SCHEMES AND US SECURITIES LAW
STRUCTURING FOR SUCCESS

Peter Castellon of Proskauer Rose (UK) LLP and Ashar Qureshi of Fried, Frank, Harris, Shriver & Jacobson (London) LLP look at the US securities law aspects of business combinations for English target companies by way of a scheme of arrangement.

A scheme of arrangement is a compromise or arrangement between a company and its shareholders or creditors, or any class of them, under Part 26 of the Companies Act 2006 (2006 Act). A scheme of arrangement can be used to effect a business combination between an acquiring entity and an English target company. When a scheme of arrangement is used for that purpose, the scheme must be approved by at least 75% in value of each class of the target company's shareholders and at least a majority in number of each class of the target company's shareholders.

Permission of the High Court is needed for the target company's shareholders to vote on a scheme. If the shareholders vote in favour of the scheme, the court will decide at a further hearing whether to approve the scheme, and it will determine whether the scheme is fair. If the court approves the scheme, its terms are binding on all shareholders of the target company.

This article covers the key issues under US securities laws of undertaking a business combination for an English target company by way of a scheme of arrangement, looking at the relevant US law provisions and how they apply to different types of scheme, how to determine the US shareholder base, and other relevant provisions including if the acquiring entity is a US business. For US purposes, a scheme is different from a tender offer, so a different approach must be taken.

US SECURITIES LAW FRAMEWORK

There are a few key pieces of US legislation that practitioners need to consider when looking at using a scheme of arrangement to acquire an English target company.

1933 Act

Any offer or sale of any security anywhere in the world must be registered with the US Securities and Exchange Commission (SEC) or be structured under an exemption from the registration requirements of Section 5 of the US Securities Act of 1933, as amended (1933 Act). Accordingly, the issuance of securities by the acquirer in connection with a scheme of arrangement must be structured under an exemption from registration. The most common exemption is Section 3(a)(10) of the 1933 Act (Section 3(a)(10)) *(see box "Text of Section 3(a)(10)")*.

1934 Act

The US Securities Exchange Act of 1934, as amended (1934 Act), governs tender offers made with US jurisdictional means. Any tender offer that is extended to a US security holder must comply with the requirements of

Regulation 14D and Regulation 14E under the 1934 Act (*see feature article "Tender offers: UK companies with US listings" www.practicallaw.com/w-043-8886*). However, schemes are not, by their nature, tender offers. Tender offer is not defined in any US securities rule, however, a business combination where the shareholders of the target company vote on the transaction is not a tender offer.

1939 Act

The US Trust Indenture Act of 1939, as amended (1939 Act), requires that certain debt securities be issued under an indenture that meets the requirements of the 1939 Act and that the indenture be qualified by the SEC. There are several exemptions in the 1939 Act, such as for debt securities that are exempt from the registration requirements of the 1933 Act under Section 4(a)(2), Regulation D, Rule 802 or Regulation S of the 1933 Act (Section 4(a)(2)) (Regulation D) (Rule 802) (Regulation S). Debt securities that are exempt from the registration requirements of the 1933 Act under Section 3(a)(10) are not necessarily exempt from the 1939 Act (*see "Schemes for debt securities" below*).

Text of Section 3(a)(10)

Section 3(a)(10) of the US Securities Act of 1933 states that:

"Section 3 (a) Except as hereinafter expressly provided the provisions of this title shall not apply to any of the following classes of securities:

(10) Except with respect to a security exchange in a case under Title 11 of the United States Code, any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any state or territorial banking commission or other governmental authority expressly authorized by law to grant such approval."

DIFFERENT TYPES OF SCHEME

Which parts of the US securities laws are relevant considerations will depend on how the scheme of arrangement is structured.

Schemes for shares

Business combinations that are structured as schemes of arrangement in which shareholders of an English target company receive shares of the acquirer can be structured under Section 3(a)(10). This exemption allows the scheme to be extended to US shareholders, including US individuals, without registering the shares with the SEC.

Schemes for cash

Schemes of arrangement in which target company shareholders receive cash are not regulated by the US securities laws. The 1933 Act regulates securities, not cash. The 1934 Act regulates tender offers, however schemes are not tender offers. Accordingly, a scheme that offers cash to the target shareholders can be extended into the US freely, including to US individuals. There is no requirement for any particular disclosure and there are no procedural requirements. The acquirer and the target company may use whatever circular and other documents are required or customary under the local laws and practices of the target company's home jurisdiction. In the case of England, the target company would typically prepare a scheme circular.

Schemes for a mix of shares and cash

A scheme of arrangement in which the consideration offered is a mix of shares and cash may be structured under Section 3(a)(10). That exemption is available irrespective of whether the proportion of cash is fixed or target company shareholders are able to choose the proportion of shares and cash. That approach is common for schemes of arrangement for English companies, where it is known as a "mix-and-match" option. Section 3(a)(10) is still the appropriate exemption, even if the cash component is a higher proportion than the share proportion.

Schemes that include loan notes

Acquirers sometimes issue loan notes in connection with schemes of arrangement. Loan notes are debt instruments that typically do not pay interest and mature after a fixed time period. They are sometimes included in English schemes of arrangement because they have a tax advantage for UK taxpayers. However, loan notes have no tax advantage for US tax purposes, so it is common for US shareholders to receive cash instead of loan notes. This approach has the benefit of not requiring the loan notes to be registered or qualified with the SEC.

Schemes for debt securities

Section 3(a)(10) applies to both equity and debt securities, so a scheme of arrangement for debt securities may also be structured under Section 3(a)(10) in order to be exempt from the registration requirements of the 1933 Act. However, the requirements of the 1939 Act must be considered for a scheme for debt securities. This means that either the securities must be issued under an indenture that is qualified by the SEC or the securities must be issued under an exemption in the 1939 Act. Since an exemption might not be available for debt securities issued under Section 3(a)(10), debt securities are sometimes instead issued under Rule 802 or Section 4(a)(2).

The 1939 Act requires that, subject to exemptions, debt securities must be issued under an indenture that meets the requirements of the 1939 Act and that the indenture be qualified by the SEC. In the case of debt securities that are not eligible for an exemption, the acquirer must prepare an indenture for the debt securities to be issued to US shareholders of the target company. This involves appointing an eligible trustee. The issuer must file an application for qualification with the SEC on Form T-3. The form must be filed before the court hearing. Once court approval is obtained, the form must be amended with the approval as an exhibit to the amended filing. Timing should be discussed and agreed with the SEC staff well in advance of the closing of the transaction. The indenture is typically governed by New York law, however, the debt securities themselves may be governed by English law.

The exemptions in the 1939 Act include the following:

- Section 304(a)(8) and Rule 4a-1 permit the issuance of up to $50 million of debt securities during a 12-month period without an indenture.

- Section 304(a)(9) and Rule 4a-3 permit the issuance of up to $10 million under an indenture and the indenture does not need to comply with the 1939 Act if it limits the amount of debt securities that may be outstanding at any time to $10 million.

- Rule 4d-10 exempts the issuance of debt securities that are issued in compliance with Rule 802.

- Section 304(b) exempts the issuance of debt securities that are issued in compliance with Section 4(a)(2) or Regulation D.

The 1939 Act does not exempt debt securities that are issued in compliance with Section 3(a)(10). Accordingly, debt securities issued under Section 3(a)(10) must either be issued under an indenture that is qualified by the SEC or be issued in compliance with Section 304(a)(8) or Section 304(a)(9) of the 1939 Act.

Schemes of reconstruction

A scheme of reconstruction is a form of business combination under English, Scottish or Guernsey corporate law that is like a scheme of arrangement, except that it does not require a court hearing. Schemes of reconstruction are used for business combinations between closed funds that are listed on the London Stock Exchange. In a scheme of reconstruction, the acquirer issues shares (or a mixture of shares and cash) to the shareholders of the target fund in exchange for the assets of the target fund, which is subsequently liquidated.

Because a court hearing is not required for this process, Section 3(a)(10) is not available. The issuance of shares in connection with a scheme of reconstruction is usually structured as an offer in the US to qualified institutional buyers (QIBs) only under Section 4(a)(2). US shareholders that are not QIBs are usually excluded from such a scheme of reconstruction. They instead receive cash as part of the process of liquidating the target fund, but not as part of the scheme. Since schemes of reconstruction are used by funds, the offer must also comply with Section 3(c)(7) of the US Investment Company Act of 1940, as amended, so that any US shareholder and any shareholder that is a US person must be both a QIB and a qualified purchaser in order to be able to participate.

While schemes of reconstruction are almost always structured under Section 4(a)(2), it is also possible to rely on Rule 802 if the target fund has a US shareholding below 10% (*see boxes "Determination of US ownership level" and "ERISA"*).

Convertible and exchangeable securities

If a scheme of arrangement is structured so that the consideration includes securities that are convertible or exchangeable, the conversion or exchange must be structured in a way that is compliant with an exemption from registration, or the conversion or exchange transaction must be registered with the SEC.

Determination of US ownership level

The test to determine how much of a target company's shares are held by US investors includes the following key elements:

Timing

The percentage of US ownership in the target company can be calculated as of any date during a 90-day period that starts no more than 60 days before and no more than 30 days after the initial public announcement of the scheme. If the acquirer determines that it is unable to calculate the percentage of US ownership as of a date within this timeframe, it can opt to make the calculation as of the most recent practicable date before the initial public announcement. However, the determination date must be no earlier than 120 days before the public announcement.

Securities to be included

Target company shares that are already held by the acquirer should be excluded from the calculation of US ownership. If the target company has securities traded in the US in the form of American depositary receipts (ADRs), then the shares underlying the ADRs should be included in the calculation of the US ownership. Any warrants or options or other securities convertible or exchangeable into the shares that are the subject of the scheme should be excluded from the calculation.

Procedure for calculation

To calculate the level of US ownership, the acquirer must start with the holders of record as of a given date by reviewing reports of beneficial ownership filed with respect to the target company in the US or in its home jurisdiction. In many jurisdictions, shareholders are required to provide information about their shareholding once they cross certain thresholds. The target company may also include information about its shareholders in its own public filings. In some cases, the acquirer or the target company will engage financial advisers that are able to access non-public sources of information about shareholders.

The acquirer cannot simply look at the recorded owners of the shares if those owners are brokers, dealers or banks, or nominees for such entities. For such entities, the acquirer is required to look through the record ownership and determine the location of the underlying beneficial owners, particularly if the holders of record are located in any of the following jurisdictions:

- The US.

- The country in which the target is incorporated.

- The primary trading market for the target company's share, if this is different from its country of incorporation.

The acquirer or target company should send inquiries to brokers, dealers, banks and other nominee holders regarding the aggregate amount of their holdings that are owned by beneficial owners in the US. If, after reasonable inquiry, it is unable to obtain the required information, it may assume that the underlying beneficial owners are residents of the jurisdiction where the nominee in question has its principal place of business.

For example, Section 3(a)(10) is available as an exemption for the original issuance of convertible bonds, but not for the conversion. The conversion will frequently be structured to comply with Section 3(a)(9). In some cases, the conversion will be limited to holders outside the US, relying on Regulation S, and to holders in the US that are QIBs or accredited investors, relying on Section 4(a)(2).

ERISA

The US Employee Retirement Income Security Act of 1974, as amended (ERISA), imposes restrictions on the level of US pension money that can be invested in funds and real estate investment trusts (REITs).

If the acquirer in a scheme of arrangement is a fund, an investment company or a REIT, it must consider how much of its shareholding after the scheme will be comprised of ERISA investors. If the percentage of ERISA investors exceeds certain thresholds, then the acquirer could be subject to substantive regulation by the US Department of Labor.

MECHANICS OF THE EXEMPTIONS

The different exemptions from registration have different requirements that must be satisfied.

Section 3(a)(10)

In order for a business combination that is structured as a scheme of arrangement to comply with Section 3(a)(10), the following conditions must be met:

- Target company shareholders cannot pay cash as part of the exchange.
- The court, or relevant government authority, must approve the fairness of the terms and conditions of the exchange.
- The court, or relevant government authority, must find that the terms and conditions of the exchange are fair to the target shareholders both procedurally and substantively.
- The court, or relevant government authority, must hold a hearing before approving the fairness of the terms and conditions of the scheme of arrangement.
- The hearing must be open to all target shareholders. They must be given adequate notice of the hearing and there cannot be any improper impediments to their attending the hearing.
- The court, or relevant government authority, must be expressly authorised by law to hold the hearing, although it is not necessary for the hearing to be required by law.
- The court, or relevant government authority, must be advised before the hearing that the issuer will rely on Section 3(a)(10) based on the court's approval of the scheme of arrangement.

These conditions are set out in SEC Staff Legal Bulletin 3A, which was issued on 18 June 2008 (SEC guidance) (*www.sec.gov/rules-regulations/staff-guidance/staff-legal-bulletins/staff-legal-bulletin-no-3a-cf*).

A vote of target shareholders is not a requirement of Section 3(a)(10); however, it is a requirement of the 2006 Act. The SEC takes the view that, because the business combination does not take effect unless the court approves the scheme, it is not effected by the vote of the target shareholders. Nevertheless, the target company's circular and any other disclosure materials must be submitted to the court before they are posted to target shareholders.

A scheme of arrangement for shares under the 2006 Act meets the requirements of the SEC guidance. The requirement to advise the court of the acquirer's reliance on Section 3(a)(10) is often satisfied by a witness statement from a US lawyer. It can also be satisfied by the barrister telling the judge about, or bringing to the judge's attention to, the relevant disclosure in the target company's circular.

While the text of Section 3(a)(10) contemplates that a security issued in connection with a Section 3(a)(10) transaction can be exchanged partly for cash (meaning that the target company shareholders would exchange cash and shares for securities of the acquirer), the SEC has clarified that it would expect to be notified in any such case. In any event, the cash would need to be a smaller portion of what is exchanged, and Section 3(a)(10) is not intended to cover any transaction that is primarily intended to raise capital.

Section 4(a)(2) and Regulation D

Section 4(a)(2) is an exemption for offers and sales of securities by an issuer that do not involve a public offering. Transactions structured under Section 4(a)(2) are usually extended in the US only to investors that are QIBs or institutional accredited investors. There can be no general solicitation in the US, so publicity restrictions must be applied to any press release or announcement that the issuer makes.

Regulation D is a safe harbor that permits offers and sales to an unlimited number of accredited investors, who need not be institutional. In certain cases, up to 35 non-accredited investors may be included, and in certain cases general solicitation is permitted. In all cases, a notice filing must be made with the SEC on Form D, and if non-accredited investors are included, certain substantive disclosure is required.

Section 4(a)(2) is typically used for equity securities where Section 3(a)(10) or Rule 802 is not available, such as for schemes of reconstruction. In the typical scheme of reconstruction for a business combination between London-listed funds, the acquirer issues shares to US shareholders of the target fund that are both QIBs and qualified purchasers. Non-QIBs are excluded and they instead receive cash through the liquidation process, not through the scheme. QIBs are typically required to sign a US investor representation letter, in which they agree to resell the shares only outside the US.

In the case of debt securities, the principal advantage of relying on Section 4(a)(2) or Regulation D is that there is a corresponding exemption under the 1939 Act.

Regulation S

Regulation S is an exemption for offers and sales of securities outside the US. However, it is not an exclusive exemption for offer or sales outside the US. Where a scheme is eligible for Section 3(a)(10) or Rule 802, that exemption can be used worldwide. Where a scheme is structured to comply with Section 4(a)(2) or Regulation D for US shareholders of the target company, it is common for non-US shareholders to be covered by Regulation S.

Rule 802

Rule 802 is an exemption from the registration requirements of the 1933 Act for securities issued in connection with cross-border business combinations. Schemes of arrangement and schemes of reconstruction can be structured to comply with the exemption. The following conditions must be met:

- The target company must be a foreign private issuer.
- US holders must hold no more than 10% of the securities that are subject to the business combination.
- US holders must be able to participate on terms that are at least as favourable as other holders.
- The acquirer must provide any information document that is required to the SEC and must appoint an agent for service of process in the US.
- Any information document must contain certain prescribed legends.

While the target company must be a foreign private issuer, the acquirer need not be a foreign private issuer (*see box "Definition of a foreign private issuer"*).

Blue sky laws

The states and territories of the US have their own securities laws, which are sometimes referred to as "blue sky laws". These securities laws sometimes require filings with state securities commissions or other state or territorial authorities. In the case of any offering into the US that is not registered with the SEC, state securities laws should be considered.

Most states have exemptions for QIBs, but that will not usually be relevant for schemes of arrangement when the target company's US shareholders include individuals. This means that the state of each US target shareholder should be identified, and a determination should be made as to whether a state filing is required or whether the applicable state securities laws contain an exemption.

Definition of a foreign private issuer

A non-US company will qualify as a foreign private issuer if it meets either of the following requirements:

- 50% or less of its outstanding voting securities are held by US residents.
- More than 50% of its outstanding voting securities are held by US residents, and none of the following circumstances applies:
  - the majority of its executive officers or directors are US citizens or residents;
  - more than 50% of its assets are located in the US; or
  - its business is administered principally in the US.

US ACQUIRERS

If the acquirer in the scheme of arrangement is incorporated in the US or is not a foreign private issuer, it must consider a few points that do not apply to an acquirer that is a foreign private issuer:

- If the acquirer is not already a 1934 Act reporting company, it should consider whether its new shareholding after the scheme will result in it being required to comply with the ongoing reporting requirements of the 1934 Act.
- If the acquirer is subject to the 1934 Act, it should consider proxy statement requirements for its own shareholders, and it should consider whether it will be required to include financial statements of the target company in its own filings.
- Since a US acquirer will not be a foreign private issuer, if it relies on Regulation S in connection with a scheme, it would need to comply with stricter selling restrictions and transfer restrictions than would be the case for a non-US acquirer. Regulation S has three tiers of restrictions and US companies are subject to the most restrictive tier.

A US acquirer may choose to register the securities that it issues in connection with a scheme of arrangement.

DISCLOSURE

None of the exemptions from registration impose any particular substantive disclosure requirements; however, any offer or sale of securities in the US will be subject to Rule 10b-5 under the 1934 Act. This means that there must not be any material misstatement or material omission in any of the transaction documents. Appropriate disclosure should also be considered if there is a fairness opinion from a financial adviser to the acquirer or if there is any unusual remuneration arrangement for financial advisers.

In addition, any recommendations of the target company's board should be clearly disclosed, including any conditions, reservations or assumptions. Also, any practical considerations that apply to US shareholders of the target company should be disclosed.

Rule 802 prescribes certain legends relating to non-US disclosure and financial requirements, enforceability of civil liabilities and purchases outside of the offer. It is common to include these legends in the body of a shareholder circular regardless of the exemption that is being used. It is also common to include a disclaimer regarding taxation.

If the target company has shares listed on a US stock exchange or is otherwise registered with the SEC, the acquirer should consider whether the transaction qualifies as a going private transaction under Rule 13e-3 and whether it must comply with the relevant disclosure requirements.

RESALES

Securities acquired by shareholders of the target company under Section 3(a)(10) are freely tradeable after the transaction completes unless the shareholder recipient is an affiliate of the acquirer or was an affiliate of the acquirer within 90 days before the transaction. There is no restriction on affiliates of the target company that are not affiliates of the acquirer. And there is no restriction on resales for shareholders of the target company that held restricted shares.

Securities acquired by shareholders of the target company under Rule 802 are restricted to the same extent and proportion as the securities that were tendered. This means that the securities are freely tradeable unless the shareholder recipient is an affiliate of the acquirer or was an affiliate of the target company or the shares that the recipient held in the target company were restricted. Affiliates of the acquirer that were not affiliates of the target company are not subject to the 90-day look-back period.

Securities acquired by shareholders of the target company under Section 4(a)(2) or Regulation D are, however, restricted from resales for one year.

OTHER JURISDICTIONS

Schemes of arrangement are a feature of many systems of corporate law that are based on English common law, including the corporate laws of Australia, Ghana, Ireland, Singapore and several Canadian provinces. It has historically been the practice when conducting a scheme of arrangement for the acquirer to ask the SEC for a no-action letter in connection with its transaction. No-action letters were provided on a transaction-by-transaction basis. The practical effect of a no-action letter was that the SEC had no objection to the scheme of arrangement taking place as described in the request. However, that practice stopped in the late 1990s, when the SEC released guidance that it would not issue further no-action letters in connection with schemes of arrangement under the law of jurisdictions where it had previously done so. There is no need to obtain a no-action letter for English schemes of arrangement. However, for schemes of arrangement under the laws of jurisdictions where the SEC has not issued a relevant no action letter in the past, such as Cyprus, Guernsey or Pakistan, the acquirer should consider whether it is appropriate to consult the SEC.

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Rule 135e provides a safe harbor for announcements, press releases and other press-related materials in connection with an offering structured pursuant to Regulation S. Inserting the legends below will have the effect of the announcement or press release ***not*** constituting general solicitation, general advertising or directed selling efforts.

The following legend should be inserted at the top of the announcement or press release in all-capital letters:

> NOT FOR RELEASE, PUBLICATION OR DISTRIBUTION IN WHOLE OR IN PART IN OR INTO THE UNITED STATES, CANADA OR JAPAN.

The following legend should be inserted at the end of the announcement or press release in addition to any legends or rubrics that might be required by local law or practice:

> This announcement is not for publication or distribution, directly or indirectly, in or into the United States of America. This announcement is not an offer of securities for sale into the United States. The securities referred to herein have not been and will not be registered under the U.S. Securities Act of 1933, as amended, and may not be offered or sold in the United States, except pursuant to an applicable exemption from registration. No public offering of securities is being made in the United States.

The first legend should always include Canada, ***unless*** a Canadian lawyer has been consulted. There is a practice developing of including further jurisdictions, such as Australia, South Africa and New Zealand. There is ***no*** need to include New Zealand. There is also practice of including a sweep-up clause (such as "and any other jurisdiction where such activity would be unlawful"). You should ***not*** use a sweep-up clause: it is of ***no*** help to the person distributing the press release.

The second legend should be inserted in announcements or press releases as its own, stand-alone paragraph. It should ***not*** be combined with other legends.

In the case of an advertisement in a non-U.S. publication, such as the *Financial Times*, the first legend can be omitted.

If the issuer is a fund or REIT, the following paragraph might be relevant. It is commonly inserted at the end of the body of the announcement rather than with other legends or disclaimers.

> The securities referred to herein may not be acquired by investors using assets of (A) an "employee benefit plan" as defined in Section 3(3) of the U.S. Employee Retirement Income Security Act of 1974, as amended (known as "ERISA"), or (B) a "plan" as defined in Section 4975 of the U.S. Internal Revenue Code of 1986, as amended.

Proskauer

U.S. investor representation letter

[*Letterhead of QIB*]

[*Date*]

To: [***U.S. broker-dealer***] **[1]**

Purchase of [*name of shares*] (the "Securities") [2] of [*name of issuer*] (the "Company")

Ladies and Gentlemen:

In connection with our purchase of the Securities:

We understand that no offering document or prospectus has been prepared.

We acknowledge that (a) we may ***not*** rely on any investigation that [***U.S. broker-dealer***], any of its affiliates or any person acting on its or their behalf may have conducted, and none of such persons has made any representation to us, express or implied, with respect to the Securities or the Company, (b) we have conducted our own investigation with respect to the Securities and the Company, and (c) we have received all information that we believe is necessary or appropriate.

We confirm that we are a "qualified institutional buyer", as defined in Rule 144A under the U.S. Securities Act of 1933, as amended, that is able to bear the economic risk of an investment in the Securities.

We understand that (a) the Securities are ***not*** being, and will ***not*** be, registered under the Securities Act, (b) the Securities are being offered and sold to us in a transaction that is exempt from the registration requirements of the Securities Act, and (c) the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act.

We agree, for so long as the Securities are "restricted securities" within the meaning of Rule 144(a)(3) under the Securities Act, (a) ***not*** to offer or sell the Securities, except **[pursuant to an exemption from the registration requirements of the Securities Act] [outside the United States pursuant to Regulation S under the Securities Act] [3]** and (b) ***not*** to deposit the Securities in an unrestricted depositary receipt facility.

We understand that an exemption pursuant to Rule 144A under the Securities Act may not be available for the resale of the Securities. **[4]**

Very truly yours,

[*NAME OF QIB*]

By:________________

Name:

Title:

Notes

[1]
This U.S. investor representation letter must be addressed to a U.S. broker-dealer regulated by FINRA. It cannot be addressed solely to a non-U.S. financial intermediary. If the seller or the issuer so request, this letter may also be addressed to either or both of them.

[2]
Examples of the name of the shares include the following:

- ordinary shares
- class A shares
- shares of common stock.

[3]
The first alternative is appropriate for most Section 4(1½) offerings. For certain Section 4(1½) offerings of securities listed on an exchange in the United States, the lawyers providing the no registration opinion might require the use of the second alternative.

[4]
The last paragraph is not needed in the case of transactions structured pursuant to Rule 144A. It might be appropriate in the case of a transaction structured pursuant to Section 4(1½) or Section 4(a)(2) to QIBs; however, it is not needed if there is an ongoing information covenant in the underwriting or placing agreement.

In certain circumstances, it might be appropriate to consider including one or both of the following paragraphs:

ERISA

We are ***not*** a "Plan" (which term includes (i) an employee benefit plan subject to part 4 of subtitle B of Title I of the U.S. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or a plan, individual retirement account and other arrangement subject to Section 4975 of the U.S. Internal Revenue code of 1986, as amended (the "Tax Code"), (ii) a plan, individual retirement account and other arrangement subject to the prohibited transactions provisions of Section 406 of ERISA or Section 4975 of the Tax Code, or to provisions under applicable federal, state, local, non-U.S. or other laws or regulations that are substantially similar to such provisions of ERISA or the Tax Code and (iii) an entity the underlying assets of which are considered to include "plan assets" under ERISA), and we are ***not*** purchasing the Securities on behalf of, or with the plan assets of, any Plan. We understand that the Securities may ***not*** be offered or sold or transferred to a Plan.

PFIC

We understand that the Company has ***not*** definitively determined whether it was a PFIC for any prior year. If the Company is treated as a PFIC for U.S. federal income tax purposes, there could be adverse consequences for U.S. investors.