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**17 CFR Ch. II (4-1-10 Edition)**

(i) Possesses the subject security or an equivalent security, or

(ii) Has a reasonable belief that, upon information furnished by the person on whose behalf the tender is made, such person owns the subject security or an equivalent security and will promptly deliver the subject security or such equivalent security for the purpose of tender to the person making the tender.

(c) This rule shall not prohibit any transaction or transactions which the Commission, upon written request or upon its own motion, exempts, either unconditionally or on specified terms and conditions.

[49 FR 13870, Apr. 9, 1984, as amended at 50 FR 8102, Feb. 28, 1985. Redesignated and amended at 55 FR 50320, Dec. 6, 1990]

**§ 240.14e-5 Prohibiting purchases outside of a tender offer.**

(a) *Unlawful activity.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with a tender offer for equity securities, no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer. This prohibition applies from the time of public announcement of the tender offer until the tender offer expires. This prohibition does not apply to any purchases or arrangements to purchase made during the time of any subsequent offering period as provided for in § 240.14d-11 if the consideration paid or to be paid for the purchases or arrangements to purchase is the same in form and amount as the consideration offered in the tender offer.

(b) *Excepted activity.* The following transactions in subject securities or related securities are not prohibited by paragraph (a) of this section:

(1) *Exercises of securities.* Transactions by covered persons to convert, exchange, or exercise related securities into subject securities, if the covered person owned the related securities before public announcement;

(2) *Purchases for plans.* Purchases or arrangements to purchase by or for a plan that are made by an agent independent of the issuer;

(3) *Purchases during odd-lot offers.* Purchases or arrangements to purchase if the tender offer is excepted under § 240.13e-4(h)(5);

(4) *Purchases as intermediary.* Purchases by or through a dealer-manager or its affiliates that are made in the ordinary course of business and made either:

(i) On an agency basis not for a covered person; or

(ii) As principal for its own account if the dealer-manager or its affiliate is not a market maker, and the purchase is made to offset a contemporaneous sale after having received an unsolicited order to buy from a customer who is not a covered person;

(5) *Basket transactions.* Purchases or arrangements to purchase a basket of securities containing a subject security or a related security if the following conditions are satisfied:

(i) The purchase or arrangement to purchase is made in the ordinary course of business and not to facilitate the tender offer;

(ii) The basket contains 20 or more securities; and

(iii) Covered securities and related securities do not comprise more than 5% of the value of the basket;

(6) *Covering transactions.* Purchases or arrangements to purchase that are made to satisfy an obligation to deliver a subject security or a related security arising from a short sale or from the exercise of an option by a non-covered person if:

(i) The short sale or option transaction was made in the ordinary course of business and not to facilitate the offer;

(ii) In the case of a short sale, the short sale was entered into before public announcement of the tender offer; and

(iii) In the case of an exercise of an option, the covered person wrote the option before public announcement of the tender offer;

(7) *Purchases pursuant to contractual obligations.* Purchases or arrangements to purchase pursuant to a contract if the following conditions are satisfied:

(i) The contract was entered into before public announcement of the tender offer;

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(ii) The contract is unconditional and binding on both parties; and

(iii) The existence of the contract and all material terms including quantity, price and parties are disclosed in the offering materials;

(8) *Purchases or arrangements to purchase by an affiliate of the dealer-manager.* Purchases or arrangements to purchase by an affiliate of a dealer-manager if the following conditions are satisfied:

(i) The dealer-manager maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of the federal securities laws and regulations;

(ii) The dealer-manager is registered as a broker or dealer under Section 15(a) of the Act;

(iii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the dealer-manager that direct, effect, or recommend transactions in securities; and

(iv) The purchases or arrangements to purchase are not made to facilitate the tender offer;

(9) *Purchases by connected exempt market makers or connected exempt principal traders.* Purchases or arrangements to purchase if the following conditions are satisfied:

(i) The issuer of the subject security is a foreign private issuer, as defined in § 240.3b-4(c);

(ii) The tender offer is subject to the United Kingdom's City Code on Takeovers and Mergers;

(iii) The purchase or arrangement to purchase is effected by a connected exempt market maker or a connected exempt principal trader, as those terms are used in the United Kingdom's City Code on Takeovers and Mergers;

(iv) The connected exempt market maker or the connected exempt principal trader complies with the applicable provisions of the United Kingdom's City Code on Takeovers and Mergers; and

(v) The tender offer documents disclose the identity of the connected exempt market maker or the connected exempt principal trader and disclose,

or describe how U.S. security holders can obtain, information regarding market making or principal purchases by such market maker or principal trader to the extent that this information is required to be made public in the United Kingdom;

(10) *Purchases during cross-border tender offers.* Purchases or arrangements to purchase if the following conditions are satisfied:

(i) The tender offer is excepted under § 240.13e-4(h)(8) or § 240.14d-1(c);

(ii) The offering documents furnished to U.S. holders prominently disclose the possibility of any purchases, or arrangements to purchase, or the intent to make such purchases;

(iii) The offering documents disclose the manner in which any information about any such purchases or arrangements to purchase will be disclosed;

(iv) The offeror discloses information in the United States about any such purchases or arrangements to purchase in a manner comparable to the disclosure made in the home jurisdiction, as defined in § 240.13e-4(i)(3); and

(v) The purchases comply with the applicable tender offer laws and regulations of the home jurisdiction; and

(11) *Purchases or arrangements to purchase pursuant to a foreign tender offer(s).* Purchases or arrangements to purchase pursuant to a foreign offer(s) where the offeror seeks to acquire subject securities through a U.S. tender offer and a concurrent or substantially concurrent foreign offer(s), if the following conditions are satisfied:

(i) The U.S. and foreign tender offer(s) meet the conditions for reliance on the Tier II cross-border exemptions set forth in § 240.14d-1(d);

(ii) The economic terms and consideration in the U.S. tender offer and foreign tender offer(s) are the same, provided that any cash consideration to be paid to U.S. security holders may be converted from the currency to be paid in the foreign tender offer(s) to U.S. dollars at an exchange rate disclosed in the U.S. offering documents;

(iii) The procedural terms of the U.S. tender offer are at least as favorable as the terms of the foreign tender offer(s);

(iv) The intention of the offeror to make purchases pursuant to the foreign tender offer(s) is disclosed in the U.S. offering documents; and

(v) Purchases by the offeror in the foreign tender offer(s) are made solely pursuant to the foreign tender offer(s) and not pursuant to an open market transaction(s), a private transaction(s), or other transaction(s); and

(12) *Purchases or arrangements to purchase by an affiliate of the financial advisor and an offeror and its affiliates.* (i) Purchases or arrangements to purchase by an affiliate of a financial advisor and an offeror and its affiliates that are permissible under and will be conducted in accordance with the applicable laws of the subject company's home jurisdiction, if the following conditions are satisfied:

(A) The subject company is a foreign private issuer as defined in §240.3b-4(c);

(B) The covered person reasonably expects that the tender offer meets the conditions for reliance on the Tier II cross-border exemptions set forth in §240.14d-1(d);

(C) No purchases or arrangements to purchase otherwise than pursuant to the tender offer are made in the United States;

(D) The United States offering materials disclose prominently the possibility of, or the intention to make, purchases or arrangements to purchase subject securities or related securities outside of the tender offer, and if there will be public disclosure of purchases of subject or related securities, the manner in which information regarding such purchases will be disseminated;

(E) There is public disclosure in the United States, to the extent that such information is made public in the subject company's home jurisdiction, of information regarding all purchases of subject securities and related securities otherwise than pursuant to the tender offer from the time of public announcement of the tender offer until the tender offer expires;

(F) Purchases or arrangements to purchase by an offeror and its affiliates must satisfy the following additional condition: the tender offer price will be increased to match any consideration paid outside of the tender offer that is greater than the tender offer price; and

(G) Purchases or arrangements to purchase by an affiliate of a financial advisor must satisfy the following additional conditions:

(1) The financial advisor and the affiliate maintain and enforce written policies and procedures reasonably designed to prevent the transfer of information among the financial advisor and affiliate that might result in a violation of U.S. federal securities laws and regulations through the establishment of information barriers;

(2) The financial advisor has an affiliate that is registered as a broker or dealer under section 15(a) of the Act (15 U.S.C. 78o(a));

(3) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the financial advisor that direct, effect, or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company with financial advisory services or dealer-manager services; and

(4) The purchases or arrangements to purchase are not made to facilitate the tender offer.

(ii) [Reserved]

(c) *Definitions.* For purposes of this section, the term:

(1) *Affiliate* has the same meaning as in §240.12b-2;

(2) *Agent independent of the issuer* has the same meaning as in §242.100(b) of this chapter;

(3) *Covered person* means:

(i) The offeror and its affiliates;

(ii) The offeror's dealer-manager and its affiliates;

(iii) Any advisor to any of the persons specified in paragraph (c)(3)(i) and (ii) of this section, whose compensation is dependent on the completion of the offer; and

(iv) Any person acting, directly or indirectly, in concert with any of the persons specified in this paragraph (c)(3) in connection with any purchase or arrangement to purchase any subject securities or any related securities;

(4) *Plan* has the same meaning as in §242.100(b) of this chapter;

(5) *Public announcement* is any oral or written communication by the offeror

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or any person authorized to act on the offeror's behalf that is reasonably designed to, or has the effect of, informing the public or security holders in general about the tender offer;

(6) *Related securities* means securities that are immediately convertible into, exchangeable for, or exercisable for subject securities;

(7) *Subject securities* has the same meaning as in § 229.1000 of this chapter; and

(8) *Subject company* has the same meaning as in § 229.1000 of this chapter; and

(9) *Home jurisdiction* has the same meaning as in the Instructions to paragraphs (c) and (d) of § 240.14d-1.

(d) *Exemptive authority*. Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms or conditions, to any transaction or class of transactions or any security or class of security, or any person or class of persons.

[64 FR 61465, Nov. 10, 1999, as amended at 73 FR 60093, Oct. 9, 2008]

### § 240.14e-6 Repurchase offers by certain closed-end registered investment companies.

Sections 240.14e-1 and 240.14e-2 shall not apply to any offer by a closed-end management investment company to repurchase equity securities of which it is the issuer pursuant to § 270.23c-3 of this chapter.

[58 FR 19343, Apr. 14, 1993]

### § 240.14e-7 Unlawful tender offer practices in connection with roll-ups.

In order to implement section 14(h) of the Act (15 U.S.C. 78n(h)):

(a)(1) It shall be unlawful for any person to receive compensation for soliciting tenders directly from security holders in connection with a roll-up transaction as provided in paragraph (a)(2) of this section, if the compensation is:

(i) Based on whether the solicited person participates in the tender offer; or

(ii) Contingent on the success of the tender offer.

(2) Paragraph (a)(1) of this section is applicable to a roll-up transaction as

defined in Item 901(c) of Regulation S-K (§ 229.901(c) of this chapter), structured as a tender offer, except for a transaction involving only:

(i) Finite-life entities that are not limited partnerships;

(ii) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1); or

(iii) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1).

(b)(1) It shall be unlawful for any finite-life entity that is the subject of a roll-up transaction as provided in paragraph (b)(2) of this section to fail to provide a security holder list or mail communications related to a tender offer that is in furtherance of the roll-up transaction, at the option of a requesting security holder, pursuant to the procedures set forth in § 240.14a-7.

(2) Paragraph (b)(1) of this section is applicable to a roll-up transaction as defined in Item 901(c) of Regulation S-K (§ 229.901(c) of this chapter), structured as a tender offer, that involves:

(i) An entity with securities registered pursuant to section 12 of the Act (15 U.S.C. 78l); or

(ii) A limited partnership, unless the transaction involves only:

(A) Partnerships whose investors will receive new securities or securities in another entity that are not reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1); or

(B) Partnerships whose investors' securities are reported under a transaction reporting plan declared effective before December 17, 1993 by the Commission under section 11A of the Act (15 U.S.C. 78k-1).

[59 FR 63685, Dec. 8, 1994]

### § 240.14e-8 Prohibited conduct in connection with pre-commencement communications.

It is a fraudulent, deceptive or manipulative act or practice within the