

SIMPSON THACHER & BARTLETT LLP

425 LEXINGTON AVENUE
NEW YORK, N.Y. 10017-3954
(212) 455-2000

FACSIMILE: (212) 455-2502

DIRECT DIAL NUMBER

E-MAIL ADDRESS

July 3, 2008

Via email: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-9303

Attention: Nancy M. Morris, Secretary

Re: File No: S7-10-08; Release Nos. 33-8917; 34-57781
Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions (the "Release")

Ladies and Gentlemen:

On behalf of Simpson Thacher & Bartlett LLP, we are writing in response to the request by the Securities and Exchange Commission ("SEC") for comments on its release entitled "Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions" (the "Release"), published on May 6, 2008.

Simpson Thacher & Bartlett LLP strongly supports the SEC's efforts to continue to adapt the U.S. regulations of cross-border tender offers, exchange offers and business combinations to the quickly evolving global market. Our comments are informed by certain trends in the global securities markets that we have observed in recent years. While we believe that U.S. investors will continue to be viewed by foreign private issuers as an important source of capital for years to come, foreign capital markets have increased in depth, liquidity and regulatory sophistication. Many foreign private issuers have chosen to forego listings and public reporting requirements in the United States and, instead, have included only qualified institutional buyers in their offerings in reliance on the exemption from registration available under Rule 144A under the Securities Act of 1933, as amended (the "Securities Act"). In the secondary market, we have also witnessed increasing direct U.S. investment in foreign companies whose primary trading market is outside the United States, a fact noted by the SEC in the Release. We believe such investment is overwhelmingly attributable to sophisticated institutional U.S. investors.

In a globalized environment, we believe that the long-term vitality of the U.S. capital markets depends on a regulatory approach that (1) continues to focus on the protection of U.S. investors, while recognizing trends in investor behavior and the potentially divergent needs of different types of investors, (2) acknowledges the efficacy of increasing protections provided

to investors under foreign regulatory regimes and (3) provides objective rules, where possible, to decrease the uncertainty associated with accessing the U.S. capital markets.

The rules governing cross-border tender offers, exchange offers and business combinations are important not only in providing protections to investors affected by those types of transactions but also in influencing attitudes of foreign private issuers and U.S. and foreign investors through their application to specific transactions. We believe that appropriate attention to this latter concern will be crucial in maintaining the competitiveness of the U.S. capital markets. We therefore applaud the SEC's request for comments on the overall framework for determining eligibility for the cross-border exemptions. Our primary comment on the Release is that we urge the SEC to bear in mind the concerns outlined above in fashioning appropriate modifications to those exemptions.

With respect to the SEC's specific proposals, as a general matter, we support the proposed revisions because the amendments, if adopted, would provide offerors and issuers with more certainty and flexibility in structuring cross-border business combination transactions. We do not comment on every proposal contained in the Release. We do, however, have certain concerns and suggestions on specific proposals, as set forth below.

We have divided our letter into four parts: (1) comments on certain of the proposed changes to the eligibility threshold for the exemptions; (2) comments on certain of the proposed changes to the Tier II exemptions; (3) comments on the expanded availability of early commencement for exchange offers; and (4) comments on certain of the proposed changes to schedules and forms.

1. Proposed Changes to the Eligibility Threshold – Determining U.S. Ownership

A. Calculation Method

The proposed amendments to the eligibility standards for cross-border transactions generally would not change the current calculation method for determination of the U.S. ownership level of a subject company. We believe that the current calculation method poses significant practical challenges and does not always produce reliable data. In negotiated transactions, an acquiror in its calculation of the U.S. beneficial ownership level must, among other things, "look through" securities held of record by brokers and other nominees to identify those held for the accounts of U.S. persons. Due to confidentiality obligations, brokers and other nominees frequently are not allowed to disclose for whose account they hold securities and whether the beneficial owner is a U.S. resident. Even if brokers and other nominees are not bound by confidentiality obligations, brokers and nominees in many jurisdictions are not required to share the data with the acquiror or the target. In addition, where brokers and other nominees agree to provide the acquiror and the target with the requested data, it is generally difficult for the acquiror to verify whether the information is complete and accurate.

In the Release, the SEC proposed to consider and requested comment on whether, among other alternatives, the eligibility test for the exemptions should be based on the average daily trading volume ("ADTV") of the subject securities over a twelve-month period in the United States as compared to the worldwide ADTV over the same period (the "ADTV Test"). In

considering the ADTV Test, the SEC expressed concern, based on SEC staff research, that a low ADTV in the United States may not correlate with a low percentage of U.S. ownership and may not provide necessary protection to U.S. investors.¹

We believe that the ADTV Test has the advantage of being an objective, verifiable and transparent test, and we encourage the SEC to seriously consider adopting such a test to replace the current eligibility test or at least to offer such a test as an alternative to the current eligibility test. Under the current test, offerors and issuers must often rely upon incomplete or extrapolated data that cannot be fully supported by information within the offeror's or issuer's control. Although we assume that all issuers and offerors use good faith efforts to conduct a "reasonable inquiry" to determine the U.S. beneficial ownership under the current test, in light of the varied standards of maintaining records and requirements for providing such information (or maintaining the confidentiality of such information), there can be no assurance that such reasonable inquiries actually yield the information sought in a reliable or verifiable manner. In contrast, under the ADTV Test, current data would be more readily available to make the required determination and such determination would no longer depend on the specific circumstances of how the target's securities are being held by investors or the responsiveness or reliability of information provided by brokers, other nominees or centralized depositories.

In addition to ease of calculation, we believe an ADTV test would more clearly link the U.S. regulatory interest to activity occurring within the United States. We respectfully submit that secondary market investment activity by sophisticated U.S. investors in major overseas markets, without additional connections between an issuer and the United States, is an insufficient nexus upon which to require registration of a foreign business combination under the Securities Act. Particularly in light of the Staff's recent proposal to expand the ability of U.S. qualified investors to transact directly with foreign broker-dealers, we believe continued application of a bright-line beneficial ownership test, without any regard to an issuer's lack of other ties to the U.S. market or the primacy of a foreign regulator, will become increasingly untenable.

We believe that one reason there has not been greater objection to date to the eligibility standards used for the existing Tier I and Securities Act Rule 802 exemptions is that issuers in many jurisdictions still habitually exclude U.S. persons. In jurisdictions such as Japan and Korea, for example, where there are strict principles against disparate treatment of shareholders in certain types of business combinations, there is great consternation and some disbelief that a merger pursuant to local law between two locally incorporated and listed companies, neither of which has ever conducted a public offering in the U.S. market, could trigger an obligation to register shares in the United States. These types of results under the current test may lead to the adoption of discriminatory measures against U.S. investors and are counter to the Staff's other policy initiatives as well as the lobbying efforts of the local American Chambers of Commerce, among others, for greater market openness. Such results also require

¹ See Section II.A.4 of the Release.

very significant expenditures on behalf of a limited group of sophisticated U.S. investors who acquired shares with no expectation of receiving disclosure pursuant to U.S. standards.

We acknowledge, however, the SEC's concern with respect to the adoption of the ADTV Test in connection with exchange offers or other forms of business combinations where a bidder may issue securities without registration under the Rule 802 exemption. For determining eligibility under Securities Act Rule 802, we would propose addressing that concern by coupling the ADTV test with a requirement that the "primary trading market" (as defined in Rule 12h-6(f)(5) under the Exchange Act) for the subject securities be outside the United States. We believe that such an additional requirement, together with the ADTV Test, should provide sufficient additional comfort regarding the level of U.S. investor interest while eliminating the practical difficulties of the current test.

If the SEC does not accept the proposed ADTV Test and retains the current test, however, we strongly believe that the applicable threshold percentage for Tier I-eligible tender offers and for the Rule 802 exemption should be increased from 10% to 15%. With the increase in U.S. investment in foreign issuers in recent years noted by the SEC, we believe that maintaining a 10% threshold will tend to increase the number of tender offers, exchange offers and business combinations that are structured in a manner that excludes U.S. investors, depriving those investors of the ability to participate in those transactions even in circumstances in which the protections offered by the foreign regulatory regime may be comparable to those in the United States. We believe that raising this threshold is particularly important if the SEC decides to maintain the current rule excluding 10% shareholders, which is discussed below.

In the case of a cash tender offer that is not subject to Regulation 14D or Rule 13e-4 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), involving a target company that is not subject to the reporting requirements under the Exchange Act, we believe that an increase of the Tier I threshold from 10% to 25% would be appropriate. In such a case, the target company has not sought the benefits of a U.S. listing, and investors in the target company do not expect the protections afforded investors in U.S. public companies. Rather, investors expect to be able to monitor the value of their investment using information provided under the regulations of the target's home jurisdiction and should be prepared to evaluate an offer for cash on a similar basis.

If the SEC decides to maintain the current calculation methods and threshold percentages, we suggest eliminating the requirement to exclude from the calculation persons who hold 10% or more of the subject securities. Typically, holders of a large block of stock in a foreign private issuer are not U.S. residents. As a result, the exclusion of such holders often inappropriately and artificially increases the U.S. ownership level relative to the holdings of non-U.S. investors. In situations in which a small percentage of U.S. investors are given disproportionate weight under the current calculation method, we believe that bidders are all the more likely to structure transactions in a manner that excludes U.S. investors entirely, defeating the purpose of the U.S. rules. We further believe that eliminating this feature of the calculation method would more closely align the U.S. rules with calculation methods used in foreign jurisdictions and improve the perceptions of foreign issuers and investors of the predictability and fairness of the U.S. cross-border regulatory regime.

B. *Determination Date*

Under the proposed revisions, bidders would be allowed to calculate the level of U.S. beneficial ownership as of any date within 60 days before the public announcement of the transaction. We support the proposed elimination of the commencement as the reference point and the replacement of a specific date with a range of dates.

However, we believe that a requirement to determine the U.S. beneficial ownership before the announcement may severely jeopardize the confidentiality of the negotiations between the acquiror and the target in a negotiated transaction. If the SEC does not adopt the ADTV Test as the new calculation method, an acquiror would still be required to “look through” securities held of record by brokers or other nominees to identify those held for the accounts of U.S. persons. Contacting brokers and other nominees before the public announcement of the transaction to inquire about the level of U.S. beneficial ownership significantly increases the risk of leaks to the market. Eliminating this concern is another advantage of adopting an ADTV Test.

We therefore suggest that the appropriate range of days for determining U.S. beneficial ownership should be any date during the period beginning 60 days before the public announcement and ending 60 days after the public announcement of the transaction, except that the determination must in any event occur before the commencement of the offer. This proposal would enable bidders to calculate U.S. ownership before announcement if they can do so and maintain confidentiality of the transaction. Bidders with confidentiality concerns could continue to calculate U.S. ownership after announcement, as the current rules generally permit.

C. *“Reason to Know” Exception*

We support the SEC’s proposal to clarify when a bidder “knows or has reason to know” that the U.S. beneficial ownership level exceeds the applicable threshold percentage in hostile offer situations. In our experience, clients are typically concerned about the circumstances in which knowledge of certain information will be imputed, *i.e.* what information the offeror had “reason to know.”

We agree with the SEC’s position that such clarification should be made through a non-exclusive list of examples. We strongly recommend that any such clarification use only objective elements, as a definition of “reason to know” that depends on a bidder’s state of mind or other subjective elements may actually add to the uncertainty surrounding the phrase and fail to provide the intended clarification. In fact, as a general matter, we believe that any test in connection the eligibility thresholds should be based on objective criteria to provide offerors and issuers with the greatest possible certainty and to prevent any manipulation in determining U.S. beneficial ownership levels.

2. Proposed Changes to Tier II Exemptions

Proposed Rule 14d-1(d)(2)(viii) would permit the suspension of so-called “back-end” withdrawal rights while tendered securities are being counted if, among other specified conditions, all offer conditions have been satisfied or waived at the time withdrawal rights are suspended, except to the extent the bidder is in the process of determining whether a minimum

acceptance condition has been satisfied. We support proposed Rule 14d-1(d)(2)(viii), but we believe that, in furtherance of the SEC's objectives, proposed Rule 14d-1(d)(2)(viii) should be expanded to allow the suspension of "back-end" withdrawal rights if, in addition to a minimum acceptance condition, a financing condition is not satisfied or waived at the time withdrawal rights are suspended. Where an offer is conditioned on debt financing being available to the bidder, the lender's obligation to provide the necessary financing to the bidder is, in turn, typically subject to the minimum acceptance condition in the offer terms being satisfied or waived. Rule 14d-1(d)(2)(viii), as proposed, would not allow a bidder who needs to count tendered securities to determine whether the minimum acceptance condition is satisfied and to secure the financing of the offer, to suspend "back-end" withdrawal rights.

In the Release, the SEC also refined its interpretive position pursuant to which a bidder whose offer is Tier II-eligible may, subject to the satisfaction of a number of specified conditions,² waive or reduce the minimum acceptance condition without providing withdrawal rights during the remaining offering period. We suggest that the SEC expand its interpretive guidance and allow bidders in the context of Tier II-eligible offers to waive any financing condition without providing withdrawal rights during the remaining offering period. We believe that such an expansion is consistent with the SEC's proposals with respect to waiver or reduction of a minimum acceptance condition and will ensure that leveraged transactions, particularly in an unsolicited context, are not unfairly disadvantaged. Furthermore, keeping the offer open for a certain period of time after a material change in the offer terms and allowing security holders to withdraw their tendered securities is meant to protect target security holders. In the case of the waiver of a financing condition, however, target security holders do not need such protection: Typically, waiver of the financing condition renders the successful completion of the tender offer more certain by reducing the conditionality of the offer.

Consistent with the conditions required for a bidder to waive or reduce the minimum acceptance condition without providing further withdrawal rights, we propose that a bidder must satisfy the following conditions in order to waive a financing condition without providing withdrawal rights during the remaining offering period: (i) the bidder must announce that it may waive the financing condition at least five business days before it waives such condition, (ii) the bidder must disseminate this announcement through a press release and other methods reasonably designed to inform U.S. security holders, (iii) the bidder must announce its actual intentions once it is required to do so under the target's home country rules, (iv) during the five business day period after announcement of a possible waiver of the financing condition, security holders who have tendered into the offer must be afforded withdrawal rights, (v) the announcement must advise security holders to withdraw their tendered securities immediately if their willingness to tender into the offer would be affected by the waiver of the financing condition, (vi) the procedure for waiving the financing condition and the implications of waiver of the financing condition must be described in the offering document and (vii) the bidder must hold the offer open for acceptances for at least five business days after the waiver of the financing condition.

² See Section II.C.5 of the Release.

3. Expanded Availability of Early Commencement for Exchange Offers

The proposed amendments to Exchange Act Rules 13e-4 and 14d-1(d), if adopted, would allow bidders in Tier II-eligible offers, subject to providing withdrawal rights and certain other conditions, to commence exchange offers that are not subject to Regulation 14D or Rule 13e-4 under the Exchange Act on the date of filing of the registration statement rather than on the date the registration statement becomes effective.

We agree with the SEC's proposal, and we also support the extension of early commencement to all types of exchange offers that are not subject to Regulation 14D or Rule 13e-4 of the Exchange Act, including exchange offers for unregistered equity securities of domestic target companies and offers for debt securities. Even under the proposed rule, exchange offers for unregistered equity securities of a U.S. company in which the bidder offers its shares as part or all of the offer consideration would remain at a disadvantage compared to cash offers. While a cash tender offer may commence on the date of filing of the tender offer statement with the SEC, the exchange offer may only begin after the SEC has declared the bidder's registration statement effective. Although we applaud the SEC's proposal to address this regulatory disparity insofar as it affects Tier II-eligible offers, we see no reason not to extend this relief to similar offers for securities of U.S. companies.

4. Proposed Changes to Schedules and Forms

In the Release, the SEC requested comment on whether an additional box should be added to Schedule TO, Forms S-4, F-4 and Form CB to specify the level of U.S. ownership interest in the foreign private issuer, noting that requiring the filing person to disclose the U.S. beneficial ownership level would help it to monitor the application and effectiveness of the cross-border exemption. We strongly suggest that offerors and issuers should not be required to disclose the U.S. beneficial ownership levels on Schedule TO, Forms S-4, F-4 and Form CB so long as the method of determining U.S. beneficial ownership is subject to the uncertainties and potential inaccuracies identified in Section 1 of this letter.

As noted above, in connection with negotiated transactions, the current calculation method does not yield reliable results in respect of the U.S. beneficial ownership. In non-negotiated transactions, bidders rely on a statutory presumption for determining the U.S. beneficial ownership.³ The U.S. ownership percentages determined pursuant to the current methods may therefore not reflect the actual beneficial holdings of U.S. investors in a foreign private issuer. In addition, the ownership percentages are determined through the application of a complex set of rules. Without a thorough understanding of these rules and the underlying rationale, the disclosure of the U.S. ownership level might mislead the investing public to believe that the disclosed percentages represent the actual holding percentages. For offerors and issuers, such disclosure requirements would further increase their liability exposure under U.S. securities laws, and will likely create an incentive to exclude U.S. investors from cross-border transactions.

³ See Instruction 3 to Rule 14d-1(c) and 14d-1(d).

Even if the requirement to disclose U.S. beneficial ownership were included in Form 20-F rather than in the transaction-driven forms mentioned above, we believe that such a requirement should be included only if a calculation method is used that addresses the concerns articulated in Section 1 of this letter.

5. Conclusion

We commend the SEC for its initiatives, as reflected in the Release, to encourage offerors and issuers in cross-border transactions to permit U.S. investors to participate in these transactions in the same manner as other holders. We appreciate this opportunity to submit, and the SEC's consideration of, our comments on the Release, all of which are intended to further achievement of the SEC's stated objectives. Any questions about this letter and our comments should be addressed to John C. Ericson ((212) 455-3520; jericson@stblaw.com) or Kathryn K. Sudol ((212) 455-3232; ksudol@stblaw.com).

Respectfully,

A handwritten signature in black ink that reads "Simpson Thacher + Bartlett LLP". The signature is written in a cursive, flowing style.

SIMPSON THACHER & BARTLETT LLP