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BY EMAIL

Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
U.S.A.

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We are pleased to submit this letter in response to the request of the U.S. Securities and Exchange Commission ("Commission") for comments regarding its proposed revisions to the cross-border tender offer, exchange offer, and business combination rules (the "Cross-Border Rules") and beneficial ownership reporting rules for certain foreign institutions, published in Release Nos. 33-8917; 34-57781 (May 6, 2008) (the "Release"). As the Commission notes in the Release, the increased globalization of the world's securities markets together with advances in information technology, in particular the Internet, has significantly increased the number of cross-border business combination transactions and has led U.S. investors to more frequently purchase securities of foreign private issuers ("FPIs"). We strongly support the Commission's goal to expand and enhance the utility of the Cross-Border Rules to continue to encourage bidders in cross-border business combination transactions to permit U.S. security holders to participate in these transactions in the same manner as other holders. We also strongly support the Commission's efforts to further enhance the regulatory system applicable to FPIs through its proposed changes to the Cross-Border Rules. While we welcome all of the Commission's proposed changes, we believe that further improvements could be made to make the Cross-Border Rules even more workable in practice and provide transaction participants with even greater flexibility in a manner consistent with the Commission's goal of protecting U.S. investors. Our specific suggestions are set forth below.

Adoption of Alternative Eligibility Threshold

We believe the Commission's proposed revisions to the eligibility thresholds for the Cross-Border Rules should be expanded.

We support the use of trading volume as an additional criterion to the level of U.S. beneficial ownership for purposes of determining the availability of the Tier I exemption. While statistical analysis may indicate a low correlation between U.S. trading volume and the level of U.S. beneficial ownership, U.S. beneficial ownership is itself an imperfect measure (and in some instances not the right measure) of the level of U.S. interest that should trigger the applicability of the U.S. tender offer rules and registration requirements of Section 5 of the Securities Act of 1933, as amended. A trading volume test provides an alternative measure of U.S. interest (and arguably better measure of U.S. retail investor interest) that below an appropriate threshold ought to justify the inapplicability of U.S. rules. A trading volume test (based on twelve-month average daily trading volume ("ADTV") in the United States as compared to worldwide trading volume over the same period) could be applied in much the same way as the "hostile presumption" but at a lower (e.g., 5%) threshold. If the test is satisfied at this lower threshold, a bidder would be entitled to assume (absent any reason to know otherwise) that the level of U.S. beneficial ownership is no more than 10% (or, as we propose below, 15%), the threshold for the Tier I exemption. If the test is not satisfied, a bidder would still be entitled to establish the availability of the Tier I exemption based on the level of U.S. beneficial ownership calculated in accordance with the Commission's rules, including a revised "look-through" requirement as proposed below.

A trading volume test has a number of advantages, not least of which is that it would present a clearly defined process with appropriate benchmarks. A trading volume test as an additional measure, but at a lower threshold, would provide transaction participants with greater certainty about the availability of the Cross-Border Rules and thereby facilitate transaction planning considerably. It would enable transaction participants to determine eligibility for the Tier I exemption faster and at lower cost. In our experience, FPIs find it very difficult to determine accurately the specific country of residence of their investors. Conducting a "look-through" analysis as required by the Commission's rules typically takes several weeks in most jurisdictions and often requires the use of considerable resources, while achieving results that are often less than accurate. In some jurisdictions, such as the U.K., publicly traded companies have the right as a matter of law to obtain details about the ownership of their shares. Many U.K. public companies use this legal right to undertake investigations at regular intervals. Even where such an investigation is possible, however, it is usually not possible to obtain completely accurate information to the standard required for the look-through analysis within a reasonable time. Often enquiries will reveal a chain of nominee holdings and the ultimate beneficial owner can only be identified after three or four formal notices have been served on successive nominees. There is inadequate time to complete these enquiries in the timetable for most major transactions. The problem is exacerbated in many jurisdictions where a target company has no legal right to obtain this kind of information from nominee holders. Nominees are often unwilling to provide any information about their customer accounts, and as a result, an acquiror must rely on the presumption that the customers are residents in the jurisdiction in which the nominee has its

principal place of business. Special problems arise when the nominee holder is a European operation of a U.S.-based financial institution and as a result may, depending on facts and circumstances, be considered a U.S. nominee. If such a nominee does not provide any information, an acquiror may be forced to presume that all of the nominee's customers are U.S. holders when the nominee may in fact hold largely on behalf of non-U.S. holders. In other jurisdictions, the calculation may have to be based on very outdated shareholder information. In Japan, for example, information about a company's share ownership is available only when a record date for a shareholders' meeting is set, generally once a year in connection with the annual shareholders' meeting. In order to obtain the information necessary to conduct the required look-through analysis in connection with an offer, a target company would need to convene an extraordinary shareholders' meeting, which appears to go beyond the reasonable effort standard mandated by the Cross-Border Rules. In any of these circumstances, the results of the calculation may not accurately reflect the target company's U.S. ownership base. In contrast, looking at twelve-month ADTV in the United States as compared to worldwide trading volume over the same period would be an objective, simple, clear and more reliable measure of U.S. interest.

The Commission has adopted trading volume tests in various other circumstances. In the context of the Cross-Border Rules, a trading volume test is used in determining the availability of the exemptions in the context of hostile transactions. From a policy perspective, the Commission appears to be comfortable allowing a 10% U.S. trading volume presumption for both the Tier I and the Rule 802 exemption in a non-negotiated transaction and allowing the issuance of unregistered securities into the United States at this level. A 5% U.S. trading volume presumption in negotiated transactions should therefore not raise significant policy concerns. Trading volume is also the chief criterion for terminating an FPI's registration and reporting obligations under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), in the case of equity securities (the "Deregistration Rules"). The distinction between the eligibility standards for the Deregistration Rules and for the Cross-Border Rules does not appear warranted. The Commission's reasons for adopting a trading volume test in the context of deregistration are equally valid for the Cross-Border Rules. As the Commission stated in its release proposing the Deregistration Rules, "a standard based on trading volume may in fact be superior to a standard based on a comparison of U.S. public float with worldwide public float, because it is a direct measure of the issuer's nexus with the U.S. market, and because trading volume data is easier to obtain than public float and record holder data. In addition, a trading volume test establishes a more clearly defined process with more appropriate benchmarks and companies will face reduced costs."

In the context of the Deregistration Rules, by permitting a FPI to terminate its Exchange Act registration and reporting obligations based on a 5% U.S. trading volume test and providing it with an automatic exemption from Exchange Act registration through Rule 12g3-2(b), in

each case regardless of the size of the company's U.S. public float, the Commission has accepted that the U.S. investors of such FPI will make investment decisions in the secondary market based on disclosure documents that are prepared in accordance with the laws of its home jurisdiction. At the same time, the Commission has also already effectively accepted that any future tender offer for securities of a FPI that has deregistered from the U.S. regulatory scheme will be conducted primarily in accordance with the laws of the relevant home jurisdiction as the disclosure and procedural protections afforded by Regulation 14D under the Exchange Act would no longer be applicable. We believe that, in the context of the Cross-Border Rules, U.S. investors should also be able to base their investment decision in a business combination transaction on non-U.S. disclosure documents if U.S. trading volume, which is typically a good gauge of U.S. retail interest, is low. In our experience, in a large number of European jurisdictions as well as certain Asian jurisdictions such as Japan, the disclosure and procedural protections imposed under local law in the context of business combination transactions provide sufficient safeguards for investors, including U.S. investors. The laws of many European jurisdictions provide safeguards for the protection of shareholders, either as a result of the implementation of the EU Directive on Takeovers or as a result of pre-existing regulation, such as equal treatment requirements, detailed disclosure obligations, regulations governing mandatory and voluntary offers and their terms and importantly, squeeze-out provisions. In exchange offers, these regulations are supplemented by the provisions of the EU Prospectus Directive which has been implemented into local law in most EU Member States and which requires the publication of a prospectus for an offer of securities made to the public or the admission to trading on a regulated market in an EU Member State.

In the Release, the Commission expressed concern that, by adopting a trading volume test, FPIs with no U.S.-traded securities may in effect be placed into the Tier I and Rule 802 exemptions. We do not believe that this concern should lead to the outright rejection of a trading volume test, in particular if qualified by an imputed knowledge standard. In line with the Deregistration Rules, ADTV in the U.S. as well as worldwide trading volume should be determined based on both on-exchange and off-exchange trading. Hence, with respect to target companies without U.S.-listed securities, U.S. trading volume should be determined by reference to the trading of the FPI's shares on alternative trading systems and on the over-the-counter ("OTC") market in the U.S. While trading volume data from the OTC market may arguably be more difficult to obtain than trading data of exchange-listed securities, trading volume information about OTC trades is generally readily available in the U.S. and obtaining such data will be less burdensome than conducting a look-through analysis. As the Commission stated in the release adopting the Deregistration Rules, as long as trading information is credible and the sources are reliable, securities transactions should be included in the calculation of ADTV, regardless of the platform on which they occur. Target companies whose securities are neither traded on-exchange nor off-exchange in the U.S. typically do not have a large U.S. retail shareholder base. Moreover, U.S. investors (typically

institutional investors) who voluntarily buy FPI shares in a foreign market which do not trade in the U.S. at all, neither on-exchange nor off-exchange, conceivably accept and are comfortable relying on disclosure documents prepared in accordance with, and receiving the protections provided by, the laws of the relevant home jurisdiction. Where a FPI does not actively access the U.S. public securities markets either through a public offering or by listing its equity securities in the U.S. public markets, we believe the trading volume approach is particularly justified and a business combination transaction involving such FPI should be governed by the laws of its home jurisdiction. In our view, the same principle underlies Rule 12g3-2(b) in that Exchange Act registration should not attach to FPIs who have not actively accessed the U.S. markets and whose home country disclosure documents are accepted as a valid substitute for Exchange Act periodic reports.

As discussed above, we recommend the adoption of a trading volume test as an additional measure of the level of U.S. interest for purposes of determining the availability of the Tier I exemption and propose that such test be applied in the same way as the "hostile presumption". The relevant percentage of U.S. ADTV compared to worldwide trading volume could be set at a lower level (e.g., 5%) to mitigate the fact that more transactions may qualify for the Tier I and Rule 802 exemptions if a trading volume test is adopted and in line with the threshold adopted for the Deregistration Rules. If the test is satisfied at this lower threshold, a bidder would be entitled to assume (absent any reason to know otherwise) that the level of U.S. beneficial ownership is no more than 10% (or, as we propose below, 15%), the threshold for the Tier I exemption. If the test is not satisfied, a bidder would still be entitled to establish the availability of the Tier I exemption based on the level of U.S. beneficial ownership calculated in accordance with the Commission's rules, including a revised "look-through" requirement as proposed below. While a trading volume test may extend the Tier I and Rule 802 exemptions to more transactions, we believe that it will at the same time encourage the extension of more transactions to U.S. holders without significantly sacrificing U.S. investor protection.

Proposed Changes to Look-Through Analysis

We generally support the proposed changes to the look-through analysis, but we believe that additional changes could be made to further alleviate practical concerns and provide transaction participants with even greater flexibility.

Timeframe for Calculation. We support having the date of public announcement of a transaction as the trigger point for the calculation of U.S. ownership. The calculation will more accurately reflect the unaffected U.S. shareholder base of the target company. In addition, allowing an acquiror to choose any date within a set range will alleviate practical difficulties in a number of jurisdictions where acquirors rely on third-party reports published at fixed intervals. The proposed changes do not, however, alleviate the concern that

performing a look-through analysis may prematurely tip off the market regarding a transaction. In fact, changing the trigger point of the calculation to the date of public announcement may in some instances even exacerbate the problem. In order to accommodate this problem and provide maximum flexibility to acquirors, the Commission should consider setting a range that comprises a period both before and after announcement, allowing an acquiror to also calculate U.S. ownership as of a date after announcement. The range could comprise a period commencing 60 days prior to, and ending 30 days after, the date of announcement. This would accommodate acquirors in jurisdictions where the public announcement must contain a detailed description of the treatment of U.S. shareholders in the transaction, while at the same time alleviate problems in jurisdictions where information about U.S. ownership cannot be obtained as of a date in the past. In practice, we are often asked by clients not to commence the look-through analysis until after the date of announcement due to confidentiality concerns, but at the same time, in many jurisdictions no historical records of share ownership are available.

Increased Threshold for Tier I Exemption. We believe an increase in the eligibility threshold for the Tier I and the Rule 802 exemptions to 15% would further enhance the usefulness of the Cross-Border Rules while still striking the right balance between encouraging acquirors to include U.S. shareholders in business combination transactions with non-U.S. targets and providing U.S. investors the protections of the U.S. federal securities laws where needed. A large number of commenters supported an eligibility threshold of 15% or above in 1999 when the Cross-Border Rules were first proposed and we believe the arguments made then are still valid today. Many bidders still exclude U.S. shareholders from cross-border business combinations to avoid the applicability of the U.S. federal securities laws. Raising the eligibility threshold to 15% would further encourage the extension of more transactions to U.S. investors while at the same time not significantly sacrificing U.S. investor protection. At 15%, U.S. ownership levels are still sufficiently low to conclude that it is better for U.S. investors to participate in, and benefit from the opportunities presented by, business combination transactions than to be excluded. With a threshold that is set too low, bidders will continue to be inclined to exclude a target's U.S. shareholders or structure the transaction in a way to avoid the application of U.S. securities laws, for example as a scheme of arrangement if available under the laws of the home jurisdiction. Based on a survey conducted by the U.K. Takeover Panel in 1997 and cited in the Release, bidders excluded U.S. investors when the U.S. ownership of the target was less than 15%, even though in some instances U.S. ownership exceeded 10%. With the continuing globalization of the world's capital markets and the resulting increase in both U.S. investment in FPIs and cross-border transactions, avoiding disincentives for the inclusion of U.S. investors in cross-border business combinations becomes ever more important. At the same time, increased globalization has also raised the standards of regulatory oversight in many jurisdictions and supervision by competent regulators should justify allowing more transactions to qualify for the Tier I and Rule 802 exemptions and thereby be conducted on the basis of home

jurisdiction laws and regulations. In this regard, we refer to our discussion above regarding the protections provided by the regulatory regimes in many European jurisdictions as a result of the implementation of various EU Directives.

Exclusion of Certain Shareholdings. We do not believe that non-U.S. holders who hold more than 10% of the target's shares should be excluded from the calculation of U.S. ownership. Generally, whether the non-U.S. shareholder base of the target is made up of large institutional investors or predominantly retail investors should not be relevant to the applicability of the U.S. federal securities laws to the transaction (unless the non-U.S. affiliate is also the bidder). Excluding non-U.S. affiliates distorts the true ownership of the target shares by artificially increasing the U.S. ownership percentage, thereby denying the availability of the exemptions in transactions that, in absolute terms, may have a very small U.S. interest. If the Commission is inclined to retain the exclusion of affiliated non-U.S. holders, we propose raising the threshold to 20%-30% so that only holders with a significant control position (as opposed to large institutional investors otherwise unaffiliated with the target company) are excluded.

Non-Negotiated Transactions – Clarification of Imputed Knowledge Standard

We support the Commission's clarification of the imputed knowledge standard in non-negotiated transactions. We also generally believe that the date of announcement as the cut-off date for the actual knowledge element of the test appears more appropriate than the date of commencement. It should be made clear, however, that the date of announcement is interpreted in the same manner as it is for purposes of the pre-commencement filing obligations and Rule 14e-5 and includes an announcement that raises the possibility of a transaction (for example, in response to a leak in the market), as long as the parties to the transaction are specified.

Other Imputed Knowledge Standard – Bearer Shares

We would ask the Commission to clarify the requirements of the imputed knowledge standard applicable with respect to bearer shares. The shares of a number of FPIs in continental European jurisdictions are held in bearer form and as a result, it is not possible to ascertain fully the location of ownership of the shares. Generally, these bearer shares are presumed to be held by persons other than U.S. holders, unless the bidder knows or has reason to know otherwise. In order to obtain information about the ownership of the bearer shares to satisfy this imputed knowledge standard, some transaction participants have engaged outside information service providers to make blind inquiries of depositary banks. Due to the limited information available as to the holders of bearer shares, however, these surveys cannot be comprehensive and are necessarily incomplete. It would be very helpful if the Commission could clarify that the guidance it has given with respect to the "reason to

know" element of the eligibility test in connection with non-negotiated transactions applies equally to bearer shares, in particular that an acquiror is not required to engage an outside information service provider at its own expense in order to satisfy the imputed knowledge standard.

Proposed Changes to Subsequent Offer Period

Payment on Modified Rolling Basis. As the Commission notes in the Release, the requirement to pay for shares tendered into a subsequent offer period on a rolling basis conflicts with market practices in a number of non-U.S. jurisdictions and is in many instances practicably unworkable. In a number of jurisdictions, a bidder must pay for tendered shares within a certain number of trading days after the expiration of the subsequent offer period. This is due to the particularities of the settlement systems in these jurisdictions which are based on a centralized settlement process. Shareholders declare their acceptance of an offer to their depositary bank. Those individual depositary banks will only deliver the tendered shares to a central settlement agent after the expiry of the offer period, both for tenders into the initial offer period or the subsequent offer period. Therefore, a bidder will only know what shares have been tendered after the expiry of the offer period. The Commission's proposal to allow payment on a modified rolling basis within 14 business days of the date of tender does not address this issue. This is particularly true in many non-U.S. jurisdictions where the subsequent offer period may be longer than 20 business days. A period of 14 business days will often not be long enough to allow for payment at the end of the subsequent offer period and bidders would need to continue to request specific relief from Rule 14d-11(e). We would therefore recommend a rule allowing payment to be made in accordance with the target's home jurisdiction law and practice after the expiration of the subsequent offer period.

Other Clarification. We would ask the Commission to clarify that payment for shares tendered into the initial offer period made in accordance with the requirements of the target's home jurisdiction law and practice not only satisfies the requirements of Rule 14e-1(c), but also those of Rule 14d-11(c). This would eliminate the need for bidders to continue to request technical relief from the requirements of this rule on a transaction-by-transaction basis.

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We appreciate the opportunity to comment on the Release and would be pleased to discuss any questions the Commission or its Staff may have in respect of our comments. Please do not hesitate to contact George Karafotias in London at +44-207-655-5576, Abigail Arms in Washington D.C. at 202-508-8025, George Casey in New York at 212-848-8787 or Kenneth Lebrun in Tokyo at +81-3-5251-0203.

Very truly yours,

Shearman & Sterling LLP

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