Forum for | US Securities Lawyers | in London

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

June 23, 2008

**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 No. 33-8917**

Dear Ms. Morris,

We are submitting this letter in response to the request of the U.S. Securities and Exchange Commission (the "**Commission**") for comments in respect of the Commission's proposal (the "**Proposal**") to revise the current cross-border exemptions for tender offers to expand and enhance their utility for business combination transactions. The Forum for U.S. Securities Lawyers in London (the "**Forum**") is a trade association representing a large number of U.S. qualified lawyers practicing at a number of law firms and financial institutions in the London capital markets, as well as market participants including securities exchanges, settlement systems and registrars. Founded in 2006, the Forum is an independent, self-funded organization dedicated to addressing issues of, application of and compliance with U.S. securities laws in the London and international capital markets. We are submitting this letter on behalf of certain members of the Forum who are signatories of this letter.

We strongly support the Commission's efforts to encourage offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers, to permit U.S. security holders to participate in these transactions in the same manner as other securities holders. We also strongly support the Commission's codification of existing interpretive positions and exemptive orders in the cross-border area and its efforts to harmonize practice across borders where doing so does not harm U.S. investors. In particular, we applaud the Commission's work to harmonize, where appropriate, its approach with international practice. With the recent adoption and implementation in the European Economic Area (the "**E.E.A**") of the E.U. Takeovers Directive (2004/25/EC) (the "**E.U. Takeovers Directive**"), European tender offer laws and regulations, driven by the twin goals of promoting the efficiency of capital markets across borders (including reducing the risk of regulatory arbitrage) and investor protection, have been increasingly harmonized and we believe the Commission's proposed changes will help U.S. investors to more smoothly and safely participate in the global capital markets. As the Commission recognizes, as evidenced by the multiple questions posed in the Proposal, there are many areas that lend themselves to public comment in the Proposal. We are limiting our comments to those points that we perceive to be of the most direct relevance to foreign private issuers in the London and other European capital markets.

We wish to comment in respect of the following issues:

(a) Tier I Threshold

The Commission has asked for comment on whether the maximum U.S. ownership level for Tier I and Rules 801 and 802 should be raised from 10 percent to 15 percent. We believe that the Commission should raise this maximum threshold to 15 percent. In particular, we note the increased globalization of the capital markets and the increased participation of U.S. investors in both offerings and securities trading outside of the United States. As a result, it is increasingly plausible for non-U.S. companies to have a U.S. investor base that is near 10 percent, even if such company did not actively market its securities into the United States. By raising the threshold to 15 percent, the proposed rules would benefit U.S. investors as this would encourage a greater number of offerors and issuers in cross-border business combinations, and rights offerings by foreign private issuers, to include U.S. investors in target companies in transactions where otherwise, because of a lack of clarity on the availability of a Tier I exemption, such investors may be excluded or the offered consideration limited to cash, thereby depriving U.S. investors of the opportunity to determine their desired form of consideration. In addition, such a change to the rules would allow U.S. investors who had invested in non-U.S. issuers in offerings outside the United States to rely on local procedures and disclosure, which, particularly in many European jurisdictions, include target shareholder and minority shareholder protections which are often comparable to protections provided by the U.S. tender offer rules.

We also believe that U.S. investors would benefit from the proposed amendment because the E.U. Takeovers Directive contains squeeze-out provisions that allow an offeror to compulsorily acquire any outstanding shares: (i) if the offeror holds securities representing at least 90 percent of the capital carrying voting rights in the target company; or (ii) if, following acceptance of a bid, the offeror has firmly contracted to acquire securities representing at least 90 percent of the capital carrying voting rights and 90 percent of the voting rights comprised in the bid. It also allows E.U. Member States, when adopting the provisions of the directive into their national law, to elect a higher minimum percentage, of up to 95 percent. The E.U. Takeovers Directive also includes sell-out provisions that entitle minority shareholders to require an offeror to acquire their shares in the same or similar circumstances. As a result, this practice encourages the inclusion of U.S. investors in such offerings. If U.S. investors are not included in transactions, offerors may not be able to take advantage of these provisions and may be forced to contend separately with locked-in U.S. minority shareholders. Neither offerors nor the U.S. shareholders benefit in such a scenario.

In the United Kingdom, for instance, minority shareholders have the right to require an offeror to acquire their minority shares once the offeror has obtained at least 90 percent in value of all voting shares in the target and at least 90 percent of the voting rights in the target. Similarly, in Germany such rights can arise upon obtaining an even lower threshold. By initially including U.S. holders in the relevant takeover transaction, the applicable sell-out threshold could be more easily met, allowing minority (including U.S.) shareholders to more effectively exit the company at a reasonable price per share.

(b) U.S. Ownership Calculation Date (Negotiated and Non-Negotiated Transactions)

We welcome the Commission's proposed change to make the announcement date the reference date for the calculation of U.S. ownership to determine eligibility for the Tier I and Tier II exemptions. We encourage the Commission to adopt these proposed amendments for both negotiated and non-negotiated transactions.

(1) Announcement Date as Reference Date

For negotiated transactions, the adoption of the announcement date as the reference date will, as the Commission acknowledges in its Proposal, accommodate transactions in those jurisdictions where the equal treatment of "overseas shareholders" (*i.e.,* including U.S. shareholders) is required by law. In addition, as the Commission acknowledges, even where it is not required by law, in many European and other jurisdictions, it is necessary to have a concrete analysis of U.S. shareholdings and a plan for addressing the relevant U.S. requirements at the time an offer is announced, which in turn supports the announcement date as a reference date.

For example, although a discussion of the treatment of U.S. (or other overseas shareholders) is not required in an announcement of a takeover offer under the United Kingdom City Code on Takeovers and Mergers (the "**U.K. Takeover Code**"), a discussion of the conditions for the offer and other substantive and procedural details is required. As a result, the ability to plan all significant aspects of such a tender offer, such as the minimum tender condition, any planned "squeeze out", the offer's timing and alternative forms of consideration for certain shareholders, before the transaction is announced is crucial. These considerations, among others, can depend on the offer's eligibility for Tier I or Tier II relief. The availability of certainty at the time of announcement may encourage issuers to include U.S. shareholders in an offer where they might otherwise have been excluded because of the uncertainty of treatment at the time of the announcement. As a result, bidders, issuers and shareholders in such a situation would benefit from the clarity that would come from having a clear announcement-linked reference date. Similarly, in certain European jurisdictions, such as Germany and Austria, where it is mandatory to include all shareholders on the same basis, the Proposal will allow bidders to consider the availability of Tier I or Tier II relief for the offer, plan the offer accordingly (including consulting the Commission in respect of any relief that may be required) and announce the offer with greater certainty.

In the case of non-negotiated tender offers, the use of the announcement date as the reference date would also benefit transactions. As the Commission notes in the Proposal, an announcement may itself trigger significant trading, which could overstate the importance of the United States as a trading market in analyzing a target's U.S. shareholders.

(2) Range of Dates

We also support the Commission's proposal of allowing a range of dates to be used when analyzing the number of U.S. shareholders. As the Commission notes in its Proposal, the availability of information in respect of U.S. shareholdings may vary significantly. By allowing bidders to use a broader range of dates on which to conduct their analysis, the proposed amendments will enhance the quality of bidders' analyses. We believe that, in respect of jurisdictions such as the United Kingdom, most E.E.A. countries and Australia, a range of 60 days should be sufficient. We note, however, that particularly in many emerging market jurisdictions, the analysis may be more difficult and that a longer period of time for analysis might be needed in such cases.

(3) Period Between Reference Date and Commencement

The Commission has requested comments on whether it would be appropriate to limit the time period between the reference date for the assessment of eligibility (*i.e.*, announcement) and commencement. The period of time between announcement and commencement will, in most circumstances, be governed by local law requirements and, in many cases, be subject to review by local regulators. Consequently, delays are very often beyond the control of the parties to the transaction, such as the need to obtain an independent valuation. We believe that any limitation on the time period in question may create conflict with local practices rather than lead to the intended harmonization across international borders that the Commission has promoted with the implementation of the cross-border rules and proposed rules. We consider the Commission's position of denying cross-border exemptions to any transaction or series of transactions that technically comply with the Commission's rules but are actually part of a plan or scheme to evade such rules sufficient to prohibit bidders from using the timing of the announcement or the commencement of the offer for purposes other than genuine legal and commercial reasons.

(4) Selection of a Date for Analysis

The Commission has also requested comment on whether it should provide further guidance on the selection of an appropriate date within the range of permissible dates. In our experience, we believe that such guidance is unnecessary. Selection of a date is typically driven by the availability of information in a given jurisdiction on a target company's shareholders. As with the time period between announcement and commencement, we believe that any attempt by a bidder to evade the Commission's rules in connection with the selection of a date for analysis of U.S. shareholdings is sufficiently addressed by the Commission's position of denying cross-border exemptions to transactions that are part of a plan or scheme to evade the Commission's rules.

(c) Possible New Eligibility Standards for Negotiated and Hostile Transactions

Two alternative tests are suggested by the Commission in its Proposal for use in measuring the U.S. nexus of a transaction: ((a) measuring the average daily trading volume (“**ADTV**”) of a security in the United States against the worldwide ADTV relating to that security; or (b) using a test based on the percentage of an issuer’s shares that are held in the form of American Depositary Shares or Receipts (“**ADRs**”)) to gauge the U.S. securities regulatory interest in an underlying security. We strongly favor the ADTV approach as an optional alternative to the current U.S. beneficial ownership test. We believe that adopting an alternative, appropriate ADTV test would benefit U.S. investors by increasing transparency, liquidity and certainty in the worldwide financial markets. We note that, in the following discussion, we have assumed that the Commission would propose an ADTV test similar to the test it recently proposed in the Rule 12g3-2(b) context[1].

(1) ADTV

As discussed in the Proposal, one advantage of using ADTV as a measure, particularly in hostile or negotiated transactions, is that ADTV information is readily available to all market participants on what is, essentially, a real-time basis, whereas U.S. beneficial ownership is more difficult to determine, as often the information required to determine it is unavailable. In addition, we agree that changing the rules to allow bidders to use a 20 percent ADTV test for Tier I eligibility would likely result in many more transactions properly being eligible for Tier I, which we believe would benefit U.S. shareholders by promoting their inclusion in cross-border transactions already governed by local securities laws. Moreover, we believe that streamlining the Tier I eligibility standards in this way would eliminate much of the uncertainty involved in determining a transaction’s eligibility for Tier I treatment, thus making a critical component of the cross-border business combination process more efficient, which should benefit all market participants.

The ADTV threshold chosen in the Tier I context should be consistent with that used in the determination of a U.S. nexus in the U.S. reporting obligation context. The Commission has already determined that the 20 percent ADTV threshold adequately represents the fulcrum of

[1] The Commission’s proposal would amend Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934, as amended (the “Exchange Act”), to allow a foreign private issuer to claim the Rule 12g3-2(b) exemption if, *inter alia*, the average daily trading volume of the subject class of securities in the United States for the issuer’s most recently completed fiscal year has been no greater than 20 percent of the average daily trading volume of that class of securities on a worldwide basis for the same period.

active U.S. securities regulatory oversight of an issuer's ongoing operations. It follows that there is a rational basis for using this threshold in all contexts where ADTV is analyzed to determine U.S. beneficial ownership, such as for rights offerings and business combinations. Moreover, as the ADTV test is objective and based on publicly available information, there would be no need to differentiate between hostile and other transactions, or to qualify the test based on actual knowledge or reported figures.

(2) ADR

As the Commission notes in its Proposal, we agree that there are numerous disadvantages to adopting an ADR-based test, even in the alternative, to determine the U.S. securities regulatory interest in the securities of an issuer. In our experience, foreign private issuers do not use ADR programs sufficiently to make them a reliable proxy for U.S. securities regulatory interest in an issuer's securities and, because ADR programs are relatively opaque, they give rise to the prospect of abuse. Although determining the percentage of an issuer's outstanding securities (of the same class) held in one or more ADR programs on a particular day would be easier than performing an ADTV analysis over a trailing 12-month period, simplicity is not necessarily advantageous in this case. As discussed in the Proposal, many foreign private issuers with U.S. beneficial ownership do not, for various reasons, sponsor ADR programs. Other foreign private issuers benefit from un-sponsored ADR programs and still others rely exclusively on home-market (or secondary, but still non-U.S. market) trading. As a result, because the population measured by an ADR-based test would not necessarily be representative of the whole population, such a test could create inconsistent or inaccurate results.

Moreover, in our view, a simple ADR-based test, in which it is not always possible to determine the identities of participants in ADR programs, is ripe for manipulation. The ease at which underlying securities can be deposited and removed from an ADR program enhances the liquidity of such securities, but it also means that large shareholders could very easily and, perhaps, anonymously, skew the percentage of an issuer's securities held in ADR form in either direction. For the foregoing reasons, we believe that an ADR-based test would be too unreliable and malleable to adequately determine the threshold of U.S. securities regulatory interest in a security.

We would be pleased to respond to any enquiries regarding this letter or our views on the Proposal generally. Please contact Sarah Cebik at DLA Piper UK LLP (Tel: +44 (0) 8700 111 111); Jamie Benson at Dorsey & Whitney (Europe) LLP (Tel: +44 (0) 20 7826 4513); Alan J. Berkeley at Kirkpatrick & Lockhart Preston Gates Ellis LLP (Tel: +44 (0) 20 7360 6344); John Holtrichter or Katherine Mulhern at Lovells LLP (Tel: +44 (0) 20 7296 2000); Paul de Bernier at Mayer Brown International LLP (Tel: +44 (0) 20 7782 8232); Peter O'Driscoll or Nell Scott at Orrick, Herrington & Sutcliffe LLP (Tel: +44 (0) 20 7562 5000); or Eva Talmacsi or Daniel Winterfeldt at Simmons & Simmons (Tel: +44 (0) 20 7628 2020) if you have any enquiries in relation to this letter.

Respectfully submitted,

**DLA Piper UK LLP**

**Dorsey & Whitney (Europe) LLP**

**Kirkpatrick & Lockhart Preston Gates Ellis LLP**

**Lovells LLP**

**Mayer Brown International LLP**

**Orrick, Herrington & Sutcliffe LLP**

**Simmons & Simmons**