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Tender Offer Considerations for Cash Repurchases and Exchange Offers

A key consideration in developing any liability management strategy is the extent to which the SEC's tender offer rules apply to contemplated transactions, given that these rules can substantially affect the manner in which a transaction is conducted, the timing of the transaction, as well as the issuer's ability to conduct other transactions in its securities around the time of the tender offer. The tender offer rules can apply when a company is offering securities and/or cash for its outstanding securities, and the level of regulation of the offer (in terms of timing and mandated procedural protections) varies depending on the type of security that is the subject of the offer. In the case of exchange offers, the tender offer rules may apply in addition to the requirement that the issuer must either register the transaction or meet the conditions for an exemption under the Securities Act of 1933, as amended (the "Securities Act"). We discuss other federal securities law and tax considerations for liability management transactions in our News Bulletin titled "Liability Management: Is Now the Time to Rebalance Your Balance Sheet." In this news bulletin, we focus on the applicability of tender offer rules to potential liability management alternatives, including cash tender offers and exchange offers for outstanding securities.[1]

I. Tender Offer Requirements

A. Defining the Tender Offer

The comprehensive regulation of tender offers came about with the enactment of the Williams Act in 1968. The Williams Act and the SEC's implementing regulations are designed to require the dissemination of material information about a tender offer, while providing sufficient procedural protections so that security holders get the opportunity to consider the disclosure when making a decision about whether to tender their securities in the offer. The tender offer rules apply in the case of a third-party tender offer for the securities of another issuer, as well as to a tender offer by an issuer for its own securities.

The term "tender offer" is not specifically defined in the statute or in the SEC's regulations. The lack of a specific definition has permitted the SEC and the courts to apply tender offer rules to a broad range of transaction structures. The analysis of whether an offer constitutes a tender offer begins with the often-cited "eight factor" test cited in the case of *Wellman v. Dickinson*[2]:

1. An active and widespread solicitation of public shareholders for the shares of an issuer;

2. A solicitation is made for a substantial percentage of the issuer's securities;

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[1] This News Bulletin does not address tender offer rules applicable to third-party tender offers for an issuer's securities, such as Rules 14d-1 through 14d-11.
[2] 475 F. Supp. 783, 823–24 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (2d. Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983). *See also SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985).

3. The offer to purchase is made at a premium over the prevailing market price;

4. The terms of the offer are firm rather than negotiable;

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

6. The offer is open only for a limited period of time;

7. The offeree is subjected to pressure to sell his or her security; and

8. Public announcements of a purchasing program concerning the target issuer precede or accompany a rapid accumulation of large amounts of the target issuer's securities.

These eight factors need not all be present for a transaction to be deemed a tender offer, and the weight given to each element varies with the individual facts and circumstances. While these factors were cited in the context of an offer for equity securities, the principles would equally apply to tender offers involving debt securities or equity securities other than common stock. The eight factor test may be applied both in the context of third-party offers, as well as offers by an issuer for its own securities.

Courts have also applied a "totality of the circumstances" test in determining whether a transaction involves a tender offer that should be subject to the statutory requirements and the SEC's rules. In this context, the courts have examined whether, in the absence of disclosure and procedures required under the tender offer rules, there will be a substantial risk that the offeree will lack the information needed to make an investment decision with respect to the offer.[3] The SEC Staff has historically focused on whether a tender offer involves an investment decision on the part of the offeree, particularly where the protections afforded by the tender offer requirements would appear to be necessary based on the nature of the transaction.

B. Requirements Applicable to All Tender Offers

Section 14(e) of the Securities Exchange Act of 1934 (the "Exchange Act") is an antifraud provision that establishes the "baseline" for tender offer regulation. Section 14(e) prohibits an offeror from making any untrue statement of a material fact, or omitting to state any material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Section 14(e) also prohibits any fraudulent, deceptive or manipulative acts in connection with a tender offer. Section 14(e) applies to cash tender offers, as well as to exchange offers subject to the tender offer requirements.

Pursuant to the authority specified in Section 14(e), the SEC has adopted Regulation 14E.[4] Regulation 14E specifies requirements applicable to all tender offers, and for those tender offers where additional requirements apply (such as tender offers for equity securities), the requirements of Regulation 14E must still be satisfied. Regulation 14E applies to cash tender offers, as well as exchange offers subject to the tender offer requirements. In addition, Regulation 14E applies to both third-party tender offers as well as issuer tender offers.

[3] *See Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 848-49 (2d Cir. 1986), *cert. denied*, 479 U.S. 987 (1986) (citing *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47 (2d Cir. 1985)).
[4] Regulation 14E applies to tender offers for any securities other than "exempt securities" as defined by Section 3(a)(12) of the Exchange Act. As a result, the rules that comprise Regulation 14E apply to tender offers for debt securities, equity securities, and the securities of companies that do not have a class of securities registered under Section 12 of the Exchange Act or are otherwise required to file reports under the Exchange Act.

1. What is Required by Regulation 14E?

Regulation 14E sets forth certain requirements for tender offers that must be carefully followed throughout the course of an offer. These requirements seek to prevent practices that would be deemed fraudulent, deceptive or manipulative acts in connection with a tender offer. Regulation 14E requires that:

- A tender offer must be held open for at least 20 business days;
- The percentage of the class of securities being sought or the consideration being offered may not be increased or decreased unless the tender offer remains open for at least 10 business days from the date that the notice of such increase or decrease is first published or sent or given to security holders, subject to certain exceptions;
- The offeror promptly pay the consideration, or return tendered securities, upon termination or withdrawal of the tender offer;
- Public notice be provided in connection with the extension of a tender offer, and such notice must include disclosure of the amount of securities already tendered;
- The issuer subject to a tender offer disclose to its security holders its position with respect to the offeror's tender offer;
- Certain trading be avoided when a person is in possession of material nonpublic information relating to the tender offer;
- Tendering persons must have a net long position in the subject security at the time of tendering and at the end of the proration period in connection with partial tender offers (and not engage in "short-tendering" and "hedged tendering" in connection with their tenders); and
- No covered person directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer, from the time of public announcement of the tender offer until the tender offer expires.

Each of these requirements is described in more detail below.

a. Minimum Offer Period

Rule 14e-1(a) provides that a tender offer must remain open for at least 20 business days from the date the tender offer commences.[5] Rule 14e-1(b) provides that the offer must also stay open for at least ten business days from the date a notice is first published or sent or given to the holders of the subject securities of an increase or decrease in: (i) the percentage of securities to be acquired pursuant to the tender offer (if the change exceeds two percent of the original amount); (ii) the consideration offered, without any *de minimis* exception; or (iii) any dealer-manager's solicitation fee. The SEC has stated that a tender offer subject only to Regulation 14E must remain open for a minimum of five business days for any other material change to the offer or waiver of a material condition.[6]

b. Prompt Payment

Rule 14e-1(c) provides that the offer must either pay the consideration offered, or return the securities tendered, promptly after termination or withdrawal, respectively, of the tender offer.

[5] Rule 14d-1(g) states that when "computing any time period under section 14(d)(5) or section 14(d)(6) of the Act or under Regulation 14D or Regulation 14E, the date of the event which begins the running of such time period shall be included." Therefore, the date on which the tender offer is first published or sent to holders of the subject securities is counted as the first day of the 20 business day period.
[6] *See* SEC Release No. 34-42055 (Oct. 22, 1999).

The SEC Staff has generally taken the view that "prompt payment" under Rule 14e-1(c) requires the payment of consideration or the return of tendered securities no later than three business days after the conclusion of the tender offer.

c. Extension of Offering Period

Rule 14e-1(d) provides that any extension of the offer period must be made by a press release or other public announcement by 9:00 a.m., Eastern Time, on the next business day after the scheduled expiration date of the offer, and the press release or other announcement must disclose the approximate number of securities tendered to date. If the securities are registered on one or more national securities exchange, the announcement must be made by the first opening of any one of such exchanges on the next business day following the scheduled expiration date of the tender offer.

d. Disclosure of Position Regarding the Offer

Rule 14e-2 requires that an issuer that has securities subject to a tender offer disclose to its security holders its position with respect to the offeror's tender offer, *i.e.*, whether the issuer recommends the offer, expresses no opinion with respect to the offer or is unable to take a position. The disclosure must be provided no later than ten business days after the tender offer is first disseminated to security holders. In the event of any material change in the disclosure, the subject company must promptly disseminate a statement to security holders noting the material change. Given that Rule 14e-2 is not expressly limited to third party tender offers, it is common for an issuer conducting an issuer tender offer to include in its tender offer materials a statement that the issuer makes no recommendation as to the tender.

e. Prohibited Trading

Rule 14e-3 contains an antifraud prohibition on activities of a person conducting a tender offer. If such person is in possession of material non-public information that he or she knows or has reason to know is non-public, and knows or has reason to know was acquired from the offering person, the issuer or any of its directors, officers or employees, it is unlawful for that person to purchase or sell or cause to be purchased or sold any of the securities that are the subject of the tender offer. The prohibition applies even if the trading does not occur in breach of a duty of trust or confidence. In the case of an issuer tender, an issuer must be careful not to conduct a tender at a time when it possesses material non-public information. Material non-public information for this purpose may include unreleased earnings, a potential change in an issuer's credit ratings or an unannounced merger. The issuer should, to avoid any issues, disclose any such material non-public information prior to commencing a tender offer.

f. Prohibited Transactions in Connection with Partial Tender Offers

Partial tender offers typically involve the risk to security holders that not all of the securities that the security holder tenders will be accepted in the tender offer (commonly referred to as "proration risk"). Rule 14e-4 prohibits security holders from engaging in the practice of "short tendering," which occurs when the security holder tenders more shares than they own in order to avoid or mitigate the proration risk, or "hedged tendering," which occurs when a security holder tenders securities but then sells a portion of their shares before the proration deadline to a person that could then tender those shares. Under Rule 14e-4, a tendering person must have a net long position in the subject security at the time of tendering and at the end of the proration period.

g. Prohibited Purchases Outside of a Tender Offer

Rule 14e-5 provides that, subject to certain exceptions, no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer. The prohibition in Rule 14e-5 applies from the time of public announcement of the tender offer until the tender offer expires, but does not apply to any purchases or arrangements to purchase made during the time of any subsequent offering period as provided for in Rule 14d-11, as long as the consideration paid or to be paid for the purchases or arrangements to purchase is the same in form and amount as the consideration offered in the tender offer.

For the purposes of Rule 14e-5, the term "covered person" is defined broadly to include: (i) the offeror and its affiliates; (ii) the offeror's dealer-manager and its affiliates; (iii) any advisor to any of the persons specified in paragraphs (i) and (ii) above, whose compensation is dependent on the completion of the offer; and (iv) any person acting, directly or indirectly, in concert with any of these persons in connection with any purchase or arrangement to purchase any subject securities or any related securities. "Subject securities" are defined for the purposes of Rule 14e-5 to include the securities or class of securities that are sought to be acquired in the transaction or that are otherwise the subject of the transaction.

The period during which purchases outside of the tender offer are prohibited runs from the potentially earlier date of "public announcement" as compared to commencement of the tender offer. The term "public announcement" is defined for the purposes of Rule 14e-5 as "any oral or written communication by the offeror or any person authorized to act on the offeror's behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer." Given the potentially broad reach of this definition, offerors must be very careful about what is stated in advance of any potential cash tender offer or exchange offer, particular when it is contemplated that purchases of subject securities or any related securities may occur in advance of commencement of the offer.

Exceptions to the Rule 14e-5 prohibition on purchases outside of the tender offer include:

- The exercise, conversion or exchange of related securities into subject securities, as long as the related securities were held prior to public announcement of the tender offer;
- Purchases or arrangements to purchase by or for a plan that are made by an agent independent of the issuer;
- Purchases during odd-lot offers;
- Purchases by or through a dealer-manager or its affiliates that are made in the ordinary course of business and made either on an agency basis not for a covered person, or as principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;
- Purchases or arrangements to purchase a basket of securities containing a subject security or a related security under specified conditions;
- Purchases or arrangements to purchase to cover a short sale or the exercise of an option by a non-covered person, if (i) the short sale or option transaction was made in the ordinary course of business and not to facilitate the offer; (ii) the short sale was entered into before public announcement of the tender offer; and (iii) the covered person wrote the option before public announcement of the tender offer;
- Purchases or arrangements to purchase pursuant to a contract, if an unconditional and binding contract was entered into before public announcement of the tender offer, and the existence of the contract and all material terms including quantity, price and parties are disclosed in the offering materials;
- Purchases or arrangements to purchase by an affiliate of a dealer-manager under specified conditions;
- Purchases by connected exempt market makers or connected exempt principal traders under certain conditions; and
- Purchases made during cross-border tender offers under specified circumstances.

2. What is Not Required by Regulation 14E?

Under Regulation 14E, an issuer is not required to file any tender offer documents with the SEC, and Regulation 14E does not prescribe any form requirements with respect to offering materials. Any offer to purchase, and other tender offer documentation, is subject, however, to the general antifraud provisions of the Exchange Act, notably Section 10(b), Rule 10b-5 and Section 14(e), and, therefore, may not contain any material misstatement or omission.

Regulation 14E does not specifically require that an offeror provide withdrawal rights to offerees.[7] Similarly, the proration, "best price," "all holders" and other provisions set forth in Section 14(d) and Rule 13e-4 of the Exchange Act are only applicable to tender offers conducted pursuant to Regulation 14D and Rule 13e-4, and do not apply to tender offers subject only to Regulation 14E.

C. Requirements Applicable to Issuer Tender Offers for Equity Securities

Pursuant to Rule 13e-4 under the Exchange Act, an issuer with equity securities registered under Section 12 of the Exchange Act or that is required to file periodic reports with the SEC pursuant to Section 15(d) of the Exchange Act is required, in connection with any tender offer for its own equity securities, to file a tender offer statement (on Schedule TO) and to make certain disclosures to offerees. Rule 13e-4 is intended to prevent fraudulent, deceptive or manipulative acts in connection with issuer tender offers.

In general, Rule 13e-4 imposes disclosure, filing, and procedural requirements on issuers and their affiliates in connection with issuer tender offers. For the purposes of this rule, the term "issuer tender offer" is defined as a tender offer for, or a request or invitation for tenders of, any class of equity security made by the issuer of that class of security or by an affiliate of that issuer. An soon as practicable on the commencement date of the issuer tender offer, the issuer or affiliate making the offer must comply with the filing, disclosure and dissemination requirements specified in the rule.

1. Applicability of Rule 13e-4 to Equity Securities

The term "equity securities" used in Rule 13e-4 is not defined in the rule. Section 3(a)(11) of the Exchange Act provides a general definition of the term "equity security," which includes "any stock or similar security; or any security future on any such security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of a similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security." Under the statute, the SEC has discretion to evaluate the "nature" of a security and to consider public policy implications in determining the characterization of the security. Based on this definition, the term "equity securities" for the purposes of the applicability of Rule 13e-4 includes debt securities convertible or exchangeable for equity securities.

In the past, the Staff has provided limited no-action letter relief in respect of offers that should be excluded from the application of Rules 13e-3 and 13e-4 based on whether the subject securities were deemed "equity securities" for the purposes of those rules. In a no-action letter to American Financial Corporation,[8] the Staff concluded it would not recommend enforcement action if, in reliance on an opinion of counsel, the issuer proceeded with an exchange offer relating to non-voting, non-participating, mandatorily redeemable preferred stock without compliance with either Rule 13e-3 or Rule 13e-4. Counsel to the issuer had concluded that, in economic

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[7] In tender offers for straight debt securities, it is standard practice to provide holders with withdrawal rights. These withdrawal rights typically expire after an initial period, often after the first ten business days. An issuer also should consider whether it should reinstate limited withdrawal rights following the occurrence of any material change in the terms of the tender offer or the waiver of a material condition.

[8] SEC No Action Letter, *American Financial Corporation* (Dec. 20, 1982).

substance, the preferred stock was equivalent to a debt security. The Staff later affirmed this view in a subsequent no-action letter issued to American Financial Corporation.[9] In between these two letters, the Staff issued no-action letter guidance to Republic New York Corporation.[10] In Republic New York Corp., the Staff concluded that it could not assure the company that it would not recommend enforcement action if the issuer were to undertake purchases of shares of its cumulative preferred stock without compliance with Rule 13e-3. The Staff will not necessarily take the same view today as was expressed in the American Financial Corporation letters with respect to preferred stock, particularly in situations where preferred stock which has debt-like characteristics has not been treated as debt for the purposes of matters such as compliance with the Trust Indenture Act of 1939 (the "Trust Indenture Act") and legality opinions.

On the other hand, the Staff has recently provided informal, oral advice that trust preferred securities are sufficiently "debt-like" so that tender offers for trust preferred securities would be subject to the requirements applicable to debt tender offers or exchange offers, and not the more restrictive requirements applicable to equity tender offers or exchange offers under Rule 13e-4. The Staff's position is predicated on the applicable instruments being qualified under the Trust Indenture Act.[11]

Further, in a no-action letter for BBVA Privanza International Limited and Banco Bilbao Vizcaya Argentaria, S.A.,[12] BBVA and Banco Bilbao proposed to make a cash tender offer for all of the outstanding Non-Cumulative Guaranteed Preference Shares, Series D of BBVA Privanza International (Gibraltar) Limited, including Preference Shares represented by American Depositary Shares. It was a condition to the tender that all such shares be validly tendered and not withdrawn. The intention was to price the tender offer based on a stated fixed spread over the yield on a specified benchmark U.S. Treasury security as of 2:00 p.m. New York time, on the second business day immediately preceding the expiration date of the tender offer (the 18th business day of the offer period).

BBVA and Banco Bilbao described that the tender offer would be made consistent with the principles established in prior no-action letters relating to formula pricing in issuer tender offers for *equity* securities, and that the offer would be substantially similar to the tender offers covered by no-action letters relating to the use of fixed spread pricing methodologies for non-convertible, investment grade debt tender offers.

The Staff stated that it would not recommend enforcement action under Rule 14e-1(b) against BBVA or Banco Bilbao if the tender offer uses the pricing mechanism described and if the tender offer was otherwise conducted in the manner represented.

In granting the requested relief, the Staff noted, in addition to the typical conditions for fixed spread transactions, that:

- the subject securities are represented as being valued by investors on the basis of their yield, taking into account the issuer's credit spread, compared to a benchmark yield, and the yield of the subject securities fluctuates in response to changes in prevailing interest rates;
- the final offer price will be set at least two trading days prior to the scheduled expiration of the offer; and
- the offerors will issue a press release to publicly announce the final offer price prior to the close of business on the pricing date.

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[9] SEC No Action Letter, *American Financial Corporation* (Mar. 9, 1989).
[10] SEC No Action Letter, *Republic New York Corporation* (Mar. 5, 1985).
[11] The Staff has previously indicated that "[the Trust Indenture] Act generally would apply . . . to preferred securities issued by a trust that represent an interest in debt issued by a single obligor." See SEC Division of Corporation Finance, *Compliance and Disclosure Interpretations*: Trust Indenture Act of 1939 (#101.04) (March 30, 2007), available at http://www.sec.gov/divisions/corpfin/guidance/tiainterp.htm.
[12] SEC No-Action Letter, *BBVA Privanza International Limited and Banco Bilbao Vizcaya Argentaria, S.A.*, (Dec. 23, 2005).

2. Filing Requirements

Unlike under Regulation 14E, Rule 13e-4 requires that an issuer[13] engaged in an issuer tender offer must file a tender offer statement on Schedule TO with the Commission as soon as practicable on the commencement date of the offer.[14] In addition, the issuer is required to file:

- Any of its written communications relating to the issuer tender offer, from and including the first public announcement, as soon as practicable on the date of the communication;
- An amendment to the Schedule TO reporting promptly any material changes in the information disclosed in the previously filed Schedule TO and amendments thereto;[15] and
- A final amendment to the Schedule TO reporting promptly the results of the issuer tender offer.

A significant amount of disclosure is required to be filed under cover of Schedule TO.[16] Most of the specific line item requirements are satisfied by reference to a separate Offer to Purchase or Offer to Exchange document that is filed as an exhibit to the Schedule TO. The information required by Schedule TO includes:

- A summary term sheet;
- Information about the issuer;
- The identity and background of filing persons;
- The terms of the transaction;
- Any past contacts, transactions and negotiations;
- The purposes of the transactions and plans or proposals;
- The source and amount of funds or other consideration for the tender offer;
- Interests in subject securities;
- Persons/assets retained, employed, compensated or used;
- Financial statements;
- Additional information;
- Exhibits; and
- To the extent applicable, information required by Schedule 13E-3.

In addition to the Schedule TO filing, an issuer conducting an issuer tender offer must file any pre-commencement written communications under cover of Schedule TO, marking the box on the cover page to note the status of the materials as pre-commencement communications.[17] Pursuant to Instruction 3 to Rule 13e-4(c),

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[13] The requirements of Rule 13e-4 applicable to issuers are also applicable to affiliates of the issuer. For the purposes of this discussion of Rule 13e-4, references made to the issuer also include affiliates of the issuer.
[14] For the purposes of Rule 13e-4, the term "commencement" means 12:01 a.m. on the date that the issuer has first published, sent or given the means to tender to security holders. The term "means to tender" includes the transmittal form or a statement regarding how the transmittal form may be obtained.
[15] Instruction 1 to Schedule TO provides that information previously disclosed in the Schedule TO may be omitted in an amendment disclosing a material change.
[16] At the time of making the initial Schedule TO filing, the issuer will be required to pay a filing fee computed in accordance with Rule 0-11 of the Exchange Act. If a fee has been paid under Section 6(b) of the Securities Act with respect to any of the securities issued in connection with the proposed transaction, then the required fee is reduced by that amount. Similarly, the fee required for a Securities Act registration statement would be reduced by the amount of any fee paid in connection with the Schedule TO filing.
[17] *See* Instruction 1 to Rule 13e-4(c). The filing person need not respond to the specific line items of Schedule TO when filing pre-commencement written communications, and no fee is required with the filing.

each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the tender offer statement when it becomes available because it contains important information, that the tender offer statement and other materials are available for free at the SEC's website, and identify which documents are available for free from the issuer.

If pre-commencement communications are made in connection with an exchange offer that is registered under the Securities Act, then the issuer can file the communications solely under Rule 425 under the Securities Act, and such communications will be deemed filed for the purposes of Rule 13e-4.

3. Disclosure Requirements

An issuer making an issuer tender offer under Rule 13e-4 must publish, send or give to security holders:

- the summary term sheet required by Item 1 of Schedule TO; and
- the information required by the remaining Schedule TO items for issuer tender offers, except for Item 12 (exhibits), or a fair and adequate summary of the information.

To the extent that there are any material changes to the information previously disclosed to shareholders, paragraphs (d)(2) and (e)(3) of Rule 13e-4 require that the issuer disclose those changes promptly to shareholders in a manner reasonably calculated to inform them of the change.

In the event that an the issuer disseminates the issuer tender offer by means of summary publication as discussed below, any summary advertisement used by the issuer must not include a letter of transmittal that would permit shareholders to tender securities, and the advertisement must disclose at least the following information:

- the identify of the issuer (or affiliate) making the tender offer;
- the material terms and purposes of the transaction, as specified in Items 1004(a)(1) and 1006(a) of Regulation M-A;
- instructions as to how shareholders can promptly obtain a copy of the disclosure statement required by Rule 13e-4(d)(1), at the issuer's expense; and
- a statement that the information contained in the disclosure statement, i.e., the Offer to Purchase or the Offer to Exchange, is incorporated by reference.

4. Dissemination Requirements

With respect to issuer tender offers in which the consideration offered consists solely of cash and or securities exempt from registration under Section 3 of the Securities Act, an issuer must disseminate the required disclosure to security holder by one or more of these methods: long form publication of the information, the use of security holder lists or through summary publication.

Rule 13e-4(e)(1)(i) provides that dissemination may occur by making adequate "long form" publication of the tender offer in a newspaper or newspapers on the commencement date of the issuer tender offer. For this purpose, the Instruction to paragraph (e)(1) specifies that adequate publication may require publication in a newspaper with a national circulation, a newspaper with a metropolitan or regional circulation, or a combination of the two, depending on the specific facts and circumstances.

Alternatively, Rule 13e-4(e)(1)(iii) permits publication of a summary advertisement in a newspaper or newspapers on the commencement date including the disclosures referenced above, and by mailing or otherwise furnishing promptly the Rule 13e-4(d)(1) disclosure statement and a transmittal letter to any security holder upon request.

Tender offer materials may also be disseminated by using security holder lists and security position listings. Under the procedures specified in 13e-4(e)(1)(ii), the materials may be distributed by:

- Mailing, or otherwise furnishing promptly, the disclosure required by Rule 13e-4(d)(1) to each security holder whose name appears on the issuer's most recent security holder list;
- Contacting each participant on the most recent security position listing of any clearing agency within the possession or access of the issuer, and inquiring of each participant as to the approximate number of beneficial owners of the subject securities held by the participant;
- Furnishing to each participant a sufficient number of copies of the Rule 13e-4(d)(1) disclosure statement for transmittal to the beneficial owners; and
- Agreeing to reimburse each participant promptly for its reasonable expenses incurred in forwarding the statement to beneficial owners.

In an exchange offer where the consideration consists solely or partly of securities that are registered under the Securities Act, then Rule 13e-4(e)(2) provides that the issuer must:

- File a registration statement containing all of the required information, including pricing information; and
- Deliver to shareholders a preliminary prospectus or a prospectus that meets the requirements of Section 10(a) of the Securities Act, along with a letter of transmittal.[18]

5. Material Changes

Rule 13e-4(e)(3) specifies that when a material change occurs in the information that the issuer has published, sent or given to security holders, then the issuer must promptly disseminate disclosure of the material change "in a manner reasonably calculated to inform security holders of the change."

In the case of a registered exchange offer, special timing provisions govern the dissemination of material changes when the issuer has disseminated a preliminary prospectus in accordance with Rule 13e-4(d)(2). Rule 13e-4(e)(3) specifies that the offer must remain open from the date on which the issuer disseminates material changes to the tender offer materials to shareholders, as follows:

- 5 business days for a prospectus supplement containing a material change other than price or share levels;
- 10 business days for a prospectus supplement containing a change in price, the amount of securities sought, the dealer's soliciting fee, or other similarly significant change;
- 10 business days for a prospectus supplement included as part of a post-effective amendment to the registration statement; and
- 20 business days for a revised prospectus when the initial prospectus was "materially deficient."

6. Procedural Requirements

Rule 13e-4(f) prescribes the manner in which issuers may conduct an issuer tender offer, including specific requirements with respect to the period during which the tender offer must remain open; the availability of

[18] Instruction 2 to Rule 13e-4(e)(2) provides that a preliminary prospectus cannot omit information under Rule 430 or 430A of the Securities Act. Instruction 3 to Rule 13e-4(e)(2) provides that when a preliminary prospectus is used and the issuer must disseminate material changes, the tender offer must remain open for the period specified in Rule 14d-4(d)(2). If a preliminary prospectus is used, tenders may be requested in accordance with Securities Act Rule 162(a), pursuant to Instruction 4 to Rule 13e-4(e)(2).

withdrawal rights; *pro rata* acceptance; any increases in consideration; prompt payment for or return of securities tendered; purchases outside of the tender offer; and the "all holders" and "best price" protections.

a. Offering Period

Rule 13e-4(f)(1)(i) specifies that, unless withdrawn, an issuer tender offer must remain open until expiration of:

- At least 20 business days from commencement of the issuer tender offer; and
- At least 10 business days from the date that notice of an increase or decrease in one of the following is first published, sent or given to security holders:
  - The percentage of the class of securities being sought;[19]
  - The consideration being offered (subject to no *de minimis* exception); or
  - The dealer's soliciting fee to be given.

b. Withdrawal Rights

Rule 13e-4(f)(2) provides that the issuer making an issuer tender offer must permit shareholders to withdraw securities tendered pursuant to the issuer tender offer:

- At any time during the period when the issuer tender offer remains open; and
- If tendered securities have not yet been accepted for payment, after the expiration of 40 business days from the commencement of the tender offer.

c. *Pro Rata* Acceptance

Rule 13e-4(f)(3) requires that the tender offer by the issuer or affiliate is for fewer than all of the outstanding equity securities of a class, and the number of securities tendered exceeds the number that the issuer is bound or willing to take up and pay for, the issuer must accept and pay for the securities as nearly as may be *pro rata*, disregarding fractions, according to the number of securities tendered by each security holder during the period that the offer remains open.

Rule 13e-4(f)(3) does not prohibit the issuer making an issuer tender offer from:

- Accepting all securities tendered by security holders who own no more than a specified number of shares less than one hundred and who tender all of their securities, before pro rating securities tendered by others; or
- Accepting by lot securities tendered by security holders who tender all of their shares and who elect to have all or none (or at least a minimum amount and none) accepted, if the issuer first accepts the securities tendered by persons who have not made such an election.

d. Increase in Consideration

Rule 13e-4(f)(4) requires equal treatment of security holders in the event of an increase in the consideration offered. If the issuer increases the consideration offered after the tender offer has commenced, then issuer must pay that increased consideration to all security holders whose tendered securities are accepted for payment.

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[19] An issuer may accept for payment up to an additional two percent of the class without triggering the additional 10 business days. For the purposes of this rule, the "percentage of the class" is calculated in accordance with Section 14(d)(3) of the Exchange Act.

e. Prompt Payment or Return

Under Rule 13e-4(f)(5), an issuer must either pay the consideration offered, or return the tendered securities, promptly after the termination or withdrawal of the tender offer.

f. Purchases Outside the Tender Offer

Rule 13e-4(f)(6) prohibits purchases outside of the tender offer. Until at least ten business days after the termination of the tender offer, the issuer and its affiliates cannot purchase – other than pursuant to the tender offer – any subject security, any security of the same class and series, or any right to purchase such securities. With respect to exchange offers, this prohibition applies to the purchases of any security being offered in the exchange offer, any securities of the same class and series, and any right to purchase such a security.

g. "All Holders" Requirement

Rule 13e-4(f)(8)(i) provides that the tender offer must be open to all security holders[20] of the class of securities subject to the tender offer.[21]

This "all-holders" provision would not prohibit an issuer or affiliate from excluding all security holders in a state where the tender offer is prohibited by administrative or judicial action under a state statute after a good faith effort to comply with the statute.

h. "Best Price" Requirement

Rule 13e-4(f)(8)(ii) requires that the consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.

Rule 13e-4(f)(10) specifies that the "best price" requirement does not prohibit more than one type of consideration being offered in a tender offer, provided that: (i) security holders have an equal right to elect among each of the types of consideration offered; and (ii) the highest consideration of each type paid to any security holder is paid to any other security holder receiving that type of consideration.

Under Rule 13e-4(f)(11), if the offer and sale of securities constitute consideration offered in the tender offer, and the issuer has made a good faith effort to register or qualify the offer and sale in a particular state but is prohibited by the appropriate authority of that state, the issuer may offer security holders in that state an alternative form of consideration. The alternative form of consideration need not be offered or paid to security holders in any other state.

7. Antifraud Provisions

Rule 13e-4(j) specifies antifraud requirements applicable to issuer tender offers, prohibiting issuers and affiliates, in connection with an issuer tender offer, from:

- Employing any device, scheme or artifice to defraud any person;
- Making any false statement of material fact or omission of material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading; or

[20] Rule 13e-4(a)(6) specifies that the term "security holders" means both holders of record and beneficial owners of securities of the class which is the subject of the tender offer. As a result, a tender offer open to only holders of record would not satisfy the "all holders" requirement.
[21] The SEC has indicated that a tender offer may be made for fewer than all outstanding securities, but all security holders must be eligible to accept the offer if they choose. *See* Release No. 34-23421 (July 11, 1986).

- Engaging in any act, practice, or course of business that operates or would operate as a fraud or deceit on any person.

Rule 13e-4(j) also states that, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative practices in connection with an issuer tender offer, it is unlawful for an issuer or affiliate to make an issuer tender offer unless it complies with the requirements of Rule 13e-4(b), (c), (d), (e), (f), and (j). In addition, the other antifraud and antimanipulation provisions of the Exchange Act would apply to an issuer tender offer, including Section 10(b) and Rule 10b-5 thereunder, as well as Section 14(e).

8. Exemptions

Certain transactions are exempt from the application of the rule under Rule 13e-4(h) from the issuer tender offer provisions. Specifically, Rule 13e-4 does not apply to:

- Calls or redemptions pursuant to the governing instrument;
- Offers to purchase evidenced by a scrip certificate, order form, or similar document that represents a fractional interest in a share of stock;
- Offers to purchase shares of dissenting shareholders in accordance with a statutory procedure;
- Tender offers subject to Exchange Act Section 14(d);
- Offers to purchase from owners of up to a specified number of shares less than 100, provided that the offer satisfies the “all holder” provisions of the rule with respect to shareholders who own a number of shares equal to or less than the specified number of shares (except that the issuer can exclude participants in certain plans for employees or security holders, and can exclude security holders who do not own their shares as of a specified date); and the equal consideration provisions of rule are satisfied or consideration paid is determined on the basis of a uniformly applied formula based on the subject security’s market price;
- Issuer tender offers made solely to effect a rescission offer, provided that: (1) the offer is registered under the Securities Act; and (2) the consideration equals the price paid by each security holder, plus legal interest if the issuer elects or is required to pay legal interest;
- Offers by closed-end management investment companies to repurchase equity securities under Investment Company Act Rule 23c-3;
- Issuer tender offers by a foreign private issuer under certain conditions relating to: (1) the maximum percentage of U.S. holders of the subject class of securities; (2) the equal treatment of U.S. holders and other holders; and (3) dissemination of informational documents; and
- Transactions exempted by the SEC, on written request or on its own motion, either unconditionally or subject to conditions.

An offer may qualify for the “Tier I” exemption from the tender offer rules if it can be established that 10% or less of the securities are held by U.S. resident holders, looking through to the beneficial owners. For the purpose of this exemption, holders of notes held in bearer form may be presumed to be outside the United States unless the issuer “knows or has reason to know that these securities are held by U.S. residents.” Under recently adopted amendments to the Tier I exemption, an offeror may calculate ownership by U.S. resident holders as of any date no more than 60 days before, and no more than 30 days after, the public announcement of the transaction, rather than as of the date that is 30 days prior to the publication of the offering document as was previously required. In situations where the offeror is unable to conduct the necessary analysis of beneficial holders within the 90-day period, the SEC now permits the use of a date not more than 120 days before the public announcement. Under the recently effective amendments, individual holders of more than 10% of the subject securities are no longer excluded for the purposes of calculating the level of U.S. ownership.

9. SEC Staff Review

When a Schedule TO is filed, the SEC Staff may review and comment on the disclosure in the Schedule TO, the Offer to Purchase or Offer to Exchange, and any other related documents, as well as review and comment on compliance with Rule 13e-4 and Regulation 14E. The Staff Office of Mergers & Acquisitions in the Division of Corporation Finance reviews the Schedule TO. Typically, the Staff tries to issue comment quickly (within 5-7 business days), because the tender offer is only required to be open for 20 business days. The Staff's comments may require that the issuer file amendments to the Schedule TO and disseminate changes in order to address the Staff's concerns.

II. Considerations for Liability Management Transactions

A. Debt versus Equity Tender Offers

The requirements of Rule 13e-4 result in significantly less flexibility for tender offers or exchange offers for convertible or exchangeable debt securities, common stock and preferred stock, when compared to tender offers or exchange offers for straight debt securities. For example, it is not possible for issuers to "sweeten" a tender offer or exchange offer for convertible or exchangeable debt securities, preferred stock or common stock with an "early tender premium" as is sometimes the case in tender offers or exchange offers for straight debt securities. Under this approach, holders that tender early in the offering period, typically within the first ten business days, may receive the "total consideration." Holders that tender after the early tender period terminates will receive lesser consideration for their securities. The early tender feature benefits the issuer because it may have greater visibility regarding the success of the tender offer. An issuer needs to be mindful that the falling away of the "premium" may, under certain circumstances, constitute a change in consideration that may require that the tender stay open for an additional ten days, as discussed above.

Moreover, in a straight debt tender offer, an issuer has the flexibility to choose to accept tenders of securities on a "first come, first served" basis, or offer limited or no withdrawal rights, or conduct a Dutch auction or modified Dutch auction for pricing purposes.

B. SEC Staff Relief for Investment Grade Debt Securities

The requirements of Regulation 14E may still be limiting for an issuer conducting a tender offer for straight debt securities. Specifically, if an issuer must keep the offer open for 20 business days or extend the offer period if there are any changes in the consideration or percentage sought, it can adversely affect the tender because the issuer is subject to market risk during this time. Most debt tender offers occur when interest rates are low – the issuer is trying to lower its cost of funds by retiring high interest rate debt securities with the proceeds from new securities issued at a lower rate, or a lower-interest rate credit facility. If interest rates decline during the offer period, an issuer will not retire as much debt and if rates increase, the retired debt will come at a higher price. Longer offer periods translate into increased uncertainty.

Because the SEC staff believes that issuer debt tender offers for cash for any and all non-convertible, investment grade debt securities may present considerations that differ from any and all or partial issuer tenders for a class or series of equity securities or non-investment grade debt, it consistently has granted relief to issuers of investment grade debt in the context of tenders for their debt securities. An issuer need not keep the tender open for 20 business days, provided the following conditions are met:[22]

[22] *See*, SEC No-Action Letter, *Salomon Brothers Inc.* (Mar. 12, 1986); SEC No-Action Letter, *Goldman Sachs & Co.* (Mar. 26, 1986); SEC No-Action Letter, *Merrill Lynch, Pierce, Fenner & Smith Inc.* (July 2, 1986).

- Offers to purchase were made for any and all of the investment grade debt, non-convertible debt of a particular series or class;
- The offer is open to all record and beneficial holders of that series or class;
- The offer is conducted so as to afford all record and beneficial holders of that series or class the reasonable opportunity to participate, including dissemination of the offer on an expedited basis in situations where the tender offer is open for a period of less than ten calendar days; and
- The tender offer is not being made in anticipation of or in response to other tender offers for the issuer's securities.

Following these no-action letters, investment grade debt issuers were no longer subject to the 10- and 20-business day requirements.

C. Modified Dutch Auctions

Typically, in its tender offer documents, an issuer will specify the amount of securities it is seeking to purchase, as well as the price at which it will purchase these securities (or the method of calculating the purchase price). However, in some cases, an issuer may specify the amount of securities to be tendered, but may set the price using a modified "Dutch auction" pricing structure. In this structure, the issuer sets a cascading range of prices at which a holder may tender its securities. The purchase price will be the highest price at which the issuer is able to buy all of the securities for which it has solicited a tender (or a smaller amount, if not all the securities are tendered). This price is often referred to the "clearing price."[23]

The SEC Staff has permitted tender offers to proceed without the issuer disclosing the range of prices in the tender offer documents, so long as the aggregate amount of securities to be purchased is disclosed (and the range of securities to be purchased if the offer were fully subscribed). Usually, the permitted price range is very narrow – often no more than 15% of the minimum price. In this regard, modified issuer Dutch auction tender offers have been permitted under Rule 13e-4, subject to several additional conditions:

- Disclosure in the tender offer materials reflects the minimum and maximum consideration to be paid;
- *Pro rata* acceptance occurs throughout the offer with all securities purchased participating equally in prorationing;
- Withdrawal rights are available throughout the offer;
- The issuer makes a prompt announcement of the purchase price, if determined prior to the expiration of the offer; and
- The purchase of all accepted securities is made at the highest price paid to any security holder under the offer.[24]

In prior no-action letter guidance, the Staff had noted its belief that issuers conducting modified Dutch auction tender offers could not satisfy the requirements of (then) Schedule 13e-4 by stating a range of shares to be sought

[23] Under the SEC's guidance, all security holders whose securities are accepted in a modified Dutch auction issuer tender offer subject to Rule 13e-4 must be paid the highest consideration paid to any other security holder whose securities are accepted. *See* Release No. 34-23421 (July 11, 1986). The Release also notes that "pure" dutch auctions are not permitted under Rule 13e-4, stating: "In a pure dutch auction cash tender offer, the bidder invites security holders to tender securities to it at a price to be specified by the tendering security holder, rather than at a price specified by the bidder. Securities are accepted, beginning with those for which the lowest price has been specified, until the bidder has purchased the desired number of securities."

[24] *See* Release No. 34-23421 (July 11, 1986) at note 64.

in the tender offer. In this regard, the Staff appeared to be concerned that an issuer would have discretion to select a number from within that range that might be purchased in the tender offer.[25]

More recently, in a recent no-action letter to Alliance Semiconductor Corporation,[26] the Staff considered a modified Dutch auction tender offer where the issuer suggested that the total number of securities may be disclosed in terms of the maximum number that can be purchased, subject to the number of shares tendered and at which price those shares are tendered. In the proposed tender offer, the Offer to Purchase was to state that the maximum number of shares was 10,909,090, and that if the offer was fully subscribed, the issuer would buy an amount of shares between 10,000,000 and 10,909,090, with exact number dependent on the terms of the offer, not a decision on the part of the issuer. As a result of this structure, the amount that would be purchased in the tender offer was determined as a function of the prices at which shares are validly tendered and the number of shares tendered. Alliance Semiconductor argued that Rule 13e-3(f)(1)(ii) would not require extending the offer for 10 days after the purchase price – and hence exact number of shares to be purchased – was determined, and that the disclosure of the range of shares presented would satisfy the requirement of Item 1004(a)(1)(i) of Regulation M-A to disclose the "total number and class of securities."

In providing its response that no Enforcement action would be recommended if the offer was conducted as described in the letter, the Staff particularly noted that:

- The total number and dollar value of securities being sought in the offer is disclosed in the offer materials as required by Item 1004(a)(1)(i) of Regulation M-A;
- The maximum number of shares that may be purchased in the offer is stated on the cover page of the offer to purchase;
- The offer to purchase discloses the range of shares that will be purchased if the offer is fully subscribed; and
- The exact number of shares to be purchased in the offer will be based on the purchase price established by the shareholders determined in accordance with the terms of the offer as disclosed in the offer to purchase.

D. Concerns with "Creeping" Tender Offers and Purchases Outside of the Offer

In certain circumstances, purchases of securities in the market or through negotiated transactions could be deemed to constitute a tender offer that is not in compliance with the rules described above. Further, when a tender offer commences around the time of open market or negotiated purchases, security holders could potentially object to the terms of the transactions outside of the tender offer.

Courts that have addressed the issue of tender offer "integration" have taken disparate approaches. Most cases have arisen in connection with claims of violations of the "best price" and "all holders" provisions applicable to tender offers, or violations of the prohibitions on purchases outside of a tender offer. Some courts have strictly construed the time frame of the tender offer to start with public announcement or commencement and end with withdrawal or termination, while others have adopted an approach of determining whether the questioned transaction was an integral part of the tender offer. More specifically, several courts have held that share purchases by the acquiror made in advance of a tender offer are not improper, because the tender offer rules are only applicable upon announcement or commencement of the tender offer.[27] Some courts, however, have taken a

[25] *See* SEC No-Action Letter, *Tektronix, Inc.* (June 19, 1987); SEC No-Action Letter, *Janet S. Thiele* (Dec. 21, 1987).
[26] SEC No-Action Letter, *Alliance Semiconductor Corp.* (Sept. 22, 2006).
[27] *See, e.g.*, *Lerro v. Quaker Oats Co.*, 84 F.3d 239, 257 (7th Cir. 1996); *Kahn v. Virginia Retirement Sys.*,13 F.3d 110, 113 (4th Cir. 1993); *Heine v. The Signal Companies, Inc.*, 1977 US Dist. LEXIS 17071 (S.D.NY 1977).

broader view in interpreting whether transactions occurring before or after the precise technical commencement and termination or withdrawal of the tender offer were considered part of the tender offer.[28]

Issuers must carefully structure any ongoing market purchases or negotiated acquisitions of securities so as to comply with the prohibitions on purchases outside of the tender offer in Rules 13e-4 and 14e-5. In this regard, it is often important to analyze whether the targeted securities in the outside purchases are of a separate class from the class of securities that are the subject of a tender offer. The term "class" is not defined specifically for the purposes of Rule 13e-4 and Regulation 14E, however the term has been defined for other purposes under the Exchange Act. In Section 12(g)(5) of the Exchange Act, the term "class" is defined to include "all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges." Further, the SEC has provided guidance regarding the determination of whether different series of preferred stock are the same "class" for the purposes of Rule 144A, stating that the test under Rule 144A to determine whether securities would be of the same class would be the same test as under Section 12(g)(5) of the Exchange Act and would be interpreted in the same manner.[29]

E. Regulation M

While Regulation M does not apply to investment grade non-convertible debt securities, it does apply to equity securities, non-investment grade debt and convertible debt. An issuer that engages in a tender offer must ensure that it complies with Regulation M. Rule 102 under Regulation M makes it unlawful for an issuer or its affiliates "to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period." This prohibition is intended to prevent an issuer from manipulating the price of its securities when the issuer is about to commence or is engaged in a distribution. If debt being exchanged in an exchange offer is convertible into the issuer's equity securities, under certain circumstances, repurchases of convertible debt securities could be deemed a forced conversion and, therefore, a "distribution" of the underlying equity security for Regulation M purposes.

F. Special rules for European Tenders

It may be the case that the holders of an issuer's debt securities are located in foreign jurisdictions. For instance, if an issuer sold its securities pursuant to Rule 144A in the United States and pursuant to Regulation S outside the United States. Many frequent debt issuers issue and sell their debt securities pursuant to Euro medium-term note programs or market and sell U.S. registered securities into the European Union ("EU") or other foreign jurisdictions. For these tenders, an issuer must not only focus on the various considerations described above, but also must be cautious that its tender does not violate any rules in the home country of its security holders.

In the EU, there are two directives about which an issuer should be concerned. First, The Market Abuse Directive ("MAD"). As its name suggests, MAD is intended to prevent abuses relating to insider trading. Similar to Regulation FD, MAD requires that an issuer announce without delay information directly concerning it. MAD applies to financial instruments admitted to trading on a regulated market or for which a request for admission to trading has been made. The statute is intended to address insider dealing, market manipulation and the dissemination of false or misleading information. Under MAD, an issuer should perform an analysis similar to that under Regulation FD – is the insider in possession of material non-public information. In the case of a debt tender, the terms of the transaction likely was announced, so an issuer need only consider whether it possesses other information that may be considered material.

In the EU, an issuer need also be mindful of anti takeover restrictions contained in Directive 2004/25/EC. This directive pertains to takeover bids for the securities of issuers governed by the laws of a member state, where all or

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[28] *See, e.g.*, *Millionerrors Investment Club v. General Electric Co. PLC*, 2000 Dist. Lexis 4803 (W.D. Pa. Mar. 21, 2000); *Perera v. Chiron Corporation*, 1996 US Dist. Lexis 22503 (ND. Cal. May 8, 1996); *Field v. Trump*, 850 F.2d 938 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1122 (1989).

[29] Release No. 33-6862 (Apr. 23, 1990).

some of the securities are admitted to trading on a regulated market. A takeover bid means a public offer (other than by the offeree issuer itself) is made to the holders of securities to acquire all or some of the securities with the objective of acquiring control. Though not directly applicable, the directive provides guidance that an issuer should follow in conducting a tender for its own securities. In particular, all holders must be treated equally and must have sufficient time and information to enable them to reach an informed decision.

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