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COMMITTEE ON MERGERS, ACQUISITIONS AND CORPORATE CONTROL CONTESTS

July 11, 2008

Via email: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Mergers, Acquisitions and Corporate Control Contests of the Association of the Bar of the City of New York (the "**Committee**") in response to the request by the Securities and Exchange Commission (the "**Commission**") for comments on its May 6, 2008 proposed rule entitled "Revisions to the Cross-Border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions" (the "**Proposing Release**"). The Committee is composed of members whose practices focus on merger and acquisition transactions and related corporate law, corporate governance and securities regulation matters. The Committee includes lawyers in private practice as well as from corporate and investment bank law departments and academia.

We welcome and encourage the Commission's interest in and review of the current rules relating to cross-border business combinations. While we applaud the Commission's flexibility over the years in granting no-action and exemptive relief in specific situations and the Commission's efforts to codify much of the relief and guidance that it has previously given, we strongly

encourage the Commission to take this opportunity to take more substantive steps to revise certain aspects of the cross-border rules and to take into account developments in the substantive corporate law of foreign jurisdictions as well as the continued globalization and integration of financial markets around the world.

I. Background and Policy Considerations

The fundamental tension involved in the regulation of cross border business combinations – the risk that U.S. investors will be excluded from the benefits of these transactions weighed against the desire to have these transactions conducted in a manner that is fair and transparent to U.S. investors – dates back to well before the initial adoption of cross border rules in 1999 (the "**Cross Border Rules**").[1] It was the repeated exclusion of U.S. investors from cross-border transactions, and the desire to encourage the inclusion of U.S. investors in such transactions, that led the Commission to consider in 1989 the need for exemptions to otherwise applicable U.S. rules.[2] It took nearly 10 years to move from the 1990 Concept Release to the Cross Border Rules and it has been nearly 10 years since the adoption of the Cross Border Rules. While, as a result of the Commission's flexibility in granting no-action relief, there has been some evolution in the practical application of the Cross Border Rules, the basic premise of the Commission's approach to cross-border regulation has not been seriously revisited since 1990.

During this same period the world of global investing, cross-border business combinations and foreign takeover regulation has undergone a dramatic transformation as evidenced by the growth in the market value of foreign equity holdings by U.S. investors which was $4.3 trillion as of December 2006, compared to $567 billion in March 1994.[3] On the regulatory front, in 1999 comprehensive, modern foreign takeover regulation existed in few countries. Neither the movement towards globalized accounting standards nor the global trend towards the adoption of regulations patterned after many aspects of the U.S. Sarbanes Oxley Act of 2002 had begun. Since that time, foreign regulatory regimes, at least those in the major developed countries, have come of age in terms of protecting the interests of investors, including in connection with

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[1] See Cross-Border Tender Offers, Business Combinations and Rights Offerings, Release No. 33-7759 (October 22, 1999) [64FR 61382] (the "**Cross Border Release**")

[2] Concept Release on Multinational Tender and Exchange Offers, Securities and Exchange Commission Release Nos. 33-6866 & 34-28093, 17CFR pts.230 and 240 (June 6, 1990) (the "**1990 Concept Release**").

[3] U.S. Treasury Dept. Report on U.S. Portfolio Holdings of Foreign Securities (Nov. 2007).

business combinations.[4] Today, even less developed and developing countries are following the trend, as they must in order to attract foreign capital. Although historically, uniform and transparent enforcement of foreign takeover regulations may have been less than perfect, the maturity and consistency today of foreign takeover regulation, as well as the demands of the marketplace for transparent and predictable enforcement, have created a much more stable and predictable foreign regulatory environment.[5]

As U.S. investors increasingly have chosen voluntarily to diversify their investment portfolios by purchasing foreign shares either directly or in the form of American Depositary Receipts ("**ADRs**"), foreign companies have become increasingly concerned about becoming involuntarily subject to U.S. securities regulation. A foreign company often considers as a "rude awakening" advice to the effect that it may not effect a planned business combination without complying with Commission regulations under circumstances where the foreign company has neither listed its shares in the United States nor otherwise taken action to accept regulation under the U.S. regulatory regime. The advice is even more poorly received when compliance requires, as in the case of an exchange offer, ongoing filing or reporting requirements for any period of time. Consequently, the exponential growth in voluntary U.S. investment in foreign shares has been accompanied by similar growth in decisions by companies to exclude U.S. investors whenever possible consistent with their business objectives.

Unfortunately, from the perspective of U.S. investors, companies often conclude that it is possible to exclude U.S. investors and still accomplish their business objectives. The bidding or acquiring companies know that they do not have to use U.S. jurisdictional means to reach the sophisticated U.S. investors who regularly monitor home country filings, announcements and publications and often retain home country counsel or other advisers to assist them in connection with their investments. In other words, these investors generally are not relying on SEC filings for disclosure or U.S. laws to protect them in connection with the investment. As a result, the bidding companies know that, in all probability, excluding U.S. investors only means being unable to reach the unsophisticated or retail U.S. investor, and that a portion of the retail U.S. investors will sell into the market in anticipation of the offer in any event.

As the Commission stated in the Proposing Release, the Cross Border Rules have facilitated the inclusion of U.S. investors in a number of transactions;

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[4] See, e.g., Directive 2004/25/ of the European Parliament and of the Council of 21 April 2004 on Takeover Bids (the "**Takeover Directive**").

[5] See, e.g., Instruction No. 361 of the Brazilian Securities Commission (Comissão de Valores Mobiliários).

however, as indicated above and due to some of the fundamental problems with the rules discussed below, U.S. investors continue to be excluded from large numbers of transactions. In view of the development of sophisticated takeover regulatory regimes in many other parts of the world, the increasing importance of capital markets outside of the United States and the requirement that transactions be subject to the risk of nonconsummation for the shortest possible period of time, we believe that the trend towards exclusion of U.S. investors will continue and may well increase unless more fundamental changes in the Cross Border Rules are made. We suggest below a number of ways in which the Cross Border Rules could be modified to encourage greater inclusion of U.S. investors, institutional and retail alike, in cross-border business combinations while still protecting the core policies and principles underlying the U.S. rules normally applicable to the transactions and meeting the expectations of investors under these circumstances.

II. Measurement of U.S. Ownership in Negotiated and Hostile Transactions

While the incremental changes proposed by the Commission and discussed below regarding the timing of the calculation of U.S. ownership are helpful, we strongly believe that the Commission has not gone far enough in addressing the core problem with the Cross Border Rules – the test used for determining when the cross-border exemptions will apply. In this section of our letter we address the following questions raised by the Commission:

- *Is our continued focus on the percentage of target securities beneficially held by U.S. persons as the relevant test for measuring U.S. interest appropriate and in the best interests of U.S. investors?*
- *Should we propose a different test for Tier I and Tier II eligibility, based on U.S. ADTV compared to worldwide ADTV over a twelve-month period?*
- *Should we propose a different test for Tier I and Tier II eligibility based on the percentage of shares held in ADR form?*
- *ADTV- and ADR-based standards may effectively place companies with no U.S.-traded securities in Tier I. What implications would this have for investor protection?*

The nature of the test used for determining when the cross border exemptions will apply is likely to have the earliest and most significant influence on the decision of a company to include or exclude U.S. investors from business combination transactions. If the nature of the test makes compliance difficult, imposes risk or uncertainty on a transaction, including the risk of premature disclosure, is costly or is subject to manipulation, companies simply will choose whenever possible to exclude U.S. investors rather than perform the calculation and then consider the nature of the potentially available cross border exemptions and/or the flexibility that the Commission might offer in granting no-action relief to reconcile any remaining conflicts of law or regulation. In other words, the

parties never even reach the issue or substance of the cross border exemptions. Consequently, to the extent that the Commission's goal is to reduce the continuing exclusion of U.S. investors from business combination transactions, the Commission should adopt a test that can be applied on a confidential basis, is reasonably easy and inexpensive to administer, produces reasonably certain results and is not subject to manipulation by bidders or target companies. The current "look through test" under the Cross Border Rules (the "**Ownership Test**") falls short in almost all respects, and we urge the Commission to reevaluate its proposals and instead adopt a test based on average daily trading volume (an "**ADTV test**") discussed below.

A. Shortcomings of the Ownership Test

Absence of Confidentiality. For obvious reasons, in most business combination transactions involving publicly traded companies, including foreign private issuers, maintaining confidentiality prior to public announcement of a transaction is essential. However, maintaining the confidentiality of a potential transaction while performing the analysis required for the Ownership Test is extremely difficult and, in many countries, impossible. Under the current rules, because the calculation of U.S. ownership requires, in connection with negotiated transactions, a determination of beneficial ownership in specified jurisdictions, parties to a transaction are forced, at a minimum, to contact brokers and other nominee holders to determine the underlying beneficial ownership of certain holders. Also, in some jurisdictions, the parties are required to make formal requests of national clearing systems or other agencies for this information or to hire agents to make direct market inquiries. Clearly, none of these actions are consistent with maintaining the confidentiality of the transaction and moving the date as of which the calculation is made to a date, or range of dates, prior to announcement (as opposed to the applicable dates under the Cross Border Rules) will not solve the problem. When faced with a choice between risking the loss of a transaction, or a change in the pricing of the transaction, and taking the steps necessary to determine U.S. ownership, many acquirors will choose simply to exclude U.S. holders regardless of how easy or hard U.S. compliance might have been had they known the level of U.S. ownership and been able to take advantage of the Cross Border Rules and/or no-action relief.

Complexity and Cost. It is equally important that any test adopted to measure U.S. ownership of a foreign private issuer be reasonably easy and inexpensive to perform. Generally speaking, determining beneficial ownership is complicated, time consuming and requires a significant amount of both factual and legal analysis. When a potential acquiror is fully engaged structuring and negotiating a potential transaction, it often does not have and/or is not willing to expend the necessary time and resources to undertake the beneficial ownership analysis of the target company required by the Ownership Test. As a result, the potential offeror will often make the easier choice to simply exclude U.S. holders.

While we understand that time and resource constraints may not be an intellectually compelling excuse, the practical reality is that any company, no matter how large, well capitalized and sophisticated, often will make this easier decision to exclude U.S. holders when it is engaged in highly pressured, time consuming merger negotiations involving the future of its institution. U.S. beneficial ownership calculations simply do not rise to a level of importance unless the participation of U.S. investors who are not likely to participate without the use of U.S. jurisdictional means is needed for the success of the transaction.

Unreliability of Results. Finally, any test used to determine U.S. ownership must also provide reliable results. Foreign companies are reluctant to take the actions required to comply with the Ownership Test because, in many cases, they are not confident of the quality of the information regarding beneficial ownership that will be obtained at the end of the exercise. Under the best of circumstances, obtaining information as to beneficial ownership depends upon the willingness of brokers and other market participants to release information and upon the completeness and accuracy of the information that ultimately is released. Under less ideal circumstances, apart from confidentiality issues, parties to a transaction may encounter legal prohibitions, cultural resistance, impossibility (such as bearer shares) or other constraints on obtaining complete or accurate ownership information.[6] Finally, foreign private issuers having concerns that they may become the target of an unsolicited takeover proposal have learned how to use the Cross Border Rules defensively. They understand that levels of U.S. ownership may make it relatively easier or more difficult for an unwanted bidder to gain control of their companies particularly during periods when financing for cash only transactions is not plentiful. These foreign private issuers also understand that, to a degree, they can control their status as a potential target under the Cross Border Rules by the nature of the disclosure of U.S. ownership that they include in their Commission reports and by placing shares in the hands of U.S. persons. They also understand that this status can be affected by actions that might be taken by existing friendly shareholders with respect to the manner in which they hold their investments in the company.

In light of these uncertainties and this potential for manipulation, foreign companies tend to discount the usefulness of calculating the ownership levels necessary to allow inclusion of U.S. investors. Concerned that the information obtained may not be accurate in any event and that they may, as a result, incorrectly apply U.S. securities laws, companies often prefer simply to exclude the U.S. investors. While the Commission's advice generally to the effect that using all reasonable efforts under the circumstances is sufficient has been helpful, unfortunately foreign companies, in particular, are often reluctant to rely on this assurance. They fear that, in the litigious world of U.S. mergers and acquisitions,

[6] For example, Bearer shares can still be issued in Luxembourg.

even good faith reliance on faulty information may not be enough to save them from liability and/or reputational harm.

B. Alternate Eligibility Standards

In view of the many problems associated with the Ownership Test and the resulting tendency of foreign companies to exclude U.S. investors whenever feasible, we strongly encourage the Commission to consider alternate eligibility standards for the cross border exemptions. In the Adopting Release, the Commission appeared to say that, regardless of the test adopted, foreign private issuers should be willing to include U.S. investors in business combination transactions because U.S. compliance is not overly burdensome. Unfortunately, foreign companies simply do not share the Commission's view. For example, they view U.S. financial statement requirements, pro-forma and otherwise, in connection with exchange offers, partial tender offers and mergers as burdensome, because, among other things, foreign private issuers often do not have the interim financial statements required for SEC compliance. They also view as burdensome the unlimited SEC review period for registration statements, compliance with the going private disclosure rules that are based on substantive U.S. law that is inconsistent with the laws of many foreign jurisdictions[7] and submission to U.S. jurisdiction in connection with a transaction having little U.S. nexus. Regardless of whether the Commission disagrees with these views, foreign companies are likely to continue to demonstrate this disagreement by excluding U.S. investors. Moreover, as discussed above, these companies often never reach the question of whether or not U.S. compliance would be feasible. Upon receiving an explanation of the Ownership Rule, they elect not to make the ownership calculations.

In the Proposing Release, the Commission's approach to alternate eligibility standards for the cross border exemptions was apparently based on looking for a test that would reflect U.S. beneficial ownership or that would result in the regulation of an equivalent number of transactions as the Ownership Test. We do not believe that this is the correct starting point. Nothing will accurately reflect beneficial ownership better than beneficial ownership; thus, any analysis of this question, economic or otherwise, is bound to reach a negative conclusion. On the other hand, as we have described, the use of a test based on beneficial ownership has many problems that are not resolved by the Proposing Release amendments and we thus urge the Commission to develop a test that focuses on those U.S. investors in need of Commission representation and protection. We believe that an ADTV test would meet this objective and otherwise would serve the best interests of all U.S. investors in securities of foreign private issuers.

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[7] See discussion under "IV. Exchange Act Rule 13e-3" below.

ADTV Test is Confidential, Simple and Reliable. The advantages of the ADTV Test in meeting the confidentiality, simplicity, cost effectiveness and reliability criteria outlined above are obvious. Average daily trading volumes are readily available from numerous third party data providers and can be obtained quickly and anonymously, all but eliminating the risk of a premature disclosure of a potential transaction. Furthermore, because of the objective nature of trading volume data, the trading volume calculation can be done easily, quickly and cost effectively in the days prior to an announcement. Moreover, the potential for manipulation would be substantially less than that associated with the Ownership Test because altering the ratio would require concerted action over a longer period of time and would have the economic implications associated with market trading.

Average Daily Trading Volume Test Protects U.S. Investors. It is clear from the Proposing Release that the Commission's primary objection to an ADTV Test is that U.S. trading volume may not reflect U.S. beneficial ownership and/or that application of such a test might result in too many transactions avoiding U.S. regulatory scrutiny. However, we do not believe that the number of business combination transactions or rights offerings subject to regulatory review, or whether transactions involving specified levels of U.S. beneficial ownership are being regulated, is important. Rather, we believe the analysis of whether a test is appropriate should focus on whether it protects those U.S. investors who, in connection with their participation in the global trading market, need and expect the protections of U.S. securities laws in connection with these transactions. We believe an ADTV Test would protect those investors.

When U.S. institutional investors choose to purchase shares of a foreign private issuer in an off-shore market, they do so with the awareness that differences in legal, regulatory and other issues exist between the U.S. market and foreign markets. For the most part, these investors have access to, and employ, home country advisors, legal, accounting, financial and otherwise, to assist them with their investment. Furthermore, these investors often make their investments based on home country disclosure documents rather than Commission filings, and they regularly monitor home country filings and announcements. Thus, these investors neither need nor expect the protections of U.S. securities laws in connection with these investments. Despite this fact and despite the fact that these investors have the expertise to achieve the economic benefits of a cross-border transaction structured to exclude U.S. holders and often participate in these transactions, these investors increase the number of U.S. persons under the Ownership Test and increase the likelihood that a company will structure the transaction to exclude U.S. persons.

The investor most adversely affected by the exclusion of U.S persons from cross-border transactions and from the realities of cross-border institutional investment described above is the unsophisticated or retail investor. These are the investors who may not have the knowledge or capability to purchase foreign

shares in off-shore markets, to convert from being U.S. holders to being non-U.S. holders when a transaction opportunity arises, or to achieve the economic benefit of a cross-border transaction structured to exclude U.S. holders, or who never learn of the cross-border transaction in the first place. These unsophisticated or retail investors typically make their investments in foreign equities by purchasing either ADRs of a foreign private issuer or by investing in a mutual fund that invests in the shares of foreign private issuers. In either case, the securities representing their investment are traded almost exclusively in the United States and thus would be represented as part of the U.S. trading volume in an ADTV test. It also is true that many U.S. institutional investors invest in ADRs or in U.S. funds investing in shares of foreign private issuers and the trading of these investors also would constitute part of the U.S. trading volume for purposes of an ADTV test. Consequently, the only U.S. investor group whose interest would be likely to be underrepresented in an ADTV test as compared to the Ownership Test are U.S. investors who voluntarily purchase shares of a foreign private issuer in an off-shore market, and we believe that most of these investors are institutional or other sophisticated investors that do not need or expect U.S. regulatory protections.

Improved Foreign Regulation Offers More Investor Protection to U.S. Investors. Since the time of the adoption of the Cross Border Rules, many foreign countries, including, with the adoption of the Takeover Directive, all of the member states of the European Economic Community, have adopted modern takeover legislation establishing disclosure requirements in connection with business combination transactions, providing for governmental or regulatory supervision of these transactions and mandating procedural and substantive protections for public shareholders. Moreover, following the adoption of the Sarbanes-Oxley Act and related regulations in the United States, many foreign jurisdictions adopted regulations relating to matters such as director independence, audit standards and corporate governance in general. Markets and transactions have globalized dramatically since 1999, and, in order to take part in this globalization, foreign regulation has been forced to develop and keep pace. Consequently, U.S. persons who elect to invest in foreign corporations today enjoy far more regulatory protection and oversight from foreign regulators than existed when the beneficial ownership approach to eligibility for cross border exemptions first was conceived by the Commission.

ADTV Test Consistent With Critical Safeguards. In the Adopting Release, the Commission expressed reluctance to move away from the Ownership Test due to concern that business combination transactions are extraordinary events and that, in connection with these events, it is important to provide investors with the critical safeguards of U.S. regulation. Even if adoption of an ADTV Test were to result in more transactions qualifying for Tier I or Tier II relief, adoption of an ADTV Test would not imply, as a practical matter, an abandonment of these critical safeguards. First, Tier II offers only limited relief

and otherwise requires full compliance with U.S. regulation. While Tier I offers broad exemptive relief, it does so only conditioned upon compliance with home country law and upon equal treatment of U.S. investors. A survey of the laws regulating takeover bids in the 27 member states of the European Community plus the other major industrialized or developing countries of Brazil, Hong Kong, India, Japan and Mexico indicates, for example, that the laws of each of these countries, while different with respect to procedural details that often are the subject of reconciling no-action relief on the part of the staff of the Commission, contain principles substantially similar to the critical safeguards of U.S. regulation.[8] For example, many of the laws of these foreign jurisdictions, including those European countries covered by the Takeover Directive, Brazil and Hong Kong, have laws that contain disclosure standards similar to the U.S. standard and contain principles of equal treatment of holders of the same class of shares. Most require proration in connection with partial offers and provide for settlement of offers within specified periods of time after the end of the offer period. We recognize that, in the context of an exchange offer or other business combination involving an offering of securities, increased availability of the Tier I exemption would permit foreign private issuers to offer potentially significant amounts of bidder securities without registration under the Securities Act. We believe that this exemption is appropriate if the U.S. investor interest requiring protection is low, as measured by an ADTV test and is justified in order to induce the inclusion of U.S. investors in these transactions. Moreover, even if more transactions will meet the requirements for a Tier I or Tier II exemption, U.S. investors will still have the protection of the general anti-fraud provisions of the Securities Act and the Exchange Act.

We do not believe that an ADTV test should be qualified based on U.S. beneficial ownership, either as reported by a target company or as known by an acquiring company, because this would both provide opportunity for manipulation, as discussed above, and defeat the simplification benefits of the ADTV test.

Test Based on Ownership of ADRs. In order for U.S. investors to be included in cross-border business combinations, the critical factor is, as indicated above, the development of an eligibility test that meets the criteria of confidentiality, simplicity and reliability. A test based on ADRs could be adapted to meet this objective; however, we do not believe that it offers any advantages over an ADTV Test. While non-U.S. persons may hold ADRs, these securities are held overwhelmingly by U.S. investors. Moreover, in our experience, when applying the Ownership Test, most companies assume, for purposes of the test, that all ADRs of a target company are U.S. owned. Consequently, a test that deemed all ADRs to be held by U.S. persons and all shares to be held by non-U.S.

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[8] See The International Comparative Guide to Mergers & Acquisitions 2008, Global Legal Group Ltd., February 2008.

person would be workable. However, the test would not necessarily be accurate as U.S. persons (probably institutional shareholders) could and probably would hold shares and foreign persons could hold ADRs. It would not be useful to attempt to correct this problem by merely having these rules operate as presumptions and continue to require inquiry by transaction participants into beneficial ownership. Since the most logical alternative test would be an ADTV Test, our view is that an ADTV Test is the best approach from the outset.

We share the Commission's concern regarding the availability of information concerning the percentage of target shares held in ADR form in the context of non-negotiated transactions but we do not believe that a disclosure requirement is the solution. Any disclosure requirement would report, by definition, historical information as of a specific point in time. Particularly in the context of a business combination, it is uncertain whether this type of single data point historical information is likely to be representative of ADR holdings overall. Consequently, we would encourage the continuation of a presumption based on ADTV in connection with non-negotiated transactions similar to that which exists today under the Ownership Test.

C. Modifications to the Ownership Test

While we encourage the Commission to adopt an ADTV Test, if the Commission chooses not to adopt an ADTV Test, then the Commission should take this opportunity to make additional changes to the current Ownership Test. While these changes are not as helpful as the adoption of an ADTV Test, they might nonetheless encourage a reduction in the number of business combination transactions in which U.S. holders are excluded, at least in the cases where the parties are willing to undertake the task of computing ownership pursuant to the Ownership Test. In this section we address the following questions raised by the Commission:

- *Should we continue to exclude from the calculation of U.S. ownership target securities held by the acquiror in the contemplated transaction?*
- *Should we eliminate greater than ten percent holders only where such holders are otherwise affiliated with the issuer?*
- *If the requirement to exclude large holders is retained, is a greater than ten percent holding the appropriate level for exclusion? Should the percentage be higher, such as 15 or 20 percent?*
- *Is it helpful to specify in the rule [relating to the hostile presumption], as proposed, examples of information that the acquiror has reason to know, or should the rule remain more general?*
- *Would the clarifications we propose to the reason to know element of the test prevent the abuse of U.S. ownership information by targets? Are there currently sufficient safeguards to prevent misuse of this information?*

- *For purposes of the hostile presumption, should we change the date for comparison of the average daily trading volume of the target securities in a twelve-month period ending no later than 60 days before announcement, as proposed?*
  - *Should we limit the knowledge or reason to know element of the test to the same time, as proposed, so that acquirors will not be disqualified from relying on the presumption if they learn of conflicting U.S. ownership information after the date of announcement? Or should we require acquirors to take into account any information they learn at any time before commencement?*
  - *Would the proposed cut-off date for the actual knowledge test be disadvantageous for U.S. investors in the target company?*
  - *Where the target asserts levels of U.S. ownership that are inconsistent with reliance on an applicable presumption in the context of a hostile transaction, should the rules provide any guidance on the extent to which such assertions must be substantiated? Should we allow acquirors to ignore such assertions by the target, absent adequate substantiation or in the face of conflicting information known to the acquiror?*

Exclusion of 10% Holders. Currently, securities held by 10% holders are excluded from the calculation of the U.S. ownership percentage and thus reduce, for purposes of the calculation, the total number of shares outstanding and increase the likelihood that a transaction will have a higher percentage of U.S. holders. We believe that the concept of considering U.S. ownership as a percentage of the publicly traded shares generally is sensible since this focus represents the market reality for the U.S. investors. Nevertheless, we believe that the existing rule is somewhat overbroad in attempting to achieve this objective. Given the present day reality that hedge funds and other investment vehicles easily and quickly acquire and dispose of significant ownership stakes in public companies and are almost certain to participate in any business combination transaction in respect of a stock that they hold, we see no current justification to treat 10% holders as if they were not market participants. Consequently, we believe that the Commission should modify the rule to provide that only shares held by 10% holders that are otherwise affiliated with the target company are excluded from the calculation of U.S. ownership. Moreover, we note that not counting 10% non-U.S. shareholders only increases the likelihood that calculations under the Ownership Test will induce a bidder to exclude U.S. investors because not counting such non-U.S. shareholders inflates the U.S. ownership percentage.

Increase of Percentage Thresholds. Since we believe that the substantive U.S. ownership eligibility standards are the most important cause of the exclusion of U.S. investors, we believe this is the area on which the Commission should

focus its attention. Nevertheless, if the Commission decides not to make changes in this area, an increase in the percentage thresholds for the exemptions would be useful. In this case, we believe that the focus should be on the percentage threshold for Tier I eligibility since it is the distinction between Tier I and Tier II that most often causes exclusion in cases where companies are willing to undertake the U.S. ownership calculations. To be meaningful, we believe that this percentage would need to be increased to at least 15% and possibly even higher for exchange offers that would otherwise require compliance with the registration requirements of the Securities Act.

Presumption for Non-Negotiated Transactions. We believe that it is useful for the Commission to clarify that acquirors are presumed to know information about beneficial ownership reflected in filings by third parties such as beneficial ownership reports and that they are not required to engage third party service providers at their own expense. We also agree, in general, with the Commission's proposals relating to the time period applicable to the hostile presumption but we note that should the Commission adopt an ADTV test for U.S. ownership, the reason to know standard will not be necessary. We also suggest, in order to prevent the manipulation of U.S. shareholder information about which the Commission has expressed concern, that the Commission require that, in the context of a business combination, a target company be required to disclose publicly any information regarding U.S. ownership that it agrees to provide to any bidder. Thereafter, if a second bidder should emerge and the target company were to provide inconsistent information to the second bidder, we would propose that the second bidder could ignore the inconsistent U.S. ownership information in the absence of reasonable substantiation.

III. Timing of U.S. Ownership Determination

As discussed above, we believe that the Commission should take this opportunity to adopt a trading volume test for purposes of determining eligibility for the cross border exemptions. Nevertheless, should the Commission not take this action, we believe that changes are appropriate with respect to the rules relating to the times as of which beneficial ownership must be calculated for purposes of the Ownership Test. In this section, we address the following questions raised by the Commission:

- *Should we revise the date as of which U.S. ownership is calculated for purposes of determining eligibility to rely on the cross border exemptions for business combinations transactions, as proposed?*
- *Is a range of 60 days before announcement sufficient time to allow bidders and issuers maximum flexibility while avoiding the potential for manipulation of the calculation of U.S. ownership? Or would 75 or 90 days be more appropriate?*

- *Is announcement the appropriate reference point for determining eligibility to rely on the cross border exemptions? Or should we retain commencement as the reference point? Are there other alternative reference points we should consider?*

Calculation Prior to Announcement. We believe that the Proposing Release's suggestion that the calculation with respect to U.S. ownership be made as of any time within the 60 days prior to announcement of a transaction would be a significant improvement to the current requirement that U.S. ownership be calculated on exactly the 30th day prior to the commencement of a transaction. As the Commission noted in the Proposing Release, calculation of U.S. ownership on the 30th day prior to commencement presents significant difficulties with respect to planning and logistics, and, in some countries, the calculation cannot be completed in 30 days. By choosing to key the calculation off of the announcement date, the Commission has provided much needed flexibility for an acquiror to prepare its offer in a manner that complies with applicable laws and regulations. Moreover, stock ownership is much less likely to be artificially affected by deal trading and deal rumors as of a date prior to announcement than as of a date post announcement but prior to the commencement of a transaction.

Use of a Range for Calculation. We agree with the Commission that it would be more appropriate to permit the calculation of U.S. ownership as of any time within a specified range of dates than to require the calculation as of a specific date. Our experience is that the methodologies that must be employed to determination U.S. ownership vary significantly from jurisdiction to jurisdiction and, accordingly, so do the time periods required to complete the application of these methodologies. Just as it often is not possible to calculate U.S. ownership as of a set date in the past, it often is not possible to calculate U.S. ownership as of a set date in the future. Moreover, upon beginning the process of calculating U.S. ownership, parties often do not know when the calculation will be complete. If calculation as of a specific date prior to announcement were required, companies would be forced to set the announcement dates of their transactions based on the date as of which it is possible to calculate U.S. ownership in a particular jurisdiction or based upon the date that the calculation of U.S. ownership is completed, regardless, in either case, of whether that announcement is otherwise sensible under the circumstances. We believe that a range of 60 days should be sufficient for purposes of a range of calculation dates.

Risk of Avoidance with Range. In the Proposing Release, the Commission expressed concern that permitting the calculation of U.S. ownership as of a date within a specified range might permit abuse because companies could select a date that would present a less than representative picture of U.S. ownership. While we believe that the overall solution to this problem is, as discussed above, to change the eligibility standard for the cross border exemption to an ADTV test, we do not share the Commission's concern for abuse even if the

Ownership Test is retained, because, based on our experience, there is no reason to believe that U.S. ownership fluctuates significantly at any point in a 60 day period prior to announcement, in particular when a transaction is confidential and the trading markets are operating in the ordinary course. Furthermore, as we have explained, parties to cross-border transactions frequently do not have, as a practical matter, control over the date as of which the calculations of U.S. ownership are made.

U.S. Ownership Change Between Announcement and Commencement. Finally, in the Proposing Release the Commission raised a concern that U.S. ownership of a target company could change dramatically between announcement and commencement. While it is true that a delay between announcement and commencement could lead to a significant change in U.S. ownership, the Commission should not, with two exceptions, create a rule to address this risk for several reasons. The current frustrations faced by potential acquirors – trying to determine U.S. ownership exactly 30 days prior to commencement – would resurface if acquirors were unable to rely on the U.S. ownership analysis that was performed within the 60 days prior to announcement. Acquirors would be forced to assume added expense and complication if they were unable to rely on their initial calculation of U.S. ownership and would be forced to constantly monitor the changes in U.S. ownership between the time of announcement and commencement. Also, if acquirors were forced to recalculate U.S. ownership, significant conflicts could arise because announcements of deal structure and terms might well have been made both in U.S. and foreign markets based on the original calculations, filings and representations may have been made to foreign regulators based on the calculations and contracts may have been entered into in reliance on them. Further, from a policy perspective, if an investor purchases shares in a target company that is subject to a publicly announced transaction between the time of the announcement of the transaction and its commencement, we believe that the investor purchasing the shares should be deemed to be aware of the pending transaction and its proposed structure and whether U.S. investors are able to participate in the transaction.

While we generally believe that U.S. ownership should not be recalculated if a long period of time elapses between announcement and commencement, there should be two exceptions to this rule. First in a contested takeover situation the cross border rules must continue to operate, as they do today, in a manner that maintains a level playing field between competing bidders. If the Commission changes the date as of which U.S. ownership is calculated to a date that may be significantly in advance of commencement and therefore permits the possibility of a material change in U.S. ownership that would cause one competing bidder to fall into one regulatory category (Tier I, Tier II, etc.) but would permit a subsequent competing bidder to take advantage of a less onerous regulatory category, the Commission should permit the first bidder also to proceed in the less restrictive manner, taking advantage of the lower tier exemption. Second, if U.S.

ownership of a target company decreases between the announcement and commencement of a transaction such that a transaction would qualify for a different tier exemption, a bidder should be permitted to avail itself of the lower tier exemption. Conversely, we do not think it would be necessary for a bidder to move to a different tier if U.S. ownership in a target company increases between announcement and commencement because any new U.S. holders have purchased their interest with full knowledge of the announced transaction and the regulatory regime that governs the transaction and with no expectation that their purchase may trigger increased U.S. regulatory review.

IV. Exchange Act Rule 13e-3

We strongly support the Commission's proposal that the current Tier I exemption from Rule 13e-3 apply to transactions that otherwise qualify for Tier 1 relief regardless of the legal structure of the transaction; however, we believe that further changes to Rule 13e-3 should be made. We, like the Commission, believe that the legal form of a transaction should not prevent an otherwise eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3.
However, while we applaud this proposal, we believe that now is an opportune time for the Commission to consider more broadly how Rule 13e-3 should apply in tender offers for, and other business combinations affecting, foreign private issuers. Specifically, we believe that any such transaction that is subject to a third party fairness hearing and determination, as is the case with "schemes of arrangement" under the laws of the United Kingdom and "plans of arrangement" under the laws of Canada, should be exempt from Rule 13e-3. Moreover, we believe that the existing Rule 13e-3 exemption, as modified by the Commission's proposal should be a Tier II exemption, so long as the acquiring company confirms in its SEC filings that its transaction complies with applicable foreign law and makes certain other disclosures described below.

Compliance with Rule 13e-3 effectively subjects foreign private issuers to the substantive standards of U.S. state corporate law and frequently requires that foreign private issuers take actions that are duplicative of minority shareholder protection rules with which they must comply under their home country law. In some cases, due to the SEC's disclosure rules, compliance may require that a foreign private issuer acknowledge the potential for a conflict of interest that would not exist as a matter of their home country law. In addition, foreign private issuers view going private transactions as transactions that carry a higher risk of U.S. litigation than other types of transactions. Accordingly, parties structuring a going private transaction involving foreign private issuers typically will seek to exclude U.S. investors in any case where their inclusion is not essential to the purpose of the transaction.

The underlying premise and justification for Rule 13e-3 is that going private transactions may involve conflicts of interest and consequently that

enhanced disclosure is appropriate to ensure that the conflicts are known to all stockholders and that unaffiliated stockholders are not disadvantaged. While full disclosure of conflicts is a worthwhile objective, and while Rule 13e-3 theoretically is a disclosure rule, the reality is that the rule has a far more fundamental effect, particularly when applied in the context of a transaction involving a foreign private issuer. First, the very nature of what may constitute a conflict of interest often is different under foreign law than it is under U.S. law because the nature of the duties of corporate directors vary significantly from country to country.[9]

Second, over the course of many U.S. transactions and based in large part on litigation involving U.S. state corporate law, there has evolved a somewhat standard approach to managing going private transactions. This approach involves taking actions to assure both the procedural and the substantive fairness of the transaction. However, applicable foreign laws, statutory and otherwise, often are quite different from these state laws. They do not contain these concepts and do not require that directors adopt these procedures or satisfy these standards. Nevertheless, in order to be in a position to meet the disclosure requirements of Rule 13e-3, the Staff of the Commission frequently takes the position that a foreign private issuer must include in its filings essentially the same language as would a U.S. issuer — reaching separate conclusions on procedural fairness and substantive fairness. This requirement effectively obligates the company to follow the same substantive approach to the going private transaction as a U.S. corporation would follow or alternatively to justify in great detail why it believes that it was not necessary to follow this approach and to indicate that, as a result, there is a risk to shareholders. As a result, foreign private issuers are forced to choose between accepting the application of substantive U.S. corporate law or including disclosure that increases their exposure to potential U.S. litigation. Faced with this choice, foreign private issuers elect to opt out of the U.S. regulatory framework.

We do not believe that adoption of the changes we are proposing would undermine the policy objectives of Rule 13e-3. The principal reason that foreign private issuers are reluctant to take the actions that would permit compliance with Rule 13e-3 is that they believe that minority shareholders are adequately protected by full disclosure and full compliance with their home country corporate laws. The details of the disclosure required by Schedule 13E-3, and thus the substantive

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[9] For example, whereas under Delaware law a board owes fiduciary duties to the Company's stockholders, the Takeover Directive states "the board of an offeree company must act in the interests of the company as a whole" and also provides that the target company board must provide the reasons for its views "including its views on the effects of implementation of the bid on all of the company's interests and specifically employment, and of the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business."

compliance actions required to enable a company to generate this disclosure, are merely the path to achieving full disclosure under one applicable legal regime – the U.S. legal regime.

The most significant requirement of Rule 13e-3 is that, in connection with any "13e-3 transaction" the filer must make a determination that the transaction is "fair to the unaffiliated stockholders". In many foreign jurisdictions, however, standards other than "fairness" apply to these transactions, other types of protections for minority shareholders are available or a "fairness" standard applies to the transactions but is subject to regulatory or other judicial review. For example, the Takeover Directive requires that all member states of the European Community ("**EC**") adopt on or before May 20, 2006 legislation meeting the general principles and specific rules set forth in the Takeover Directive, many of which related to the protection of minority shareholders in connection with tender offers and other business combinations and disclosure in connection with these transactions. While the regulations adopted by the EC countries in response to the Takeover Directive vary, all adhere to the principles established in the Takeover Directive and many of these principles are redundant to, or conflict with, principles required to comply fully with Rule 13e-3.

As a result, investors holding stock in European companies have protections different than those that exist under U.S. law but when coupled with the Takeover Directive's mandate for full disclosure, are founded on the same policy objectives as Rule 13e-3. Rather than rely on requiring a board to make an independent assessment of fairness, as evidenced by appointment of a special committee, independent bankers, presentation of a fairness opinion and disclosure of conflicts of interest, the Europeans have determined to regulate the conflicts of interest by requiring that bidders provide bids or other exits to minority shareholders and to address questions of "equitable price" and "fairness" by statute and by allowing third party regulators to intervene in establishing price.[10]

While we have focused on the European standards applicable to going private transactions and to the protection of minority shareholders, we note that other jurisdictions also include protections that often are duplicative of, or different than, the U.S. standards upon which Rule 13e-3 and Schedule 13E-3 were based. For example, in Brazil, the applicable standard in share for share mergers is whether the transaction "causes damage to minority shareholders".

[10] It is useful to note that the Takeover Directive requires that the takeover laws of the EC countries require (1) in cases where the consideration for an offer includes securities but the securities do not consist of liquid securities admitted to trading on a regulated market, the offer include a cash alternative, (2) shareholder approval of any action, other than seeking alternative bids, which may result in the frustration of an offer, and (3) the target company board to publish a document setting out its opinion of the offer and the reasons on which it is based.

Moreover, like Europe, Brazil requires a person who acquires control of a target company to make a mandatory tender offer for the remaining shares of the same class of securities and prescribes rules relating to the determination of the offer price. In the United Kingdom, business combinations often are accomplished through "schemes of arrangement" in which the substantive terms of the transaction are subject to a judicial fairness review.

Continuing to require compliance with Rule 13e-3 in connection with going private transactions that satisfy the criteria for Tier II relief or that are the subject of judicial determinations of fairness will not provide meaningful investor protection. Foreign takeover laws have evolved significantly since the Commission first adopted its cross border exemptions and the laws of most of the major money center jurisdictions now contain investor protection provisions that, while different in approach, assure disclosure and substantive price protection. When these facts are weighed against the burden that will be borne by U.S. investors from continuing to be excluded from going private transactions involving foreign private issuers, we believe that the need for the additional changes to Rule 13e-3 proposed above becomes clear.

V. Suggestion for Additional Tier II Exemption

We applaud the Commission's proposal to codify the no-action relief that has been granted by the Commission staff in an effort to accommodate the conflicts between U.S. and foreign takeover regulation and thus encourage the inclusion of U.S investors in cross border transactions. We support all of the proposals set forth in the Proposing Release and believe that they will continue to facilitate cross-border transactions and obviate the need for many case by case no-action requests in the future. However, we suggest that the Commission consider addressing one additional common conflict between U.S. law and foreign law. Many foreign jurisdictions specify a maximum tender offer period while the United States provides for mandatory extension of the offer period under a variety of circumstances. As a result, companies frequently find themselves in the position of needing to structure a transaction without knowing whether they will be able to comply with both U.S. law and home country law. If an offer is structured as a single global offer and events transpire such that an extension of the offer period would be required under U.S. law (for example, as a result of a price increase near the end of the offer period in response to a competitive bid) and that offer period extension goes beyond the home country maximum offer period, the offer is by definition illegal in one jurisdiction or the other. On the other hand, if the parties elect to structure the transaction as dual offers to avoid this illegality trap, one offer, the foreign offer, will be completed before the U.S. offer, which would result in adverse treatment of U.S. holders as to timing and possibly as to other issues such as changes in exchange rates and subsequent failures of the U.S. offer conditions. Any such unequal treatment of U.S. investors then would be grounds to make unavailable the Tier II exemption upon

which the transaction had been structured. Additionally, in the case of a partial offer, permitting a foreign offer to end and thus allowing the foreign holders to be paid prior to the end of the corresponding U.S. dual offer would violate U.S. proration rules because a single proration pool would not be possible.

We strongly encourage the Commission to act to address this situation, because today companies are being forced to commence transactions and simply hope that difficult circumstances do not arise. This situation is frequently reflected in today's disclosure documents in the U.S. and in the home country which often contain totally conflicting statements with respect to offer period duration because it often is impossible to obtain regulatory approval of the documents and reconcile the conflicting statements. This situation can only lead to investor confusion.

To resolve this conflict, we suggest that the Commission adopt a Tier II exemption providing for an exemption from the mandatory offer period extension rules under Regulation 14D and Regulation 14E to the extent necessary to comply with an applicable maximum offering period under home country law, so long as (1) prior to the date when the U.S. offer period extension rule would have applied, the company making use of the exemption has requested in good faith from home country authorities a waiver of the maximum offer period regulation and failed to receive the waiver and (2) the possibility of the situation was prominently disclosed in the offer documents.

VI. Exchange Act Rule 14e-5

The Proposing Release proposes to codify the exemptive relief issued with respect to Rule 14e-5 in the context of cross-border tender offers.[11] We believe that the position taken by the Commission in its exemptive orders has been consistent with the policy objectives of Rule 14e-5 and generally has worked well, and we believe that the proposed codification will be helpful in accommodating conflicting international regulations and customs. We note, however, that there are two areas in which we believe the Commission's proposal may not adequately address issues frequently faced in cross-border transactions. First, in providing Tier II relief for purchases or arrangements to purchase by an affiliate of the financial advisor, the Commission has proposed to require that the financial advisor have an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act. This requirement effectively favors financial institutions with U.S. broker dealer affiliates over international financial institutions having no such affiliates. Stated differently, foreign companies engaged in cross-border

[11] See, e.g., Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007); Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007); Mittal Steel Company N.V. (June 22, 2006).

transactions are likely to find quite objectionable the concept that they must choose between retaining their financial advisor of choice or foregoing acquisition strategies that are customary under home country law and practice.

In our experience, the extra-territorial effect of Rule 14e-5 always has been a subject of great concern to foreign private issuers and another major reason that companies have chosen to exclude U.S. investors. In the Proposing Release, the Commission has moved significantly in the direction of correcting this problem in the context of Tier II transactions, but much of this benefit could be lost if companies are only entitled to the benefit at the expense of their chosen advisors. Moreover, from the perspective of investor protection, so long as the required information barriers are maintained, in today's age of international regulatory information exchange, we fail to see how use of a foreign financial advisor without a U.S. broker affiliate will harm U.S. investors.

The Commission has provided Rule 14e-5 relief similar to that covered by the Proposing Release to financial institutions engaged in cross-border transactions for their own account. [12] When financial institutions are themselves acquiring companies, they require Rule 14e-5 relief in order to be permitted to conduct their ordinary course of business activities during the pendency of the applicable tender offer. We suggest that the Commission adopt a Tier II exemption codifying the relief previously granted by the Commission in this respect.

VII. Interpretative Guidance

A. Exclusion of Foreign Investors from U.S. Offers

The Commission has included interpretive guidance affirming its previous position to the effect that the all-holders requirement of Rule 14d-10 does not permit the exclusion of any foreign or U.S. holder from any tender offer that is subject to Regulation 14D, even under circumstances where making that offer available to all holders might require compliance with multiple foreign regulatory regimes. Nevertheless, the Commission has itself questioned whether it is overly burdensome to require an acquiring company to take responsibility for compliance with the laws of all of the jurisdictions in which any of the shareholders of a U.S. target company may be resident or whether the Commission should adopt an exception to Rule 14d-10 permitting exclusion of foreign shareholders or otherwise reducing the burden of compliance with foreign takeover laws. For the reasons described below, we do not believe that it is essential to adopt an amendment to Regulation 14D permitting the exclusion of foreign holders from U.S. offers; however, we do believe that such an amendment

[12] See Combination of Barclays PLC and ABN AMRO Holdings N.V. (April 24, 2007).

would be useful. Moreover, while the Proposing Release appears to confirm the Commission's previous advice to the effect that Regulation 14D does not require the dissemination of offer materials outside of the United States, this position is not totally clear. Accordingly, we suggest that the Commission specifically state that such dissemination is not required by Regulation 14D.

While we do not believe that it is feasible to require bidders for U.S. target companies to survey and, to the extent necessary, comply with the laws of every jurisdiction in which a U.S. target company has or may have a shareholder, we also do not believe that it frequently is necessary to exclude foreign holders from a U.S. offer. The applicability of most foreign takeover laws and most foreign laws relating to the public offering of securities is not triggered by a level of foreign beneficial ownership. Rather, jurisdiction under foreign takeover laws typically is linked to the jurisdiction of incorporation and the jurisdictions in which the subject class of securities are listed, and foreign laws relating to public offerings of securities customarily apply depending on whether the relevant offering is made in the applicable foreign jurisdiction. Consequently, foreign takeover laws seldom will apply to a cash offer for a U.S. incorporated company that is listed only on a U.S. securities exchange. While it is possible that foreign public offering registration and other similar requirements will apply in the context of an exchange offer for a U.S. target company, it is most likely that the application of these laws will be triggered as a result of either a listing of the U.S. shares in the foreign jurisdiction or the extension of the U.S. offer into the foreign jurisdiction through the dissemination of offer materials in that jurisdiction. Given how foreign laws customarily operate, we do not view this issue as one of the most important issues under consideration by the Commission; however, we believe that an appropriate balance between the objectives of the all-holders rule and the practical reality that bidders in offers subject to Rule 14d-10 cannot and do not survey every potentially applicable law would still be maintained even if the Commission were to include a de minimis numerical exemption to Rule 14d-10. To be useful, a de minimis exemption to Rule 14d-10 (and Rule 13e-4) must be simple and easy to apply. Consequently, we believe the exemption should be calculated based on record, not beneficial, ownership and we do not believe it should require prior inquiry into or efforts to comply with foreign laws. For the same reason, we do not see a basis for distinguishing between cash offers and exchange offers. We suggest that the Commission establish the de minimis threshold at 5%.

B. Exclusion of U.S. Investors

Although, in practice, there are steps that are typically followed to exclude U.S. investors, we share the Commission's view that there is uncertainty as to what specific measures an acquiror should take in order to exclude U.S. investors from a cross-border tender offer. More importantly, if the Commission intends to more closely monitor exclusionary offers, we strongly encourage the Commission

to provide clear guidance as to the rules it will apply in determining which offers have satisfactorily excluded U.S. investors and which offers have not done so. Also, to the extent that, in the Commission's view, there are categories of contacts with the United States- such as incidental telephone communications not directed to target company shareholders- that do not convert an offer that otherwise would have successfully excluded U.S. investors into an offer subject to U.S. regulation, we encourage the Commission to delineate these categories.

We agree with the basic premise stated by the Commission in both the Adopting Release and in the Proposing Release to the effect that "a bidder making a tender offer for target securities of a foreign private issuer may exclude U.S. target security holders if the offer is conducted outside the United States and U.S. jurisdictional means are not implicated". We believe that this statement reflects the current state of case law regarding exclusion of U.S. holders and is consistent with the Commission's authority under the Exchange Act. Consequently, we believe that any interpretive guidance provided by the Commission and any rules adopted by the Commission should be consistent with, and should not extend beyond, this standard.

In our view, much of the uncertainty in the area of exclusion of U.S. investors arises from confusion of the concepts of "not implicating U.S. jurisdictional means" and "prohibiting participation by U.S. persons". An offer for a foreign company that is conducted entirely outside of the United States, entirely under foreign law and without any publicity in the United States does not become subject to U.S. jurisdiction simply because a U.S. person residing abroad owning shares in the foreign target company sees a foreign newspaper publication announcing the offer and succeeds in accepting the offer by complying with the procedures described in the publication to tender his shares. Moreover, the bidder does not fail to exclude U.S. holders if it accepts a tender by this U.S. holder. On the other hand, if the bidder were to fail to take reasonable steps to preclude acceptance of the offer by persons in the United States, it clearly would have failed to exclude U.S. investors. In essence, parties to transactions tend to confuse the "jurisdictional means" standard that applies under Section 14(d) of the Exchange Act and tests used for other purposes of the U.S. securities laws such as the "U.S. person" test under Regulation S and the "U.S. holder" test under the Cross Border Rules. We encourage the Commission to clarify the difference between these standards and, to the extent that it determines to provide interpretive guidance on the exclusion of U.S. investors, to explain how its guidance is consistent with the "jurisdictional means" standard.

In the Proposing Release, the Commission states that if a bidder wants to support a claim that an offer has no jurisdictional connection to the United States, it also will need to take special precautions to prevent sales or tenders from U.S. target holders. To the extent the Commission intends to say that avoiding jurisdictional means requires that the bidder take precautions to prohibit sales to

all U.S. persons whether or not resident in the U.S. and whether or not the offer complies with all other aspects of the Commission's guidance relating to the use of jurisdictional means, we believe that this should be clearly indicated as we are concerned that this position may not be consistent with applicable law. However, the Proposing Release also cited the Commission's prior standard to the effect that a bidder must take "special precautions" to assure that tenders are not accepted nor sales of bidder securities made (in the case of exchange offers) to target security holders resident in the United States. Consequently, it is not clear whether the Commission is attempting to step beyond its previous position and require a bidder to prohibit all tenders by U.S. holders. The Commission itself strongly encourages these actions and any alternative would only create information differentials in globalized trading markets. In addition, we are uncertain that the Commission has the authority to adopt interpretive authority the result of which is that, to the extent a company complies with a mandatory provision of foreign law requiring the posting of offer materials on an open website, that company must prohibit all tenders by, and sales of bidder securities to, U.S. persons, whether or not the jurisdictional means (apart from the website posting) are used in connection with such tenders or sales.

The Commission has questioned whether it should consider additional rulemaking to address the situation where a bidder seeks to avoid U.S. jurisdictional means by excluding U.S investors but is subject to a foreign home country's "all-holders rule". Since we do not believe that the participation of every U.S. holder must be prohibited in order to avoid the use of U.S. jurisdictional means, we do not believe that additional rulemaking in this area is necessary. Moreover, in our experience, the scope and nature of the foreign all-holders rules are extremely varied and, in fact, foreign regulators interpreting these rules often permit the exclusion of U.S. holders.

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We appreciate the opportunity to comment on the Proposing Release, and we would be pleased to discuss any questions the Commission or its staff may have about this letter.

Respectfully submitted,

Committee on Mergers, Acquisitions and
Corporate Control Contests

By: Daniel S. Sternberg, Committee Chair