UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

December 3, 2008

Andrew R. Brownstein, Esq.
Umut Ergun, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019

Re: ShareGift USA's Charitable Share Donation Programs

File No. TP 09-20

Dear Ms. Ergun and Mr. Brownstein,

We are responding to your letter dated December 3, 2008, as supplemented by telephone conversations with the Staff, with regard to your request for no-action relief. To avoid having to recite or summarize the facts set forth in your letter, our response is attached to the enclosed photocopy of your letter. Unless otherwise noted, capitalized terms in this letter have the same meaning as in your letter.

Section 14(d), Regulation 14D, Rule 14e-1(a), Section 14(a) and Regulation 14A

Based upon your opinion that the ShareGift USA corporate share donation programs and related activities will not implicate the above-captioned tender offer and proxy solicitation regulatory provisions, as well as the facts and representations made in correspondence and conversations regarding the request for relief, the Staff in the Division of Corporation Finance, without necessarily concurring with the analysis or conclusions set forth in your letter, will not recommend that the Commission take enforcement action under Section 14(d), Regulation 14D, Rule 14e-1(a), Section 14(a) or Regulation 14A with respect to ShareGift USA's corporate share donation programs and related activities. In issuing this no-action position, the Division of Corporation Finance considered the following facts and representations, among others:

- ShareGift USA has represented that the conduct of the corporate share donation programs would not result in ShareGift USA being deemed either a "bidder" or "offeror" in the context of a tender offer or a "participant" in the context of a proxy solicitation;
- ShareGift USA corporate share donation programs do not offer to "purchase" shares and are designed only to provide security holders with the ancillary option of donating their shares through an efficient mechanism;

- None of the descriptive information relating to the corporate share donation programs will materially contribute to a reasonable investor's understanding of the value of the subject securities or the corporate transactions in which the programs are described;

- ShareGift USA will not be asking security holders for a proxy or making a request that they execute, not execute or revoke a proxy; and

- ShareGift USA will not be making any communications with security holders that would constitute a solicitation or recommendation in respect of a tender offer or other transaction in which ShareGift USA seeks donations.

Rule 14e-5

On the basis of the representations and the facts presented in your letter, the Staff in the Division of Trading and Markets, without necessarily concurring with the analysis or conclusions set forth in your letter, will not recommend to the Commission enforcement action under Rule 14e-5 under the Exchange Act against ShareGift USA with respect to its acceptance of donated shares from security holders whose securities are subject to a pending issuer or third-party tender offer whether ShareGift USA accepts such shares via the letter of transmittal mechanism or directly from security holders.

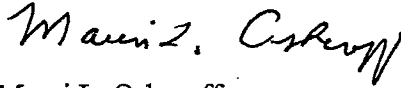
Conclusion

This response expresses the Divisions' positions on enforcement action only and does not express any legal conclusion on the question presented. The Divisions of Corporation Finance and Trading and Markets express no view with respect to other questions that the proposed corporate share donation programs and related activities may raise, including, but not limited to, the adequacy of disclosure concerning, and the applicability of other federal and state laws to, the proposed programs and activities described in your letter. Your attention is directed to the anti-fraud and anti-manipulation provisions of the Exchange Act. Responsibility for compliance with these and other provisions of the federal or state securities laws rests with ShareGift USA.

The foregoing action positions are based on the representations and the facts presented in your letter dated December 3, 2008, as supplemented by telephone conversations with the Staff. Any different facts or circumstances may require a different conclusion. The relief is strictly limited to the application of the regulatory provisions listed above to the proposed corporate share donation programs and related activities. These programs and activities should be discontinued pending further consultation with the Staff if any of the facts or representations set forth in your letter change.

Andrew R. Brownstein, Esq.
Umut Ergun, Esq.
SEC No-Action Letter for ShareGift USA
December 3, 2008

For the Division of Corporation Finance,



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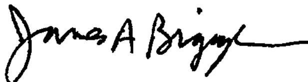
Associate Director, Regulatory Policy
Division of Corporation Finance

For the Division of Trading and Markets,



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December 3, 2008

Division of Corporation Finance
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, N.E.,
Washington, D.C. 20549

Attention: Mauri L. Osheroff, Associate Director (Regulatory Policy)
Michele M. Anderson, Chief, Office of Mergers and Acquisitions
Nicholas P. Panos, Senior Special Counsel, Office of Mergers and Acquisitions
James A. Brigagliano, Associate Director, Division of Trading and Markets

Re: ShareGift USA's Charitable Share Donation Programs

Dear Ms. Osheroff, Ms. Anderson, Mr. Panos and Mr. Brigagliano:

As special counsel to ShareGift USA, a New York not-for-profit corporation qualified under Section 501(c)(3) of the Internal Revenue Code ("ShareGift USA"), we write to request no-action relief under the United States Securities Exchange Act of 1934, as amended (the "Exchange Act") and the rules promulgated thereunder, in connection with the corporate share donation programs and related activities of ShareGift USA (the "Programs").

I. Background

ShareGift USA was founded in 2004, inspired by the success of ShareGift, the share donation charity in the UK ("ShareGift UK"), which was established in 1996. Over the last decade, ShareGift UK has given millions of pounds to hundreds of different charities in the UK. ShareGift USA is building on the work of ShareGift UK by providing a valuable service to individuals and corporations and by contributing to U.S. charities through facilitating corporate share donations.

As an "umbrella charity," ShareGift USA's primary objective is to get as much funding into the hands of worthy charities as possible. ShareGift USA anticipates receiving donations from a wide array of individuals located in all parts of the U.S., and its donation policy seeks to reflect this diverse donor base. Upon receiving title to donated shares, ShareGift USA converts the shares into cash and allocates the proceeds to selected charities. ShareGift USA selects leading national charitable organizations that reflect the philanthropic patterns of generous Americans and that have both a track record of success and a high efficiency rating. The charities that are selected focus on education, health, human services, the environment and international aid. Currently, ShareGift USA's designated charities include: First Book, American Cancer Society, Make-A-Wish Foundation, The Conservation Fund and CARE. ShareGift USA selected these charities based on its rigorous criteria; it does not accept applications from charities seeking funding.

ShareGift USA's Programs employ "check the box" charitable giving options on the documentation that is normally communicated to shareholders as part of corporate transactions. By checking the box, charitably-minded shareholders can donate some or all their shares or other transaction proceeds. ShareGift USA then aggregates and sells the donated shares and gives the proceeds to not-for-profit and other charitable organizations. ShareGift USA currently conducts its operations with two dedicated volunteers. To date, all of ShareGift USA's operating costs have been underwritten by members of its Board of Directors.

Historical Growth

Relying on the long-standing Commission relief in respect of odd-lot tender offers,[1] ShareGift USA began its activities by encouraging shareholders to donate their dormant odd-lot shareholdings by participating in corporate odd-lot tender offer programs. These odd-lot donation programs do not suffer from legal uncertainty because purchases of odd lots are exempt from many of the compliance rules applicable to general tender offers.[2] ShareGift USA now seeks to expand charitable share and transaction proceeds donation programs to a variety of corporate transactions, thereby providing all shareholders, regardless of the size of their holdings, the opportunity to easily and efficiently engage in charitable giving. In particular, ShareGift USA is now in the process of

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[1] See SEC Release No. 34-19246 (Nov. 17, 1982)

[2] In particular, Rule 13e-4(h)(5) exempts offers to puchase odd lots of shares from the disclosure requirements imposed on issuer tender offers, and Rule 14e-5(b)(3) exempts odd lot purchases from the prohibition against purchases by "covered persons."

fully integrating its Program on a national scale for all tender and exchange offers, merger and acquisition transactions, and related proxy solicitations.

II. The Requested Relief

We write to request assurance that, based upon the facts, views, and representations set forth below, the Staff of the Commission will not recommend that the SEC take any enforcement action against ShareGift USA or any of its corporate partners (that may be subject to the Exchange Act) that facilitate its programs if:

A. When administered in conjunction with pending third-party or issuer tender or exchange offers, the Programs (1) are conducted without submitting the disclosures mandated by Sections 14(d) of the Exchange Act, Regulations 14A and 14D under the Exchange Act and Rule 14e-1 of Regulation 14E under the Exchange Act; (2) give shareholders the option to make irrevocable donations of their shareholdings during the pendency of a transaction; and (3) permit donations to be made both within and outside of the tender offer under Rule 14e-5; and

B. When administered in conjunction with merger and acquisition transactions involving proxy solicitations, the Programs are conducted without submitting the disclosures mandated by Section 14(a) of the Exchange Act and Regulation 14A.[3]

Please note that ShareGift USA will comply with all applicable anti-fraud and anti-manipulation provisions of the federal securities laws, including Section 9(a) and 10(b) of the Exchange Act and Rules 10b-5 and Rule 14a-9. In light of the nature of its Programs, and the anticipated level of participation by shareholders, it is very unlikely that ShareGift USA will become the beneficial owner of five percent or more of any issuer's securities. However, if that should occur, ShareGift USA confirms that it will comply with applicable reporting requirements under Regulation 13D and 13G.[4] Furthermore, ShareGift USA does not anticipate receiving share

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[3] If ShareGift USA's Programs are implemented in the context of a stock-for-stock merger or a mixed cash/stock consideration transaction, participating shareholders would have the opportunity to donate some or all of the stock consideration received in the transaction to ShareGift USA, which would then promptly sell those shares in the open market and provide the proceeds to the selected charities. We believe that ShareGift USA would not be more than an ordinary shareholder engaging in retail market transactions at any point in this process. While ShareGift USA believes that this kind of activity would not render it an "underwriter" under section 2(11) of the Securities Act or a "distribution participant" or "affiliated purchaser" under Regulation M, ShareGift USA understands that it would be inappropriate to make a general request for relief from the Commission in this regard, given the fact-specific nature of the inquiry required for any finding that no "underwriter," "distribution participant" or "affiliated purchaser" status arises in the context of a specific transaction. To the extent any particular transaction involved circumstances that would raise the question whether ShareGift was potentially acting as an "underwriter," "distribution participant" or "affiliated purchaser" in the context of such transaction, ShareGift would consult with counsel to assist it in making such determination and comply with the securities laws as appropriate.

[4] ShareGift USA receives periodic reports from its brokerage firm regarding its shareholdings, and from proxy solicitation/shareholder service firms regarding any shares received by them and held on behalf of ShareGift USA. ShareGift USA's in-house lawyer (who is a member of the ShareGift board and serves on a volunteer basis) actively monitors these reports for compliance with the applicable reporting obligations. In addition, ShareGift USA will seek to

(footnote continued)

donations of control shares from insiders or similar gifts that might impose resale restrictions. However, if that should occur, ShareGift USA confirms its understanding that it may be subject to resale restrictions, including those imposed by Rule 144 of the United States Securities Act of 1933, as amended (collectively with the rules promulgated thereunder, the "Securities Act").

We also note that transactions by "issuers" or their "affiliates" are subject to special "13e" rules. In particular, Rule 13e-3 imposes filing, disclosure and dissemination obligations upon issuers and their "affiliates" if they are engaged in an enumerated "going private" transaction; and Rule 13e-4 imposes filing, disclosure and dissemination obligations upon issuers and their "affiliates" making tender offers for the issuer's equity securities. As a charitable enterprise, it is extremely unlikely for ShareGift USA, to ever be an issuer either under Rule 13e-3 (since ShareGift USA has not issued and does not intend to issue or propose to issue any security) or under Rule 13e-4 (since ShareGift USA does not have and does not at any point in the future expect to have a class of equity security registered pursuant to Section 12 of the Exchange Act, and since it is not, and does not at any point in the future expect to be (i) required to file periodic reports pursuant to Section 15(d) of the Exchange Act, or (ii) a closed-end investment company registered under the Investment Company Act of 1940).[5] Similarly, the involvement between ShareGift USA and the issuer envisioned by the Programs would be extremely unlikely to result in "affiliate" status for purposes of Rules 13e-3 and 13e-4.[6] That said, should such extremely unlikely circumstances arise, ShareGift USA confirms that it would comply with the filing, disclosure and dissemination requirements imposed by Rules 13e-3 and 13e-4 on "issuers" and their "affiliates."

(footnote continued)

dispose of any shareholdings as soon as reasonably practicable by having a standing order to proxy solicitation firms to aggregate and sell the shares on ShareGift USA's account on an ongoing basis, which will make it extremely unlikely for ShareGift USA to cross the ownership thresholds that would trigger any reporting obligations.

[5] See the definitions of "issuer" provided in Section 3(a)(8) of the Exchange Act (for purposes of Rule 13e-3) and in Rule 13e-4(a)(1) (for purposes of Rule 13e-4), respectively.

[6] For purposes of both Rules, an "affiliate" of an issuer is "a person that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with such issuer" (subject to the special Rule 13e-3 caveat that a person who is not an affiliate of an issuer at the commencement of such person's tender offer will not be deemed an affiliate of such issuer prior to the termination of that tender offer). See Rules 13e-3(a)(1) and 13e-4(a), which incorporates Rule 12b-2's definition of "affiliate." Thus, in determining whether an entity is an "affiliate," the SEC looks at whether the entity is or would be in a position to "control" the company within the meaning of Exchange Act Rule 12b-2, which defines the concept of "control" as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." Clearly, issuers that choose to participate in the Programs do not thereby afford ShareGift USA any influence over the transaction, much less over the direction of the management and policies of the issuer. Any arrangements entered into between ShareGift USA and issuers participating in its Programs would speak only to how the donative option would be incorporated into shareholder communications and pending transactions. ShareGift USA would occupy no board seats nor share management with an issuer; and since any securities obtained by ShareGift USA as a result of donations would immediately be sold to generate cash proceeds for the Programs' designated charities, it would be extremely unlikely that ShareGift USA would hold any substantial amount of equity securities of the issuer. Thus, it would be extremely unlikely for circumstances to arise in which ShareGift USA could be considered a person that directly or indirectly "controls" the issuer. Nor could ShareGift USA be expected to be "controlled by" or "under common control with" the issuer, as ShareGift USA is an independent 501(c)(3) charitable nonprofit organization with its own mission and board of trustees.

We provide the following information in support of our view that ShareGift USA's activities should not be viewed as "tender offers" or proxy solicitation.

III. ShareGift USA's Charitable Share Donation Programs

The Programs would be incorporated into shareholder communications relating to a variety of transactions including: (1) tender or exchange offers (whether sponsored by third parties or issuers as part of self-tenders); (2) cash-out acquisition transactions; (3) stock-for-stock mergers; and (4) hybrid part cash/part stock transactions. Depending on any given transaction's details, a combination of the foregoing transaction types may apply.

The details regarding how the Programs would be implemented, including specific disclosures and mechanics regarding donative share transfers, are substantially the same across the transactional contexts. After describing the generally applicable components of the Programs below, we explain how implementation may vary with the transactional form at issue. As different transactional forms trigger different securities laws and regulations, an overview of how the Programs operate in the different contexts will provide additional background for the relief requested.

A. Description of the Programs

When major transactions occur, shareholders often receive cash or stock consideration in exchange for their current shareholdings. The Programs, in cooperation with corporations and their transfer, purchasing, exchange, and information agents, as well as their attorneys and investment bankers, would provide shareholders with the option of donating all or part of the consideration they expect to receive in a transaction (regardless of the form of the consideration) or all or part of their current shareholdings, within the context of the transfer procedures for such transactions.

Corporations would not be charged for providing shareholders such a donative option. While interested donors can donate their shares at any time directly to ShareGift USA, the Programs would provide shareholders with the ability to transfer their shares via the standard documentation used in tender and exchange offers and merger and acquisition transactions. Letters of transmittal would include an additional "check the box" option to donate either transaction proceeds or current shareholdings to ShareGift USA alongside the traditional options of tendering shares or submitting share certificates in exchange for consideration. In the case of issuer repurchases and tender offers, shareholders would be given the opportunity to (1) sell all their shares to the issuer, (2) keep their shares, or (3) donate all or a portion of their shares to ShareGift USA.

Donations made in the context of the transfer procedures for a transaction can be effected in two ways. First, shareholders could donate their original shareholdings directly to ShareGift USA by utilizing a check-the-box option included in standard transaction documentation. Where possible, shareholders would be given the option to make their gift either immediately effective or contingent on the consummation of the transaction described in the documentation being completed. If a donation is elected to be "immediately effective," then ShareGift USA would

receive the donated shares immediately upon processing of the applicable documentation through which the donation has been made. If a donation is elected to be contingent on the consummation of a transaction, ShareGift USA would receive the donated shares if and when the transaction closed, in accordance with the latest effective transaction documentation executed by the shareholder. Once a given donation became effective, ShareGift USA would then sell or exchange the donated shares itself, receiving proceeds or transaction consideration directly from the acquiror or issuer. Alternatively, charitably minded shareholders could hold onto their shares, participate in the transaction, and then donate the consideration received in the transaction to ShareGift USA by simply directing payment of those proceeds to ShareGift USA.

As per the usual custom in charitable giving, donations to ShareGift USA would be irrevocable once effective, whether the shareholder elected to make them effective (i.e. receivable by ShareGift USA) immediately or upon the consummation of a transaction. Upon donation, shares would no longer be an asset of the donating shareholder but the property of ShareGift USA. To avoid entanglement with pending tender offers or transactions, donors would not be permitted to impose any restrictions or conditions to the donation that could involve ShareGift USA facilitating the transaction or taking a position on the merits of the overall transactions or which would prevent ShareGift USA from freely and effectively using the gift to further its charitable goals.

B. Content & Methods of Disclosures to Shareholders

In general, issuers, bidders, targets, and/or acquirors would work with ShareGift USA to incorporate information about the Programs into the disclosure documents mandated to be delivered by the securities laws and regulations in connection with particular transactions. For example, in the context of a tender offer, generic disclosure about the Programs would be provided in the Schedule TO being disseminated to an issuer's shareholders, and shareholders would be afforded an opportunity to donate their shares by checking an appropriate box included in the letter of transmittal distributed to the shareholders concurrently with such Schedule TO. In the context of merger-related transactions, generic disclosure about the Programs would be included in proxy statements and, where applicable, prospectuses.

The disclosure and the documentation would be purely informative, simple and straightforward, and consistent across different types of transactions. Shareholders in all transactional contexts would receive information regarding ShareGift USA's identity and status as an organization recognized as exempt from tax under Section 501(c)(3) of the Internal Revenue Code, a list or general description of the supported charities, and the necessary paperwork and instructions for donating their shares, should they so choose. Where shareholders are given an option to make a gift effective immediately, there would be clear disclosure that the gift is not conditioned on the existence or completion of the background transaction, and would be irrevocable once processed by ShareGift USA. Conversely, where shareholders are given an option to condition their gifts upon the consummation of the background transaction, there would be a clear description of when and under what circumstances the gift would become effective, as well as detailed information on when a donative choice may be modified (for example, through a later dated letter of transmittal) and when it becomes final and irrevocable (for example, automatically upon consummation of a transaction). In addition, shareholders would be provided with contact

information including ShareGift USA's e-mail address, website (http://www.sharegiftusa.org), and phone number. At no point would ShareGift USA be making, through its disclosures or its personnel, any solicitation or recommendation regarding the merits of any transaction.

A company's disclosure materials would include a mention of ShareGift USA and the donative option along the following lines (appropriate disclosure would be crafted for each transaction and, depending on the nature of the transaction, there may be additional or different disclosure than the sample provided below):

> Should you desire, the Company has made arrangements to enable you to donate some or all of your [shares] [transaction consideration] to ShareGift USA. ShareGift USA is a nonprofit charity recognized as exempt from tax by IRS under Section 501(c)(3) of the Internal Revenue Code that will distribute the proceeds from [the sale of your donated shares] [your donated transaction consideration] to a variety of recognized U.S. charities. [If you would like to donate your shares under this program, simply return your properly completed Letter of Transmittal and Share certificate(s).] [Once your donation is received and processed,] [After the consummation of the transaction,] you will receive from ShareGift USA written confirmation of your donation. By donating [shares] [transaction consideration] to ShareGift USA, eligible donors may receive a tax deduction on their U.S. income tax returns. Please consult your tax advisor to determine whether you may be eligible to receive such a deduction.

It bears repeating that nothing about this disclosure would involve any mention of the merits of the transaction in the context of which the ShareGift USA donation option is being made available to shareholders.

C. Overview of the Mechanics of the Programs

Donative share transfers would be effectuated using the traditional letters of transmittal associated with tender offer and merger and acquisition transactions by working with the transaction's information, exchange, disbursing, and transfer agents.[7] Shareholders would donate securities by having a broker transfer securities in deliverable form to ShareGift USA's brokerage account. Depending on the form of the transaction, either the issuer or the acquiror would, at the time of the mailing of the circulars, tender offer materials, or the effective date of the merger as appropriate, forward to each shareholder at the address of such holder as it appears on the applicable register, along with the customary letter of transmittal and instructions for obtaining delivery of the merger or purchase consideration, instructions for donating shares (or for donating the transaction proceeds in the context of merger and acquisition transactions) to ShareGift USA. Provision would be made to allow share donations to be effective, at the donating shareholder's election, either immediately upon receipt of the shareholder's completed forms or (for shareholders who wish to preserve the ability to change their minds in the event the transaction is not consummated or its

[7] Shareholders would be informed that ShareGift USA accepts shares held in the form of paper certificates as well as in street name.

terms are modified) upon consummation of the background transaction. While shareholders who choose not to donate would simply receive a standard sale proceeds check and/or acquiror share certificates, shareholder donors would receive from ShareGift USA written confirmation of their donations once a donation is received and processed.

Once shareholders have donated their shares to ShareGift USA, ShareGift USA would become the beneficial owner of the shares. In the context of a pending merger or tender offer, ShareGift USA can exchange the donated target shares for the merger or tender offer consideration in the same manner as any other shareholder. Where the merger or tender offer consideration consists partly or wholly of acquiror stock, since ShareGift USA's goal is to convert shares into cash and get the funds into the hands of the designated charities with minimal delay, ShareGift USA would sell acquiror stock on the open market as soon as practicable, subject to any applicable restrictions, and distribute the proceeds to its designated charities.

D. Share Donations in Pending Tender Offers

In the tender offer context, the Programs operate substantially as described regardless of whether the donations occur in conjunction with a third-party tender or exchange offer or an issuer repurchase program. Where charitable share donation programs are integrated into tender offers, the "Schedule TO" Tender Offer Statement would include information about ShareGift USA's Programs and the option to donate shares along the lines described above. The Programs would feature no minimum or maximum share donation conditions nor any expiration date or time limit for donating shares. While the specific transactions may have their own timeframes, ShareGift USA would not impose any temporal limitations of its own and in fact would be eager to accept donated shares before, during, and after the transaction. If offering periods for the overarching tender offer are extended, shareholders would continue to have the donative option.

Just as with traditional donations of shares or other property outside of tender offers, donations would be irrevocable once effective. As described below, withdrawal rights would not need to apply to the donations of shares as the Programs are not "tender offers." Nevertheless, to avoid complications regarding withdrawal rights, ShareGift USA would not pre-commit to tender donated shares into the tender offer. By donating to ShareGift USA, shareholders would not be tendering into the offer but would rather be engaged in an ancillary transaction with ShareGift USA. In this context, the decision to donate is entirely independent of (and excludes) the decision to tender into the offer. Once shares are donated, ShareGift USA would convert the shares into cash as quickly as possible in a manner designed to maximize the amount available to charity. In addition, in the context of a tender offer, shareholders would be given the option to condition effectiveness of their gift upon the conclusion of the tender offer. Shareholders availing themselves of this option would be able to change their minds regarding the donation of shares in the event the terms of the underlying tender offer were modified in a way that impacted their charitable intentions.

Many transactions that begin as tender offers subsequently feature short-form or "freeze-out" mergers once a minimum ownership threshold is reached. In such cases, shareholders would also have an opportunity to donate their shares to ShareGift USA in the freeze-out transaction. Additionally, in many cases, shareholders who do not tender their shares during initial

tender periods will, once the merger becomes effective, receive a second letter of transmittal and instructions for surrendering their certificates pursuant to the effectuated merger. This second letter would also contain, alongside instructions and methods for participating in the transaction, instructions for donating shares to ShareGift USA.

E. Share Donations in Merger and Acquisition Transactions: All-Cash Sales versus Hybrid or Stock-for-Stock Deals

In the merger context, the proxy statement and (where applicable) prospectus that a corporation files with the SEC and provides to shareholders would include a description of the Programs, and the proxy card and/or the letter of transmittal used in the transaction would present shareholders with a check-the-box option to donate shares (accompanied with clear instructions), along the lines described above. Thus, when shareholders are asked to approve or reject the proposed transaction by filling out a proxy card, they would also have, as an independent option on the proxy card, the opportunity to donate their shares to ShareGift USA, accompanied with full and fair disclosure as to the irrevocability of such a gift. ShareGift USA would not seek to solicit shareholders' votes nor take a position on the merits of the overall transaction. Regardless of whether the merger is approved or not, shareholders could donate their shares to ShareGift USA via the appropriate forms, which would alert shareholders to the fact that such donations would be irrevocable when made, and that there would be another opportunity to donate either shares or transaction proceeds via a letter of transmittal after the transaction is consummated.

Customarily, after the merger is completed, the exchange/transfer agent for the merger sends a letter of transmittal to each former shareholder of the target. The letter of transmittal normally contains instructions for exchanging shares of target common stock for cash and/or shares of acquiror common stock as provided in the documents governing the transaction. In addition, the letter of transmittal would also include instructions for donating all or some of the target shares to ShareGift USA or, in the alternative, donating the proceeds of the exchange to ShareGift USA. The mechanics would be substantially the same in all-cash mergers or sales and stock-for-stock or hybrid cash/stock mergers; the difference would be that where merger consideration or an exchange offer involves distribution of acquiror stock, ShareGift USA would then have to take the additional step of selling the shares of acquiror stock that have been donated, in order to convert them into cash to be donated to its designated charities.

IV. Discussion & Relief Requested

A. Regulations 14D and 14E: Charitable Share Donation Programs Are Not Subject to Tender Offer Regulations

As the Commission rightly notes regarding the reach of federal tender offer regulations (Section 14(d) and Regulation 14D, Section 14(e) and Regulation 14E, and Section 13(e) and Rule 13e-4), "the threshold question is whether the transaction constitutes a 'tender offer'

within the scope of the Williams Act."[8] Under the Exchange Act and implementing rules and regulations, applying Section 14(d), Regulation 14D and Rule 14e-1 of Regulation14E to ShareGift USA's Programs would be appropriate only if the Commission were to conclude either (1) that although ShareGift USA is not itself conducting the tender offer, incorporating the option of donating their shares into the context of a pending tender offer renders ShareGift USA either a "co-bidder"[9] for the securities or part of the bidding "group" or (2) that giving shareholders the option of donating their shares to charity in the context of a tender offer itself constitutes "engaging in a tender offer" and renders ShareGift USA an "offeror."[10] In other words, in order for the disclosure requirements imposed by the Williams Act to be applicable to ShareGift USA by virtue of its implementation of the Programs, ShareGift USA would have to be deemed either a "bidder" or an "offeror" under the Williams Act. As discussed below, its conduct of the Programs would render ShareGift USA neither a "bidder" nor an "offeror." Consequently, the aforementioned tender offer regulations do not apply to ShareGift USA's charitable share donation activities.

1. Accepting Share Donations in the Context of a Pending "Tender Offer" Does Not Render ShareGift USA a "Co-Bidder" or "Offeror"

As described above, the Programs will often be implemented in conjunction with pending tender offers being conducted by a third party or the issuer itself. However, under the tender offer regulations, even though ShareGift USA itself is not conducting a tender offer,[11] its charitable share donation activities could nevertheless be subject to the tender offer rules (and the disclosure requirements imposed by Regulations 14D and/or 14E) if it is deemed to be a "co-bidder" or "offeror" with regard to the overarching tender offer.

Rule 14d-1(g)(2) defines a "bidder" in a tender offer as "any person who makes a tender offer or on whose behalf a tender offer is made." Each bidder in a tender offer subject to Regulation 14D must file a Schedule TO and disseminate the information required by that schedule. Thus, obligations fall not only on the entity used to make the tender offer and purchase the securities, but also on associated persons "on whose behalf" the tender offer is being made. Similarly, Schedule TO imposes certain disclosure requirements vis-à-vis any person who is an "offeror," which is defined in General Instruction K to the Schedule TO as "any person who makes a tender offer or on whose behalf a tender offer is made." For the reasons specified below, incorporating a charitable donation program into an existing tender offer does not render ShareGift USA a "co-bidder" or an "offeror" in connection with that offer.

The definitions of "bidder" and "offeror" include those "on whose behalf" the offer is made in order to prevent "real" or "co-" bidder(s) such as parent companies or control persons

[8] SEC Release No. 34-43069 (July 31, 2000)
[9] Rule 14d-1(g)(2) defines a "bidder" in a tender offer as "any person who makes a tender offer or on whose behalf a tender offer is made."
[10] General Instruction K to the Schedule TO defines an "offeror" as "any person who makes a tender offer or on whose behalf a tender offer is made."
[11] See Section IV.A.3 *infra* for an analysis of why ShareGift's acceptance of share donations in the context of a tender offer cannot itself be viewed as a tender offer.

from evading disclosure requirements by using "nominal" entities to purchase tendered securities.[12] To illustrate the point, the SEC has explained that where a parent company forms an acquisition entity for the purpose of making the tender offer, "both the acquisition entity and the parent company are bidders even though the acquisition entity will purchase all securities tendered."[13]

The SEC Division of Corporation Finance's November 2000 "Current Issues and Rulemaking Projects" outline ("Rulemaking Outline") presents a number of relevant factors for analyzing whether a person is a bidder for purposes of Regulations 14D and 14E. The SEC's relevant factors include:

(1) Did the person play a significant role in initiating, structuring, and negotiating the tender offer?

(2) Is the person acting together with the named bidder?

(3) To what extent did or does the person control the terms of the offer?

(4) Is the person providing financing for the tender offer, or playing a primary role in obtaining financing?

(5) Does the person control the named bidder, directly or indirectly?

(6) Did the person form the nominal bidder, or cause it to be formed?, and

(7) Would the person beneficially own the securities purchased by the named bidder in the tender offer or the assets of the target company?

Application of these factors compels the conclusion that incorporating a charitable share donation option into an existing tender offer would not bestow "bidder" or "offeror" status upon ShareGift USA: ShareGift USA would not play any role in initiating, structuring, negotiating, or financing the tender offer (factors (1) and (4). It would have no direct or indirect control, by any legitimate definition, over the named bidder (factor (5)). It would have no involvement in the formation of the nominal bidder (factor (6)). At the time the tender offer is commenced, ShareGift USA would not own any of the acquiror's shares, and any subsequent ownership would be a result of ShareGift USA exchanging voluntarily donated target shares for acquiror stock. Any such holdings would be quickly liquidated in order to convert such securities into cash to be distributed to the charities that ShareGift USA supports (factor (7)).[14]

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[12] SEC Division of Corporation Finance, Current Issues and Rulemaking Projects § II.D.2 (Nov. 14, 2000), available at: http://www.sec.gov/divisions/corpfin/guidance/ci111400ex_tor.htm (last visited November 19, 2008). The full Current Issues and Rulemaking Projects Outline (November 14, 2000) is available at http://www.sec.gov/pdf/cfcr112k.pdf.

[13] Id. The SEC adds that the "fact that the parent company or other persons control the purchaser through share ownership does not mean that the entity is automatically viewed a bidder. Instead, we look at the parent's or control person's role in the tender offer."

[14] While a stockholder of the acquiring corporation may be a "bidder" if the stockholder "is in a position to have a significant impact on the future of that corporation," as "information about the stockholder may well be material to a decision of stockholders of the target whether to take the offer or hang on with the hope of a greater return," (), ShareGift USA may will simply hold shares for a brief period before selling them, and will not ever be "in a position to

(footnote continued)

Perhaps most fundamentally, there is no sense in which ShareGift USA could be viewed as controlling or in any way influencing the terms of the offer (factor 3). On the contrary, ShareGift USA's participation in the tender offer would be essentially passive, or parasitic: ShareGift USA would merely be giving shareholders the ancillary option of donating their shares in the context of the tender offer transaction. The connection between the tender offer and the donative option is incidental – while ShareGift USA of course hopes that corporations will view charitable share donation programs as a vital part of corporation social responsibility initiatives, a philanthropic motivation would not have any effect, even at the margins, on a bidder or issuer's calculus of whether and on what terms to initiate a tender offer. Nor, by the same token, can ShareGift USA be fairly seen as "acting together" with a named bidder (factor 2); as this factor is intended to cover situations in which the person "acting together" with the named bidder serves as an active co-participant.[15] ShareGift USA's involvement in the tender offer transaction, by contrast, would be limited to enabling charitably minded shareholders to donate their shares through an efficient mechanism.

In addition, any information about ShareGift USA included in proxy materials, prospectuses, or tender offer documents will not be "material" under the securities laws.[16] The Supreme Court's definition of a material fact is one that "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[17] This standard does not encompass all information; instead, the "total mix" at issue is that which investors reasonably use to evaluate the investment prospects of a given company or an investment decision in the context of a transaction. The focus is on information which could reasonably lead to or prevent any "distortion in price" of a company's securities.[18] None of the descriptive information relating to the Programs would be viewed as "material" by a reasonable investor with regards to the tender offer or subject securities because this information will not have an effect, adverse or otherwise, on the price of an issuer's or target's stock. While ShareGift USA will provide shareholders descriptive information about itself and how it allocates proceeds to worthy charities, information regarding the Programs will not, even minimally, "change the assumptions on which the market price is based."

(footnote continued)

have a significant impact on the future of [the] corporation." See City Capital Associates Ltd. Partnership v. Interco Inc., 860 F.2d 60, 65 (C.A.3 (Del., 1988).

[15] Compare MAI Basic Four Inc. v. Prime Computer, Inc., 871 F.2d 212, 218 (1st Cir. 1989) (finding that an entity was a bidder because it played a "central participatory role" in the tender offer) with City Capital Associates Limited Partnership v. Interco, Inc., 860 F.2d 60, 63 (3d Cir. 1988) (finding that an entity was not a bidder when it had no "role with respect to the purchaser other than that of an investor.").

[16] In its November 2000 Rulemaking Outline, the Commission's Division of Corporation Finance adds that in making a bidder determination, the Commission also considers "whether adding the person as a named bidder means shareholders will receive material information that is not otherwise required under the control person instruction, Instruction C to Schedule TO" and "the extent to which the other party benefits from the transaction."

[17] Basic, 485 U.S. at 231-32 (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

[18] See id. at 248.

Thus, an evaluation of the factors that the SEC lists in its November 2000 Rulemaking Outline as relevant to a tender offer "bidder" or "offeror" determination compels the conclusion that ShareGift USA cannot be viewed as a "co-bidder" or "offeror" when charitable share donation programs are implemented in conjunction with a pending tender offer. This conclusion accords with commonsense, the purpose of the securities laws, and application of the relevant factors, not the least of which is that at no time does ShareGift seek to buy or offer consideration for donated securities.[19] As the SEC noted in its proposing release, the term "bidder" is designed to encompass the "principal participants in a tender offer."[20] Simply put, ShareGift USA will not be a planner, principal, or player in the overarching tender offer transaction and hence should not be viewed as a "co-bidder" or "offeror" under the securities laws. As one judge put it, the distinction between "bidders and the rest of humanity is not subtle, but rather is used to make a simple differentiation between those who are central to the offer and those who are not."[21] While the issue of bidder status calls for a facts-and-circumstances analysis and does not lend itself to a bright-line rule, ShareGift USA clearly falls, in any imaginable circumstance, on the non-bidder side of the divide. In other words, providing shareholders the option to donate their shares in conjunction with an existing tender offer cannot plausibly be viewed as implying that the tender offer was made "on behalf of" ShareGift USA.[22]

2. ShareGift USA Is Not Part of a "Group" Seeking To Acquire Securities Pursuant to a "Tender Offer"

Under section 14(d)(2) of the Exchange Act, "when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person'" for purposes of the tender offer rules. This same language in Rule 13d-5(b)(1) has been interpreted to mean that multiple entities do not constitute a "group" without an "agreement to act for a common purpose to acquire, hold, vote or dispose of" the securities at issue.[23] "Mere relationship, among

[19] While security holders may benefit from favorable tax treatment, this benefit is bestowed by the government, not ShareGift USA. The Programs would merely give shareholders a convenient mechanism for making charitable donations that they would be equally entitled to make (with the attendant potential tax advantages) independently of the Programs.
[20] SEC Release No. 15548 (Feb. 5, 1979).
[21] Van Dusen Air, Inc. v. APL Ltd. Partnership, 1985 WL 56596, at *2 (D. Minn. 1985).
[22] Similarly, Rule 165 under the Securities Act, which imposes certain disclosure requirements on offerors of securities in a business combination transaction and expressly applies not only to the offeror but also to any other participant, defines "participant" as "any person or entity that is a party to the business combination transaction and any persons authorized to act on their behalf." It would be just as implausible to view ShareGift USA as a "participant" under Rule 165 as it would be to view it as a "co-bidder" or "offeror" under the tender offer regulations, and for similar reasons. ShareGift USA would play no role and have no influence whatsoever in determining any aspect of the business combination transaction, would have no relation to the offeror and would not be offering to buy or pay consideration for any shares donated to it in the context of a business combination transaction. While it is true that disclosure materials for the transaction would include a brief neutral description of ShareGift USA's Programs, including mention of the fact that donations to ShareGift USA may be tax deductible, this potential tax benefit is bestowed by the government and is also entirely outside of ShareGift USA's control, the Programs being merely a convenient conduit that enables shareholders to avail themselves of a potential tax benefit that is independently available to them in any event.
[23] Strauss v. American Holdings, Inc., 902 F. Supp. 475, 479 (S.D.N.Y. 1995).

persons or entities . . . is insufficient to create the group which is deemed to be a statutory person."[24] The legislative history behind the language suggests that it was intended to close a loophole by which a syndicate was previously able to escape the reporting requirements of the Securities Exchange Act.[25]

Because "the touchstone of a group . . . is that the members combined in furtherance of a common objective,"[26] ShareGift USA is not part of a "group" with the corporations involved in a tender offer. ShareGift USA's mission is to aggregate and sell donated shares and use the proceeds to benefit charities. The other entities involved in a tender offer have separate objectives, usually related to issues of corporate control in which ShareGift USA has no interest.

3. ShareGift USA's Charitable Share Donation Programs Do Not Themselves Constitute "Tender Offers"

While ShareGift USA's proposes to enable shareholders to make charitable donations in the context of tender offers (whether such tender offers are being conducted by third parties under Rule 14d-l and 14e-l or by issuers themselves under rule 13e-4), ShareGift USA will not thereby itself be engaging in a tender offer. An examination of the eight factors the Commission employs to determine whether a transaction constitutes a 'tender offer," as well application of the more holistic approach employed by some courts, bear out this claim. The Commission's factors include whether:

(1) an active, widespread solicitation is made for securities of an issuer;

(2) the solicitation is made for a substantial percentage of the issuer's securities;

(3) the offer to purchase is made at a premium over the prevailing market price;

(4) the terms of the offer are firm rather than negotiable;

(5) the offer is contingent on the tender of a fixed minimum number of securities and often subject to a ceiling of a fixed maximum number of securities to be purchased;[27]

(6) the offer is open only for a limited period of time;

(7) the offerees are subject to pressure to sell their stock; and

(8) public announcements of an acquisition program precede or accompany the accumulation of securities.[28]

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[24] Texasgulf, Inc. v. Canada Development Corp., 366 F. Supp. 374,403 (S.D. Tex. 1973).
[25] See GAF Corp. v. Milstein, 324 F. Supp. 1062, 1066 (S.D.N.Y. 1971).
[26] Wellman v. Dickinson, 682 F.2d 355, 363 (2d Cir. 1982).
[27] The lack of a minimum share requirement counsels strongly against a conclusion that a request for charitable donations is a tender offer. See SEC v. Carter Hawley Hale Stores, Inc., 760 F.2d 945,951 (9th Cir. 1985) (no tender offer where acquisition program was not contingent upon the tender of a fixed minimum number of shares); Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773,792 (S.D.N.Y. 1979) ("Its purchasing was not contingent on a minimum fixed number of shares being offered").
[28] See Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979).

Application of these factors compels the conclusion that the ShareGift USA Programs do not constitute "tender offers." The Programs do not offer to "purchase" shares but simply enable shareholders to make donations in the context of tender offer, merger or exchange transactions. Since such donations are gifts, shareholders receive no consideration from ShareGift USA, so there is no question of there being a premium. ShareGift USA does not condition acceptance of donations on receipt of a minimum or maximum number of shares. Nor are the Programs open only for limited periods of time; shareholders may donate their shares before, during, or after the issuer or third-party tender offer is complete. Furthermore, the Programs do not subject target shareholders to any pressure to donate their shares, but simply make the option to donate available. In other words, a ShareGift USA request for donations is in no way coercive.[29]

Most courts have either adopted the Commission's eight-factor formulation or employed a "totality of the circumstances" test that considers those factors as relevant to determining whether a given solicitation implicates the "purpose of the Williams Act" and hence constitutes a "tender offer." For example, in Hanson Trust PLC v. SCM Corp., the Second Circuit held that a "tender offer" should be defined in the context of the policies and concerns of the Exchange Act; the test is "whether, viewing the transaction in the light of the totality of circumstances, there appears to be a likelihood that unless the pre-acquisition filing strictures of [the Exchange Act's tender offer scheme] are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them."[30] A "totality of the circumstances" test compels the same conclusion that the Programs are not "tender offers." A fundamental distinction between the Programs and "tender offers" is that in the latter case, shareholders are attempting to decide whether tendering into the offer will maximize the monetary value of their investment. Disclosure is necessary to ensure that shareholders have sufficient information to properly assess the true purchase price being offered and the likelihood and celerity of closing. With the charitable share donation programs at issue here, shareholders are not choosing among competing proposals for maximizing monetary value but simply deciding whether or not to donate their shares to charity. The disclosure needed in this context is not that of the pre-acquisition filing strictures of the Exchange Act and its implementing rules and regulations, but rather, straightforward, neutral and accurate descriptions of ShareGift USA's status as a 501(c)(3) non-profit organization, its designated charities, and the mechanics of the donative transfer option that it makes available to shareholders. ShareGift USA will provide such neutral disclosures. Non-adherence to the pre-acquisition filing structures of Regulations 14D and 14E will not disadvantage shareholders.

The Programs also should not be viewed as "mini-tender offers" subject to the Commission's interpretive guidance regarding disclosures pertaining to such offers. "Mini-tender offers" are those which "would result in the bidder holding not more than five percent of a

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[29] ShareGift USA's Programs do not manifest the coercion that flows from coupling a "high premium with a threat that the offer will disappear within a certain time." Brascan Ltd. v. Edper Equities Ltd., 477 F. Supp. 773, 792 (S.D.N.Y. 1979). All transfers of shares will take place solely as a result of the uninfluenced discretion of charitably minded shareholders. Shareholders may donate all, some, or none of their shares, before, during or after the tender offer, and ShareGift USA will accept donations regardless of what other shareholders decide to do with their shares.

[30] Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57. (2d Cir. 1985).

company's securities"[31] and are generally structured as such to avoid the filing, disclosure and procedural requirements of Section 14(d) and Regulation 14D.[32] While Section 14(e) and Regulation 14E apply to all tender offers, even those which would not result in the bidder owning more than five percent after the consummation of the offer or those that are for less than five percent of the outstanding securities and offers, they apply *only* to tender offers. The critical distinction that renders the ShareGift USA Programs beyond the reach of tender offer regulation is neither the percentage of shares likely to be donated nor the percentage of shares ShareGift USA would end up temporarily holding but rather the fact that none of the donative activities are "tender offers."

To conclude, because ShareGift USA's activities do not implicate the concerns animating the tender offer-related securities laws, and because the requests for charitable donations do not meet the critical factors of any of the dominant tests, the Programs are not "tender offers" under the Exchange Act or implementing regulations.

4. Rule 14d-7(a)(1): Irrevocable Donations Do Not Interfere with Shareholder Withdrawal Rights

Rule 14d-7(a)(1) provides to "any person who has deposited securities pursuant to a tender offer . . . the right to withdraw any such securities during the period such offer, request or invitation remains open." By contrast, charitable donations are traditionally irrevocable once made; there is generally no ability to "withdraw" a formal gift. Under the proposed mechanism, shareholders would be given the opportunity to make an immediately effective gift, or to condition effectiveness of their gift upon the conclusion of the tender offer. Shareholders availing themselves of the latter option would be able to change their minds regarding the donation of shares in the event the terms of the underlying tender offer were modified in a way that impacted their charitable intentions. Shareholders availing themselves of the former option would not suffer any interference with their withdrawal rights because they would not have "deposited securities pursuant to a tender offer."[33] The donative option is ancillary to the tender offer, and shareholders who elect to donate their shares are not tendering into the offer but giving their shares to ShareGift USA. Moreover, as ShareGift USA would not pre-commit to tendering donated shares into the offer, there would be no issue of shareholders viewing the charitable donation as a means of tendering into the offer. Thus, this aspect of the Programs does not run afoul of Rule 14d-7(a)(1).

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[31] SEC Release No. 34-43069 (July 31, 2000).

[32] The Programs do not raise the concerns that animated the Commission's interpretive guidance regarding "mini-tender offers," namely that the disclosure related to such tender offers were often deceptive and coercive, e.g., investors often made decisions without knowing that bidders planned to modify the price mid-stream, offers were often extended by bidders who lacked the financing ability to pay for shares and avoided using escrow accounts or independent receiving agents, and such offers threatened to victimize investors by providing below-market prices without disclosing the lack of a premium and including "first-come, first-purchase terms [that] may pressure customers to make hasty, uninformed tender decisions." See generally SEC Release No. 34-43069 (July 31, 2000).

[33] Rule 14d-7(a)(1).

5. Rule 14d-9: ShareGift USA Would Not Need to Communicate with Shareholders Under Cover of a Schedule 14D-9

Under Rule 14d-9, any person who makes a solicitation or recommendation to shareholders on behalf of the target, its management or any bidder (or affiliates of the foregoing) in respect of a tender offer "other than by means of a solicitation or recommendation to security holders which has been filed with the Commission pursuant to this rule or Rule 14d-3" must file a Schedule 14D-9.[34] As discussed above, ShareGift USA would not be making any communications with shareholders that would constitute a solicitation or recommendation in respect of the tender offers in the context of which ShareGift USA would be presenting shareholders with an ancillary donative option. All communications involving ShareGift USA's Programs would be incorporated either into the Schedule TO, in the form of a brief description of ShareGift USA's Programs and the donative option being made available to shareholders, or into the letter of transmittal that would accompany the Schedule TO covering the tender offer transaction, in the form of a check-the-box donation option. As the sample disclosure in Section III.B shows, the information about ShareGift USA's Programs contained in a Schedule TO would not involve any "solicitation or recommendation" by ShareGift USA, and ShareGift USA would not at any point before, during or after the commencement of the tender offer be making any other such solicitation or recommendation. Accordingly, we seek confirmation that no separate Schedule 14D-9 would need to be filed by ShareGift USA, as its only communications with shareholders in the context of a tender offer would be the disclosure of basic information about ShareGift USA in the body of the Schedule TO, and the inclusion of the donative option in the letter of transmittal.

6. Rule 14e-5

Under Rule 14e-5 under the Exchange Act, "no covered person may directly or indirectly purchase or arrange to purchase any subject securities or any related securities except as part of the tender offer."[35] The prohibition applies "from the time of public announcement of the tender offer until the tender offer expires." In addition to accepting donated shares from shareholders who use the letter of transmittal mechanism, ShareGift USA would like to be able to accept shares from shareholders who, for whatever reason, prefer not to use the letter of transmittal mechanism and instead seek to donate directly to ShareGift USA. We submit that acceptance of donations during the pendency of an issuer or third-party tender offer, whether via a letter of transmittal contained in the tender offer or otherwise, would not constitute "purchases outside of the tender offer" by a "covered person" under Rule 14e-5.

"Covered person" under Rule 14e-5 means the offeror and its affiliates, the offeror's dealer-manager and its affiliates, any advisor to the offeror, dealer manager or their affiliates if such advisor's compensation is dependent on the completion of the offer, and any person acting, directly or indirectly, in concert with any of the covered persons in connection with any arrangement to

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[34] See Rule 14d-9(e)(iii).
[35] Rule 14e-5(a).

purchase any subject securities or related securities.[36] As an independent 501(c)(3) charitable organization, ShareGift USA would plainly not be the offeror, the offeror's dealer-manager, or an advisor to the offeror or its dealer-manager. Nor should ShareGift USA be considered, by virtue of its acceptance of freely made charitable donations in the form of the issuer's shares, either an affiliate of the offeror or the offeror's dealer-manager, or a person acting in concert with any covered person. Regarding affiliate status, as previously stated[37], it would be extremely unlikely for circumstances to arise in which ShareGift USA could be considered a person that directly or indirectly "controls" the issuer or its dealer-manager; nor could ShareGift USA be expected to be "controlled by" or "under common control with" the issuer or any dealer-manager, as ShareGift USA is an independent 501(c)(3) charitable nonprofit organization with its own mission and board of trustees. Regarding "acting in concert," ShareGift USA would accept donations of shares in the ordinary course of its business; this would have neither the intent nor the effect of facilitating or otherwise affecting the outcome any tender offer and would not involve any concerted action with any offeror or other covered person. Other than asking them to facilitate donative transfers by including the donative option and related disclosures in their tender offer materials, ShareGift USA would have no dealings or other cooperation with offerors. Ultimately, donations would have no effect on the pending tender offer, and the decision to donate is independent of the decision of whether to tender into the offer. Although ShareGift USA may tender donated shares into a tender offer, ShareGift's decision to tender would be made independent of any "covered person" and not with the intent to improperly facilitate the tender offer.

Just as, we submit that ShareGift USA is not a "covered person" under the definition of Rule 14e-5, nor should acceptance of donations by ShareGift USA, whether directly or through the letter of transmittal mechanism outlined in this letter, be viewed as a "purchase" within the meaning of Rule 14e-5. ShareGift USA is not acquiring the shares that it receives for value and is not paying any consideration for them; it is simply requesting charitable donations and accepting a gift. This distinction between acquiring shares through "purchase" as opposed to through donation is supported by Commission pronouncements and promulgations. In its No-Action Letter regarding Monfort of Colorado, Inc., the Staff explained that "persons such as donees, beneficiaries of an estate, trustees and executors who become beneficial owners of securities otherwise than through purchase are deemed to have acquired such securities for purposes of Section 13(d)(1)."[38] Rule 13d-5(a) provides that any person who "becomes" the beneficial owner of securities shall be deemed to have acquired such securities whether such acquisition was "through purchase or otherwise." Thus, under Rule 13d-5(a) and the SEC's Monfort of Colorado no-action letter, donees or grantees are deemed to have "acquired" securities when they receive a donation or grant of equity securities for purposes of section 13(d) despite not having "purchased" them. Rule 13d-5 does not contain any language that would sweep within its ambit acquisitions that are not "purchases" and its application is expressly confined to "purchases" and "arrangements to purchase." Thus, in addition to it being extremely unlikely that ShareGift USA could be considered

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[36] Rule 14e-5(c)(3).
[37] See Section II.
[38] See Monfort of Colorado, Inc., SEC No-Action Letter, 1975 WL 10018, (July 16, 1975) (emphasis added).

a "covered person," we submit that ShareGift USA would also not be considered to be engaged in "purchasing" shares outside of the tender offer.

The acceptance of donations by ShareGift USA in the context of, or concurrently with, a tender offer conforms not only with the letter of Rule 14e-5, but with its spirit as well. The rule is intended to be "a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices in connection with a tender offer for equity securities."[39] As the adopting release to the superseded Rule 10b-13, the predecessor to Rule 14e-5, states, "irrespective of the price at which [they] are made, [purchases outside of the tender offer] are manipulative in nature and they can deceive the investing public as to the true state of affairs. Their consequences can be various, depending upon conditions in the market and the nature of the purchases. . . . [T]he rule accomplishes the objective of safeguarding the interests of the persons who have tendered their securities in response to a cash tender offer or exchange offer; moreover once the offer has been made, the rule removes any incentive on the part of holders of substantial blocks of securities to demand from the person making a tender offer or exchange offer a consideration greater than or different from that currently offered to public investors."[40] The rule thus aims to maintain the integrity of tender offers by "preventing an offeror from extending greater or different consideration to some security holders by offering to purchase their shares outside the offer, while other security holders are limited to the offer's terms."[41] By accepting donations, ShareGift would not be distorting the overall calculus facing potentially tendering shareholders, and ShareGift's acceptance of donations would not result in different holders of the subject shares receiving differential consideration in the context of a tender offer. Giving shareholders the ability to donate all or a portion of their shareholdings to an independent charity does not lend itself to the kind of abuse of the tender offer construct that the rule against purchases outside the tender offer was designed to prevent, and therefore does not implicate the concerns that motivate Rule 14e-5's prohibition on purchases outside the tender offer by covered persons.

In light of the foregoing, we respectfully request that the Staff provide no-action relief from the provisions of Rule 14e-5 in respect of ShareGift's acceptance of donations, whether through or outside of the letter of transmittal mechanism that provides for a donative option as outlined in this submission, by confirming that it will not recommend enforcement action under Rule 14e-5 under the Exchange Act in connection with ShareGift's acceptance of such donations.

7. Section 14(d)(4): ShareGift USA Will Not Recommend Acceptance or Rejection of Pending Tender Offers

Under section 14(d)(4) of the Exchange Act, "any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders" is subject to regulatory oversight. At no point will ShareGift USA take any position regarding the

[39] Rule 14e-5(a).
[40] Prohibition Against Purchase of Securities During Tender Offer, Exchange Act Release No. 34-8712, 34 Fed. Reg. 15838, 15838-9 (Oct. 8, 1969)
[41] Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 34-42054, International Series Release No. 1208 (October 28, 1999), Section II.C.1.

merits of a pending tender offer or encourage shareholders to oppose or tender into the offer. At all times, ShareGift USA's sole object is and will continue to be to provide charitably minded shareholders, regardless of their views on the merits of the overall transaction, the opportunity to donate their shares to charity. Therefore, ShareGift USA should not be deemed to be making a solicitation or recommendation respecting the tender offer within the meaning of Section 14(d)(4) by virtue of implementing the Programs.

B. Regulation 14A: The Programs Are Not "Proxy Solicitations" and ShareGift USA Is Not a "Participant in a Solicitation"

Under Section 14(a) of the Exchange Act, the solicitation of proxies with respect to securities registered pursuant to section 12 of the Exchange Act must comply with the applicable rules and regulations promulgated by the SEC. For the reasons set forth below, if an issuer or acquiror chooses to include information and mechanisms for donating shares to ShareGift USA in its proxy solicitations, this inclusion should not be viewed as a proxy solicitation, and ShareGift USA should not be viewed as a "participant in a solicitation."

In general, a proxy solicitation is a "commendatory or subjective presentation" of the merits (or lack thereof) of a proposed corporate transaction, over and above a "purely factual description of the proposed transaction."[42] Not only would ShareGift USA not render subjective judgments about the overarching transaction, it would not even provide neutral descriptions of it. Indeed, ShareGift USA is indifferent to how shares are voted; its only concern in the context of the overarching transaction is providing an efficient mechanism to charitably minded shareholders to enable them to donate their shares in the context of those transactions.

More specifically, sub-section (a)(vi) of Instruction 3 to Items 4 and 5 of Schedule 14A states that the terms "participant" and "participant in a solicitation" include "any person who solicits proxies." Rule 14a-1(*l*) of the Exchange Act defines the terms "solicit" and "solicitation" as including:

(i) any request for a proxy whether or not accompanied by or included in a form of proxy;

(ii) any request to execute or not to execute, or to revoke, a proxy; and

(iii) the furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

In facilitating share donations through the inclusion of a check-the-box mechanism in the proxy cards that are sent to shareholders prior to effectiveness of a merger, or the inclusion of basic information about ShareGift USA and the donative option (along the lines set forth in Section III.B of this letter), ShareGift USA plainly will not be asking shareholders for a proxy or making a

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[42] Capital Real Estate Investors Tax Exempt Fund Ltd. Partnership v. Schwartzberg, 929 F. Supp. 105, 113 (S.D.N.Y. 1996).

request that they execute, not execute or revoke a proxy. ShareGift USA is requesting donations of shares, not proxies, and neither the generic disclosure regarding ShareGift in the proxy statement, nor the inclusion of a "check-the-box" option to donate shares on the proxy card, will involve the presentation by ShareGift of any view whatsoever (commendatory or otherwise) on the merits of the separate corporate transaction or on how shareholders should vote. Nor should the inclusion of the check-the-box donative option on the proxy card, or the inclusion of basic information about ShareGift USA and the donative option (along the lines set forth in Section III.B of this letter) be viewed as "reasonably calculated to result in the procurement, withholding or revocation of a proxy." As stated above, ShareGift USA is merely piggybacking on the existing transaction to ask shareholders for donations of their shares, and is unconcerned with shareholders' decisions regarding whether or not to execute a proxy vis-à-vis the overarching transaction. The donation is independent of any vote on pending transactions or proposals, and merely ancillary to the overarching corporate transaction. Both the generic disclosure regarding ShareGift in the proxy statement, and the manner in which the donative option is presented on the proxy card, will be designed to make this abundantly clear to shareholders.

Thus, because the Programs do not involve solicitations of proxies or taking a position regarding the merits of the overarching transaction, ShareGift USA should not be subject to the requirements of Regulation 14A.

In addition, ShareGift USA is arguably expressly exempt from the proxy rules of Regulation 14A. In 1992, the SEC adopted new express exemptions from the proxy rules. Under Rule 14a-2(b), a person is exempted if it does not "seek directly or indirectly, either on its own or another's behalf, the power to act as a proxy for a security holder and does not furnish or otherwise request, or act on behalf of a person who furnishes or requests, a form of revocation, abstention, consent or authorization." This exemption covers ShareGift USA, which does not seek to act as a proxy for other holders in the context of a shareholder vote or engage in any of the other specified activities. ShareGift USA also does not fall within any of the ten categories of persons who cannot claim the Rule 14a-2(b) exemption, as ShareGift USA is not:

(1) the registrant of the securities it receives through donations;

(2) an officer or director of the registrant;

(3) an officer, director, affiliate, or associate of a person ineligible under one of these categories;

(4) a nominee for whose election as a director proxies are solicited;

(5) soliciting in opposition to a merger or other extraordinary transaction recommended or approved by the board of directors of the registrant;

(6) required to report beneficial ownership of the registrant's equity securities on a Schedule 13D filing;

(7) a person who receives compensation from an ineligible person directly related to the solicitation of proxies;

(8) an interested person of an investment company;

(9) a person likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities; or

(10) a person acting on behalf of any of the foregoing ineligible persons.

At the time of any proxy vote, it is highly unlikely that ShareGift USA would meet the beneficial ownership thresholds of Regulation 13D-G in light of its focus on converting shares into cash proceeds as quickly as possible. In addition, ShareGift USA would not receive any special benefit from a successful solicitation. Therefore, whether by virtue of an express Rule 14a-2(b) exemption or the simple fact that ShareGift USA is not soliciting proxies, the Programs are not subject to the proxy rules of Regulation 14A.

V. Conclusion

We appreciate the Staff's prompt consideration of these matters. As charitable share donations do not meet the threshold requirements for triggering application of the tender offer or proxy solicitation regulations, do not raise risks of abuse, and do not contravene the purposes underlying the securities laws, we hope the SEC will not hesitate to adopt expressly a position reflecting agreement with the legal positions described above. Please do not hesitate to contact either the undersigned at (212) 403-1233 or my colleague Umut Ergun at (212) 403-1342 with any questions regarding this matter.

Very truly yours,

/s/ Andrew. R. Brownstein

Andrew R. Brownstein