

Manual of Publicly Available Telephone Interpretations

Q. TENDER OFFER RULES AND SCHEDULES

1. Regulation 14D

The Division staff took the position that an offer for debt securities that are not registered under Section 12 of the Exchange Act is not subject to the requirements of section 14(d) and Regulation 14D, even though the notes are convertible into common stock of a class registered under the Act. Although the conversion feature rendered the notes "equity securities" within the meaning of Section 3(a)(11) of the Act and Rule 3a11-1, that class of equity securities was not registered under the Exchange Act and therefore the tender offer was not subject to Section 14(d).

2. Regulation 14D

In a Regulation 14D tender offer, a bidder may not limit an extension of the withdrawal period to a select group of the subject company's shareholders (e.g. only those shareholders who tendered prior to the extension of the withdrawal period). Any extension of the period for withdrawal must be provided to all shareholders.

3. Regulation 14D

Pursuant to Regulation 14D, X and Y are conducting competing tender offers for the shares of common stock of Company Z. X decides to tender to Y the shares of Company Z it owns or has acquired pursuant to its tender offer. Regulation 14D does not, per se, prohibit X from tendering Z's shares to Y. However, X's tender offer material must be reviewed to determine if there are any statements or conditions in X's Schedule 14D-1 (or Schedule 14D-9 if one has been filed relating to X's recommendations concerning whether the subject shareholders should tender to Y) which state that X will not tender to Y or that set forth a condition that would be triggered by such a tender. If X's material contained such a statement or condition that would be triggered by such a tender by X to Y, prior to such tender, X must (1) announce its decision to tender to Y as soon as possible after the decision and (2) amend its Schedule 14D-1 and disseminate the information contained in the amendment to the shareholders of Z as promptly as possible in accordance with Rule 14d-4(c). These same steps must be taken, however, even if X's material does not contain any restrictive language or conditions with regard to a tender to Y.

4. Regulation 14D

An issuer making an exchange tender offer for the securities of another person may not use Forms S-2 or S-3 to register the securities it will offer in the transaction. As specifically noted in Release No. 33-6383, the Commission determined not to make Forms S-2 and S-3 available for exchange offer registration at this time. Accordingly, an exchange tender offer which previously could have been registered on Form S-7 must, for the present, be registered on Form S-1, Form S-4 or Form S-11.

5. Regulation 14D

The parent of an insurance company owned over 50% of the insurance company's outstanding common stock. The common stock of insurance company was not registered pursuant to Section 12(g) of the Exchange Act 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. Section 14(d)(l) of the Exchange Act and Rule 14d-1 thereunder require that tender offers for a class of securities exempt from registration by 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. The going private provisions of Rule 13e-3, however, do not apply to an insurance company which is exempt from registration under Section 12 pursuant to Section 12(g)(2)(G), unless the insurance company is required to file periodic reports with the Commission pursuant to Section 15(d) of the Exchange Act. This interpretation is based upon the absence in Rule 13e-3(b) of language similar to that which appears in Section 14(d)(l), subjecting Section 12(g)(2)(G) companies to the tender offer provisions.

6. Regulation 14D; Rule 13e-3

An affiliate of the subject company will conduct a Regulation 14D tender offer, resulting in the subject company "going private". Dissemination of the tender offer materials and the disclosures required by Rule 13e-3 will be made by mailing the disclosure document to shareholders. The shareholder list is being voluntarily provided to the bidder by the subject company without the latter's invocation of Rule 14d-5. Although Rule 14d-4(a)(2)(i) states that a summary advertisement may not be used to commence a tender offer subject to Rule 13e-3, the Division staff did not object where several days after the tender offer had commenced via other permissible means (*see, e.g.*, Rules 14d-3(a) and 14d-4(a)(1)), the bidder published a summary advertisement complying with Rule 14d-6(b), and noted that the offer will result in the issuer "going private".

7. Regulation 14D; Rule 13e-4

A tender offer by an issuer's ESOP, for equity securities of the issuer, is treated the same as a tender offer by any other affiliate of the issuer. If the securities are registered pursuant to Section 12 of the Exchange Act, and after the tender offer the ESOP will hold more than 5% of the outstanding shares of the class, then the ESOP must comply with Regulation 14D. Schedule 13E-4 would not be required, inasmuch as Rule 13e-4(g)(4) exempts tender offers governed by Section 14(d) from Rule 13e-4. If, however, the tender offer is not within the scope of Section 14(d), then Rule 13e-4 should be examined to determine whether the offer must be made in compliance with that rule. In all events, a tender offer by an ESOP will be subject to Section 14(e) of the Exchange Act and Regulation 14E.

8. Regulation 14D; Rule 13e-4(f)(3)

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 and such persons tender all their shares. No such "odd-lot" preference is available, however, for tender offers governed by Regulation 14D.

9. Regulations 14D and 14E

A shareholder possessing restricted shares is not prohibited from tendering the shares pursuant to a tender offer merely because the shares are restricted. The bidder, however, accepts the shares subject to such restrictions.

10. Regulations 14D and 14E

A statutory merger is not in itself a tender offer and therefore not subject to Regulations 14D and 14E. But see *Smallwood v. Pearl Brewing Company* 489 F.2d 579 (1974).

11. Regulations 14D and 14E

Exchange offers by newly formed investment companies, unitary trust funds, and other investment vehicles for the equity securities of a public company are considered tender offers. 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% of the outstanding securities in the class, the exchange offer must be made in compliance with Regulation 14D. In all events, Section 14(e) will apply and the time periods set forth in Rule 14e-1 must be observed.

12. Regulation 14E

Regulation 14E applies to tender offers for any securities other than exempt securities as defined by Section 3(a)(12) of the Exchange Act. Rules 14e-1, 2 and 3, therefore, apply to tender offers for debt and/or equity securities, and the securities of non-reporting companies.

13. Regulation 14E; Section 14(d)

The proration, withdrawal and other provisions set forth in subsections (1) through (8) of Section 14(d) of the Exchange Act are only applicable to tender offers conducted pursuant to Regulation 14D. They do not apply to tender offers governed solely by Regulation 14E.

14. Rule 14d-1; Section 14(e); Section 13(e); Rule 14d-9; Rule 13e-4

A general partner making a tender offer for the interests of the limited partners, which are registered under Section 12 of the Exchange Act, must file on a Schedule 14D-1 and may not use a Schedule 13E-4. The general partner, however, may include a statement in the Schedule and offering materials on behalf of the partnership to satisfy the partnership's obligations under Rules 14e-2 and 14d-9.

15. Rule 14d-1; Rule 13e-4

An issuer made a tender offer for its debt securities that were convertible into the common stock of another unaffiliated issuer. The common stock, amounting to less than 5% of the class, had been purchased and placed in escrow at the time the debt securities were issued. The Division staff took the position that the offer was not subject to Rule 13e-4, but rather was an exempt offer under Rule 14d-1. To the extent it was an offer for an equity security, it was the equity security of another company. Since the offer related to less than 5 percent of the common stock, it was not subject to Regulation 14D. It was, however, subject to the Regulation 14E rules.

16. Rule 14d-2

A corporation had made an initial investment in another company and intended to increase that investment in the future through a partial tender offer. The stock of the subject company had become the subject of rumors and the bidder desired to announce its plan to make a future offer, but was not yet prepared to proceed. Its investment banker was advising that the bidder

announce the price it would offer. The Division staff took the position that an announcement of the price would constitute commencement of the offer even though the number of shares to be sought would not be disclosed. The safe harbor of Rule 14d-2(d) is unavailable if either the price or the number of shares sought is announced. Although the language of Rule 14d-2(c) is less clear with respect to whether announcement of both price and number of shares is required to constitute commencement of the offer, the Division staff took the position that since announcement of the price alone would start the market reaction that the rule was intended to prevent, the price announcement alone would constitute commencement of the offer.

17. Rule 14d-2(b); Section 14(d)

Rule 14d-2(b) (commencement by public announcement of the terms of a tender offer) is applicable to offers to acquire companies in Chapter 11 reorganization proceedings. In order to obtain control of a company in reorganization, approval by the bankruptcy court is necessary. Therefore, a bidder is not likely to commence a tender offer unless it had court approval of its plan to take control. To obtain court approval, the bidder must submit its proposal to the debtor's board (which is usually functioning as a debtor in possession), since the debtor, at least for the first 90 days following the petition, has the exclusive right to submit a plan of reorganization.

If approved by the board, the proposal would have to be approved by all the various bankruptcy committees and eventually submitted to the bankruptcy court for approval. Any one of these steps is likely to result in public disclosure of the terms of the tender offer, and therefore could be viewed as a public announcement by the bidder of the terms of the tender offer within the meaning of Rule 14d-2(b). The Division staff has expressed the view that it would not object if the tender offer is not commenced within 5 days following public disclosure of the terms of the proposal under the above circumstances. Although public disclosure is certainly contemplated by the bidder when it makes its proposal to the board, any subsequent announcement in connection with the reorganization proceedings is properly attributed to the target, not the bidder.

18. Rule 14d-2(b); Section 14(d)

A foreign bidder and U.S. target have 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. The bidder and the target made a joint statement setting forth the identities of the parties, the consideration to be paid and the amount and class of securities being sought. Counsel was advised that Rule 14d-2(b) is applicable to the joint statement, and a tender offer effectively commenced upon the issuance of the joint statement.

19. Rule 14d-4(c)

An offer was made for three classes of the target's stock, and the bidder conditioned its obligation to purchase any securities on a separate minimum condition being met with respect to each class. The Division staff took the position that the bidder could not waive the minimum with respect to one class without extending the offer with respect to all three. A shareholder would consider it important whether the bidder met its minimum condition with respect to each class, since it could affect the type of control the bidder could exercise over the target.

20. Rule 14d-5

A bidder, in making its written request for dissemination of its initial tender offer materials pursuant to Rule 14d-5, indicated that it, rather than the subject company, would disseminate amendments to the materials (assuming that it otherwise could identify all holders). The subject company elected to mail the materials for the bidder, rather than furnish the bidder a stockholder

list. Prior to delivering the materials to the subject company for mailing, the bidder increased the tender offer price and the materials delivered to the subject company reflected this increased price. The subject company argued that, as it was not responsible to disseminate amendments, it would not be required under Rule 14d-5 to mail the amended tender offer material. This argument was rejected. Once having elected to mail the initial tender-offer documents the subject company is obligated to mail such materials, even though the material reflected amendments to the tender offer made prior to the bidder's delivery of the material to the subject company and the bidder was obligated to disseminate amendments to the materials.

21. Rule 14d-5

In a registered exchange tender offer, a subject company receiving a bidder's request complying with Rule 14d-5(f) prior to the bidder's registration statement becoming effective, need not comply with the provisions of Rule 14d-5(a) until the registration statement becomes effective and the tender offer commences in accordance with Rule 14d-2(a)(4). The application of Rule 14d-5 is generally keyed to the commencement of a tender offer in which the consideration offered is cash or securities exempt from registration under the Securities Act. The same principle applies when Rule 14d-5 is utilized in a registered exchange tender offer, with the provisions of the Rule applying at the commencement of the tender offer.

22. Rule 14d-5

A "subject company", as defined in Rule 14d-1, had agreed informally to mail tender offer material furnished by a bidder. Accordingly, the bidder did not make a Rule 14d-5 or state law request to have the material mailed or to receive the shareholder list. However after the subject company mailed the bidder's offer to purchase, as well as some additional tender offer material, the bidder decided that the subject company was not being sufficiently cooperative. Counsel for the bidder asked the Division staff whether Rule 14d-5 would be available for the mailing of subsequent materials during the tender offer. Counsel was advised that compliance with the rule must be sought prior to dissemination of the initial offer to purchase; the bidder may not invoke Rule 14d-5 after commencement of its tender.

23. Rule 14d-7

A bidder in a tender offer governed by Regulation 14D may not accept for payment and pay for tendered shares prior to the end of the withdrawal periods specified in Section 14(d)(5) and Rule 14d-7, even though such purchase may be subject to the offeree's right of rescission. The right of rescission is merely a contractual right under state law, whereas the right of withdrawal is a right created by federal statute.

24. Rule 14d-7(a)(2)

Pursuant to Regulation 14D, A commenced a tender offer for the common stock of B. As a defensive measure, B commenced an issuer tender offer under Rule 13e-4 for its own common stock. While Rule 14d-7(a)(2) requires a bidder to extend additional withdrawal rights to shareholders following the date of commencement of another bidder's tender offer for securities of the same class, A was not required to extend additional withdrawal rights because an issuer is not a bidder for purposes of Regulation 14D. See Rule 14d-1(b)(l).

25. Rule 14d-9

Rule 14d-9(a) directs the subject company in a Regulation 14D tender offer to "hand deliver a copy of the Schedule 14D-9 to the bidder. . .". In order to comply with the rule, the Schedule 14D-9 delivered to the bidder must contain copies of all exhibits called for by the Schedule that are filed with the Commission.

26. Rule 14d-9; Section 14(e); Section 13(e); Rule 14d-1; Rule 13e-4

A general partner making a tender offer for the interests of the limited partners, which are registered under Section 12 of the Exchange Act, must file on a Schedule 14D-1 and may not use a Schedule 13E-4. The general partner, however, may include a statement in the Schedule and offering materials on behalf of the partnership to satisfy the partnership's obligations under Rules 14e-2 and 14d-9.

27. Rule 14d-10

Counsel sought to conduct a tender offer open to all shareholders, but condition the acceptance of shares from the controlling shareholder on the grant of representations and warranties by that shareholder with respect to the accuracy of the issuer's books and records and financial statements. While the bidder could condition the entire offer on the grant of such warranties, it could not condition one individual shareholder's tender without violating the All-Holders Rule.

28. Rule 14e-1(b)

The staff took the position that in a situation where there are two competing two-tier tender offers, a change in the back end consideration in one of the offers required that offer to remain open for at least ten business days. The issue was not governed by Rule 14e-1(b), since the consideration offered in the tender offer was not changed; rather, Footnote 70 of the All-Holders adopting release governed. Since shareholders would choose between the two competing bids on the basis of the back-end price as well the tender offer price, the change amounted in significance to a change in the tender offer price requiring an extension of a least 10 business days.

29. Rule 14e-1(c)

Rule 14e-1(c) requires that a bidder in a tender offer either pay the consideration offered or return the securities tendered "promptly" after the withdrawal or termination of the tender offer. If payment is delayed because the bidder must obtain approvals from regulatory agencies before completing the purchase, the Division staff ordinarily (depending on the length of the delay) will not deem a violation of Rule 14e-1(c) to have occurred, provided the tender offer materials fully disclosed the possibility of such delay.

30. Rule 14e-2

Where an investment trust made an exchange offer for less than 5 percent of a public company, the Division staff took the position that the inclusion of the target company's reaction to the offer in the prospectus for the investment trust, satisfies the requirement that the target company publish, send or give to security holders the statement required by Rule 14e-2.

31. Rule 14e-2

An issuer plans to remain neutral with respect to a clean-up tender offer by a 49% shareholder and does not want to incur the expense of mailing a disclosure statement. The bidder plans to disseminate the offer only by summary publication. Since Rule 14e-2 only requires that the issuer's position be published, the issuer could annex its statement to the summary publication so long as all the information in its Schedule 14D-9 required to be disseminated to shareholders is included.

32. Rule 14e-3

The Board of Directors of an issuer has determined that the issuer will conduct a tender offer in accordance with Rule 13e-4. Prior to the tender offer, however, the issuer proposes to purchase in the open market some of the securities of the class which will be the subject of the tender offer. The question has been presented whether these purchases will violate Rule 14e-3. The purchases will not violate the Rule. If a person 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. As mentioned in Footnote 34 in Release No. 34-17120, "any other person" means someone other than the offering person or, in the case of an issuer tender offer, the issuer.

33. Rule 14e-3

Rule 14e-3 would not apply where the Options Clearing Corporation exercised a call option pursuant to its rules that require the automatic exercise of an option that is in the money, where the holder of that option had obtained material nonpublic information concerning a tender offer, after purchasing the option but prior to the expiration date.

34. Rule 14f-1

A disclosure document, as described in Rule 14f-1, need only be filed with the Commission and distributed to security holders if a change in the majority of directors occurs pursuant to an arrangement or understanding with a person or persons acquiring securities in a transaction subject to Section 13(d) or 14(d) of the Exchange Act. Where directors sell their shares back to the company and resign, and new directors are appointed to fill the vacancies, there is no 13(d) or 14(d) acquisition, and therefore no Rule 14f-1 statement is required. A Form 8-K, however, should be filed if such change in the composition of the Board represents a change in control of the company.

35. Rule 14f-1

An arrangement whereby directors of an acquired company would become directors of the acquiring company without an election is not subject to Rule 14f-1. That rule 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.

36. Schedule 14D-1

Item 9 of Schedule 14D-1 requires disclosure of financial information concerning a bidder when the bidder is other than a natural person and 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. As set forth in footnote 22 of Release No. 34-13787 (the release adopting the present Schedule 14D-1) financial information concerning a bidder who is a natural person may be required, in certain circumstances.