WAYNE STATE UNIVERSITY
LAW SCHOOL

June 23, 2008

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1 090
Attention: Nancy M Morris, Secretary

Re: File Number S7-10-08

Dear Secretary Morris:

I respectfully submit the following comment on the proposed revisions to the cross-border tender offer, exchange offer, and business combination rules (the "Cross-Border Exemptions"), as set forth in Release Nos. 33-8917; 34-57781. I am an assistant professor of law at Wayne State Law School where I teach and write in the capital markets and corporate finance areas. I have previously co-authored an article on the Cross-Border Exemptions, *Getting U.S. Security Holders to the Party: The SEC's Cross-Border Release Five Years On*, 12 U. PENN J. INT'L ECON. L. 455 (2005). This comment reflects my research in this area as well as my own personal experiences as a takeover attorney practicing in London and advising on cross-border takeovers during 2000 through 2005.

My comment is directed to two topics: 1) the methodology of determining U.S. beneficial ownership for purposes of qualifying for the Cross-Border Exemptions, and 2) the need for further study of the Section 3(a)(10) exemption and its interaction with the Cross-Border Exemptions in light of the recent surge in use of the scheme of arrangement structure in common law countries.

Determining the Applicability of the Cross Border Exemptions

The Release currently proposes that the test for beneficial U.S. ownership be revised to be a date in a 60-day range prior to the announcement of the transaction. In addition, the Release solicits comments as to appropriate alternative tests to determine this ownership level, including a test based on the target's U.S. aggregate daily trading volume or securities held in U.S. ADR form.

The SEC should consider adopting these two alternative proposals or a modified form of either of them for the following reasons:

The revision to a 60-day pre-announcement date range will mainly address two prior difficulties with the Cross-Border Exemptions: 1) the impossibility in many Continental European countries

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of performing the required count in the 30-day period prior to commencement due to the fractured shareholder clearing and accounting systems in those jurisdictions, and 2) local regulatory conflicts and transaction uncertainty created when an offer or solicitation does not commence until a 30-day time period after transaction announcement and the applicable Cross-Border Exemption, if any, is therefore unknown at the time of announcement. In addition, a "look through" test keyed to announcement rather than commencement will better reflect the U.S. ownership of a target and possibly exclude any post-announcement U.S. ownership shift due to arbitrageur purchases of target stock.

These SEC-proposed revisions are a step forward, but will not address the principal issues with the "look through" test. First, the "look-through" process takes a significant amount of time and effort, effort that a foreign acquirer may not wish to have expended or may not have the time to undertake. Foreign acquirers will instead opt for a scheme of arrangement structure or to exclude U.S. holders. Consequently, acquirers will primarily utilize the Cross-Border Exemptions in those countries where a scheme of arrangement process is unavailable, U.S. ownership is significantly above the 10 percent threshold or the form of transaction structure does not permit exclusion of U.S. holders.[1] This is no different than the current situation under the 30-day "look through" test.[2]

Second, since a count of this type is wide-spread and unusual, acquirers may be loath to undertake it because the "look-through" is a signal to the markets of a transaction about to be announced.[3] The proposed revision to a 60-day pre-announcement range will exacerbate this problem since it will require the "look-through" to be conducted while the transaction is still likely to be undisclosed. Moreover, most transactions are negotiated over a very short time period; many targets located in Continental Europe and other jurisdictions may not be able to finish their "look through" before transaction announcement, again raising the problem of transaction announcement before the applicability of the Cross-Border Exemptions is known.[4]

Finally, the beneficial requirement creates arbitrary differences for acquirers in certain countries. For example, in Germany where the majority of securities are held in bearer form, this has led to a sometime practice of retaining a financial advisor or information agent to make blind inquiries of depositary banks (nominees) as part of the required look-through analysis. However, such a survey is necessarily incomplete and produces only a limited picture of security holder residences. In some circumstances this entirely excuses the acquirer from performing a "look-through".[5] The result is that the purpose of the count – to determine U.S. ownership – is defeated

[1] It is my understanding that acquirers in non-U.S. offers often exclude U.S. holders even when ownership is above the 10% level in the belief that U.S. holders will either sell in the market or transfer investment discretion to an off-shore affiliate in order to accept the offer. The SEC may view the affiliate's acceptance on behalf of the U.S. parent as a means to avoid the rightful application of U.S. rules, but to my knowledge has not brought any enforcement action with respect to an unlawful tender of this nature.

[2] In the Cross-Border Proposing Release, the SEC estimated that 824 transactions per year would file documentation in reliance upon the Cross-Border Rules. See Cross-Border Tender Offers, Business Combinations and Rights Offerings, Release No. 337611, at n.150 (November 13, 1998) [63 FR 69136]. The Release does not have current utilization rates, but it is likely far below this number.

[3] *See, e.g.*, Cinven Limited, SEC No-Action Letter, 2003 WL 1969293 (April 9, 2003) (granting an exemption under Rule 14e-5 to an acquirer prior to announcement of a takeover offer and without the acquirer having conducted the full look-through analysis required under the Cross-Border Rules).

[4] *See, e.g.*, Saipem SpA, 2002 WL 1841561 (July 29, 2002) (providing a detailed discussion of the time-line for "look-through" procedures in France).

[5] *See* Axel Springer AG Offer for ProSiebenSat.1 Media AG, SEC No-Action Letter, 2005 WL 2291629, at *3 (Sept. 12, 2005) ("The Offeror has not performed a 'look-through' analysis required for purposes of establishing the availability of the cross-border exemptions under Rule 14d-1(d) under the Exchange Act . . . because, given the limited information available as to the holders of bearer shares of German

in these jurisdictions, and these acquirers can more easily take advantage of the Cross-Border Exemptions than acquirers of targets located in other jurisdictions.

The "look through" test is thus difficult to perform, encourages acquirers to structure transactions to avoid reliance upon the Cross Border Exemptions, produces arbitrary compliance requirements, and oftentimes produces an incomplete report of U.S. ownership.[6] The SEC would better facilitate the utilization of the Cross Border Exemptions and inclusion of U.S. shareholders if it instead adopted a bright line test which would permit acquirers in all circumstances to easily determine their eligibility. This could be a test based on 1) U.S. aggregate daily trading volume, 2) U.S. ADR presence, or 3) a once yearly required disclosure to be made by a foreign private issuer with respect to all of its securities registered under the Exchange Act (something currently required by Form 20-F).[7] Each of these three tests has this benefit, although it appears that institutional shareholders increasingly hold their shares abroad and not in ADR form.[8] The SEC should confirm this trend, and if true, the third of these tests would likely be the most reflective of U.S. ownership.[9] This test also has the virtue of being the easiest for acquirers to comply with. Additionally, this test is likely to be reflective of U.S. ownership as of the pre-announcement time period in a manner similar to the current proposed "look through" test as significant shifts in ownership between this time period of disclosure and pre-announcement are uncommon.

Nonetheless, in offers and solicitations for securities of foreign private issuers, a more principled test could be built by focusing upon the initial investment decision (and choice) of the target's U.S. security holders. U.S. security holders of a foreign private issuer have made the decision to invest in such an entity and therefore have accepted that they will be governed, to varying extent, by rules of a non- U.S. jurisdiction and will not have the full protections of the Exchange Act that are applicable to U.S. domestic reporting companies. This is particularly true for securities of a foreign private issuer that are not registered under the Exchange Act. These securities are not registered either because there are less than 300 holders resident in the United States, or because there are greater than 300 holders but the foreign private issuer is relying upon Rule 12g3- 2(b) to avoid the periodic reporting requirements under the Exchange Act. In the vast majority of instances, these securities are not listed on the New York Stock Exchange or quoted on Nasdaq, but instead only on a non-U.S. exchange. In addition, because these securities are not registered under the Exchange Act, U.S. security holders are not benefitting from the protections of the periodic reporting requirements of the Exchange Act applicable to foreign private issuers, nor have these securities typically been issued pursuant to a registration statement filed with and reviewed by the SEC. The U.S. investor has consciously made the decision to invest in a foreign private issuer without the full protections of the U.S. federal securities laws; to apply the relevant Williams Act or securities registration requirements at this juncture seems inapposite and unduly

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companies, it is unlikely to yield comprehensive or complete results."); 91 Profi-Start 2004, SEC No-Action Letter, 2004 WL 1780985, at *2 (June 24, 2004) (describing the accepted practice for a look-through analysis in Germany for an target with outstanding bearer securities).

[6] Attempting to pinpoint U.S. ownership as of the time of transaction announcement also does not comport with SEC tests in similar circumstances such as for deregistration and registration requirements under the Exchange Act.

[7] To the extent the SEC does not adopt my other proposals set forth herein, this yearly share ownership reporting requirement could also be imposed upon Rule 12g3-2(b) issuers. All other acquirers would then be able to presume that the target's applicable beneficial ownership is below the 10% threshold unless an equal or higher number is revealed in the public filings of the target in their home country.

[8] *See* Carrie Coolidge, *Going Abroad.(foreign stocks versus American depository receipts)*, FORBES, Apr. 7. 2008; Edgar Ortega, *ADR Listings Decline in U.S. Markets*, INT'L HER. TRIB., Jan. 30, 2006.

[9] ` In addition, the other two tests would include arbitrage transactions and volume between ADR facilities and a target's primary home trading market unduly biasing the U.S. trading and ADR numbers upward.

burdensome and the level of U.S. shareholdings seemingly irrelevant. This is especially true in jurisdictions such as the United Kingdom that have similar shareholder protections with respect to equal treatment and accounting requirements.

The SEC should thus revise any test chosen to apply only for securities of foreign private issuers that are registered under Section 12 of the Exchange Act. All other acquirers should be able to presume that the target's applicable beneficial ownership is below the 10% threshold unless an equal or higher number is revealed in the public filings of the target in their home country or in any document furnished to the SEC.[10]

In addition, I am aware that the S.E.C. is currently exploring a mutual recognition scheme. I would recommend that any such mutual recognition scheme permit substituted compliance with a foreign jurisdiction's takeover regulation so long as it was substantially similar in protections to the U.S. one. This would largely encompass the jurisdictions of most foreign private issuers registered under the Exchange Act. This would also address another primary impediment to foreign private issuers accessing the U.S. market – fears of potential exposure under the anti-fraud, anti-manipulation and civil liability provisions of the U.S. federal securities laws.

The Section 3(a)(10) Exemption

The SEC should also consider the interaction of the Cross-Border Exemptions with another commonly used transactions exemption, the Section 3(a)(10) exemption for schemes of arrangement. Currently, the Cross-Border Exemptions do not account for the transaction arbitrage that can occur abroad. More specifically, as the scheme of arrangement has become a preferred transaction structure in the United Kingdom, Australia and other common law jurisdictions, it provides issuers in these countries a distinct advantage over civil law jurisdictions which do not permit schemes of arrangement.[11] More specifically, acquirers with significant U.S. ownership in common law jurisdictions can structure their transactions to avoid the U.S. registration requirements by utilizing a scheme of arrangement. But, civil law acquirers are deprived of this option forcing them to register securities in similar situations.[12] Yet, many countries such as France have a court-process for a merger with elements similar to the requirements of Section 3(a)(10), including a court-supervised fairness review. Consequently, acquirers in common law jurisdictions have a relatively easy way to avoid the filing burden imposed on civil law issuers for an apparently unjustified reason. The S.E.C. should reexamine the validity of the Section 3(a)(10) exemption for foreign issuers and determine if its availability

[10] I believe that issuers taking advantage of the 12g3- 2(b) exemption should be included in this presumption since they are otherwise exempt from Exchange Act reporting requirements. This would jibe with their expectations and prevent some seemingly bizarre results. For example, Gaz de France recently registered its securities in connection with its merger with Suez. Gaz de France cannot take advantage of the Cross Border Exemptions since Suez's U.S. holders appear to own more than 10% of Suez. Yet, nether Gaz de France or Suez is listed on a U.S. exchange nor do either have securities registered under the Exchange Act. In fact, Gaz de France is likely to deregister these securities as soon as possible. *See* Registration Statement on Form F-4 of Gaz de France, at 23 (Filed June 16, 2008). In this regard, the SEC should consider raising the threshold to a 20% level to reflect the greater U.S. ownership of non-U.S. companies even when they are not listed on a U.S. exchange or otherwise have securities registered under the Exchange Act.

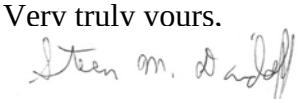
[11] *See* Charles Martin, *The Rise and Rise of Schemes of Arrangement*, LAWYER, 2007 WLNR 5350943, Mar. 19, 2007 ("[S]chemes have become the preferred way of proceeding for many offerors, so much so that the Takeover Panel is intending to consult on changes to the Takeover Code to make it more tailored to fit the mechanics of schemes.")

[12] *See* Steven M. Davidoff, *French Deal, American Red Tape*, N.Y. TIMES DEALBOOK, June 17, 2008, available at http://dealbook.blogs.nytimes.com/2008/06/17/french-deal-american-red-tape/ (describing the 571 page registration statement of Gaz de France filed in connection with its merger with Suez and commenting that "if the Gaz de France transaction unfolded under the rules of the United Kingdom, the parties would no doubt have structured it as a scheme of arrangement," in order to avoid this regulatory burden).

is justified or should otherwise be expanded within the scope of SEC regulatory authority.

I congratulate the SEC Staff for taking a significant step forward with this Release. The Staff has clearly carefully thought about these issues and acted admirably in this Release to further facilitate Cross-Border transaction. My suggestions are but a small step that can further this goal while preserving SEC oversight and the applicability of the full panoply of U.S. federal securities laws where appropriate.

Very truly yours.



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