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July 24, 2008

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

Re: File No. S7-10-08—Revisions to the Cross-Border Tender Offer, Exchange Offer, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions

Dear Ms. Morris:

We write to provide our comments on the Securities and Exchange Commission's proposed revisions to the current exemption regime applicable to cross-border transactions. The SEC's openness to considering comprehensive reform of the existing regulatory framework is a welcome and timely development. Comprehensive revisions are necessary to avoid inappropriate extension of the reach of U.S. takeover regulation to cross-border transactions that lack a sufficient nexus to the U.S. and may be fully and fairly regulated by well-developed non-U.S. bodies of law and regulation. While it may often appear that extending U.S. regulation to non-U.S. transactions involving securities some of which are held by U.S. persons will provide protection to U.S. investors and fund managers, the actual effect of such extra-territorial regulation may be

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to inappropriately intrude upon non-U.S. transactions and regulatory regimes, to impede the ability of U.S. investors and fund managers to deploy their capital on a global basis, and to cause the United States to be viewed unfavorably by issuers, investors and regulators around the world.

This comment letter is organized as follows: (1) a brief statement of the animating theme; (2) specific comments on three proposed revisions; and (3) a description of the 2005-2007 *Endesa/E.ON/Acciona* transaction as litigated in the U.S.<sup>1</sup> We believe that that transaction well illustrates the areas in which there is need for reform of U.S. cross-border transactional regulation, as developed in this comment letter – *viz.*, the definition of the U.S. nexus that determines the level of exemption, the need for extending the available Tier I-style exception to Section 13(d) regulation under the Williams Act, and the inappropriateness of applying U.S. “unconventional tender offer” concepts to purchases of foreign securities by foreign firms on foreign exchanges from foreign holders. The *Endesa/E.ON/Acciona* experience certainly teaches that traditional extraterritoriality doctrine of the *Bersch v. Drexel Firestone*<sup>2</sup> variety is not adequate to cabin judicial application of U.S. regulation to foreign transactions within appropriate bounds.

**Theme:**

The increased globalization of financial markets warrants a thorough re-thinking of the limits of U.S. legal regulation of cross-border transactions. Concepts that previously conveyed accepted understanding – such as the idea of “U.S. holders” of securities or the classification of transactions as either “predominantly foreign” or not – no longer describe clear demarcations. A world in which a person or entity physically located on U.S. soil has a range of options by which to invest in foreign firms (as do persons or entities located abroad, including via U.S. investment entities or managers) requires different thinking about applying U.S. rules across borders. By the same token, the globalization of major transactions, the instantaneous communication between firms and markets, and the sometimes radically different approaches to transactional regulation taken in other significant financial jurisdictions suggests the need for careful limitations on the reach of U.S. transactional regulation. The danger of overreaching U.S. regulation in this context being viewed as inappropriately intrusive and imperialistic is real, as is the concomitant danger of U.S. interests being adversely affected by exclusion of U.S. persons from foreign transactions (if not markets).

Protecting opportunities for U.S. investors and fund managers to participate in foreign markets and transactions (and benefit from premium offers and potentially advantageous transactions) requires limiting the applicability of U.S. regulation to predominantly (if not exclusively) non-U.S. transactions conducted outside of the U.S. involving non-U.S. targets. Non-U.S. buyers and sellers can rationally conclude that involving U.S. investors or fund managers is unwise where their inclusion is not critical to closing the transaction and yet carries the burden of a regu-

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<sup>1</sup> This firm represented Acciona, S.A. following the commencement of the U.S. litigation by E.ON AG (in the Southern District of New York) in October 2006.

<sup>2</sup> *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975).

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latory structure that is understandably seen as foreign and, at times, inconsistent with the home jurisdiction system.

**Specific Comments:**

**1. Adoption of a relative trading volume test in place of a beneficial ownership test.**

The U.S. person beneficial ownership test, however structured or tinkered with, suffers from inherent inadministrability. First, the “look-through” process can be burdensome and expensive. Second, it often risks premature disclosure of the transaction. Third, given the wide variance in the ability of targets (or offerors) in different jurisdictions to gather information necessary to determine beneficial ownership, the test is unavoidably discriminatory and unevenly applied, treating similarly situated bidders differently merely because of their jurisdiction. (We understand that the difficulty is particularly pronounced in jurisdictions where nominees are not required by law to provide – or reliably record during the time frames required – beneficial ownership data.) Fourth, the test (as currently in place) is subject to manipulation, as potential target companies are able to claim high U.S. beneficial ownership in an effort to use U.S. tender offer regulation as a form of cross-border defensive shield. Fifth, and especially from the viewpoint of an unfriendly suitor, the test is unverifiable by reference to objective and widely available data, and that very absence of transparency invites the mischief of defensive manipulation by the target as well as unnecessary uncertainty on the buy side – whether friendly or not. Sixth, the very definition of a U.S. shareholder is increasingly enigmatic given the number of ostensibly “U.S.” entities whose underlying holders are foreign, who indeed may trade exclusively for foreign investors, or who may conduct substantial portions of their investment management business from offshore branches.

More fundamentally, and administrative concerns aside, the beneficial ownership test is misplaced as a matter of principle. The strength of the nexus with the U.S. market – and not the presence of individual U.S. resident or headquartered investors or fund managers who trade in non-U.S. markets – should govern the applicability *vel non* of U.S. securities laws beyond our borders. Trading volume on the U.S. market, as compared to volume on non-U.S. markets, appropriately gauges the force of that nexus. If a U.S. person has a choice whether to invest in shares of foreign firms either via the U.S. market or a foreign market and chooses the latter, that decision ought not expand the reach of U.S. transactional regulation to that foreign firm. And investors and fund managers – whether they might be considered U.S. persons or not – do not reasonably expect that U.S. laws will apply to their investments made in foreign markets in foreign shares, and should be recognized as having chosen to instead rely on the protections and

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laws of the jurisdictions in which they have chosen to invest (be that the situs of the corporation or the foreign market).<sup>3</sup>

That a relative trading volume test may not perfectly (or even approximately) correlate with actual beneficial ownership (assuming such ownership is in fact ascertainable) is precisely the point: many U.S. investors and fund managers have opted to forego U.S. capital markets in whole or in part, investing directly in non-U.S. companies by trading on non-U.S. exchanges. Their trading on non-U.S. exchanges should not operate to divest non-U.S. companies from otherwise applicable exemptions. Further, it appears quite clear that reliance on reported U.S. beneficial ownership simply will not, as a practical matter, sufficiently limit application of U.S. regulation; of the 87 largest European corporations with ADR shares, 71 reportedly had more than 10% of their institutionally-owned shares held by seeming U.S. investors or fund managers (see the discussion below of the expert evidence in the *E.ON/Acciona* litigation). It can hardly be thought appropriate for U.S. transactional regulation to extend that broadly through the happenstance of ADR programs often involving only miniscule percentages of the foreign firms' capitalization but implicating Section 12 registration.

A relative trading volume test, reflective of the strength of the nexus with the U.S., directly, measures a non-U.S. target's connection with the U.S. market over a particular period of time and is the appropriate benchmark for determining coverage of U.S. transactional regulation. Undoubtedly, a trading volume test has substantial administrative benefits over an effort to determine beneficial ownership residence in a meaningful way. Obtaining information regarding trading volume is a straightforward, non-burdensome and reliable process. Trading volume data is not prone to manipulation. A trading volume test will not compromise the confidentiality of a contemplated transaction. Adoption of a trading volume standard also avoids the need for targeted exclusions to the U.S. ownership calculation to eliminate the distorting effect of the presence of a few major U.S. holders.

Indeed, it appears that, while framed in terms of U.S. ownership levels, the current exemptive regime was actually a proxy for relative U.S. trading volume. The 1999 Cross-Border Release made clear that the presumptive exemptive level of Tier I was predicated on relative U.S. trading volume, placing special emphasis on exception (ii) to the 10%-or-less presumption of Instruction 3 to Rule 14d-1(c)(1) for non-affiliate transactions, which looks to U.S. trading volume:

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<sup>3</sup> Cf. "Exemption of Certain Foreign Brokers or Dealers," SEC Release No. 34-58047, 2008 WL 2566725, at \*10 (June 27, 2008):

. . . The Commission does not believe, as a policy matter, that registration is necessary if U.S. investors have sought out foreign broker-dealers outside the United States and initiated transactions in foreign securities markets entirely of their own accord. In that event, U.S. investors would have taken the initiative to trade outside the United States with foreign broker-dealers . . . .

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Because it will be difficult for third-party offerors in an unsolicited or “hostile” tender offer to ascertain whether the exemption is available without information on the subject company’s U.S. ownership, *we are adopting the proposed presumption that the U.S. ownership percentage limitations are not exceeded based on the relative level of trading volume in the United States.*

“*Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*,” SEC Release No. 33-7759, 1999 WL 969592, at \*20 n.74 (Oct. 22, 1999); *see id.* at \*4 (emphasis added).<sup>4</sup> It thus appears that the Commission’s own position in 1999 was that the appropriate test for applicability of U.S. tender offer regulations is relative U.S. trading volume – and that the basic reference to the percentage of U.S. holders was simply a shorthand to reflect what really matters, *viz.*, the percentage of U.S. market trading.

As the 1999 Cross-Border Release thus reflects, relative U.S. v. non-U.S. trading volume is the particular proxy underlying the Tier I exemption (hence, exception (ii) in Instruction 3 if U.S. trading over the twelve-month period ending 30 days before the tender offer exceeds 10% of the worldwide aggregate trading volume over the same period). In March 2007, the Commission again endorsed reliance on trading volume as an appropriate proxy for U.S. ownership, when it permitted foreign private issuers to terminate their registration and reporting obligations under Sections 12(g) and 15(d) of the Securities Exchange Act if the average daily trading volume of their securities in the U.S. has been 5% or less of the average daily trading volume worldwide during a recent twelve-month period. *See* New Exchange Act Rule 12h–6(a)(4)(i); “*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*,” SEC Release No. 34-55540, 2007 WL 907996.<sup>5</sup> As was then noted: “One advantage of a benchmark based solely on trading volume is that it is a fairly direct measure of U.S. market interest in a foreign private issuer’s securities at a particular time.” Elliot Staffin, SEC Division

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<sup>4</sup> The Commission further explained that it was adopting the 10%-or-less presumption because “it will be difficult for third-party offerors to ascertain whether the exemption is available without information on the subject company’s U.S. ownership. It will be even more difficult for persons other than the issuer to obtain information from nominees, including information on 10% holders, as required under the modified approach adopted today.” Cross-Border Release, 1999 WL 969592, at \*23 (footnotes omitted).

<sup>5</sup> *See also* “*Exemption From Registration Under Section 12(G) of the Securities Exchange Act of 1934 for Foreign Private Issuers*,” SEC Release No. 34-57350, 2008 WL 441529, at 12-13 (February 19, 2008):

... We adopted a trading volume benchmark as part of the 2007 amendments concerning foreign deregistration because we believed it to be a more direct and less costly measure of the relative U.S. market interest in a foreign private issuer’s securities than one based on a count of the issuer’s shareholders. We believe the same considerations apply to the proposed amendments of the rules that determine when a foreign private issuer must register a class of equity securities under Section 12(g). If only 20 percent or less of an issuer’s worldwide trading volume occurs in the United States, we believe the relative U.S. market interest in those securities does not warrant subjecting the issuer to Exchange Act reporting requirements.

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of Corporation Finance, *Opening Remarks at the SEC Open Meeting* (Dec. 13, 2006), available at <http://www.sec.gov/news/speech/2006/spch121306es.htm> (emphasis added).<sup>6</sup> If, as suggested, a trading volume test is adopted, actual knowledge of U.S. beneficial ownership levels should remain irrelevant; the key is to de-link the selected measure from beneficial ownership and focus instead on the nexus to trading in U.S. markets (as revealed by relative trading volume).<sup>7</sup>

## **2. Exemptive relief from 13D filing obligation.**

The exemptive regime should be expanded to include exemption from the filing requirements of Section 13(d) of the Williams Act/Schedule 13D in the same circumstances as the Tier I-style exemption from tender offer regulation. Under current practice, the mere fact of registration under Section 12 of the 1934 Act, by itself, triggers the 13D filing requirement at the 5% level. A 13D filing may thus be required simply because some miniscule percentage of the foreign company's shares have been deposited as ADRs. That may result in a 13D filing being required where there are only a miniscule number of U.S. holders holding a tiny fraction of the shares – or theoretically even *none* – and where the triggering purchases are entirely of foreign shares purchased on a foreign exchange from foreign persons, *i.e.*, completely extraterritorial.

There is no apparent justification for exempting tender offers from U.S. regulation while providing no corresponding 13(d)/13D exemption in the same circumstances. The intent of U.S. law to provide an early warning of potential control changes seems out of place where applied to a foreign corporation lacking the nexus to the U.S. marketplace reflected by its qualification for Tier I-style exemption. That seems particularly obvious as to foreign corporations subject to foreign regulations similar to Section 13(d) – which, indeed, often require disclosure at less than 5% and more promptly than the U.S. 10-day delay. Moreover, there is an ever-present risk of tension if not conflict between home jurisdiction practice and U.S. requirements: the types of disclosure called for by 13D may be entirely foreign to the home jurisdiction where disclosure may be limited to the objective facts of the share acquisition and extended disclosure of “subjective” intentions may be considered inherently problematic (if not potentially violative of regulatory norms) as well as potentially triggering mandatory bid requirements at an unduly early stage.

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<sup>6</sup> While we support a wholesale adoption of an “ADTV” test in lieu of any reliance on beneficial ownership, the SEC may wish to consider a “backstop” to a trading volume analysis such that the exemptions would not be available if more than 40% of holders were in fact U.S. residents.

<sup>7</sup> It appears clearly the case that non-U.S. targets have exploited the flaws of the current regime, having reportedly been advised to claim U.S. ownership levels above the Tier I levels in public filings so as to cloud the exemption issue and thus use U.S. tender offer regulation as a form of raid defense. Given the impossibility of determining with any meaningful level of certainty actual ownership levels by U.S. residents and the need for objectively verifiable information, both the actual knowledge and imputed knowledge standards are insurmountably flawed and should be discarded if the U.S. beneficial ownership standard is maintained. If the rebuttable nature of the 10%-or-less presumption is maintained, given the incentive for targets to manipulate ownership information, data provided by the target or representatives of the target should be deemed irrelevant and only information actually known from third-party independent sources should be considered.



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It may also be noted that extraterritorial jurisdictional analysis provides insufficient protection against unwarranted cross-border application of Section 13(d). As an illustration, in the *Acciona* matter discussed below, a non-U.S. (German) bidder for a non-U.S. (Spanish) target company was found to have a private right of action to sue another non-U.S. (Spanish) purchaser in U.S. courts with respect to a Schedule 13D filed with regard to the non-U.S. purchase of shares of the non-U.S. target whose purchases were effected entirely on a non-U.S. (Spanish) exchange through the services of a non-U.S. (Spanish) bank. Indeed, the federal court strongly suggested that the mere fact of filing a 13D established sufficient nexus with the U.S. so as to render unnecessary the “predominantly foreign” conduct/effects test of *Bersch* for assessing the appropriateness of extraterritorial application of U.S. law.

### **3. Elimination of “unconventional tender offer” analysis in cross-border transactions.**

The existing cross-border regulatory regime fails to carve out from U.S. regulation open market purchases, negotiated block trades and other techniques for establishing an ownership position in a non-U.S. target that, while perfectly legal and appropriate in the non-U.S. jurisdiction where effected, could nevertheless be deemed “unconventional tender offers” under the contextual and somewhat ill-defined standards of U.S. caselaw. It cannot fairly be expected that a non-U.S. company buying shares of another non-U.S. company on a non-U.S. exchange from other non-U.S. persons via techniques recognized, permitted, and regulated by its home securities regulators would pause to consider that it may be engaging in an illegal U.S. tender offer simply because the non-U.S. target company may have ADRs (representing some tiny fraction of its capitalization) and therefore registered under Section 12 of the 1934 Act. Nor that such U.S. regulation is appropriate or will enhance the reputation or flexibility of U.S. capital markets, investors or regulators. Moreover, the exclusionary techniques that have developed for avoiding applicability of U.S. takeover regulation are simply not available to non-U.S. purchasers who buy shares through open market purchases or other routine means not involving fully negotiated, contracted deals; it may simply be impossible in transacting on foreign exchanges to exclude U.S. sellers, and this inability to structure around U.S. laws is a peculiar evil of applying unconventional tender offer doctrine to non-U.S. business combinations or investment activity.

As the discussion below of the *E.ON/Acciona* case demonstrates, there are distinctive aspects of the “unconventional tender offer” issue that warrant the Commission’s clear statement that that doctrine should not be applied across borders to purchases of foreign securities effected on foreign exchanges regardless of whether the foreign issuer in question would otherwise qualify for Tier I-style exemption. The recognized forms of market purchases and “book building” considered entirely appropriate abroad are one aspect of an integrated regulatory structure that requires mandatory bids above specified levels while purposefully not treating acquisitions below that level as “tender offers.” Accordingly, it is especially disruptive to consider applying U.S. regulation to deem such acquisitions to be “tender offers.” Moreover, the effect of deeming such acquisitions to be U.S. “tender offers” would upset the most fundamental principle of for-

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foreign exchanges – the finality of trades – as *post hoc* adjudication that foreign transactions on foreign exchanges were part of an unlawful U.S. tender offer would presumably entitle sellers to rescind their sales. It is impossible to imagine a justification for applying U.S. law to entitle a foreign person selling foreign shares on a foreign exchange to a foreign buyer – in a circumstance perfectly lawful and recognized in that foreign jurisdiction – to rescind the transaction based on applying U.S. “unconventional tender offer” analysis.<sup>8</sup>

**The Endesa/E.ON/Acciona case:**

The *Endesa/E.ON/Acciona* case provides an illuminating “case study” of the need to limit the extraterritorial reach of U.S. tender offer and transactional regulation – in particular, the unworkability and overbreadth of the current “U.S. holders” test and the inappropriateness of applying “unconventional tender offer” doctrine to market transactions in foreign shares that are accepted practice in the foreign jurisdiction where the transactions occur. That example, we submit, illustrates that the basic measure for extraterritorial application of U.S. tender offer regulations should be ADTV. It also provides perspective for considering appropriate limits on the application of Section 13(d) to foreign companies and the special problem of applying “unconventional tender offer” doctrine to the cross-border context, *viz.*, the doctrine should not be applied to transactions conducted predominantly in a jurisdiction in which they are lawful, regardless of whether the issuer would or would not otherwise be subject to complete exemption à la Tier I.

**Background.** The battle for Endesa was intensely a matter of Spanish (and European) political and legal focus. Endesa, Spain’s leading electric utility, was a Spanish corporation. Endesa’s shares traded publicly on the Madrid, Barcelona, Bilbao and Valencia exchanges in Spain, and on the Santiago Off Shore Stock Exchange in Chile. Approximately 2% of Endesa’s shares were present in the U.S. in the form of American Depository Shares. Endesa was the subject of an unsolicited exchange offer by Gas Natural SDG, S.A., another Spanish energy company, announced in September 2005; and a competing tender offer by E.ON AG, a German power corporation, announced in February 2006 as a “white knight” offer supported by Endesa management. After the E.ON bid, the Spanish government passed legislation requiring companies to obtain approval from the *Comisión Nacional de la Energía* (“CNE”), the Spanish energy regulator, before acquiring over 10% of a Spanish energy firm. The CNE’s July 2006 ruling on the E.ON bid imposed conditions that E.ON deemed unacceptable, resulting in legal challenges by E.ON and Endesa before the Spanish Ministry of Industry and the European Union. In addition, both bids were the subject of litigation in the Spanish courts: Endesa’s suits to block Gas Natural’s bid resulted in an injunction by the Commercial Court of Madrid pending a determination as to whether the Gas Natural bid violated Spanish unfair competition law, and the Spanish

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<sup>8</sup> The same should hold even if substantial shares are purchased from U.S. holders at the same time. At minimum, there ought be no room for cross-border application of U.S. “unconventional tender offer” analysis if less than the 5% minimum tender offer amount (referred to in Section 14(d) of the Williams Act) is purchased in the U.S.



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Supreme Court's suspension of the Spanish government's antitrust approval of the bid. For its part, Gas Natural initiated a proceeding in the Barcelona Mercantile Court against E.ON and Endesa alleging illegal Endesa-E.ON communications and violation of Spanish insider information law. Spanish law requires all competing tender offers to commence at the same time, as a result of which E.ON could not commence its offer so long as the injunction blocking Gas Natural's bid was in place.

In September 2006, Acciona, S.A., a Spanish public corporation headquartered in Madrid, determined to seek to become an *accionista de referencia* ("key" or "reference" stockholder) of Endesa under Spanish law, by obtaining a 20% investment (which would entitle Acciona to proportional board representation at Endesa under Spanish law, but not trigger the mandatory tender offer required by Spanish law of holders of 25% or more of a Spanish company's capital stock). Acciona was advised by Banco Santander Central Hispano, S.A., the largest bank in Spain and among the five largest banks in Europe by market capitalization, to proceed by a confidential "book building" process in which Santander (directly or through intermediaries) contacted select clients during a specified time after the close of the Spanish market, informing them of the interest of an unnamed client in purchasing 10% of Endesa shares at a set price. In the evening of September 25, 2006, Santander contacted its pre-existing institutional clients, who had previously requested to be advised of special trading opportunities, and reached the 10% level in approximately 90 minutes. Santander also contacted two other firms (one in the U.S.) to request assistance in identifying Endesa shareholders in connection with the book building process; the U.S. firm, as a result, contacted its own principally foreign clients to determine their interest in joining in the book building. The book building trades all cleared through the Madrid stock exchange the next day. None of the shares were purchased on a U.S. exchange. All of the shares purchased were ordinary shares of Endesa; a small portion of the shares held by the sellers appear to have been ADSs, all of which were converted to ordinary shares before being sold to Acciona (or Santander).<sup>9</sup>

On September 25, immediately after acquiring the Endesa shares, Acciona filed a *Hecho Relevante*, or "Relevant Note," with the *Comisión Nacional del Mercado de Valores* ("CNMV"), the Spanish securities regulator, disclosing the investment in Endesa, and the possibility of Acciona's increasing its percentage up to the 25% mandatory offer threshold to permit it to take part in management of Endesa once it obtained CNE approval. On September 26, Acciona filed a second *Hecho Relevante* and publicly released an Additional Information Memorandum describing its interest in acquiring up to 25% of Endesa's shares, and hosted a public teleconference on its business rationale and desire to become an *accionista de referencia* of Endesa, including with materials that Acciona filed with the CNMV and publicly disseminated. Acciona also publicly

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<sup>9</sup> It was not clear which institutional sellers were U.S. located in any meaningful sense. At most, 3.4% of Endesa's shares purchased were indicated as U.S. held; that amount certainly overstated the U.S. involvement in the block trade, as it included numerous foreign firms as well as asset managers who managed funds with different nationalities.

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disclosed to the CNMV and the market its entry into a series of total return swaps covering Endesa shares above the 10% CNE limit. All of this was widely reported in the financial press.

**The U.S. Litigation.** In its lawsuit against Acciona in the U.S. District Court for the Southern District of New York,<sup>10</sup> E.ON sought injunctive relief under Section 13(d) of the Williams Act, alleging that Acciona had failed to accurately disclose its intentions in the Schedule 13D it filed and failed initially to describe the swaps even though indisputably these arrangements were disclosed to the CNMV in Spain, publicly disclosed via Acciona's filings in Spain, and publicly reported. Essentially, E.ON's complaint leveled fraud claims against Acciona in the U.S. based on Acciona's public and regulatory disclosures in Spain. The U.S. court held that the foreign tender offeror E.ON had standing to seek injunctive relief against the Spanish stockholder Acciona of the Spanish issuer Endesa, and that a U.S. court had subject matter jurisdiction over the suit. The Court reasoned in part that there was a "strong argument" that such a suit did not even involve "extraterritorial" application of U.S. securities laws and should not be considered "predominantly foreign" because the suit challenged the accuracy of the 13D filing made with the SEC.<sup>11</sup> The Court's opinion quoted liberally from Acciona's *Hecho Relevante* filed with the CNMV, but noted that "while materiality must be judged in the context of the total mix of information available to Endesa's shareholders, this does not relieve Acciona of its obligations to comply with Section 13(d)."<sup>12</sup>

The Court proceeded to allow extensive discovery and further litigation on the 13(d) claims, which focused in large part on Acciona's intentions vis-à-vis Endesa including, in particular, Acciona's stated goal of becoming the *accionista de referencia* of Endesa. That concept is immediately recognizable and well understood in Spain, where each of the IBEX 35 (except Endesa) had an *accionista de referencia* – a supportive stockholder who does not control but may influence the company's direction, owing in part to Spain's corporate law allocating such levels of ownership proportional board representation.<sup>13</sup>

In an amended complaint, E.ON further contended that the book building process conducted in Spain was an illegal "unconventional tender offer" violative of Section 14(d) of the Williams Act.<sup>14</sup> E.ON did not dispute that the block trade was lawful, and accepted practice, in Spain. E.ON's contention was that Acciona had conducted an alleged "integrated worldwide tender offer" in violation of Section 14(d) regardless of the number of shares solicited from or

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<sup>10</sup> As already noted, this firm was retained by Acciona after E.ON's suit was filed.

<sup>11</sup> *E.ON AG v. Acciona, S.A.*, 468 F. Supp. 2d 537, 546 (S.D.N.Y. 2006).

<sup>12</sup> *Acciona*, 468 F. Supp. 2d at 559.

<sup>13</sup> The Court ultimately declined to order sterilization and the other relief sought by E.ON after Acciona amended its 13D filing, determining to grant only an injunction against future securities law violations. *E.ON AG v. Acciona, S.A.*, 2007 WL 316874 (S.D.N.Y. Feb. 5, 2007).

<sup>14</sup> The Court ultimately rejected the unconventional tender offer claim on its merits. *See Acciona*, 2007 WL 316874, at \*12.

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sold by U.S. holders of Endesa securities; the Section 14 theory advanced in the case would have been equally applicable even if not a single share were solicited or purchased from any U.S. person or entity. The U.S. Court held that it had subject matter jurisdiction over the Section 14 claim, that dismissal under the doctrine of *forum non conveniens* was not warranted, and that a foreign bidder had standing to sue for injunctive relief pursuant to the Williams Act against another foreign company alleged to have acquired shares of a third foreign company all on a foreign stock exchange, in the midst of a takeover battle being waged in a foreign country by another foreign bidder, subject to the close supervision of the foreign securities regulator. The U.S. Court held that it could entertain the suit, which sought not only to enjoin further purchases and to require proportional voting of shares (lawfully acquired where acquired), but also to require that all selling Endesa shareholders in the block trade be offered the option of rescinding transactions effected on the Madrid stock exchange. The U.S. Court so ruled notwithstanding its acknowledgment that the litigation was “essentially a tactical skirmish in a European takeover battle” and risked “creating unnecessary conflict between the American and Spanish regulatory systems if American law is not applied with sensitivity to the issues of international comity,” including “the extent to which the unconventional tender offer doctrine has survived the significant revisions made to the tender offer regulations in 2000, particularly in the context of a cross-border transaction in which an investor takes a stake in a foreign private issuer.”<sup>15</sup>

**Applicability of Tier I.** The *E.ON/Acciona* litigation did not resolve the applicability of the Tier I exemption to Endesa, but it pointed up the importance of reforming the existing Tier I standards. In particular, the case demonstrated the ineffectiveness of the 10%-or-less presumption under SEC Rule 14d-1(c). E.ON’s contention was that Instruction 3(iv) of Rule 14d-1(c) defeated the 10%-or-less presumption (*i.e.*, that Acciona “knows or has reason to know that the level of U.S. ownership exceeds 10 percent”) based on the following statement found on the Endesa website:

According to figures from the latest General Shareholders’ Meeting of May 2005, ENDESA has 858,946 shareholders.

Capital stock according to information provided by Iberclear at 19 April 2005 for the General Shareholders’ Meeting breaks down as follows: 54.2% shareholders from Spain, 45.8% from other countries. Of the Spanish investors, 28.8% are private and 25.4% institutional. Of the international investors, 18.9% are from continental Europe, 10.8% from the UK, 15.3% from the US and 0.8% from other countries.

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<sup>15</sup> *E.ON AG v. Acciona, S.A.*, 468 F. Supp. 2d, 559, 563, 588 (S.D.N.Y. 2007).

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Endesa's "Operations Review," at 50, *available at* <http://www.endesa.es/Portal/portada?url=/Portal/en/default.htm&idioma=en&>, under Investors, Annual Reports.<sup>16</sup>

While seemingly apt to eligibility for the Tier I exemption, the Endesa website's 15.3% figure in actuality was irrelevant. The figure is stated to be based on "information provided by Iberclear." Iberclear is the Spanish clearance system entrusted with book-keeping of securities in book-entry form and settlement of trades on the Spanish stock exchanges. As the record in the case established without dispute, Iberclear only provides information as to certain types of nominee holders – not beneficial owners. Information provided by Iberclear thus simply could not address what was relevant to the Tier I exemption – the percentage of Endesa's shares held beneficially by U.S. holders. As the SEC's 1999 Cross-Border Release made clear, what matters is actual U.S. beneficial holdings of the shares, not nominee or other intermediary "record"/"street name" holders: the "focus[] on beneficial ownership rather than record ownership" was adopted based on the Commission's determination "that it is critical that the exemptive rules function based upon a fair assessment of the U.S. participation." Cross-Border Release, 1999 WL 969592, at \*21.

That circumstance illustrates not only the inappositeness of supposed U.S. holder information, but the fecklessness of relying on "U.S. holder" status at all. A nominee record owner located in the U.S., or someone with discretionary authority (perhaps a Fidelity fund manager in Boston acting on behalf of owners all over the world or for funds that are not even open to U.S. persons) will regularly hold securities for persons or entities who are not U.S. persons. As the SEC's Cross Border Release makes clear, it is the nationality of the actual beneficial owner that should count, since they are the ones whose economic interests are at stake – not the location of the nominee/record holder. And that information is seemingly impossible to obtain, especially by a party other than the foreign issuer itself.

The *Endesa* example also demonstrates the disconnect of supposed U.S. holder information as indicative of relative U.S. trading volume. Undisputed expert evidence in the case established that over the twelve-month period from August 24, 2005 through August 25, 2006 (the twelve months preceding the measurement date specified in SEC Rule 14d-1(c)'s Instruction 2(i), and the twelve-month period referred to in exception (ii) to Instruction 3), approximately 1% of the aggregate worldwide trading in Endesa shares occurred on U.S. exchanges. The evidence of this disconnect between the alleged 15.3% figure in Endesa's website and the verifiable 1% of ADTV on U.S. exchanges is of particular significance in light of the Commission's emphasis, in the 1999 Cross-Border Release, that the predicate for the 10%-or-less presumption of Rule 14d-1(c)'s Instruction 3 is "the relative level of trading volume in the United States"; the

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<sup>16</sup> The Endesa website information was not "filed or submitted by the issuer [Endesa] with securities regulators of the home jurisdiction [Spain] or with the Commission," and was therefore not of moment under the express terms of Instruction 3(iii).

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Cross-Border Release refers to that presumption as “a presumption based on trading activity.” Cross-Border Release, 1999 WL 969592, at \*20 n.74, \*24.

From a more macro policy perspective, it should also be noted that the undisputed expert evidence in the case further showed quite clearly that a 10% test based on reported U.S. holder ownership simply will not screen out any appreciable level of European corporations. That evidence<sup>17</sup> demonstrated that for the 87 largest European companies having ADR shares, the average institutionally-held equity reportedly held by U.S. institutional investors was 24.9%, and the average percentage of shares outstanding nominally held by U.S. institutions was 13.3%. (For Endesa, those figures were 7.9% and 4.8%, respectively, placing Endesa 11th from the bottom of all 87 companies in percentage of shares held by U.S. institutions.) For the 87 companies, the percentage of institutional ownership by U.S. institutional investors exceeded 50% for eight, and fully 71 of the 87 European companies had more than 10% of their institutionally-owned shares nominally held by U.S. investors. (There is apparently no publicly available source of information on the non-institutional (individual or “retail”) holding in European companies by U.S. investors.) Accordingly, it would seem plain that maintaining an exemptive regime of 10% based on reported U.S. ownership will not effectively limit the application of U.S. law to anything approaching an appropriate level.

**Cross-border “unconventional” tender offers.** As noted, it was undisputed in the *E.ON/Acciona* case that the Acciona block trade of Endesa shares was lawful and accepted practice in Spain, and the expert evidence of record established that the same would hold true throughout Europe. European regulations set forth a general “bright-line” regulatory framework whereby a tender offer commences when a shareholder exceeds a specified level of share ownership, but not otherwise. See Directive 2004/25/EC of the European Parliament of the Council of 21 April 2004 on Takeover Bids. Experts from across Europe and elsewhere indicated that to subject a European block trade to regulation as a U.S. “unconventional tender offer” would undermine the predictability of the “bright-line” rule and thereby create discord among foreign regulators and in foreign markets. Ferran Decl. ¶ 17 (United Kingdom) (“Such a ruling would undermine the permissive stance of the UK to acquisitions that are below the threshold to trigger the ‘brightline’ mandatory bid requirement.”); Couret Decl. at 2 (France) (“This result would destroy the clarity of the compulsory offer threshold.”); Amatucci Decl. ¶ 5 (Italy) (“Such a rule would directly clash against the Italian jurisdiction.”); Winter Decl. ¶ 7 (European Union) (“the safe harbor created within the EU for shareholders who remain below the mandatory bid threshold, would effectively become meaningless”); Hill Decl. ¶ 12 (Australia) (“[I]t would lead to inevitable regulatory friction, if not regulatory mayhem.”). The experts also were in consensus that block trades such as the Acciona book building alleged to be an illegal U.S. tender offer were customary in their home jurisdictions, and without question permissible throughout Europe

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<sup>17</sup> The evidence was provided by an expert report by National Economic Research Associates, Inc.

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and beyond. *See* Ferran Decl. ¶¶ 1, 16 (United Kingdom); Couret Decl. at 2 (France); Amatucci Decl. ¶ 4 (Italy); Winter Decl. ¶ 6 (European Union); Hill Decl. ¶ 8 (Australia).<sup>18</sup>

The expert evidence also addressed the possible effects abroad of an order by a U.S. court applying U.S. tender offer rules to require rescission of a supposed illegal U.S. “unconventional tender offer” as to all sellers, including Europeans. The experts opined that such a result would be viewed as a startling intrusion of U.S. regulation into capably regulated foreign stock markets, contrary to EU principles of finality, and for those reasons an affront to local regulations. Ferran Decl. ¶ 17 (United Kingdom) (deeming the Endesa block trade an unconventional tender offer under U.S. law “would undoubtedly be seen to be in conflict with the fundamental principle that it is for countries to regulate their own markets”); Couret Decl. at 3 (France) (“that would be seen as an unjustified extension of US law and an affront to French regulation of its own markets and trading conducted on its own territory”); Amatucci Decl. ¶ 3 (Italy) (“this would come as a surprise to, and create consternation amongst, officials of the Italian securities regulator . . . as well as the judiciary”); Winter Decl. ¶ 8 (European Union) (“grant[ing] rescission rights to shareholders who have validly transferred their shares in a predominantly EU transaction . . . would seriously undermine the aforementioned principle of finality”); Hill Decl. ¶ 11 (Australia) (“a significant incursion into the autonomy and discretion of Australian regulators”).

Judge Cote’s decision at one point in the *E.ON/Acciona* matter cogently noted that the inherent haziness of the “unconventional tender offer” doctrine counseled especial caution in applying the doctrine “in the context of cross-border buying programs, where a foreign buyer may be acting in compliance with the laws of its own jurisdiction and the home jurisdiction of the issuer and unwittingly run afoul of a broadly interpreted tender offer rule in this country.” *Acciona*, 468 F. Supp. at 582. Indeed, the unconventional tender offer doctrine had never been applied in the cross-border context. And the principle that U.S. tender offer rules should be applied narrowly and predictably with respect to predominantly foreign transactions was powerfully affirmed by the Commission in its 2000 amendments to Regulation 14D and the accompanying Cross-Border Release. The Commission has repeatedly made clear that the fundamental purpose of the 2000 amendments was to “encourage [foreign] issuers and bidders to extend tender and exchange offers, rights offerings and business combinations to the U.S. security holders of foreign private issuers,” and “to promote the inclusion of U.S. security holders in these types of cross-border transactions.” Cross-Border Release, 1999 WL 969592, at \*2. As Judge Cote

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<sup>18</sup> The experts filing reports in the case included: John C. Coffee, Jr., Professor of Law, Columbia University Law School; Juan Fernandez-Armesto, Professor of Commercial Law, Universidad Pontificia Comillas-Icade (Madrid); Eilis Ferran, Professor of Company and Securities Law, Cambridge University; Alain Couret, Professor of Private Law, University of Paris I – Pantheon-Sorbonne; Carlo Amatucci, Professor of Commercial Law, University of Naples Federico II; Jaap W. Winters, Chairman of the High Level Group of Company Law Experts, appointed by EU Commission, Professor of International Company Law, University of Amsterdam; and Jennifer G. Hill, Professor of Corporate Law, University of Sydney Law School.

These expert reports are publicly available. We would be glad to make copies supplementally available to the staff on request.



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noted, the Commission's "admirable intention will be largely unrealized if a tender offer is defined so broadly that foreign investors unwittingly run afoul of the American regulatory system when they take substantial stakes in a foreign private issuer through a buying program which is not widely understood to constitute a tender offer." *Acciona*, 468 F. Supp. at 583. Undoubtedly, an "overly broad [tender offer] definition will undercut the recent reforms and create unnecessary friction in the international regulatory system." *Id* at 583-84.

Reflecting these principles, and supportive of excluding the application of "unconventional tender offer" doctrine to transactions conducted abroad, Judge Cote noted that the 2000 amendments to Regulation 14D are constructed on the premise "that cross-border tender offers are those that fit comfortably within the traditional definition of a tender offer, and would be recognized as such both in this country and in the issuer's home jurisdiction." *Acciona*, 468 F. Supp. at 582. For example:

- Under the Tier I exemption, a purchaser must provide equal treatment to U.S. holders so that they can participate "on terms at least as favorable as those offered any other holder," 17 C.F.R. § 240.14d-1(c)(2), "furnish" to the SEC any "informational document" it disseminates pursuant to its home jurisdiction's rules to securities holders in connection with the tender offer, *id.* § 240.14d-1(c)(3)(iii), and disseminate to U.S. holders that informational document in English on a basis "comparable" to that which it uses to disseminate the document to security holders in the "home jurisdiction," *id.* § 240.14d-1(c)(3)(i).
- Tier I purchases are likewise exempt from the restrictions that would otherwise apply to making purchases of the issuer's securities outside the tender offer itself so long as the "purchases comply with the applicable tender offer laws and regulations of the home jurisdiction," and the purchaser discloses the possibility of such purchases in its offering documents. 17 C.F.R. § 240.14e-5(b)(10)(v).
- Similarly, with respect to the Tier II exemption, many of the ordinary conditions imposed on offerors are lifted so long as the proposed transaction complies with "home jurisdiction law." *See, e.g.*, 17 C.F.R. § 240.14d-1(d). For example, payment and notice of the extension of a tender offer may be governed by home jurisdiction law. *Id.* § 240.14d-1(d)(iii)-(iv).

Considered as a whole, the 2000 amendments thus were found by Judge Cote to "provide significant evidence that the SEC does not intend a broad or sweeping definition of a tender offer for the securities of a foreign private issuer." *Acciona*, 468 F. Supp. at 582. To the contrary, that regulatory structure indicates the Commission's understanding that U.S. tender offer regulation applies to cross-border transactions only when the foreign buying program would be clearly recognized as a tender offer both in the U.S. and in the "home jurisdiction." *Id.* Moreover – and

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equally important – the Commission’s 2000 framework “recognizes that the tender offer process may be competently and appropriately managed by the home jurisdiction.” *Id.* at 583.<sup>19</sup>

The record in the *E.ON/Acciona* case further established that the general policy of respect for home-jurisdiction tender offer regulation is especially important in the context of “unconventional tender offer” analysis of a buying program that is plainly predominantly foreign. Throughout the EU, tender offer rules are triggered once a holder reaches a statutorily defined ownership threshold. This statutory framework, which is mandated under the EU’s 2004 Take-over Directive (Directive 2004/25/EC, Art. 5 ¶¶ 1-3), is specifically designed to provide transaction planners with clear guidelines – accumulations of stock beneath the statutory threshold are not subject to tender offer regulation, while any accumulations that exceed the threshold automatically are subject to such regulation. *See, e.g.*, Fernández-Armesto Decl. ¶ 16 (Spain) (25%); Ferran Decl. ¶ 14 (United Kingdom) (30%); Couret Decl. at 2 (France) (33%); Amatucci Decl. ¶ 4 (Italy) (30%). Thus, block purchases in European companies that fall beneath the home jurisdiction statutory trigger are commonplace and customary under these rules throughout Europe and elsewhere, and are not subject to home jurisdiction tender offer regulations as a matter of considered regulatory policy. *See, e.g.*, Fernandez-Armesto Decl. ¶¶ 20, 25-30 (Spain); Ferran Decl. ¶¶ 14-16 (United Kingdom); Couret Decl. at 1-3 (France); Amatucci Decl. ¶ 4 (Italy); Winter Decl. ¶ 6 (European Union); Hill Decl. ¶¶ 6-8 (Australia). To allow for the possibility that such transactions – which, to emphasize, are entirely lawful in their home jurisdiction – are subject to after-the-fact “unconventional tender offer” regulation in the United States would “introduce a crippling uncertainty in an area in which practitioners should be entitled to be guided by reasonably clear rules of the road.” *Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773, 791 (S.D.N.Y. 1979). Worse, by undermining the efforts of European (and other) regulators to create “clear rules of the road” in their home jurisdictions, such a holding would needlessly “provoke a collision (a real *casus belli*) between different regulatory regimes.” Fernández-Armesto Decl. ¶ 42; *see also* Coffee Decl. ¶ 4 (imposing unconventional tender offer doctrine to block trades would provide “an unavoidable collision between U.S. and Spanish law”); Ferran Decl. ¶ 17 (would “provoke an intense negative reaction in the UK” and “would undoubtedly be seen to be in conflict with the fundamental principle that it is for countries to regulate their own markets”);

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<sup>19</sup> The Cross-Border Release that accompanied the existing regulations reinforces this interpretation. The Cross-Border Release explains that the SEC is “adopting, as proposed, the requirement that a bidder or issuer relying on the Tier I exemption submit any offering materials prepared under foreign law to the Commission for notice purposes only.” Cross-Border Release, 1999 WL 969592, at \*7. The Release similarly explains that “[i]f the foreign subject company’s home jurisdiction permits dissemination solely by publication, the offeror likewise will publish the offering materials simultaneously in the United States.” Cross-Border Release, 1999 WL 969592, at \*7; *see also* Cross-Border Release, 1999 WL 969592, at \*18 (in order to encourage inclusion of U.S. holders in offerings, if an “offeror disseminates by publication in its home jurisdiction, the offeror must publish the information in the United States” as well). The Release thus confirms the Commission’s policy to look substantially to “home jurisdiction” regulation in the context of cross-border tender offers. The Commission’s determination to look to “home jurisdiction” regulation in the tender offer context was reinforced by its confidence that U.S. “anti-fraud provisions [will] continue to provide a basic level of protection for U.S. security holders participating in these transactions.” Cross-Border Release, 1999 WL 969592, at \*3.

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Couret Decl. at 3 (“would be seen as an unjustified extension of US law and an affront to French regulation of its own markets and trading conducted on its own territory”); Amatucci Decl. ¶ 3 (“would come as a surprise to, and create consternation amongst, officials of the Italian securities regulator . . . as well as the judiciary”); Winter Decl. ¶ 7 (from an EU perspective, “the safe harbor created within the EU for shareholders who remain below the mandatory bid threshold, would effectively become meaningless”); Hill Decl. ¶ 11 (“would obviously constitute a significant incursion into the autonomy and discretion of Australian regulators”).

Moreover, the record in the *E.ON/Acciona* litigation established that the policy justification for the “unconventional tender offer” doctrine does not exist with respect to block trades or other stock accumulations subject to the European regulatory framework. Because United States law does not have a bright-line rule that requires a mandatory all-shares offer, there is some risk that an acquiror subject to the U.S. rules might attempt a so-called “creeping control acquisition” – *i.e.*, the acquisition of effective control of a company through a series of unregulated purchases, without ever having to offer a control premium to the shareholder body as a whole. The policy justification for the U.S. unconventional tender offer doctrine is that it provides protection for minority shareholders against such acquisition maneuvers. But this concern does not exist with respect to acquisitions of shares in foreign companies subject to European rules. As noted above, under EU law, all member states must set an accumulation threshold, beyond which a shareholder must make an offer to minority holders on favorable terms. *See* Directive 2004/25/EC, Art. 5. The existence of a bright-line trigger means that “there can be no ‘creeping control’ acquisition[]” of European issuers – no party can obtain a control position without extending the same favorable terms to all shareholders, complete disclosure to the marketplace as a whole, and ample procedural protections. *See* Coffee Decl. ¶ 28; Directive 2004/25/EC, Art. 5 ¶ 4, Arts. 6-8; *see also* Fernández-Armesto Decl. ¶¶ 15-20 (Spain); Ferran Decl. ¶¶ 9, 14-16 (United Kingdom); Couret Decl. at 1-2 (France); Winter Decl. ¶ 6 (European Union). Accordingly, there should be no policy concern in excluding the possibility of “unconventional tender offer” regulation as to any jurisdiction that has chosen to adopt an EU-style bright-line mandatory offer regulatory regime.

As the lead expert report in the *E.ON/Acciona* case observed, it is apparent that applying U.S. “unconventional tender offer” concepts to buying programs legal where done “would be extremely offensive to [the foreign jurisdiction] regulators, because it would divest them of authority over takeover regulation affecting the core of their economy and industrial structure.” Coffee Decl. ¶ 4. It would “be as logical as to insist that British drivers (or, more accurately, U.S. drivers in the U.K.) should drive on the right side of the road,” *id.* at ¶ 4, and amount to “U.S. law . . . trumping [foreign] law with regard to a [foreign] transaction.” Coffee Supp. Decl. ¶ 11. Moreover, such U.S. regulation would fundamentally undermine the bright-line tender offer rule that prevails across Europe (and in much of the world), thereby “disrupt[ing] the ability of European securities regulators to administer their own markets.” *Id.* ¶ 5(ii); *see also* Fernández-Armesto Decl. ¶ 2 (“an important element of the Spanish markets would be severely disrupted”).

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The near-certain result of subjecting foreign block trades to United States tender offer rules would be that U.S. investors and fund managers will be excluded from such transactions whenever possible, as indicated by the uncontroverted expert declarations from around the world filed in the *E.ON/Acciona* matter. See Coffee Supp. Decl. ¶ 5(iv) (“E.ON’s theory would not protect U.S. shareholders, but would lead to their systematic exclusion from profitable trading opportunities.”); Fernández-Armesto Decl. ¶¶ 2, 38 (a rule subjecting Acciona’s block trade to U.S. tender offer regulation would amount to the U.S. “shooting itself in the foot,” as “US institutional investors would be harmed, being excluded from the possibility, open to other investors, to sell shares at a lucrative premium”); Ferran Decl. ¶ 20 (unlimited extraterritorial application of the U.S. securities laws “could [lead to] the exclusion of U.S. investors from opportunities to sell at a lucrative premium and the withdrawal of UK issuers from the U.S. markets”); Couret Decl. at 3 (“[A] ruling of that sort would likely result in American sellers being excluded from future transactions.”); Winter Decl. ¶ 9 (“[I]t may be expected that market participants will react by excluding U.S. citizens and residents from block trade transactions which may be lucrative to them.”); Hill Decl. ¶ 12 (“[A]cceptance by a US court of E.ON’s position would likely lead to US investors being excluded from advantageous block trade opportunities and to foreign firms choosing to be wholly absent from the US marketplace, consequences that would redound to the detriment of US investors.”).

Judge Cote carefully pointed out the dangers of applying U.S. unconventional tender offer analysis even though deciding to reject the tender offer claim on its merits. Noting that Acciona’s purchases were “entirely legal under Spanish law. . . known in Spain as an ‘extraordinary transaction’ and is not a tender offer” (*Acciona*, 2007 WL 316874 at \*12), Judge Cote observed as follows:

Caution in finding that an unconventional tender offer has occurred is particularly necessary “in the context of cross-border buying programs, where a foreign buyer may be acting in compliance with the laws of its own jurisdiction and the home jurisdiction of the issuer and unwittingly run afoul of a broadly interpreted tender offer rule in this country.”

*Id.* Judge Cote then went on to note that the EU “extensively regulates the tender offer laws of its Member States” by requiring that they “set a threshold for the accumulation of stock beyond which the shareholder must make an offer to minority holders on favorable terms.” As Judge Cote pointed out: “In Spain, this threshold is set at 24.99%. Because of this system, Spain has had no need to develop an unconventional tender offer doctrine.” *Id.*<sup>20</sup>

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<sup>20</sup> Judge Cote expressly reserved “the larger question” whether unconventional tender offer analysis “could ever be applied successfully to a buying program for the securities of a European Union issuer given the European Union’s requirement that Member States set a threshold ownership interest in a corporation that will trigger each state’s formal tender offer rules.” *Id.* at note 18.

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In sum, the cross-border rules should provide that a predominantly foreign purchase of a non-controlling position in a foreign corporation, executed on a foreign exchange and lawful under home jurisdiction rules, cannot be subjected to U.S. regulation under “unconventional tender offer” analysis – wholly apart from whether a conventional tender offer for shares of the foreign issuer would or would not be subject to U.S. tender offer regulation. The *E.ON/Acciona* matter illustrates the dangers of allowing such claims to be made, and Judge Cote’s thoughtful analysis counsels strongly in favor of a clear statement by the Commission that “unconventional tender offer” analysis is inapplicable to purchases of shares of foreign corporations on foreign exchanges on foreign soil as permitted by applicable foreign law.

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We appreciate the opportunity to provide these comments and, of course, would welcome the opportunity to discuss them with the staff (either Ted Mirvis or Adam Emmerich of this firm can be reached at 212-403-1000, or via [tnmirvis@wlrk.com](mailto:tnmirvis@wlrk.com) or [aoemmerich@wlrk.com](mailto:aoemmerich@wlrk.com), respectively).

Very truly yours,

Wachtell, Lipton, Rosen & Katz