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To Our Clients:

The Takeover Defense Aspects
of Foreign Companies Registering ADRs in the U.S.

Having a class of equity securities (usually ADRs representing ordinary shares) listed on a U.S. stock exchange and registered under the U.S. securities laws may be a very significant factor for a foreign company that becomes the target of a hostile takeover bid. U.S. law provides takeover defenses and disclosure requirements that are not available in many foreign countries. In addition, having equity securities listed in the U.S. can facilitate cross-border equity mergers, such as the SmithKline Beecham combination. The issuance of ADRs in such transactions is easier and the transactions can be completed in a shorter time frame if the foreign company has ADRs registered in the U.S.

The listing and registration of ADRs in the U.S. is not burdensome for most foreign companies. Over 200 foreign companies have ADRs listed and registered in the U.S. Registration under the U.S. securities laws requires the foreign company, among other things, to file with the SEC annual reports containing financial statements either prepared in accordance with U.S. GAAP or containing a reconciliation to U.S. GAAP. The foreign company, however, is not generally required to file quarterly reports with the SEC or to comply with the SEC's proxy rules. As noted below, to provide greater assurance as to the applicability of U.S. law, foreign companies should take the shareholder relations steps necessary to build a significant U.S. shareholder base. With the rise of multinational equity funds in the U.S. and the increasingly global perspective of many U.S. institutional investors, building such a base should not be difficult for major foreign companies.

Several recent prominent takeover battles outside the U.S. have touched on U.S. interests and raised public concern for the fairness of such multi-jurisdictional takeovers, attracting the attention of Congress and the SEC. In connection with the proposed multi-jurisdictional disclosure system for certain Canadian companies, the SEC recently reaffirmed that "the requisite use of the jurisdictional means [under the U.S. securities laws] can be established, notwithstanding the absence of an affirmative act of the bidder, where it is reasonably foreseeable that U.S. shareholders of a foreign issuer that have been excluded from an offshore offer will sell their shares into the market in response to that offer." SEC Release No. 33-6841, [Current] Fed.Sec.L.Rep. (CCH) ¶ 84,432 (July 26, 1989). The SEC also indicated that, as a

policy matter, it is desirable that tender offers for the securities of a foreign issuer be extended to the U.S. holders of such securities.

While the anti-fraud provisions of the U.S. securities laws technically apply to all tender offers, whether the subject securities are registered under the U.S. securities laws or not, foreign companies will significantly enhance their ability to invoke the protection of the U.S. anti-fraud provisions in defending against a hostile bid by listing and registering ADRs in the U.S. SEC Chairman David Ruder, in a recent statement suggesting that jurisdiction under the anti-fraud provisions would be lacking in connection with Sir James Goldsmith's bid for BAT, stressed that BAT is not a U.S. registrant. As illustrated by the decision in the Minorco case (and the SEC's amicus brief), even where jurisdiction exists under the anti-fraud provisions, considerations of international comity may make it difficult to obtain injunctive relief for such claims. The more significant the foreign company's shareholder base in the U.S., however, the more likely that injunctive relief would be available.

The U.S. securities laws contain detailed rules and regulations governing tender offers for registered securities. These rules govern, among other things, the required disclosure by the bidder, the time period which the offer must remain open, withdrawal rights, the equal treatment of tendering shareholders and the acquisition of shares during the pendency of the offer. In most instances, a raider can attempt to avoid these rules by not distributing the tender offer documents in the U.S., not making the offer open to ADR holders, not accepting tenders mailed from the U.S. and taking other steps to avoid bid activity in the U.S. See Plessey Co. PLC v. General Electric Co. PLC, 628 F. Supp. 477 (D. Del. 1986). The SEC has indicated, however, that where a significant portion of the foreign company's shares are traded in the U.S. (even in the form of ADRs), application of the U.S. rules may be appropriate. As noted above, the SEC has indicated that as a policy matter it does not believe that U.S. investors should be excluded from multi-jurisdictional offers.

While listing and registering ADRs in the U.S. may not provide a show-stopper defense, it can provide a foreign target of a hostile bid with litigation, regulatory and public relations options that would otherwise be unavailable. Such options could be sufficient to tip the scale in a major contested takeover battle.

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