subject to the liability provisions of § 18 of the Exchange Act. However, the bidder may be liable under the other antifraud provisions of the U.S. securities laws, including §§ 10(b) and 14(e) of the Exchange Act. The bidder may also be liable under Rule 12b-20 under the Exchange Act, which requires that, in addition to the information expressly required to be included in a registration statement under § 12(b) or § 12(g) of the Exchange Act or a report filed under § 13 or § 15(d) of that Act, there must “be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.” 17 C.F.R. § 240.12b20; see Exchange Act Form CB, supra, at Part 1; 17 C.F.R. §§ 240.12b1–1, 240.12b20 (2002); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,542; 1 Edward F. Greene et al., U.S. REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS SA3–4 n.11 (5th ed. 2000). See also Exchange Act
Schedule TO, a bidder relying on the Tier I exemption will submit Form CB (which, together with Form F-X, discussed below) is much less burdensome to prepare than Schedule TO. Further, financial statements submitted under cover of Form CB that comply with the accounting requirements of the filer's home jurisdiction need not be reconciled to U.S. GAAP.

The following exhibits must be provided as part of Form CB, but need not be sent to U.S. security holders, unless sent to security holders in the home jurisdiction:

(a) Any reports or information (in English or an English summary) that are required by the home jurisdiction to be made publicly available for the transaction, but need not be disseminated to security holders;
(b) Copies of any documents incorporated by reference into the home jurisdiction document(s); and
(c) If any name is signed to the Form CB under a power of attorney, manually signed copies of the power of attorney.

Each person (or its authorized representative) on whose behalf the Form CB is submitted must sign the form.

Sixth and last, if the bidder is a foreign company, it must also file a Form F-X with the SEC with Form CB. Form F-X requires the bidder to appoint an agent for service of process in the United States for: (a) any SEC investigation or administrative proceeding (even if not related to the offering for which the Form CB is submitted); and (b) any civil suit or action brought against the bidder (or to which the bidder has been joined as defendant or respondent) in any appropriate court in any place subject to the jurisdiction of any state of the United States, any of its territories or possessions, or the District of Columbia, where the investigation, proceeding, or cause of action relates to the offering for which Form CB is submitted.

Form CB may also be used by the target company (or any officer, director, or other person that provides a recommendation concerning the offer) to meet its disclosure obligations under Rules 14e-2 and 14d-9 under the Exchange Act. Specifically, the target

Form CB, supra, at Part 3 (because any information given on Form CB will be made publicly available, the SEC can use this information for a variety of purposes, including referral to other governmental authorities or securities self-regulatory organizations for investigations or for litigation involving the federal securities laws or other civil, criminal, or regulatory statutes or provisions).

50. Id. at 82,542 n.22.
51. Exchange Act Form CB, supra note 48, at Part II.
52. Exchange Act Form CB, supra note 48, at Part IV(1).

Additionally, a bidder filing Form F-X with the Form CB must agree to appoint a successor agent for service of process and file an amended Form F-X if the bidder discharges the agent or the agent is unwilling or unable to accept service on behalf of the bidder at any time until six years have passed from the effective date of the last amendment to the Form CB. See Exchange Act Form F-X, supra, at Part II(F)(b). See Exchange Act Form CB, supra note 48, at Part III(2) (any change in the name or address of an agent for service must be promptly communicated to the SEC by amendment of the Form F-X).


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company (or any other person subject to Rule 14d-9) is exempt from Rule 14d-9 if the following conditions are met:

(a) The target is the subject of a tender offer conducted under Rule 14d-1(c) (i.e., a third-party tender offer conducted under the Tier I exemption);

(b) The target (or other subject person) submits to the SEC on Form CB the entire informational document it disseminates to holders of the subject securities in response to the tender offer, no later than the next business day after dissemination;

(c) The target (or other subject person) disseminates any informational document (and any amendments) to U.S. holders, in English, on a comparable basis to that provided to security holders in the target's home jurisdiction; and

(d) If the target (or other subject person) disseminates the information by publication in its home jurisdiction, that person publishes the information in the United States in a manner reasonably calculated to inform U.S. security holders of the offer."55

For a tender offer that otherwise would be subject only to section 14(e) of the Exchange Act and Regulation 14E thereunder, no offering document or recommendation need be submitted to the SEC because the current regulations do not require a filing for those offers.56

B. Tier II Exemption: Rule 14d-1(d)

1. Introduction

Rule 14d-1(d) under the Exchange Act provides limited exemptive relief to bidders by eliminating frequent areas of conflict between U.S. and foreign tender offer regulatory requirements. For the bidder to take advantage of Rule 14d-1(d), the target company must be a foreign private issuer, U.S. security holders must hold more than 10 percent but no more than 40 percent of the class of securities sought in the tender offer, and certain other conditions (discussed below) must be met. This is called the "Tier II" exemption.57 Qualifying offers receive relief from Exchange Act requirements concerning: (a) equal treatment of target security holders (the all-holders and best price requirements); (b) notice of extensions of the offer; (c) prompt payment for or return of tendered securities; (d) subsequent offering period withdrawal rights; and (e) extension of the offer after reduction or waiver of a minimum tender condition.58 Nevertheless, the antifraud, anti-manipulation, and civil liability provisions of the U.S. securities laws remain applicable, including sections 10(b) and 14(e) of the Exchange Act and Rules 10b-5 and 14e-3 thereunder.59 This exemption is available to both U.S. and foreign bidders, regardless of the domicile or reporting status of the bidder.60

57. 17 C.F.R. § 240.14d-1(d); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,539, 82,544, 82,559.

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2. The Tier II Forty Percent Exemption

To rely on the Tier II exemption, the following conditions must be met. First, no more than 40 percent of the class of securities sought in the offer may be held by U.S. holders, except for a tender offer commenced during a tender offer made by a prior bidder (whether by the target company, its affiliate, or a third-party) under the Tier II exemption. Second, the target company must be a foreign private issuer and not an investment company registered or required to be registered under the Investment Company Act, other than a registered closed-end investment company. Third and last, the bidder must comply with all applicable U.S. tender offer laws and regulations, other than those for which an exemption is provided under Tier II. Thus, the bidder must comply with the remaining procedural, disclosure, and filing requirements of the Williams Act and Rule 13e-3.

The Tier II exemption provides relief from common impediments to extending into the United States offers for the securities of foreign target companies. First, under U.S. tender offer rules, a bidder must open the tender offer to all security holders of the class of securities subject to the offer (the "all-holders rule") and the consideration paid to any security holder of the subject class must be as high as the consideration paid to any other security holder of the subject class (the "best price rule"). The Tier II exemption provides two exemptions from these "equal treatment" requirements. Under the Tier II exemption, a bidder conducting a tender offer may separate the offer into two offers: one made only to U.S. holders and one made only to non-U.S. holders. This way, the U.S. offer can comply with the U.S. tender offer rules and the non-U.S. offer can comply with the home jurisdiction's tender offer rules. However, the offer to U.S. holders must be made on terms at least as favorable as those offered any other holder of the class of securities subject to the tender offers. Additionally, under the Tier II exemption, if the bidder offers loan notes solely to offer sellers tax advantages not available in the United States, the bidder need not offer loan notes to U.S. holders.

61. 17 C.F.R. § 240.14d-1(d), (d)(1).
62. 17 C.F.R. § 240.14d-1(d)(1)(ii). See above (defining "U.S. holder" and discussing tender offers commenced during a tender offer made by a prior bidder under the same exemption).
63. 17 C.F.R. § 240.14d-1(d)(1)(i).
64. 17 C.F.R. § 240.14d-1(d)(1)(iii); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,544. For example, a bidder making a Tier II offer must: (a) keep the offer open twenty business days; (b) file a Schedule TO; (c) disseminate the offering documents; and (d) offer withdrawal rights until the offer becomes "wholly unconditional" (i.e., until all conditions to the offer have been satisfied or waived). Additionally, Rule 14e-5 under the Exchange Act (which governs purchases and arrangements to purchase the subject security and related securities during, but outside, the tender offer) applies to Tier II offers, except for U.K. market making activities by eligible traders during tender offers subject to the U.K. City Code. See Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,544, 82,559; GREENE ET AL., supra note 48, at SA3–7.

Because a bidder making a Tier II offer must file a Schedule TO, it need not submit a Form CB, or file a Form F-X, with the SEC. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,544.
68. 17 C.F.R. § 240.14d-1(d)(2)(i). Loan notes are discussed in § 11:41.

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Second, under U.S. tender offer rules, a bidder may not extend the length of a tender offer without issuing a notice of the extension by press release or other public announcement. The notice must disclose the approximate number of securities deposited to date and be issued by the earlier of: (a) 9:00 A.M. Eastern time, on the next business day after the scheduled expiration date of the offer, or (b) if the subject class of securities is registered on one or more U.S. exchanges, the first opening of any of those exchanges on the next business day after the scheduled expiration date of the offer. Under the Tier II exemption, if a bidder decides to extend an offer beyond a scheduled expiration date, it may announce the extension under home jurisdiction law or practice.

Third, under U.S. tender offer rules, a bidder must pay the consideration offered or return the securities deposited by or for security holders promptly after the termination or withdrawal of the tender offer. This "prompt payment" standard is met if payment is made in accordance with normal settlement periods (three trading days in the United States).

Under the Tier II exemption, payment for the tendered securities may be made under home jurisdiction law or practice.

Fourth, under U.S. tender offer rules, a third-party bidder may elect to provide a "subsequent offering period" without withdrawal rights, regardless of whether the transaction is domestic or foreign. A bidder that includes a subsequent offering period must promptly pay for tendered securities and announce the approximate number and percentage of outstanding securities that were deposited by the close of the initial offering period no later than 9:00 A.M. Eastern time on the next business day after the scheduled expiration date of the initial offering period. The subsequent offering period must then begin immediately. Under the Tier II exemption, a bidder will meet these announcement and prompt payment requirements if it announces the results of the tender offer, including the approximate number of securities deposited to date, and pays for tendered securities, under home jurisdiction law or practice and the subsequent offering period begins immediately after the announcement. Further, under U.S. law, securities tendered into a tender offer may be withdrawn within seven days after the original tender offer, and at any time after sixty days from the date of the original offer. Nevertheless, under the Tier II exemption, the bidder need not extend withdrawal rights during the period between the close of the offer and the commencement of the subsequent offering period.

69. 17 C.F.R. § 240.14e-1(d).
71. This requirement does not prohibit a bidder electing to offer a subsequent offering period under Rule 14d-11 under the Exchange Act from paying for securities during the subsequent offering period in accordance with that rule. 17 C.F.R. § 240.14e-1(e).
73. 17 C.F.R. § 240.14d-1(d)(2)(iv).
76. 15 U.S.C.A. § 78n(d)(5).
Fifth and last, the SEC has stated that at least five business days must remain in an offer after the bidder waives a minimum tender offer condition. This is intended to permit investors to learn of and react to this material change in the offer.78 To address conflicts between this requirement and rules in other jurisdictions, the SEC permits a bidder meeting the requirements for the Tier II exemption to reduce or waive the minimum acceptance condition without extending withdrawal rights during the remainder of the offer (unless an extension is required by Rule 14e-1), if the following conditions are met:

(a) The bidder announces that it may reduce the minimum condition five business days before it reduces the condition (a statement at the commencement of the offer that it may reduce the minimum condition is insufficient);

(b) The bidder disseminates this announcement through a press release and other methods reasonably designed to inform U.S. security holders (e.g., advertising in a newspaper with a national circulation in the United States);

(c) The press release states that a reduction may occur and the exact percentage to which the acceptance condition may be reduced, the procedure for reducing the minimum condition is described in the offering document, and the bidder declares its actual intentions once it is required to do so by the regulations of the home jurisdiction;

(d) The announcement advises security holders to withdraw their tenders immediately if their willingness to tender would be affected by a reduced minimum acceptance condition;

(e) During this five business day period, withdrawal rights are extended to security holders who have tendered their shares; and

(f) The bidder holds the offer open for acceptances for at least five business days after the minimum acceptance condition is reduced or waived.79

If relief beyond that provided in the Tier II exemption is needed, the SEC will consider applications for exemptions on a case-by-case basis.80


79. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,545. A bidder may not terminate withdrawal rights during the offer, even though the offer has been declared wholly unconditional. To terminate withdrawal rights, all conditions to the offer must be satisfied or waived and the bidder must declare the offer wholly unconditional. See July 2000 Telephone Interpretations, Cross-Border Release: Release No. 33-7759, October 22, 1999, A. Tier II, Question 1, at 25 available at http://www.sec.gov/offices/corpfin/phonits3.htm (stating that the reference in the Cross-Border Adopting Release to “the remainder of the offer” refers to a subsequent offering period during which withdrawal rights are not provided).

80. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,545. To maintain its resources, the SEC has delegated to the Directors of the Divisions of Corporation Finance and Market Regulation the authority to exempt tender offers from specific tender offer requirements. Nevertheless, the staff may submit matters to the SEC for consideration as it deems appropriate. Additionally, the SEC retains discretionary authority to review, on its own initiative or on application by a party adversely affected, any exemption granted or denied by the Division under delegated authority. See Exchange Act § 4A(b), 15 U.S.C.A. § 78d-1(b); General Organization Rule 30-1(e)(16)(i)-(ii), 17 C.F.R. § 200.30-1(e)(16)(i)-(ii) (delegating to the Director of the Division of Corporation Finance the authority to grant exemptions from: (a) §§ 13(e) and 14(d)(1)-7 of the Exchange Act, and Rules 13e-3 and 13e-4, Regulation 14D (i.e., Rules 14d-1 through 14d-11), and Schedules 13E-3, TO, and 14D-9 thereunder, under §§ 14(d)(5), 14(d)(8)(C), and 36(a) of the Exchange Act; and (b) Rules 14e-1, 14e-2, and 14e-5 of Regulation 14E under the Exchange Act, under § 36(a)); General Organization Rule 30-3(a)(68), 17 C.F.R. § 200.30-3(a)(68) (delegating to the Director of the Division of Market Regulation the authority, under § 36(a), to grant exemptions from Rule 14e-1); Cross-Border Adopt-
Where U.S. ownership exceeds 40 percent of the target class of securities (and, therefore, the offer does not qualify for the Tier II exemption), the SEC will consider, on a case-by-case basis, applications for exemptive relief only when there is a direct conflict between U.S. laws and practice and those of the home jurisdiction. Any relief would be limited to what is necessary to accommodate conflicts between the regulatory schemes and practices. 81 The Tier II exemption does not address bidders offering only cash to U.S. holders to avoid registering an exchange offer under the Securities Act (the cash-alternative exception to the equal treatment condition of the Tier I exemption does not apply to Tier II offers). The SEC will consider requests for that type of relief on a case-by-case basis. 82 Likewise, the SEC will consider vendor placements on a case-by-case basis. 83

C. Other Rules Governing Tender Offers: Rule 14e-5 and Regulation M

In tender offers for equity securities, Rule 14e-5 under the Exchange Act prohibits covered persons from purchasing or arranging to purchase the subject securities or any related securities except as part of the tender offer. 84 Related securities are any securities immediately convertible into, exchangeable for, or exercisable for, the subject securities. 85 This prohibition applies from the time of public announcement of the tender offer until the offer expires. 86 Rule 14e-5 is intended 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. 87 The rule applies to: (1) the bidder and its affiliates; (2) the bidder's dealer-manager and its affiliates; (3) any adviser to the bidder, the bidder's dealer-manager, or their affiliates, whose compensation depends on the completion of the offer; and (4) any person acting, directly or indirectly, in concert with any of the other covered persons in connection with any purchase or arrangement to purchase any subject securities or related securities. 88
Many foreign jurisdictions do not prohibit a bidder from purchasing or arranging to purchase the subject security outside the offer. A strict application of Rule 14e-5 could be disadvantageous to U.S. security holders if the bidder decides not to extend the offer in the United States because of the rule's restrictions. Therefore, flexible application of Rule 14e-5 is needed to encourage bidders for the securities of foreign private issuers to extend their offers to U.S. security holders. Accordingly, Rule 14e-5 contains two exceptions that are intended to balance the investor protection goals of the rule and the interests of U.S. investors in being included in tender offers for the securities of foreign private issuers.91

First, for Tier I tender offers (i.e., those exempt under Rule 14d-l(c)), Rule 14e-5(b)(10) provides an exception from Rule 14e-5 for purchases or arrangements to purchase made in or outside the United States, provided certain conditions are met.92 However, the anti-fraud, anti-manipulation and civil liability provisions of the U.S. securities laws continue to apply to these transactions.93 Specifically, the conditions of the exception are:

(a) The U.S. offering documents prominently disclose the possibility of purchases or arrangements to purchase, or the intent to make purchases, outside the tender offer;
(b) The offering documents disclose the manner in which information about those purchases or arrangements to purchase will be disclosed;
(c) The bidder discloses information in the United States in English about those purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction; and
(d) The purchases comply with the tender offer laws and rules of the home jurisdiction.94

There is no exception to Rule 14e-5 for Tier II tender offers because of the greater U.S. interest in those offers. For offers not eligible for the Tier I exemption, requests for relief from Rule 14e-5 will be reviewed on a case-by-case basis. For those offers, the SEC will consider factors such as the proportional ownership by U.S. security holders of the relevant securities of the target company compared to the total number of shares outstanding and to the public float, whether the offer will be for all shares tendered or will involve pro-ratination, whether cash or securities will be offered, whether the offer will be subject to the tender offer laws or rules of a foreign jurisdiction that provide protections comparable to Rule 14e-5, and whether the principal trading market for the subject security is outside the United States.95

Second, Rule 14e-5(b)(9) under the Exchange Act permits "connected exempt market makers" and "connected exempt principal traders," as defined by the U.K. City Code, to continue their U.K. market making activities during an international tender offer subject


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to the U.K. City Code. Under the U.K. City Code, connected exempt market makers and connected exempt principal traders are market makers or principal traders that are affiliated with the bidder's advisers ("eligible traders"). Unlike Rule 14e-5(b)(10) above, Rule 14e-5(b)(9) is not limited to Tier I tender offers (nor is it limited to Tier II offers). Further, Rule 14e-5(b)(9) applies to the bidder and anyone acting on its behalf (such as advisers and other nominees or brokers). However, the anti-fraud, anti-manipulation, and civil liability provisions of the U.S. securities laws continue to apply to transactions excepted under Rule 14e-5(b)(9). Specifically, the conditions of this exception are:

(a) The purchase or arrangement to purchase is effected by an eligible trader;
(b) The target company is a foreign private issuer;
(c) The tender offer is subject to the U.K. City Code;
(d) The eligible trader complies with the applicable provisions of the U.K. City Code; and
(e) The tender offer documents disclose the identity of the eligible trader and disclose, or describe how U.S. security holders can obtain, information concerning market making or principal purchases by the eligible trader to the extent that this information is required to be made public in the United Kingdom.

Regulation M under the Exchange Act imposes trading restrictions on issuers and broker-dealers participating in exchange offers that are "distributions," generally from the day offering materials are disseminated until the end of the distribution. International exchange offers are not exempt from Regulation M, even if they qualify for the Tier I or Tier II exemption from the U.S. tender offer provisions (or the Rule 802 exemption from Securities Act registration).

D. Exchange Offer (and Business Combination) Exemption: Rule 802

In addition to the exemptions from the tender offer requirements of the Exchange Act for certain international tender offers, there is an exemption from the registration requirements of the Securities Act for certain international exchange offers (and business combinations). Exchange offers extended to U.S. holders pose a much more difficult regulatory problem than cash tender offers because exchange offers involve the offer and sale of securities in the United States, which require bidders to register the securities under the Securities Act and establish a continuing presence for bidders in the U.S. capital markets.

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98. Id. at 82,540.
102. 17 C.F.R. § 230.802.
However, foreign bidders find the prospect of registration under the Securities Act and its delay, cost, and attendant reporting obligation under the Exchange Act to be a strong disincentive to extending exchange offers to U.S. holders of securities of foreign target companies. Consequently, the SEC has adopted Rule 802 under the Securities Act to encourage exchange offers for the securities of foreign target companies to be extended to U.S. security holders.

Rule 802 provides an exemption to permit an exchange offer for the securities of a foreign private issuer (or an exchange of securities for the securities of a foreign private issuer in a business combination) to proceed in the United States without registration under section 5 of the Securities Act if U.S. security holders ("U.S. holders") hold no more than 10 percent of the relevant class of securities of the foreign target, and certain other conditions (discussed below) are met.

Under Rule 802, an "exchange offer" is a tender offer where securities are issued as consideration, and a "business combination" is a statutory amalgamation, merger, arrangement, or other reorganization requiring the vote of security holders of one or more of the participating companies. Under Rule 802, the term "business combination" also includes a statutory short form merger that does not require a vote of security holders. For an amalgamation (i.e., a business combination where the securities will be issued by a successor company to all participating companies), all participants in the business combination must be foreign private issuers.

Under Rule 802, "U.S. holder" means any security holder residing in the United States. To determine the percentage of subject securities held by U.S. holders:

(a) For an exchange offer, the bidder would calculate U.S. ownership as of thirty days before commencement of the exchange offer. For a business combination such as a merger, where the securities will be issued by the acquiring company, the calculation would be based on U.S. ownership of the company to be acquired (i.e., of the target) as of thirty days before commencement of the solicitation for the merger. For a business combination such as an amalgamation, where there is no surviving acquiring company and the securities will be issued by a successor company to all participating companies, the calculation would be based on U.S. holder information available as of thirty days before commencement of the business combination, but applied on a pro forma basis as if measured immediately after completion of the business combination (i.e., no more than 10 percent of the class of securities of the successor company may be held by U.S. holders, as if measured immediately after completion of the business combination).

104. Id.; Greene et al., supra note 48, at 7-34. See also Cross-Border Reproposing Release, Exchange Act Release No. 40,678, supra note 1, at 81,058.
107. 17 C.F.R. § 230.800(a), (c).
(b) When calculating the number of subject securities outstanding (the denominator), and the number of subject securities held by U.S. holders (the numerator), the bidder includes securities underlying ADRs (or GDRs) convertible or exchangeable into the subject securities, but excludes: (i) other securities that are convertible or exchangeable into the subject securities (e.g., warrants, options, and convertible securities); (ii) securities held by any person (whether U.S. or foreign) that holds more than 10 percent of the subject securities; and (iii) securities held by the bidder (or bidding group).\(^{111}\)

(c) The bidder must use the "look through" method of calculating record ownership in Rule 12g3–2(a) under the Exchange Act, except that its inquiry as to the amount of securities held in accounts of U.S. residents may be limited to voting securities held of record by broker-dealers, banks, and other nominees located in: (i) the United States, (ii) the target company's jurisdiction of incorporation (or that of each participant in a business combination), and (iii) the primary trading market for the subject securities, if different than the target company's jurisdiction of incorporation;\(^{112}\)

(d) If, after reasonable inquiry, the bidder cannot obtain information from the nominee about the amount of securities represented by accounts of U.S. residents, including where the nominee's charge for supplying this information would be unreasonable, the bidder may presume that the customers are residents of the jurisdiction where the nominee has its principal place of business;\(^{113}\) and

(e) The bidder must count securities as beneficially owned by U.S. residents as stated in beneficial ownership reports that are provided to the target or filed publicly, whether in the United States or in other countries (e.g., in the home jurisdiction), and based on beneficial ownership information otherwise provided to the target or bidder.\(^{114}\)

Like the Tier I and Tier II tender offer exemptions, under Rule 802, if a bidder commences an exchange offer (or business combination) during an ongoing exchange offer (or business combination) for securities of the same class, the subsequent bidder may use Rule 802 provided that all the conditions of the exemption are met by the subsequent bidder, other than the limitation on U.S. ownership. Thus, if the initial bidder relied on Rule 802 to make its tender offer, a subsequent competing bidder would not be subject to the 10 percent ownership limitation condition of Rule 802. This rule is intended to provide a level playing field for competing offers. However, if the initial bidder relied on the Tier I exemption, but did not also rely on Rule 802, a subsequent competing bidder could not use Rule 802 without complying with the 10 percent ownership limitation of the rule (i.e., the subsequent bidder would have to comply with all the conditions of Rule 802).\(^{115}\)


\(^{115}\) The definition of "U.S. holder" under Rule 802 is basically the same as that under the Tier I (and Tier II) exemption, and, therefore, is discussed in greater detail in Part II.A above.
For an unsolicited or "hostile" exchange offer by a third-party (i.e., an exchange offer by a person other than the target company or an affiliate of the target, where the exchange offer is not made under an agreement, whether written or unwritten, with the target), the bidder is entitled to the same presumptions concerning the status of the target and the level of U.S. ownership as under the Tier I and Tier II exemptions. Consequently, the target will be presumed to be a foreign private issuer and U.S. holders will be presumed to hold 10 percent or less of the outstanding subject securities, unless:

(a) The aggregate trading volume of the subject class of securities on U.S. securities exchanges, in NASDAQ, or in the OTC market, as reported to the NASD, over the twelve-calendar-month period ending thirty days before commencement of the exchange offer, exceeds 10 percent of the worldwide aggregate trading volume of that class of securities over the same period;

(b) The most recent annual report or other annual information filed or submitted by the target or its security holders with securities regulators in the home jurisdiction or elsewhere (including with the SEC) indicates that U.S. holders hold more than 10 percent of the outstanding subject class of securities; or

(c) The bidder knows, or has reason to know, from other sources, that the level of U.S. ownership exceeds 10 percent of the subject securities.'

The Rule 802 exemption is available to both U.S. and foreign bidders, regardless of the domicile or reporting status of the bidder, and regardless of whether the bidder is the issuer of the securities being offered or a third-party bidder. Further, the exemption is available regardless of the type of securities offered in the transaction (i.e., the offered securities may be debt or equity securities, convertible or nonconvertible). Therefore, the exemption permits bidders to offer debt securities in an exchange offer (or business combination) for the target company's equity or debt securities. In addition to being exempt from registration

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116. 17 C.F.R. § 230.802(c); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,549 & n.55. These presumptions are discussed further in Part IIA above.

117. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,550, 82,552 n.74, 82,554 & n.80. The definitions of "home jurisdiction" and "United States" under Rule 802 are the same as those under the Tier I and Tier II exemptions. 17 C.F.R. § 230.800({o, q). These definitions are discussed in Part IIA above.

Rule 802 is not available for exchange offers (or business combinations) by an investment company registered or required to be registered under the Investment Company Act, other than a registered closed-end investment company. General Note 9 to Securities Act Rules 800-802, 17 C.F.R. §§ 230.800-802. Both foreign and U.S. bidders excepted from the definition of "investment company" under the Investment Company Act may use Rule 802, so long as their use of the rule is consistent with their being unregistered under the Investment Company Act. For example, foreign private issuers that can offer their securities publicly in the United States under a rule, such as Rule 3a-6 under the Investment Company Act (which generally exempts foreign banks and insurance companies from the definition of investment company under the Investment Company Act), or under an individual exemptive order under the Investment Company Act may use Rule 802. However, bidders relying on § 3(c)(1) or § 3(c)(7) of the Investment Company Act for an exception from the definition of investment company may not offer their securities publicly in the United States. Thus, their use of Rule 802 would be inconsistent with their being unregistered under the Investment Company Act. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,551 n.68; Cross-Border Reproposing Release, Exchange Act Release No. 40,678, supra note 1, at 81,079 & nn.128–129.
under the Securities Act, debt securities issued under Rule 802 are exempt from the requirements of the Trust Indenture Act, whether or not the securities are issued under an indenture.119

Rule 802's exemption from Securities Act registration covers only the issuer of the securities and the transaction in which the securities are exchanged by the issuer, not the securities themselves. Consequently, Rule 802 does not provide an exemption to an affiliate of the issuer or to any other person for resales of the issuer's securities. Resales of those securities in the United States are permissible only if the securities are registered under the Securities Act or an exemption from registration is available. Securities acquired by a U.S. investor in a Rule 802 transaction are "restricted securities" under Rule 144(a)(3) under the Securities Act to the extent that the subject securities were restricted securities in the hands of that investor before the Rule 802 transaction (e.g., because they were acquired by that investor in a private placement).120 Conversely, securities acquired by an investor in a Rule 802 transaction are unrestricted if the subject securities were unrestricted in the hands of that investor before the Rule 802 transaction.121 In the latter case, the securities acquired in the Rule 802 transaction are freely tradeable by security holders that are not affiliates of the issuer, provided they are not participating in the offer under circumstances where they could be deemed statutory "underwriters" within the meaning of section 2(a)(11) of the Securities Act.122 Securities acquired by affiliates of the issuer in a Rule 802 exchange offer are "control" securities as affiliates are subject to volume restrictions on the resales of their securities under Rule 144(e)(1) under the Securities Act.123

Rule 802 provides an exemption only from the registration provisions of the Securities Act and not the anti-fraud, anti-manipulation, civil liability, or other provisions of the U.S. securities laws, which still apply.124 Similarly, Rule 802 does not affect a bidder's need to


Under Rule 144(d) under the Securities Act, the holding period for restricted securities acquired in a Rule 802 transaction depends on the nature of the transaction. For restricted securities acquired in an issuer exchange offer not involving any additional cash investment, the investor may "tack" the holding period for the tendered restricted security to the holding period for the new security, and thus will calculate the holding period from the time it originally acquired the tendered security from the issuer or an affiliate of the issuer. However, the holding period for restricted securities acquired in a third-party exchange offer begins with the issuance of those securities in the Rule 802 transaction. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,549 n.56.

121. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,549. Thus, in an exchange offer (or business combination) under Rule 802, the proportion of restricted to unrestricted securities will be based on the securities tendered or exchanged by the holders. Id.
122. Id. at 82,549 & n.57 (citing Securities Act § 2(a)(11), 15 U.S.C.A. § 77b(a)(11)).
comply with the securities or broker-dealer registration requirements of the Exchange Act or any state laws concerning the offer and sale of securities. Rule 802 is not available for any transaction or series of transactions that technically complies with the exemption, but is part of a plan or scheme to evade the registration requirements of the Securities Act. Offerings exempt under Rule 802 will not trigger Exchange Act reporting under section 15(d) of the Exchange Act nor will they disqualify the issuer from using the Rule 12g3-2(b) information-supplying exemption for foreign private issuers from registration and reporting under section 12(g) of the Exchange Act unless the acquired company was a reporting company. Finally, securities issued under Rule 802 would not be integrated with other exempt offerings by the bidder.

To qualify for the Rule 802 exemption, several conditions must be met. First, as discussed above, except for an exchange offer (or business combination) commenced during a prior exchange offer (or business combination) made under Rule 802, no more than 10 percent of the subject class of securities may be held by U.S. holders.

Second, subject to one exception, U.S. holders must be permitted to participate in the exchange offer (or business combination) on terms at least as favorable as those offered to foreign holders. Under this exception, where a U.S. state or jurisdiction does not provide an exemption comparable to Rule 802, thereby requiring registration or qualification, the bidder may exclude security holders in that state or jurisdiction if a cash-only alternative is not being offered in any other state or jurisdiction (whether inside or outside the United States). However, if a cash-only alternative is being offered anywhere, the bidder must offer the same cash-only alternative to security holders in any U.S. state or jurisdiction that would require registration or qualification.

126. General Note 2 to Securities Act Rules 800–802, 17 C.F.R. §§ 230.800-.802. For example, if the exchange offer is a sham conducted solely as a pretext for distributing securities in the United States, Rule 802 would not be available. A second example would be when an initial offer is commenced solely as a pretext for making a subsequent offer automatically eligible for the exemption. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,548 & n.51. A third example would be when a bidder excludes U.S. security holders from an exchange offer made in a foreign jurisdiction when U.S. ownership exceeds 10 percent (Tier II) and then later extends the offer to U.S. security holders when U.S. ownership falls to 10 percent or below (Tier I).
128. See General Note 7 to Securities Act Rules 800–802, 17 C.F.R. §§ 230.800-802; Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,548 n.49. Thus: (a) unregistered offers and sales made outside the United States under Regulation S would not affect contemporaneous offers and sales made in compliance with Rule 802, and (b) a transaction that complies with Rule 802 would not be integrated with offerings exempt under other provisions of the Securities Act, even if undertaken contemporaneously.
129. 17 C.F.R. § 230.802(a)(1).
Third, while Rule 802 does not require that specific information be sent to U.S. security holders, if the bidder disseminates any document or other information concerning the exchange offer (or business combination) to security holders in the foreign target company's home jurisdiction, it must disseminate copies of that information (and any amendments) to U.S. security holders in English on at least a comparable basis to that provided to home jurisdiction security holders.\footnote{132} If the bidder disseminates the information solely by publication in the home jurisdiction, it must publish that information in the United States in a manner reasonably calculated to inform U.S. security holders of the offer.\footnote{133} Of course, the bidder may always mail the information to U.S. security holders.\footnote{134} The bidder must provide the information to U.S. security holders when it provides the information to home jurisdiction security holders.\footnote{135} A legend must be included in any information the bidder disseminates to U.S. security holders stating, among other things, that the exchange offer (or business combination) is being conducted under foreign disclosure requirements, and that those requirements may differ from U.S. disclosure requirements, including financial statement requirements.\footnote{136} Further, the bidder must submit to (but not file with) the SEC for notice purposes, under cover of Form CB, a copy of any information (and any amendments) in English that it disseminates to security holders in the exchange offer (or business combination). Form CB must be submitted no later than the first business day after dissemination. A foreign company also must file with the SEC a Form F-X, appointment of agent

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

17 C.F.R. § 230.802(b).

A U.S. issuer incorporated in the United States may tailor this legend so that it is not confusing or misleading. If there are no risks associated with enforcing claims under the federal securities laws against the bidder in the United States, then the legend need not include this risk. July 2000 Telephone Interpretations, Cross-Border Release: Release No. 33-7759, October 22, 1999, C. Rules 801 and 802, Question 2, at 26, available at http://www.sec.gov/offices/corpfin/phonits3.htm.\footnote{137}

If the bidder disseminates the information electronically, the legend must be presented in a manner reasonably calculated to draw attention to it. Exchange Act Form CB, supra note 48, at Part I.
for service of process in the United States, with Form CB. Thus, instead of filing a registration statement on Form F-4, F-1, S-4, or S-4, a bidder relying on Rule 802 will submit Form CB and, if a foreign company, file Form F-X, which are much less burdensome to prepare than a registration statement. 137

E. INTERNET DISCLOSURE

The exemptions discussed above (and those discussed below, for issuer tender offers by foreign private issuers) do not limit the use of the Internet to publish offering materials and other information about the international transaction. 138 However, when offering materials must be disseminated directly to U.S. security holders (e.g., in a Tier II offer subject to Regulation 14D or when offering materials are mailed in the home jurisdiction in a Tier I offer), Internet dissemination of the offering materials does not, alone, constitute adequate dissemination under the exemptions. 139 If a bidder publishes the materials in its home jurisdiction, posting the materials on its Web site does not constitute adequate publication in the United States. Electronic dissemination can satisfy a dissemination requirement only if conducted in a manner consistent with the guidance provided in the SEC's 1995 release on electronic dissemination, including the requirement to obtain the U.S. holder's consent to receive the mandated materials by electronic means or other evidence of delivery. 140

Additionally, as discussed immediately below, the SEC has provided guidance on when materials relating to an offshore tender offer, business combination, or rights offering can be posted on the Internet without triggering U.S. tender offer or securities registration requirements for that offering. 141 In providing this guidance, the SEC noted that while the exemptions for international tender offers, business combinations, and rights offerings are intended to facilitate the inclusion of U.S. security holders in those transactions (and not to provide a means to avoid U.S. jurisdiction), U.S. security holders would benefit from timely and reliable information about foreign corporate actions, even if they are unable to participate in the transactions. 142

1. General Approach

The posting of information on a Web site may constitute an "offer" of securities under the U.S. securities laws. In a 1998 release (the "Offshore Internet Offerings Release"), the SEC clarified when the posting of materials on Internet Web sites will not be considered an offer or soliciting activity in the United States under the registration requirements of the federal securities laws. In that release, the SEC stated that offering materials posted on

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137. See 17 C.F.R. § 230.802(a)(3)(i); Exchange Act Form CB, supra note 48, at Part I, Item 1, Part III(1) ¶ 7541; Exchange Act Form F-X, supra note 53, at 1(g), II(E) ¶ 7096; Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,551, 82,559, 82,561. Forms CB and F-X are discussed further in Part II.A above.

138. Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,555. The Internet materials must be filed or submitted with, or as an amendment to, the Schedule TO or the Form CB, when applicable. Id. at 82,555 n.87.

139. Id. at 82,555. See Regulation M-A Adopting Release, Exchange Act Release No. 42,055, supra note 1, at 82,592-93.


142. Id.

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a Web site will not be viewed as an “offer,” “general solicitation,” or “directed selling efforts” in the United States if the bidder implements precautionary measures reasonably designed to ensure that the Internet offer is not targeted to persons in the United States or to U.S. persons. When a bidder prominently discloses that the offer is being made to countries other than the United States and implements adequate measures reasonably designed to guard against sales in the offshore Internet offer to persons in the United States or to U.S. persons, the SEC will not view the offer as targeted to persons in the United States or to U.S. persons. Therefore, the SEC will not treat the offshore Internet offer as occurring in the United States for purposes of Securities Act registration.  

Generally, a bidder conducting an offshore tender offer may rely on the guidance in the Offshore Internet Offerings Release. Further, as discussed immediately below, the SEC has provided additional guidance as to what constitutes adequate precautions to prevent participation by persons in the United States or U.S. persons in offshore tender offers and similar transactions. What constitutes adequate measures depends on the facts and circumstances of the situation. These procedures are nonexclusive; other procedures sufficient to guard against sales to persons in the United States or to U.S. persons also may be used to demonstrate that the offer is not targeted at the United States.

2. Offshore Tender Offers, Rights Offerings, and Business Combinations on the Internet

Posting materials relating to tender offers (and rights offerings) on the Web site of the bidder or target company, or a third party, presents special problems not present in public underwritten offerings. U.S. holders of the target securities already are familiar with the target and its securities and are more likely to be alerted immediately to the posting of offering materials. Investors may either monitor the target’s Web site or use a search service to alert them to any materials posted on the Internet relating to the target. Also, because of their existing investment in those securities, U.S. investors are more likely to have an incentive to find indirect ways to participate in the offer, even though the offering materials state that the offer is not being made in the United States. As a result, bidders using a Web site to publicize their offer should take “special care” that it is not used as a means to induce indirect participation by U.S. holders of those securities. One way in which a bidder can take special care to prevent sales to U.S. holders is, in responding to inquiries and processing letters of transmittal, to obtain adequate information to determine whether the holder is a person in the United States or a U.S. person. A second way in which a bidder can take such special care is to obtain representations by the investor, or anyone tendering on its behalf, that the investor is not a person in the United States or a U.S. person. Similarly, in disseminating the consideration to tendering investors, special care should be taken to avoid mailing the cash or securities into the United States.


145. Id. at 82,556.

Despite the use of disclaimers and the implementation of precautionary measures against accepting tenders (or the exercise of rights) from the United States, a web site posting could be viewed as an offer in the United States if the content of the web page clearly is designed to induce U.S. investors to find an indirect way to participate in the offer through offshore nominees or other means (i.e., bidders may not do indirectly what they claim not to be doing directly).\textsuperscript{147}

In many cases, even though the offering materials disseminated outside the United States state that the offer is not being made in the United States, the bidder will permit U.S. institutional investors to participate either under Regulation S for offers and sales taking place outside the United States,\textsuperscript{148} or as a private or limited placement under section 4(2) of the Securities Act or other exemption from registration.\textsuperscript{149} In the Offshore Internet Offerings Release, the SEC concluded that a posting of offering materials on a Web site is not necessarily offering activity in the United States, even though the Web site is accessible by investors in the United States. This conclusion was premised on the implementation of measures both to prevent the targeting of U.S. investors and to prevent actual sales to persons in the United States or to U.S. persons in the offshore offer. A web site accessible in the United States may not be used to entice U.S. investors to participate in the offering offshore. Accordingly, reliance on Regulation S to permit participation by U.S. persons offshore is inappropriate for tender offers posted on an unrestricted Web site.\textsuperscript{150}

3. U.S. Exempt Component

The Offshore Internet Offerings Release recognized that a private offering in the United States may simultaneously accompany the offshore Internet offering. In that case, special precautions must be instituted to assure that the Internet offering is not used as a “general solicitation” to find qualified investors for the private offering (because a general solicitation for investors in a private offering is prohibited by section 4(2) of the Securities Act and Regulation D thereunder). Likewise, to the extent a bidder conducting an offshore exchange offer (or an issuer conducting an offshore rights offering) on the Internet wants to extend the offer to persons in the United States in a private offering, means must be in place to provide reasonable assurance that the Web site is not used to solicit U.S. investors for the private U.S. offering. Measures to assure that the U.S. participants did not learn about the offering from the Web site include:

(a) Not placing U.S. investors that respond to the offshore Internet offering in the U.S. private offering;

\textsuperscript{147} Id.
\textsuperscript{149} Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,556. Exchange offers for securities subject to § 14(d) of the Exchange Act may not be made in the United States on a private offering basis without violating the all-holders provision of Rule 14d-10. Under the all-holders provision of Rule 14d-10, a tender offer for securities subject to § 14(d) must be open to all security holders of the class of securities subject to the tender offer. Because an exchange offer made in the United States on a private offering basis would not be open to all security holders of the class of securities subject to the offer, the offer would violate Rule 14d-10 if the offer was for securities subject to § 14(d). See 17 C.F.R. § 240.14d-10(a)(1); Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,556 n.91.
\textsuperscript{150} Cross-Border Adopting Release, Exchange Act Release No. 42,054, supra note 1, at 82,556.
(b) Extending the U.S. offer only to U.S. investors that were solicited before, or independ-ently from, the posting of offering materials on the Internet;
(c) Using separate contact persons for the Internet solicitation from those used for the U.S. offering; and
(d) Not referring to the private U.S. offering in the web site materials, except to the extent required by foreign law.\textsuperscript{151}

These measures are nonexclusive; other procedures sufficient to guard against sales to persons in the United States or to U.S. persons also can be used to demonstrate that the Web site is not used to solicit U.S. investors for the private U.S. offering.\textsuperscript{152}


In the Offshore Internet Offerings Release, the SEC expressed special concerns with U.S. issuers' use of the Internet to conduct a purportedly offshore Internet offering. The SEC stated that a U.S. issuer may not use a Web site to disseminate offering materials, unless access to the site is limited to non-U.S. persons. This position was based on: (1) the potential for abuse when a U.S. issuer purports to rely on Regulation S to conduct an offering solely offshore, and (2) the SEC's approach under Regulation S to put offshore unregistered offerings by U.S. issuers on the same regulatory footing as private placements.\textsuperscript{153}

In light of the exemptions for international tender offers discussed above, the SEC believes that there will be very limited circumstances where a U.S. bidder would have a reason to exclude U.S. holders of the foreign target company from a tender offer. At a minimum, a U.S. bidder purporting to extend an Internet tender offer solely to non-U.S. investors should likewise limit access to the Web site to non-U.S. persons.\textsuperscript{154}

\textsuperscript{152} Id. at 82,557. See also Greene et al., supra note 48, at SA3–10 n.25 (opining that because security holder participation in business combinations is not voluntary, general solicitation prohibitions that result in the need for special precautions in private placements generally are less relevant in business combinations, and, therefore, for business combinations, the ability to establish the availability of a private placement exemption should not depend on instituting the kind of special precautions described above for private placements generally).
\textsuperscript{154} Id.