

Tender Offer Rules and Schedules

Questions and Answers of General Applicability

Section 101. General Questions

Question 101.01

Question: An offeror conditions its obligation to complete its tender offer upon the occurrence or non-occurrence of certain events and discloses these conditions in its offer to purchase. May some of these conditions be determinable based on subjective criteria?

Answer: No. A tender offer may be subject to conditions only where the conditions are based upon objective criteria and otherwise not within the offeror's control. See Release No. 34-43069 (July 24, 2000). If an offeror could arbitrarily determine or control whether an offer condition has been triggered (e.g., by stating that determination of whether a condition has been triggered is in the offeror's "sole" discretion instead of its "reasonable" discretion), the offer would be illusory and may constitute a manipulative or deceptive act or practice under Section 14(e). Whether or not each condition has been triggered should therefore be objectively verifiable. Once a condition is determined to have been triggered under the objective criteria, however, the offeror can then lawfully decide, in its sole discretion, to assert or waive that condition. [March 17, 2023]

Question 101.02

Question: A tender offer is conditioned on receipt of regulatory approvals, such as receipt of permits from a state authority. The offeror further discloses that the conditions may be invoked, and the offer terminated, "regardless of the circumstances giving rise to such conditions, including any action or inaction by the offeror." Is inclusion of such a term at risk of constituting a manipulative or deceptive act or practice under Section 14(e)?

Answer: Yes. If an offeror may terminate an offer "regardless of the circumstances giving rise to such conditions," including its own actions or inaction, the offer, according to its terms, could be terminated at any time for any reason. Because such an offeror might intentionally fail to take the requisite steps to obtain the regulatory approvals, the offer may be illusory and thus undertaken in contravention of Section 14(e). [March 17, 2023]

Question 101.03

Question: An offeror issues a press release stating that the offer has been terminated "pursuant to the offer conditions." The press release does not specify which offer condition or conditions were triggered. Could the issuance of a press release without specifying the exact condition(s) upon which the offeror relied to terminate the tender offer constitute an omission of a material fact within the meaning of Section 14(e)?

Answer: Yes. The failure to disclose the specific basis for the termination of the offer may constitute a material omission under Section 14(e) and raises the possibility that the offer might have been illusory. [March 17, 2023]

Question 101.04

Question: Because Rule 14d-2 provides that commencement does not begin until the means of tendering have been given to security holders, would the staff review a Schedule TO filing that does not include a transmittal form, issue and clear comments, and then allow a bidder to disseminate their tender offer materials?

Answer: Yes. The staff, however, will give priority in its review to transactions that have already commenced. Because prompt review of a tender offer that has not commenced may be impracticable, the staff still encourages concurrent filing and dissemination of tender offer documents. Prospective bidders are reminded that Rule 14e-8 requires bidders to have a bona fide intent to commence a tender offer once a Schedule TO has been filed. In addition, if a bidder files a Schedule TO before commencing the offer, the materials should make it clear that the offer has not yet commenced in order to avoid confusing investors. Furthermore, the Schedule TO filed should be filed using EDGAR tag “SC TO-C,” and not EDGAR tag “SC TO-I” or “SC TO-T.” [March 17, 2023]

Question 101.05

Question: Does the determination of who is the “bidder” for purposes of Regulations 14D and 14E stop at the entity used to make the offer and purchase the securities?

Answer: No. Rule 14d-1(c)(1) also requires persons “on whose behalf” the tender offer is being made to be included as bidders. For instance, where a parent company forms an acquisition entity for the purpose of making the tender offer, both the acquisition entity and the parent company are bidders even though the acquisition entity will purchase all securities tendered. The staff views the acquisition entity as the nominal bidder and the parent company as the real bidder. They both should be named bidders in the Schedule TO. Each offer must have at least one real bidder, and there can be co-bidders as well. [March 17, 2023]

Question 101.06

Question: Does the fact that the parent company or other persons control the purchaser through share ownership mean that the entity is automatically viewed as a bidder?

Answer: No. Bidder status is a question that is determined by the particular facts and circumstances of each transaction. Determining who the bidder is requires consideration of the parent’s or control person’s role in the tender offer, including the following non-exclusive factors:

- Did the person play a significant role in initiating, structuring, and negotiating the tender offer?
- Is the person acting together with the named bidder?
- To what extent did or does the person control the terms of the offer?

- Is the person providing financing for the tender offer, or playing a primary role in obtaining financing?
- Does the person control the named bidder, directly or indirectly?
- Did the person form the nominal bidder, or cause it to be formed?, and
- Would the person beneficially own the securities purchased by the named bidder in the tender offer or the assets of the target company?
- One or two of these factors may control the determination, depending on the circumstances.

If a named bidder is an established entity with substantive operations and assets apart from those related to the offer, the staff ordinarily will not go further up the chain of ownership to analyze whether that entity's control persons are bidders. However, it still would be possible for other parties involved with the offer to be co-bidders. The factors listed above would be used in the analysis. In addition, the staff would consider the degree to which the other party acted with the named bidder, and the extent to which the other party benefits from the transaction. [March 17, 2023]

Question 101.07

Question: Must a person who qualifies as a bidder under Rule 14d-1(c)(1) be included as a bidder on the Schedule TO even if the disclosure in the Schedule TO will not change as a result?

Answer: Yes. Instruction C elicits information about the control persons of the bidder. Merely disclosing the Instruction C information does not eliminate the requirement that the real bidder sign the Schedule TO and take direct responsibility for the disclosure. Where the real bidder does not sign the Schedule TO and does not provide the required disclosure, the parties run the risk of having to extend the offer to provide a full 20 business day period for shareholders to consider the new information. [March 17, 2023]

Question 101.08

Question: May an issuer making an exchange offer for the securities of another person use Form S-3 (or Form F-3 if the registrant is a foreign private issuer) to register the transaction?

Answer: No, as specifically noted in Release No. 33-6383, the Commission determined not to make Form S-3 available for registration of an exchange offer. [March 17, 2023]

Question 101.09

Question: The parent of an insurance company owns over 50 percent of the insurance company's outstanding common stock. The common stock of the insurance company was not registered pursuant to Exchange Act Section 12(g) because of the exemption provided by Section 12(g)(2)(G). The parent desires to make a tender offer for the common shares it does not own.

(1) Must the tender offer be made in compliance with Section 14(d) and Regulation 14D? (2) Do the going-private provisions of Rule 13e-3 also apply to the proposed tender offer given that the insurance company is exempt from registration under Section 12 pursuant to Section 12(g)(2)(G)?

Answer: (1) Yes, Exchange Act Section 14(d)(1) requires that tender offers for a class of securities exempt from registration under Section 12(g)(2)(G) be made in compliance with Section 14(d) and Regulation 14D, just as though the securities were registered under Section 12. (2) No, Rule 13e-3 would not apply to such tender offer unless the insurance company is required to file periodic reports with the Commission pursuant to Exchange Act Section 15(d). This interpretation is based on the absence in Section 13(e)(1) and Rule 13e-3(b) of language similar to that which appears in Section 14(d)(1), subjecting Section 12(g)(2)(G) companies to the tender offer provisions. [March 17, 2023]

Question 101.10

Question: An issuer's employee stock ownership plan (ESOP) intends to conduct a tender offer for a class of equity securities of the issuer which is registered pursuant to Exchange Act Section 12. Is the tender offer subject to Exchange Act Section 14(d) and Regulation 14D, or alternatively, to Rule 13e-4?

Answer: If, assuming the offer is fully subscribed, the ESOP will be the beneficial owner of more than 5 percent of the class, the tender offer will be subject to Section 14(d) and Regulation 14D and not Rule 13e-4, so long as the ESOP is not a wholly-owned subsidiary of the issuer. Refer to Rule 13e-4(h)(4), which exempts from Rule 13e-4 any tender offer which is subject to Section 14(d).

If, however, the ESOP is a 100 percent-owned subsidiary of the issuer, the offer will be subject to Rule 13e-4. See Release No. 34-14234 (December 8, 1977) (noting that the Commission has only extended the exemption from Section 14(d) provided by Section 14(d)(8)(B) to tender offers by 100 percent-owned subsidiaries of an issuer). In either case, such tender offer will be subject to Exchange Act Section 14(e) and Regulation 14E. [March 17, 2023]

Question 101.11

Question: In a "partial offer" for less than all outstanding securities of the subject class, Rule 13e-4(f)(3)(i) permits the issuer or an affiliate making an issuer tender offer to accept all shares tendered by persons who own an aggregate of not more than a specified number of shares, provided that the number is less than 100 shares of that security, before prorating securities tendered by others. Is this "odd-lot" preference available for tender offers governed by Regulation 14D?

Answer: No, as this preference, by its terms, is available only for issuer tender offers governed by Rule 13e-4. [March 17, 2023]

Question 101.12

Question: In a tender offer subject to Regulation 14D or Rule 13e-4, can a bidder or issuer exclude a security holder from participating in a tender offer because they hold restricted securities?

Answer: No. Such an exclusion would not be permitted under Rule 14d-10 or Rule 13e-4(f)(8)(i), which requires a tender offer to be open to all security holders of the class of the securities subject to the tender offer. [March 17, 2023]

Question 101.13

Question: Is a statutory merger subject to Regulations 14D and 14E?

Answer: No, a statutory merger is not in and of itself a tender offer and therefore not subject to Regulations 14D and 14E. [March 17, 2023]

Question 101.14

Question: Are exchange offers by newly formed investment companies, unitary trust funds, and other investment vehicles for the equity securities of a public company considered tender offers?

Answer: Yes. Unless an affirmative statement is made in the offering materials that the amount of equity securities to be acquired, when added to the securities already beneficially owned by the sponsor of the trust or investment company, will not exceed 5 percent of the outstanding securities in the class, the exchange offer must be made in compliance with Regulation 14D to the extent the subject class of equity securities is registered under Exchange Act Section 12. In all events, Section 14(e) and Regulation 14E will apply and the time periods set forth in Rule 14e-1 must be observed. [March 17, 2023]

Question 101.15

Question: Are the proration, withdrawal and other provisions set forth in subsections (1) through (8) of Exchange Act Section 14(d) only applicable to tender offers conducted pursuant to Regulation 14D, or do they also apply to tender offers governed solely by Regulation 14E?

Answer: The provisions set forth in subsections (1) through (8) of Section 14(d) are only applicable to tender offers conducted pursuant to Regulation 14D. They do not apply to tender offers governed solely by Regulation 14E. [March 17, 2023]

Question 101.16

Question: If a limited partnership's general partner makes a tender offer for a class of the limited partnership's units registered pursuant to Exchange Act Section 12, is the tender offer subject to Rule 13e-4 or Regulation 14D?

Answer: If, after consummation of the tender offer, the general partner will be, directly or indirectly, the beneficial owner of more than 5 percent of such class, such tender offer will be

subject to Regulation 14D and the general partner will be required to file a Schedule TO. In addition, assuming the general partner speaks on behalf of the limited partnership, the general partner is obligated to comply with Rules 14e-2 and 14d-9(b). The general partner may do so by including a statement in the offering materials on behalf of the partnership and incorporating such statement by reference into the Schedule 14D-9 filed by the partnership. [March 17, 2023]

Section 104. Rule 13e-4

Question 104.01

Question: Must issuer exchange offers that are conducted for compensatory purposes comply with Rules 13e-4(f)(8)(i) and (ii), the all holders and best price rules?

Answer: Pursuant to a 2001 exemptive order, such offers need not comply with Rules 13e-4(f)(8)(i) and (ii) so long as the following conditions are met:

- the issuer is eligible to use Form S-8, the options subject to the exchange offer were issued under an employee benefit plan as defined in Rule 405 under the Securities Act, and the securities offered in the exchange offer will be issued under such an employee benefit plan;
- the exchange offer is conducted for compensatory purposes;
- the issuer discloses in the offer to purchase the essential features and significance of the exchange offer, including risks that option holders should consider in deciding whether to accept the offer; and
- except as exempted in such order, the issuer complies with Rule 13e-4.

Issuers that are subject to Rule 13e-4 are reminded that the remaining provisions of Rule 13e-4, as well as Regulation 14E, apply to these exchange offers. A Schedule TO-I must be filed at the time the exchange offer commences, and the disclosure required by the schedule must be disseminated to option holders in accordance with Rule 13e-4. The disclosure items of the Schedule TO-I must be complied with in the offer to purchase only to the extent applicable. The disclosure should set forth clearly the essential features and significance of the exchange offer, including risks that option holders should consider in deciding whether to accept the offer. The disclosure also should include financial information about the issuer, which generally is material to the option holders' investment decisions. See Item 10 of Schedule TO. The financial information in the disclosure may be in summary form if the issuer incorporates its financial statements by reference into the schedule and offer to purchase. See Instruction 6 to Item 10 of Schedule TO. [March 17, 2023]

Question 104.02

Question: An issuer makes a tender offer for its debt securities that are convertible into the Section 12-registered common stock of another unaffiliated issuer. The common stock, amounting to less than 5 percent of the class, had been purchased and placed in escrow at the time the debt securities were issued. The issuer of the debt securities making the tender offer currently owns none of the common stock of the unaffiliated issuer. Is the tender offer subject to Rule 13e-4?

Answer: To the extent the offer is for an equity security, as defined in Rule 3a11-1, the equity security was issued by a company other than the issuer conducting the tender offer. The offer, therefore, is not subject to Rule 13e-4. Because consummation of the offer would not result in the bidder owning more than 5 percent of the subject class, Exchange Act Section 14(d) is inapplicable. The offer is, however, subject to Section 14(e) and the Regulation 14E rules. [March 17, 2023]

Section 14(d) and Regulation 14D

Section 130. Section 14(d)

Question 130.01

Question: A third-party bidder makes a tender offer for convertible debt securities. The class of such debt securities is not registered under Exchange Act Section 12. However, the debt securities are convertible into common stock, and the class of such common stock is registered under Section 12. Is the offer for debt securities subject to the requirements of Exchange Act Section 14(d) and Regulation 14D?

Answer: No, the tender offer is not subject to Section 14(d) and Regulation 14D. Although the conversion feature results in the debt securities being a class of “equity securities” within the meaning of Exchange Act Section 3(a)(11) and Rule 3a11-1, the tender offer is not subject to Section 14(d) and Regulation 14D because the class of debt securities itself is not registered under the Exchange Act. [March 17, 2023]

Question 130.02

Question: X and Y are conducting competing tender offers subject to Section 14(d) and Regulation 14D for the shares of common stock of Company Z. X decides to tender to Y the shares of Company Z it owns or expects to acquire pursuant to its tender offer. What disclosures should X provide?

Answer: Regulation 14D does not prohibit X from tendering its Z shares to Y. X’s tender offer materials must be reviewed, however, to determine if there are any statements or conditions in X’s Schedule TO-T (or Schedule 14D-9 if one has been filed by X pursuant to Rule 14d-9(b) relating to X’s recommendations concerning whether the subject shareholders should tender to Y) which state that X will not tender to Y (or another party) or that set forth a condition that would be triggered by such a tender. In addition, X must (1) announce its decision to tender to Y as soon as possible after the decision; (2) amend its Schedule TO-T to reflect this material

change and disseminate any other additional material changes in the information prompted by the need to comply with Section 14(e), including, but not limited to, changes relating to the merits of X's offer as promptly as possible in accordance with Rule 14d-4(d); and (3) make a determination whether an offer condition has been triggered, and, if so, whether or not X intends to waive or assert the offer condition. [March 17, 2023]

Question 130.03

Question: May a bidder in a tender offer subject to Exchange Act Section 14(d) and Regulation 14D accept and pay for tendered shares prior to the end of the withdrawal periods specified in Exchange Act Section 14(d)(5) and Rule 14d-7 if such purchase is also subject to the offeree's right of rescission?

Answer: No. The right of rescission is merely a contractual right under state law, whereas the right of withdrawal is a right created by federal statute and also governed by a rule promulgated under the Exchange Act. [March 17, 2023]

Section 131. Regulation 14D

Question 131.01

Question: An affiliate conducting a third-party tender offer subject to Rule 13e-3 will disseminate the tender offer materials and the disclosures required by Rule 13e-3 by mailing the disclosure document to security holders. Although Rule 14d-4(a)(2)(i) does not authorize a summary advertisement to be used to commence a tender offer subject to Rule 13e-3, can the bidder, several days after validly commencing the tender offer via other permissible means (see, e.g., Instruction to paragraph (a) of Rule 14d-4(a)), publish a summary advertisement complying with Rule 14d-6(b) and noting that the offer will result in the issuer "going private?"

Answer: Yes. [March 17, 2023]

Question 131.02

Question: A foreign bidder and U.S. target with a class of equity securities registered under Exchange Act Section 12 entered into a memorandum of understanding whereby the foreign bidder will buy shares from insiders and engage in a cash tender offer to acquire the rest of the shares. If the bidder and the target make a joint statement setting forth the identities of the parties, the consideration to be paid, and the amount and class of securities being sought, is such a statement considered a pre-commencement communication by each party subject to Regulation 14D?

Answer: Yes, such a statement is considered a pre-commencement communication and is subject to Rules 14d-2(b)-(c) and 14d-9(a). [March 17, 2023]

Question 131.03

Question: Three separate offers were contemporaneously made by a bidder for three different classes of the target's stock. The bidder conditioned its obligation to purchase securities on a

separate minimum condition being met with respect to each class. Can the bidder waive the minimum condition with respect to one class without extending the offers for the other classes?

Answer: No. Minimum conditions are considered material conditions. In this case, changes in or waivers of the minimum condition for each offer would also be considered material changes or developments with respect to the other two offers. The bidder, therefore, should not waive the minimum condition with respect to one class without extending all three offers, to the extent necessary, so at least five business days remain prior to the time of expiration. [March 17, 2023]

Section 144. Rule 14d-5

Question 144.01

Question: A bidder, in making its written request for a security holder list in connection with the dissemination of its initial tender offer materials pursuant to Rule 14d-5, elects to disseminate amendments under Rule 14d-5(f)(1) rather than require the subject company to disseminate amendments to the materials (assuming that it otherwise could identify all holders). The subject company elects to mail the materials for the bidder under Rule 14d-5(a)(3), rather than furnish a stockholder list to the bidder. Prior to delivering the materials to the subject company for mailing, the bidder increases the tender offer price and the materials delivered to the subject company reflect this increased price. Since the subject company is not responsible for disseminating amendments, is the subject company required under Rule 14d-5 to mail the amended tender offer material?

Answer: Yes. Once having elected to mail the initial tender offer documents, the subject company is obligated to mail such materials because such information reflects only an amendment to the tender offer made prior to the bidder's original delivery of the initial offering material to the subject company. The bidder is obligated to disseminate the amendment under these circumstances, as the revised disclosure is viewed as part of the "tender offer materials" that the subject company remains obligated to disseminate under Rule 14d-5(b). [March 17, 2023]

Section 146. Rule 14d-7

Question 146.01

Question: Rule 14d-7 provides that any tendering security holder has the right to withdraw its tendered securities "during the period such offer request or invitation remains open." If a bidder extends an offer period, can it limit the availability of withdrawal rights during this extended offer period to a select group of the subject company's security holders (e.g., only those security holders who tendered prior to the extension of the offer period)?

Answer: No, the withdrawal rights required under Rule 14d-7 must be made available to all security holders during any extension of the offer period. [March 17, 2023]

Section 149. Rule 14d-10

Question 149.01

Question: Can a bidder conduct a tender offer that conditions the acceptance of shares from the controlling shareholder on the grant of representations and warranties by that security holder with respect to the accuracy of the issuer's books and records and financial statements?

Answer: Although the bidder could condition the entire offer on the grant of such warranties, it could not impose conditions upon the acceptance of one individual security holder's tender without violating the "all-holders" provision of Rule 14d-10. [March 17, 2023]

Section 158. Rule 14d-100 – Schedule TO

Question 158.01

Question: Item 10 of Schedule TO requires disclosure of financial information concerning a bidder when the bidder's financial condition is material to a decision by a security holder whether to sell, tender, or hold securities sought in a tender offer. Are there circumstances that require disclosure of financial information of a bidder who is a natural person?

Answer: Yes, as set forth in footnote 22 of Release No. 34-13787 (July 21, 1977) (adopting former Schedule 14D-1, predecessor to current Schedule TO), financial information concerning a bidder who is a natural person may be required in certain circumstances. For example, bidders who are natural persons may be required to disclose information concerning their net worth in accordance with Instruction 4 to Item 10 of Schedule TO. [March 17, 2023]

Section 161. Regulation 14E

Question 161.01

Question: Does Regulation 14E apply to tender offers for securities of a non-reporting company?

Answer: Yes. Pursuant to Rule 14d-1(a), Regulation 14E applies to tender offers for any securities other than exempted securities, as defined by Exchange Act Section 3(a)(12). This includes issuer and third-party tender offers, (i) whether for debt or equity securities, (ii) whether or not such securities belong to a class registered pursuant to Exchange Act Section 12, and (iii) whether or not the subject company, as defined in Item 1000(f) of Regulation M-A, is required to file periodic reports pursuant to Exchange Act Section 15(d). [March 17, 2023]

Section 162. Rule 14e-1

Question 162.06

Question: Two competing tender offers describe the bidders' intent to acquire any shares remaining after completion of their respective offers through second-step "squeeze-out" transactions. Where the type or the amount of the consideration to be paid in the second-step

squeeze-out transaction changes from what was disclosed in the initial offer materials, is the bidder obligated to extend the first-step tender offer?

Answer: Although Rule 14e-1(b) is not directly implicated because the terms of the first-step tender offer are unchanged, the type or amount of consideration to be offered in the second-step “squeeze-out” transaction may nevertheless be material to shareholders’ decision on whether or not to participate in the first-step tender offer. A material change to the consideration offered in the second-step transaction may therefore be comparable in significance to a material change in consideration offered in a tender offer subject to Rule 14e-1(b). See footnote 70 in Release No. 23421 (July 11, 1986).

Accordingly, the first-step tender offer must remain open for a minimum of ten business days from the date that a change in the type or amount of consideration offered in the second-step “squeeze-out” transaction is first published, sent or given to security holders, and the bidders must extend the offers if needed to ensure this minimum period of time. [March 17, 2023]

Question 162.07

Question: Rule 14e-1(c) requires that an offeror in a tender offer either pay the consideration offered or return the securities tendered “promptly” after the withdrawal or termination of the tender offer. Can the offeror delay payment because it must obtain regulatory approvals before completing the purchase?

Answer: Depending on the length of the delay resulting from the offeror awaiting regulatory approvals, the staff will not object to the delay, provided the tender offer materials fully disclose the possibility of such delay. [March 17, 2023]

Section 163. Rule 14e-2

Question 163.01

Question: In a third-party tender offer, may the target company satisfy its requirement to publish, send or give to security holders the statement required by Rule 14e-2 by attaching its solicitation/recommendation statement to materials sent by the bidder to security holders?

Answer: Yes. If the tender offer is subject to Regulation 14D, the target company must also comply with its obligations under Rule 14d-9. [March 17, 2023]

Section 164. Rule 14e-3

Question 164.01

Question: An issuer will conduct a tender offer in accordance with Rule 13e-4. Before the tender offer commences, however, the issuer proposes to purchase in the open market some of the securities that will be the subject of the tender offer. Would such purchases violate Rule 14e-3?

Answer: No. If an issuer has taken a substantial step to commence, or has commenced a tender offer, Rule 14e-3 places a “disclose or abstain from trading” burden on “any other person” in

possession of material, nonpublic information relating to the tender offer and acquired from the issuer or any of its officers, directors, partners or employees or any other person acting on the issuer's behalf. As explained in footnote 34 in Release No. 34-17120 (September 4, 1980), "any other person" means "someone other than the offering person, or in the case of an issuer tender offer, the issuer." Note that, to the extent that the issuer had publicly announced its intention to commence a tender offer, the issuer would have to consider the application of Rule 14e-5 to its proposed open market purchases. [March 17, 2023]

Section 181. Rule 14f-1

Question 181.01

Question: Is an arrangement whereby directors of an acquired company become directors of the acquiring company without an election subject to Rule 14f-1?

Answer: No, Rule 14f-1 would apply only in the converse situation where there is an arrangement for the acquiring company to appoint directors of the acquired company without an election. [March 17, 2023]