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Nancy M. Morris
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June 23, 2008

By Electronic Mail

File No. S7-10-08 – Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (the “Proposals”)

Ladies and Gentlemen:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the “**Commission**” or “**SEC**”) for comments on the Commission’s proposals to amend the existing cross-border tender offer, exchange offer, and business combination rules it first adopted in 1999 (the “**Cross-Border Rules**”). We routinely represent U.S. and non-U.S. companies in connection with cross-border business combination transactions, which quite often require compliance with the U.S. tender offer rules, including the Cross-Border Rules. In addition, we have needed to seek interpretive guidance and exemptive and “no-action” relief with respect to the application of the Cross-Border Rules on a number of occasions since the rules were adopted.

Our experience acting in this area informs our view that, as a general matter, the Proposals represent an important step in the further development of the Cross-Border Rules and should improve the execution of cross-border business combinations and access by U.S. shareholders to such transactions. While we welcome the Proposals and agree with a number of them as presented, there are nevertheless several aspects of the Proposals that merit specific comment and revision in furtherance of this objective without compromising the protection of U.S. investors, which are set out below.

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Eligibility Threshold – Method of Calculation of U.S. Ownership

Although many aspects of the Cross-Border Rules have worked well since their adoption, we believe that the current method of calculating U.S. ownership and determining eligibility for the exemptions afforded by Rules 14d-1(c) (“Tier I”) and 14d-1(d) (“Tier II”) under the Securities Exchange Act of 1934 (the “Exchange Act”) should be reconsidered because it is undermining the Cross-Border Rules’ objective of ensuring that U.S. shareholders have greater access to cross-border business combination transactions.

The obligation of the offeror to count shareholders by “looking-through” securities held of record by brokers, dealers, banks and other nominees in specified jurisdictions (the “U.S. beneficial ownership test”), which the Commission would retain for negotiated transactions, has given rise and would continue to give rise to problems, even taking into account the proposed changes to the eligibility standards that the Commission has enumerated.

For us and, we believe, for our clients, the application of the U.S. beneficial ownership test has been the greatest single source of frustration in using the Cross-Border Rules, especially in Europe and Asia.¹ In particular, where the “look-through” obligation has been applied to the myriad of nominee and custodial arrangements outside the United States, it has given rise to several difficulties, including (i) an inability to maintain secrecy prior to announcement of a potential transaction, (ii) a lack of accurate or reliable results, since many non-U.S. nominees and custodians cannot or will not provide the required information and (iii) its cumbersome and costly application, since there is often no legal requirement or obligation to respond to such inquiries in many jurisdictions (including the United States). The application in practice of this requirement is the principal reason, in our view, that the Tier I exemption has not been as widely used as originally anticipated at the time the Cross-Border Rules were adopted. To ensure that U.S. shareholders continue to be included in cross-border transactions, it is important that any changes to the Cross-Border Rules address the concerns noted above.

We therefore request that the Commission reconsider adopting an eligibility standard for negotiated transactions that includes consideration of a 12-month average daily trading volume of target securities in the United States as compared to worldwide trading volume over the same period (the “ADTV test”). If a test solely based on ADTV is not acceptable to the Commission for negotiated transactions, we would urge the Commission to consider the ADTV test combined with a review of beneficial shareholding information from an independent third party source, such as Bloomberg, or to maintain the current U.S. beneficial ownership test, but amend it in accordance with our recommendations below.²

In the event that an ADTV test is adopted for negotiated transactions, we believe it would be appropriate to maintain the Tier I and Tier II thresholds as they currently are (i.e., at 10% and 40%, respectively). However, in the event that counting the number of U.S. shareholders remains an eligibility criteria for the Cross-Border Rules, as under the combined ADTV and independent third party

¹ See footnote 4 and accompanying text in the letter dated February 28, 2006 from Linklaters to the SEC re File No. S7-12-05 – Termination of a Foreign Private Issuer’s Registration of a Class of Securities under Section 12(g) and Duty to File Reports under Section 15(d) of the Securities Exchange Act of 1934, Release No. 34-53020; International Series Release No. 1295.

² As noted by the Commission in the Proposals, we do not believe that a test of eligibility for the cross-border exemptions solely based on ownership or trading of American depository receipts is appropriate. For the avoidance of doubt, we recommend retaining the other remaining “exclusions” within the U.S. beneficial ownership test in the event it or some form thereof is retained in the final rules.

test discussed below or the current U.S. beneficial ownership test, we believe that the Tier I threshold should be changed to 15%.³ Also, in such cases, we believe that the securities held by owners of more than 10% of the target's securities should not be excluded from the calculation for the reasons discussed further below.

ADTV Test

We take note of the Commission's statement in the Proposals as to why an ADTV test has not been supported to determine eligibility for the cross-border exemptions. Although we do agree with the Commission's view that business combination transactions raise particular issues for target shareholders, we do not believe that the distinctions that can be drawn between the impact on shareholders of such transactions as compared to deregistration under the Exchange Act merits an inconsistent approach to the way in which the Commission determines its regulatory authority. In particular, we believe that the relevant question is whether an ADTV-based eligibility criteria is adequate to determine whether there is a sufficient nexus with the United States to merit regulation by the Commission. This question has already been answered by the Commission in the affirmative in the context of the revised deregistration rules. An ADTV-based approach is also consistent with the way in which the Commission seeks to regulate other non-U.S. activities that affect the U.S. markets, including the use of "substantial U.S. market interest" in Regulation S under the Securities Act of 1933 and the use of an ADTV-based calculation in the context of Regulation M under the Exchange Act.

Furthermore, as the information needed to perform an ADTV calculation is relatively easy to obtain and is not readily subject to manipulation, an offeror can achieve a high degree of certainty with respect to its eligibility to rely on the Tier I or Tier II exemptions. An ADTV test would also eliminate the significant confidentiality issues that are inherent in the application of the current U.S. beneficial ownership test. Finally, the use of an ADTV test is more consistent with the way in which our foreign private issuer clients and other market participants in general analyze a company's regulatory nexus to a particular jurisdiction. Consequently, we believe an ADTV-only test can be an appropriate test of eligibility for the Tier I and Tier II exemptions for both negotiated and non-negotiated transactions.

Combined ADTV and Independent Third Party Test

To the extent the Commission believes the Cross-Border Rules should continue to take into account eligibility criteria for negotiated transactions based on counting U.S. shareholders, we recommend coupling the ADTV test described above with a review of the U.S. beneficial shareholding information provided by an independent third party information service, such as Bloomberg.⁴ Under this combined test, the transaction would only be eligible for the cross-border exemptions if both the U.S. ADTV and the U.S. beneficial ownership numbers according to the independent third party information service indicated that U.S. ownership interest was below the relevant threshold. We recommend that the ADTV standard be set at 10% and the U.S. beneficial ownership threshold be set at 15% for the Tier I exemption. In the event that a target's securities are below these thresholds, we are of the view that there is insufficient nexus with the United States to merit regulation by the Commission. For Tier II

³ We do not recommend, however, that the Tier II threshold be amended from 40%.

⁴ Although the Commission has noted that neither the Cross-Border Rules nor the Proposals impose an obligation on offerors to pay for access to shareholder information, we believe that introducing a requirement to access an independent third party information source should not be considered burdensome, particularly since many companies will regularly have access to such information and such information is widely used by the market, including by financial advisers and information agents.

transactions, we recommend that both the ADTV and U.S. beneficial ownership thresholds be set at 40%.

In the event that there is not a reliable source of independent third party information for a particular class of securities, the offeror would be required to conduct an ADTV-based calculation and engage in a U.S. beneficial ownership calculation based on the existing rules, though in the Tier I context amended to reflect a 15% threshold for the Tier I exemption. As discussed further below, we recommend that under no circumstance should the offeror be required to exclude security holders holding 10% or more of the subject class of securities.

We believe that this two-pronged approach addresses the concerns raised by the Commission regarding the ADTV-based test, but at the same time achieves certainty and clarity with respect to the availability of the relevant exemption while preserving confidentiality prior to the announcement of a potential business combination transaction.

U.S. Beneficial Ownership Test

If the Commission is committed to retaining the current U.S. beneficial ownership test for negotiated transactions, we strongly urge the Commission to raise the Tier I threshold to 15% and to eliminate the requirement that securities held by persons owning 10% or more of the subject securities be excluded from the calculation. We believe that changing the thresholds for Tier I transactions to 15% would permit greater use of the rules and greater inclusion of U.S. shareholders, and is consistent with the convergence of global disclosure standards and the internationalization of the securities markets.

We also respectfully recommend that the requirement to exclude holders that own 10% or more of a subject class of securities be removed from the Cross-Border Rules as it (i) is inconsistent with the way other regulators approach whether or not there is a sufficient jurisdictional nexus with a transaction to merit the application of their rules (in addition to the primary regulator of a transaction), (ii) is inconsistent with the way in which offerors and targets think about a shareholder base and (iii) is not a meaningful threshold in the context of business combination transactions, particularly when shareholders at lower thresholds may have greater influence on the subject company and may be more relevant to determining what is a "unaffiliated" float.⁵

We also note that a separate letter, to which we are a signatory, is being submitted by the Permanent Committee in London, which is a group of seven international law firms with established U.S. securities and mergers and acquisition practices (the "**Permanent Committee**"). Although we do not address the issue further in this letter, we support the Permanent Committee's alternative recommendation that, at the very least, large U.S. institutional security holders be excluded from the calculation of the level of U.S. ownership for the purposes of determining eligibility for the cross-border exemptions.

⁵ We do not believe that the concept of an "affiliate" as defined under the U.S. federal securities laws would be a workable solution because it may not be readily apparent whether a target shareholder would fall within that definition, since the concept of control is particularly fact driven. However, the exclusion of securities held by directors and executive officers is a practical alternative that would be consistent with the Commission's objective of achieving an "unaffiliated" shareholding calculation.

“Reason to Know”

We welcome the Commission's efforts to clarify the “reason to know” standard set out in Instruction 3(iv) to paragraphs (c) and (d) of Rule 14d-1 (“**Instruction 3(iv)**”) and its proposal that “an acquiror has reason to know information that is publicly available” as of the date of announcement. However, we believe that several further refinements to that concept would enhance clarity with respect to the rule and its application in practice.

We recommend that the “reason to know” rule include a qualification that an acquiror should only be deemed to know publicly available information that it considers to be reasonably reliable. While we believe the correct interpretation of the Proposals would imply a “reasonableness” standard into the rule, we think the additional language will make the Cross-Border Rules more workable by making the standard clearer.

We also recommend that the Commission define more narrowly the type of information that “may not be ignored” by acquirors. We believe that the Proposal's language in this regard may result in unnecessary ambiguities by leaving “credible information” and “receive information” open to different interpretations. Along these lines, we respectfully urge the Commission to consider whether Instruction 3(iv) should be amended to state that acquirors may not ignore information about target securities held by U.S. owners that it considers to be reasonably reliable obtained (i) directly from the target or any person acting on behalf of the target or (ii) from persons the acquiror has retained for the purpose of advising it in connection with the proposed transaction (including representatives of its financial adviser, dealer manager or information agent).

Eligibility Threshold – Calculation reference date

We support the Commission's proposals to change the reference point for the calculation of U.S. ownership to the announcement date and to permit the offeror to calculate U.S. ownership as of a date within a 60-day range of that announcement. Consistent with our views noted above, we believe that these changes will result in the parties in cross-border business combination transactions having sufficient flexibility to ensure compliance with the rules and achieving greater certainty in their ability to rely on the exemptions.

Subsequent Offer Period and Prompt Payment Proposals

We welcome the Proposals relating to the subsequent offering period in the context of Tier II-eligible offers. In particular, we welcome the proposal to eliminate the maximum time period and to extend the prompt payment cycle to a longer period in such offers.

However, in connection with preparing this comment letter, we consulted with our colleagues in a number of jurisdictions about whether the proposed 14 business day settlement period would be sufficient in their respective jurisdiction, and based on those consultations, we recommend that the 14 business day period be extended to 20 business days.⁶ In the event that 20 business days is not

⁶ Our survey included the following jurisdictions: Belgium, France, Hong Kong, Italy, Japan, the Netherlands, Russia, Spain, Sweden and the United Kingdom. Based on that survey, most jurisdictions would fall within the 14 business day time frame; however, in at least Belgium, France, Japan, and the Netherlands, a 14 business day period was considered to be insufficient.

sufficient in a particular jurisdiction, we would request that Commission continue to consider requests for “no-action” relief on a case-by-case basis.

Application of All Holders Rule to Foreign Target Security Holders

We believe that it is appropriate to amend Rules 13e-4 and 14d-10 under the Exchange Act to include a provision expressly stating that those rules will not prohibit an offeror in Tier-II eligible offers from excluding shareholders (i) in a particular foreign jurisdiction where the offeror is prohibited by law or regulation from extending the tender offer into that jurisdiction or (ii) where it is permitted to do so under the laws of target’s home country jurisdiction or the jurisdiction where the target shareholder is located. We do not believe that compliance with the Cross-Border Rules should put an offeror at risk of violating the laws of another jurisdiction or require an offeror to extend an offer on a global basis where local law does not require it to do so.

Early Termination of Initial Offering Period

We note that the Commission has requested comments on its decision not to codify its guidance on the ability to terminate an initial offer period after 20 U.S. business days or following a voluntary extension of the initial offering period following the 20th U.S. business day. We respectfully request that the Commission codify its “no-action” position in this regard, as it will further streamline the ability of offerors to conduct business combination transactions without needing to obtain specific relief from the Staff, particularly where many of the other types of relief typically requested are proposed to be addressed by the Commission in the revisions to the Cross-Border Rules.

Subject to the conditions enumerated by the Staff in its “no-action” letters, we believe the ability of an offeror to terminate an initial offer period (or voluntary extension thereof) prior to its scheduled expiration date gives the offeror the ability to achieve greater certainty with respect to its offer and does not materially prejudice shareholders. In addition, it is consistent with the way in which offers are conducted in many European jurisdictions, including the United Kingdom. We believe that this issue arises often enough, and the Staff has granted relief routinely enough, to support codification of the existing “no-action” position.

* * * * *

Linklaters

We would be pleased to respond to any enquiries regarding this letter or our views on the Proposals generally. Please contact Edward Fleischman (edward.fleischman@linklaters.com), Thomas N. O'Neill III (tom.oneill@linklaters.com), Thomas B. Shropshire, Jr. (tom.shropshire@linklaters.com) or Lawrence Vranka, Jr. (larry.vranka@linklaters.com), or any of the above by telephone at (212) 903 9000, if you would like to discuss any of these matters.

We thank the Commission in advance for considering our and others' comments on the Proposals.

Yours sincerely,

A handwritten signature in black ink that reads "Linklaters LLP". The signature is written in a cursive, flowing style.

Linklaters LLP