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Co-Bidder Status in Tender Offers

By Spencer Klein, Jeffery Bell, Louisa Zhou and Stephanie Ference

The recent *Allergan* litigation in California District Court¹ involved the allegation that Pershing Square Capital Management, LP (together with certain of its affiliates, “Pershing Square”) had violated the prohibition, under Rule 14e-3 of the Securities Exchange Act of 1934 (the “Exchange Act”), against trading on certain information related to tender offers obtained from the offering person. In its defense, Pershing Square analogized to Section 14(d) of the Exchange Act and Regulation 14D thereunder (which contemplate the possibility of two persons or entities (“Persons”) acting together as co-bidders) to argue that Pershing Square was a co-offering person for purposes of Rule 14e-3 and therefore could not have violated the rule. The arguments, and the court’s analysis, provide a timely reminder of the rules regarding whether a Person is a co-bidder for purposes of Regulation 14D. In this article, we discuss the limited available guidance on this topic and factors to consider when determining whether a Person is a co-bidder under Regulation 14D.

Whether a Person is a co-bidder will determine if it is required to file a Schedule TO and disclose certain information about itself to shareholders. The minimum disclosure requirements that must be satisfied by each co-bidder for a tender offer include: (a) its identity and background, including information regarding civil and criminal lawsuits involving the co-bidder and its affiliates during the past five years; (b) any borrowings by the co-bidder for the purposes of the tender offer; (c) the purpose(s) of the tender offer and any plans or proposals regarding, among other things, the sale of a material amount of assets of the target company or its subsidiaries, changes in the present board of directors or management and changes in the present capitalization; (d) any contracts, arrangements or understandings between a co-bidder and any other Person with respect to the target company’s securities; and (e) financial statements of the co-bidder where those statements are material to a decision whether to sell, tender or hold securities.² Additionally, since each co-bidder must individually satisfy the disclosure, filing and dissemination requirements of Schedule TO and Regulation 14D, the U.S. Securities and Exchange Commission (the “SEC”) staff has stated that adding new bidders may require the co-bidders to extend the tender offer and disseminate new offering materials to shareholders, depending on the materiality of the new disclosures provided.³

SEC GUIDANCE FOR IDENTIFYING A CO-BIDDER IN A TENDER OFFER

According to available SEC guidance published in 2000 on this topic (the “2000 SEC Guidance”), Regulation 14D defines “bidder” in a tender offer to potentially include more than one Person.⁴ Under Rule 14d-1(c)(1) of

¹ *Allergan, Inc. v. Valeant Pharms. Int'l, Inc.*, 2014 U.S. Dist. LEXIS 156227 (C.D. Cal. Nov. 4, 2014).

² Rule 14d-6, 17 C.F.R. § 240.14d-6, and Schedule TO, 17 C.F.R. § 240.14d-100, set forth the minimum disclosure requirements that must be satisfied for a tender offer to comply with Section 14(d)(1).

³ See, e.g., Letter from Edward Deibert, counsel for American Spectrum Realty, Inc., to Julia Griffith, SEC (June 11, 2010) (<http://www.sec.gov/Archives/edgar/data/1121783/000090634410000214/filename6.htm>).

⁴ Current Issues and Rulemaking Projects Outline (Nov. 14, 2000), § II.D.2. Mergers & Acquisitions—Identifying the Bidder in a Tender Offer, http://www.sec.gov/divisions/corpfin/guidance/ci111400ex_tor.htm.

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Regulation 14D, “[t]he term bidder means any person who makes a tender offer or on whose behalf a tender offer is made.”⁵ According to the 2000 SEC Guidance, “[e]ach offer must have at least one real bidder, and there can be co-bidders as well.”⁶ Moreover, each bidder in a tender offer subject to Regulation 14D must file a Schedule TO and disseminate the information required by that schedule to shareholders.

When the SEC analyzes “bidder” status for Regulation 14D purposes, the staff will consider factors such as:

- 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?
- Would the person beneficially own the securities purchased by the named bidder in the tender offer or the assets of the target company?⁷

According to the 2000 SEC Guidance, one or two of these factors may control the determination of co-bidder status, depending on the circumstances, and the factors listed above are not exclusive. The SEC staff will also consider whether adding a particular Person as a named bidder will result in shareholders receiving material information that is not otherwise required under the control person Instruction C to Schedule TO.⁸ In addition, the SEC staff will consider the degree to which the party in question acted with the named bidder and the extent to which such party benefits from the transaction. However, the 2000 SEC Guidance makes it clear that no single factor or issue is dispositive of co-bidder status. According to both the SEC and the courts (as discussed further below), the analysis of whether a Person is a co-bidder for Regulation 14D purposes is a fact-specific and case-by-case inquiry.

Several SEC comment letters provide insight into situations where the SEC staff will presume, until proven otherwise by the bidder in its response to the SEC, that certain affiliates of the bidder should also be named as co-bidders based on their relationship as a parent, sponsor, other financing source or other control person of the bidder further up the corporate chain. A survey of publicly available SEC comment letters to Schedule TOs filed with the SEC from 2006 to 2015 generated 18 letters with discussions between the SEC and the bidder on the topic of co-bidder status. Seventeen out of these 18 SEC comment letters referred to the 2000 SEC Guidance and asked the bidder to re-evaluate whether other Persons affiliated with the bidder should also be included as a co-bidder in the proposed tender offer. Bidders are invited to either amend their Schedule TO or respond to the

⁵ The rule excludes an issuer who makes a tender offer for its own securities. 17 C.F.R. § 240.14d-1(g)(2). See also 17 C.F.R. § 240.14d-100 (“The term offeror means any person who makes a tender offer or on whose behalf a tender offer is made.”).

⁶ 2000 SEC Guidance at 1.

⁷ *Id.*

⁸ The *Allergan* court agreed with the plaintiffs that the purpose of the Williams Act is to ensure that investors have access to the material information they need to decide how they will respond to a tender offer. *Allergan* at *38.

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SEC explaining why such affiliates identified by the SEC staff as potential co-bidders should not be included as co-bidders based on the factors listed in the 2000 SEC Guidance.⁹ We discuss a few of these situations below.

When is the parent of a bidder a co-bidder? “[W]here 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 shares tendered.”¹⁰ In SEC correspondence relating to a tender offer directed by Giraffe Acquisition Corporation (“Giraffe”), pursuant to the SEC’s suggestion, Giraffe agreed to amend its initial Schedule TO to add its parent, Giraffe Holding, Inc., as a co-bidder because the parent controlled Giraffe, the acquisition entity “formed solely for the purpose of” the tender offer.¹¹ However, “[i]f 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.”¹²

When is a controlling stockholder of a bidder a co-bidder? According to the 2000 SEC Guidance, “[t]he fact that the parent company or other persons control the purchaser through share ownership does not mean that the entity is automatically viewed as a bidder. Instead, [the SEC looks] at the parent’s or control person’s role in the tender offer.” Further, the SEC staff has indicated in its comment letters that “control persons of [co-bidders] may also be required bidders, depending on the analyses outlined [in the 2000 SEC Guidance].”¹³ In contrast, in *Revlon, Inc. v. Pantry Pride, Inc.*, 621 F. Supp. 804 (D. Del. 1985), the court held that two corporations who had controlling interests in the parent and sole shareholder of the tender offeror were not “bidders,” since they had not capitalized the tender offeror with their funds nor offered their funds to assist in the purchase.¹⁴ According to case law, “the mere status as a majority shareholder in the parent of a tender offeror without financial participation is not enough.”¹⁵

When is a general partner or manager of a bidder a co-bidder? General partners, managers, and the control entities of such entities are not specifically mentioned in the 2000 SEC Guidance. However, a review of SEC comment letters indicates that the factors in determining whether these affiliates of the bidder are co-bidders are the same as for any other entity: the extent of control that they have over (a) the named bidder, directly or indirectly, and/or (b) the terms of the tender offer. In Giraffe’s tender offer for The Gymboree Corporation, in addition to adding its parent as a co-bidder, Giraffe agreed to add the general partner of its parent, Bain Capital Fund X, L.P. (“Bain”), as a co-bidder at the SEC’s suggestion, not only because “[Giraffe] is controlled by [Bain]” but also because it would “be providing part of the financing for the offer.”¹⁶ In The Talbots, Inc. tender offer, the two sponsors of the bidder and the sponsors’ investment manager, Sycamore Partners Management, L.L.C., were ultimately named as co-bidders at the suggestion of the SEC because (1) they were all signatories to the

⁹ See, e.g., Letter from Edward Deibert to Julia Griffith, *supra* note 3.

¹⁰ 2000 SEC Guidance at 1.

¹¹ See Letter from R. Newcomb Stillwell, counsel for Giraffe Acquisition Corporation, to Peggy Kim, SEC (November 8, 2010) (<http://www.securitiesmosaic.com/net/tools/CreatePDF.aspx?FileLink=gateway/secdata/10/0000000000-10-065400/filename1.pdf|gateway/secdata/10/0001193125-10-252365/filename6.htm>) (second letter on webpage).

¹² 2000 SEC Guidance at 2.

¹³ Letter from Edward Deibert to Julia Griffith, *supra* note 3.

¹⁴ *Revlon*, 621 F. Supp. 804, at 814.

¹⁵ *Koppers Co., Inc. v. American Exp. Co.*, 689 F.Supp. 1371, 1388 (W.D. Pa. 1988) (citing *Revlon* at 814).

¹⁶ Letter from R. Newcomb Stillwell to Peggy Kim, *supra* note 11.

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Confidentiality Agreement and Exclusivity Agreement entered into “during the initial structuring and negotiation of the transaction,” (2) the two sponsors had “committed to providing \$210 million of equity financing for the offer” and (3) Sycamore Partners Management, L.L.C. played a “significant role . . . in the initiating, structuring, and negotiating of the tender offer.” However, also according to available SEC correspondence, the general partner of the sponsors and its managing member did not need to be named as co-bidders due to their “lack of involvement in the negotiations.”¹⁷

When is a financing source of a bidder a co-bidder? Although the body of case law on this topic is limited, courts have distinguished the status of a mere banker from that of a co-bidder acting as a “principal participant” who is “central to the offer.”¹⁸ While neither the SEC nor the courts have articulated a bright-line test for determining whether a Person is a co-bidder, the *Allergan* court notes the one takeaway from case law is that bankers who do no more than supply the tender offeror with money in return for a fee or an interest in the target company’s stock do not qualify as co-bidders.¹⁹

For example, in *MAI Basic Four, Inc. v. Prime Computer, Inc.*, 871 F.2d 212 (1st Cir. 1989), the First Circuit affirmed the district court’s ruling that Drexel Burnham Lambert, Inc. (“Drexel”), who helped a group of companies (“Basic”) make a tender offer for Prime Computer, Inc., was a co-bidder based on the following facts:

- Drexel’s primary role in financing the tender offer was to place \$875 million in junk bonds. If Drexel was successful, it would get \$65 million in fees. Even if the junk bonds were not sold, there was some evidence that Drexel was still expected to contribute \$875 million.
- Drexel was also instrumental in raising \$20 million that a Basic-affiliated entity was using to finance the tender offer.
- As of the date of the tender offer, Drexel had the right to name one of three board directors of one of Basic’s principal shareholders, with veto power over some corporate actions. After the tender offer commenced, Drexel relinquished its directorship, but still had the right to attend board meetings and had first rights of refusal with regard to underwriting and placement.
- Drexel held significant equity interests in three different Basic-affiliated entities.
- Drexel had helped arrange financing for Basic-affiliated entities to acquire other companies in the past.²⁰

The *MAI* court stated, “In this case we cannot say that, as a matter of law, an active advisor-broker-financier-participant who owns less than a majority interest in the surviving entity is not a bidder where, as here, there has

¹⁷ Letter from Mellissa Duru, SEC, to Stefan L. Kaluzny, counsel for TLB Merger Sub, Inc. (June 22, 2012) (<http://www.securitiesmosaic.com/net/tools/CreatePDF.aspx?FileLink=gateway/secdata/12/0000000000-12-032874/filename1.pdf|gateway/secdata/12/0001104659-12-047015/filename2.html|gateway/secdata/12/0001104659-12-047015/filename2.html|gateway/secdata/12/0000000000-12-035029/filename1.pdf|gateway/secdata/12/0001104659-12-050197/filename6.html|gateway/secdata/12/0001104659-12-050197/filename6.htm>).

¹⁸ *Koppers* at 1388.

¹⁹ “[B]ankers who do no more than supply the tender offer or with money to make the tender offer in return for a fee or in return for a security interest in the post-transaction company’s stock are not co-bidders.” *Allergan* at *33 (citing *Van Dusen* at *1-3; *Revlon* at 816-17). “Beyond that, “there is no bright, hard-line test” for distinguishing a co-bidder from the “rest of humanity.” Id. (citing *MAI Basic Four, Inc. v. Prime Computer, Inc.*, 871 F.2d 212, 221 (1st Cir. 1989); *Koppers* at 1387).

²⁰ *Allergan* at *34 n.6.

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been a history of close association, equity sharing, board representation and involvement from the beginning of the present offer, and where there is the possibility of the advisor-broker being the indispensable key to the offer's success."²¹

In *Koppers Co., Inc. v. American Exp. Co.*, 689 F.Supp. 1371 (W.D. Pa. 1988), the district court held that Shearson Lehman Brothers Holdings, Inc. and its affiliates ("Shearson"), who worked with Beazer PLC ("Beazer") and other entities to make a tender offer for Koppers Co., Inc. ("Koppers") shares, was a co-bidder based on the following facts:

- Shearson had been involved from the start in advising Beazer on acquisition possibilities.
- Evidence from their early negotiations showed that Shearson intended from the start to take an active and aggressive role in the Koppers takeover.
- Shearson contributed \$23.05 million to acquire a toehold in Koppers before the tender offer.
- Shearson held a significant equity interest in BNS, Inc., an entity created by Shearson, Beazer, and others for the sole purpose of holding the Koppers shares acquired through tender offer, and would hold slightly less than 50% interest in BNS, Inc. after the tender offer was consummated.
- Shearson committed to making a financial contribution of \$570 million to BNS, Inc. to carry out the tender offer.
- In return, Shearson would receive either unsecured notes from BNS, Inc. or stock in BNS, Inc.
- Shearson would earn significant brokerage fees by underwriting the purchase of Koppers stock pursuant to the tender offer.²²

The *Koppers* court characterized Shearson's role as one that "far surpass[ed] that of a typical investment banker" because Shearson "play[ed] a central participatory role" in the tender offer despite the fact that it did not have "control" over BNS, Inc.²³ Based on the facts listed above, the *Koppers* court found that Shearson was "unquestionably . . . a motivating force fueling the formation and capitalization of BNS, Inc., as it now stands, and as it is intended to stand after the purchase."²⁴

When is a purchaser of target assets a co-bidder? A party who agrees to purchase a portion of the target's business from the bidder upon completion of the tender offer may also be a co-bidder. Such an arrangement could be agreed upon as a way to finance the purchase of the whole target, or to address a potential antitrust or regulatory concern. While there is no SEC guidance directly on point, an agreement resulting in "the person beneficially own[ing] . . . the assets of the target company" is a factor examined in the 2000 SEC Guidance.²⁵ In addition, the "extent to which the other party benefits from the transaction" will be weighed.²⁶ A bidder should

²¹ *MAI* at 221.

²² *Allergan* at *34 n.6.

²³ *Koppers* at 1390.

²⁴ *Id.*

²⁵ 2000 SEC Guidance at 1.

²⁶ *Id.* at 2.

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consider the relative size of the target's business to be sold compared to the size of the whole target. In addition, the SEC would consider "whether adding the person as a named bidder means shareholders will receive material information that is not otherwise required under" the Schedule TO.²⁷ Disclosing such a third-party agreement in the initial Schedule TO may satisfy the requirement to inform shareholders. Finally, the significance of the financing source's role in "initiating, structuring, and negotiating the tender offer"²⁸ would indicate whether this relationship was closer to that of "mere banker" or "principal participant" who is truly a party "on whose behalf a tender offer is made."

CONCLUSION

As the available guidance indicates, the standards for determining whether a Person is a co-bidder under Regulation 14D are subject to interpretation. The applicable analysis is a fact-specific one involving numerous factors. Market participants should be aware that, when interpreting existing rules to determine whether a Person is a co-bidder, a court will likely consider the intended purpose of Section 14(d) and Regulation 14D and weigh the cost of additional disclosures against the potential harm to investors receiving inadequate information.

Market participants should also keep in mind that, in its review of a bidder's Schedule TO, the SEC may provide comments requiring the bidder to reconsider adding additional Persons to its offer as co-bidders, including but not limited to the parent of the bidder, general partners of the parent of the bidder, other financiers of the purchase of the target company's shares and other control persons of the bidder up the corporate chain, depending on the level of direct or indirect control the entity has on the named bidder and an analysis of the other factors listed in the 2000 SEC Guidance. Based on our review of available SEC comment letters, we note that the SEC ultimately places the burden on the named bidder to argue why certain persons or entities affiliated with the bidder should not be considered co-bidders subject to Regulation 14D. The courts might be the final arbiters of the issue in a case brought by a competing bidder or a disgruntled shareholder.

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²⁷ *Id.*

²⁸ *Id.* at 1.