

DAVIS POLK & WARDWELL

**450 LEXINGTON AVENUE
NEW YORK, NY 10017**

**212 450 4000
FAX 212 450 3800**

**MENLO PARK
WASHINGTON, D.C.
LONDON
PARIS
FRANKFURT
MADRID
TOKYO
BEIJING
HONG KONG**

July 16, 2008

Re: File No: S7-10-08; Release Nos: 33-8917, 34-57781

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

Ladies and Gentlemen:

Davis Polk & Wardwell is an international law firm that regularly represents both U.S. and non-U.S. entities in cross-border business combination transactions. We are writing in response to the request of the Securities and Exchange Commission (the “**Commission**”) for comments on its proposed changes to rules applicable to cross-border business combination transactions.¹ We commend the Commission for its thoughtful reexamination of the current rules and appreciate the opportunity to comment on the Proposed Rules. The Commission and its Staff have demonstrated a significant degree of practical flexibility in recent years in granting no-action and exemptive relief to specific situations and particular cross-border transactions, and we support the Commission’s efforts to codify much of this prior relief and guidance. However, given the changes in the manner in which U.S. investors invest in foreign equity securities, the continued globalization and integration of financial markets as well as ongoing developments in applicable legal principles in many non-U.S. jurisdictions, we strongly encourage the Commission to take this opportunity to revisit and fundamentally revise key aspects of the existing rules.

I. Beneficial Ownership vs. ADTV

We believe that replacing the beneficial ownership test that forms the foundation of the current U.S. cross-border business combination rules (the

¹ Revisions to the Cross Border Tender Offer, Exchange Offer and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, Release Nos. 33-8917; 34-57781; File No. S7-10-08 (May 6, 2008) (the “**Proposed Rules**”).

“**Ownership Test**”) with a test based upon the average daily trading volume (or “**ADTV**”) would substantially benefit U.S. investors by increasing their ability to participate in cross-border business combination transactions in a fair and transparent manner. Moreover, we believe that an ADTV test would more accurately align regulatory jurisdiction with the interests of those investors who need and expect the protection of U.S. securities laws and who today are all too often are deprived not only of that protection but also of the economic value of deal participation because bidders frequently are unwilling even to attempt the calculations required by the beneficial ownership test.

The fundamental tension reflected in the Commission’s cross-border business combination rules is the desire to facilitate the ability of U.S. investors to participate in cross-border business combination transactions while at the same time ensuring appropriate regulatory oversight. The repeated exclusion of U.S. investors from cross-border business combination transactions led the Commission to consider in 1989 the need for a variety of exemptions to the Commission’s rules.² After nearly a decade of consideration in one form or another, the SEC adopted the current cross-border rules³ in an attempt to balance this fundamental tension. The Commission’s rules have been refined over the ensuing decade through a combination of exemptive and no-action relief but the basic premise of the Commission’s approach to cross-border regulation has remained substantially unchanged. In the meantime, however, the degree to which U.S. investors invest in foreign shares, how these investments are made and by whom they are made have evolved significantly.

Since the development of the Commission’s current cross-border rules, a number of forces have come together to work against the average U.S. investor who would like an opportunity to be included in a cross-border transaction. First, the world of global investing, cross-border business combinations and foreign takeover regulation has undergone a dramatic transformation. The participation of U.S. investors in global markets has grown dramatically⁴, with much of the investing being done by institutional investors or through mutual funds. Trading by institutional investors has become a 24 hour a day, global exercise and trading by U.S. investors of foreign equity securities does not create an exception to this rule. Major institutional investors generally maintain advisers around the world and, due to technological advancements, monitor information in home countries as well as in the United States on a real time basis. These investors no longer need to buy their foreign equity securities in or through the U.S. markets and

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

⁴ According to U.S. Treasury Dept. Report on U.S. Portfolio Holdings of Foreign Securities (Nov. 2007), the market value of foreign equity holdings of U.S. investors grew from \$567 billion in March 1994 to \$4.3 trillion in December 2006.

instead, prefer to trade in whatever market is open at the time an investment decision is made or in whatever market is most cost effective and efficient.

Foreign legal systems have become significantly more sophisticated since the adoption of the current cross-border rules and modern takeover regulation has been adopted in most of major developed countries.⁵ Moreover, the realities of today's global capital markets are requiring even developing and less-developed countries to follow this trend. In addition, our experience is that enforcement of foreign takeover regulation is becoming more consistent and predictable as foreign governments and regulators gain experience in these matters and are confronted by the forces inherent in today's global capital markets.⁶ Consequently, U.S. investors are much more willing today than in the past to invest abroad without the protections of U.S. securities laws. Many of the former investment guidelines requiring investment only in equity securities listed in the United States are disappearing. These changes reflect the fact that U.S. investors who elect to invest directly 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 and adopted.

At the same time, the United States and its capital markets have become less attractive to foreign companies due at least in part to the adoption of the Sarbanes-Oxley Act and related regulations, a perception that America has an overly-zealous regulatory culture as evidenced by the very public actions of not only regulators but also prosecutors and the press and the overly litigious nature of the American legal system. U.S. capital markets are no longer the only, or even necessarily the first, market of choice for multi-national corporations seeking to raise capital or to list their shares. Accordingly, foreign companies have become increasingly concerned about becoming inadvertently subject to U.S. securities regulation, in particular where the foreign company has neither listed its shares in the United States nor otherwise taken action to accept becoming subject to the U.S. regulatory regime. The concern is particularly acute where compliance requires ongoing filing or reporting requirements or where, as is often the case in cross-border business combination transactions, compliance is

⁵ 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. Since the time of the adoption of the current cross border rules, many foreign countries, including with the adoption of the Directive 2004/25/ of the European Parliament and of the Council of 21 April 2004 on Takeover Bids (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.

⁶ See Instruction No. 361 of the Brazilian Securities Commission (Comissão de Valores Mobiliários).

viewed at best as burdensome and at worst as increasing the risk of non-consummation of a transaction for reasons unrelated to fundamental business matters.

We recognize that the Commission has repeatedly taken actions to facilitate U.S. compliance by foreign companies and otherwise to reassure foreign companies that compliance with the U.S. rules will not be overly burdensome and we understand that the Staff has shown great flexibility in accommodating requests for relief to address conflicts of law. Nevertheless, foreign companies simply do not share the view of the Commission or the Staff with respect to the ease of U.S. compliance and, in our experience, they generally would prefer to exclude U.S. investors from participation in a cross-border business combination transaction unless that exclusion would thwart their business objective. As sophisticated U.S. investors now have access to, and regularly monitor, an issuer's home country disclosure (and often retain or have ready access to professional advisers in a variety of jurisdictions around the world), many non-U.S. companies believe that, in connection with their business combination transactions, even without using U.S. jurisdictional means, they will reach all sophisticated global (including U.S.) investors. Accordingly, the participants in a cross-border transaction often conclude that excluding U.S. investors only means potentially foregoing the participation of the unsophisticated or retail U.S. investors and that these U.S. investors are likely to represent the smaller percentage of U.S. investors. As a result, the transaction participants often conclude that exclusion of U.S. investors is consistent with the transaction's business objective. We believe that, notwithstanding the practicality and flexibility demonstrated by the Commission and the Staff in administering the Commission's cross-border rules, the trend towards exclusion of U.S. investors will continue and may increase unless more fundamental changes in the rules are made. Moreover, without these changes, unfortunately the investors least able to protect themselves, the unsophisticated investors, will continue to bear the greatest burden.

Problems With the Beneficial Ownership Test.

The Ownership Test often results in the determination to exclude U.S. investors from cross-border business combination transactions wherever practical because the very nature of the Ownership Test increases the risk of premature disclosure, is inherently difficult to administer and is subject to manipulation. As a result, companies prefer to exclude U.S. investors rather than engage in a technical analysis of the application of the Ownership Test (much less the related substantive U.S. regulations and the potential availability of regulatory relief). A test based on ADTV would be superior and we urge the Commission to reevaluate its proposals and adopt an ADTV test.

Confidentiality. For obvious reasons, in most business combination transactions involving publicly traded companies, maintaining confidentiality

prior to public announcement of a transaction is essential. This confidentiality concern is no less important in the context of business combination transactions involving foreign private issuers, but maintaining the confidentiality of a potential transaction while performing the analysis required for the beneficial 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 due to a loss of confidentiality, on the one hand, and taking the steps necessary to determine U.S. ownership, on the other hand, 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. By way of contrast, 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.

Administrability and Reliability. While it is critical that an acquiror maintain confidentiality while performing its analysis of U.S. ownership, for the same incentive reasons, it is equally important that any test adopted to measure U.S. ownership of a foreign private issuer be reasonably easy and cost effective to perform and must produce reasonably reliable results. Generally speaking, making the determinations required by the Ownership Test is complicated, time consuming and requires a significant amount of both factual and legal analysis. Companies engaged in merger negotiations or in structuring complicated cross-border transactions simply are not willing to allocate the time and resources necessary to undertake a beneficial ownership analysis of the target company if they believe that their transaction still can succeed if U.S. investors are excluded. The analysis undertaken is whether participation is necessary by the U.S. investors who are not likely to participate unless U.S. jurisdictional means are used. If the answer is “no”, the parties will not make the calculations required by the Ownership Test.

Any test used to determine U.S. ownership must also provide reliable results. Today, companies generally are highly suspicious of beneficial ownership tests because they do not believe that current definitions and concepts of beneficial ownership reflect market ownership realities. Their perception is that, due to the common use of equity derivatives and market trading strategies,

even if they were able to obtain the information necessary to make the calculations required by the Ownership Test, those calculations might not accurately reflect the actual economic ownership of the relevant stock or the actual voting power of that stock. In addition, foreign companies are not confident of the quality of the information regarding beneficial ownership that will be obtained when they seek to apply the Ownership Test. 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 restrictions, demands for indemnities, requests that the companies acknowledge the uncertain nature of the information being provided to them, multiple disclaimers as to the quality of the data provided and other limitations on obtaining complete or accurate ownership information. Moreover, some jurisdictions, such as Luxembourg, still permit the issuance of bearer shares. For all of these reasons, foreign companies are discouraged from taking the actions required to comply with the Ownership Test. By way of contrast, the objective and readily available nature of ADTV data means that a calculation on this basis can be done easily, quickly and cost effectively in the days prior to an announcement.

Manipulation. 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 disclosed levels of U.S. ownership may make it relatively easier or more difficult for an unwanted bidder to gain control of their companies. These foreign private issuers understand that, to a degree, they can control their status as a potential target under the existing 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. The potential for manipulation under an ADTV test would be substantially less because meaningfully impacting trading volume over a sixty or ninety day period would require concerted action and would have substantial economic implications for anyone attempting to do so.

Investor Protection Issues.

It is clear from the Proposed Rules 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 inappropriately avoiding U.S. regulatory scrutiny. We believe, however, that focusing on these facts means that the Commission may be asking itself the wrong basic policy question. From the perspective of its mandate to protect the interest of investors, we do not believe that the Commission's focus should be on whether or not a cross-border eligibility test aligns itself well with

U.S. beneficial ownership. After all, it is abundantly clear that no test will align itself as well with beneficial ownership as a test based on beneficial ownership. We also do not believe the proper inquiry to be whether the test results in the review or regulation of a similar number of transactions because numbers of transactions, as well as the nature thereof, vary dramatically from time period to time period. Instead, we suggest that the proper inquiries, taking into account the current market place dynamics, the current state of both U.S. and foreign regulation and the realities of technology and current market practice, are: (1) do all U.S. investors need the protections of U.S. securities laws in connection with these transactions; (2) which investors need these protections and which do not; (3) if some investors do not need these protections, is it better nonetheless, to have a test that provides these protections at the cost of excluding other U.S. investors from these transactions; (4) if these investors can protect their own interests, would an ADTV test be more likely to result in the inclusion of the other U.S. investors and would it adequately protect these 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 with respect to legal, regulatory and other issues exist between 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 on the basis of an issuer's filings with the Commission 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. Nevertheless, and despite the fact that these investors frequently participate in cross-border transactions that are structured to exclude U.S. holders and also have the expertise to be able otherwise to achieve the economic benefits of a such a transaction even when they do not participate in it directly, these investors increase the number of U.S. persons and decrease the availability of the cross border exemptions. Obviously, this result provides an incentive to exclude U.S. persons from the transaction.

Those 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 are the unsophisticated or retail U.S. investors. These are the persons 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, to be able to accept an offer without using U.S. jurisdictional means or to achieve the economic benefit of a cross-border transaction without directly participating in the transaction. In fact , under today's rules, these investors may never learn of the cross-border transaction in the first place. These are the investors on whom the Commission should focus its attention and to which the cross border eligibility test should be directed.

U.S. retail investors typically make their investments in foreign equities by purchasing either ADRs of a foreign private issuer or by investing in a U.S. managed and traded mutual fund that invests in the shares of foreign private issuers. In either case, the foreign securities representing this 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.⁷ Institutional investors also invest in ADRs and in U.S. mutual funds; however, as noted above, their investment activities are not limited to these markets or securities. Consequently, the only U.S. investor group whose interest would be likely to be under-represented in an ADTV test, as compared to the beneficial 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 U.S. regulatory protections.

In the adopting release, the Commission expressed reluctance to move away from the beneficial 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. We note, however, that 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 U.S. standards and contain principles of equal treatment of holders of the same class of securities. 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

⁷ 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

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

exemption would permit foreign private issuers to offer potentially significant amounts of bidder securities without registration under the Securities Act of 1933 (the “**Securities Act**”). Nevertheless, 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, we are not proposing any exemption from the general anti-fraud provisions of the Securities Act or the Securities Exchange Act of 1934 (the “**Exchange Act**”).

II. Modifications to the Beneficial Ownership Test

If the Commission determines to retain the Ownership Test, we encourage the Commission to take this opportunity to make additional changes to it in order to facilitate the inclusion of U.S. holders in cross-border business combination transactions.

Timing of U.S. Ownership Determinations. We believe the suggestion in the Proposed Rules 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 Proposed Rules, calculation of U.S. ownership on the 30th day prior to commencement presents significant difficulties with respect to planning, 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.

We believe that it would be more prudent 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 indicates that the methodologies that must be employed to determine 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 and/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. In the Proposed Rules, 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 beneficial 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.

In the Proposed Rules, the Commission raised a concern with the possibility 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, including the availability or lack thereof to U.S. investors.

While we generally believe that U.S. ownership should not be recalculated if a long period of time elapses between announcement and commencement, in a contested takeover situation the cross border rules must continue to operate 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.

Exclusion of 10% Holders. Currently, securities held by 10% holders are excluded from the Ownership Test 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 all 10% holders as if they were passive investors or not market participants. Moreover, we note that bidders frequently are not in a position, even in a negotiated transaction, to determine whether a specific shareholder is an “affiliate” of the target company assuming that affiliate status is required to be determined under a traditional securities law analysis. This analysis, by its nature, requires a close examination of all of the facts and circumstances involved in the relationship between a shareholder and an issuer and then requires the application of subjective legal judgment, on a case by case basis. Bidders involved in merger negotiations typically have considerable difficulty developing this information without concerns relating to premature disclosure of the transaction, among others. 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 and that a bidder is entitled to conclude that the only “affiliates” of the target company are those identified in the target company’s SEC reports or the home country either as being affiliates or as meeting specific factual standards such as meeting the 10% share ownership test and (1) having more than a specified percentage of the seats on the target company’s board of directors or (2) acting as, or having one or more of one’s employees act as, an executive officer of the target company.

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 address the eligibility standards, 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%, particularly with respect to 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 proposal's 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 manipulative use 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 or alternate 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. 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. regulation and foreign takeover regulation and the U.S. encourage the inclusion of U.S. investors in cross-border transactions. We support all of the proposals set forth in the Proposed Rules 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 permitting foreign holders to be paid before the end of the corresponding U.S. dual offer would violate U.S. proration rules because a single proration pool would be impossible.

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. The situation frequently is reflected in today's disclosure documents. The U.S. and the home country offer documents often contain conflicting statements with respect to offer period duration as it generally is impossible to obtain advance regulatory approval to resolve the legal conflict. At times it also can be extremely difficult even to have the documents themselves approved so that the transaction even may be commenced. In any event, the conflicting statements 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.

IV. "Going Private" Transactions

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 I relief regardless of the legal structure of the transaction. In addition, we encourage the Commission to extend this exemption in two ways. First, we encourage the Commission to extend the exemption to transactions that otherwise qualify for Tier II relief so long as the acquiring company discloses in its SEC filings that the transaction complies with applicable foreign law. Second, we encourage the Commission to adopt an additional exemption for transactions where the subject company is a foreign private issuer and the transaction is subject to a judicial or regulatory fairness hearing and determination, as is the case with "schemes of arrangement" under the laws of the United Kingdom.

Fundamental to Rule 13e-3 is the requirement that the filing person make and disclose a determination as to the fairness of the transaction to the unaffiliated stockholders. This determination is consistent with the U.S. state-law duties of the directors of a corporation. However, in many foreign jurisdictions other standards apply and/or other types of protections for shareholders exist. Nevertheless, the Staff often takes the position in the comment process that a foreign private issuer must include language that as a practical matter is

substantially similar to the disclosure required of a U.S. domiciled corporation. As a result, when structuring a 13e-3 transaction non-U.S. issuers often determine that it is optimal either to exclude U.S. holders or to incorporate substantive U.S. procedural and disclosure protections that are different from, and may actually conflict with, home country practices. As noted before, when faced with such a choice non-U.S. companies often prefer to exclude U.S. holders where possible.

Substantive takeover regulation has developed substantially outside of the U.S. over the past decade. For example, the Takeover Directive required that all member states of the European Community adopt legislation meeting certain general principles and specific rules, including those relating to minority shareholder protection and disclosure.⁹ While the regulations adopted under 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, stockholders in European companies have protections different than those that exist under U.S. law but they have protections that, when coupled with the Takeover Directive's mandate for full disclosure, are founded on the same policy objectives as Rule 13e-3. Rather than a board assessment of fairness following a variety of procedural protections (such as appointment of a special committee, a fairness opinion rendered by an independent financial advisor, a "majority of the minority" vote, and/or enhanced disclosure of conflicts of interest and other matters), the EC member states have determined to regulate the transactions that would otherwise be covered by Rule 13e-3 by requiring that bidders provide bids and/or other exits to minority shareholders and to address questions of "equitable price" and "fairness" by statute and/or by allowing home country regulators to intervene in establishing price.¹⁰

Given these regulatory developments, we believe it would be appropriate to exclude transactions that qualify for Tier II relief from Rule 13e-3 in order to facilitate the ability of U.S. investors to participate in those transactions while at the same time affording U.S. holders meaningful protections under the applicable home-country regulatory regimes. We also believe that an exemption from 13e-3

⁹ A number of other non-EC jurisdictions include protections that often are duplicative of, or different than, the U.S. standards upon which Rule 13e-3 is based. For example, 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. In addition, in Brazil the applicable standard in share for share mergers is whether the transaction "causes damage to minority shareholders". Moreover, like EC member states, 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.

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.

is appropriate, regardless of U.S. ownership levels, where home-country rules provide for a fairness hearing or determination.

V. Exchange Act Rule 14e-5

The Proposed Rules would codify certain established practices that have previously received exemptive relief under Rule 14e-5.¹¹ We believe this codification is consistent with the policy objectives of Rule 14e-5 and support the Commission's proposal.

However, the Proposed Rules would require that in order for an affiliate of a financial advisor to receive Tier II relief for purchases or arrangements to purchase, it must have an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act. We do not believe that this requirement meaningfully increases investor protection. However, it could effectively disadvantage entities without an affiliated U.S. broker-dealer from serving as a financial advisor. The extra-territorial effect of Rule 14e-5 is a recurring source of great concern to foreign private issuers and another reason why companies exclude U.S. investors from participating in cross-border business combinations. Accordingly, we encourage the Commission to eliminate this requirement.

In addition, when financial institutions engage in certain business combination transactions they require Rule 14e-5 relief in order to conduct ordinary course of business activities during the applicable tender offer period. In the past the Commission has provided relief to financial institutions engaged in cross-border transactions for their own account that is similar to that proposed in the Proposed Rules.¹² We recommend that the Commission adopt a Tier II exemption codifying the relief previously granted by the Commission in this respect.

VI. Exclusion of U.S. or Non-U.S. Holders

We agree with the Commission's view that there is a wide variation in practice concerning the specific steps taken to avoid U.S. jurisdictional means and thus "exclude U.S. holders" from a cross-border tender offer, and we strongly encourage the Commission to provide clear guidance as to the specific standards the Staff will apply in connection with its intention to monitor more closely offers that exclude U.S. shareholders.¹³ We also believe that the evolving nature of

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).

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

¹³ We note that we are uncertain that the Commission or the Staff has the authority to issue interpretive authority that a bidder must prohibit all tenders by, and sales of bidder securities to, U.S. persons in circumstances where the bidder or the subject company complies with a mandatory provision of foreign law requiring the posting of offer materials on an open website and otherwise does not employ U.S. jurisdictional means in connection with the offer.

global business communications, particularly those customarily used and often mandated in connection with cross-border business combinations, justify further examination of what constitutes jurisdictional means for purposes of these transactions.

We believe that much of the confusion in this area arises from confusing the concepts of “not implicating U.S. jurisdictional means” and “prohibiting participation by U.S. persons” and from the lack of clarity as to the meaning of “U.S. jurisdictional means” in the context of today’s cross-border transactions. The provisions of the U.S. securities laws most frequently applicable to cross-border business combinations (Regulation 14D, Regulation 14E and the registration requirements of the Securities Act), by their terms, apply upon the use of “any means or instrumentality of interstate commerce”. They do not apply merely because a U.S. holder, or for that matter, many U.S. holders, participate in a particular transaction. Consequently, we believe that it is clear that an offer, not otherwise eligible for any U.S. exemptions, that is made for a foreign company, that is conducted entirely outside of the United States and entirely under foreign law and that is made without any solicitation efforts in the United States (a “**Foreign Jurisdiction Offer**”) does not become subject to U.S. jurisdiction simply because a U.S. person residing abroad sees a foreign publication concerning the Foreign Jurisdiction Offer and succeeds in accepting the Foreign Jurisdiction Offer by complying with the procedures described in the publication. Moreover, we do not believe that the bidder violates U.S. law if it accepts a tender from this U.S. person. On the other hand, if the bidder were to fail to take reasonable steps to preclude acceptance of the Foreign Jurisdiction Offer by persons in the United States, it clearly would have failed to exclude U.S. holders and the Foreign Jurisdiction Offer would be subject to SEC regulation. Market practice on these points varies considerably, however, because market participants fail to distinguish among, for example, 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 current cross-border rules.¹⁴

We strongly encourage the Commission to clarify that “jurisdictional means”, as opposed to the mere fact of participation by one or more U.S. persons in a transaction, is the relevant standard for determining whether a cross-border business combination is subject to U.S. regulation. Stated simply, we believe that the Commission should confirm that it is not necessary to prohibit, in all cases, the participation by all U.S. investors in cross-border business combinations in order avoid U.S. jurisdiction. We recognize that the standard applicable to a cash tender offer and the standard applicable to an exchange offer may be different. We see no reason why it ever should be necessary to prohibit participation by

¹⁴ For example, the Proposed Rules note 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. Another portion of the Proposed Rules states less precisely that a bidder needs to take special precautions to prevent sales or tenders “from U.S. target holders” in order to avoid U.S. jurisdiction means.

U.S. investors in a cash tender offer. In a cross border exchange offer, we recognize that, depending on the level of U.S. investment in both the bidder and the target company, concern regarding the potential flow back to the United States of securities issued abroad to U.S. persons in the exchange offer might require that U.S. holders be prohibited from participating. We suggest that Commission look to the “substantial U.S. market interest” test of Regulation S for purposes of formulating the threshold above which participation by U.S. holders should be prohibited.

We also strongly encourage the Commission to provide specific guidance with respect to what constitutes use of jurisdictional means in the context of cross-border business combinations or at least guidance as to what does **not** constitute use of such jurisdictional means. Historical interpretation and guidance relating to the meaning of “use of any means or instrumentality of interstate commerce” often allows for the possibility of a “hair trigger application” of the jurisdictional nexus test. If applied here, this interpretation and guidance theoretically, could have the effect of sweeping under the U.S. regulatory umbrella virtually every international business combination transaction. For example, advice given by practitioners, regulators, courts and others, from time to time, has included statements to the effect that the making of a telephone call to the United States is sufficient to trigger U.S. jurisdiction, that the inadvertent mailing of a single document, even in violation of established procedures, might be sufficient, that posting anything on the internet is sufficient, that translating any foreign language document into English is sufficient, etc. The Foreign Jurisdiction Offer presents a very common and frequent issue. Historically, most foreign laws would have required and/or allowed the Foreign Jurisdiction Offer to be commenced by publication in a local foreign language newspaper. Now, following to a significant degree the SEC’s success with EDGAR and SEC requirements and recommendations that issuers make disclosure documents available on their websites, foreign regulators increasingly are amending their rules to require that this “publication” occur, among other places, on the bidder’s website, on stock exchange websites, etc. Obviously, this change raises the question as to whether the new requirement has converted what clearly was a foreign publication into a “a means of U.S. interstate commerce” and thus given the SEC jurisdiction over the Foreign Jurisdiction Offer. Based on statements in the Proposed Rules, it would appear that the Commission’s answer is “yes” because it indicates that, under these circumstances, all U.S. persons would need to be excluded from the Foreign Jurisdiction Offer. If this indeed is the Commission’s position, we urge the Commission to reconsider it because it effectively would mean that bidders would be required either to comply with U.S. law or to prohibit U.S. investors from participating in their offers.

While, a first impression might be that forcing bidders to make this choice would benefit U.S. investors because it would limit the ability of bidders to obtain the participation of the sophisticated U.S. investors in transactions while excluding the U.S. retail investors, that impression would be short-sighted. Any such position by the Commission would be an unprecedented expansion of U.S.

jurisdiction as it would subject to U.S. jurisdiction otherwise foreign transactions solely because technological advances and foreign law changes have caused an event that would not ever have been viewed as a use of a means or instrumentality of U.S. interstate commerce suddenly to become one. We believe that this would be met with great skepticism around the world and ultimately that U.S. investors would bear the burden of the Commission's position by being excluded from offers, by being the targets of adverse foreign regulation, etc.

Finally, we urge the Commission to provide interpretive guidance to the effect that immaterial or incidental contacts by transaction participant with the United States that are not made, directly or indirectly, for the purpose of soliciting direct or indirect U.S. participation in a transaction and publications on websites or other internationally available locations, so long as they reflect proper restrictive legends, will not constitute a use of U.S. jurisdictional means triggering U.S. jurisdiction in cross-border transactions that otherwise have been structured properly to exclude U.S. investors.

The Proposed Rules solicit comment as to whether the Commission should consider additional rulemaking to address the situation where a bidder seeks to avoid U.S. jurisdictional means by excluding U.S. investors and is subject to a foreign home country's "all-holders rule". As participation of every U.S. holder is not required to avoid the use of U.S. jurisdictional means, we do not believe that additional rulemaking in this area is necessary.

In the Proposed Rules the Commission also solicits comment on whether there are any circumstances under which a non-U.S. or foreign holder may be excluded from a tender offer subject to Regulation 14D. While the concerns raised by this issue are of much less significance than the other issues that we have discussed, we would be supportive of the Commission establishing a de minimis numerical exception to the all holders rule (Rules 14d-10 and Rule 13e-4) for both cash and non-cash offers. Based on our experience, exclusion of foreign holders is not a significant practical issue in the context of a cash offer for a company since foreign takeover laws generally apply only to a business combination transaction where the subject company is incorporated in that jurisdiction or has a class of subject securities listed on an exchange in that jurisdiction. Consequently, it usually is possible to know and comply with applicable foreign regulations. In the context of an exchange offer, there is somewhat more uncertainty because foreign public offering, registration and other similar requirements may apply. Again, however, the application of these laws is most often triggered by either a listing of the U.S. shares in the foreign jurisdiction or the dissemination of offer materials in that jurisdiction.

Regardless of the probabilities outlined above, the practical reality is that bidders in offers subject to Rule 14d-10 do not (and could not) survey all potentially applicable laws when making an offer. Accordingly, we believe that establishing a de minimis exception to the all holders rule (Rules 14d-10 and Rule 13e-4) for both cash and non-cash offers would be appropriate. However, in

order to be of any practical utility the rule (i) would need to be based on record, not beneficial, ownership without the look-through problems that plague the current cross-border rules, (ii) could not require prior inquiry or other efforts to comply with foreign laws and (iii) need to employ a relatively low threshold, such as 5% record ownership.

We greatly appreciate the efforts of the Commission and its Staff to reexamine the cross-border rules and the opportunity to comment on the Proposed Rules, and we would be pleased to discuss any questions the Commission or its Staff may have about this letter. Please do not hesitate to contact Diane Kerr at 212-450-4529.