

U.S. securities laws considerations and options for Japanese cash tender offers

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U.S. securities laws regulate tender offers for securities of Japanese companies whether or not such securities are registered with the U.S. Securities and Exchange Commission (SEC) if the tender offers have relevant U.S. connections. This client update discusses U.S. securities law considerations for an all-cash tender offer by a Japanese company for the common stock of another Japanese company, where the target's securities are not SEC-registered but at least some of the target's common stock is held by U.S. residents.¹

I. General considerations²

Section 14(e) of the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act") and Regulation 14E promulgated thereunder by the SEC regulate tender offers (together, the "Tender Offer Rules") for debt and equity securities.³ Section 14(e), and the Tender Offer Rules generally, are designed to prevent acts and practices in connection with tender offers that are fraudulent, deceptive or manipulative. The Tender Offer Rules apply to tender offers for shares of a Japanese target company if even a single U.S. holder owns only one share, unless an exemption is available or the U.S. holders are properly excluded from the offer, as described below.

The bidder for a Japanese target company will often have three primary options for conducting a tender offer in compliance with U.S. legal requirements.

1. *Comply with all relevant Tender Offer Rules.* Allow U.S. holders to participate in the tender offer and comply with the relevant requirements of the Tender Offer Rules;
2. *Rely on the Tier I exemption.* Allow U.S. holders to participate in the tender offer but rely on the exemption from many of the Tender Offer Rules under Rule 14d-1(c) under the Exchange Act if not more than 10% of the target's outstanding shares are held by U.S. holders and certain other conditions are met (the "Tier I exemption");⁴ or
3. *Exclude U.S. holders.* Prevent U.S. holders from participating in the tender offer and avoid the use of "U.S. jurisdictional means."

¹ Virtually all listed companies in Japan have some beneficial shareholders who are U.S. holders.

² For purposes of this client update, we assume that the tender offer is not hostile or unsolicited; i.e., the target will agree to the bidder's tender offer and recommend that its shareholders tender their shares. We also assume that the bidder and target qualify as "foreign private issuers" ("FPIs"). This client update does not discuss considerations relevant to rights offerings, exchange offers, share exchanges, share deliveries or similar business combination transactions, or targets with multiple classes of stock. This client update also does not discuss considerations relevant to an issuer tender offer for its own securities.

³ Regulation 14D promulgated under Section 14(d) of the Exchange Act, which also regulates tender offers, is generally applicable only to tender offers for equity securities registered in the United States pursuant to Section 12 of the Exchange Act and certain other limited types of securities. When Regulation 14D is applicable, its requirements (which, among others, include the filing of detailed disclosure documents with the SEC) are in addition to those of the Tender Offer Rules.

⁴ A second, more limited exemption under Rule 14d-1(d) under the Exchange Act may be applicable where at least 10% but no more than 40% of the target's outstanding shares are held by U.S. holders (the "Tier II exemption"). However, for tender offers for Japanese targets that do not have securities registered pursuant to Section 12 of the Exchange Act, the Tier II exemption is generally not meaningful because it does not provide relief from the most burdensome Tender Offer Rules. Therefore, this client update will not discuss the Tier II exemption in detail.

If the U.S. holders of the target do not own a meaningful percentage of the outstanding shares, it may be possible to exclude U.S. holders from the tender offer without compromising the bidder's ability to acquire sufficient shares in the tender offer to complete the second-step squeeze-out. The key advantage of excluding U.S. holders is avoiding the expense of preparing English translations of the offer documents, but it is critical that the bidder take care to properly exclude U.S. holders from the offer and avoid the use of "U.S. jurisdictional means," as described further in Section IV below.

However, if the bidder needs U.S. holders to tender their shares in order to reach the threshold to squeeze out the remaining shareholders, excluding U.S. holders is not a viable option. In such cases, most bidders for Japanese target companies choose to comply with all of the relevant requirements of the Tender Offer Rules. The primary reasons are that such compliance:

- does not impose a significant additional burden on the bidder, as the Japanese tender offer rules are already generally aligned with the Tender Offer Rules;
- does not require strict compliance by the bidder with the requirements for the Tier I exemption described under Section III.B, including the U.S. publication of information by means of a costly advertisement in the *Wall Street Journal* or *New York Times*; and
- does not require the bidder to conduct the "look-through" analysis for determining the percentage of U.S. holders described under Section III.C, thereby avoiding additional cost and complexity.

The Tier I exemption described above is generally used only in the unusual scenario where the cash tender offer is followed by a second-step squeeze-out transaction in which the bidder uses stock consideration rather than cash. In this case, reliance on the Tier I exemption in the first step of the transaction is necessary to rely on the exemption under Rule 802 under the Securities Act from a requirement to register the share exchange in the second step of the transaction on Form F-4.

Each of these options is discussed in more detail in subsequent sections of this client update.

II. Allow U.S. holders to participate and comply with all relevant tender offer rules

A tender offer that is made to U.S. holders will be subject to all of the Tender Offer Rules, unless an exemption applies. Rules 14e-1 to 14e-8⁵ under Regulation 14E regulate the timing and procedures for and prohibit certain actions in connection with a tender offer. As mentioned, because the current Japanese tender offer rules are generally aligned with the Tender Offer Rules, many Japanese companies choose to comply with all of such rules rather than relying on the Tier I or Tier II exemptions or seeking to exclude U.S. holders from the tender offer and to avoid the use of U.S. jurisdictional means.

A. Antifraud rules

The Tender Offer Rules generally do not require specific information to be included in tender offer materials and do not require that such materials be filed with the SEC. Although the Tender Offer Rules do not require tender offer materials to be translated into English, the bidder may want to provide English translations of tender offer materials to U.S. holders to protect against the risk that U.S. holders may claim that the information they received about the tender offer was misleading.

Section 14(e) makes it unlawful for any person to "make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer." This is essentially the same as the general standard for securities fraud claims under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

B. Minimum offering period and prompt payment

Rule 14e-1 provides that the bidder in a tender offer may not:

⁵ Not relevant to this client update are: Rule 14e-6, which applies to mutual funds, and Rule 14e-7, which applies to roll-ups of limited partnerships.

- hold the tender offer open for fewer than 20 U.S. business days from the date the tender offer is first published, sent or given to the target's security holders;
- increase or decrease the percentage of the class of securities being sought, the consideration offered or the dealer's soliciting fee to be paid in connection with the tender offer unless the tender offer is kept open for at least 10 U.S. business days from the date that notice of such increase or decrease is first published, sent or given to the target's security holders;
- fail to promptly pay the consideration offered⁶ or return the securities deposited by or on behalf of security holders, upon termination or withdrawal of the tender offer; or
- extend the length of the tender offer without issuing a notice of such extension by press release or other public announcement, which notice must include disclosure of the approximate number of securities deposited to date and must be issued no later than the 9:00 a.m. (U.S. Eastern Time), on the next business day after the scheduled expiration date of the tender offer.

C. Target's statement of position with respect to the tender offer

Rule 14e-2 requires that, in responding to the bidder's solicited tender offer, the target must, no later than 10 U.S. business days from the date the tender offer is first published, sent or given to the target's security holders, issue a statement in which it discloses to its security holders that it recommends acceptance of the tender offer.⁷ Such statement must also include the reasons for the target's recommendation to accept the tender offer. If any material change occurs in the disclosure made in connection with such statement of position, the target must promptly publish, send or give a statement disclosing the material change to security holders.

D. Prohibition on insider trading

Rule 14e-3 prohibits trading in the target's securities (other than purchasing by or on behalf of the bidder) while in possession of material, nonpublic information relating to the tender offer, unless within a reasonable time prior to the purchase or sale such information and its source are publicly disclosed. The rule also prohibits the bidder, the target and certain persons associated with them from communicating material, nonpublic information relating to the tender offer to any person under circumstances where it is reasonably foreseeable that the rule described in the prior sentence will be violated.

E. Prohibition on short tendering into a partial tender offer

Rule 14e-4 essentially prohibits any person, directly or indirectly, from tendering into a partial tender offer stock that such person does not own. In a partial tender offer (i.e., a tender offer for less than 100% of the shares of the target), it would be advisable for the bidder to include disclosure in its tender offer materials to the effect that such prohibition on short tendering applies.

F. Prohibition on purchases outside of the tender offer

Rule 14e-5 prohibits "covered persons" from purchasing, or making any arrangement to purchase, the target's securities, whether directly or indirectly, outside of the tender offer from the time the tender offer is publicly announced until it expires.⁸ The term "covered person" means:

- the bidder and its affiliates;
- the bidder's dealer-manager and its affiliates;
- any adviser to the bidder, dealer-manager or their respective affiliates, if such adviser's compensation is dependent on the completion of the tender offer;
- the target;⁹ and

⁶ The SEC staff generally views payment within three business days after conclusion of the tender offer as "prompt."

⁷ In response to an unsolicited tender offer, a target may (i) recommend acceptance or rejection of the tender offer, (ii) express no opinion and remain neutral to the tender offer, or (iii) decide that it is unable to take a position with respect to the tender offer. In this case, the target's statement of position must include the reason or reasons for its position, or inability to take a position, and if any material change occurs in the disclosure made in connection with such statement of position, it must promptly publish, send or give a statement disclosing the material change to security holders.

⁸ Rule 14e-5 sometimes restricts the activities of "market makers" who act as tender offer agents. We understand, however, that there are no "market makers" in Japan as that term is defined in Section 3(a)(38) of the Exchange Act.

⁹ In a negotiated transaction, the target is a covered person because it is acting in concert with the bidder. It is not clear whether affiliates of the target would also be covered persons.

- any person acting, directly or indirectly, in concert with any of the other covered persons in connection with any purchase or arrangement to purchase the target's securities or any related securities.

The term "affiliate" as used above is construed very broadly under the relevant U.S. securities laws,¹⁰ and therefore the scope of "covered persons" may be significantly broader than the persons covered by the analogous rule against purchases outside of the tender offer (*betto kaittsuke kinshi*) under Japanese law. For example, covered persons under Rule 14e-5 will typically cover all upstream parent companies and controlling shareholders, all sister companies under common control, and all subsidiaries and controlled affiliates of the tender offeror, as well as the directors and officers of the foregoing. Certain stock purchase organizations (*mochikabu-kai*) may also be covered persons depending on the facts.

A financial adviser of the bidder or target may be subject to the prohibition on purchases outside of the tender offer if it is acting as the dealer-manager or tender offer agent for the bidder, its compensation is contingent upon completion of the tender offer, or it is acting in concert with a covered person. Rule 14e-5 prevents several types of trading activities of financial advisers, only some of which are expressly exempted from the operation of the rule.

Notwithstanding the general prohibition on purchases by a covered person of a target's securities outside of a tender offer, the SEC has permitted such purchases in a few specific situations. A no-action letter allows a Japanese target that is a covered person to purchase shares constituting less than one unit as required under Japanese law, subject to certain specified conditions.¹¹

In addition, if they reasonably expect that the tender offer meets the conditions for reliance on the Tier II exemption, including that not more than 40% of a target's outstanding shares are held by U.S. holders, the affiliates of the respective financial advisers to the bidder and the target as well as the affiliates of the tender offer agent may continue their ordinary course trading activities in respect of the target's securities subject to certain conditions set forth in Rule 14e-5(b)(12), including the maintenance of information barriers and the inclusion of appropriate legends in the offer documents.¹²

G. Prohibition of certain pre-commencement communications

Rule 14e-8 prohibits public announcement of a tender offer unless the bidder:

- intends to commence and complete the tender offer within a reasonable time;
- has no intention to manipulate the stock price of the bidder or target; and
- reasonably believes that it has the means to purchase securities to complete the tender offer.

III. Allow U.S. holders to participate in reliance on the Tier I exemption

As noted above, in transactions where the second-step squeeze-out uses stock consideration rather than cash, it may be advantageous for a bidder to rely on the Tier I exemption in order to be able to rely on the exemption under Rule 802 under the Securities Act from the requirement to register the second-step share exchange. The Tier I exemption provides relief from many of the Tender Offer Rules if not more than 10% of the target's outstanding shares are held by U.S. holders and certain other conditions are met.¹³

A. Scope of Tier I exemption

A tender offer conducted in reliance on the Tier I exemption will be exempt from the following Tender Offer Rules:

¹⁰ In Rule 405 under the Securities Act, an "affiliate" of a person is defined as a "person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with" another person, with "control" being defined in turn as the "possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." The determination of whether a person is an affiliate will depend upon the relevant facts and must be determined on a case-by-case basis.

¹¹ Davis Polk can provide more information on the conditions required to rely upon this exemption upon request.

¹² Davis Polk can provide more information on the conditions required to rely upon this exemption upon request.

¹³ SEC guidance provides that the initial calculation of U.S. ownership made for the first step of the transaction is sufficient to determine eligibility for the use of the exemption in the subsequent step of the transaction, so long as: (i) the disclosure document for the first step discloses the bidder's intent to conduct the subsequent step and the terms of the subsequent transaction; and (ii) the subsequent step is consummated within a reasonable time following the first step.

- minimum offering periods and prompt payment requirements under Rule 14e-1;
- disclosure by the target of its position with respect to the tender offer as required by Rule 14e-2; and
- the prohibition on purchases outside of the tender offer under Rule 14e-5, assuming that the following additional conditions of Rule 14e-5(b)(10) are met:
 - the offering documents given to U.S. holders must prominently disclose the possibility of any such purchases, or arrangements to purchase, or the intent to make such purchases;
 - the offering documents must disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed;
 - the bidder must disclose in the United States information about any such purchases or arrangements in a manner similar to disclosure in Japan; and
 - the purchases must comply with the applicable tender offer laws and regulations of Japan.

A tender offer conducted in reliance on the Tier I exemption will remain subject to the following Tender Offer Rules:

- the prohibition on insider trading under Rule 14e-3;
- the prohibition on short-tenders in a partial tender offer under Rule 14e-4;
- the prohibition on certain pre-commencement communications under Rule 14e-8; and
- the anti-fraud rules under Section 14(e).

B. Conditions for reliance

The availability of the Tier I exemption is conditioned on the following:

- *Limitations on U.S. ownership.* U.S. holders must, in the aggregate, possess not more than 10% of the target's common stock;
- *Equal treatment of U.S. shareholders.* U.S. holders of the target's stock must be permitted to participate in the tender offer on terms at least as favorable as those offered to non-U.S. holders;
- *Informational documents.* The bidder must disseminate the tender offer materials and any informational documents¹⁴ (translated into English) to U.S. holders on a basis comparable to the methods used with respect to non-U.S. holders;¹⁵ and
- *U.S. publication.* When the bidder disseminates information by publication in Japan, information must be published in the United States in a manner reasonably calculated to inform U.S. holders of the tender offer.¹⁶

C. Determining U.S. holder percentage ownership

The U.S. holder percentage ownership is determined as follows:¹⁷

- *Calculation reference dates.* The percentage should generally be calculated on a date within a 90-day period that is no more than 60 days (in some cases 120 days) before and no more than 30 days after the public announcement¹⁸ of the tender offer (but in any event prior to the commencement of the tender offer); and

¹⁴ The phrase "informational document" is not defined in the Tier I exemption as provided under Rule 14d-1(c), but will generally be read to include any document (or amendments) published or otherwise disseminated by bidder to the holders of target shares in connection with the tender offer. It may also include documents, such as earnings announcements, that do not mention the tender offer but that are relevant to the decision by holders concerning whether to tender shares in response to the tender offer.

¹⁵ Although not required in order to obtain the Tier I exemption, it is recommended that informational documents include a prominent legend. Davis Polk can provide such legend upon request.

¹⁶ As the target is not an SEC reporting company, the Tier I exemption will not require the bidder to: (i) furnish to the SEC on Form CB English translations of any informational materials sent by it to non-U.S. security holders; or (ii) file with the SEC on Form F-X an appointment of an agent for service of process in the United States with respect to the Tender Offer.

¹⁷ As mentioned above, the methodology for determining the U.S. holder percentage is complex and we generally advise companies to consult with U.S. counsel and to hire a professional service provider to assist with identifying U.S. holders.

¹⁸ The adopting release for the 2008 amendment of the Tier I exemption stated that "public announcement" is any oral or written communication by a bidder or any party acting on its behalf, which is reasonably designed to inform or has the effect of informing the public or security holders in general about the transaction. See <http://www.sec.gov/rules/final/2008/33-8957.pdf>.

- *Determination of U.S. holders.* The percentage is calculated as a ratio of (i) the number of shares of the target held by U.S. holders (the *numerator*) divided by (ii) the number of outstanding shares of the target (the *denominator*). Shares owned by the bidder or target are excluded from the numerator and the denominator.

In limited situations, where the bidder and target are unable to conduct the required look-through analysis for exceptional reasons, the Tier I exemption will allow the determination to be conducted based on an alternative “average daily trading volume” test.

Entities relying on the Tier I exemption must query some record holders and review public beneficial holder filings to determine beneficial ownership by U.S. holders.

IV. Prevent U.S. holders from participating and avoid the use of U.S. jurisdictional means

The Tender Offer Rules will generally not apply to a tender offer that excludes U.S. holders and avoids the use of U.S. jurisdictional means (an “Exclusionary Offer”). In evaluating this approach, the bidder and target should also consider, as a business matter, whether the success of the tender offer may be impaired and whether they are comfortable with potential ill will that may be generated among U.S. holders excluded from the tender offer.

If the bidder wishes to conduct an Exclusionary Offer, it should review the following general considerations and procedures. Even if the bidder takes the precautionary steps outlined below to avoid U.S. jurisdictional means, there will be some risk that the SEC or a U.S. court may nonetheless deem the Exclusionary Offer to be subject to U.S. jurisdiction. The SEC has previously indicated that it will more closely monitor Exclusionary Offers to determine whether SEC action is necessary to protect U.S. holders of the target’s securities.

Note also that there is tension between the requirements for an Exclusionary Offer, which strictly limit the information about the tender offer which can be released into the United States, and the U.S. disclosure requirements applicable to some issuers under Form 6-K or Rule 12g3-2(b) under the Exchange Act, which require that certain material information be made available to U.S. holders. Bidders faced with a potential conflict between these two requirements should contact U.S. counsel for guidance well in advance of commencing an Exclusionary Offer.

A. General considerations and procedures

In order to avoid the application of the Tender Offer Rules, an Exclusionary Offer must be conducted without implicating U.S. jurisdictional means. However, the term “U.S. jurisdictional means” is interpreted very broadly. It may include, for example:

- mailing tender offer materials to the agents in Japan acting as standing proxies (*jōnin dairi nin*) if the agents are required or expected to forward the materials to beneficial holders resident in the United States;
- making tender offer materials available, electronically or physically, in the United States, including by means of posting the documentation on a company’s website;
- directing communications with respect to a tender offer into the United States;
- permitting the participation of U.S. securities analysts or reporters in telephone conferences, meetings or other similar events relating to the tender offer;
- permitting tenders to be mailed from the United States; or
- sending the payment for the shares into the United States.

The SEC has stated that it will skeptically view Exclusionary Offers for securities of FPIs that trade on a U.S. exchange, where the participation of U.S. holders is necessary to meet the minimum acceptance condition in the tender offer. Where purportedly exclusionary offers are made under those circumstances, the SEC has said that it will look closely to determine whether bidders are taking reasonable measures to keep the tender

offer out of the United States.¹⁹ It is possible that the SEC will challenge the exclusion of U.S. holders in transactions where the participation of U.S. investors is necessary to make the transaction successful.

In addition, the bidder may implicate U.S. jurisdictional means if it fails to take adequate measures to prevent tenders by U.S. holders of the target's securities, while purporting to exclude such U.S. holders. If the bidder seeks to avoid the application of the Tender Offer Rules, it should take special precautions to assure that an Exclusionary Offer is not made in the United States, for example by:

- including legends on the tender offer materials themselves and on any internet website on which they are posted;²⁰
- putting in place measures to ensure that tenders are not accepted from U.S. holders, including, when responding to inquiries and processing letters of transmittal, obtaining adequate information to identify U.S. holders;
- obtaining representations from tendering investors, or nominees or other persons tendering on investors' behalf,²¹ that the investors tendering are not U.S. holders;
- avoiding the mailing into the United States of cash or other consideration to tendering holders; and
- checking for indications that the tendering holder is a U.S. holder, including receipt of payment drawn on a U.S. bank, or provision of a U.S. taxpayer identification number or other statements by the tendering holder suggesting that, notwithstanding a foreign address, the holder is a U.S. holder.

B. Press activities

We suggest that a bidder conducting an Exclusionary Offer should generally seek to exclude members of the U.S. press from press conferences and other press activities conducted in connection with the tender offer. Naturally, no press activities in connection with an Exclusionary Offer should be conducted in the United States. If there is a desire or need to include members of the U.S. press in such press activities, U.S. counsel should be contacted well in advance of such press activities.

The SEC has provided a limited "safe harbor" which is intended to allow bidders, in advance of a Regulation 14D tender offer, to conduct certain press activities outside the United States without triggering certain of the procedural requirements of U.S. tender offer laws and regulations.²² As it is written, this safe harbor would seem to also be available for an Exclusionary Offer and might permit members of the U.S. press to attend such press activities. Pursuant to this safe harbor under Rules 14d-1(e) and (f), U.S. journalists can participate in foreign press conferences and other press activities. A bidder choosing to rely on the safe harbor need not comply with the requirements of a minimum offering period and prompt payment under Rule 14e-1 or the requirement of a disclosure by the target of its position with respect to the tender offer under Rule 14e-2, which are the main substantive differences between the Tender Offer Rules and many foreign tender offer rules. When the bidder chooses to rely on this safe harbor, however, the tender offer is still subject to Rules 14e-3 (prohibiting insider trading), 14e-4 (prohibiting short tenders into a partial tender offer), 14e-5 (prohibiting purchases outside a tender offer) and 14e-8 (prohibiting market manipulation) and Section 14(e) (prohibiting fraud). The conditions for the safe harbor are as follows:²³

- Any press release must be issued outside the United States and may not be transmitted into the United States. Any press conference or other meeting with the press must be held outside the United States. U.S. journalists may be present at any press meeting held outside the United States so long as foreign journalists are also present. No U.S. journalist can participate by conference call originating in the United States. A U.S. journalist may not undertake follow-up conversations from a location in the United States.
- No one-on-one meetings may be held with a U.S. publication or U.S. journalist.

¹⁹ *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*, Securities Act Release No. 8957, pg. 110 (Sept. 19, 2008) (available at <https://www.sec.gov/rules/final/2008/33-8957.pdf>).

²⁰ A legend or disclaimer stating that a tender offer is not being made into the United States, or that the tender offer materials may not be distributed there, is not likely to be sufficient in and of itself.

²¹ The SEC has provided guidance that where tenders are made by nominees on behalf of U.S. holders, and nominees or holders misrepresent their status as non-U.S. persons in order to participate in an Exclusionary Offer, the bidder will not be viewed as having targeted the United States.

²² See *Offshore Press Conferences, etc.*, Exchange Act Release No. 39,227 § III.A (Oct. 17, 1997).

²³ Certain other conditions pertaining to written materials are presented as requirements in Rule 14d-1(e)(2) of the Exchange Act, but the SEC rule release makes clear that these requirements only apply to a tender offer for securities registered under Section 12 of the Exchange Act. *Offshore Press Conferences, etc.*, Exchange Act Release No. 39227 n. 43 (Oct. 17, 1997).

C. Use of the internet and U.S. jurisdictional means

Materials relating to Exclusionary Offers are often posted on the websites of the parties involved and thus widely accessible on the internet. If the bidder uses a website to publicize an Exclusionary Offer, it must take special care that the website is not used as a means to induce indirect participation in the tender offer by U.S. holders. As a general matter, however, we believe that website materials in the Japanese language are of less concern than those in the English language.

In addition to the general precautions described above, certain other measures should be adopted if tender offer materials are posted to a website, such as utilizing technology to obtain adequate information (such as the location of internet access, a mailing address or a telephone number) to determine whether persons attempting to access the documents are U.S. holders before providing access, responding to inquiries or processing letters of transmittal.

D. Risk that procedures may be deemed ineffective

Any decision to structure a tender offer as an Exclusionary Offer necessarily involves a degree of risk (which must be evaluated in light of the facts and circumstances of the particular bid) that the SEC or a U.S. court may deem that, irrespective of the steps taken, the tender offer is subject to U.S. jurisdiction. For example, a court or the SEC could conclude that a tender offer should be subject to U.S. jurisdiction because the level of ownership by U.S. holders is significant enough to impact the tender offer.

Other factors may conceivably cause the SEC or a U.S. court to deem an Exclusionary Offer to be subject to U.S. jurisdiction, including one or more of the following:

- the size of the tender offer;
- the percentage of the target's securities held in the United States;
- whether there is a market for the target's securities in the United States;
- pressure by U.S. holders on the SEC or other U.S. government bodies to protect their ability to participate in the tender offer;
- the amount of publicity the tender offer receives in the United States;
- whether fraud or other illegality occurs as part of the tender offer;
- whether the tender offer complies with Japanese laws and regulations;
- whether U.S. jurisdictional means are in fact used by U.S. holders (or by their custodians) to tender shares;
- whether offer materials or other materials concerning the press release are distributed in English; and
- whether actions are taken by the bidder to increase publicity in the United States (e.g., timing a press release to maximize U.S. exposure).

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