

Determination of the U.S. ownership level

Timing

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

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

Securities to be included in the calculation

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

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

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

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

⁴ C&DI, Question 101.05 (October 17, 2018).

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

Procedure for calculation

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

The “look-through” test

To calculate the level of U.S. ownership, the bidder must start by looking at the holders of record as of a given date. The bidder generally starts by looking at reports of beneficial ownership filed with respect to the target in the United States or in its home jurisdiction.⁶ Shareholders in many jurisdictions are required to provide information about their shareholding once they cross certain thresholds. The target may also include information about its shareholders in its own public filings. In many cases, the bidder also engages financial advisors that are able to access other non-public sources of information about shareholders.

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

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

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

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

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

Average daily trading volume test

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

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

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

⁸ C&DI Question 101.04. (October 17, 2018).

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

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

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