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June 23, 2008

By E-mail: rule-comments@sec.gov

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

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

Dear Ms. Morris:

We are pleased to respond to Release Nos. 33-8917 and 34-57781 (the "Proposing Release") in which the U.S. Securities and Exchange Commission (the "Commission") solicited comments on proposed amendments (the "Proposed Rules") to the rules that apply to cross-border tender offers and business combinations, as well as to beneficial ownership reporting rules that apply to certain non-U.S. shareholders.

The Proposed Rules largely fall into two categories: (i) those that codify existing no-action and exemptive relief granted to parties on case-by-case bases in cross-border transactions and (ii) additional proposed rules that permit compliance with home-country law or practice in lieu of U.S. rules where the two conflict. The Proposing Release also addresses certain interpretive issues of concern for U.S. and other offerors engaged in cross-border business combinations. We support the Commission's impetus in putting forth the Proposed Rules. We think the proposed codification of previously-granted relief permitting certain purchases outside of tender offers and the proposed change in date for calculation of U.S. beneficial ownership of target securities will be particularly helpful, as will the proposed changes to the rules on subsequent offering periods in Tier II-eligible transactions that are meant to eliminate conflicts with non-U.S. law and practice.

We also appreciate the Commission's stated purpose of encouraging offerors and issuers in cross-border business combinations and foreign private issuers in rights offerings to permit U.S. shareholders to participate in these transactions in the same manner as other holders. We believe that the Proposed Rules are helpful modifications to the cross-border exemptions that were initially adopted in 1999 (the "1999 Rules").[1] We note, however, that if the Proposed Rules are adopted in their current form, many foreign private issuers may continue to exclude U.S. holders from cross-border business combination transactions and rights offerings, as has been the case since the adoption of the 1999 Rules, principally due to the continuing incremental regulatory burden of compliance with U.S. regulation and inability to fully reconcile U.S. and home-country rules in a manner that justifies the inclusion of U.S. shareholders in the transaction. Accordingly, our letter focuses on a few specific aspects of the Proposed Rules that we believe may be improved or clarified in a manner that is consistent with the Commission's articulated goals. We also make a few technical observations below.

Application of the all-holders rule.

As described in the Proposing Release, Rule 14d-10(a)(1) (the "all-holders rule") under the U.S. Securities Exchange Act of 1934, as amended (the "Exchange Act"), requires that all tender offers subject to Section 14(d) of the Exchange Act be held open to all holders of securities of the subject class. To accommodate procedural differences between U.S. and non-U.S. rules, however, an exemption from the all-holders rule is permitted in Tier II-eligible transactions to allow the bidder to conduct two separate, parallel offers: one made only to non-U.S. shareholders and the other made, on at least as favorable terms, only to U.S. shareholders.

The Proposed Rules would expand this exemption to allow multiple non-U.S. offers in parallel with one U.S. offer, so long as the U.S. offer is made on terms at least as favorable as the non-U.S. offers. We think that this additional flexibility will be helpful in allowing bidders to structure multiple offers outside of the United States so that they may more easily comply with differing procedural requirements in a number of jurisdictions.

The Commission's position that the all-holders rule prohibits the exclusion of any U.S. – or non-U.S. – holders from an offer that is subject to Section 14(d) of the Exchange Act, however, is problematic and likely to encourage many bidders to exclude U.S. holders from cross-border tender offers if they may do so without affecting deal certainty. As articulated in the Proposing Release, the Commission appears to be seeking to impose an absolute requirement on bidders to extend their offers to all non-U.S. shareholders, without allowing for exclusions of holders in non-critical jurisdictions in

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[1] "Final Rule: Cross-Border Tender Offers, Business Combinations and Rights Offerings", SEC Rel. Nos. 33-7759 and 34-42054 (October 22, 1999), 64 FR 61382 (November 10, 1999).

cases where there may be irreconcilable differences between laws or regulations of such non-critical jurisdictions and the laws or regulations of other jurisdictions that are key to consummating the transaction because of the number of shareholders that reside there. Bidders, therefore, may have to make a choice between jeopardizing the overall transaction because of inability to comply with legal requirements of a non-critical jurisdiction, and simply excluding the United States in order to avoid running afoul of this broader interpretation of the all-holders rule. Moreover, even when compliance with a non-critical jurisdiction's rules would be merely burdensome – without necessarily being irreconcilable with the rules of critical jurisdictions – bidders may simply exclude the United States (as well as the non-critical jurisdiction) in order to avoid added complexity that they may view as unnecessary. Finally, there is serious doubt about the Commission's jurisdictional ability to extend its reach outside of the United States in such a manner. We strongly recommend that the Commission not pursue this interpretation of the all-holders rule.

Calculation of U.S. beneficial ownership.

As noted in the Proposing Release, in negotiated transactions, the current test for Tier I or Tier II eligibility requires calculation of U.S. ownership by reference to the target's or issuer's non-affiliated, or "free" float, which includes securities underlying American Depositary Receipts ("ADRs") that are convertible or exchangeable into the subject securities, but excludes (from both the numerator and denominator of the calculation) all holders of more than 10% of the class of subject securities and any subject securities held by the bidder or issuer (or their affiliates). Under the present rules, the level of U.S. beneficial ownership must be calculated as of the 30th day before commencement of a tender or exchange offer and as of the 30th day before the commencement of solicitation for other types of business combinations. The level of U.S. beneficial ownership in a rights offering context is currently measured as of the record date, and no amendment to this rule as been suggested by the Commission in the Proposing Release.

In an effort to alleviate several unintended consequences of the application of the current rule to tender or exchange offers and other business combination transactions, the Commission proposes to key the calculation of U.S. ownership to the date of "public announcement" rather than commencement of a transaction, and to permit calculation on any date within a 60-day period before such announcement. We support this proposal as a move toward making compliance less burdensome, consistent with the Commission's stated purpose of encouraging offerors and issuers in cross-border transactions to extend participation to U.S. shareholders. In addition, this change will give bidders in negotiated transactions much more certainty about Tier I or Tier II eligibility while the transactions are in the planning stage, which will be extremely beneficial to planning for the execution of the transaction and ascertaining deal feasibility.

We believe that it would be advisable to amend the calculation date for rights offerings as well. The current requirement that U.S. beneficial ownership be calculated as of the record date poses problems in certain jurisdictions. For example, in Australia, issuers cannot rely with certainty on eligibility for Rule 801 relief before making a public announcement of their intention to undertake a rights offering, since announcement often occurs many days in advance of the record date. We suggest that the calculation date be moved to within 30 days of the date of announcement or, alternatively, within 30 days of the record date. Consistent with the considerations described above for tender or exchange offers and other business combinations, such a change may encourage issuers to include U.S. holders in rights offerings where their participation otherwise might be excluded entirely or limited only to certain U.S. institutional investors.

The Proposing Release requests comment with respect to the current requirement that holders of greater than 10% of subject securities be excluded from the calculation of U.S. beneficial ownership. We think that non-affiliated holders of greater than 10% of the subject securities should be taken into account in the calculation. By excluding such shareholders who are otherwise non-affiliated with the bidder or the issuer, the current calculation mechanism tends to overstate the actual interest U.S. shareholders have in the subject securities when there are one or more holders of such relatively large stakes. The end result consequently distorts the Commission's stated dual purposes of investor protection and facilitation of cross-border transactions where U.S. interest is minimal.[2]

Disclosure of beneficial ownership.

We support the Commission's proposal to extend access to short-form beneficial ownership reporting on Schedule 13G to non-U.S. institutions that are substantially comparable to the types of U.S. institutions already permitted this flexibility. Under the current rules, non-U.S. institutional investors generally face more extensive filing requirements than comparable U.S. institutions, unless they obtain no-action relief from the Division of Corporation Finance as to their comparability to the

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[2] The Proposing Release also requests comment on whether the Commission should adopt a different approach altogether to measure U.S. investor interest in target securities for purposes of providing exemptions from U.S. tender offer rules and registration requirements. In considering this issue, we would request that the Commission keep in mind that in certain jurisdictions, such as Japan and Greece, domestic corporate law requires that every shareholder of a company involved in a statutory merger (or another business combination transaction that requires a shareholder vote) be afforded the right to approve or disapprove the proposed transaction and, in most cases, receive the proxy statement and other related disclosure documents. This means that such issuers may not have the ability to exclude U.S. shareholders regardless of the overall percentage of shares held by U.S. shareholders and irrespective of whether the parties to the transaction ever sought to avail themselves of the U.S. capital markets.

categories of qualified institutions set out in Rule 13d-1(b) under the Exchange Act. The proposed change is a positive step toward putting U.S. and non-U.S. institutional investors on an even footing with respect to beneficial ownership reporting and obviating the need to request individual relief in a well-settled area of interpretive guidance.

We note, however, that the Proposed Rules do not address the definition of "beneficial owner" in Rule 16a-1(a)(1) under the Exchange Act and the related beneficial ownership reporting requirements set forth in Section 16 of the Exchange Act and related rules promulgated by the Commission thereunder. Specifically, Rule 16a-1(a)(1) excludes from the definition of "beneficial owner" types of U.S. institutions that are currently also eligible to file on Schedule 13G. Comparable non-U.S. institutions, however, are not eligible for this exemption provided by Rule 16a-1(a)(1). We recommend that non-U.S. institutions that are similarly situated to their U.S. counterparts should likewise be eligible, subject to the same types of conditions enumerated in the Commission's Schedule 13G discussion in the Proposing Release, for the exemption provided by Rule 16a-1(a)(1), without having to apply for individual no-action relief. We consequently recommend that the adopting release extend the applicability of its proposed amendments to both sets of rules governing beneficial ownership reporting.

Exclusionary offers.

The Commission acknowledges in the Proposing Release that bidders may exclude U.S. shareholders, and thereby avoid the application of U.S. rules, if they do not trigger U.S. jurisdictional means. The Proposed Rules reaffirm the Commission's position that business combination transactions present special considerations not applicable to capital raisings. As a result, bidders need to take special precautions — above and beyond those used in capital-raising transactions — to ensure that their offer is not made in the United States. The Commission outlined concerns with respect to the efficacy of two such types of precautions (legends and disclaimers employed by bidders, as well as representations and certifications made by tendering holders) in preventing U.S. holders from participation in offers. The Commission has not, to date, provided comprehensive guidance to the market as to how, in the Commission's view, bidders should appropriately keep offers outside the United States. This contrasts with the detailed procedures prescribed by the Commission for offshore capital raising transactions in Regulation S under the U.S. Securities Act of 1933, as amended. In addition, to date, the Commission has typically refrained from actively policing exclusionary offers or intervening to require issuers to implement more robust transaction restrictions. The Proposing Release indicates that the Commission could become more active in monitoring the procedures utilized by bidders in connection with exclusionary offers. Prior to doing so, it is imperative that the market be given clear guidance by the Commission as to the specific practices and procedures that bidders will need to implement in order to exclude the United States in a manner that the Commission would consider proper.

We believe that, in certain instances, it may be reasonable for an offeror to make a determination – after weighing the feasibility of complying with U.S. regulation, whether there is a need to include U.S. shareholders in order to consummate the transaction and other factors – to exclude U.S. shareholders. In the event that the Commission wishes to provide guidance on an offeror's ability to exclude U.S. shareholders, we believe that it would be appropriate to set forth clear parameters and safe harbors, rather than putting an offeror in the position of having to make an otherwise reasonable decision against the specter of possible action from the Commission based on unarticulated criteria. This is particularly so in light of the varied offering mechanics that issuers adopt in different non-U.S. jurisdictions in accordance with applicable non-U.S. law and practice.

Rule 14e-5 and Regulation M.

As described in the Proposing Release, Rule 14e-5 under the Exchange Act prohibits "covered persons" from purchasing or arranging to purchase any securities of the target that are the subject of the tender offer or "related" securities, except as part of the offer. Covered persons for this purpose include: the offeror and its affiliates; the offeror's dealer-manager and its affiliates; any advisor to the offeror and its affiliates or the offeror's dealer-manager and its affiliates whose compensation depends on completion of the offer; any person acting, directly or indirectly, in concert with the foregoing; as well as the target and its affiliates and advisors in the context of a negotiated transaction.

Currently, Tier I-eligible offers are exempt from Rule 14e-5, but Tier II-eligible offers are not. We strongly support the Commission's proposal to codify class relief previously granted for Tier II-eligible offers, which permits: (i) purchases made pursuant to a non-U.S. offer where there are separate U.S. and non-U.S. offers; (ii) purchases made by offerors and their affiliates outside of the United States; and (iii) purchases made by financial advisors' affiliates outside of the United States in accordance with their ordinary course business activities.[3] We recommend, however, including in the adopting release further exemption to codify relief the Commission has granted to targets, their affiliates and advisors in the context of negotiated transactions.[4]

We note that the Proposed Rules would impose additional conditions on affiliates of financial advisors. In particular, the requirement that the financial advisor have a registered broker-dealer affiliate under Section 15(a) of the Exchange Act renders

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[3] *See, e.g.*, Rule 14e-5 Relief for Certain Trading Activities of Financial Advisors (April 4, 2007); Cash Tender Offer by Sulzer AG for the Ordinary Shares of Bodycote International plc (March 2, 2007); Mittal Steel Company N.V. (June 22, 2006).

[4] *See, e.g.*, Barclays PLC and ABN AMRO Holding N.V. (April 24, 2007).

the proposed exception of limited utility to non-U.S. financial advisors that do not have registered broker-dealer affiliates. There is no apparent reason to discriminate against such non-U.S. entities, and making it easier for large non-U.S. financial advisors to play a role in cross-border transactions is very important to the Commission's goal of facilitating cross-border transactions that include U.S. shareholders. We do not think the presence of a registered broker-dealer affiliate should be a relevant factor in the analysis, and we recommend eliminating this condition from the final rules that the Commission adopts.

We note, further, that the Proposed Rules do not extend relief to ordinary course business activities of offerors and targets that are financial institutions (even though relief would be extended to the financial advisors of these offerors and targets).[5] As evidenced in several recent cross-border business combination transactions, financial institution offerors, targets and their affiliates face many of the same issues that their financial advisors do in terms of conforming their ordinary course business activities to the requirements of Rule 14e-5. We believe that it would be appropriate to extend this relief to financial institution offerors, targets (in negotiated transactions) and their affiliates, to the same extent as such relief would apply to financial advisors of offerors, targets and their affiliates. Doing so would be in keeping with the Commission's stated objectives of facilitating cross-border transactions and obviating the need for case-by-case relief in well-settled areas of guidance.

Similarly, we believe that these objectives warrant the codification of relief the Commission has granted previously to financial institution offerors, targets (in negotiated transactions) and distribution participants from Rules 101 and 102 of Regulation M.[6] If the Proposed Rules are adopted as proposed, bidders that happen to be financial institutions will continue to need to request relief under Rule 14e-5 and Regulation M on a case-by-case basis to allow them to engage in their ordinary course business activities, such as market making, asset management activities, unsolicited brokerage and stock borrowing and lending. We believe the Commission should codify the relief it has given previously on a case-by-case basis in respect of these issues.

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5 *See, e.g.*, Royal Bank of Scotland Group plc (July 20, 2007); Barclays PLC and ABN AMRO Holding N.V. (April 24, 2007).

6 *See, e.g*, ABN AMRO Holding N.V. (August 7, 2007); Barclays PLC (August 7, 2007); The Royal Bank of Scotland Group plc (July 23, 2007); Banco Bilbao Vizcaya Argentaria, S.A. (June 25, 2007); Allianz SE (March 23, 2007); *see also* UBS AG (April 22, 2008) (rights offering); The Royal Bank of Scotland Group plc and ABN AMRO Holding N.V. (April 21, 2008) (rights offering).

Subsequent offering periods.

The relief currently provided by the Tier II exemption allows bidders to accept and pay for securities tendered during the initial offering period, but not during the subsequent offering period, in accordance with home-country law and practice. The Proposed Rules would expand and refine the exemptions in order to allow bidders to conduct subsequent offering periods in a manner more consistent with non-U.S. law and practice. Specifically, the Commission has requested comments or proposed specific amendments in four areas, which are meant to avoid unnecessary conflict between the Commission's rules and non-U.S. laws and regulations.

First, the Commission seeks comment as to whether there may be drawbacks to eliminating the maximum length of a subsequent offering period. In our experience, the cap on the length of a subsequent offering period serves limited purpose and its elimination would be a beneficial change, giving bidders more flexibility to structure offers in accordance with home-country laws and practice.

Second, the Commission proposes to codify previous no-action relief allowing acceptance of and payment for tendered securities on a "modified rolling" basis during a subsequent offering period. The proposal would permit securities to be bundled and paid for within 14 days of tender. However, if a jurisdiction's law or practice would require longer than 14 business days for acceptance and payment, then the bidder would still need to approach the SEC's staff for individual relief. We recommend that the adopting release permit bundling and payment on a schedule consistent with local law and practice, rather than specify a 14-day or any other specific cap.

Third, the Proposed Rules would codify previous no-action relief from rules that have the effect of limiting the functioning of mix-and-match facilities, by permitting a ceiling on a form of consideration (*i.e.*, cash vs. stock) and allowing separate proration pools, in each case provided that the offer qualifies for Tier II relief. We support this amendment, and would further support the flexibility that could be provided by the extension of this relief to U.S. domestic transactions as well.

Fourth, the Commission proposes to permit compliance with applicable non-U.S. laws requiring the payment of interest on securities tendered during subsequent offering periods in Tier II-eligible offers. We support this amendment, as it facilitates the structuring of offers in accordance with home-country practice.

Electronic filing requirement.

As discussed in the Proposing Release, bidders and issuers who rely on the Tier I exemptions are required to furnish an English translation of their home-country offering materials to the Commission under cover of Form CB, together with a Form F-X

appointing an agent in the United States for service of process. Under the current rules, bidders and issuers who do not already file Exchange Act reports with the Commission may submit Form CB and Form F-X in either paper form or electronically on the Commission's EDGAR system (while reporting bidders and issuers must submit them electronically). The Proposed Rules would eliminate the option for non-reporting bidders and issuers to submit Form CB and Form F-X in paper form, and the Commission specifically inquired whether there are reasons why this proposed electronic filing requirement would not be desirable.

Due to the costs and practical issues associated with timely filing of Form CB and Form F-X via EDGAR, we believe that making such electronic filings mandatory may discourage bidders and issuers in cross-border transactions from extending participation to U.S. shareholders. We do not believe that the electronic filing of such forms should be mandatory, particularly for transactions relying on the Tier I exemption. As an alternative to EDGAR filing, we recommend providing bidders and issuers an exemption from filing forms and the exhibits to such form if such forms and exhibits are posted (in English) on the bidder's or issuer's website, or on the website of the bidder's or issuer's principal stock exchange or home-country securities regulator.

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We appreciate the opportunity to comment on the Proposed Rules, and we would be pleased to discuss any questions the Commission or its staff may have about this letter. Any questions may be directed to Richard C. Morrissey, Brian E. Hamilton or Alan P.W. Konevsky in our London office at +44 (0)20 7959 8900.

Very truly yours,

SULLIVAN & CROMWELL LLP