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July 18, 2008

Ms. Florence E. Harmon  
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Securities and Exchange Commission  
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Washington, D.C. 20549-9303

Re: File No. S7-10-08

Release Nos. 33-8917; 34-57781

Revisions to Cross-Border Tender Offer, Exchange Offer and Beneficial Ownership  
Reporting Rules for Certain Foreign Institutions (May 6, 2008)

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association ("ABA"), in response to the request by the Securities and Exchange Commission (the "Commission") for comments on the release described above (the "Proposing Release") relating to exemptions for cross-border acquisitions and beneficial ownership reporting under the Securities Act of 1933, as amended (the "Securities Act") and the Securities Exchange Act of 1934, as amended (the "Exchange Act").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

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We applaud the Commission's decision to revisit the cross-border exemptions<sup>1</sup> in the light of eight years of experience and against the backdrop of other recent Commission rule-making initiatives ameliorating some of the difficulties encountered by foreign private issuers in connection with Exchange Act reporting, registration and deregistration. Overall, we welcome the Commission's proposals. They serve the goal of facilitating cross-border transactions, and thus encouraging the inclusion of U.S. investors in these transactions, by codifying individualized no-action and exemptive relief that has been granted to address recurring conflicts between U.S. and foreign law and practice, and by eliminating certain regulatory anomalies based on the form of a transaction or whether a transaction is subject to Section 14(e) of the Exchange Act rather than Section 13(e) or 14(d).

We agree with the Commission's view that it must strike an appropriate balance between facilitating cross-border transactions and extending the protections of the U.S. securities laws to U.S. investors. The importance of finding this balance has been magnified during the period since the adoption of the cross-border exemptions -- but to some extent made easier -- because of the continuing globalization of the world's securities markets, the increasing convergence of disclosure and governance standards and the transition to nearly universal use of the Internet to disseminate information in rapid, boundary-less fashion to investors around the globe. We believe the appropriate balance can be found by recognizing that the United States does not have a strong regulatory interest in watching over large U.S. institutional investors who have the sophistication and resources to access foreign markets and have made their own business judgments to invest directly in foreign securities outside the United States in reliance on foreign regulatory regimes and foreign market practices. Instead, the U.S. regulatory interest lies in situations where a foreign target or issuer has a "critical mass" of U.S. retail and smaller institutional investors who have invested in their securities through the U.S. markets and who therefore may be presumed to be relying upon and require the protections of the U.S. federal securities laws.<sup>2</sup> The territorial approach we are proposing would extend into the takeover context the policy considerations that have long and successfully underpinned the offshore exemptions from Securities Act registration.<sup>3</sup>

To date, the cross-border exemptions have been underutilized. We believe the principal reason -- one that is beyond the scope of any of the proposed revisions to address -- is the continuing concern of foreign private issuers and other foreign market participants about the impact of the U.S. antifraud rules and exposure to U.S. litigation. However, we believe that other impediments to the use and efficacy of the cross-border exemptions can and should be removed. Thus, as discussed below, we advocate enhancing the Commission's proposals in a number of ways.

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<sup>1</sup> See Cross Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Proposing Release No. 33-7611 (November 13, 1998) ("1998 Cross-Border Proposing Release") and Adopting Release No. 33-7759, 34-42054 (October 22, 1999) ("1999 Cross-Border Adopting Release").

<sup>2</sup> In this letter, we use the term "smaller institutional investors" to refer to those U.S. institutional investors either that by chartering document or regulation are not permitted to, or that do not have the resources to, participate directly in non-U.S. markets through offshore offices and affiliates.

<sup>3</sup> See Offshore Offers and Sales, Proposing Release No. 33-6779 (June 10, 1988) and Adopting Release Nos. 33-6863 and 34-27942 (April 24, 1990) ("Reg S Adopting Release").

### Summary of Comments

First, we propose to expand the eligibility criteria for reliance on Tier I and Tier II by creating alternative tests that eliminate the effect of direct securities investment abroad by large U.S. institutional investors, and focus instead on U.S. retail and smaller institutional investors who have made their foreign investments directly in or through the U.S. markets. While we support the proposed revision to the calculation of beneficial ownership that would permit the calculation to be as of any day within 60 days before the announcement of the transaction, we believe that the holdings of large U.S. and foreign investors should not be excluded from the number of shares outstanding in making the calculation, and further believe, strongly, that eligibility based on ADTV data should be available in all Tier I and Tier II transactions, whether or not the transaction is negotiated.

Second, while we generally support the proposed expansions of the Tier II exemptions, we propose to extend certain of the benefits currently afforded to Tier I transactions to Tier II transactions. In particular, we believe the exemption from Rule 13e-3 should be expanded to make it available in all Tier II transactions, not just to make it available in mergers and other non-tender offer transactions. We also propose certain exemptions from Rule 13e-4 for certain de minimis purchases by the issuer.

In addition:

- We support the clarification that the Tier II exemptions are available irrespective of the application of Rule 13e-4 or Regulation 14D.
- We support the codification and streamlining of the Rule 14e-5 no-action letters, but urge the Commission to revisit certain of the remaining proposed conditions to that relief.
- We support extension of the early commencement relief to registered exchange offers subject only to Regulation 14E and urge the Commission to extend that relief to all such offers by domestic and foreign issuers, and to clarify the effect of early commencement on exchange offers made in reliance on the Section 3(a)(10) exemption from registration under the Securities Act.
- We cautiously support the proposed changes to Forms CB and FX and the requirement for electronic filing, subject to concerns regarding the possible deterrent effect of such a filing requirement.
- We support the expansion of Schedule 13G eligible institution status to foreign regulated institutional investors.

Finally, to keep pace with global market practices, we propose that the Commission (i) clarify its interpretive guidance regarding the ability of bidders and issuers to choose the jurisdictions in which their offers are, or are not, being made, and (ii) revise its guidance regarding the consequences of posting offering materials on open websites. In particular, we are concerned that the suggestion that to avoid U.S. jurisdiction a bidder must exclude U.S. persons from participation in the offer could harm the interests of those U.S. investors who are capable of participating directly in the offshore securities markets and transactions from locations outside the United States.

We believe these enhancements of the Commission's proposals would be consistent with the protection of the "investing public," which has always been the central concern of the U.S. federal securities laws.<sup>4</sup> In addition, these enhancements would simplify and harmonize various U.S. regulations applicable to foreign private issuers and eliminate complexities and uncertainties that have kept many foreign private issuers and other foreign market participants from willingly embracing the U.S. regulatory regime.

Before commenting in greater detail, we wish to note our appreciation for the staff's demonstration over the years, often under considerable time constraints, of both flexibility and creativity in administering the exemptive and no-action process in connection with cross-border M&A and capital-raising transactions.

## **I. Eligibility Threshold/Calculation of U.S. Beneficial Ownership**

### **A. Exclusion of Certain Holders**

- *Should we continue to exclude from the calculation of U.S. ownership target securities held by the acquiror in the contemplated transaction?*

In determining to exclude both acquirors and greater than 10% holders from the calculation of the percentage ownership represented by U.S. investors, the Commission focused on "public float" as a means of identifying those foreign targets and issuers having a critical mass of U.S. investors presumed to be relying upon, and thus to require, the protections of the U.S. federal securities laws. We agree with the underlying premise of the public float approach, namely, that the U.S. regulatory interest should focus on those U.S. investors in need of such protections and that U.S. acquirors and greater than 10% holders are not such investors. In practice, however, bidders and issuers have encountered difficulties in employing the Commission's public float approach.

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<sup>4</sup> See Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145, Proposing Release No. 33-6806 (October 25, 1988) ("Rule 144A Proposing Release") at text accompanying footnotes 98-101. (The Securities Act is remedial legislation designed "to protect the investing public and honest business." The "investing public" intended to benefit from the registration provisions of the Securities Act was unsophisticated, individual investors. Despite measurable institutional presence in the capital markets, Congress concentrated on the protection of individuals.)

First, while determining the number of the acquiror's securities to exclude is clear-cut because that ownership information is within the acquiror's control, the requirement to exclude securities owned by greater than 10% holders of the subject company's securities has presented problems because of the absence of reliable current information about such holdings in certain jurisdictions. If retained, the requirement should make clear that the information regarding such large holdings need only be the most recently available information, not information as of the date used to calculate U.S. beneficial ownership.

More fundamentally, the exclusion of securities owned by acquirors and greater than 10% holders (both U.S. and foreign) from the number of securities deemed to be outstanding can have the effect of mathematically increasing the percentage of U.S. ownership by U.S. retail and smaller institutional investors above the Tier I and Tier II thresholds when, based on the number of securities actually outstanding, the absolute amount of securities owned by them is sufficiently small to support reliance on the exemptions. As discussed below, we believe there is a more direct way to achieve the Commission's goal of focusing on companies that have a critical mass of U.S. investors who may be presumed to rely upon and require U.S. securities laws protections.

- ***Should we eliminate the requirement to exclude subject securities held by greater than ten percent holders in calculating U.S. ownership of the target company? Would U.S. interest in a transaction more appropriately be measured by considering all of the outstanding securities, without excluding large holders? Would changing the rule in this manner result in extending the exemptions to circumstances where U.S. investors could be adversely affected?***

For the reasons discussed above, we would support eliminating the requirement to exclude subject securities held by greater than 10% holders (U.S. and foreign) when calculating U.S. ownership, but not as our preferred solution. This revision would be consistent with the multi-jurisdictional disclosure system ("MJDS") for Canadian foreign private issuers, which has operated without abuse for 17 years. Under the MJDS, there is no requirement to eliminate securities owned by greater than 10% holders when determining whether U.S. ownership exceeds the 40% ceiling.

Our preferred solution for the U.S. ownership test is to eliminate the requirement to exclude subject securities held by all acquirors and greater than 10% holders (U.S. and foreign) from the total number of securities of the class deemed to be outstanding (i.e., from the denominator of the test) while *retaining* the exclusion of subject securities held by U.S. acquirors and greater than 10% holders from the number of securities deemed to be held by U.S. persons (i.e., from the numerator of the test). In addition, if this modification is adopted, we would suggest lowering the percentage – from 10% to 5% – used to identify holders who should be excluded from the denominator. We believe U.S. acquirors and greater than 10% (or 5%) holders have the requisite sophistication and resources to fend for themselves under a foreign regulatory regime and foreign market practices and do not require the protections of the U.S. federal securities laws. On the other hand, as discussed above, excluding the securities they (and foreign acquirors and greater than 10% – or 5% – holders) own from the total number deemed to

be outstanding inflates the significance of the holdings of other U.S. investors. This can unfortunately lead to a bidder's inability to rely on Tier I rather than Tier II – or to the bidder's total inability to rely on the cross-border exemptions – where the U.S. regulatory interest is, in absolute terms, low.

- ***Should we eliminate greater than ten percent holders only where such holders are otherwise affiliated with the issuer?***

As discussed above, we strongly recommend limiting the exclusion to the numerator or, alternatively, eliminating the exclusion. However, if retained, we would oppose using affiliate status as a basis for excluding large holders from the calculation of U.S. beneficial ownership except where the holder is an affiliate of the acquiror or has been identified as an affiliate of the issuer by the affiliate or issuer itself in a document publicly filed with a regulatory body or stock exchange. Affiliation is a facts and circumstances analysis that third parties would not be able to assess and thus would not lend itself to use in determining eligibility for these exemptions

- ***Are there problems in determining who is a greater than ten percent holder that should be addressed in revised rules?***
- ***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?***

If the exclusion is maintained in its present form, we would support raising the percentage to as high as 20%. At that level, there may be more readily available and current information about the identity of the large U.S. and foreign holders that must be identified and excluded as a condition to reliance on the exemption. Moreover, there should be fewer instances in which the significance of the holdings of other U.S. investors would be inflated as discussed above. If the exclusion is modified to apply only to the numerator as we strongly recommend, we support lowering the percentage to permit an offeror to exclude all known five percent or greater U.S. holders, an ownership level that we believe more accurately captures large U.S. institutional holders who do not require the protections of the U.S. federal securities laws.

- ***Is there any reason to eliminate the exclusion of greater than ten percent holders only for non-U.S. holders and not for U.S. holders, or vice-versa? What would the impact of such change be on the number of companies eligible for Tier I or Tier II?***

As discussed above, we strongly recommend modifying the exclusion to apply only to the numerator. However, if the exclusion is maintained with respect to the denominator, we do not see a principled basis for excluding from the denominator of the test foreign, but not U.S., greater than 10% holders (or vice versa).

**B. Thresholds and Reference Dates for the Existing U.S. Beneficial Ownership Test**

- ***Should we maintain the same tests, with the revisions proposed, but raise the maximum U.S. ownership level for Tier I and Rules 801 and 802 to 15 percent? What effect would this have on the number of cross-border transactions eligible to be conducted under these exemptions? Would expanding the availability of Tier I and Rules 801 and 802 be in the interests of U.S. investors?***

Given the Commission's experience with the cross-border exemptions over the last eight years, the lack of abuses and the continued need to encourage foreign participants to include U.S. holders in their transactions, we strongly support raising the Tier I threshold to 20% and the Tier II threshold to 50%. To put this issue in better perspective, like the MJDS, the exemption of securities of foreign private issuers from the proxy rules provided by Rule 3a12-3 under the Exchange Act is not conditioned on a public float analysis. Rather, all proxy solicitations, including those for a cash merger (which the Commission has repeatedly stated should be treated as functionally equivalent to a cash tender offer), are unconditionally exempt. The philosophy underlying the proxy rule exemption is that certain matters are best addressed by regulations of the chartering jurisdiction. With respect to Rules 801 and 802, we believe the Commission should follow its longstanding approach in Regulation S, where a 20% trading volume test is used to determine whether there is "substantial U.S. market interest" in a foreign issuer that warrants more stringent conditions for relying on the safe harbor from registration for offshore offerings.

- ***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 combination transactions, as proposed?***

As discussed above, we strongly agree with the Commission that the difficulty in satisfying the requirement to calculate U.S. ownership as of 30 days prior to commencement is one of the principal reasons why the cross-border exemptions are underused. The staff's interpretive guidance to date on that issue has been very helpful, but cannot fully address the issue without a modification of the rule. Modifying the rule to extend the period to 60 days, to allow selection of a date within that period, and to reference the period to the announcement date rather than the commencement date, should create sufficient flexibility to address conflicts with home jurisdiction rules and practice. As discussed below, however, the principal concern with the "look through" test -- that it creates a risk of signaling a possible transaction prior to announcement and therefore prevents bidders concerned with confidentiality from including in the announcement information regarding the treatment of holders resident in the United States -- will not be addressed by these modifications. Inquiry will still have to be made of nominees prior to announcement in order to have such information available at the time of announcement. Establishing an alternative test based on average daily trading volume ("ADTV"), which we discuss below, would address the signaling concern.

- *Should we revise the rules to provide for a range of dates as proposed, or should we continue to specify a date certain for the calculation? If we continue to specify a date certain, should we specify a date earlier than the 30th day before commencement? For example, should we specify the 30th day before announcement?*

We support permitting the acquiror to select a date from within a range of dates for performing the calculation.

- *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?*

Ninety days is preferable to ensure that in those countries where share ownership information is only available on a quarterly basis, the look back period will cover at least one quarter's end. However, a more fundamental problem is that implementation of foreign market procedures to ascertain the level of U.S. ownership often takes a significant amount of time (which may exceed the timetable for many major transactions) because it requires making inquiry of several layers of nominees. The inquiry process may be complicated by privacy concerns, secrecy laws and local trading conditions that not only require considerable effort to address but also create concern that the resulting information as to U.S. beneficial ownership will not be accurate and complete. The delay and uncertainties associated with the inquiry exercise, and the risk of leaks, discourage reliance on the exemptions.

- *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?*
- *Should we keep commencement as a reference point, but use a range, such as within 60 days before commencement?*
- *Is it appropriate to use announcement as the reference point, even where a significant period of time may elapse between announcement and commencement, and the makeup of the target security holder base may change in response to announcement or because of the lapse of time?*
- *Should we establish a limit on the period of time which may elapse between the reference point for calculation of U.S. ownership and the commencement of the business combination transaction?*



Subject to one refinement, we believe announcement is the appropriate reference date, even where a significant amount of time elapses between announcement and commencement (for example, to permit the obtaining of regulatory approvals under takeover regimes, such as that of the United Kingdom, where the maximum duration of the offer is fixed and may not be able to accommodate a long regulatory process). The announcement approach focuses on U.S. ownership on an “undisturbed basis” since, in the preponderance of transactions, announcement precedes commencement. We note that the proposed revision will not allow the calculation to take into account a shift of ownership into or out of the United States following the announcement, presumably depending in part on the announced treatment of U.S. holders. We do not believe that the Commission should be concerned about the movement of shares into the United States following an announcement that an offer will or will not include U.S. holders. Purchasers of target securities following the announcement of a business combination are likely to be risk arbitrageurs, hedge funds or other sophisticated persons who wish to benefit from the difference between the market price of a security and the announced transaction price. In any event, these purchasers would be acquiring shares with awareness of the inclusion or exclusion of U.S. investors from the transaction. On the other hand, to the extent that sufficient shares move out of the United States between announcement and commencement, we believe the Commission should refine its proposal to permit a bidder to change the exemption on which it is relying from Tier II to Tier I, as U.S. investors would have indicated a preference to realize value in the marketplace rather than through the transaction itself. This right to change Tiers should be conditional upon the bidder’s disclosure in the announcement that such a change could be made.

An associated question is what type of announcement should serve as the reference point. We suggest that this be the first announcement that raises the possibility of the transaction in respect of which cross-border exemptions are sought (in U.K. City Code terms, for example, a “possible offer announcement”). Once announcement of a possible transaction has been made, the shareholder structure of the foreign target may change significantly and U.S. ownership (particularly by risk arbitrageurs and hedge funds) can increase considerably. This is consistent with keeping the focus on U.S. ownership on an “undisturbed basis.”

- ***Should we change the date as of which U.S. ownership is calculated for rights offerings in the same or in a similar manner? If so, please explain what issues may arise under the current test and what changes should be made.***

The use of the record date under Rule 801 presents many of the same issues as the current approach under Rule 802 and Tier I and Tier II. While we prefer use of announcement rather than commencement as the reference date, the issuer cannot determine whether the rights offer can be extended to U.S. holders in reliance on Rule 801 without conducting the inquiry of nominee holders. Again, that search process risks premature signaling to the market of a possible transaction. Waiting until after the announcement precludes the announcement from disclosing the treatment of U.S. holders. As discussed below, these concerns can be addressed by allowing the issuer to use a trading volume alternative, rather than mandating a “look-through” approach.

- *If we adopt the proposed rule changes allowing bidders and offerors to choose a date within a range for purposes of the calculation of U.S. ownership, should we provide guidance on what dates may not be chosen because of an event or events significantly affecting the target security holder base? For example, if an event occurs that the bidder or offeror knows significantly impacted the U.S. ownership of the target securities within the relevant sixty-day range, but the bidder or offeror did not cause or contribute to such event, should the bidder or offeror be prohibited from using that date as the reference point for the calculation of U.S. ownership?*

If the target or issuer recently acquired a company with a significant number of U.S. holders in a share-for-share exchange or recently conducted a private or public offering in the United States, it may be inappropriate for the bidder or issuer to choose a date that preceded the closing of the transaction as the date for calculating U.S. beneficial ownership. Any guidance provided by the Commission should be fairly specific and should not impose a general “reason to believe” or “scheme to evade” standard.

### **C. Reliance on Trading Volume**

We believe that, for purposes of determining Tier I and Tier II eligibility in the context of a negotiated business combination transaction, as well as eligibility to rely on Rules 801 and 802, the Commission should adopt an alternative measure of U.S. interest based solely on a comparison of the ADTV of the target foreign private issuer’s equity securities in the United States against the issuer’s worldwide ADTV over a 12-month period. Throughout the Release, the Commission has noted the difficulties “that can make application of the beneficial ownership threshold eligibility test problematic in practice”<sup>5</sup> and, as discussed above, we believe this test will continue to be problematic notwithstanding the improvements that would be made by implementing the Commission’s proposals and, ideally, the further enhancements we propose. For nearly twenty years, the Commission has relied on trading volume as the appropriate means of identifying “substantial U.S. market interest” for purposes of Regulation S.<sup>6</sup> Similarly, in recent rulemaking initiatives, the Commission has stated its belief that a trading volume-based benchmark is “a fairly direct measure of U.S. market interest in a foreign private issuer’s securities” and that trading volume data “is easier to obtain and confirm than is data required for...record holder determination.”<sup>7</sup> Moreover, while we agree that business combinations can be extraordinary events for investors, we do not believe that it is consistent with the spirit of Regulation M-A, reflective of the reality of how transactions are negotiated, or appropriate in

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<sup>5</sup> Proposing Release at page 19.

<sup>6</sup> See Reg. S Adopting Release.

<sup>7</sup> See Termination of a Foreign Private Issuer’s Registration of a Class of Securities Under Section 12(g) and Duty to File Reports Under Section 13(a) or 15(d) of the Securities Exchange Act of 1934, Proposing Release No. 34-55005 (December 22, 2006) (“Deregistration Proposing Release”) at pages 28-29 and Adopting Release No. 34-55540 (March 27, 2007) (“Deregistration Adopting Release”) at page 7.

terms of investor protection to draw a distinction – even one based on practicality – between negotiated and hostile transactions.

- ***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 interest of U.S. investors?***

We believe strongly that it is not appropriate or in the best interest of U.S. investors for the Commission to continue to focus *exclusively* on the percentage of target securities beneficially owned by U.S. persons (apart from acquirors and greater than 10% holders). According to a U.S. Treasury Department report, the market value of foreign equity holdings by U.S. investors grew from \$567 billion in March 1994 to \$4.3 trillion in December of 2006.<sup>8</sup> While the precise portion of this growth attributable to institutional investors is not known, it is reasonable to conclude that exponential growth of this kind over a six-year period would not occur but for massive institutional investment. Accordingly, a test of U.S. interest based on beneficial ownership will reflect these institutional investors to a very significant degree.<sup>9</sup> As the Commission stated twenty years ago when proposing Rule 144A, “the Congress and the Commission historically have recognized the ability of professional institutional investors to make investment decisions without the protections mandated by the registration requirement of the Securities Act.”<sup>10</sup> The ability of these types of investors to fend for themselves is equally true in the takeover context.<sup>11</sup> Thus, we strongly believe that the Commission should adopt an alternative test for eligibility for cross-border exemptive relief that eliminates the effect of direct investment by U.S. institutional investors outside the United States. This alternative test would be aimed at identifying those foreign targets and issuers that have a critical mass of U.S. retail and smaller institutional investors who may be presumed to rely upon and require the protections of the U.S. securities laws.

We understand that, as markets globalize and as markets outside the United States become more sophisticated and more liquid, U.S. institutional investors no longer feel the same need or pressure to make their investments through the United States markets. Guidelines that once required or encouraged investment only in securities listed or traded on a U.S. exchange are no longer the norm. Instead, U.S. institutional investors look to make their investments in the most cost effective, most convenient and most efficient market.<sup>12</sup> As U.S. institutional investors

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<sup>8</sup> U.S. Treasury Dept. Report on U.S. Holdings of Foreign Securities (Nov. 2007).

<sup>9</sup> We also note that increasingly there is a lack of international consensus with respect to what constitutes or should constitute beneficial ownership of securities when securities are the subject of equity derivative contracts and other market trading strategies.

<sup>10</sup> Rule 144A Proposing Release at text accompanying footnote 89.

<sup>11</sup> See Hanson Trust PLC v. SCM Corp., 774 F.2d 47 (2d Cir. 1985) in which the court recognized that the purpose of the Williams Act is not to protect highly sophisticated market professionals.

<sup>12</sup> For example, when U.S. institutional investors decide to invest in the securities of a foreign private issuer that maintains its primary listing in a non-U.S. jurisdiction, we understand that they generally rely on the disclosure

continue to increase their direct investments in foreign private issuers, those issuers will continue to experience increases in U.S. beneficial ownership, although there may be no corresponding increase in the level of interest of U.S. retail and smaller institutional investors.

Moreover, as this direct investment trend continues, it will become increasingly difficult for transactions involving foreign private issuers to qualify for cross-border exemptive relief if the measure of U.S. interest is based on U.S. beneficial ownership. Without cross-border exemptions that are - - and are widely perceived to be - - easily applied, participants in such transactions may have less and less incentive to include U.S. holders. We are aware that U.S. institutional investors often have the practical ability to enter into arrangements with non-U.S. affiliates that enable them to participate in transactions not extended into the United States. Moreover, foreign bidders and issuers may well be able to reach these U.S. institutional investors abroad without using any U.S. jurisdictional means. These arrangements and opportunities are not available to U.S. retail and smaller institutional investors, who therefore suffer the disadvantages that the cross-border exemptions were intended to prevent.

The increased willingness of U.S. institutional investors to make direct investments outside the United States reflects, at least in part, significant modernization and improvement from the U.S. perspective in the disclosure and takeover regulations of many jurisdictions around the world, such as the European Community, Brazil, Chile, Hong Kong, Japan and India. Thus, one ironic consequence of using U.S. beneficial ownership as the exclusive test for eligibility for cross-border exemptive relief is potentially to subject foreign private issuers in jurisdictions with the *most* highly developed regulatory regimes to the *highest* degree of U.S. regulation.

The existing "hostile presumption" currently allows a third-party bidder in a non-negotiated tender or exchange offer to assume that U.S. ownership in the target company is no more than 10% or 40%, the respective Tier I and Tier II thresholds, based on a comparison of U.S. and worldwide ADTV. Given the success of, and lack of abuse with, utilizing an ADTV-based test in hostile transactions during the eight years since the cross-border exemptions came into effect, we see no reason why negotiated transactions should not be put on equal footing. We note that, in practice, the distinction between negotiated and non-negotiated transactions may be quite blurred. Many transactions take twists and turns: they may start friendly (or at least with an attempt at negotiations), turn hostile (or at least suffer a public breakdown in negotiations) and ultimately resolve themselves into agreed transactions. Another ironic consequence of using U.S. beneficial ownership as the exclusive eligibility test is to make it *most* difficult to qualify for Tier I or Tier II the type of transaction that arguably subjects U.S. investors to the *least* procedural and disclosure risk: a negotiated transaction approved by the target's board. We also note that, in our view, the impracticality of obtaining beneficial ownership information in a hostile situation does not warrant drawing a distinction about the level of protection to be afforded to U.S. investors.

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documents published in the jurisdiction of the primary trading market, and not on the U.S. documents that are furnished to or filed with the Commission - perhaps well after the information has been disseminated and absorbed in the issuer's home jurisdiction.

- ***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?***

We believe that the same test should apply to Tier I and Tier II eligibility.

- ***Using U.S. ADTV compared to worldwide ADTV would likely result in many more transactions being eligible for Tier I, and some additional transactions being eligible for Tier II if we maintain the existing ten percent and 40 percent thresholds. Should the thresholds be adjusted so that the transactions eligible for the cross-border exemptions are equivalent, in terms of number of transactions eligible, before and after changing the eligibility test? If ADTV levels in the United States are very low even where beneficial ownership is high, should we adjust the thresholds to account for this situation? For example, should we lower the Tier I threshold to five percent? One percent? Less than one percent? If we do this, should we also adjust the thresholds in the hostile presumption correspondingly? What would be the appropriate adjustments for Tier II?***

Unfortunately, we expect that the continuing concerns of foreign private issuers and other foreign market participants about the application of the U.S. antifraud rules and U.S. litigation exposure will continue to restrain use of the cross-border exemptions. Therefore, although we believe adoption of an ADTV-based test would eliminate many of the disadvantages of the U.S. beneficial ownership test and appropriately encourage the inclusion of U.S. holders in cross-border transactions, we would not expect to see, at least in the short run, a quantum leap in the number of Tier I and Tier II transactions.

We believe that the appropriate thresholds for an ADTV-based test (as well as, as noted above, the current U.S. beneficial ownership test) are the Regulation S Category 1 threshold of 20% for Tier I and the foreign private issuer definitional threshold of 50% for Tier II. These thresholds will serve the important goals of simplifying and harmonizing the U.S. regulatory regime applicable to foreign private issuers and encouraging the inclusion of U.S. investors in cross-border transactions while not detracting from the protection of those U.S. investors who may be presumed to rely upon and require the protections of the U.S. federal securities laws. In light of the Commission's long and successful experience with Regulation S and the MJDS, under no circumstances do we believe that the current 10% and 40% thresholds for Tiers I and II should be lowered for purposes of an ADTV test. Moreover, for the reasons discussed above, we believe that the thresholds for negotiated and hostile transactions should always be the same.

- ***Are there reasons for or against adopting an ADTV test? For example, would an ADTV test be an adequate measure for gauging U.S. retail versus institutional ownership of the target securities?***

We note the Commission's concern regarding an apparent disparity between an ADTV-based measure of U.S. interest and the U.S. beneficial ownership figures yielded by the currently

mandated “look through” analysis. As discussed above, this disparity can be explained by the fact that the beneficial ownership figures capture significant direct investments in foreign securities made outside the U.S. by large U.S. institutional investors.

An ADTV-based test avoids the significant practical difficulties, delays and premature disclosure risks inherent in conducting a “look through” analysis. Further, an ADTV-based test has been used successfully, without abuse, in non-negotiated business combination transactions since the cross-border exemptions were adopted. Given these advantages, and the consistency of such a test with the tests used in Regulation S and recent Commission rulemaking initiatives, we urge the Commission to adopt an alternative ADTV-based eligibility test for cross-border exemptive relief.

- ***Should we qualify the ADTV test based on other factors, such as an acquiror’s actual knowledge or U.S. ownership as reported by the target?***

We believe that qualifying the ADTV test based on U.S. beneficial ownership, either as reported by the target or otherwise known to the acquiror, would defeat the purpose of adopting the ADTV test. Attaching a U.S. ownership qualifier to an ADTV-based test in this manner would reintroduce into the calculation of U.S. interest the distorting effect created by the inclusion of securities held by large U.S. institutional investors who have made direct investments outside the U.S.

- ***If we adopt an ADTV test, should we adopt the concept of “primary trading market” as defined in Exchange Act Rule 12h-6(f)(5)? That is, should we establish the requirement that the issuer maintain a listing for the subject securities on one or no more than two exchanges in a foreign jurisdiction that, alone or together, constitute 55 percent of the trading in the subject securities over a specified period as a comparison point for U.S. trading volume? Should we adopt the concept that the “primary trading market” for the subject securities may encompass one or no more than two foreign markets, and if more than one market, the requirement that the aggregate trading volume in one of those two foreign markets must be greater than the trading volume in the U.S., as specified in Rule 12h-6(f)(5)?***

We believe that any adopted ADTV test should set thresholds based on a comparison of U.S. trading volume with worldwide trading volume. Where a foreign private issuer target has more than one non-U.S. listing, comparing U.S. trading volume against only trading volume in a “primary trading market” would effectively overstate the level of U.S. interest in the foreign private issuer and distort the analysis for exemptive relief. Furthermore, a comparison of trading volume in the U.S. against worldwide trading volume would allow for a consistent baseline of U.S. trading volume to be applied to all foreign private issuers no matter in which, or how many other, markets a given issuer’s securities trade.

- ***Should we propose a different test for Tier I and Tier II eligibility, based on the percentage of shares held in ADR form?***

We understand that U.S. retail investors who desire to invest in foreign stocks generally buy ADRs trading on U.S. exchanges. Thus, a test for Tier I and Tier II (and Rule 801 and 802) eligibility based on the percentage of shares held in ADR form could serve the policy goal of protecting U.S. investors who may be presumed to rely upon and need the protections of the U.S. federal securities laws. This would require clarifying that, for purposes of the test, all shares not represented by ADRs would be presumed to be held by persons who are not U.S. investors.

An ADR-based test would certainly be much more workable than the current “look through” test and, like an ADTV test, would serve to exclude U.S. direct foreign investment from the U.S. side of the equation. However, not all foreign stocks trade in ADR form, especially those of non-reporting foreign private issuers. Also, while seldom done, most ADR deposit agreements allow holders to freely exchange shares and ADRs. Therefore, we believe the alternative test that would best serve the Commission’s goals would be one based on ADTV.

- ***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?***

We believe it is appropriate for foreign private issuers with no U.S.-traded securities to be placed in Tier I because of the nature of the U.S. investors in those securities (i.e., large institutions that participate directly in the foreign markets). It is important to note that the cross-border exemptions do not alter the jurisdictional reach of the U.S. anti-fraud, anti-manipulation and civil liability provisions.

- ***If we make any changes to the standard for determining Tier I and Tier II eligibility, should we also change the standard for the hostile presumption? Should we adopt this alternative standard for business combination transactions only, or should we adopt it for both business combinations and rights offerings?***

In adopting an ADTV-based test, we believe that the Commission should maintain a consistent standard across the various types of cross-border transactions. The two-tier system of exemptive relief was based, not on the type of cross-border transaction involved, but rather on the level of U.S. interest in the transaction. In fact, the Commission stated that its adoption of the cross-border exemptive rules was “intended to encourage issuers and bidders to extend tender offer and exchange offers, rights offerings and business combinations to the U.S. security holders of foreign private issuers” and to balance the need to protect U.S. security holders against the need to “promote the inclusion of U.S. security holders in these types of cross-border

transactions.”<sup>13</sup> We note that, in the Proposing Release, the Commission has proposed to extend Tier I relief to all 13e-3 transactions, regardless of the form they take, for similar reasons.

- *If we change the standard, should we also change the standard for the tender offer rules in Rule 14d-1(b) under MJDS with Canada?*

We believe one set of criteria should apply to all foreign private issuers.

- *Should we propose a different eligibility test(s) for determining eligibility to rely on the cross-border exemptions? What general criteria are important in selecting a measure for U.S. investor interest, for the purposes of this rule? Several potential criteria are (i) the ease of public access to information related to the measure; (ii) the difficulty of manipulation of the measure; and (iii) the alignment of the measure with the percentage of target securities beneficially held by U.S. investors. Are these criteria appropriate? Are there others we should consider?*

As discussed above, a measure of U.S. interest based on beneficial ownership will be distorted by the inclusion of securities held by large U.S. institutional investors that do not rely upon the protections of the U.S. securities laws when investing. We believe the appropriate interest from a U.S. regulatory standpoint is that of U.S. retail and smaller institutional investors who may be presumed to rely upon and need the protections of the U.S. federal securities laws.

In our view, the key criteria for an eligibility test for the cross-border exemptions are as follows: (1) the test should serve to identify the level of interest represented by those U.S. investors who are presumed to rely on and need the protections of the U.S. federal securities laws; (2) the test should be able to be conducted in an expeditious, cost-effective manner; (3) information to be used in applying the test should be readily available to the public; (4) the test should not create a risk of premature disclosure; and (5) the test should be resistant to manipulation. For the reasons stated above, we believe an ADTV-based test meets each of these key criteria. In particular, in light of the increased liquidity, transparency and anti-manipulation rules observed in foreign markets, and the extended effort that would be required, we do not believe there is an appreciable risk that a foreign private issuer's trading volume could be manipulated over a 12-month period for purposes of attaining eligibility for cross-border exemptive relief.

## **II. Proposed Changes to Tier I/ Rule 13E-3**

### **A. 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

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<sup>13</sup> See Cross-Border Adopting Release, Section I.A.



structure of the transaction; however, we believe that further changes to Rule 13e-3 should be made. We, like the Commission, believe that the form of a transaction structure should not prevent an otherwise eligible issuer or affiliate from relying on the Tier I exemption from Rule 13e-3. Consequently, we see no reason why transaction structures that are commonly used abroad, including schemes or plans of arrangement, cash mergers and compulsory acquisitions for cash, should be excluded from the Rule 13e-3 relief that currently exists.

While we commend this proposal, we do not believe that it is sufficiently far-reaching and 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 Canadian provincial law, should be exempt from Rule 13e-3. Moreover, we believe that the existing Rule 13e-3 exemption, as modified by the Commission's proposal, also 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.

When the Commission adopted the original cross border exemptions, most of its experience in regulating cross-border transactions had been gained in the context of cross – border transactions involving companies organized in the United States and the United Kingdom. However, since the adoption of these exemptions, there has been a vast proliferation of the variety of cross-border deals transacted in the market and subject to Commission review. Because they arise from a common legal heritage, the substantive corporate laws of the United Kingdom (and Canada) and the substantive laws of the various states of the United States often share many similar concepts. The same has not remained true as cross-border transactions have expanded to cover multiple jurisdictions in disparate parts of the world.

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 even 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 consummation 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 to ensure that unaffiliated stockholders are not disadvantaged. While full disclosure of conflicts is a worthwhile objective and while Rule 13e-3 theoretically is merely 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 varies significantly from country to country. Foreign directors often owe their duties to their companies and to other constituencies rather than to shareholders. For example, one of the general principles set forth in Directive 2004/25/ of the European Parliament and of the Council of 21 April 2004 on Takeover Bids (the "Takeover Directive") provides that "the board of an offeree company must act in the interests of *the company* as a whole ..." (emphasis added). Moreover, in setting forth the obligation of a target company's board to advise its shareholders as to an offer, the Takeover Directive 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". Stated simply, the duties of European directors are different than those of American directors.

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 because these are the standards of care and loyalty to which U.S. directors generally must adhere under these state laws. However, applicable foreign laws often are quite different from these state laws, do not contain these concepts and do not require that directors 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, which effectively obligates it 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 may increase their exposure to 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. In essence, this full disclosure mandate was the purpose and policy origin of Rule 13e-3. The details of the disclosure required by Schedule 13E-3 and thus the substantive 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. It should not be surprising that a rule drafted on the basis of one legal regime fits poorly when applied to multiple foreign legal systems.

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, as other types of protections for minority shareholders are available. Where a

“fairness” standard applies to the transactions, it is often subject to regulatory or other judicial review. For example, the Takeover Directive, which was adopted in 2004, required 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 of the regulations 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.

The Takeover Directive (1) requires that, with certain exceptions, any person acquiring control of an EC company must make a tender offer to acquire all remaining shares of that EC company but provides defined substantive price protection to the minority shareholders in connection with the mandatory tender offer, (2) provides a right of “squeeze-out” to a controlling shareholder that holds in excess of 90% to 95% of a target company’s shares but, again, provides for substantive price protection for minority shareholders and (3) provides minority shareholders with certain rights to sell or “put” their shares to a bidder with the same price protections that would apply in the case of a “squeeze out”. More specifically, the Takeover Directive required that the legislation of the EC countries specify that the price of a mandatory tender offer must be “equitable” and include a provision to the effect that the highest price paid by the bidder for the same securities over a period of not less than 6 nor more than 12 months before the tender offer, as specified in such legislation, would be regarded as “equitable.” The Takeover Directive also permitted the respective EC countries to authorize their regulatory authorities to adjust the “equitable” price as determined pursuant to the formula in accordance with criteria that are clearly determined. In the case of a “squeeze out,” the “squeeze out” price is required to be “fair”; however, if the “squeeze out” takes place after a voluntary bid, the legislation is required to provide that the consideration offered shall be deemed to be “fair” if, through acceptance of the offer, the offeror has acquired securities representing not less than 90% of the capital carrying voting rights comprised in the offer. Accordingly, investors holding stock 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 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, etc., the Europeans have determined to regulate the conflicts of interest 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 by allowing third party regulators to intervene in establishing price.<sup>14</sup>

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<sup>14</sup> It also is useful to note that the Takeover Directive requires that the takeover laws of the EC countries (1) require, 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) require shareholder approval of any action, other than seeking alternative bids, which may result in the frustration of an

It could be argued that the European approach offers greater investor protection than the U.S. approach or that it offers less protection; however, we do not believe that it should be the role of the SEC to determine which approach is better. Rather, we believe that the SEC should focus on whether investors are adequately informed. In the context of a going private transaction in which a foreign private issuer is the target company, we believe that the policy objective of full and enhanced disclosure can be satisfied without requiring compliance with Rule 13e-3 so long as the parties to the transaction are required to meet the other thresholds tests for the availability of the Tier II exemption and so long as they are obligated to disclose (a) all material aspects of foreign law and regulation affecting minority shareholder rights that are applicable to the transaction and all material actions taken by the parties to comply with such laws and regulations, (b) any aspects of such laws and regulations with which such parties are not in material compliance, (c) the manner in which the offer price was determined, and (d) any position with respect to the transaction taken by the parties to the transaction or their respective boards of directors and the reasons for this position.

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 adopt 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." Moreover, like Europe, Brazil requires that 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 and Canada, business combinations often are accomplished through "schemes of arrangement" or "plans 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 Tier II going private transactions that are the subject of judicial determinations of fairness will not provide meaningful investor protection. Moreover, with regard to other Tier II transactions, we believe the Commission should take into account that foreign takeover laws have evolved significantly since adoption of the cross-border exemptions and the laws of most of the major money-center jurisdictions now contain investor protection provisions that, while different in approach from the U.S., assure disclosure and substantive price protection. Finally, in exempting all proxy solicitations by foreign private issuers from the Exchange Act proxy rules, the Commission recognized that matters in the realm of corporate governance are best addressed by home country regulation. 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 to extend relief from Rule 13e-3 to all Tier II transactions, as proposed above, becomes clear.

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offer, and (3) require the target company board to publish a document setting out its opinion of the offer and the reasons on which it is based.

**B. Extend Tier II Relief Where Target Securities Are not Subject to Rule 13e-4  
Regulation 14D**

- *Is the proposed expansion of the application of the Tier II exemptions to tender offers not subject to Rule 13e-4 or Regulation 14D appropriate?*

The expansion of the Tier II exemptions to tender offers not subject to Rule 13e-4 or Regulation 14D is appropriate and welcome. We do not see any reason why tender offers for debt securities and equity securities not registered under Section 12 of the Exchange Act and therefore subject only to the basic level of tender offer regulation embodied in Regulation 14E should not receive the same relief as tender offers for Section 12-registered equity securities, which are considered to require the more extensive regulatory protections set forth in Rule 13e-4 or Regulation 14D. Thus, we believe the Commission should revise the tender offer rules to eliminate any possible uncertainty regarding the applicability of the Tier II exemptions to offers subject only to Regulation 14E. While some of the Tier II exemptions are not necessary since they are exemptions to requirements of Regulation 14D that do not have counterparts in Regulation 14E, the remainder are important because they permit bidders to follow the requirements of home jurisdiction law or practice.

- *Should we condition the proposed extension of the relief provided under Tier II on any other factors besides general eligibility to rely on the Tier II exemptions?*

We do not believe that any additional conditions should be imposed on a bidder's ability to rely on the Tier II exemptions for cross-border tender offers not subject to Rule 13e-4 or Regulation 14D.

- *Are there other areas in which we should provide targeted relief (other than those currently proposed for Tier II offers) for tender offers not subject to Rule 13e-4 or Regulation 14D?*

We do not see the need at this time for additional targeted relief for tender offers not subject to Rule 13e-4 or Regulation 14D. However, as discussed below, we propose that the Commission create two additional exemptions from Rule 13e-4 for certain *de minimis* cross-border transactions.

In contrast with Section 14(d)(1) and Regulation 14D, Section 13(e)(1) and Rule 13e-4 under the Exchange Act do not contain any *de minimis* exemptions apart from an exemption for issuer tender offers extended to holders of not more than a specified number of shares that is less than 100. We propose two modifications to facilitate cross-border transactions. First, in recognition of the fact that U.S. and foreign market practices differ and that in many jurisdictions the trading value of shares is much lower than in the U.S., we propose amending Rule 13e-

4(h)(5) so that, in the case of foreign private issuers, the maximum number of shares for which an exempt offer may be made shall be the greater of 99 or such other number as represents an “odd lot” in the foreign private issuer’s principal market. Secondly, we propose an exemption to permit a foreign private issuer to make what arguably U.S. law may consider an issuer tender offer without compliance with Rule 13e-4 provided that (1) the offer is not regulated as a tender offer in either the issuer’s home jurisdiction or, if different, its principal market and (2) the maximum number of shares that may be acquired in the transaction does not exceed 5% of the outstanding subject securities. While this is not a situation of direct conflict between U.S. and foreign law, we believe that this exemption is justified by the expansive concept of a tender offer under U.S. law in contrast with foreign law. Such an exemption would, for example, facilitate the provision of “small shareholder dealing facilities” that are often provided in jurisdictions outside the U.S. to enable retail investors to dispose of the relatively small quantities of shares they receive in a business combination transaction without delay or transaction costs.<sup>15</sup>

### **C. Expand Tier II Relief for Dual or Multiple Offers**

- *Should we permit the use of multiple offers outside of the United States for Tier II eligible tender offers?*

Yes. We view this as a technical issue that should be approached with a view to giving bidders maximum flexibility to extend what is essentially a single transaction into several jurisdictions by separating the transaction into separate tender offers that comply with each respective jurisdiction’s requirements. Based on the extensive experience to date, we see no reason to require bidders in Tier II transactions to continue to seek no-action relief.

- *Should we allow all non-U.S. holders to be included in a U.S. offer, or only non-U.S. holders of ADRs, as proposed?*

The Commission’s proposal to revise the equal treatment provisions in the tender offer rules to allow the U.S. offer in a multiple offer structure to be made to U.S. target holders and all holders of ADRs representing interests in the subject securities is appropriate. In addition, while the staff has not received requests for relief to permit foreign target holders who do not hold in ADR form to participate in the U.S. offer, we do not see any distinction between holders of shares and holders of ADRs for this purpose. Provided that the home country rules do not prohibit the inclusion of these holders, we see no U.S. policy reason to do so. Moreover, this result would be consistent with the Commission’s position that ADRs and the underlying shares represent the same class of securities for purposes of an offer.

- *Should we allow U.S. holders to be included in the foreign offer(s) open to target security holders outside of the United States? Should we permit this, as proposed, only when*

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<sup>15</sup> See General Electric Company and GE Investments, Inc. (February 24, 2004); Reuters Group PLC and Thomson Reuters PLC (February 29, 2008).

***applicable foreign law does not allow exclusion of U.S. holders from the foreign offer, even where a concurrent U.S. offer is available to them? Is the requirement that the implications of participating in the foreign offer(s) be disclosed in the U.S. offering materials adequate to protect U.S. investors? Should we impose additional conditions on the ability of offerors to include U.S. target holders in the foreign offer(s)?***

We support the Commission's proposal to permit U.S. persons to be included in the foreign offer(s) where the laws of the jurisdiction governing such foreign offer(s) expressly preclude the exclusion of U.S. persons from the foreign offer(s). We believe this approach properly balances the protection of U.S. investors with the need for bidders to comply with the requirements of foreign jurisdictions. Disclosure of the implications of participating in the foreign offer(s) should be adequate protection for U.S. investors interested in tendering their securities into the foreign offer as opposed to the U.S. offer, and we do not believe that it is appropriate to impose any other conditions on offerors.

- ***Are there situations where bidders in cross-border tender offers should be permitted to separately pro rate securities tendered into U.S. and foreign offers?***

Consistent with our view that a transaction should be viewed as a single offer separated into separate tranches to meet local regulatory requirements, we believe there should be a single proration pool. We are not aware of any specific situations that would justify separate proration pools for U.S. and foreign tranches and we believe that any situations that arise can be most properly handled by the staff on a case by case basis.

#### **D. Termination of Withdrawal Rights While Tendered Securities Are Counted**

- ***Is it appropriate and in the best interests of U.S. investors to permit the suspension of back-end withdrawal rights, as proposed?***

We believe it is reasonable and appropriate to allow a bidder to suspend back-end withdrawal rights during the period in which tendered shares are centralized and counted, whether or not a subsequent offering period is provided.

- ***Do the proposed conditions address bidders' practical concerns while still protecting tendering security holders?***

We believe that the conditions imposed on the suspension of back-end withdrawal rights, particularly the requirement that all conditions other than the minimum tender condition must be satisfied, will protect holders from the possibility of any protracted "limbo" period following the expiration of the initial offer period in which they might be placed in the difficult position of not being able to exercise withdrawal rights and not having received payment for their securities.

- *Should we permit back-end withdrawal rights to be suspended only during the counting process? Or should this relief be provided through the announcement of the results of the tender offer?*

We believe that it is appropriate and desirable for the Commission to defer to, and avoid conflicts with, the tender, acceptance and payment procedures of a foreign private issuer's home jurisdiction and principal market. Therefore, we support extending the suspension through the announcement of the results of the tender offer, provided the timing of such announcement comports with home jurisdiction and principal market requirements.

#### **E. Expanded Relief for Subsequent Offering Periods**

- *Are there any other conflicts between U.S. and foreign laws or practice arising out of the subsequent offering period structure that should be addressed through additional rule revisions?*

Apart from the maximum limit on the duration of the subsequent offering period, which we support eliminating, and accommodations necessary for "mix and match" offers, as discussed below, we have not identified any common or recurring conflicts that are not being addressed.

- *Is it appropriate, as proposed, to eliminate the 20 U.S. business day limit on the length of the subsequent offering period for Tier II cross-border tender offers?*

We believe it is appropriate to give a bidder the flexibility to set a subsequent offering period of any duration (of not less than three days).

- *Should we eliminate the 20 U.S. business day limit on the length of the subsequent offering period for all tender offers generally, including those for domestic issuers?*

We see no basis for treating U.S. issuers and foreign private issuers differently with respect to the maximum subsequent offering period.

- *Do bidders for U.S. companies face any practical difficulties because of the 20 U.S. business day limit?*

Practical considerations such as corporate law "freeze-out" provisions that prohibit back-end mergers for a period of time unless a certain ownership threshold is achieved and short-form merger requirements also based on an ownership threshold are typically dealt with as conditions to the original tender offer. We do not believe, therefore, that bidders for securities of U.S. companies face serious practical difficulties due to the 20 business day limit on subsequent



offering periods. However, as noted above, we support giving a bidder greater flexibility over its offer through elimination of the maximum duration of the subsequent offering period.

- ***Is the limit on the length of the subsequent offering period necessary for investor protection, either in the U.S. or in cross-border offers? Should we retain a limit but increase it, for example, to 30 or 60 U.S. business days?***

We do not believe that there is any sound policy reason to impose a limit on the length of the subsequent offering period. It does not appear that a lengthy subsequent offering period would have a greater effect on the market than, for example, a bidder's use of successive 20 business day tender offers over a more than 60 business day period. Moreover, to the extent that investors essentially have a "put right" during the subsequent offering period, that right is more valuable the lengthier the period.

- ***Is it appropriate to permit payment for securities tendered during the subsequent offering period in cross-border tender offers to be made up to 14 business days after the date of tender?***

We do not believe that it is appropriate for the Commission to impose a 14 business day – or indeed any other – deadline for payment for securities tendered during a subsequent offering period. In keeping with our belief that deference should be given to, and conflicts should be avoided with, foreign tender, acceptance and payment practices, we would, instead, simply require payment to be made within the time period permitted by the home jurisdiction and principal market.

- ***Is 14 business days a sufficient period to make this relief useful for cross-border tender offers that include a subsequent offering period? Would a shorter (five, seven or 10 business days) or longer period (15, 20 or 30 business days) of time better serve the interests of bidders or tendering security holders?***

As indicated above, we believe the Commission should enshrine the principle of deference to home jurisdiction and payment requirements, which may vary by jurisdiction and change over time.

- ***Should we permit payment for securities tendered during the subsequent offering period to be made within a certain number of days after the end of that period, such as within five, 10 or 14 business days, even if we eliminate the time limit on the length of the subsequent offering period? Or would this disadvantage tendering security holders?***

As indicated above, we believe deference to home jurisdiction and principal market payment requirements is appropriate.

- ***Should we revise our rules to permit the payment of interest on target securities tendered during the subsequent offering period, as proposed?***

Interest payments on target securities tendered during a subsequent offering period do not appear to violate the policy underlying the best price rule. Interest payments would compensate security holders for the opportunity cost of not being able to withdraw their tenders and sell in the market during the period prior to payment.

- ***Should we expand the proposed relief to encompass interest paid on securities tendered during the initial offering period?***

We do not believe this expansion is required unless mandated by foreign law. Where withdrawal rights apply in the initial offering period, security holders cannot be considered to have “sold” their securities until the expiration of the offer and satisfaction or waiver of its conditions. Thus, the opportunity cost argument discussed above does not apply to the initial offering period. However, we do believe that the Commission should clarify that where the interest amount is mandated by foreign law and is defined by reference to an index and a change occurs in the index within the last 10 business days of the initial offer period, the change in the index is not a change in the offer price requiring an extension of the offer period under Rule 14e-1.

- ***Should we provide this relief only where interest is required to be paid under foreign law, as proposed?***

Whether interest is required to be paid by foreign law or is paid voluntarily in the subsequent offer period, the regulation should be driven by the economic analysis discussed above.

- ***Should the proposed amendment only permit de minimis interest payments? If so, what limits are appropriate?***

As discussed above, interest payments do not appear to have the potential to be coercive and therefore we would not advocate that the Commission prescribe a maximum amount.

#### **F. Prompt Payment and “Mix and Match” Offers**

- ***Would these proposed rule changes address the practical needs of cross-border offerors? Would there be any disadvantages for target security holders?***

We believe that the proposed rule changes adequately address the identified conflicts between U.S. regulation and the typical features of “mix and match” offers for foreign private

issuers. We do not believe that the proposed changes create any disadvantages for target security holders.

- ***Should we extend these changes to all tender offers, including tender offers for U.S. issuers? Would bidders for U.S. issuers use the ability to make mix and match offers? Would such a structure be workable in the U.S. and in the best interests of U.S. investors?***

We do not believe there are meaningful grounds to limit “mix and match” relief to tender offers for foreign targets. We note that an acquiror of a U.S. target currently is able to provide consideration on a “mix and match” basis by entering into a merger agreement that offers target shareholders the same elections. Acquirors of the U.S. targets should be able to choose the form of transaction – tender offer or merger – that best serves their commercial objectives. The share portion of the consideration in both forms of transaction will be registered under Section 5 of the Securities Act.

**G. Additional Guidance with Respect to Terminating Withdrawal Rights After Reduction or Waiver of a Minimum Acceptance Condition**

- ***Should we continue to allow bidders in Tier II-eligible offers to waive or reduce the minimum acceptance condition without providing withdrawal rights?***
- ***Are the conditions set forth in the Cross-Border Adopting Release adequate? Or overly burdensome?***
- ***Is it appropriate to modify such relief, as discussed above?***
- ***Should we condition the ability to waive or reduce the minimum acceptance condition without providing withdrawal rights on the undertaking by the bidder not to waive below a majority, as proposed? What should constitute a “majority” for these purposes?***
- ***Should we continue to require bidders seeking to rely on the interpretation to place an advertisement in a newspaper of national circulation in the United States? Does this serve a useful function under current market practices? Does it constitute an undue burden?***
- ***Is the guidance, as modified above, clear? Should it be codified in rules?***

We believe that withdrawal rights are an important shareholder protection under the Williams Act. The modifications to those rights included in the Commission’s current interpretive guidance from the Cross-Border Adopting Release represent thoughtful adjustments

to the current rules that serve the dual purposes of protecting shareholders while encouraging the inclusion of U.S. shareholders in cross-border tender and exchange offers. Except as discussed below, we agree with the Commission that the additional limitations proposed in the Proposing Release are reasonable and will further serve to protect the interests of U.S. shareholders. Also, we believe that this exemptive relief should be codified so as to provide greater certainty to transaction participants and their advisors, and to remove the burden of seeking specific relief from the staff for each transaction.

We believe that the Commission should condition the ability to waive or reduce the minimum acceptance condition without providing withdrawal rights on the undertaking by the bidder not to waive or reduce the minimum acceptance condition below the percentage threshold required for the bidder to control the target company after the tender offer under foreign law. We note that this is often the requirement of foreign law. However, some of the other conditions should be revisited. For example, because bidders have very little time to decide to waive the minimum condition or not, the requirement to give advance notice is sometimes unworkable and can create tactical disadvantages in competed offers. Given the prevalence of Internet based communication, the requirement for a national newspaper advertisement is unnecessary.

#### **H. Early Termination of the Initial Offering Period or a Voluntary Extension of the Initial Offering Period**

- *Is this relief necessary to alleviate practical difficulties? If so, should the relief be codified in rules?*
- *Should we allow a bidder in a Tier-II eligible cross-border tender offer to terminate the initial offering period or any voluntary extension of that period upon the satisfaction of all offer conditions? Or should the rules limit this relief only to early termination of the initial offering period or only to early termination of a voluntary extension of the initial offering period?*
- *Should we allow early termination only where it is specifically required under the law of the target's home jurisdiction? Or should this be permitted when customary under foreign practices as well?*
- *Should we condition this relief on any other conditions besides those listed above? For example, should we require the same kind of advance notice as we propose for a waiver of the minimum acceptance condition in a tender offer?*

We believe that the Commission's proposal is reasonable and should be codified. We believe that early termination should be permitted when required either by foreign law or when permissible under foreign market practice. The condition that all offer conditions have been

satisfied is reasonable, and this relief should be available both for the initial offering period and for any subsequent voluntarily extended offering period. We agree that an advance notice of an anticipated early termination of either an initial or extended offering period be incorporated in the amended rule, consistent with the Commission's proposals concerning waivers or reductions of the minimum acceptance condition.

#### **I. Codification of Rule 14e-5 Cross –Border Exemptions**

- ***We solicit comments on all aspects of the proposed exceptions, including each of the enumerated conditions.***

We strongly support the Commission's decision to codify the exemptive relief that it has provided under Rule 14e-5 to bidders seeking to purchase shares outside of the U.S. tender offer in Tier II cross-border tender offers. The conditions to such exemptive relief achieve the regulatory goals of protecting the equal treatment of U.S. shareholders and providing a check against potentially fraudulent or manipulative purchasing activity by the bidder and those affiliated with the bidder, including affiliates of the bidder's dealer-manager in the tender offer. Moreover, the decision to codify relief that the Commission has routinely granted since 2000 will promote the Commission's policy goal of encouraging issuers and bidders to extend tender and exchange offers for the shares of foreign private issuers to U.S. shareholders by eliminating both the regulatory uncertainty that was created by extending relief under Rule 14e-5 to Tier I but not Tier II offers, and the timing and cost burdens associated with seeking exemptive relief from the Commission for each transaction. We also recognize that the Commission has streamlined the conditions imposed by the no-action letters in certain respects and believe that as streamlined, the Financial Advisors and Sulzer conditions adequately protect investors. As discussed below, however, we believe that the Commission should consider whether there are additional conditions imposed by the no-action letters that can be eliminated.

- ***We solicit specific comments on each of the conditions in the Rule 14e-5(b)(11) proposal concerning Tier II status, economic terms, consideration, currency conversion, procedural terms, disclosure and purchases being made solely pursuant to the foreign tender offer.***

We suggest modifying condition (v) of proposed Rule 14e-5(b)(ii) to clarify that purchases by the offeror in the foreign offer must be made solely pursuant to the foreign offer, except to the extent such purchases are permitted to be made under Rule 14e-5(b)(12).

- ***We solicit specific comments on each of the conditions in the Rule 14e-5(b)(12) proposal concerning foreign private issuer and Tier II status, no purchases or arrangements to purchase in the U.S. other than pursuant to the tender offer, and disclosure. We also solicit comments on the price matching condition applicable to the offeror and its affiliates, as well as each of the additional conditions applicable to a financial advisor's affiliate, including the financial advisor having an affiliate that is registered as a broker or dealer under Section 15(a) of the Exchange Act.***

- *Are there additional means besides analyzing prior purchasing activity by the financial advisor's affiliate to assure that routine trading activity outside the tender offer is not conducted with the intent to affect the tender offer?*
- *Are there additional conditions that should be added to the proposed exceptions to safeguard the interests of persons who sell their securities in response to a tender offer? In particular, should conditions number ten from the Financial Advisors letter and numbers three and five from the Sulzer letter be incorporated into the Rule 14e-6(b)(12) proposal?*
- *Are there other alternatives that would better protect the interests of security holders?*
- *We solicit comment on suggested definitions of risk arbitrage.*
- *In addition to risk arbitrage, is there any other purchasing activity that should be excluded from the proposed Rule 14e-5(b)(12) exceptions?*

In light of all the other protections and the globalization of securities markets, we do not believe that it is necessary for the protection of U.S. investors to require purchases to be made *outside* the United States.

We do not believe it is necessary with respect to purchases by affiliates of the financial advisor to require that any such purchases above the tender offer price cause the bidder to have to increase the tender offer price. We believe this condition is inconsistent with the requirements that the affiliate's investment decisions be made independently of the financial advisor and not be in furtherance of the tender offer and that informational and operational barriers exist between the financial advisor and the affiliate. If those conditions are satisfied, the affiliate should be able to manage at least its non-proprietary accounts as it deems to be in the best interest of clients, and not be frozen out of additional purchases when the market price moves above the tender offer price.

Finally, we do not see any reason for the condition that the financial advisor have an affiliate that is a U.S. registered broker-dealer. If retained, the Commission should explain the expected role of that broker-dealer with respect to the purchases.

### **III. Other Proposals**

#### **A. Early Commencement for Regulation 14E Exchange Offers.**

We support the Commission's proposal to expand the availability of the "early commencement" procedure to cover all Tier II-eligible exchange offers subject to registration

under the Securities Act, regardless of whether tender offers for the subject securities themselves are subject to Regulation 14D or Rule 13e-4 under the Williams Act. In our view, this change in the existing regulatory structure would advance the Commission's stated goal of encouraging bidders in cross-border transactions to allow participation by U.S. investors while assuring all necessary and appropriate investor protections – including but not limited to the added benefits, otherwise not required in connection with Regulation 14E offerings, of withdrawal rights and mandatory minimum extension periods to permit dissemination of material change information. For the same reasons, we support the corresponding amendment that the Commission proposes to Securities Act Rule 162, which would exempt from Section 5(a) of the Securities Act those exchange offers that are not subject to Rule 13e-4 or Regulation 14D, but that meet the conditions for the Tier II relief (which as proposed to be amended would encompass withdrawal rights and mandatory minimum extension periods). Finally, for the reasons discussed below, we urge the Commission to extend the early commencement option to Regulation 14E exchange offers for the securities of U.S. domestic issuers.

Our experience with representing clients that have availed themselves of early commencement in the context of Securities Act-registered exchange offers subject to Regulation 14D and/or Rule 13e-4 – whether for securities of foreign or domestic registrants -- has been almost uniformly positive. Accordingly, we fully agree with the Commission that the staff has fulfilled its commitment, first made in 1999, to expedite the review of Securities Act-registered exchange offers subject to Rule 13e-4 or Regulation 14D in order to level the playing field between cash and exchange offers. The time has come, we believe, for the Commission to build on this record of success by expanding the staff's original commitment to encompass cross-border exchange offers that are not subject to Rule 13e-4 or Regulation 14D, but that are required to be registered under the Securities Act. Investors in these transactions will receive the full panoply of protections under the Securities Act, coupled with safeguards that are provided under Tier II and that otherwise would not be offered to them in "pure" Regulation 14E offerings (i.e., withdrawal rights, mandatory minimum extensions).

- ***Should the expanded eligibility to commence early be limited, as proposed, to cross-border exchange offers eligible to rely on the Tier II exemptions only?***

No, assuming that Rule 162(a) is amended to make clear that early commencement in exchange offers for the securities of domestic issuers is likewise conditioned on the bidder's extension of withdrawal rights and compliance with mandatory minimum extension periods in the case of material informational changes. We urge the Commission to permit early commencement in Regulation 14E-only exchange offers that are subject to registration under the Securities Act, regardless of whether these offers are cross-border transactions falling within the ambit of Tier II, provided that a bidder's use of this option is conditioned upon the same voluntary extension of withdrawal rights and compliance with mandatory minimum extension periods (in the event of specified material informational changes) as would be mandated under the proposed Tier II amendments. The ability of the Commission's staff to review and comment fully on the Securities Act registration statement and the concomitant private remedies available to target company investors under that statute, along with the added Williams Act safeguards that

these investors otherwise would not be entitled to invoke in Regulation 14E-only offerings, are more than sufficient to protect U.S. investors in both U.S. and foreign companies presented with an investment decision in connection with such an offering.

- ***Should the expanded eligibility be conditioned on the bidder providing withdrawal rights and keeping the offer open for certain minimum time periods after information about material changes is disseminated to security holders, as proposed? Are there any other procedural protections applicable to offers subject to Regulation 14D or Rule 13e-4 besides withdrawal rights that should be required in an early commencement offer not subject to Regulation 14D or Rule 13e-4?***

We believe that expanded eligibility to use the early commencement procedure is properly conditioned on the bidder providing withdrawal rights and keeping the offer open for certain prescribed minimum time periods after material change information is disseminated to investors. However, for the reasons noted above, no other “procedural protections” applicable to Regulation 14D or Rule 13e-4 tender offers are necessary or appropriate in this situation to assure the requisite investor protection.

- ***Should the early commencement option be made available for all exchange offers, including those for domestic target companies not within the scope of current Rule 162? For example, would this be useful in the case of tender offers for debt securities, which are not covered by Regulation 14D or Rule 13e-4?***

We believe that the early commencement option should extend to all Securities Act – registered exchange offers for *either* equity or debt securities of *either* domestic or foreign target companies, with a corresponding amendment made to Rule 162 and the applicable Williams Act rules. Those bidders that opt for Securities Act registration of a Regulation 14E exchange offer, and are willing voluntarily to allow withdrawal rights and comply with mandatory minimum extension requirements, should be able to avail themselves of early commencement if they so choose. As discussed further below, moreover, there is no sound policy reason to distinguish between equity and debt exchange offers.

- ***Are there certain types of exchange offers for which early commencement should not be permitted, whether in the cross-border context or otherwise? For example, should transactions in which an issuer privately places securities and, shortly thereafter, conducts an exchange offer to exchange them for registered securities citing Exxon Capital and its progeny be permitted to commence early, where such offers are not subject to Rule 13e-4?***

There is no reason not to permit early commencement for so-called A/B exchange offers, given that the investors in such transaction can fend for themselves for purposes of the Securities Act (and therefore, we submit, for purposes of Regulation 14E): the Exxon Capital exchange procedure normally follows a private placement limited to qualified institutional buyers within



the meaning of Rule 144A and possibly a limited number of accredited institutional investors. More importantly, if withdrawal rights and mandatory minimum extension safeguards were to apply throughout the tender offer period, these investors would not be adversely affected and would presumably have the benefit of Securities Act remedies in connection with the registered exchange offers. In any case, participating investors arguably have made their investment decision, in the context of the private placement, to swap a 144A-eligible security for the identical security to be issued under the effective Form S-4 or F-4.

Although the early commencement issue should only have relevance in connection with registered exchange offers, the Commission should clarify that, where a tender offer is conditioned on a judicial determination of fairness in reliance upon the Section 3(a)(10) exemption from registration, the commencement of an exchange offer prior to the court determination of fairness would not result in a non-exempt offer of securities. This approach would be consistent with the guidance provided by the staff with respect to exchanges subject to a shareholder vote in Section 3 of Staff Legal Bulletin No. 3A (June 18, 2008).

- *What have been bidders' experiences with the usefulness of the early commencement option in our current rules, in light of the staff review and comment process?*

Our experience in representing bidders that have elected early commencement has been positive. We have found that the staff has worked hard over the past eight years to fulfill the Commission's promise in Regulation M-A to reduce the delay and other costs associated with securities-based exchange offers in comparison with their cash-based counterparts.

## **B. Proposed Changes to Schedules and Forms**

### **1. Forms CB and F-X**

We cautiously support the Commission's proposal to require the electronic submission of Form CB and accompanying Form F-X, where such forms otherwise are required to be submitted in connection with cross-border transactions conducted under Tier I and/or Securities Act Rules 801 or 802, but we are concerned about the possible deterrent effect the prospect of increased liability arising from electronic submission may have on foreign bidders. As the Commission itself points out, however, "there are costs associated with requiring that all Forms CBs and related Forms F-Xs be filed electronically."<sup>16</sup> Accordingly, we urge the Commission to consider providing interpretive guidance regarding the availability of the Regulation S-T hardship exemption to a non-reporting person or entity obligated to file a Form CB and any related Form F-X in the unique context of a cross-border offering made in reliance upon the Tier I and/or Rule 801 or 802 exemptions.

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<sup>16</sup> See Proposing Release at page 157.

- ***Should we require all Form CBs to be furnished to the Commission in electronic form via our EDGAR system, as proposed? Would this requirement present a hardship for non-reporting entities submitting the form? For example, would the process for procuring a notarized authenticating document in a foreign jurisdiction for purposes of obtaining a Form ID present a hardship for non-reporting entities?***

Although we do not have the necessary data to perform the type of quantitative cost-benefit analysis that the Commission itself must undertake before proceeding to adoption of this proposal, we are concerned that the obligation to make an electronic submission via EDGAR may present a significant hardship for some non-reporting entities that could be sufficient to tip the balance in favor of complete exclusion of U.S. investors where their participation is not necessary to complete a predominantly non-U.S. transaction. We recognize that the liability consequences under the federal securities laws of furnishing these documents to the Commission are the same regardless of the paper vs. electronic format of the submission. However, we remain concerned that current global perceptions of the excessive litigiousness of the U.S. securities markets might motivate some foreign bidders (or issuers, in the case of a self-tender or rights offering) that otherwise might not be subject to U.S. jurisdiction to avoid the risk of publicity generated by a widely available notice on the SEC's EDGAR website, through the simple expedient of withholding the offer from the *de minimis* U.S. investor base of a particular target or issuer. Accordingly, and depending on the data collected by the Commission during this comment process, we recommend that the Commission forego action if it appears on balance that adoption would increase the risk that U.S. investors would not be permitted to participate in a Tier I (or Rule 801 or 802) transaction.

- ***If we change our rules to require the electronic submission of all form CB's, should we adopt the same requirements for electronic filing of Form F-Xs, as proposed, when required to be submitted with the Form CB?***

Assuming the Commission were to determine, based on public comment, that the benefits of electronic Form CB filings in some or all situations where not currently required would outweigh the costs, there would seem to be no reason not to include a related Form F-X. If the real concern of a prospective foreign bidder is the perceived liability risk, however, the public availability of an English-language form submitting to U.S. service of process could have a significant deterrent effect – thus defeating the SEC's stated goal of expanding U.S. investor participation in cross-border transactions in the securities of non-U.S. companies.

- ***Are there reasons why electronic filing would not be desirable?***

As noted above, we believe global perceptions of excessive U.S. litigation risk may be exacerbated by widespread public availability via EDGAR.

- *Should we require the filing person to fill in a box on the cover page of the Form CB specifying the level of U.S. ownership of the target or issuer that permits reliance on the cross-border exemptions?*

We would not support such a requirement unless the Commission were to adopt an ADTV test for U.S. ownership, for the reasons discussed below.

## 2. **Schedule TO, Forms F-4 and S-4 (Tier II)**

We support the Commission's proposal to add a box to the cover page of Schedule TO and Forms F-4 and S-4, which a filing person would be required to check to indicate its reliance on the applicable cross-border exemptions. We agree that the inclusion of this information could expedite staff review by addressing potential comments, and provide more information to U.S. based investors without imposing undue burdens on filers.

However, we do not believe that the Commission should add a space or box to the cover pages of these schedules and forms to require a filer to specify the U.S. ownership percentage that permits reliance on the exemption(s) claimed, and are pleased that the Commission has not affirmatively proposed such a change. A filer's compliance with this requirement might suggest erroneously to U.S. investors that the target company (or issuer) actually has the maximum level of U.S. ownership permissible under the particular exemption(s) cited. If it wishes to rebut such a potentially negative inference, the filer would be forced to disclose what it reasonably believes to be the approximate level of U.S. ownership within a specified range prior to public announcement of the particular transaction. Unless the Commission moves to a more objective ADTV test, we are concerned that the potential liability risks to the filing person of providing this information – given the inherent deficiencies of the present U.S. beneficial ownership test -- would significantly outweigh any countervailing informational benefits to investors, thereby undermining the Commission's stated goal of promoting enhanced U.S. investor participation in cross-border deals.

## 3. **Beneficial Ownership Reporting by Foreign Institutions**

We generally support the Commission's proposed expansion of short-form Schedule 13G eligibility to cover foreign institutional investors that are not currently specified in Rule 13d-1(b)(1)(ii) or otherwise able to claim the statutory or administrative exemptions from Schedule 13D reporting that are now available. We believe that it is appropriate to require short-form eligible foreign institutions to certify on Schedule 13G that they are subject to a regulatory scheme "substantially comparable" to those applicable to their domestic institutional counterparts listed in existing Rule 13d-1(b)(1)(ii). This certification, along with the current condition of favorable Schedule 13G reporting status that the investor relying on Rule 13d-1(b)(1)(ii) has acquired and holds the securities in the ordinary course of business and without the purpose or effect of influencing or affecting control of the issuer, is sufficient because it gives the Commission all the leverage it needs to pursue those foreign institutions that might abuse the opportunity thus extended. We recommend that the Commission similarly expand the

carve-out from the definition of "beneficial owner" of more than 10% of a class of Section 12-registered securities, as set forth in Rule 16a-1(a)(1), to include non-U.S. institutions eligible to file on Schedule 13G under proposed Rule 13d-1(b)(1)(ii)(K). For the same reason, we do not believe that a Form F-X is either necessary or appropriate to expand that leverage, whether a foreign institution is relying on Rule 13d-1(b), as proposed to be expanded, or Rule 13d-1(c) – the filing of a Schedule 13G itself affords the Commission an adequate jurisdictional basis for enforcement purposes.

By the same token, we do not support that aspect of the Commission's proposed amendment to Rule 13d-1(b)(1)(ii) that would condition the availability of short-form beneficial ownership reporting by foreign institutions on an undertaking to furnish upon staff request the information that otherwise would have been disclosed pursuant to a long-form beneficial ownership report on Schedule 13D. We note in this regard that foreign investors qualified to rely on the hybrid "passive investor" reporting option codified in Rule 13d-1(c) need not provide such an undertaking, although we do recognize that this option has a more onerous amendment provision and does not give an investor the ability (which is available under Rule 13d-1(b)(1)(ii)) to delay filing a Schedule 13G for up to 45 days after the end of the calendar year in which that person's beneficial ownership exceeds five percent. We acknowledge that the undertaking has been a condition of the staff no-action relief to date, but question whether it is either necessary or consistent with the policy underlying expanded filing relief. It would be preferable, in our view, for the Commission to condition a foreign institution's reliance on Rule 13d-1(b)(1) on an undertaking, set forth in its Schedule 13G, to supply the staff in writing (upon request) with a written analysis of the basis for the filing person's certification to the "substantial comparability" of its home-country regulatory framework.

- ***Should a foreign institution that seeks to use a Schedule 13G also be required to file a Form F-X? Should the Form F-X, like Schedule 13G, be required to be filed electronically?***

For the reasons outlined above, we do not support a Form F-X filing as a condition to the proposed exemption.

- ***Should a foreign institution that intends to rely on proposed new Rule 13d-1(b)(1)(ii)(K) be required to file a public notice of such intent? If such a notice was required to be filed, when should the notice be filed and should the filer be required to make the proposed certification at the time the notice is filed?***

We respectfully submit that such a requirement is neither necessary nor appropriate to protect U.S. investors. Under the proposal, only certain foreign institutions willing to certify that they are subject to comparable regulatory schemes would be eligible to file a Schedule 13G. Absent the Commission's grant of a hardship exemption under Regulation 13G, these filings would be publicly available on the Commission's widely used EDGAR website. Like their U.S. counterparts in current Rule 13d-1(b)(ii)(A) through (J), foreign institutions that otherwise would

fit within proposed sub-paragraph (K) of that Rule would not be eligible either to file or to remain on a short-form Schedule 13G once they were no longer able truthfully to represent that they acquired and/or hold the securities without a control purpose or effect and in the ordinary course of their business. These safeguards are sufficient, we believe, to deter abuse even if – as we recommend -- eligible foreign institutions are not required to provide an undertaking to supply long-form Schedule 13D information upon staff request. At the same time, we recognize the importance of the Commission's enforcement concerns and would not object if the Commission were to limit short-form eligibility under Rule 13d-1(b)(1)(ii)(K) to those non-U.S. institutional investors from jurisdictions whose regulatory and/or law-enforcement authorities are signatories either to a bilateral MOU with the SEC, or to the IOSCO Multilateral Memorandum of Understanding.

- ***Should we also require foreign institutions filing as passive investors under Rule 13d-1(c) to file a Form F-X?***

No, for the reasons discussed above.

- ***Should the use of Schedule 13G by foreign institutions relying on the proposed rule be limited to institutions from jurisdictions that have a bilateral enforcement memorandum of understanding (MOU) with the SEC or institutions that are signatories to the IOSCO Multilateral Memorandum of Understanding concerning consultation, cooperation and the exchange of information?***

We would have no objection to such a condition, as just explained, if the Commission were to forego the imposition of an undertaking under sub-paragraph (K) to provide Schedule 13D-level information to the staff upon request. The Commission's current enforcement powers, coupled with the Commission's ability to invoke the assistance of a foreign institution's home-country regulator and/or law-enforcement officials, are more than sufficient to prevent abuse of Schedule 13G if made available to a limited number of foreign institutional investors.

#### **IV. Interpretive Guidance**

We appreciate the Commission's effort to provide helpful interpretive guidance (the "Interpretive Guidance") as part of its efforts to clarify the operation of the tender offer rules and registration provisions in cross-border transactions. As the Interpretive Guidance notes, the question of whether a bidder for a U.S. company may exclude holders residing in non-U.S. jurisdictions is just the flip side of the question faced by a bidder for a non-U.S. company under foreign tender offer schemes that require the offer be made to all holders. The Interpretive Guidance addresses the circumstances under which it is appropriate or necessary to exclude holders from a tender offer based on their country of residency or citizenship. We suggest that the circumstances in which such categorical exclusions are necessary in either U.S. or foreign offers should be rare and the Commission should minimize the occurrence of such exclusionary practices by clarifying that exclusion of U.S. persons from foreign offers, particularly cash

offers, is not necessary to avoid U.S. jurisdiction except when necessary to comply with Regulation S or to meet regulatory prohibitions on foreign ownership of the issuer's securities. That should be the result even if offering materials are posted on an open website, unless the website is used as a means to accept subscriptions or tenders.

The Interpretive Guidance assumes that there is something inconsistent with the bidder stating that it is only conducting the tender or exchange offer in certain jurisdictions or that the offer is not being made in specified jurisdictions at the same time that the bidder is stating the offer is open to all shareholders. Indeed, the release seems to suggest that an offer that states that it is not being made in the United States but states it is open to all holders is inherently a sham and advises that bidders must categorically exclude all U.S. resident holders and enforce that exclusion in order to avoid U.S. jurisdiction. We submit that this guidance is inconsistent with the requirements of the traditional territorial approach of federal securities laws and would appear to be inconsistent with the jurisdictional nexus test of the Exchange Act which requires only that an offer not be made by any means or instrumentality or means of interstate commerce

The regulatory requirements of the federal securities laws do not apply wherever in the world U.S. residents choose to engage in a securities transaction. U.S. investors that determine to engage in offshore transactions do so knowing that the protections of U.S. securities laws will not apply. Likewise, persons who offer securities or propose a business combination transaction can choose in which jurisdictions that offering or business combination will occur. That notion is embodied in existing rules and regulations of the Commission as well as longstanding practice.

A few examples demonstrate this point. First, Item 501(1)(iv) of Regulation S-K mandates that every preliminary prospectus state that:

This prospectus is not an offer to sell securities and is not soliciting an offer to buy these securities in any state where the offer and sale is not permitted.

Virtually every prospectus substitutes the word "jurisdiction" for "state" when presenting the legend without objection from the Commission staff. The Commission's approach to tender offers has been no different. As the Interpretive Guidance recognizes, although a tender offer subject to the all-holders rule must be made to all holders, the Commission has never required that the material be mailed into a foreign jurisdiction. Similarly, the Commission has never required U.S. bidders to qualify their offers in foreign jurisdictions in which target shareholders reside.<sup>17</sup> Accordingly, there is nothing unusual or suspect about the notion that a person making an offer to sell or buy a security can select the jurisdictions in which it will make an offer

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<sup>17</sup> We note that, in the proposing release, the Commission refers to its prior advice to the effect that Regulation 14D does not require dissemination of offer materials outside of the United States but then asks for comments on this subject. We assume that, in doing so, the Commission does not intend to change its prior position; however, we suggest that the Commission specifically state that such dissemination is not required by Regulation 14D.

without categorically excluding from participation in the offer residents of jurisdictions in which the offer is not being made.

The Commission has applied the same analysis with respect to offshore transactions. The basic tenet of Regulation S, as reflected in Rule 901, is that the registration requirements of the Securities Act do not apply to transactions that occur outside the United States. The regulation embodies a territorial, not a citizenship or residency, jurisdictional analysis. Indeed, Category 1 of Rule 903 provides a safe harbor for an offering by a non-U.S. issuer with no substantial U.S. market interest so long as the buyer is outside the United States when the offer is accepted and no offer or directed selling efforts takes place in the United States. Category 1 contains no requirement to exclude U.S. persons from direct participation in the offshore offer. Categories 2 and 3 of Rule 903, on the other hand, mandate the exclusion of U.S. persons as a condition to the safe harbor protection, but only after a finding by the Commission that relative trading volume in the United States above 20% presents a risk of flow back into the United States.

We believe that Regulation S provides a useful conceptual basis and yardstick for issuers in rights offerings and exchange offers to determine whether, from a U.S. perspective, it is necessary to exclude U.S. investors from the offering. While Rule 903 looks to the status of the issuer in determining which level of offering restrictions apply, and the tender offer exemptions have looked to the status of the target, we believe that in the case of exchange offers, it would be reasonable for the Commission to conclude that both should be examined. Thus, whenever either the offeror or the target in an exchange offer has a substantial U.S. market interest in the relevant securities and Rule 802 is not available, in order to claim the Rule 903 safe harbor the offeror would have to exclude U.S. persons from the exchange offer. Where neither company has a "substantial U.S. market interest", there would be no need to exclude U.S. persons to claim the benefits of the safe harbor. By the same token, we believe that the Commission should make clear its view that there is never a reason to categorically exclude U.S. persons from a cash tender offer.

We believe that the interests of U.S. investors will be harmed by the suggestion in the Interpretive Guidance that categorical exclusion of U.S. residents is necessary in all instances to avoid U.S. jurisdiction. U.S. institutional investors are active participants in foreign markets. These institutions in many instances have determined that it is the best interest of their investors and clients to participate directly in foreign markets rather than indirectly through ADR facilities in the United States, or by buying in the public offshore Regulation S tranche of a global offering rather than in the concurrent private Rule 144A offering. They do so through foreign offices or foreign advisers acting with discretion. Consistent with the teaching of Regulation S, orders entered by employees of the buyers from offshore are deemed to be made offshore, even if the decision to participate originated in the United States.<sup>18</sup> We note that, as the test for a substantial

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18 See Reg S Adopting Release at note 39 and accompanying text ("When the buyer is a corporation or partnership, if an authorized employee places the buy order while abroad, the requirement that the buyer be outside the United States will be satisfied. \*\*\* When the buyer is an investment company, if an authorized person employed by either such company or its investment adviser places the buy order outside the United

U.S. market interest is based on trading volume, that approach would be consistent with our strong preference for a trading volume alternative for determining the level of U.S. regulatory interest in a cross-border transaction.

We would support an amendment to the all holders rule to allow a bidder to offer cash only to shareholders in a particular jurisdiction where it wishes to extend the offer into that jurisdiction but chooses not to register or qualify securities in an exchange offer in that jurisdiction, so long as the bidder reasonably believes that the cash has equivalent value to the securities offered elsewhere. On the other hand, we do not believe an amendment to the all holders rule is necessary to permit categorical exclusions of persons resident in a specific jurisdiction, since a bidder can always choose not to extend the offer into that country by not mailing materials into, or accepting tenders from within, that jurisdiction.

**A. Application of All-Holders Rule to Foreign Target Security Holders**

- ***Is it necessary or appropriate for bidders in tender offers for U.S. target companies to exclude foreign target security holders in certain non-U.S. jurisdictions? Why? Is the answer different for cash tender offers versus exchange offers?***

Relief from the tender offer rules to categorically exclude residents in non-U.S. jurisdictions from participating in an offer for a U.S. target should be based on a showing of actual legal conflicts. For example, certain companies cannot have significant ownership by non-U.S. residents.<sup>19</sup> These conflicts are unlikely to be presented in a cash tender offer. However, the Commission should not object to statements in tender offer materials that the tender offer is not being made where illegal to do so and should not require the mailing of tender offer materials into all jurisdictions in which holders reside.

- ***Should bidders be allowed to condition tendering into an offer on the subject security holder certifying to compliance with the securities law requirements of its jurisdiction?***

We agree with the statement in the Proposing Release that the onus should not be on the investor to determine whether acceptance of the offer is legal in the investor's home jurisdiction. Particularly in exchange offers and rights offerings, the onus should be on the offeror to identify the jurisdictions into which it chooses not to comply with local law and to ensure that no materials are disseminated and no tenders or subscriptions are accepted from within those jurisdictions.<sup>20</sup> In cash tender offers for U.S. companies, however, this simply has not been an

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States, the requirement that the buyer be outside the United States will be satisfied. \*\*\* There would be no need to consider where the investment decision leading to the transaction was made.”)

<sup>19</sup> See Hallwood Energy Partners, LP, (May 1, 1990); Freeport-McMoran Energy Partners Ltd. (June 19, 1989)

<sup>20</sup> Cf., The Korea Fund (July 2005) (redemption offers providing in-kind distribution of portfolio securities would trigger registration in Japan of each issuer of the portfolio securities. Cash alternative permitted).



issue; foreign regulators are unlikely to assert jurisdiction over a cash tender offer for the shares of a non-domestic company.

- ***Would permitting exclusion of some foreign target holders result in decreased protections for U.S. holders in cross-border tender offers?***

Permitting categorical exclusion of non-U.S. persons from U.S. offers would likely increase the tendency of foreign transaction participants to categorically exclude U.S. investors from foreign offers, which in our view harms the interest of U.S. investors.

- ***Should Rule 14d-10 and Rule 13e-4 be amended to include a provision expressly stating that those rules will not prohibit a bidder from excluding shareholders in a particular foreign jurisdiction, where the bidder is prohibited from making the tender offer by foreign law after a good faith effort by the bidder to comply with the law?***
  - ***What should be considered a “good faith effort” for purposes of such a rule change?***
  - ***Should the number or percentage of security holders in a particular jurisdiction or the cost or additional timing requirements of complying with a particular jurisdiction’s rules impact the good faith determination?***
- ***Should our rules be revised to permit exclusion of foreign target security holders in any jurisdiction where a minimal number of target holders are located? If so, what would be an appropriate de minimis threshold? Three percent? Five percent?***
- ***If the rules should be amended as described, should such a provision be expanded to specifically include situations where a bidder is unable to determine the beneficial ownership of the securities in a foreign jurisdiction?***
- ***If we were to adopt a de minimis exclusion, should we permit exclusion only where the bidder also establishes a significant risk of civil or criminal liability by extending the offer into that jurisdiction?***
- ***Should we require dissemination of offering materials to all holders of a target’s securities, whether or not they are located in the United States? If we adopted such a requirement, should there be exceptions? If so, what should they be?***

As noted, we disagree with the premise that there is a need to categorically exclude investors resident in a particular jurisdiction except in those narrow circumstances when regulatory requirements prohibit foreign ownership of the offered shares. Offerors should be free to determine in which jurisdictions they will conduct their tender offer and should not be mandated by Commission rule to mail into a particular jurisdiction or accept subscriptions or tenders from a particular jurisdiction based on the number or percentage of holders resident in that jurisdiction.

In those instances where a bidder desires to extend an exchange offer into a particular jurisdiction but cannot do so without registration or qualification, the bidder should be able to offer a cash alternative, similar to the exemption to the equal treatment requirements of the cross-border exemptions in Rule 13e-4(h)(8)(ii)(C) and 14d-1(c)(iii). Thus, we would recommend that the Commission amend the Rule 13e-4(f)(8) and Rule 14d-10(f)(11) exemptions to eliminate the good faith effort requirement and instead to require a bidder to have reasonable basis for believing that the cash alternative is equal in value to the offered shares. If, however, the bidder does not desire to expend cash in the exchange offer, it should be free to state, consistent with Item 501 of Regulation S-K, that the exchange offer is not being made in, and no tenders will be accepted from, the jurisdiction requiring registration of the exchange offer. As we believe this already is the case, we do not believe an amendment to the all holders rule is necessary.

#### **B. Ability of Bidders to Exclude U.S. Target Security Holders**

- *Should the Commission provide additional guidance on the specific measures an acquiror may or should take to avoid triggering U.S. jurisdictional means in the context of cross-border business combination transactions?*
- *What measures are reasonable and effective, and in the best interests of U.S. investors?*
- *Should we also consider further rulemaking to address the situation where a bidder seeks to avoid U.S. jurisdictional means by excluding U.S. target security holders, but is subject to foreign home country rules mandating that all target security holders must be permitted to participate in the offer? How would such rules balance the practical needs of bidders with the requirement to protect the interests of U.S. investors?*

As noted, we strongly believe that the Commission should reconsider the suggestion in the Interpretive Guidance that the above categorical exclusion of U.S. persons is required to avoid U.S. jurisdiction. Circumstances where a bidder would need to elect to exclude U.S. holders should be limited to rights or exchange offers involving issuers or target companies subject to Category 2 or 3 of Regulation S where the bidder seeks to rely on the Rule 903 safe harbor. If the issuer or target is a U.S. issuer or a foreign issuer with substantial U.S. market interest, it is reasonable for a bidder to exclude U.S. persons in order to claim the protections of

the Regulation S safe harbors. Otherwise, and particularly in cash offers, the Commission should make clear that there is no reason under U.S. law to exclude U.S. holders.

The Commission should revisit the position it expressed in the 1999 Cross-Border Adopting Release with respect to the use of the Internet in cross-border transactions. In that release, the Commission expressed the view that a bidder that posts offering materials on a public website could not rely on Regulation S and must exclude U.S. persons from participation in the offer. That guidance was based on the notion that the mere posting of tender offer material in English on an open website by foreign issuers could be viewed as targeting the United States unless measures are taken to prevent participation by U.S. persons. Since 1999, foreign law and stock exchange rules now almost universally mandate the posting of such materials on an open website as a means of informing the trading markets of important developments. Since the posting is a result of a regulatory mandate, not offeror choice, the use of the website is by definition not a means to target U.S. investors. The Commission likewise has encouraged use of issuer websites in public offerings, and no one would suggest that an issuer posting roadshow materials on its website is targeting foreign investors with its public offering. At most, the Commission should require legends describing the jurisdictions in which the offer is being conducted and any limitations on participation by persons outside those jurisdictions. Moreover, the Commission should make clear that its rules do not require certification of non-U.S. person status in order to view materials posted on an otherwise open website – a meaningless practice that just demeans the seriousness of the U.S. securities regulation. Unless tenders or subscriptions are being accepted over the website, the Commission should not erect regulatory barriers to dissemination of information via the Internet regarding public securities transactions taking place elsewhere in the world.

In the same vein, the Commission should rescind the statement it made in its April 2000 interpretive release on use of electronic media in public offerings that the safe harbor protection of Securities Act Rule 135e is not available if press materials regarding an offering are posted on an open website.<sup>21</sup> Given the requirement of many foreign regulators and stock exchanges that issuers post press announcements of public offerings on an open website, that one sentence in a footnote to a release has for all practical purposes had the effect of rescinding Rule 135e. That statement was inconsistent with both the approach of Rule 135e to ensure U.S. press equal access to offshore press materials and the 1998 interpretive release on use of the Internet in securities transactions, which did not object to posting of foreign offering materials on an open website unless the website posting was targeted at the United States.<sup>22</sup> It is also inconsistent with subsequent Commission rulemaking, such as the exclusion from Regulation G of foreign earnings announcements even if the announcement is made on an open website, so long as the website is not available exclusively to, or targeted at, U.S. investors.<sup>23</sup>

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<sup>21</sup> Use of Electronic Media, Securities Act Release No. 7856 (April 28, 2000), at note 68.

<sup>22</sup> Statement of the Commission Regarding Use of Internet Websites to Offer Securities, Solicit Securities Transactions, or Advertise Investment Services Offshore, Securities Act Release No. 7516 (March 23, 1998).

<sup>23</sup> 17 C.F.R. §244.100 note 2(iii).

**C. Vendor Placements**

The Commission's highlighting of vendor placements as a useful alternative for extending the benefits of rights offerings and exchange offers to U.S. holders without registration is certainly welcome. For exchange offers that are not subject to the all holders rule, the Commission should consider clarifying in the adopting release whether an issuer would need to get its own no-action letter with respect to compliance with Section 5 of the Securities Act in connection with extending the vendor placement procedure to persons in the United States. Indeed, we believe that the determination of the appropriate standards for a valid vendor placement is best handled through rulemaking, after notice and comment, rather than staff interpretive advice. Offerors conducting rights offerings or exchange offers should not be required to seek individual relief in connection with transactions employing a vendor placement. They should be able to ascertain, based on objective standards, whether a vendor placement would be a viable option prior to the announcement of the rights offering or exchange offer.

\* \* \* \* \*

The Committee appreciates the opportunity to comment on the Proposed Release and respectfully requests that the Commission consider the recommendations set forth above. We are prepared to meet and discuss these matters with the Commission and the staff and to respond to any questions.

Respectfully submitted,

Keith F. Higgins  
Chair, Committee on Federal Regulation of Securities

Task Force on Cross-Border Exemptions

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Ellen J. Odoner, Co-Chair  
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*The Task Force extends its thanks to Peter D.S. King and Christian Stambach for contributing their U.K. and Swiss perspectives on the Proposing Release.*

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Securities and Exchange Commission  
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