



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
MARKET REGULATION

April 4, 2007

Sebastian R. Sperber  
Cleary Gottlieb Steen & Hamilton LLP  
55 Basinghall St.  
London EC2V 5EH, England  
United Kingdom

Re: Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors  
TP No. 07-53

Dear Mr. Sperber:

We are responding to your April 3, 2007 letter to James A. Brigagliano (the "April 3<sup>rd</sup> Letter"), as supplemented by telephone conversations with the staff of the Division of Market Regulation ("Division" or "Staff"), with regard to your request for exemptive relief under Rule 14e-5 of the Securities Exchange Act of 1934 ("Exchange Act"). Unless otherwise noted, capitalized terms in this letter have the same meaning as in your letter.

As you note in your letter, the U.S. Securities and Exchange Commission ("Commission") has granted relief for Financial Advisor's Affiliates<sup>1</sup> and Departments on other occasions in order to permit such persons to engage in Trading Activities during tender offers subject to Rule 14e-5 under the Exchange Act ("Rule 14e-5" or the "Rule"). Rule 14e-5 prohibits a covered person from directly or indirectly purchasing or arranging to purchase subject securities or any related securities except as part of the tender offer.<sup>2</sup> This prohibition applies from the time the offer is publicly announced until it expires. Rule 14e-5 defines a "covered person" as (i) the offeror and its affiliates, (ii) the offeror's dealer-manager and its affiliates, (iii) any advisor to the parties described in (i) and (ii) above whose compensation is dependent on the completion of the offer, and (iv) any person acting, directly or indirectly, in concert with any of the foregoing in connection with any purchase or arrangement to purchase any subject securities or any related securities. Rule 14e-5 would prohibit purchases or arrangements to purchase subject and related securities in the context of certain of the Trading Activities where the Financial Advisors are "covered persons" under the Rule.

<sup>1</sup> For purposes of our response, an "affiliate" is any person that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, the Financial Advisor.

<sup>2</sup> The terms "subject securities" and "related securities" are defined in Rule 14e-5(c).

We find that it is appropriate in the public interest and consistent with the protection of investors to grant, and hereby grant, an exemption from Rule 14e-5 to permit the Financial Advisor's respective Affiliates and Departments to engage in purchases or arrangements to purchase subject and related securities subject to Rule 14e-5 while conducting the Trading Activities, if the following conditions are met:

1. The company that is the target of the offer ("subject company") is a "foreign private issuer" as defined in Rule 3b-4(c) of the Exchange Act;
2. The Financial Advisor reasonably believes that the subject company has a level of U.S. shareholding that would enable it to rely on the Tier II exemptive relief provided under Rule 14d-1(d) of the Exchange Act;
3. The Trading Activities are only conducted outside the United States;
4. The Trading Activities are consistent with the Financial Advisor's Affiliates' and Departments' normal and usual business practices, and are not conducted for the purposes of promoting or otherwise facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or maintaining or affecting the price of, the securities of the subject company;
5. The offer document discloses prominently the Financial Advisor's intention to conduct the Trading Activities;
6. Each of the Affiliates and Departments of the Financial Advisor that conduct the Trading Activities has no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) who direct, effect or recommend transactions in the subject securities or related securities who also will be involved in providing the offeror or subject company in such transactions with financial advisory services or dealer-manager services;
7. The Financial Advisor has an affiliate that is registered as a broker-dealer under Section 15(a) of the Exchange Act;
8. The Trading Activities are permissible under, and will be conducted in accordance with, applicable law of the home jurisdiction, as defined in Rule 14d-1.<sup>3</sup> The Financial Advisor and its Affiliates and Departments will also comply with any information barrier requirements imposed by applicable law of the home jurisdiction;

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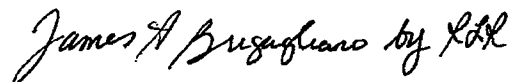
<sup>3</sup> The term "home jurisdiction" is defined in the Instructions to paragraphs (c) and (d) of Rule 14d-1 as both the jurisdiction of the subject company's incorporation, organization or chartering and the principal foreign market where the subject company's securities are listed or quoted.

9. The Financial Advisor and its Affiliates and Departments maintain and enforce written policies and procedures that are reasonably designed to prevent the transfer of information among the Financial Advisor and its Affiliates and Departments that conduct the Trading Activities that might result in a violation of the U.S. federal securities laws through the establishment of information barriers;
10. The Financial Advisor, through its Affiliates and Departments, conduct the Trading Activities voluntarily in compliance with the pertinent provisions of the United Kingdom's City Code on Takeovers and Mergers and Rules Governing Substantial Acquisitions of Shares (the "City Code"), and the Affiliates and Departments conduct themselves as if they were connected exempt principal traders as defined in the City Code, including complying with regulations with respect to the establishment and maintenance of information barriers, conflict of interest provisions and other requirements, other than with respect to the notification of relevant trades to the Panel. The Financial Advisor will, however, publicly disclose in the United States information regarding the Trading Activities to the extent that such information is required to be made public in the subject company's home jurisdiction;
11. The Financial Advisor provides to the Division, upon request, a daily time-sequenced schedule of all transactions effected in the subject securities or related securities by the Financial Advisor's Affiliates and Departments, on a transaction-by-transaction basis, including:
  - a. size, broker (if any), time of execution, and price of purchase; and
  - b. the exchange, quotation system, or other facility through which the purchase occurred;
12. Upon the request of the Division, the Financial Advisor will transmit the information as specified in paragraphs 11.a. and 11.b. above to the Division at its offices in Washington, D.C. within 30 days of its request;
13. The Financial Advisor will retain all documents and other information required to be maintained pursuant to this exemption for a period of not less than two years from the date of the termination of the offer;
14. Representatives of the Financial Advisor are made available (in person at the offices of the Division in Washington, D.C. or by telephone) to respond to inquiries of the Division relating to its records; and

15. The Financial Advisor and its Affiliates and Departments will comply with Rule 14e-5 except as exempted by the relief granted herein or pursuant to any no-action letter or exemptive relief granted by the Staff.<sup>4</sup>

We also direct your attention to the anti-fraud and anti-manipulation provisions of the federal securities laws, including Sections 10(b) and 14(e) of the Exchange Act, and Rule 10b-5 thereunder. The participants in the transactions contemplated by this letter must comply with these and any other applicable provisions of the federal securities laws. The Division expresses no view on any other questions that may be raised by such transactions, including but not limited to, the adequacy of disclosure concerning and the applicability of any other federal or state laws to the proposed transactions.

For the Commission,  
by the Division of Market Regulation  
pursuant to delegated authority



James A. Brigagliano  
Associate Director  
Division of Market Regulation

Attachment

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<sup>4</sup> As you note in footnote 11 of the April 3<sup>rd</sup> Letter, reliance on the relief granted in this response would not preclude the Financial Advisor's Affiliates and Departments from making purchases of securities outside a Tender Offer on behalf of the bidder in such Tender Offer pursuant to relief granted in the Sulzer Letter or pursuant to a separate letter from the staff granting relief from Rule 14e-5 and consistent with local law so long as, among other things, the Financial Advisor's Affiliates and Departments designate an individual trader or traders to make such purchases on behalf of the bidder and its agents, and other than such purchases made on behalf of the bidder or its agents, the Designated Traders would not make any other purchases of Securities during the offer period.

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April 3, 2007

### VIA FACSIMILE

U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549  
U.S.A.

Attention: Mr. James A. Brigagliano  
Associate Director,  
Division of Market Regulation

Re: Blanket Exemptive Relief under Rule 14e-5

Dear Mr. Brigagliano:

We are acting as counsel to Goldman Sachs International ("Goldman Sachs") in connection with its possible purchases or arrangements to purchase equity securities of foreign private issuers, as defined in Rule 3b-4(c) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), that are the subject of a tender offer in which Goldman Sachs is acting in the capacity of financial advisor. A number of recent no-action letters (the "Trading Activities Letters")<sup>1</sup> granted by the staff of the Securities and Exchange Commission (the

<sup>1</sup> Letter regarding the offer by NYSE Euronext, Inc. for Shares of Euronext NV (July 13, 2006); letter regarding the offer by Adecco S.A. for DIS Deutscher Industrie Service A.G. (January 9, 2006); letter regarding the offer by Crucell N.V. for Berna Biotech A.G. (January 5, 2006); letter regarding Gas Natural SDG S.A.'s proposed acquisition of Endesa S.A. (November 18, 2005) (collectively, the "Trading Activities Letters").

“Staff”) have provided exemptive relief to financial advisors and their affiliates from Rule 14e-5 under the Exchange Act (“Rule 14e-5”), for certain enumerated trading activities carried out by such financial advisors during tender offers subject to Rule 14e-5. The exemptive relief granted in these letters was largely premised on the fact that the tender offers in question were for non-U.S. companies the majority of whose shareholders were outside the United States. Where the trading activities were to occur outside the United States, it was argued that ordinary course trading activities would not violate the principles of Rule 14e-5, especially when local law coupled with voluntary compliance with the United Kingdom’s City Code on Takeovers and Mergers (the “City Code”) provided protections to shareholders similar to those under the Exchange Act. We hereby request, on behalf of Goldman Sachs, as well as other similarly situated financial advisors (collectively, the “Financial Advisors”), exemptive relief from the provisions of Rule 14e-5 with respect to such trading activities during the pendency of any such future tender offers for the securities of foreign private issuers (“Tender Offers”), subject to the conditions described below.

#### I. Trading Activities

Financial Advisors and their affiliates and separately identifiable departments (“Affiliates and Departments”) typically offer a full range of banking and securities services to governmental institutions, corporate and other business enterprises and institutional and individual investors around the world. Such services may include brokerage, research, trading, corporate finance, capital markets, underwriting, asset management and investment advisory services, including discretionary portfolio management for customers.

Financial Advisors and their Affiliates and Departments may trade in the shares of a target or derivatives related to such securities (including futures, forwards, options, swaps or similar instruments) (collectively, the “Securities”) on exchanges or otherwise. Financial Advisors and their Affiliates and Departments might engage in, among other things, the following trading activities in relation to the securities subject to a Tender Offer (collectively referred to herein as the “Trading Activities”):<sup>2</sup>

- (1) market-making activities in the Securities;
- (2) purchasing and selling Securities as part of ordinary course portfolio and asset management activities for third-party customers (other than any covered person) in which activities the Financial Advisors and their Affiliates and Departments would generally have discretionary trading authority, as well as purchasing and selling Securities as principal for their own accounts;
- (3) principal facilitation to buy the Securities to facilitate client orders on the relevant stock exchanges or in the over-the-counter markets;

<sup>2</sup>

Certain activities that are clearly permitted under or exempted from Rule 14e-5 are not discussed below and exemptive relief is not being sought for any such activities.

- (4) creation of derivatives products (including futures, forwards, options, swaps or similar instruments) and dynamic hedging and covering activities, short sales and other forms of hedging and covering, such as purchasing and selling Securities, with respect to positions in these derivatives contracts that are created after the announcement of the Tender Offer in question, as well as such hedging and covering activities with respect to (a) derivatives contracts in place prior to such announcement and (b) any such trading and positions as would be permitted otherwise pursuant to this relief;
- (5) index arbitrage activities (other than risk arbitrage trading) that are not to facilitate the Tender Offer and are limited in scope, so that such index arbitrage activities are consistent with activities undertaken by the Financial Advisors and their Affiliates and Departments in the ordinary course of business prior to the announcement of the Tender Offer and reflect the same balance and constituency as the index being hedged, and hedging and covering activities, including dynamic hedging, short sales and other forms of hedging, such as purchasing and selling Securities, with respect to such index-related activities;
- (6) program trades of Securities by the Financial Advisors and their Affiliates and Departments in relation to a basket of securities the composition of which has been proposed by a client (other than any covered person), and hedging and covering activities with respect thereto, including dynamic hedging, short sales and other forms of hedging, such as purchasing and selling Securities with respect to such activities;
- (7) hedging activities, including dynamic hedging, short sales and other forms of hedging, such as purchasing and selling Securities or with respect to the market-making activities in Securities described in (1) above;
- (8) lending and borrowing Securities to and from other intermediaries to assist the Financial Advisors and their Affiliates and Departments in managing their market-making activities in Securities described in (1) above;
- (9) purchasing Securities for purposes of delivering securities upon exercise of call options or warrants or creation or redemption of exchange-traded funds, or buying Securities in respect of the exercise of put options or warrants or creation or redemption of exchange-traded funds, all in connection with the market-making and related hedging activities described in (1) and (7) above;
- (10) buying Securities to cover short positions entered into after the announcement of the Tender Offer in question; and
- (11) purchases of Securities in a proprietary capacity.<sup>3</sup>

<sup>3</sup>

This list of activities is similar to those for which the Staff has previously granted exemptive relief under similar circumstances. See, e.g., the Trading Activities Letters.

Financial Advisors typically impose trading restrictions throughout their global operations to comply with all applicable legal restrictions upon the public announcement of a Tender Offer. Relief under Rule 14e-5 with respect to purchases or arrangements to purchase Securities, either on exchanges or in the over-the-counter markets, in connection with the Trading Activities by the Financial Advisors and their Affiliates and Departments is sought only to the extent permitted under the applicable local law in the Tender Offer in question (and as would be permitted under the City Code).<sup>4</sup>

## II. Rule 14e-5 Relief

### A. Background

Rule 14e-5, among other things, prohibits a person making a cash tender offer or exchange offer for an equity security from, directly or indirectly, purchasing or making any arrangement to purchase such security or any security which is immediately convertible into, exchangeable for, or exercisable for such security, other than pursuant to the offer, from the time the offer is publicly announced until its expiration. Rule 14e-5 applies to the offeror and its affiliates, its dealer-manager and its affiliates, any advisor to such persons whose compensation is dependent on the completion of the offer and any person acting, directly or indirectly, in concert with any such persons ("Covered Persons").

Rule 14e-5, as with its predecessor rule, Rule 10b-13, is designed to prevent manipulative and deceptive practices whereby a person making a cash tender or exchange offer purchases (or arranges to purchase) shares otherwise than pursuant to the offer. Among the concerns that Rule 14e-5 is designed to prevent are avoidance of pro-rationing requirements, disparate treatment of persons who tender into the offer and persons who sell securities outside the offer, and holders of large blocks of the subject securities demanding greater or different consideration than that offered pursuant to the tender or exchange offer. None of these concerns are present here.

<sup>4</sup> Other trading activities may be permitted by exemptions contained in Rule 14e-5. For example, Rule 14e-5(b)(1) exempts transactions to convert, exchange or exercise related securities owned before public announcement into subject securities. Rule 14e-5(b)(4) exempts purchases in the ordinary course of business and made either on an agency basis not for a covered person, or as principal for one's own account if the purchasing dealer-manager or 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. Rule 14e-5(b)(5) exempts purchases of a basket of securities containing a subject security or a related security if (i) the 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. Rule 14e-5(b)(6) exempts purchases or arrangements to purchase that are made to satisfy an obligation to deliver a subject or related security arising from a short sale made before public announcement of the offer or from the exercise of an option by a non-covered person written before public announcement of the offer if the short sale or option transaction was made in the ordinary course of business and not to facilitate the offer. Rule 14e-5(b)(7) exempts purchases pursuant to a contract entered into before public announcement of the tender offer.



Rule 14e-5(b) provides certain exceptions to the general rule prohibiting Covered Persons from purchasing or arranging to purchase the subject security outside the terms of the offer. However, the Trading Activities are not technically covered by the exceptions to Rule 14e-5 and thus would be prohibited by the rule. Accordingly, relief is requested with respect to any Tender Offers to which Rule 14e-5 is applicable to engage in purchases of or arrangements to purchase Securities as related to the enumerated Trading Activities on the conditions set forth below. Without relief, Financial Advisors would effectively be compelled to stay “out of the market” for a significant period of time due to the restrictions in Rule 14e-5 and, to the extent that Financial Advisors are not able to make a market in the referenced trading markets, the markets and the Financial Advisors’ clients may be disadvantaged.

Please note that, in our view, there are serious doubts as to whether the jurisdictional predicate for the application of the Exchange Act exists, namely that there be a purchase of a security “by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange”, would be satisfied if the Financial Advisors or their Affiliates and Departments made purchases of, or arrangements to purchase, Securities outside the United States. We have been requested by Goldman Sachs to emphasize that this letter does not reflect an admission that Rule 14e-5 would apply to such purchases of Securities outside the United States in the absence of such exemptive relief. We nonetheless apply, on behalf of Goldman Sachs, for exemptive relief for such purchases, or arrangements to purchase, from the provisions of Rule 14e-5, on the conditions set forth below.

B. Rule 14e-5(b)(8)

Rule 14e-5(b)(8) provides an exception for purchases or arrangements to purchase by an “affiliate of the dealer-manager” if (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 U.S. federal securities laws and regulations, (ii) the dealer-manager is registered as a broker or dealer under Section 15(a) of the Exchange 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.

Rule 14e-5(b)(8) may not, by its terms, apply to the Trading Activities in a given Tender Offer because some Financial Advisors might be acting as financial advisors to the target, but not as dealer-managers, may not be U.S. registered broker-dealers or may not squarely satisfy the requirements of Rule 14e-5(b)(8)(iii).<sup>5</sup> However, each Financial Advisor who relies on relief hereunder, if granted, will have an affiliate that is a U.S. registered broker-dealer. Under such circumstances, and because the Financial Advisors would meet the conditions set out in the next paragraph, it is requested that they be permitted to engage in the Trading Activities.

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<sup>5</sup> Even if a Financial Advisor is acting for the target, it may be considered a Covered Person with respect to a Tender Offer because it may be deemed to be acting in concert with the offeror and its affiliates and/or the offeror’s dealer-manager and its affiliates in the context of such Tender Offer.

Financial Advisors maintain and enforce written policies and procedures that are reasonably designed to prevent the impermissible transfer of information among the Financial Advisors and their Affiliates and Departments that might result in a violation of the U.S. federal securities laws and regulations through the establishment of information barrier policies and procedures. Financial Advisors may also be required by applicable local laws to impose information barriers. These information barriers are intended to prevent improper motives from influencing the purchasing activity of the Financial Advisors and their Affiliates and Departments and to prevent the impermissible flow of confidential information between the trading and advisory arms of a Financial Advisor in order to permit unrestricted dealings in securities of clients of the advisory arms. While not all Financial Advisors may be registered under Section 15(a) of the Exchange Act, each Financial Advisor who relies on relief hereunder, if granted, will have an affiliate who is so registered and is thus subject to the high level of regulatory and reporting requirements of the U.S. federal securities laws. Consistent with these information barriers, the personnel in the Financial Advisors and their Affiliates and Departments conducting Trading Activities that direct, effect or recommend transactions in the Securities would not be the same personnel that are providing financial advisory services to a Financial Advisor's client in the Tender Offer in question. Furthermore, the Trading Activities would not be conducted in order to facilitate such Tender Offer.

C. Local Law Protection and Voluntary Compliance with the U.K. City Code

Tender Offers in many jurisdictions, including the United Kingdom, will be subject to applicable local laws and regulations, if any, that serve to protect the interests of shareholders in such Tender Offers. These local laws often include a number of protections for shareholders similar to those required by the Staff in letters issued under Rule 10b-13 and Rule 14e-5.<sup>6</sup> The Staff has previously granted exemptive relief based on similar conditions, including the availability of protections under local laws and regulations. *See, e.g.*, the letter regarding the offer by NYSE Euronext, Inc. for Shares of Euronext NV (July 13, 2006, involving French law); the letter regarding the offer by Sonaecom, SGPS, S.A. for Portugal Telecom, SGPS, S.A. (April 18, 2006, involving Portuguese laws); the letter regarding the offer by Adecco S.A. for DIS Deutscher Industrie Service AG (January 9, 2006, involving German law); the letter regarding the offer by Crucell N.V. for Berna Biotech AG (January 5, 2006, involving Swiss law); the letter regarding Gas Natural SDG S.A.'s proposed acquisition of Endesa S.A. (November 18, 2005, involving Spanish law); and the letter regarding the offer by Vodafone AirTouch Public Limited Company for Mannesmann AG (January 27, 2000, involving German law).

The City Code is a U.K. regulatory framework that governs tender offers occurring in the United Kingdom and, similar to the Exchange Act, was established to ensure fair and equal treatment of all shareholders, to provide adequate and timely advice and information to shareholders, and to prevent the creation of false markets in securities subject to a tender offer. The City Code

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<sup>6</sup> While we are including as a condition of the relief requested herein that Financial Advisors will comply with any applicable local law, it may be the case in certain transactions that local laws do not have similar protections to those described in the Trading Activities Letters. At a minimum, however, Financial Advisors would be complying voluntarily with the City Code as set out below.

provides shareholders involved in a tender offer with protections consistent with those in Rule 14e-5. The Commission is very familiar with the U.K. regulatory regime. In particular, it has included an exemption from Rule 14e-5(a) based on the applicability of the City Code in Rule 14e-5(b)(9), and has granted no-action relief under Rule 14e-5 (or Rule 10b-13) in numerous transactions where the City Code is applicable.<sup>7</sup> Even where the future tender offer in question is not technically subject to the City Code, Financial Advisors will voluntarily comply with the City Code. The Staff has previously granted relief under Rule 14e-5 based on voluntary compliance with the City Code. *See, e.g.*, the letter regarding certain trading activities by UBS AG, London Branch and J.P. Morgan Securities Limited during the issuer tender offer of Dairy Farm International Holdings Limited (February 21, 2003) (the “2003 UBS Letter”). In the 2003 UBS Letter, the City Code did not apply because the offer in that case was an issuer tender offer and because the issuer was not incorporated in England; the Staff nevertheless granted relief under Rule 14e-5, relying, in part, on representations that during the transaction, UBS would voluntarily comply with the City Code. The Staff has granted no-action relief in other similar situations. *See, e.g.*, the letter regarding the offer by NYSE Euronext, Inc. for Shares of Euronext NV (July 13, 2006); the letter regarding the offer by Adecco S.A. for DIS Deutscher Industrie Service AG (January 9, 2006); the letter regarding the offer by Crucell N.V. for Berna Biotech AG (January 5, 2006); the letter regarding Gas Natural SDG S.A.’s proposed acquisition of Endesa S.A. (November 18, 2005); the letter regarding the proposed return of cash by National Grid Transco plc (June 6, 2005); the letter regarding certain trading activities by J.P. Morgan Securities Limited during the issuer tender offer of Dairy Farm International Holdings Limited (February 27, 2002); the letter regarding certain trading activities by UBS AG and UBS Warburg during the issuer tender offer of Hongkong Land Holdings Limited (November 22, 2000); the letter regarding certain trading activities by UBS AG and UBS Warburg during the issuer tender offer of Allied Zurich (September 13, 2000); the letter regarding certain trading activities by UBS AG and UBS Warburg during the issuer tender offer of Jardine Matheson Holdings Limited (August 3, 2000); the letter regarding certain trading activities by Credit Suisse First Boston and Cazenove & Co. during the proposed recapitalization of BTR plc (April 9, 1998); the letter regarding the proposed recapitalization by EMI Group plc (July 17, 1997); and the letter regarding the proposed recapitalization by Thorn Plc (June 18, 1997).

In a Tender Offer subject to Rule 14e-5 to which the exemptive relief requested herein would, if granted, apply, Financial Advisors will conduct themselves as if they were connected exempt principal traders, as defined in the City Code, during the Tender Offer and voluntarily comply with the pertinent requirements of the City Code with respect to Trading Activities permitted following the announcement of such Tender Offer, including regulations with respect to the establishment and maintenance of information barriers, conflict of interest provisions and other requirements (except with respect to the obligation to provide notification to the U.K. Takeover Panel (the “Panel”)); trade notifications, if any, required by applicable law would be made to the relevant

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<sup>7</sup> The Rule 14e-5(b)(9) exemption is partly based on the status of “connected exempt principal trader” under U.K. law. Under U.K. law, there are two requirements for establishing such a status. First, a firm must either be (i) registered with the London Stock Exchange as a market-maker or otherwise recognized as such by the Takeover Panel, or (ii) a London Stock Exchange member firm dealing as principal in order book securities. Second, the firm must obtain approval from the U.K. Takeover Panel for exempt status. Before granting exempt status, the Takeover Panel must be satisfied with the internal procedures and controls of the firm (including its information barriers).

authorities). The interests of shareholders, which Rule 14e-5 seeks to safeguard, should not be prejudiced by the Trading Activities of Financial Advisors after the announcement and during the pendency of such Tender Offers. The services provided by Financial Advisors would be effected in the ordinary course of business, and such Financial Advisors would voluntarily comply with the relevant City Code regulations (other than with respect to the notification of such trades to the Panel) that limit the likelihood that market-making transactions will promote such Tender Offer as well as maintain the information barriers described above. In circumstances where relevant elements of the City Code are inconsistent with applicable local law, the Financial Advisors would seek to reasonably apply the City Code rules under the circumstances.<sup>8</sup>

In light of the presence in many jurisdictions of laws and regulations dealing with tender offers and trading activities designed to protect shareholders and the protection under U.K. law, with which Financial Advisors would voluntarily agree to comply, against the types of abuses that Rule 14e-5 is designed to prevent, we believe the likelihood of the occurrence of the abuses at which Rule 14e-5 is aimed is remote. The consideration of comity and the policy of promoting U.S. shareholder participation in cross-border transactions also make a compelling case for exemptive relief.

### III. Requested Exemptive Relief

Based on the foregoing, we respectfully request that Financial Advisors be granted exemptive relief from the provisions of Rule 14e-5 to the limited extent necessary to permit them, through their Affiliates and Departments, to engage in any Trading Activities in the Securities involving purchases or arrangements to purchase Securities that would be prohibited by Rule 14e-5, subject to the following conditions:

1. The target company in the tender offer must be a foreign private issuer as defined in Rule 3b-4(c) under the Exchange Act.
2. The Trading Activities must be conducted outside the United States only.
3. The offer document must disclose prominently the Financial Advisor's intention to conduct the Trading Activities.
4. The Financial Advisor reasonably believes that the target of the Tender Offer has a level of U.S. shareholding that would enable it to rely on the Tier II exemptive relief provided under Rule 14d-1(d) under the Exchange Act.<sup>9</sup>

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<sup>8</sup> For example, the City Code would not allow connected exempt principal traders to tender into an outstanding Tender Offer or to vote any shares subject to the Tender Offer in their possession until in either case the Tender Offer became "unconditional as to acceptances" within the meaning of the City Code rules. In future Tender Offers in which local law does not have a corresponding point in time before the Tender Offer is complete at which such tendering and voting would become possible, the Financial Advisors would not seek to comply with the no-tendering or voting provisions of the City Code rules. Tendering and voting of shares held by Financial Advisors would not in any event be prohibited by Rule 14e-5.

<sup>9</sup> Each of the tender offers covered by the Trading Activities Letters involved a target in which U.S. shareholders were believed to hold no more than 40% of the securities subject to the offer. While tender offers in which U.S. shareholders hold more than 40% of the securities subject to the offer may also merit exemptive relief in some circumstances (*see, e.g.*, letter regarding the offer by AstraZeneca PLC for all Ordinary Shares, including Ordinary Shares represented by ADSs, of Cambridge Antibody Technology ... (cont'd)

5. The Financial Advisor must have no officers (or persons performing similar functions) or employees (other than clerical, ministerial or support personnel) who direct, effect or recommend transactions in the securities that are the subject of the Tender Offer who also will be involved in providing the bidder or target in such Tender Offer with financial advisory services or dealer-manager services.
6. The Financial Advisor must have an affiliate that is registered as a broker-dealer under Section 15(a) of the Exchange Act.
7. The Financial Advisors and their Affiliates and Departments must maintain and enforce written policies and procedures that are reasonably designed to prevent the impermissible transfer of information among the Financial Advisors and their Affiliates and Departments that might result in a violation of the U.S. federal securities laws and regulations through the establishment of information barrier policies and procedures.
8. The Trading Activities must be permissible under, and must be conducted in accordance with, any applicable local law. The Financial Advisor and its Affiliates and Departments must also comply with any information barrier requirements imposed by applicable local law.
9. The Financial Advisor through its Affiliates and Departments must conduct the Trading Activities voluntarily in compliance with the pertinent provisions of the City Code, with the entities conducting the Trading Activities conducting themselves as if they were connected exempt principal traders as defined in the City Code, including complying with regulations with respect to the establishment

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(cont'd) ...

Group plc (May 23, 2006), in which the Staff granted relief from Rule 14e-5 in respect of purchases by the offeror and its agents outside the tender offer, which did not qualify for the Tier II exemption, in compliance with applicable local laws and regulations), the request for relief set out herein similarly assumes a tender offer in which U.S. shareholders are believed to hold no more than 40% of the securities subject to the offer. However, as mentioned in previous no-action letter requests, in many jurisdictions it may be difficult or impossible to "look through" record ownership to determine beneficial ownership or to "look back" to determine ownership percentages as of the date 30 days before the commencement of the tender offer, tests contained in Rule 14d-1 to ascertain the availability of the Tier II exemption. For example, as noted in the request letter regarding the offer by NYSE Euronext, Inc. for Shares of Euronext NV (July 13, 2006):

To calculate the level of U.S. ownership in Euronext in accordance with the guidelines set forth in Rule 14d-1 under the Exchange Act would require Euronext to "look through" the record owners in France, The Netherlands and the United States and inquire of such record owners regarding beneficial U.S. ownership. As noted in prior no-action requests, to carry out this process in France in an uncontested transaction would normally take approximately two months, and the parties do not currently expect to conduct this process in advance of the commencement of the Offer.

Financial Advisors and other transaction participants will make a determination of the percentage of the target held by U.S. shareholders in a Tender Offer to which the exemptive relief requested herein would, if granted, apply, based upon information to the extent known or which can be obtained without unreasonable effort or expense, and will exclude the bidder and greater than 10% holders from such calculations as prescribed in the instructions to Rule 14d-1, notwithstanding the lack of literal compliance with the counting rules of Rule 14d-1 to ascertain Tier II eligibility.

and maintenance of information barriers, conflict of interest provisions and other requirements, other than with respect to the notification of relevant trades to the Panel (trade notifications, if any, required by applicable law would be made to the relevant authorities).<sup>10</sup> The Financial Advisor must, however, publicly disclose in the United States information regarding the Trading Activities to the extent that such information is required to be made public in the target company's jurisdiction of incorporation.

10. The Financial Advisor must provide to the Staff, upon request, a daily time-sequenced schedule of all transactions effected in the target company's securities by such Financial Advisor, on a transaction-by-transaction basis, including:
  - (a) size, broker (if any), date and time of execution, and price of each transaction;
  - (b) the exchange, quotation system or other facility through which the trade occurred;and to retain such information on file for at least two years following the completion of the Tender Offer.
11. Upon the request of the Division of Market Regulation, the Financial Advisor shall transmit the information as specified in the preceding item to the Division of Market Regulation at its offices in Washington, D.C. within 30 days of its request.
12. The Financial Advisor must make its representatives available (in person at the Securities and Exchange Commission or by telephone) to respond to inquiries relating to its records.
13. The Trading Activities must be consistent with the Financial Advisor's normal and usual business practices, and must not be conducted for the purpose of facilitating the offer, or for the purpose of creating actual, or apparent, active trading in, or maintaining or affecting the price of, the securities of the target company.
14. The Financial Advisor must comply with Rule 14e-5 except as exempted by the relief granted pursuant to any no-action letter or exemptive relief from the Staff.<sup>11</sup>

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<sup>10</sup> As noted above, in circumstances where relevant elements of the City Code are inconsistent with applicable local law, the Financial Advisors would seek to reasonably apply the City Code rules under the circumstances. For example, the City Code would not allow connected exempt principal traders to tender into an outstanding Tender Offer or to vote any shares subject to the Tender Offer in their possession until in either case the Tender Offer became "unconditional as to acceptances" within the meaning of the City Code rules. In future Tender Offers in which local law does not have a corresponding point in time before the Tender Offer is complete at which such tendering and voting would become possible, the Financial Advisors would not seek to comply with the no-tendering or voting provisions of the City Code rules. Tendering and voting of shares held by Financial Advisors would not in any event be prohibited by Rule 14e-5.

<sup>11</sup> For example, reliance on the relief contained in this letter would not prevent Financial Advisors from making purchases of securities outside a Tender Offer on behalf of the bidder in such Tender Offer pursuant to relief granted in the letter regarding the cash tender offer by Sulzer AG for the ordinary shares of Bodycote International plc (March 2, 2007) (the "Sulzer Letter") or pursuant to a separate no-action letter from the staff and consistent with local law. In particular, a Financial Advisor and its Affiliates and Departments desiring both to engage in the Trading Activities and to make purchases on behalf of the bidder and its agents outside of a Tender Offer (where such purchases are permitted by local law and ... (cont'd)

IV. Conclusion

Where it is acting as a financial advisor in connection with a Tender Offer, a Financial Advisor may find itself in a position where it will be prohibited from engaging in the Trading Activities during such Tender Offer. To the extent that such Financial Advisor is not able to make a market in the Securities on exchanges or otherwise, the markets and its clients may be disadvantaged. In light of the exemptive relief that the Staff has previously granted in similar circumstances, Goldman Sachs believes that relief is appropriate. Therefore, Goldman Sachs is requesting, on behalf of itself and other Financial Advisors, exemptive relief from Rule 14e-5 in order to allow Financial Advisors and their Affiliates and Departments to engage in the purchases and arrangements to purchase described in the Trading Activities enumerated above.

If you need any further information or wish to discuss the foregoing matters, please do not hesitate to contact me in London on +44-20-7614-2237.

Sincerely,

*Sebastian R. Sperber*

PPSebastian R. Sperber

cc: Mr. Richard Cohn, Goldman, Sachs & Co.  
Mr. Andrew Bagley, Goldman Sachs International  
Mr. Adam Schneider, Cleary Gottlieb Steen & Hamilton LLP

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(cont'd) ...

pursuant to the relief granted in the Sulzer Letter or in a separate no-action letter from the staff granted to the bidder and its agents) would designate an individual trader or traders (the "Designated Traders") to make such purchases on behalf of the bidder and its agents, and other than such purchases made on behalf of the bidder or its agents, the Designated Traders would not make any other purchases of Securities during the offer period. Furthermore, such Financial Advisor and its Affiliates and Departments would voluntarily comply with the U.K. law and regulation that would be applicable if the Tender Offer were subject to the City Code to the effect that (1) Designated Traders would be prohibited from providing any information with respect to the bidder's plans to purchase Securities outside of the Tender Offer to any other person in the Financial Advisor and its Affiliates and Departments to the extent that the disclosure of such information would contravene applicable law and regulation in the United Kingdom (including the U.K. market abuse regime under the Financial Services and Markets Act 2000 and/or the U.K. insider dealing regime in Part V of the Criminal Justice Act 1993) and (2) the Financial Advisor or its Affiliates and Departments that would be treated as exempt principal traders if the Tender Offer were subject to the City Code, including the Designated Traders, would be prohibited from selling Securities on a principal basis to the bidder or its agents (as would be required by Rule 38.2 of the City Code if it were applicable to the Tender Offer).