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File No. S7-10-08  
SEC Releases No. 33-8917 and 34-57781

Dear Ms. Morris:

June 23, 2008

We write with respect to the rules proposed by the Securities and Exchange Commission (the "Commission") in Releases No. 33-8917 and 34-57781 (the "Proposing Release") regarding revisions to the cross-border tender and exchange offer<sup>1</sup> and other business combination rules and beneficial ownership reporting rules for certain foreign institutions. With the proposed revisions and interpretive guidance set forth in the Proposing Release, the Commission seeks to codify many of its existing interpretive and no-action positions and class exemptive relief in the area of cross-border business combination transactions and address other related areas of frequent conflict and inconsistency between the U.S. and foreign regulatory systems.

In 2000, the Commission adopted the Tier I and Tier II exemptions under Rule 14d-1 of the Securities Exchange Act of 1934 (the "Exchange Act") and Exchange Act Rules 800 through 802 (collectively, the "Current Cross-Border Exemptions"). The Current Cross-Border Exemptions were an ambitious attempt to facilitate the inclusion of U.S. holders in cross-border tender offers. The eight years of experience since the adoption of the Current Cross-Border Exemptions have exposed serious limitations, however. We, like many other practitioners, accordingly applaud and welcome the Commission's efforts to modernize the Current Cross-Border Exemptions and appreciate the thoughtful attention the Commission has shown to these issues. We continue to have some of the same concerns we have had in the past, however, in light of the limited scope

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<sup>1</sup> Any reference in this letter to a "tender offer" should be deemed to include also a reference to an "exchange offer", unless otherwise indicated.

of the proposed revisions, as set forth in the Proposing Release, and we recommend in this letter additional modifications to the regulatory structures that we believe would be advantageous for our capital markets and U.S. investors alike.

As a general comment to the Proposing Release, we would like to note that a number of the proposed revisions applicable to cross-border tender offers are also applicable to tender offers for Canadian issuers under the U.S.-Canadian Multijurisdictional Disclosure System (the “MJDS”) set forth in Exchange Act Rule 14d-1(b). For the sake of consistency, we recommend the relevant MJDS rules be revised accordingly. Similarly, we believe that the principles to be adopted for cross-border tender offers by third-parties should also be made applicable to issuer rights offerings by foreign private issuers to the extent applicable.

I. Eligibility Test for Tier I and Tier II Exemptions

A. The “Look-Through”

Practice since year 2000 has shown that the so-called “look-through” rule<sup>2</sup> is the single greatest weakness of the existing rules and substantially impairs the usefulness of the Current Cross-Border Exemptions, particularly the Tier I exemption and Rule 802. As a general matter, the analysis under the look-through rule is completely impractical because it is either impossible to obtain information needed to satisfy the rule on a confidential basis or the number of shares held by U.S. investors is so small that it does not justify the effort, time and expense associated with the look-through analysis. Despite these well-known difficulties, none of the revisions proposed by the Commission (including the proposed change to the measurement dates for determining the eligibility for the Tier I and Tier II exemptions) provides a workable solution. If the Commission does not solve the practical difficulties in applying the look-through rule, the tendency of bidders to exclude U.S. shareholders from cross-border tender offers is likely to continue.

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<sup>2</sup> Instruction 2.ii to Exchange Act Rule 14d-1 provides that the percentage of outstanding securities held by U.S. holders is to be determined using “method of calculating record ownership in Rule 12g3-2(a) under the Act, except that [...] inquiry as to the amount of securities represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in the United States, the subject company’s jurisdiction of incorporation or that of each participant in a business combination, and the jurisdiction that is the primary trading market for the subject securities, if different than the subject company’s jurisdiction of incorporation. Exchange Act Rule 12g3-2(a) states that “[s]ecurities held of record by persons resident in the United States shall be determined as provided in Rule 12g5-1 except that securities held of record by a broker, dealer, bank or nominee for any of them for the accounts of customers resident in the United States shall be counted as held in the United States by the number of separate accounts for which the securities are held. The issuer may rely in good faith on information as to the number of such separate accounts supplied by all owners of the class of its securities which are brokers, dealers, or banks or a nominee for any of them. Exchange Act Rule 12g5-1 includes a definition of securities “held of record”.

Because of these problems in applying the look-through rule, we support the 12-month average daily trading volume (the “ADTV”) method, as calculated under Exchange Act Rule 12h-6,<sup>3</sup> to determine the eligibility for both the Tier I and Tier II exemptions, both in negotiated and in non-negotiated transactions. We believe that the ADTV method provides a superior method compared to the current method based on U.S. ownership percentage because: first, it is more direct measure of an issuer’s nexus with the U.S. market and therefore the better indication of the U.S. investors’ need for U.S. regulatory protection; second, the ADTV method, contrary to the look-through rule together with the proposed determination period of 60 days before announcement<sup>4</sup>, does not subject a bidder to the risk of signaling its intentions to the market too early; third, trading volume data is significantly easier to obtain; fourth, under the ADTV method, there would no need to exclude large shareholders or bidders from the calculation, which further reduces the work and costs related to the determination of the eligibility for the Tier I and II exemptions; and fifth, the fact that the ADTV is determined over a 12-month period would also make the method less susceptible to manipulation.

The approach of adopting the ADTV method as the test to determine the eligibility of the Tier I and Tier II exemptions would also be consistent with the Commission’s other recent rulemaking applicable to foreign private issuers, including revisions to the deregistration rules<sup>5</sup> and the manner of determining the availability of the Rule 12g2-2(b) exemption.<sup>6</sup> We believe the Commission’s justification for these recent rule changes applies equally to cross border transactions. The Commission has stated, for example, that the ADTV method is a more direct and less costly measure of the relative U.S. market interest in a foreign private issuer’s securities than one based on a count of the issuer’s shareholders.<sup>7</sup>

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<sup>3</sup> Exchange Act Rule 12h-6 takes into account both on-market and off-market transactions when calculating the U.S. and worldwide ADTV for a class of securities.

<sup>4</sup> Under the proposed new rules, a bidder is required to look through securities held of record by nominees in the specified jurisdictions for the accounts of customers resident in the United States prior to announcement of its tender offer. The bidder may not be able to limit this risk *e.g.*, by moving the determination closer to announcement due to practical difficulties in certain jurisdictions, where the look-through analysis takes even longer than 30 days to perform or it is not possible to calculate U.S. ownership as of a set date in the past, or information on the location of target security holders is only published at fixed intervals, as noted in the Proposing Release.

<sup>5</sup> Adopting Release No. 34-55540 (March 27, 2007) for termination of a foreign private issuer’s registration of a class of securities under Section 12(g) and duty to file reports under Section 13(a) of 15(d) of the Securities Exchange Act of 1934 (the “Deregistration Release”).

<sup>6</sup> Proposing Release No. 34-57350 (February 19, 2008) for exemption from registration under Section 12(g) of the Securities Exchange Act of 1934 for foreign private issuers (the “12g3-2(b) Release”).

<sup>7</sup> 12g3-2(b) Release II.C.1.

Finally, the ADTV method would harmonize the eligibility tests for the Tier I and Tier II exemptions in both negotiated and non-negotiated transactions.

If the ADTV method is adopted, we believe that the beneficial ownership thresholds of 10% and 40% currently applicable to the Tier I and the Tier II exemption, respectively, are still appropriate.

If the Commission decides not to adopt the ADTV method and continues to hold on to the U.S. ownership percentage test, we would still recommend the Commission eliminate the look-through rule. We believe that bidders should be permitted and required to use their actual knowledge in determining the U.S. ownership percentage. In negotiated transactions the bidder's actual knowledge of the U.S. beneficial ownership in the target could also include the target's actual knowledge of its own shareholder base. This "actual knowledge" analysis would resemble the "actual knowledge" element used under the MJDS in connection with both the negotiated and non-negotiated tender offers for Canadian issuers and the "reason to know" element used in the so-called "hostile presumption" for non-negotiated cross-border tender offers, as discussed below.

#### B. Exclusion of Large Shareholders and Acquiror

As discussed above, we strongly recommend that the Commission adopt the ADTV method to determine the eligibility of the Tier I and II exemptions. If the Commission, however, decides not to adopt the ADTV method and reaffirms the U.S. ownership percentage test, we would like to make the following observations and recommendations regarding the exclusion of large shareholders.

Under the Current Cross-Border Exemptions, the U.S. ownership of the target securities is determined by reference to the target's non-affiliated float, which excludes from the calculation both U.S. and foreign holders of greater than 10% of the subject class of securities. We suggest that the experience has shown that the Commission's original concept of the non-affiliated float for measuring the level of U.S. interest in foreign private issuers creates the potential for peculiar, if not absurd, results. Large shareholders and shareholder groups are quite prevalent among foreign issuers,<sup>8</sup> which in our experience has led to the loss of the Tier I exemption for foreign private issuers with a minimal U.S. ownership.

If the Commission continues to consider the U.S. ownership percentage test as the appropriate test to measure the level of U.S. interest in the foreign private issuer, we believe that the correct method for determining such ownership percentage is

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<sup>8</sup> See e.g., the Commission's Adopting Releases No. 33-8220, 34-47654 and IC-26001 (April 9, 2003) regarding standards relating to listed company audit committees, for discussion on controlling shareholder representation at an audit committee.

the “overall level of U.S. ownership”, subject to the caveat that the applicability of the relevant foreign regulatory regime is not dependent on a target having a few large U.S. holders. With reference to the above, we recommend all shareholders be included in the denominator but shareholders holding greater than 5% of the subject class of securities be excluded from the numerator. We believe that the exclusion of these greater than 5% shareholders is sufficient to prevent an irrational outcome where a few large U.S. shareholders who do not need the protections of the U.S. regulatory system would cause a tender offer not to qualify for the Tier I exemption. We further recommend a bidder be treated in accordance with the same principles as shareholders.

C. Timing of and Reference Date for Calculation of Eligibility

The Commission proposes the U.S. ownership percentage be calculated in negotiated transactions within a 60-day period before first public announcement of the cross-border tender offer. The Commission similarly proposes to mandate a calculation of the so-called hostile presumption over a 12-month period ending no later than 60 days before first public announcement. We fully support these proposals and note especially that the date of first public announcement is the appropriate reference date for determining the eligibility for the Tier I and Tier II exemptions. A bidder who has claimed any exemption upon first public announcement of the cross-border tender offer must be able to continue to rely on such exemption without the risk of losing it because of subsequent changes in the shareholder base or access to new information after first public announcement, even if that information relates back to the period before first public announcement.

If the Commission remains concerned about significant passage of time between the time of announcement and commencement of the cross-border tender offer, a limit on the period of time that may elapse between first public announcement and commencement for the claimed exemption to be still available could alleviate the Commission’s concerns. We recommend such limit on a period of time be at least 60 days or such longer period as may be mandated by home jurisdiction rules for commencement.

D. “Reason to Know” Element in Hostile Presumption for Non-Negotiated Transactions

The Commission proposes changes to the so-called hostile presumption for determining eligibility for the Tier I and Tier II exemptions in non-negotiated transactions and especially to the “reason to know” element of such presumption. Under the proposed rule, a bidder has reason to know information that is publicly available and that appears in any filing with the Commission or any regulatory body in the relevant home jurisdiction. The proposed rule further states that the aforesaid example is not intended to be exclusive. The proposed revisions would also provide that the bidder’s knowledge or reason to know refers to the knowledge as of the date of first public announcement. Thus, any changes in such knowledge after that date would not affect the eligibility for the Tier I and Tier II exemption.

Although we agree with the “reason to know” example above, we do not, however, see any value in adding it. Instead, we fully support the addition of the proposed timing component to the hostile presumption and the Commission’s approach that a bidder would not be disqualified from relying on the presumption if it learns of conflicting U.S. ownership information after the date of first public announcement, as stated earlier in connection with our discussion regarding the reference date for calculating the eligibility for the Tier I and Tier II exemptions.

In addition, we recommend that the Commission clearly state in the adopting release that, except for information that is publicly available through the regulatory filings referred to in the example above, the “reason to know” element does not require the bidder to further investigate the level of U.S. beneficial ownership. For example, the bidder should not be required to engage any third-party information service or otherwise seek access to sources that are not publicly available. However, if the bidder has in fact investigated the level of U.S. beneficial ownership by using non-public sources, its actual knowledge based on such investigation would be taken into account.

## II. Proposed Changes to Tier I Exemption

With respect to affiliated transactions subject to Exchange Act Rule 13e-3, the Commission proposes to expand the Tier I exemption for transaction structures that are not covered under the Current Cross-Border Exemptions. Such transaction structures would include schemes of arrangement, cash mergers and compulsory acquisitions for cash. We support this change to the Tier I exemption and also prefer phrasing the exemption more generally, as proposed by the Commission.

## III. Proposed Changes to Tier II Exemption

### A. Offers not Subject to Sections 13(e) and 14(d) of Exchange Act

The Commission proposes to extend the Tier II exemption to all tender offers not subject to Exchange Act Rule 13e-4 or Regulation 14D. We support this extension. U.S. investors do not need or expect the full protections of Regulation 14E in tender offers for foreign private issuers that are not registered under the Exchange Act.

### B. Multiple Foreign Offers

The Commission proposes to expand the Tier II exemption to allow more than one foreign tender offer to be made abroad in conjunction with a U.S. tender offer. We support this change. Our experience has shown that the complexity of cross-border transactions often necessitates multiple foreign offers and, taking into account the Commission’s objectives to facilitate the inclusion of U.S. shareholders in such cross-border transactions and the fact that this additional relief would not jeopardize the protection of U.S. investors, the proposed relief is well justified.

C. U.S. Offers to Include Non-U.S. Persons.

The Commission proposes to expand the Tier II exemption to permit bidders to include foreign security holders in U.S. tender offers. We support this proposal and, to avoid elevating form over substance, recommend U.S. tender offers be permitted to include all non-U.S. holders of target securities and not only non-U.S. holders with ADRs. We believe the inclusion of all shareholders is in the best interest of U.S. investors as it comports with and should encourage their inclusion as well. We also believe this change is in the best interest of the efficient and fair functioning of the global capital markets as it would avoid prescription of an arbitrary and largely insubstantive requirement that adds no apparent value to the capital transactions at issue but might in fact impede some transactions or place false constraints on how market participants proceed.

D. Foreign Offers to Include U.S. Persons

The Commission proposes to expand the Tier II exemption to permit bidders to include U.S. holders in foreign tender offers. We support this proposal. However, we recommend permitting the inclusion of U.S. holders in a foreign tender offer only when applicable foreign law does not permit the exclusion of U.S. holders from the scope of such offer. Furthermore, we believe that additional conditions on the ability of bidders to include U.S. holders in foreign tender offers are unnecessary and that the U.S. offering materials that are required under the Tier II exemption to disclose the implications of participating in a foreign tender offer provide adequate protection to U.S. investors.

E. Proration and Use of Dual or Multiple Offer Structure

The Commission solicits comments on whether there are situations where bidders relying on the Tier II exemption should be permitted to separately pro rate securities tendered into U.S. and foreign tender offers. We recognize the potential for abuse here, and we suggest that separate proration be permitted only if it is required by the laws of the relevant home jurisdiction.

F. Termination of Withdrawal Rights While Tendered Securities Are Being Counted

The Commission proposes to expand the Tier II exemption to allow bidders to suspend back-end withdrawal rights during the time after the initial offering period when tendered securities are being counted and before they are accepted for payment. We support this proposal and recommend that the suspension relief be provided through announcement of the results of the cross-border tender offer. The proposed conditions for relief are otherwise appropriate.

G. Expanded Relief for Subsequent Offering Periods

1. Elimination of Twenty Business Day Limit

The Commission proposes to eliminate the 20-business day limit on the length of the subsequent offering period for Tier II tender offers and also solicits comments on whether limitation should be eliminated for all tender offers, including offers for U.S. issuers. We support the elimination of the 20-business day limit for all tender offers, including both U.S. and cross-border offers. From the perspective of U.S. investor protection, there is no evidence of abuse of a subsequent offering period based on its duration. Accordingly, we believe that granting bidders additional flexibility by eliminating the limits on subsequent offering periods will advance the Commission's objectives of facilitating cross-border transactions without jeopardizing investor protection.

2. Other Conflicts to Be Addressed

The Commission solicits comments on whether there are any other conflicts between U.S. and foreign laws or practice relating to subsequent offering periods that should be addressed concerning the Tier II exemption in the adopting release. Due to the same difficulties in counting securities tendered into a cross-border tender offer, as discussed in relation to the suspension of withdrawal rights above, we recommend that the subsequent offering period for Tier II tender offers not be required to commence until the determination and announcement of the results of the offer following the initial offering period.

3. Payment on Modified Rolling Basis

The Commission proposes to expand the Tier II exemption to allow, under certain circumstances, securities tendered during the subsequent offering period to be purchased on a modified rolling basis. Under the proposed rule, the securities tendered are bundled and paid for within 14 days from the date of tender. The proposed rule will harmonize the general requirement that the payment is to be made in accordance with the requirements of the home jurisdiction law or practice for securities tendered during both the initial and subsequent offering periods. We support this proposal and believe that 14 days is a sufficient period to make this relief useful.

4. Payment of Interest

The Commission proposes to expand the Tier II exemption to permit the payment of interest on target securities tendered during the subsequent offering period, provided that such payment of interest is required by foreign law. The Commission also solicits comments on whether the proposed relief should be extended to encompass interest paid during the initial offering period and whether only the payments of *de minimis* interest should be permitted. We support the proposed relief and recommend that interest payments during the initial offering period be permitted in accordance with



the same principles. We also recommend that the amount of interest be determined in accordance with the laws of the relevant home jurisdiction.

#### H. Prompt Payment and “Mix and Match” Offers

The Commission proposes to expand the Tier II exemption to allow separate offset and proration pools for securities tendered during the initial and subsequent offering periods. The Commission also proposes to eliminate the prohibition on a “ceiling” for the form of consideration offered in the subsequent offering period, where the shareholders are given the ability to elect between two or more different forms of offer consideration. We support both of these proposals as they are consistent with the Commission’s objectives to facilitate cross-border transactions and there is no evidence of abuse of mix and match offer structures. For the latter reason, we do not see problems in extending the revisions to all tender offers, including offers for U.S. issuers.

#### I. Terminating Withdrawal Rights after Reduction or Waiver of a Minimum Acceptance Condition

##### 1. Proposed Limitations to Interpretative Guidance

The Commission solicits comments on whether bidders should be allowed to reduce or waive a minimum acceptance condition to a Tier II offer without providing withdrawal rights to shareholders who have already tendered their shares into the offer. The Commission’s current interpretative position provides for this relief, subject to certain conditions set forth in the Commission’s Release No. 33-7611 (November 13, 1998) concerning the Current Cross-Border Exemptions (the “1998 Cross-Border Proposing Release”). The Commission also proposes guidance on the circumstances under which the above relief would be available for Tier II offers in the future.

The proposed new guidance would limit the interpretive position adopted in the 1998 Cross-Border Proposing Release by conditioning relief, among others, on bidders adequately disclosing the impact of a potential reduction or waiver in the initial offer materials and requiring them not to reduce or waive the minimum acceptance condition below a majority. The Commission also states that the revised interpretative position is limited to circumstances where there exists a requirement of law or practice in the home jurisdiction justifying a bidder’s inability to extend the offer after a waiver or reduction of the minimum acceptance condition. Finally, the interpretative position does not apply to mandatory extensions for changes related to the offer consideration, the amount of target securities sought in the offer or a change to the dealer’s soliciting fee.

We believe that bidders should be permitted to reduce or waive the minimum acceptance condition without being required to extend the offer or make available withdrawal rights, subject to the following four conditions: (a) the tender offer is made for 100% of the subject class of securities; (b) the bidder’s ability to reduce or waive the minimum acceptance condition, and the consequences thereof, are fully disclosed in the offer documents; (c) upon termination of withdrawal rights, all

conditions are satisfied or waived (subject to the proposed exemptive relief regarding counting of acceptances); and (d) the bidder keeps the offer open for at least five business days following announcement of the reduction or waiver of the minimum acceptance condition or makes available a subsequent offering period of at least five business days.

The Commission's reasoning behind the requirement to provide withdrawal rights in connection with the reduction or waiver of a minimum acceptance condition is faulty, at least in the case of an offer for 100% of the subject securities. Shareholders who have already tendered their shares into the offer will be in favor of the reduction or waiver of the minimum acceptance condition because such action enables the offer to close. Consequently, it is not likely that such shareholders would exercise their withdrawal rights. Based on our experience, practice supports our position: there is no evidence of significant withdrawals following the announced intention of a reduction or waiver of the minimum acceptance condition.

Instead, we believe it is much more important for the protection of U.S. investors that bidders are required to allow shareholders who have not yet tendered their shares to participate in the offer after the reduction and waiver of the minimum acceptance condition. To protect such shareholders, the possibility of the minimum acceptance condition being reduced or waived should be disclosed by the bidder in the offer documents and the bidder should be required to keep the offer open for a period of at least five business days. The bidder should be able to meet this last requirement by providing a subsequent offering period even if there is a gap between the initial offering period and the subsequent offering period.

As discussed above, our position deviates from the Commission's interpretive position and the proposed limitations thereof. In the event that the Commission decides to adopt its proposed interpretative position, as set forth in the Proposing Release, or even to codify it, we would, however, like to make the following observations regarding the proposed conditions. We generally believe that the conditions set forth in the Proposing Release for the reduction or waiver are appropriate, especially if used for the protection of shareholders that have not yet tendered their shares into the offer. With reference to the computerization, Internet age and the Commission's EDGAR system, we do, however, think that a mandatory condition to place an advertisement in a newspaper of national circulation in the United States constitutes an undue burden on the bidder. Consequently, we recommend the Commission clearly indicate in its adopting release that a press release published by the means reasonably designed to provide dissemination to the U.S. public and accompanied by the simultaneous filing of a tender offer document with the Commission is sufficient to satisfy the relevant condition.

## 2. Codification of Interpretative Guidance

In general, we appreciate and support the Commission's codification efforts, as they will provide more clarity and certainty to the markets and market

participants engaged in the transactions at issue. However, in this particular matter we support the codification only if the new rule reflects our position described above.

J. Codification of Rule 14e-5 Class Exemptive Relief

The Commission proposes to codify the class exemptive relief for Tier II tender offers from the prohibition under Exchange Act Rule 14e-5. Such class exemptive relief was granted in the so-called *Mittal*, *Sulzer* and *Financial Advisors* class exemptive letters in 2006 and 2007. We believe that relief provided by these class exemptive letters has generally worked well and we fully support the Commission's codification efforts. To further enhance the significance of this class exemptive relief, we recommend the Commission, as part of the codification, confirm that:

(a) the *Sulzer* condition to increase the offer consideration to match any higher consideration paid outside the tender offer is satisfied if the laws of the relevant home jurisdiction or the terms of the tender offer provide for matching the higher consideration;

(b) the *Sulzer* conditions regarding the bidder's obligation (i) to disclose in the United States, to the extent information is made public in the home jurisdiction pursuant to applicable law, information regarding all purchases of subject securities otherwise than pursuant to the offer since the announcement date and (ii) to provide the Commission, upon request, with a daily time-sequenced schedule of purchases made by the bidder from the announcement date until the offer expires, override the disclosure and reporting obligations under Schedule TO; and

(c) the U.S. "offering documents", "offering materials" and "offer document", which are required to be sent to the U.S. holders under the relevant *Mittal*, *Sulzer* and *Financial Advisors* conditions, respectively (in which the possibility of or the intention to make purchases pursuant to a non-U.S. tender offer(s) or outside the non-U.S. tender offer or the intention to conduct the trading activities (as defined in the *Financial Advisors* class exemptive letter) must be disclosed), refer to the definitive offer materials, as defined by the home jurisdiction rules or practice, and not to any earlier announcements in relation to the tender offer.

Furthermore, we recommend the Commission clarify how the *Sulzer* condition to increase the offer consideration to match any higher consideration paid outside the tender offer is satisfied in a situation in which the offer consideration consists either of stock or a mix of cash and stock and the bidder makes open market purchases for cash during the offer period. Based on our experience, if foreign law permits purchases outside the tender offer, it usually also regulates how such purchases and the consideration paid therein are to be treated. However, the approaches adopted by various foreign laws vary significantly, which makes it difficult for the Commission to set any explicit requirements for the contents of such foreign law. We recommend the codification of *Sulzer* provide that the condition regarding "increasing to match" will be deemed satisfied in an offer with consideration consisting of stock or a mix of cash and

stock if (1) applicable home jurisdiction rules have an “increase to match” requirement in the case of cash offers and (2) the home jurisdiction regulates cash purchases outside an offer with consideration consisting of stock or a mix of cash and stock.

#### IV. Interpretive Guidance

##### A. Ability of Acquirors to Exclude U.S. Target Security Holders

The Commission proposes to provide additional interpretive guidance on how bidders may conduct exclusionary offers that are limited to non-U.S. holders without implicating U.S. tender offer rules. In the same context, the Commission refers to its previous guidance on measures bidders may take to avoid triggering U.S. jurisdictional means and, consequently, the general applicability of the U.S. tender offer rules.

Any such interpretive guidance by the Commission should be consistent with the law. Section 14(d) of the Exchange Act, together with the relevant interpretive case law, is clear: the test for the U.S. tender offer rules to apply is the use of the “U.S. jurisdictional means”<sup>9</sup> and not the “U.S. person” test under Regulation S or the “U.S. holder” test in the Current Cross-Border Exemptions. Accordingly, in light of this clear legal framework that Congress and the courts have established, the Commission should not suggest any departure from the U.S. jurisdictional means test require, or that to avoid being subject to relevant U.S. laws a bidder must to take, any particular action or precaution to prevent “U.S. persons” or “U.S. holders” or their offshore nominees from accepting the offer.

##### B. Vendor Placements

Although the Commission has not specifically requested comments regarding vendor placement structures, we recommend the Commission’s interpretive guidance for such structures be liberalized with respect to exchange offers for foreign private issuers that are not registrants under the Exchange Act. Such offers for non-registrant foreign private issuers are not subject to Exchange Act Rule 13e-4 or Regulation D and as such not subject to any U.S. requirement of equal treatment. Non-U.S. bidders frequently use vendor placement structures in offers for non-registrant foreign private issuers to avoid the registration requirements under the Securities Act.

In 1990, the Commission adopted Regulation S to provide an non-exclusive safe harbor from the registration requirements of the Securities Act of 1933 (the “Securities Act”) for offers by issuers outside the United States. The conditions for the applicability of such safe harbor are clear and there is nothing in Regulation S that suggests it is inapplicable to vendor placement structures.

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<sup>9</sup> Section 14(d) of the Exchange Act refers to the “use of the mails or any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise”.

In the Proposing Release, the Commission has as part of its interpretive guidance listed several factors based on which it decides whether the vendor placement arrangement in question obviates the need for registration under the Securities Act. This list of factors includes conditions in addition to the ones set forth in Regulation S. The interpretive guidance does not differentiate between the treatment of registered and non-registered foreign private issuers, suggesting that it also would apply to cross-border business combinations involving non-registered foreign private issuers. We believe that the Commission's interpretative guidance together with its list of factors is not a useful standard for these cross-border business combinations and recommend the question whether the registration under the Securities Act is required for such transactions be solely governed by the clear regulatory framework of Regulation S.

CRAVATH, SWAINE & MOORE LLP

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard Hall', written in a cursive style.

Richard Hall

Ms. Nancy M. Morris  
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U.S. Securities and Exchange Commission  
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