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June 27, 2008

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release Nos. 33-8917; 34-57781; 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

Dear Ms. Morris:

We submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments on the proposed changes to the rules governing cross-border business combination transactions.[1] We support the Commission's proposals to codify existing staff interpretive and no-action positions and exemptive orders, to address recurring areas of conflict and inconsistency between U.S. rules and foreign regulations and practice and to expand and enhance the usefulness of the Tier I/Tier II exemptions initially adopted in 1999.

We believe, however, that a more fundamental reassessment of the U.S. treatment of cross-border business combinations is warranted. The Commission's stated goal in proposing the rule modifications is to change the behavior of bidders for securities of foreign private issuers, who often exclude U.S. holders of target shares from cross-border business combinations under the current rules. The Commission's proposals are

[1] SEC Release Nos. 33-8917; 34-57781; File No. S7-10-08 (May 6, 2008) (the "Release").

unlikely to accomplish this objective: bidders who are potentially eligible for the Tier I exemption will, in our opinion, continue to use the exemption sparingly, because the small incremental number of shares to which they gain access by using the exemption generally will not outweigh the burden of determining eligibility for the exemption and appointing an agent for service of process in the United States, even if the Commission's proposed modifications are adopted.

We propose that the Commission significantly expand the exemptions for business combinations involving foreign private issuers, by fully exempting business combinations from the U.S. tender offer rules and registration under the Securities Act of 1933 (the "Securities Act") in the following cases:

- Where the target is a non-reporting foreign company[2] and the transaction is a cash tender offer, without conditions;

- Where the target is a non-reporting foreign company and the transaction is an exchange offer or other business combination, so long as an English language version of any home country offer or merger document is made available on the bidder's website; and

- Where the target is a reporting foreign company as to which there is no "substantial U.S. market interest" (within the meaning of Regulation S under the Securities Act), so long as the target is listed in its primary trading market (as defined in the recently adopted deregistration rules), and an English language version of the home country offer document is made available on the bidder's website. The Securities Act exemption also would require the bidder to be listed in its primary trading market or to be an Exchange Act reporting company.

The exemptions would apply only to tender offer and registration requirements. All such business combinations would remain subject to the antifraud provisions of the U.S. securities laws.

We believe our proposal would be in the interest of U.S. investors, who typically are excluded from many business combinations under the current rules (and who, we believe, would remain excluded under the Commission's proposals). It would also recognize that U.S. investors today regularly accept foreign regulatory systems when they invest in non-U.S. securities, and that those regulatory systems have developed in recent years to the point where in many cases it is no longer necessary to layer U.S. regulation on top of them.

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[2] When we use the term reporting foreign company, we mean a foreign private issuer, the securities of which are registered under Section 12, or that is required to file reports under Section 15(d), of the Securities Exchange Act of 1934 (the "Exchange Act"). The term non-reporting foreign company refers to all other foreign private issuers.

We explain in more detail below why we believe these proposals are appropriate in today's global securities market. We also offer some additional suggestions with respect to the Commission's proposed rule modifications.

I. The Commission's Proposals will Improve the Current Rules, but are Unlikely to Have a Significant Impact

A bid to acquire a non-U.S. company, if made to U.S. holders of that company's securities, may be subject to the U.S. tender offer rules, irrespective of the size of the U.S. holding or whether the target is a reporting company in the United States. In addition, the offer or sale of securities in the United States to U.S. holders of the target's shares, whether by way of an exchange offer, in connection with a business combination (such as a merger) or through a rights offering,[3] must be registered under the Securities Act, unless an exemption is available. These rules thus differ from the equivalent business combination rules of many other countries, the application of which turns not on the residence of the investor, but rather on the jurisdiction of incorporation (or sometimes the jurisdiction of listing) of the target company.[4]

While many bids for non-reporting foreign target companies can potentially benefit from the Tier I exemption under current rules, in our experience few bidders attempt to use that exemption. Because the eligibility threshold is so low (U.S. holders may not exceed 10% of the target's public float, excluding from the public float holders of more than 10% of the target's shares), the inclusion of U.S. holders in such a transaction typically has at most a marginal impact on an offer's success, particularly given that many U.S. holders sell their shares into a foreign market when an offer is not open to them. The "look-through" rules that bidders must apply to determine eligibility require significant time and expense to apply. Appointing an agent for service of process in the United States often is greeted with skepticism by general counsels of bidders, significantly limiting the use of the Tier I exemption.[5]

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[3] References in this letter to business combination rules include, for Securities Act purposes, rights offerings. This is consistent with the fact that Rule 801 under the Securities Act was adopted as part of the cross-border business combination rules. It also reflects the fact that rights offerings are different from other capital-raising transactions, as they are often required for new share issuances under the corporate governance rules of many foreign countries.

[4] *See, e.g.*, French Law No. 2006-387 relating to the public offer of acquisitions (published in the Official Journal on April 1, 2006); and The City Code on Takeovers and Mergers and The Rules Governing Substantial Acquisitions of Shares (the "City Code") of the United Kingdom.

[5] When the target is a non-reporting company, bidders may open tender offers to U.S. investors by complying with the relatively modest requirements of Section 14(e) of the Exchange Act and Regulation 14E thereunder, but they often exclude U.S. investors from their bids because they have the impression that compliance with U.S. rules is complicated, and their instinctive reaction is to exclude U.S. holders. This is true even when home country rules impose an offer period that exceeds 20 business days, which is the only significant U.S. requirement (other than avoiding fraud and manipulative devices) in a Section 14(e) offer now that the Commission staff has relaxed the application of Rule 14e-5 through the no-action letter process. The Commission's challenge is to change this instinctive behavior.

The Commission has proposed allowing acquirors to make the U.S. beneficial ownership calculation on a date chosen by the bidder *within a 60-day period* before the public *announcement* of the transaction for which exemption is being sought.[6] Under the current rules, the relevant date for determining U.S. ownership is limited to *the 30th day* before *commencement* of the relevant transaction. These two changes – focusing on a range of dates rather than a specific date and keying to announcement rather than commencement – will help to address the difficulties transaction participants have had obtaining information as of a specific date, especially in light of the uncertainty of when commencement would actually occur, and address the uncertainty facing bidders at the time of announcement as to the continued availability of needed exemptions at the time of commencement.

These changes, however, are unlikely to change the situation in any significant way. Bidders in the intense environment of preparation for an acquisition will shy away from even modest burdens unless they have the potential to provide substantial benefits. To address this problem, we believe the Commission should significantly expand the exemptions, as we discuss in the next two sections.

II. U.S. Registration and Tender Offer Rules Should not Apply to Foreign Private Issuer Targets that are Non-Reporting Companies

We believe tender offers for the securities of foreign private issuers that are not reporting companies under Section 13 or 15(d) of the Exchange Act should be exempt from the U.S. tender offer rules (other than the antifraud rules).[7] This would encourage most bidders to allow U.S. holders to tender their shares into the offer, while representing only a minor regulatory change as a practical matter, or essentially none at all when the target's home country requires an offer period of more than 20 business days.

We also believe that exchange offers for the securities of non-reporting foreign companies, and other business combinations involving non-reporting foreign companies as targets (primarily Rule 145 transactions where a vote of the shareholders of the non-reporting company is required), should be exempt from the registration requirements of the Securities Act (but not the antifraud rules).[8] In these cases, we believe it would be appropriate for the Commission to require the bidder to make available on its website[9] an English language version[10] of any document it is required to

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6 *See* proposed revisions to Securities Act Rule 800(h)(1), Instruction 2.i. to Exchange Act Rules 13e-4(h)(8) and (i) and Instruction 2.i. to Exchange Act Rules 14d-1(c) and (d).

7 We would not impose a requirement to make an English language offer document available to U.S. holders electronically or otherwise, because no offer document is required in Section 14(e) offers.

8 The Commission could, however, require that the transaction not be entered into for the purpose of evading the otherwise applicable registration requirements.

9 As it has done in other contexts, such as Rule 12g3-2(b) under the Exchange Act, the Commission could also permit publication on an electronic service of an exchange or market regulator in the target's home country. In our experience, most companies expect to use their websites to satisfy the requirements of Rule 12g3-2(b).

prepare under the rules of the target's primary trading market (as defined in Rule 12h-6 under the Exchange Act). We would eliminate the requirement that the document be furnished to the Commission under cover of Form CB, as website publication would make this unnecessary. We also would not require the bidder to appoint an agent for service of process in the United States (we believe that a bidder would in any event be subject to U.S. court jurisdiction if it makes an offer in the United States, and appointment of an agent for service of process can be dissuasive, as described above).

Exempting business combinations involving the securities of non-reporting foreign companies appropriately recognizes that when U.S. investors purchase securities issued by these companies, they voluntarily elect to become subject to the applicable home country rules and regulations, including the rules and regulations relating to fundamental corporate transactions. Our proposed Securities Act registration exemption is consistent with this – U.S. investors rely on home country rules for disclosure regarding the target on an ongoing basis, and it seems appropriate for them to rely on the same rules for disclosure regarding the bidder at the time of a transaction.[11]

Such an exemption also is consistent with the Commission's recent efforts to enhance the regulatory system applicable to foreign private issuers. These new rules and proposals acknowledge that the interests of U.S. investors are not unduly jeopardized when, for example, foreign private issuers are allowed to use financial statements prepared in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board;[12] to exit the U.S. regulatory system when the level of U.S. interest in the foreign private issuer's securities is small;[13] and to avail themselves more easily of the Rule 12g3-2(b) exemption from reporting under the Exchange Act.[14] Tender and exchange offers for the securities of non-reporting foreign companies should be regulated in the jurisdiction of incorporation or listing of the target company, rather than in the United States. The principles of comity and recognition of the strong development of foreign regulation embodied in the foreign private issuer initiatives militate in favor of the Commission's deferring to home country regulation of cross-border transactions.

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10 We recommend requiring an English language version rather than an English translation in order to permit a bidder to eliminate information that is not material to U.S. investors from an offer document, making the document more user-friendly for U.S. investors. We have made a similar recommendation in connection with our comments on the Commission's proposal to amend Rule 12g3-2(b). *See* Comments of Cleary Gottlieb Steen & Hamilton LLP on Proposed Amendments to Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers – File No. S7-04-08 (April 25, 2008) at 8.

11 We note that business combinations are not effected for purposes of raising capital, and it is highly unlikely that any bidder would engage in a business combination transaction for purposes of effecting a disguised capital raising transaction.

12 SEC Release No. 33-8879 (December 21, 2007).

13 SEC Release No. 34-55540 (March 27, 2007) (the "Deregistration Release").

14 SEC Release No. 34-57350 (February 19, 2008).

Over the past decade, the number of foreign jurisdictions that have adopted robust tender and exchange offer regulation has significantly increased.[15] As a result, we believe the U.S. interest in regulating such offers has declined, particularly in the case of those issuers that have not voluntarily accessed the U.S. capital markets or are entitled to an exemption from U.S. reporting. Accordingly, we believe it would be appropriate and in the public interest for the Commission to adopt an exemption of the type we have proposed.

III. Business Combinations Involving Reporting Foreign Companies Should be Exempt from Tender Offer Rules and Securities Act Registration if they are Subject to Home Country Regulation, and if there is no Substantial U.S. Market Interest in the Target's Securities

We recognize that, when a foreign private issuer is subject to periodic reporting requirements under Section 13 or 15(d) of the Exchange Act as a result of a listing or public offer of equity securities, there is a greater interest in applying U.S. business combination rules where that issuer is a target. On the other hand, unlike a business combination involving a U.S. issuer as target, it is likely that a business combination involving a foreign private issuer as target will be subject to a foreign regulatory regime by virtue of the target's being domiciled or listed in that jurisdiction. We believe this justifies broadening the U.S. exemptions for such business combinations.

We propose that business combination transactions involving targets that are reporting foreign companies be exempt from Sections 14(d) and (e) of the Exchange Act, and Regulations 14D and 14E thereunder,[16] as well as from Securities Act registration, where (i) the securities of the target are listed in the target's primary trading market (as defined in Rule 12h-6 under the Exchange Act), and (ii) there is no "substantial U.S. market interest" (as defined in Regulation S under the Securities Act) ("SUSMI") in the target's equity securities. The bidder would be required to make available on its website an English language version of any offer or merger document it prepares under the applicable regulatory regime of the target's primary trading market. The Securities Act exemption also would require the bidder to be listed in its own primary trading market, or to be an Exchange Act reporting company, at the time of the transaction.[17]

With respect to the first requirement, we believe it is appropriate to extend exemptive relief to cases where the target is listed in its primary trading market even though the regulatory regime applicable to the target may not be the same as that in the United States. The Commission has recognized in the deregistration context that a listing

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15 *See, e.g.*, Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, which has been implemented into national law by EU member states; and Instruction No. 361 of the Brazilian Securities Commission (Comissão de Valores Mobiliários).

16 We believe analogous exemptions should apply to going private transactions and issuer self-tenders under Section 13(e) of the Exchange Act.

17 As is the case under current rules, if a bid is launched on an exempt basis, we would remove the requirements relating to the bidder's status for a competing bid.

in a primary trading market is an appropriate way to ensure the application of a foreign regulatory system, and we believe the same reasoning should apply to business combinations.[18] Foreign regulations can address matters such as publication and disclosure of transaction terms, offer periods, equal treatment of target shareholders and similar matters, as well as disclosure regarding the bidder and its securities in the case of an exchange offer or other business combination involving an offer of securities. While the Commission could require that the foreign regime address certain specific matters or meet certain minimum standards (such as requiring that U.S. holders be entitled to receive consideration with a value at least equal to the highest amount paid to any other holders), we would not recommend doing so (and in any event would recommend limiting any such standards).

With respect to the second requirement, SUSMI, we believe there are three reasons why our proposal is appropriate:

- First, it is a more appropriate substantive measure of U.S. interest in a target's securities than the current test used for the Tier I exemption. A foreign private issuer with no SUSMI is allowed to offer and sell its securities in offshore transactions with no restrictions on the resale of those securities into the United States following the offering. We think that it would be appropriate to apply the same standard to determine when it is appropriate to allow the target's home country regulatory system to govern a business combination transaction, rather than adding a second layer of regulation in the United States.

- Second, SUSMI is determined by reference to the target's trading volume. A trading volume rule for negotiated transactions would have the important benefit of making the U.S. ownership calculation easier and less costly for bidders to complete, as the Commission has recognized in other contexts (such as deregistration).

- Third, our proposal would apply on an equivalent basis to both negotiated and non-negotiated transactions, removing incentives for both the bidder and the target that we believe are not in the interests of investors. With respect to bidders, the current rules create an incentive to launch a transaction on a non-negotiated basis in order to avoid the arduous task of counting shareholders that is associated with a negotiated transaction. With respect to targets, as the Commission has noted, the current rules create an incentive to make public announcements to the effect that U.S. shareholders represent more than 10% of the target's public float as a takeover defense, even in cases where the evidence of this is not completely clear.

As noted above, we propose that transactions meeting these criteria be exempt not only from tender offer rules, but also from Securities Act registration (in

[18] Deregistration Release at 17.

cases where such registration would otherwise be required). We believe this is appropriate because the business combination would not be a capital raising transaction. The Commission has recognized that relaxation of registration requirements is appropriate in connection with business combination transactions under the deregistration rules, as an acquiror of a reporting company may use the target's reporting history in determining its eligibility for deregistration. In most cases, this will permit acquirors to deregister immediately after a business combination transaction. We believe there is little benefit to requiring such an acquiror to prepare a single Securities Act registration statement, with no continuing U.S. reporting obligations, in connection with a business combination transaction that is subject to a foreign regulatory regime and in a case where there is no SUSMI in the target's equity securities. Instead, it should be sufficient that the bidder be listed in its primary trading market or that it be an Exchange Act reporting company.[19]

IV. In any Event, Further Changes Should be Made to the Eligibility Threshold for Determining U.S. Ownership

To the extent the Commission continues to believe that a beneficial ownership test is the appropriate measurement in the context of negotiated transactions, we would encourage you to consider additional measures to improve the ease of calculation and to expand the utility of the cross-border exemptions. First, the Commission should consider adopting a more streamlined approach similar to that used in calculating U.S. holders under the U.S. Canadian Multijurisdictional Disclosure System ("MJDS"). For purposes of a business combination registered on MJDS Form F-8 or F-80, or a tender offer filed on MJDS Schedule 14D-1F, "U.S. holder" means any person whose address appears on the records of the issuer, any voting trustee, any depositary, any share transfer agent or any person acting in a similar capacity on behalf of the issuer as being located in the United States.[20] Thus, no look-through to the ultimate beneficial owner is required for the application of this rule.

Second, to the extent the Commission adopts a beneficial ownership test that does not require a "look through," we would encourage the Commission to require foreign private issuers, as part of the proposed foreign issuer reporting enhancements, to disclose at least annually in their Form 20-F the percentage of U.S. holders holding their shares.[21] Such disclosure requirement would enhance the information available to bidders contemplating cross-border offers and investors in non-U.S. targets. Moreover, such information would put U.S. investors on notice that they are investing in companies

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19 The inclusion of an exemption for companies that are Exchange Act reporting companies is designed to ensure equal treatment for U.S. bidders that seek to acquire foreign targets. We do not believe such transactions raise the concerns that have led the Commission to adopt significant restrictions pursuant to Category 3 of Regulation S under the Securities Act.

20 *See* Instruction II.D.1. to Form F-8; Instruction II.D.1. to Form F-80; and Instruction I.A.1. to Schedule 14D-1F.

21 We would not support such disclosure requirement if the Commission does not amend the look-through rule, since the requirement to calculate U.S. beneficial ownership on an annual basis would be overly burdensome for issuers.

whose securities might not be subject to the protections of the U.S. tender offer rules and registration requirements of the Securities Act in the context of fundamental corporate transactions.[22]

In the Release, the Commission requested comment as to whether to eliminate the exclusion of greater-than-10% holders in calculating U.S. beneficial ownership. In the event that the Commission chooses to retain the look-through test for negotiated transactions, we believe it should eliminate the exclusion of greater-than-10% non-U.S. holders that are not affiliates but retain the exclusion of greater-than-10% U.S. holders. Excluding large non-U.S. holders from the U.S. ownership calculation overstates the significance of the U.S. ownership percentage and correspondingly reduces the ability of bidders to rely on the exemptions, with the result that bidders will continue to exclude U.S. holders. By contrast, excluding greater-than-10% U.S. holders from the calculation would increase the availability of the exemption, thereby promoting the inclusion of *other* U.S. holders in the proposed transaction. A greater-than-10% U.S. holder is unlikely to need the U.S. tender offer rules to protect its interests. Such investments typically are made by institutional or other sophisticated investors, who choose to do so fully cognizant of being subject to foreign regulation and of the advantages and risks of their investment decision. Furthermore, because of their large size, such holders likely will find means to participate in the transaction regardless of the general exclusion of U.S. holders, which is to the disadvantage of the smaller (often retail) U.S. holders that the current and proposed exemptions are designed to protect.

The Commission has also solicited comments as to whether the current beneficial ownership tests (as proposed to be amended) should be maintained, but the maximum U.S. ownership level for Tier I and Rules 801 and 802 should be increased to 15%. If the Commission retains the beneficial ownership test, we strongly support an increase in the threshold to 20%. With the existing 10% maximum U.S. ownership limitation, relatively few bidders in cross-border tender and exchange offers have used the Tier I or the Rule 802 exemptions since they were adopted in 1999. We believe raising the Tier I and Rules 801 and 802 limitations to 20% would reduce this risk of exclusion of U.S. holders, while retaining the requirement (consistent with SUSMI) that a substantial majority of target ownership be outside the United States. We think such an increase would encourage the inclusion of U.S. investors in cross-border tender and exchange offers, business combinations and rights offerings and be in the best interests of those investors.[23]

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[22] If desirable, the Commission might also consider requiring foreign private issuers whose U.S. ownership level falls below the Tier I or Tier II exemptions explicitly to disclose the risk that the U.S. rules might not apply in a takeover of such company.

[23] We recognize that by increasing the maximum U.S. ownership limitation for Rules 801 and 802, the amount of securities that can enter the U.S. market without registration is likely to increase. From the perspective of the initial recipient of those securities, however, that increase is warranted to afford them greater opportunity to participate in rights offerings, exchange offers and business combinations, particularly in light of the protection they will continue to receive from the anti-fraud provisions of the U.S. securities laws. We also believe that in a cross-border exchange offer, the securities of a foreign private issuer target are likely to flow out of the United States.

V. The Commission Should Modify Certain Aspects of the Proposed Rule 14e-5 Cross-Border Exemptions as they Relate to Financial Advisors and their Affiliates

The Commission proposes to revise Exchange Act Rule 14e-5 to codify recent exemptive relief issued for Tier II-eligible tender offers in the following three areas: purchases and arrangements to purchase securities of a foreign private issuer (1) pursuant to the non-U.S. offer(s) in a cross-border tender offer where there are separate U.S. and non-U.S. offers; (2) by offerors and their affiliates outside a tender offer in accordance with local country practice in jurisdictions meeting certain criteria; and (3) by financial advisors' affiliates outside a tender offer. We strongly support the Commission's efforts to codify the relief granted by the staff over the past several years. In particular, we welcome the proposed removal of certain unnecessary conditions to the availability of the exemptions, such as voluntary compliance by the financial advisor and its affiliates with the pertinent provisions of the City Code[24] and certain compliance requirements with the laws of the target's home jurisdiction and the existence of a bilateral or multilateral memorandum of understanding.[25] However, we believe the Commission should clarify certain aspects of the proposed rules, particularly as they relate to financial advisor affiliates.

Proposed Rule 14e-5(b)(12) would permit purchases or arrangements to purchase outside a Tier II tender offer by (i) an offeror and its affiliates and (ii) an affiliate of a financial advisor if certain conditions are satisfied. The Commission states that the proposed rule is intended to address situations where the subject company is a foreign private issuer, and the covered person must "reasonably expect" that the tender offer qualifies as Tier II.[26] The Commission notes in the Release that it would modify the reasonable expectation condition if the proposal to change the timing of the Tier II calculation to a date no earlier than 60 days before the tender offer announcement is adopted.[27] We would hope, however, that even if the Commission modifies the reference date, it will retain a reasonable expectation standard as it relates to such new date, at least as to financial advisors' affiliates in light of the different nature of their ordinary course trading activities as opposed to activities undertaken to facilitate the tender offer. Even if the relevant date for calculating U.S. beneficial ownership is the 60th day before *announcement*, rather than *commencement*, it is possible that financial advisor affiliates would be making purchases potentially affected by Rule 14e-5 at a time, prior to announcement of the transaction, at which the availability of the exemption would not be assured. Without the reasonable expectation standard, a financial advisor's affiliates (and

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24 *See* Condition number 10 in Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007) ("Financial Advisor Letter"), providing class exemptive relief under the conditions specified.

25 *See, e.g.*, Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007).

26 Release at 94-5.

27 Id. at n.241.

even the offeror itself) could run afoul of the Rule 14e-5 prohibition in circumstances in which it legitimately appeared, at the time undertaken, that the activity was exempt.[28]

As a condition to the Rule 14e-5 exemption, proposed Rule 14e-5(b)(12) also prohibits any purchases or arrangements to purchase in the United States otherwise than pursuant to the tender offer. We do not regard such condition as implying that covered persons are not entitled to rely in the United States on any of the other exceptions from Rule 14e-5 set forth in Rule 14e-5(b) or in other applicable no-action or interpretive letters. We believe, however, that the Commission should clarify this point in the adopting release or an instruction to the final rule.

In the case of financial advisor affiliates, the proposed exception contained in Rule 14e-5(b)(12) is premised on the affiliate carrying out its normal business activity when purchasing outside a tender offer, and would not permit purchases or arrangements to purchase to be made to facilitate the tender offer. According to the Commission, purchasing activity effected in reliance on the proposed exception would have to be consistent with the affiliate's prior levels of activity.[29] To the extent that the proposed rule would require that the purchasing activity be consistent with the affiliate's prior levels of trading activity, however, it is more restrictive than previous relief the staff of the Commission has granted to financial advisors, which permitted purchasing activities when, among other conditions, such activities were "consistent with the [f]inancial [a]dvisor's [a]ffiliates' . . . normal and usual business practices, and . . . 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."[30] The focus in the previous relief was thus on the nature of the prior activities, rather than on the level of such activities. We believe such focus was appropriate to protect U.S. investors and would urge the Commission to clarify this position in the adopting release or the final rule.

Finally, the Commission specifically excludes risk arbitrage from the exception applicable to purchasing activity of the financial advisor's affiliates. The Commission states that it views risk arbitrage, which may involve the purchase of the subject security and the sale of stock in the proposed acquiror, as being so closely related to the tender offer that the incentive for abusive behavior is significant.[31] The Commission's wholesale exclusion of risk arbitrage from the types of activities financial advisors' affiliates may conduct outside the tender offer is in fact a departure from the relief it previously granted in the Financial Advisor Letter, which did not contain such a

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28 *See, e.g.*, the request attached to the Financial Advisor Letter at n.9. The incoming letter requested Rule 14e-5 relief for financial advisor affiliates in cases where the affiliate makes a determination of the percentage of target securities held by U.S. investors based upon information to the extent known or which can be obtained without unreasonable effort or expense, notwithstanding the lack of literal compliance with the counting rules. We think the Commission should codify this principle or clarify in the adopting release that this approach to counting is permissible.

29 Release at 96.

30 *See* Condition 4 in the Financial Advisor Letter.

31 Release at 96.

flat prohibition.[32] We believe the general prohibition on activities designed to facilitate the tender offer should be sufficient to protect against abuse without a general exclusion for risk arbitrage, which in any event would be difficult to define with precision, and thus urge the Commission to delete this proposed exclusion. It could, however, add an instruction highlighting the greater concern raised by such activities and urge financial advisors to take extra care in evaluating the consistency of such activities with the requirements of the exemption.

VI. The Commission Should Modify Certain Aspects of the Proposed Changes to Beneficial Ownership Reporting by Foreign Institutions

In the Release, the Commission proposes to extend Schedule 13G filing eligibility pursuant to Rule 13d-1(b) under the Exchange Act to include foreign institutions that are substantially comparable to the U.S. institutions listed in the current rule.[33] To be eligible to file on Schedule 13G under such rule, the foreign institution would be required to determine, and to certify on Schedule 13G, that it is subject to a regulatory scheme "substantially comparable" to the regulatory scheme applicable to its U.S. counterparts. In addition, the foreign institution would need to undertake, in its certification on Schedule 13G, to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D.

We commend the Commission for its efforts to extend Schedule 13G filing eligibility for certain U.S. qualified institutional investors to their non-U.S. counterparts. However, we are concerned that some non-U.S. institutions may find it difficult to determine whether their regulatory scheme is substantially comparable to the equivalent U.S. regulatory scheme. A number of foreign pension plans and other institutional investors previously have received from the staff no-action letters granting them relief to file on Schedule 13G pursuant to the qualified institutional investor exemption in Rule 13d-1(b). We would urge the Commission to make clear, in the adopting release or in an instruction to the final rules, that to the extent an institutional investor previously has received no-action relief to file on Schedule 13G pursuant to Rule 13d-1(b), the regulatory scheme applicable to such investor in its home jurisdiction will be deemed to be substantially comparable to the U.S. equivalent.

The requirement that, in order to avail itself of Rule 13d-1(b), a foreign institution would need to undertake to furnish to the Commission staff, upon request, the information it otherwise would be required to provide in a Schedule 13D appears to us to be inconsistent with the regulatory framework under Section 13(d), inasmuch as foreign institutions are eligible to rely on Rule 13d-1(c) under the Exchange Act without such an undertaking. For such Schedule 13G-eligible institutions, the principal benefit of the proposed new rule is the advantage of delaying the filing until 45 days after the end of the calendar year (or eliminating the filing altogether if the foreign institution's holdings have fallen below 5%), rather than filing within 10 calendar days pursuant to Rule 13d-

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[32] *See* the request attached to the Financial Advisor Letter at 3.

[33] Release at 114.

1(c). Obligating these types of institutions to furnish the undertaking to provide Schedule 13D-type information is likely to render the proposed exemption less attractive, and thus we urge the Commission to modify the rule so that such institutions are exempt from the undertaking.

VII. The Commission Should Expand the Relief for Subsequent Offering Periods in Both Tier II and Domestic Tender Offers

We support the Commission's proposal to eliminate the 20 U.S. business day limit on the length of subsequent offering periods for Tier II-eligible cross-border tender offers. As noted in the Release, two of the primary goals of permitting subsequent offering periods in tender offers are to help bidders reach the necessary thresholds for acquiring the target securities not tendered during the initial offering period and to give remaining security holders a second opportunity to tender their securities. Both of these purposes would be better served by the elimination of a time limit on subsequent offering periods. We also believe bidders are in the best position to know how long they need the subsequent offering period to last in order to reach the necessary threshold of target securities.

Furthermore, we agree with the Commission's reasoning that the 20 U.S. business day limit has caused unnecessary conflict between U.S. regulation and foreign law or practice. Currently, bidders from jurisdictions where longer subsequent offering periods are permitted under local law have to seek no-action relief from the Commission on a case-by-case basis, which increases the cost and burden of undertaking a tender offer. In the Release, the Commission asked whether the 20 U.S. business day limit should be retained but increased to a longer number of U.S. business days. Given the wide variety of approaches to regulating subsequent offering periods, we do not believe merely increasing the length of the period will solve the problem.

For many of the reasons stated above, we also support the elimination of the 20 business day limit on the length of subsequent offering periods for all tender offers generally, including those for domestic issuers, and encourage the Commission to amend Rule 14d-11 as part of the adopting release for the cross-border exemptions.

Similarly, we support the proposed rule amendment for Tier II cross-border offers to allow separate offset and proration pools for securities tendered during the initial and subsequent offering periods, and the elimination of the prohibition on a ceiling for the form of consideration offered in mix and match subsequent offering periods. Like the Commission, we believe these changes are necessary and appropriate to facilitate the prompt payment for securities tendered during these offer periods, and to permit the use of the mix and match structure generally. In the United States, a mix and match offer often can be achieved through a statutory merger – a structure not available in many non-U.S. jurisdictions. Unlike tender and exchange offers, mergers are not subject to the prompt payment requirements of Rule 14d-11(b) and the requirement, contained in Rule 14d-11(f), to offer the same form and amount of consideration in both the initial and subsequent offering periods. In our view, the structure of a cross-border

transaction – i.e., exchange offer versus merger – should not dictate whether offerors can include a mix and match election feature. For the same reason, we would encourage the Commission to adopt an amendment to Rule 14d-11 to accommodate mix and match offers for all tender offers generally, including those for U.S. issuers.

VIII. The Commission Should Expand the Availability of Early Commencement for Exchange Offers in Both Cross-Border and Domestic Offers

In the Release, the Commission proposes to expand the availability of early commencement for cross-border exchange offers not subject to Rule 13e-4 or Regulation 14D under the conditions outlined in the proposed rules. The Commission also proposes a corresponding change to Securities Act Rule 162 to extend the exemption from Section 5(a) in that rule for exchange offers not subject to Rule 13e-4 or Regulation 14D that otherwise meet the conditions for the Tier II exemption. The Commission also has requested comment on whether such proposed changes should be made available for all exchange offers, including those for domestic targets not within the scope of current Rule 162.

We support the Commission's proposal to expand the availability of early commencement for cross-border exchange offers as well as for all exchange offers generally. With the additional safeguards contained in the Commission's proposed rule – providing withdrawal rights to the same extent as would be required under Regulation 14D or Rule 13e-4 and requiring the same minimum time periods after the occurrence of specified changes as are required for other "early commencement" offers – we believe the revisions appropriately balance investor protection with the flexibility to conduct all cash tender and exchange offers on essentially the same timetable, which should help promote both exempt cross-border and domestic offers, benefiting all investors.

IX. The All-Holders Rule Should not Apply to Foreign Target Security Holders

In 1986, when the Commission adopted the all-holders provisions in Rules 14d-10 and 13e-4(f) under the Exchange Act, it noted that such rules apply equally to all U.S. and non-U.S. target holders.[34] In the Release, the Commission reiterates its position that the all-holders requirement does not allow the exclusion of any foreign or U.S. target holder in tender offers subject to those rules. The Commission states that it is in the interest of U.S. investors to enforce U.S. equal treatment principles for the benefit of non-U.S. target security holders, particularly where comparable foreign all-holders requirements may protect U.S. investors by preventing their exclusion from cross-border offers. The Commission recognizes, however, that the requirement to make an offer available to all foreign target holders, particularly for registered exchange offers, may present a burden for bidders that may need to comply with both foreign and U.S. rules.

In our view, the burden of ensuring the inclusion of foreign holders in U.S. tender offers outweighs any benefit in protecting those foreign holders, whose protection

[34] SEC Release No. 33-6653 (July 11, 1986) at 25.

properly resides within the purview of the foreign regulator. Thus, interpretive relief or amendments to the U.S. equal treatment provisions of Rule 14d-11 are both necessary and advisable. In particular, we believe bidders in U.S. tender offers should, consistent with the U.S. all-holders rule, be permitted to exclude security holders in any foreign jurisdiction where (i) if such offer were made in the United States it would be exempt under Tier I, (ii) such bidders are unable, after reasonable inquiry, to determine the number of holders in such jurisdiction or (iii) complying with the laws, rules and regulations of such jurisdiction relating to tender or exchange offers would be unduly burdensome.

The Commission also is soliciting comment whether Rule 14d-10 should be amended to include a provision, similar to the one contained in current Rule 14d-1(b), exempting a bidder from making a tender offer to security holders in a foreign jurisdiction where the bidder is prohibited from making the tender offer by administrative or judicial action pursuant to a statute after a good faith effort by the bidder to comply with such statute. In our view, such an amendment would not suffice to eliminate the principal burden on bidders in global tender offers subject to the U.S. rules, because foreign regulators only rarely *prohibit* such offers.

X. The Commission Should Clarify that the Ability of Bidders to Exclude U.S. Target Security Holders is Unaffected by Actions Taken by or on Behalf of the Target in a Tender Offer

The Commission provides interpretive guidance in the Release on whether and how bidders in cross-border business combination transactions legitimately may avoid the application of U.S. registration and tender offer rules. However, the Commission does not discuss the implication of the target's conduct on a bidder's attempt to avoid the use of U.S. jurisdictional means. In *Plessey v. General Electric*, the District Court for the District of Delaware held that the target, which distributed a press release about the tender offer (which was intended to exclude U.S. holders) to the U.S. holders of its American Depositary Receipts, could not implicate the bidder in such activity. According to the court, "a bidder's disclosure obligations cannot be triggered by the calculated efforts of the target . . . It would be entirely contrary to the neutrality policy of the Williams Act to invoke its requirements simply because the target engaged in jurisdiction triggering conduct that the bidder had carefully avoided."[35] We urge the Commission to make a similar affirmative statement in the adopting release for the proposed rules.

XI. The Commission's Guidance on Vendor Placements will Render such Structures of Limited Use

The Commission notes that bidders may continue to use vendor placement arrangements in accordance with the guidance set forth in previous staff no-action letters

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[35] *The Plessey Company plc v. The General Electric Company plc*, 628 F. Supp. 477, 490 (D. Del 1986).

and in the Release. Where a bidder seeks to use the vendor placement structure for a tender offer subject to Rule 14d-10 at U.S. ownership levels above Tier I, however, it must, according to the Commission, seek an exemption from those rules. The Commission indicates that such relief will be granted only where it is in the interests of U.S. investors.

To our knowledge, the Commission has not previously indicated formally that vendor placements in Regulation 14D exchange offers should be limited to those otherwise eligible for the Tier I exemption. Indeed, such relief, if conditioned on Tier I eligibility, likely would be of limited value, since the securities issued in Tier I-eligible offers are in most cases also eligible for the Rule 802 exemption under the Securities Act; thus, a bidder would have little reason to want to effect a vendor placement.[36] We therefore encourage the Commission to consider clarifying what criteria it would seek to apply in permitting vendor placements in Regulation 14D exchange offers that exceed the Tier I threshold.

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[36] The only exception to this might be for a cross-border exchange offer in which a non-reporting foreign private issuer acquires the securities of one that is already registered. In such case, the non-reporting foreign private issuer will no longer be able to rely on Rule 12g3-2(b) under the Exchange Act to avoid becoming subject to the reporting requirements of the Exchange Act, because its securities will be deemed pursuant to Rule 12g-3(a) to be registered under Section 12 thereof, unless they are held by fewer than 300 U.S. holders or unless the acquiror meets the conditions for deregistration of equity securities under the provisions of Rule 12h-6 under the Exchange Act. *See* Rule 12g-3(a); Rule 12g3-2(d & e); and Rule 12h-6. We urge the Commission, in adopting the amendments to Rule 12g3-2(b) it recently proposed, to include an explicit exception in Rule 12g3-2(d) for securities of a foreign private issuer issued in a cross-border transaction exempt under Rule 802.

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We thank the Commission for the opportunity to submit this comment letter. We would be happy to discuss with you any of the comments or alternative proposals described above or any other matters that would be helpful in adopting final rules. Please do not hesitate to contact Daniel S. Sternberg or David I. Gottlieb in New York (212-225-2000), Sebastian R. Sperber in London (+44 20-7614-2200) or Andrew A. Bernstein in Paris (+33 1-40-74-68-00) if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: The Honorable Christopher Cox, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Kathleen L. Casey, Commissioner

John W. White, Director, Division of Corporation Finance

Paul M. Dudek, Chief of the Office of International Corporate Finance
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