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Ms. Christina Chalk
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Ms. Laura McKenzie
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Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Ms. Posil, Ms. Chalk and Ms. McKenzie,

Pursuant to our telephone discussions with Christina Chalk and Laura McKenzie of the staff (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”), we are writing to you on behalf of our client, Novartis AG, a stock corporation (*Aktiengesellschaft*) incorporated under the laws of Switzerland (“Novartis”) and an indirectly wholly owned subsidiary of Novartis, Novartis BidCo AG, a stock corporation (*Aktiengesellschaft*) incorporated under the laws of Switzerland (the “Bidder” and, together with Novartis, the “Bidder Entities”).

As of June 21, 2024, the Bidder Entities owned approximately 91.17% of the shares of MorphoSys AG, a stock corporation (*Aktiengesellschaft*) incorporated under the laws of Germany (“MorphoSys”), outstanding as of that date (the “Shares”). The Bidder Entities acquired these Shares pursuant to the earlier voluntary tender offer (the “Original Tender Offer”) for the Shares described in the letter of Freshfields Bruckhaus Deringer filed with the Commission on April 8, 2024, and in the offer document filed as Exhibit (a)(1)(A) to the Schedule TO-T filed by the Bidder Entities on April 11, 2024 (the “Offer Document”). The Original Tender Offer (including a subsequent offering period) concluded on June 10, 2024. As indicated in the Offer Document, pursuant to the business combination agreement between the Bidder Entities and MorphoSys dated February 5, 2024, as amended (the “Business Combination Agreement”), following completion of the Original Tender Offer the Bidder Entities were obligated to take all necessary steps to achieve, as soon as is reasonably possible, a delisting of the Shares from all regulated markets in the European Economic Area, and MorphoSys is obligated to take all necessary steps under applicable laws, regulation and stock exchange rules to enable a delisting of the Shares and the American Depositary Shares of MorphoSys (the “ADSs”) from Nasdaq. On June 20, 2024, the Bidder and MorphoSys entered into a delisting agreement (the “Delisting Agreement”) under which MorphoSys undertook to file an



application for the revocation of the admission of all Shares to the Frankfurt Stock Exchange (the “FSE”) (the “Delisting”)¹. A delisting from the trading on the regulated market of the FSE requires the Bidder to pursue a delisting procedure in accordance with Section 39 of the German Stock Exchange Act, in which case a delisting purchase offer would have to be made by the Bidder to the remaining MorphoSys shareholders to acquire their Shares against payment of an appropriate cash compensation (the “Delisting Purchase Offer”).

We respectfully request on behalf of the Bidders that the Staff grant exemptive relief from²:

- a) Section 14(d)(5) of and Rule 14d-7 under the Exchange Act, to permit the Bidders to suspend and terminate withdrawal rights in respect of securities tendered in the Delisting Purchase Offer at the expiration of the Acceptance Period (as defined below) and during (i) the Tabulation Period (as defined below) and (ii) the corresponding Settlement Period (as defined below);
- b) Rules 14e-1(b) and 14d-4(d)(2)(ii) under the Exchange Act, to permit compliance with German law and practice regarding extensions of the Acceptance Period in the event of an amendment to the terms of the Delisting Purchase Offer;
- c) Rule 14e-1(d) under the Exchange Act, to permit the Bidder to announce any extensions of the Delisting Purchase Offer in accordance with the timing and notice requirements of German law and practice; and
- d) Rules 14e-5 and 14e-1(b) under the Exchange Act, to permit the Prospective Purchasers (as defined below), to purchase Shares outside of the Delisting Purchase Offer in accordance with applicable German securities laws and to allow for any resulting increase in the Offer Price (as defined below) (if relevant) without a ten (10) business day (as defined in Rule 14d-1(g)(3) (a “U.S. Business Day”)) extension of the Acceptance Period.

Further, we respectfully request on behalf of the Bidders that the Staff confirm that it will not recommend any enforcement action to the Commission with respect to Rule 14e-1(c) promulgated under the Exchange Act if the Bidders pay for securities tendered during the Acceptance Period after the Tabulation Period and after publication of the Delisting Purchase Offer results, in accordance with German law and practice.

We are U.S. and German counsel to the Bidder Entities in connection with the Delisting Purchase Offer. Certain lawyers from our Frankfurt office, who are members of the German bar, have reviewed the representations in this Letter concerning German law and practice.

Background

A description of the terms of the Original Tender Offer, as well as certain background information relating to the Bidder Entities, MorphoSys, the Shares and the ADSs, is set forth in the letter of Freshfields Bruckhaus Deringer LLP filed with the Commission on April 8, 2024 (the “Original No-Action Request Letter”), a copy of which is attached hereto for the convenience of the Staff, and in the Offer Document.

Following the Original Tender Offer, which was completed on June 10, 2024, and subsequent purchases at the Offer Price of Shares prior to the announcement of the Delisting Purchase Offer, the Bidder had acquired a total of 34,337,809 Shares (including Shares represented by ADSs), representing approximately 91.17% of the Shares outstanding as of June 21, 2024. Accordingly, there remain outstanding 3,324,929 Shares (including, 380,512 Shares represented by 1,522,048 ADSs), other than as held by the Bidder.

¹ MorphoSys expects to file a Form 25 in mid-July 2024, with the anticipated delisting of the Shares and ADSs from Nasdaq becoming effective in August 2024.

² We believe that the relief requested in this Letter is substantively identical to that granted in respect of the Original Tender Offer and is consistent with the relief granted by the Commission in similar transactions. See *Tender offer by Novartis AG for MorphoSys AG*, SEC No-Action Letter (April 8, 2024). See also *Tender Offer by Thermo Fisher Scientific Inc. for QIAGEN N.V.*, SEC No-Action Letter, (May 15, 2020); *AIXTRON SE*, SEC No-Action Letter, File No. 5-84994 (August 17, 2016) and *Bayer AG*, SEC No-Action Letter, File No. 5-59757 (April 28, 2006). We also believe that the relief requested in this Letter is consistent with the Commission’s guidance set forth in the Commission’s releases. See *Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, Release Nos. 33-8957, 34-58597 (September 19, 2008) (the “2008 Cross-Border Release”) and *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Exchange Act Release Nos. 33-7759, 34-42054, 39-2378, International Series Release No. 1208 (October 22, 1999) (the “1999 Cross-Border Release” and, together with the 2008 Cross-Border Release, the “Cross-Border Releases”).



As set out in the Original No-Action Request Letter, the Bidder Entities considered whether the Original Tender Offer qualified for the Tier I or Tier II exemptions codified in Regulation 14D promulgated under the Exchange Act.

To determine the percentage of outstanding Shares held by U.S. holders, MorphoSys engaged Nasdaq, Inc.'s Tax & Regulatory unit which provides shareholder analysis services to issuers ("Nasdaq") to conduct a beneficial ownership analysis of its U.S. holders in accordance with the instructions to Rule 14d-1(d), including the application of Rule 12g3-2(a), as of February 16, 2024, which was a date not later than thirty (30) days after the public announcement of the Original Tender Offer.

Because the Shares are in bearer form and held through Clearstream Banking AG in book entry records and accordingly, MorphoSys does not keep a registry of ownership, it was not possible to ascertain fully the location of ownership of the Shares in accordance with Instruction 2 to paragraphs (c) and (d) of Rule 14d-1 ("Instruction 2").

In circumstances where a bidder is unable to conduct the analysis of U.S. ownership under Instruction 2 and there is a primary trading market for the subject securities outside the United States, the alternative test set out in Instruction 3 to paragraphs (c) and (d) of Rule 14d-1 ("Instruction 3") is available. In assessing the applicability of paragraphs i., ii., and iii. of Instruction 3:

- the Bidder Entities determined that average daily trading volume in the United States in the Shares (including Shares represented by ADSs) as calculated in accordance with Instruction 3 was 11.7% of the average daily trading volume of the Shares on a worldwide basis for the twelve (12) month period ended December 31, 2023, which is a date no more than sixty (60) days prior to the public announcement of the Original Tender Offer;
- MorphoSys does not report the number of Shares held by persons with addresses in the United States in its annual report or other information filed or submitted with securities regulators in Germany or with the Commission; and
- the Bidder Entities reviewed an analysis (the "Analysis") provided by MorphoSys as of February 16, 2024, which summarized shareholder identification research performed by Nasdaq which identified the domicile of 99.9% of the issued Shares. This Analysis comprised an examination of data from Nasdaq's proprietary dataset, various outside agencies and SEC filings, and information obtained directly from 56 global and domestic banks, brokers and nominees with which Nasdaq has an ongoing relationship. Based on this Analysis, Nasdaq determined that 19,602,619 Shares (including Shares held in the form of ADSs), representing 52.0% of the outstanding Shares, were held by U.S. residents.

Given the results of the Analysis referred to above indicating that U.S. ownership exceeded 40%, in accordance with paragraph iii. of Instruction 3, the Bidder Entities determined that the Original Tender Offer did not meet the conditions in paragraph (d)(1) of Rule 14d-1 and as a result, the exemptive relief provided by paragraph (d)(2) of Rule 14d-1 was not available. Accordingly, the Bidder Entities requested the exemptive and no-action relief set out in the Original No-Action Request Letter, which was provided on April 9, 2024.

In accordance with the position of the Staff set out in *Compliance and Disclosure Interpretations, Cross-Border Exemptions, Question 101.03* (October 17, 2018), the Bidder Entities do not propose to recalculate the U.S. ownership in order to determine eligibility for, or reliance on, the Tier I or Tier II exemptions for the Delisting Purchase Offer. We respectfully submit that the initial calculation made in connection with the Original Tender Offer is sufficient to permit the Staff to grant the exemptive relief requested herein as (1) the Offer Document published in connection with the Original Tender Offer disclosed the Bidder Entities' intent to conduct the subsequent step in the business combination of Novartis and MorphoSys represented by the Delisting Purchase Offer and the terms thereof and (2) the Delisting Purchase Offer will be consummated within a reasonable time (approximately two calendar months) following the Original Tender Offer.

The Delisting Purchase Offer

Structure

The Delisting Purchase Offer will be made to the holders of all issued and outstanding Shares (including Shares held in the form of ADSs) at a cash price of EUR 68.00 per Share (the "Offer Price") in accordance with the Delisting Agreement. The Delisting Purchase Offer is not subject to any conditions.



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All holders of Shares, including U.S. holders of Shares, tendered in the Delisting Purchase Offer will be paid the Offer Price in Euros. The Bank of New York (“BNY”), acting as ADS tender agent (the “ADS Tender Agent”), will convert the Offer Price received for the Shares that represent ADSs tendered in the Delisting Purchase Offer into U.S. Dollars in the manner described in the Offer Document and will pay holders of ADSs in U.S. Dollars.

The Delisting Purchase Offer has been structured as a single offer made concurrently in Germany and the United States and, to comply with both (i) the German Stock Exchange Act (*Börsengesetz*) (the “German Stock Exchange Act”) and the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) (the “German Takeover Act”) and the rules and regulations promulgated thereunder and (ii) except to the extent permitted pursuant to the relief requested herein, Sections 14(d) and 14(e) of the Exchange Act and the rules and regulations promulgated thereunder. Given these different regulatory schemes, the Bidder Entities intend to conduct the Delisting Purchase Offer in a manner that ensures equality of opportunity for, and treatment of, all holders of Shares.

While the Delisting Purchase Offer might otherwise comprise a Rule 13e-3 transaction as defined in Rule 13e-3(a)(3) under the Exchange Act, we respectfully submit that the Delisting Purchase Offer meets the conditions for the exception set forth in Rule 13e-3(g)(1), in that the Delisting Purchase Offer (a) is made by or on behalf of the Bidder Entities within one year of the date of termination of the Original Tender Offer pursuant to which the Bidder Entities became affiliates of MorphoSys, (b) provides for consideration being offered to unaffiliated security holders in the Delisting Purchase Offer at least equal to the highest consideration offered during the Original Tender Offer, (c) was fully disclosed in the Original Tender Offer and (d) is substantially similar to the intention disclosed therein.

Commencement

The Delisting Purchase Offer materials that will be made available to holders of the Shares and holders of ADSs will be prepared in accordance with the requirements of the German Takeover Act, the rules and regulations promulgated thereunder and the German Stock Exchange Act and, except as described herein, Sections 14(d) and 14(e) of the Exchange Act and the rules and regulations promulgated thereunder, and will be offered in German (the “German Offer Materials”) and English (the “U.S. Offer Materials”) and, together with the German Offer Materials, the “Offer Materials”). The German Offer Materials and the U.S. Offer Materials will be substantively identical in content.

The Delisting Purchase Offer will be commenced in Germany by publication of the German Offer Materials on the Internet on or around July 4, 2024 and an announcement that the German Offer Materials can be picked up free of charge at a specified location and will be mailed to investors free of charge upon request. The Delisting Purchase Offer will be commenced in the United States by publication of a summary advertisement in *The New York Times* (U.S. Edition) on or around July 4, 2024, including a statement that the Bidder will mail the U.S. Offer Materials to holders of the Shares and ADSs upon request, in accordance with Rule 14d-4(a)(2) under the Exchange Act. In addition, the Bidder will mail the U.S. Offer Materials to all holders of ADSs and all holders of Shares on record with addresses located in the United States.

The Delisting Purchase Offer will initially remain open for a period of approximately four (4) weeks (and not less than twenty (20) U.S. Business Days) following the date on which the Delisting Purchase Offer commences (such period, as it may be extended, the “Acceptance Period”). The expiration of the Acceptance Period is referred to as the “Expiration Time” in this Letter. The Bidder Entities also have the option to extend the Acceptance Period by two (2) weeks in accordance with the German Takeover Act by changing the terms of the Delisting Purchase Offer within two (2) weeks prior to the expiration of the original Acceptance Period.

Tender Mechanics for Shares

Holders of Shares in book-entry form within the Clearstream System (including such holders in the United States) can accept the Delisting Purchase Offer by delivering a declaration of acceptance to the custodian credit institution or financial services institution (a “Custodian Bank”) that holds their Shares. The Custodian Banks that hold the Shares for which acceptances of the Delisting Purchase Offer have been received will effect book-entry transfers in order to hold the Shares tendered into the Delisting Purchase Offer (the “Tendered Shares”) under a separate designated securities identification number (“ISIN”) for Tendered Shares within the Clearstream System until the expiration of the Delisting Purchase Offer.



Tender Mechanics for Shares represented by ADSs

The Bidder has appointed BNY to act as ADS tender agent (BNY, in its capacity as ADS tender agent, the “ADS Tender Agent”) to receive tenders of Shares represented by ADSs pursuant to the Delisting Purchase Offer. BNY is also the depositary bank that administers MorphoSys’ ADS facility (BNY Mellon, in its capacity as the ADS depositary, the “Depositary”). In this regard the ADS Tender Agent will, among other things: (i) designate a book-entry account at DTC for the purpose of acceptances of the Delisting Purchase Offer in respect of Shares represented by ADSs tendered by book-entry delivery; (ii) instruct its German custodian to effect book-entry transfers of the underlying Shares to the Bidder against payment of the Offer Price; (iii) examine the documents required to be delivered to effect a valid acceptance of the Delisting Purchase Offer; (iv) answer procedural questions from holders of ADSs with respect to the Delisting Purchase Offer; (v) upon the request of the Bidder, from time to time, report the number of ADSs for which valid acceptances have been received and not withdrawn and the number of ADSs which have been so withdrawn; and (vi) perform any other related record-keeping tasks associated with the acceptances of the Delisting Purchase Offer by holders of ADSs. Holders of ADSs are required to deliver the appropriate documentation, which is specified in the U.S. Offer Materials, to the ADS Tender Agent in order to validly accept the Delisting Purchase Offer, and any irregularities in acceptances of the Delisting Purchase Offer by holders of ADSs may only be waived with the consent of the Bidder. Holders of ADSs will not be required to pay any fees to the ADS Tender Agent in connection with the tender of Shares represented by ADSs. The Bidder Entities will pay the fee associated with the cancellation of the ADSs representing Tendered Shares (\$0.05 per ADS) as provided in the depositary agreement among MorphoSys, the Depositary and owners and holders of ADSs, dated as of April 18, 2018 (the “Depositary Agreement”) to the Depositary.

Withdrawal Rights

The German Takeover Act does not require an offeror to provide shareholders with withdrawal rights, except in certain limited circumstances involving a competing offer or an amendment to the terms of a takeover offer. The Bidder Entities, however, intend to extend withdrawal rights through the Acceptance Period to all holders of Shares in accordance with Section 14(d)(5) and Rule 14d-7, subject to the relief requested herein.

Extension of the Delisting Purchase Offer

Under Section 21 (5) of the German Takeover Act, a change to the terms of the Delisting Purchase Offer occurring during the last two (2) weeks of the Acceptance Period would require that the Acceptance Period remain open for an additional period of two (2) calendar weeks from the expiration of the Acceptance Period.

Settlement

Subject to the relief requested herein, settlement for the Tendered Shares will occur as promptly as practicable following, and in any event no later than seven (7) Banking Days following, the Expiration Time. In this Letter, “Banking Day” refers to any day on which banks in Frankfurt am Main, Federal Republic of Germany, and New York City, United States, are open for general business with retail customers. This is because the Bidder Entities will not yet at the Expiration Time be in a position to determine the approximate number of Shares tendered during the Acceptance Period. This determination cannot be made until the second (2nd) or third (3rd) Banking Day following the Expiration Time as Shares may be traded and tendered on the last day of the Acceptance Period, and the book-entry transfer of such Shares into the appropriate ISIN for Tendered Shares within the Clearstream system can only be effected within two (2) to three (3) Banking Days. Unlike in the United States, where notices of guaranteed delivery permit the determination of the number of shares expected to be tendered on expiration of the offer period, this procedure is not used in the German market. The German Takeover Act also provides that the Bidder Entities must prepare and publish the final, official results of the Delisting Purchase Offer on the Internet and in the German Federal Gazette (*Bundesanzeiger*). Preparation for publication of those results typically occurs on the third (3rd) or fourth (4th) Banking Day following the expiration of the Acceptance Period, and publication itself typically occurs on the following Banking Day (i.e., the fourth (4th) or fifth (5th) Banking Day following the Expiration Time). The period during which results are tabulated and published following the Acceptance Period is referred to as the “Tabulation Period” in this Letter. As soon as practicable, the Bidder Entities will deliver the funds in Euros to the settlement agent in Germany and, in no event later than the seventh (7th) Banking Day following the Expiration Time, the German settlement agent will transfer the funds received from Novartis in Euros to Clearstream for settlement to holders who have tendered Shares held on the Clearstream



system. The period from the end of the Tabulation Period until settlement of Shares tendered during the Acceptance Period is referred to as the “Settlement Period” in this Letter.

ADS holders can give instructions to BNY in accordance with the Depositary Agreement to tender the Shares underlying their respective ADSs in the Delisting Purchase Offer on their behalf, arrangements for the payment of the Offer Price in U.S. dollars (as provided in the Depositary Agreement) will be completed in the same timeframe. The amount paid by BNY to tendering ADS holders will be net of any applicable fees (other than the fee payable for cancellation of the ADSs of (\$0.05 per ADS), which will be borne by the Bidder Entities) and expenses and any required withholding in respect of U.S. income tax.

The Bidder Entities will endeavor to complete the foregoing steps as promptly as practicable following the Expiration Time.

Rationale for Relief Requested

As a result of the foregoing and to permit the Delisting Purchase Offer to be successful and comply with both German and U.S. tender offer rules, on behalf of the Bidder, we respectfully request the relief described herein. In particular, we believe that the relief requested herein is necessary since there are direct conflicts between U.S. and German law and practice, specifically with respect to withdrawal rights and related procedures, timing for payment of shares and announcement of offer results and the ability of the Prospective Purchasers to purchase or make arrangements to purchase the Shares otherwise than pursuant to the Delisting Purchase Offer.

As explained in more detail below, the Delisting Purchase Offer will be regulated by applicable German law and practice. However, all conditions for the exemptions provided in Rule 14d-1(d)(2) will be met except that the Delisting Purchase Offer does not meet the condition in Rule 14d-1(d)(1)(ii) as described in the Original No-Action Request Letter and “Background” above.

Request for Relief from Section 14(d)(5) and Rule 14d-7 of the Exchange Act

Section 14(d)(5) of the Exchange Act provides that the securities tendered in a tender offer may be withdrawn at any time after sixty (60) days from the date of the original offer. Rule 14d-7 promulgated thereunder requires that “any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the period such offer request or invitation remains open.”

We understand that the Staff has taken the position that a tender offer must become unconditional not later than its expiration date and that all conditions to the offer must be satisfied (or waived), and the offer must be declared wholly unconditional before a bidder can terminate the withdrawal rights of tendering security holders. We also understand the Staff’s position that an offer that remains subject to a post-expiration condition might be deemed to “remain open” and, therefore, that security holders could be entitled to withdrawal rights under Section 14(d)(5) of the Exchange Act. *See, e.g., Compliance and Disclosure Interpretations, Cross-Border Exemptions, Question 105.01* (October 17, 2018).

To the extent that the Delisting Purchase Offer is deemed to “remain open” (within the meaning of Rule 14d-7) during the Tabulation Period, Rule 14d-7 would, in the absence of relief, require the Bidders to maintain withdrawal rights throughout the Tabulation Period for holders of such Shares. Moreover, if sixty (60) days elapse between the date on which the Bidder first makes the Delisting Purchase Offer and the end of the Settlement Period as a result of any extension of the Delisting Purchase Offer required or permitted by German law (thereby delaying “acceptance”³ of the Shares tendered during the Acceptance Period beyond sixty (60) days from the beginning of such period), Section 14(d)(5) would, in the absence of relief, permit the holders of such Shares to withdraw them during all or some part of the Tabulation Period.

Permitting withdrawals during a tabulation period would be inconsistent with German law and practice and could frustrate the success of the Delisting Purchase Offer. Because the Bidder will use the Tabulation Period to determine the number of Shares tendered, permitting withdrawals during this period would conflict with the tabulation procedures envisaged under this transaction, permitted under German law and customary under German

³ Under German law, a bidder does not “accept” tendered shares for payment as they are tendered. Rather, the tender of Shares pursuant to the Delisting Purchase Offer creates a contract of purchase and sale which is binding on the Bidder once the tendered shares are either (i) booked into a new ISIN or (ii) designated by the ADS Tender Agent as “tendered shares” within two Banking Days of the expiry of the Acceptance Period.



market practice. If withdrawals from the Delisting Purchase Offer during the tabulation process were permitted, they could adversely affect the ability of the Bidder Entities to determine the number of Shares tendered in the Delisting Purchase Offer and prevent the Bidder from publishing the final, official results of the Delisting Purchase Offer on the fourth (4th) or fifth (5th) Banking Day following the Expiration Time in accordance with German law. Rule 14d-1(d)(2)(vii) under the Exchange Act provides that a bidder may suspend withdrawal rights at the end of the offer and during the period that securities tendered into the offer are being counted provided certain other conditions are met. All other conditions for the exemption provided in Rule 14d-1(d)(2)(vii) will be met except that the transaction does not qualify for the Tier II Exemptions. The Commission has granted relief under Rule 14d-1(d)(2)(vii) in other situations where the transaction did not qualify for the Tier II Exemption.⁴

We therefore respectfully request exemptive relief from the provisions of Section 14(d)(5) and Rule 14d-7 to permit the Bidder Entities to suspend withdrawal rights for a period of no more than five (5) Banking Days following the Expiration Time to permit the tabulation of the number of Shares that are tendered and announcement of the results of the Delisting Purchase Offer, as described herein in accordance with German law and practice.

To the extent that the Delisting Purchase Offer is terminated or otherwise fails, the Bidder will promptly return all Tendered Shares (including Shares represented by ADSs) by re-booking Tendered Shares under their original ISIN, and the ADS Tender Agent will promptly return tendered ADSs. In accordance with German law and practice, such re-booking of Tendered Shares typically requires one (1) to two (2) Banking Days from the settlement of any trading in Tendered Shares that occurs prior to the announcement of the failure of termination of the Delisting Purchase Offer after the Tabulation Period.

Request for Relief from Rule 14e-1(c)

Rule 14e-1(c) promulgated under the Exchange Act prohibits a person making a tender offer from failing to pay the consideration offered or to return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of such offer. The Tier II Exemptions provide an exemption from the requirements of Rule 14e-1(c) where payment is made in accordance with the requirements of the home jurisdiction law or practice. However, as discussed above, based on available information concerning the U.S. holders of the shares, the Tier II Exemptions are not available for the Delisting Purchase Offer.

Prior to the adoption of the Tier II Exemptions, the Staff confirmed in a number of no-action letters that payment for, or return of, tendered securities in accordance with local law and customary local tender offer practice would satisfy the requirements of Rule 14e-1(c).⁵

Subsequent to the adoption of the Tier II Exemptions, the Staff has also provided relief from the requirements of Rule 14e-1(c) in respect of a number of transactions that did not satisfy the requirements of the Tier II Exemptions.⁶

As discussed above, in the Delisting Purchase Offer, payment would be made in accordance with German law and customary German market practice. Under the German Takeover Act, the determination and announcement of the final official results of the Delisting Purchase Offer in respect of Shares tendered during the Acceptance Period, as described in “The Delisting Purchase Offer – Settlement” above, generally does not occur until the fourth (4th) or fifth (5th) Banking Day following the Expiration Time, following which payment will occur in line within customary German settlement practices. German settlement practices normally provide for payment for

⁴ See *Tender offer by Novartis AG for MophoSys AG, SEC No-Action Letter (April 11, 2024)*; *Offer by Vimpelcom Ltd., Altimo Holdings & Investments Ltd. and Telenor ASA for all outstanding common shares, preferred shares and American Depositary Shares Vimpel-Communications (February 5, 2010)* (“Vimpelcom”); *Offer by Kraft Foods Inc. Offer for all outstanding ordinary shares and ADSs of Cadbury plc (December 9, 2009)* (“Kraft Foods”).

⁵ See *Proposed Exchange Offer by Crown Cork & Seal Company, Inc. for CarnaudMetalbox (December 20, 1995)*; *Re Pechiney Privatization (December 6, 1995)* and *Exchange Offer by Rhône-Poulenc S.A. Inc. for Ordinary Shares and ADSs of Hoechst AG (October 7, 1999)*.

⁶ In the Original No-Action Request Letter, *QIAGEN, AIXTRON and Bayer I*, the Staff granted relief under Rule 14e-1(c) to permit the offeror to pay for shares tendered during the acceptance period no later than seven (7) Banking Days, in the case of the Original No-Action Request Letter, within seven (7) Banking Days, in the case of QIAGEN, four (4) to twelve (12) Banking Days, in the case of AIXTRON, and four (4) to eight (8) Banking Days, in the case of Bayer I, after the expiration of such period. See also *Oak Leaf; Vimpelcom; Offer by Harmony Gold Mining Company Limited for all outstanding ordinary shares of Gold Fields Limited (November 19, 2004)* and *Offer by Alcan, Inc. for outstanding common shares, ADSs, Bonus Allocation Rights and OCEANes of Pechiney (October 7, 2003)*.



Shares tendered during the Acceptance Period to occur in a “timely” manner on a single settlement date the Acceptance Period (and customarily within ten (10) Banking Days of expiration of the Acceptance Period). In order to facilitate more timely payment for the Shares, the Bidder Entities have arranged the settlement date to occur within seven (7) Banking Days following expiration of the Acceptance Period. As discussed above, to the extent that the Delisting Purchase Offer is terminated or otherwise fails, the Bidder will promptly return all Tendered Shares (including Shares represented by ADSs) by re-booking Tendered Shares under their original ISIN and the ADS Tender Agent will promptly return tendered ADSs.

In addition to the precedent cited above, the Commission has generally looked to the clearance and payment practices, as well as the securities laws of the subject company’s home country, in determining whether the consideration in a tender offer was paid promptly. We believe that the relief requested is contemplated by or consistent with the Original No-Action Request Letter, *QIAGEN, AIXTRON, Bayer I, Axel Springer* and other relief granted by the Staff and with the Cross-Border Releases. See *Cash tender offer by Gemalto S.A. for all Shares, ADSs and Convertible Bonds of Wavecom S.A.* (November 7, 2008); *Offer by BCP Crystal Acquisition GmbH & Co., et al. for Celanese AG*, SEC No-Action Letter, File No. 5-57467 (February 3, 2004); *Offer by Sanofi-Synthelabo for Ordinary Shares and ADSs of Aventis*, SEC No-Action Letter, File No. TP 04-30 (June 10, 2004) and *Offer by Harmony Gold Mining Company Limited for all outstanding ordinary shares of Gold Fields Limited* (November 19, 2004).

Accordingly, the Bidder respectfully requests that the Staff confirm it will not recommend any enforcement action to the Commission with respect to Rule 14e-1(c) promulgated under the Exchange Act if the Bidder accepts and pays for Tendered Shares following expiration of the Expiration Time in accordance with German law and customary German market practice in the manner described in this Letter.

Request for Relief from Rules 14e-1(b) and 14d-4(d)(2)(ii)

Rule 14e-1(b) promulgated under the Exchange Act prohibits an offeror from increasing or decreasing the percentage of the class of securities being sought or the consideration offered or the dealer’s soliciting fee to be given in a tender offer unless the tender offer remains open for at least ten (10) U.S. Business Days from the date that notice of such change is first published or sent or given to security holders. Rule 14d-4(d)(2)(ii) promulgated under the Exchange Act requires that, in the event an offeror changes the offer price or makes a similarly significant change to the terms of the offer, the offeror must extend the tender offer by ten (10) U.S. Business Days and disseminate the material change to the target shareholders. In Release No. 33-7760, the Commission stated that it believed these time periods represent general guidelines that should be applied uniformly to all tender offers.

Under German law, a material change occurring during the last two (2) weeks of the Acceptance Period, to the extent such change is permitted under the German Takeover Act, would require that the Acceptance Period remain open for an additional two (2) calendar weeks from the then-scheduled expiration of the Acceptance Period. The applicable German law requires an extension of exactly two (2) weeks. In the event that such a change were to occur during the last two (2) weeks of the Acceptance Period, and the resulting two-week extension occurred over a period that included U.S. federal holidays, Rule 14e-1(b) and compliance with the Commission’s position regarding the applicability of Rule 14d-4(d)(2)(ii) would require a longer extension than that permitted by German law. Accordingly, we hereby request exemptive relief from Rule 14d-4(d)(2)(ii) and Rule 14e-1(b) to allow, only in the event that the occurrence of a U.S. federal holiday creates a direct conflict between the U.S. and German requirements, the Bidder to keep the Acceptance Period open for an additional two (2) calendar weeks in accordance with German law.

In the Original No-Action Request Letter, and in *Bayer I, AIXTRON*, and *QIAGEN* on facts similar to the present Delisting Purchase Offer, the Staff provided relief from Rule 14e-1(b) and Rule 14d-4(d)(2)(ii) promulgated under the Exchange Act in order to allow the offeror, in each case, to extend the offer for a period of two (2) calendar weeks in the event of a material change in the terms of the Delisting Purchase Offer during the last two (2) weeks of the Acceptance Period. We believe the exemptive relief requested is contemplated by or consistent with the Original No-Action Request Letter, *Bayer, AIXTRON, QIAGEN* and other tender offers similarly structured. See, e.g., *Offer by BCP Crystal Acquisition GmbH & Co., et al. for Celanese AG*, File No. 5-57467 (February 3, 2004).



Request for Relief from Rule 14e-1(d)

Rule 14e-1(d) promulgated under the Exchange Act, among other things, prohibits an offeror from making a cash tender offer from extending the length of a tender offer without issuing a notice of such extension by press release or other public announcement, which notice must include disclosure of the approximate number of securities deposited to date and has to be issued no later than the earlier of (i) 9:00 a.m. Eastern time on the next U.S. Business Day after the scheduled expiration date of the offer or (ii), if the class of securities which is the subject of the tender offer is registered on one or more U.S. national securities exchanges, the first opening of any one of such exchanges on the next U.S. Business Day after the scheduled expiration date of the offer.

As discussed in this Letter, the Bidder Entities will not yet be in a position to determine the approximate number of Shares deposited in the Delisting Purchase Offer at the time of expiration of the Acceptance Period. As noted above, German practice allows for a tabulation period as Shares may be traded and tendered on the last day of the Acceptance Period. Unlike in the United States, where notices of guaranteed delivery permit the determination of the number of shares expected to be tendered on expiration of the initial offer period, this procedure is not used in the German market.

In light of the requirements of German law, we do not believe that the delay in announcing the results of the Delisting Purchase Offer in connection with an extension of the Acceptance Period in order to comply with German law constitutes a fraudulent, deceptive or manipulative act or practice. In the proposed Delisting Purchase Offer, notice of extension will be made in accordance with German law and practice. Were the Tier II exemption available, notices of extension made in the manner described above would be permitted.

We therefore request an exemption to Rule 14e-1(d) to permit the Bidder Entities to extend the Acceptance Period in accordance with German law and practice. We believe that the relief requested herein is consistent with the relief granted by the Commission in the Original No-Action Request Letter, *QIAGEN, Bayer I and Axel Springer*, as well as additional cases with facts similar to those of the present Delisting Purchase Offer. See *Cash Offer for Ordinary Shares of Braas Monier Building Group S.A.* (October 25, 2016) and *KKR and Pennira Offer for ProSiebenSat.1 Media AG* (January 30, 2007).

Request for Relief from Rule 14e-5

Under the German Takeover Act, an offeror is permitted to purchase, directly or indirectly, shares that are the subject of a tender offer outside the tender offer pursuant to contractual arrangements or otherwise prior to and during the pendency, subject to certain limitations that are further discussed below.

Subject to certain exceptions, Rule 14e-5 promulgated under the Exchange Act prohibits a “covered person” from directly or indirectly purchasing or arranging to purchase any securities to be acquired in a tender offer for equity securities or any securities immediately convertible into, exchangeable for or exercisable for such securities, except pursuant to such offer. The prohibition continues from the time of the public announcement of the offer until the date that the offer expires, including any extension thereof. Rule 14e-5 defines a “covered person” as (i) the offeror and its affiliates, (ii) the offeror’s dealer-managers and any of their respective affiliates, (iii) any advisors to the parties described in the preceding clauses (i) and (ii) whose compensation is dependent on the completion of the offer and (iv) any person acting in concert either directly or indirectly with any of the foregoing in connection with any purchase or arrangement to purchase of any subject securities or any related securities.

Rule 14e-5(b)(12)(i) promulgated under the Exchange Act permits purchases or arrangements to purchase securities subject to a tender offer by an offeror or its affiliates to be made in accordance with the laws of the target company’s home jurisdiction(s), subject to certain conditions (including that the covered person reasonably expects that the tender offer is subject to the Tier II Exemptions). In the present case, all such conditions will be satisfied, except that the Tier II Exemptions are not available. Because the Tier II Exemptions are not available in connection with the Delisting Purchase Offer, purchases of Shares by the Bidder Entities or their advisors and brokers outside the Delisting Purchase Offer may not fall within any of the excepted activities specifically outlined in Rule 14e-5. Accordingly, in the absence of exemptive relief being granted, such purchases may be prohibited after the public announcement of the Delisting Purchase Offer.

Any purchases of Shares outside of the Delisting Purchase Offer will be regulated by German securities laws, including the German Takeover Act. The German Takeover Act allows the Bidder Entities to make such purchases, either directly or through any advisor, broker or other financial institution acting as their agent (together with the



Bidder Entities, the “Prospective Purchasers”), subject to certain conditions meant to protect holders of securities issued by MorphoSys. The Prospective Purchasers would be required to make available to all holders of the Shares subject to the Delisting Purchase Offer any more favorable terms, including price terms, agreed to in connection with any purchases of Shares by the Prospective Purchasers during the Delisting Purchase Offer. In addition, any such purchases by the Prospective Purchasers prior to the commencement of the Delisting Purchase Offer must be disclosed in the Offer Materials. Finally, pursuant to Section 23 para. 2 of the German Takeover Act, any such purchase by the Prospective Purchasers during the Delisting Purchase Offer must be reported to the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) and announced publicly immediately following such purchase.

Any such purchases would be subject to the following conditions:

- (i) No purchases or arrangements to purchase Shares, except pursuant to the Delisting Purchase Offer, will be made in the United States;
- (ii) The Offer Materials will prominently disclose the possibility of outside purchases by the Prospective Purchasers and describe the manner in which outside purchases are required to be publicly disclosed;
- (iii) There will be public disclosure in the United States, to the extent that such information is made public in Germany pursuant to the German Takeover Act, of information regarding all purchases of Shares otherwise than pursuant to the Delisting Purchase Offer from the time of the public announcement of the Delisting Purchase Offer until its expiration;
- (iv) The Prospective Purchasers will comply with the applicable requirements under the German Takeover Act, including the rules against insider trading and the rules regulating market conduct/market abuse, and other applicable German laws;
- (v) The Prospective Purchasers will not make any purchases or arrangements to purchase Shares for consideration above the Offer Price after the expiration of the Acceptance Period;
- (vi) If the Prospective Purchasers purchase or make arrangements to purchase Shares for consideration above the Offer Price during the Acceptance Period, the Offer Price paid to shareholders that tender Shares into the Delisting Purchase Offer will be increased to match the highest price paid outside the Delisting Purchase Offer without any further action on the part of the tendering shareholder;
- (vii) Upon request of the Division of Corporation Finance (the “Division”), the Prospective Purchasers will disclose to the Division a daily time-sequenced schedule of all purchases of Shares made from the time of public announcement of the Delisting Purchase Offer until the expiration, on a transaction-by-transaction basis, including (i) a description of the size, broker (if any), time of execution and purchase price; (ii) if not executed on the FSE, the exchange, quotation system or other facility through which the purchase occurred;
- (viii) Upon request of the Division, the Prospective Purchasers will transmit the information specified in clauses (i) and (ii) above to the Division at its offices in Washington, D.C. within thirty (30) days of such request;
- (ix) The Prospective Purchasers will maintain all documents and other information required to be maintained pursuant to this exemption for a period of not less than two (2) years from the date of the termination of the Delisting Purchase Offer;
- (x) Representatives of the Prospective Purchasers will be made available to respond to inquiries relating to such records; and
- (xi) Except as otherwise exempted herein, the Prospective Purchasers will comply with Rule 14e-5.

Please note that we believe that it is unlikely that the jurisdictional predicate for the application of the Exchange Act, namely that there be a purchase of a security “by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange,” would be satisfied if the Bidder Entities, or financial institutions acting on their behalf, made purchases of, or arrangements to purchase, Shares outside the United States. We nonetheless apply, on behalf of such persons, for exemptive relief for such purchases, or



arrangements to purchase, from the provisions of Rule 14e-5, subject to the limitations set forth above. We have been requested by the Bidder Entities to emphasize that this Letter does not reflect an admission that Rule 14e-5 would apply to such purchases of the Shares outside the United States in the absence of such exemptive relief.

We hereby request an exemption to Rule 14e-5 to permit purchases of Shares outside of the Delisting Purchase Offer as described above. In the context of the Delisting Purchase Offer, we believe that the requested relief is consistent with relief the Staff has afforded to offerors in similar circumstances in the past, including in transactions that did not separately qualify for the Tier II Exemptions. *See the Original No-Action Request Letter; QIAGEN; Offer by Stork Holdco L.P. for Songbird Estates Pie* (December 19, 2014); *Oak Leaf; Offer by UnitedHealth Group Inc. for all outstanding shares of Amit Participacoes S.A.* (November 20, 2012); *Offer by BHP Billiton for all common shares of Potash Corporation of Saskatchewan Inc* (August 26, 2010); *Vimpelcom Ltd; Kraft Foods; KKR and Permira Offer for ProSiebenSat.1 Media AG* (January 30, 2007); *Axel Springer and RWE Aktiengesellschaft Offer for Innogy Holdings* (July 22, 2002).

Relief Requested from Rule 14e-1(b)

The request for relief from Rule 14e-5 above contemplates that, in the event the Prospective Purchasers make purchases of Shares outside of the Delisting Purchase Offer pursuant to German law, the Bidder Entities would increase the Offer Price to the level of any higher purchase price outside of the Delisting Purchase Offer. The Bidder Entities do not currently anticipate making any purchases outside of the Delisting Purchase Offer at a price higher than the Offer Price but are requesting this exemptive relief from Rule 14e-1(b) in the event that purchases are made outside of the Delisting Purchase Offer prior to the publication of the results of the Acceptance Period for a purchase price above the Offer Price. Rule 14e-1(b) promulgated under the Exchange Act prohibits an offeror from increasing or decreasing the consideration offered in a tender offer unless the tender offer remains open for at least ten (10) U.S. Business Days from the date that notice of such change is first published or sent or given to security holders.

As described above, under Sections 21 para. 5 and para. 6 of the German Takeover Act, the Bidder may voluntarily increase the Offer Price and extend the Delisting Purchase Offer on only one occasion during the final two (2) weeks of the Acceptance Period, for a period of exactly two (2) calendar weeks. Under German law and practice, the purchase of shares during the offer period but outside of the Delisting Purchase Offer for a higher price than the Offer Price would result in an automatic increase in the Offer Price to match the higher price but would not require an extension of the Delisting Purchase Offer. Under Rule 14e-1(b), the Bidder Entities would be required to extend the Acceptance Period by a period of ten (10) U.S. Business Days from the date the notice of any increase in the Offer Price is first published or sent or given to security holders. As described above, however, the direct conflict between German law and U.S. law would prevent the Bidder Entities from extending the Delisting Purchase Offer on more than one occasion during the final two (2) weeks of the Acceptance Period and from extending the Delisting Purchase Offer for a period of more than two (2) calendar weeks in the event that the ten (10) U.S. Business Day period required under U.S. law occurs over a period longer than two (2) calendar weeks.

We therefore request exemptive relief from Rule 14e-1(b) promulgated under the Exchange Act in the event that purchases are made outside of the Delisting Purchase Offer prior to the publication of the results of the Acceptance Period for a purchase price above the Offer Price to allow the Bidder Entities to increase the Offer Price payable to shareholders that tendered their Shares during the Acceptance Period without extending the Acceptance Period by ten (10) U.S. Business Days.

If the exemption is granted, the Bidder Entities will make the following disclosures:

- (i) Disclose in the Offer Materials the possibility that purchases of Shares may be made outside of the Delisting Purchase Offer; and
- (ii) If Shares are acquired at a price above the Offer Price, promptly disclose in the U.S. the resulting increase to the Offer Price.

We believe that the exemptive relief requested is consistent with the relief granted by the Commission in the Original No-Action Request Letter, *QIAGEN* and *Bayer I*. In *QIAGEN*, the offering parties requested relief under Rule 14e-1(b) in order to make purchases outside of the offer in the event that purchases are made outside of the offer prior to the expiration of the Acceptance Period for a purchase price above the offer parties, as such allowing



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the offering parties to increase the offer price payable to shareholders that tendered their ordinary shares during the Acceptance Period. Similarly, in *Bayer I*, the offering parties requested relief under Rule 14e-1(b) in order to make purchases outside of the offer in order to respond to market developments by making offers to purchase shares outside of the offer at prices higher than the offer price. In *QIAGEN* and *Bayer I*, as in the present case, the direct conflict between German law and U.S. law prevented the offering parties from extending the Acceptance Period.

Finally, the requested relief will enable the Prospective Purchasers to make purchases outside of the Delisting Purchase Offer in accordance with the conditions described above in request for relief from Rule 14e-5.



* * *

Based on the foregoing, we respectfully request that the Staff grant exemptive relief to the Bidder Entities under Section 14(d)(5) of Exchange Act and Rule 14d-7, Rules 14e-1(b) and (d), Rule 14d-4(d)(2)(ii), and Rule 14e-5 promulgated under the Exchange Act. We further request that the Staff confirm that, based on the facts and circumstances described in this Letter, it will not recommend any enforcement action to the Commission with respect to Rule 14e-1(c) promulgated under the Exchange Act if the Bidder Entities conduct the Delisting Purchase Offer as described in this Letter.

If you have any questions or comments relating to this request, or if it would facilitate your response in any way, please do not hesitate to contact the undersigned at doug.smith@freshfields.com or +44 20 7716 4752.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Smith'.

Doug Smith

cc: Jenny Hochenberg
Sabrina Kulenkamp
Rick van Aerssen
Freshfields Bruckhaus Deringer LLP