

Sanctions in Takeover Situations: Navigating Regulatory Hurdles

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06/28/16

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The U.S. government frequently uses sanctions as a key tool in pursuing its foreign policy agenda. As a result, transactions involving sanctioned individuals and entities (Sanctioned Persons) are often prohibited. The successful resolution of sanctions-related issues in a recent U.S.-regulated multibillion-dollar tender offer may help guide buyers in other takeover situations.

Months after entering into a definitive agreement to acquire Alcatel-Lucent in April 2015, Nokia Corporation learned that two Sanctioned Persons held a very small number of Alcatel-Lucent American depository shares (ADS)¹ (in fact, the total value of the ADSs held by two Cuban nationals subject to U.S. sanctions against Cuba was approximately \$100). Notwithstanding the insignificant ADS holding, as a result of the sanctions, the tender offer could not be extended to the two individuals, and the ADS they held could not be acquired in the offer.

The situation required a two-pronged approach: Nokia needed to obtain relief from the U.S. Securities and Exchange Commission (SEC) to exclude the Sanctioned Persons from its tender offer, and it needed to obtain a license from the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) in order to acquire the target shares held for the benefit of the Sanctioned Persons in the second-phase transaction.

SEC Relief

Alcatel-Lucent was listed on Euronext Paris and was an SEC registrant, so the transaction was structured as dual tender offers in France and the U.S. The U.S. tender offer had to comply with U.S. tender offer rules — in particular, Rule 14d-10(a)(1) promulgated under the Securities Exchange Act of 1934. This rule restricts a bidder from making a tender offer unless “the tender offer is open to all security holders of the class of securities subject to the tender offer.” If, however, the offer was extended to the two Sanctioned Persons in order to comply with Rule 14d-10(a)(1), the bidder would be in breach of OFAC's sanctions regulations.

Rule 14d-10(b)(2) provides an exemption from Rule 14d-10(a)(1) that allows a bidder to exclude “all security holders in a state where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a state statute after a good faith effort by the bidder to comply with such statute.” However, the exemption afforded under this rule does not extend to federal laws, including sanctions.

In the first instance, Nokia applied to the SEC for exemptive relief from Rule 14d-10(a)(1). As far as we are aware, this was the first request for SEC relief based on a conflict between U.S. federal law and Rule 14d-10(a)(1) since 1987. That year, the SEC granted relief in an exchange offer to Freeport-McMoRan Energy Partners, which derived most of its income from land held through federal oil and gas leases. Such leases could be held only by, among other entities, partnerships made up solely of U.S. citizens. The SEC granted Freeport-McMoRan permission to exclude from its exchange offer “persons who are prohibited by law from holding interest in federal oil and gas leases,” including individuals who are not “citizens of the United States.”

The SEC granted Nokia's request for no-action relief on November 17, 2015, and the tender offer was launched on November 18, 2015. In its request for the relief, Nokia made representations that U.S. sanctions prohibited it “from acquiring or otherwise dealing with any security registered in the name of a Sanctioned Person.” The SEC

¹ Nokia is a Finnish corporation and Alcatel-Lucent is a French company. Both entities are “foreign private issuers” for purposes of the U.S. securities laws.

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specifically relied on the representation that the Sanctioned Persons held ADS valued at approximately \$100. Additionally, in granting relief, the SEC noted that Nokia had applied for a license from OFAC in order to include the Sanctioned Persons in its tender offer but had been advised that such license was unlikely to be granted in time to permit them to be included in the offer. In addition, the SEC noted the representation that if the license was timely granted by OFAC, the Sanctioned Persons would be permitted to participate in the offer.

OFAC Relief

As tender offers typically do not result in 100 percent ownership, obtaining SEC relief only postponed and did not definitively resolve the problem of needing to transact with the Sanctioned Persons. In most tender offers, a squeeze-out or short-form merger would follow the offer in order for the bidder to secure 100 percent ownership. In a situation such as that which Nokia encountered, any such second-stage transaction would similarly involve dealings with Sanctioned Persons, whether such persons' shares would be transferred to the bidder by operation of law or otherwise, and would thus be prohibited by U.S. sanctions.

To address this issue, in parallel with the request for relief from Rule 14d-10(a)(1) made to the SEC, Nokia applied to OFAC for a license that would allow it to deal with the Sanctioned Persons in the context of the offer. The OFAC license was granted

approximately two months later and was specific to Nokia's facts and circumstances. Because Nokia received it shortly before the opening of the subsequent offering period, the tender offer was extended during that period to the Sanctioned Persons.

Conclusion

When structuring a corporate transaction (whether structured as a tender offer to be followed by a merger or a single-step merger), the parties must be mindful of the possible existence of shareholders who are Sanctioned Persons. If it becomes clear that such shareholders are in the share register of the target company or otherwise, the parties should consider the available options. These may include seeking exemptions from the applicable state and federal regulators and an OFAC license as early as possible, as such exemptions and/or licenses are not guaranteed and may take time to obtain.

Skadden represented Nokia Corporation in connection with its acquisition of Alcatel-Lucent. The views expressed in this article are the views of the authors and are not the views of Nokia, Skadden or any other Skadden clients. The authors acknowledge the contribution of Skadden associate Lindsey F. Randall to this article.