

# GIBSON, DUNN & CRUTCHER LLP

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December 8, 2009

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U.S. Securities and Exchange Commission  
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Washington, DC 20549

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Office of Mergers and Acquisitions  
Division of Corporation Finance

Josephine J. Tao, Assistant Director  
Office of Trading Practices and Processing  
Division of Trading and Markets

Re: *Kraft Foods Inc. Offer for Ordinary Shares, Including those Represented  
by ADSs, of Cadbury plc*

Dear Ms. Anderson, Ms. Chalk, and Ms. Tao:

We are writing this letter (this "Letter") on behalf of Kraft Foods Inc., a Virginia corporation ("Kraft Foods"). On November 9, 2009, Kraft Foods announced its firm intention to make an offer to acquire each outstanding ordinary share, including each ordinary share represented by American Depositary Shares ("ADSs"), of Cadbury plc, a public limited company incorporated under the laws of England and Wales ("Cadbury"), in exchange for 0.2589 of a share of Kraft Foods common stock and 300 pence in cash (the "Offer"). Cadbury's board of directors has recommended that Cadbury shareholders reject the Offer. Kraft Foods commenced the Offer on December 4, 2009.

The Offer is being made as a single offer with separate offer documents directed to (i) holders of Cadbury ordinary shares who are U.S. holders (within the meaning of Rule 14d-1(d) under the Securities Exchange Act of 1934 and the rules and regulations thereunder, as amended (the "Exchange Act")) or Canadian residents, and all holders of Cadbury ADSs,

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wherever located, pursuant to a prospectus/offer to exchange and related transmittal materials (the "U.S. Offer Documents") filed with the Securities and Exchange Commission (the "Commission") on December 4, 2009 as part of a registration statement on Form S-4 in respect of the common stock of Kraft Foods offered and (ii) all holders of Cadbury ordinary shares who are not U.S. holders or Canadian residents pursuant to separate United Kingdom offer documents (the "U.K. Offer Documents"). The U.S. Offer Documents and the U.K. Offer Documents provide for identical terms and reflect the same conditions to the Offer (the "Conditions").

Kraft Foods is conducting the Offer in accordance with The City Code on Takeovers and Mergers (the "City Code"), the U.K. Prospectus Rules and Listing Rules, the Exchange Act and any relief granted by the Commission pursuant to this Letter. Pursuant to the City Code, Kraft Foods was required to commence the Offer by December 7, 2009 (28 days after the announcement of Kraft Foods' firm intention to make the Offer) or such later date as the United Kingdom Panel on Takeovers and Mergers (the "U.K. Takeover Panel") (the regulatory body which administers the City Code) may agree.

On behalf of Kraft Foods, we hereby respectfully request exemptive relief from the provisions of the following rules under the Exchange Act in order for Kraft Foods to conduct the Offer as described in this Letter:

- Rule 14e-5: *To Permit Purchases of Cadbury Ordinary Shares Outside the Offer;*
- Section 14(d)(5) and Rule 14d-7(a)(1): *To Permit the Removal of Withdrawal Rights After Termination of the Initial Offer Period Prior to the Expiration of a Voluntary Extension;*
- Rule 14e-1(c) and Rules 14d-11(c) and (e): *To Permit Prompt Payment of the Offer Consideration in Accordance with United Kingdom Law and Practice;* and
- Rules 14d-10(a)(2) and (c) and Rules 14d-11(b) and (f): *To Permit the Use of a Mix and Match Facility in Accordance with United Kingdom Law and Practice.*

The information provided in this Letter with respect to Cadbury and Cadbury's securities has been obtained from Cadbury's publicly available filings. Information relating to Cadbury has not been independently verified by Kraft Foods or its advisors.

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## I. DESCRIPTION OF THE COMPANIES

### A. *Cadbury*

According to Cadbury's publicly available filings, Cadbury is an international confectionery business that generated £5.4 billion in total revenue from its global operations in 2008. At December 31, 2008, Cadbury operated in over 60 countries and had over 45,000 employees. Cadbury's principal product segments are: chocolate, which contributed 46% of Cadbury's revenue in 2008; gum, which contributed 33% of Cadbury's revenue in 2008; and candy, which contributed 21% of Cadbury's revenue in 2008 (in each case, excluding the revenues of Reading Scientific Services Limited).

Cadbury is registered under the laws of England and Wales as a public limited company with its registered office (principal executive office) at Cadbury House, Sanderson Road, Uxbridge, Middlesex, England, UB8 1DH. Cadbury is a reporting company under the Exchange Act, and we understand that Cadbury is a "foreign private issuer" as defined in Rule 3b-4(c) under the Exchange Act. Cadbury's ordinary shares are traded on the Official List of the London Stock Exchange under the symbol "CBRY." Cadbury's ADSs are traded on the New York Stock Exchange (the "NYSE") under the symbol "CBY." Each Cadbury ADS represents four Cadbury ordinary shares. Cadbury ADSs and Cadbury ordinary shares (for non-trading purposes, in connection with the listing of Cadbury ADSs) are registered pursuant to Section 12(b) of the Exchange Act.

### B. *Kraft Foods*

Kraft Foods is the world's second largest food company, with revenues of \$41.9 billion and earnings from continuing operations before income taxes of \$2.6 billion in 2008. Kraft Foods' approximately 100,000 employees worldwide manufacture and market packaged food products, including snacks, beverages, cheese, convenient meals and various packaged grocery products. Kraft Foods sells its products to consumers in approximately 150 countries. At December 31, 2008, Kraft Foods had operations in more than 70 countries and made its products at 168 manufacturing and processing facilities worldwide. At September 30, 2009, Kraft Foods had net assets of \$25.2 billion and gross assets of \$66.7 billion. Kraft Foods is a member of the Dow Jones Industrial Average, the Standard & Poor's 500, the Dow Jones Sustainability Index and the Ethibel Sustainability Index.

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Kraft Foods is a Virginia corporation with principal executive offices at Three Lakes Drive, Northfield, IL 60093. Kraft Foods' common stock trades on the NYSE under the symbol "KFT."

## II. BACKGROUND TO REQUEST

### A. *The Cross-Border Rules*

Effective in January 2000, the Commission adopted certain rules for cross-border tender and exchange offers, business combinations and rights offerings relating to the securities of foreign companies (the "Cross-Border Rules"). The adopting release (Release Nos. 33-7759 and 34-42052; October 22, 1999) (the "Cross-Border Release") indicates that the purpose of granting these and other exemptions was to facilitate United States investor participation in these types of transactions. Additionally, in adopting the Cross-Border Release, the Commission stated that, in cases where an exemption would be unavailable, it would consider relief on a case-by-case basis as necessary to address direct conflicts between United States laws and practice and those of the foreign jurisdiction.

In September 2008, the Commission adopted amendments (the "Cross-Border Amendments") to the Cross-Border Rules, which became effective December 8, 2008, pursuant to Release Nos. 33-8957 and 34-5897 (September 19, 2008) (the "2008 Release"). The Cross-Border Amendments, among other things, effectively eliminated the need for individual requests for relief where the application of two regulatory regimes to a transaction has historically presented conflicts.

### B. *Qualification for Tier II Relief*

In order for Kraft Foods' Offer to qualify for exemptive relief under Rule 14d-1(d) under the Exchange Act (as in effect and amended by the Cross-Border Amendments) ("Tier II Relief"), among other conditions, U.S. holders must not hold more than 40% of the outstanding Cadbury ordinary shares. In conducting its analysis of whether the Offer qualifies for Tier II Relief, Kraft Foods presumed, as permitted by Instruction 3 to Rule 14d-1(d), that less than 40% of the Cadbury ordinary shares were held by U.S. holders because:

- the Offer is not being made pursuant to an agreement or other arrangement with Cadbury;
- the average daily trading volume of Cadbury ordinary shares on all national securities exchanges and other trading markets in the United States over the 12-

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calendar-month period ending the trading day before Kraft Foods' first public announcement relating to the Offer was less than 40% of the worldwide average daily trading volume of the Cadbury ordinary shares over the same period;<sup>1</sup>

- Cadbury's most recent annual reports filed with the Commission and the United Kingdom regulatory authorities do not indicate that U.S. holders hold more than 40% of the outstanding Cadbury ordinary shares;<sup>2</sup> and
- after reasonable investigation and prior to Kraft Foods' first public announcement relating to the Offer, neither Kraft Foods nor its advisors had knowledge or believe they had reason to know that U.S. holders held more than 40% of the outstanding Cadbury ordinary shares.<sup>3</sup>

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<sup>1</sup> Based on data obtained from Lazard & Co., Kraft Foods' financial advisor, during the 12-calendar-month period ending September 4, 2009 (the last trading day before Kraft Foods' first public announcement relating to the Offer), the average daily trading volume of Cadbury ordinary shares (including those represented by Cadbury ADSs) in the United States represented 8.3% of the worldwide average daily trading volume.

<sup>2</sup> Cadbury's Form 20-F and Annual Reports & Accounts for the year ended December 31, 2008 disclose that record owners with addresses in the United States held approximately 18.2% of the outstanding Cadbury ordinary shares (including those represented by Cadbury ADSs).

<sup>3</sup> Based on data Lazard & Co. obtained from Lionshares regarding the historical ownership of Cadbury ordinary shares (including those represented by Cadbury ADSs), the U.S. ownership 30 days and 60 days before Kraft Foods' first public announcement relating to the Offer was approximately 33.4% and 32.4%, respectively. The data compiled by Lionshares, which we understand is the best information available to Kraft Foods and its advisors regarding the historical ownership of Cadbury ordinary shares (including those represented by Cadbury ADSs), was based on approximately 73% of the total number of outstanding Cadbury ordinary shares on each date. In addition, information available in public filings with the Commission or the United Kingdom regulatory authorities reported U.S. ownership of Cadbury ordinary shares (including those represented by Cadbury ADSs) below the 40% threshold.

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However, we understand that Cadbury's counsel recently sent a letter to Lazard & Co. and the Commission claiming that the actual level of ownership by U.S. holders prior to public announcement regarding the Offer was in excess of 40%.<sup>4</sup> Given the uncertainty surrounding the actual level of ownership of Cadbury ordinary shares by U.S. holders prior to public announcement regarding the Offer and for the avoidance of any doubt as to whether the proposed terms of the Offer comply with the Exchange Act, we are hereby requesting the exemptive relief summarized above and discussed further below.

### **III. PROPOSED OFFER STRUCTURE**

#### **A. *General***

The Offer is structured as a single offer made concurrently pursuant to the U.S. Offer Documents and the U.K. Offer Documents to satisfy regulatory requirements in the United Kingdom as well as in the United States.

The Offer is designed to comply with the City Code (as administered by the U.K. Takeover Panel), the regulatory regime with the greatest interest in the conduct of the Offer, the rules and regulations of the United Kingdom Listing Authority, and Regulations 14D and 14E under the Exchange Act as they apply to offers that are eligible for Tier II Relief under Rule 14d-1(d).

The Offer is subject to the Conditions customary for offers of this type in the United Kingdom. One of the most important Conditions is that Kraft Foods receive acceptances from Cadbury shareholders with respect to not less than 90% (or such lesser percentage as Kraft Foods may subsequently decide) of Cadbury ordinary shares to which the Offer relates (the "Acceptance Condition"). Pursuant to the City Code, the Acceptance Condition may not be satisfied unless Kraft Foods shall have acquired or agreed to acquire, directly or indirectly, pursuant to the Offer or otherwise, Cadbury's ordinary shares carrying more than 50% of the votes normally exercisable at general meetings of Cadbury's shareholders. Under the City Code,

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<sup>4</sup> The letter alleged that data compiled from Bloomberg and Thomson Citywatch (as further adjusted by Cadbury's counsel in some indeterminate manner) indicated that Kraft Foods and its advisors should have had reason to know, prior to September 7, 2009, that the level of U.S. ownership of Cadbury ordinary shares was between approximately 39.8% and 40.5%.

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the Acceptance Condition must be satisfied by midnight on the 60th day after commencement of the Offer.

To harmonize the United Kingdom and the United States regulatory regimes, the U.K. Takeover Panel has agreed that, unless Kraft Foods otherwise determines, the Acceptance Condition shall be capable of being satisfied or treated as satisfied only at the time when all other Conditions have also satisfied or, to the extent permitted, waived (*i.e.*, the Offer becomes or is declared "wholly unconditional"). The U.K. Takeover Panel has agreed to this in order to remove the possibility of withdrawals reducing the level of acceptances below 50% (based on the fact that declaring the Offer wholly unconditional will terminate shareholders' right to withdraw Cadbury ordinary shares and Cadbury ADSs with respect to which the Offer has been accepted prior to such time). On that basis, under the City Code, the Offer would be required to lapse if it does not become or is not declared wholly unconditional by the 60th day after commencement ("Day 60"), unless the U.K. Takeover Panel agrees otherwise or a competing proposal for Cadbury has been made. Usually however, bidders would have a further 21 days after the Acceptance Condition had been satisfied, to declare the Offer wholly unconditional.

As set forth in Section II.C. of the 2008 Release, the Acceptance Condition may be reduced in accordance with the City Code if the following conditions are met:

- a public announcement that such a reduction may occur is made at least five U.S. business days *prior to* the time an offeror reduces the Acceptance Condition;
- such announcement is made by press release and other methods reasonably calculated to inform U.S. holders of the possibility of such reduction, which may include placing an advertisement in a newspaper of national circulation in the United States;
- the press release states the exact percentage to which the Acceptance Condition may be reduced, and Kraft Foods announces its actual intentions regarding a reduction as soon as required under home country rules;
- withdrawal rights are provided during the five-day period after the announcement of a possible reduction;
- the announcement advises security holders to withdraw tendered securities immediately if their willingness to tender into the Offer would be affected by the reduction of the Acceptance Condition;

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- the procedure for reducing the Acceptance Condition is described in the offering materials;
- the Offer remains open at least five U.S. business days *after* the reduction of the Acceptance Condition;
- all Conditions are satisfied or waived when withdrawal rights are terminated;
- the potential impact of the reduction of the Acceptance Condition is fully discussed in the initial offering materials or any supplemental materials; and
- Kraft Foods does *not* reduce the Acceptance Condition below the percentage required for it to control Cadbury after the Offer under applicable United Kingdom law and, in any case, below a majority of the outstanding Cadbury ordinary shares.

The Offer provides that Kraft Foods will make an announcement not less than five U.S. business days prior to the date on which any such reduction in the Acceptance Condition may be effected, stating the percentage to which the Acceptance Condition may be reduced. Any such announcement will be made through a press release and other methods reasonably calculated to inform U.S. holders of the possibility of such reduction, which will include placing an advertisement in a newspaper of national circulation in the United States. Any such announcement will advise shareholders to withdraw their acceptances immediately if their willingness to accept the Offer would be affected by a reduction of the Acceptance Condition. Moreover, Kraft Foods will file any such announcement with the Commission via EDGAR. In addition, disclosure regarding the procedure for, and the potential impact of, reducing the Acceptance Condition is described in the Offer documentation. Further, as noted above, as required by the City Code, the Acceptance Condition may not be satisfied unless Kraft Foods shall have acquired or agreed to acquire, directly or indirectly, pursuant to the Offer or otherwise, Cadbury's ordinary shares carrying more than 50% of the votes normally exercisable at general meetings of Cadbury's shareholders. Accordingly, Kraft Foods will not reduce the Acceptance Condition below 50% of the outstanding Cadbury ordinary shares to which the Offer relates.

During the period of at least five U.S. business days following the public announcement that such a reduction may be made, holders will have withdrawal rights (given that, under the terms of the Offer, withdrawal rights will already be available until the Offer becomes or is declared wholly unconditional). If necessary, Kraft Foods will delay declaring the Offer wholly

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unconditional until the expiration of the period of at least five U.S. business days following the public announcement that such a reduction may be made.

**B. *Initial Offer Period***

The Offer will remain open for acceptance after the date of commencement for not less than 20 U.S. business days and thereafter for such additional period or periods as may be determined by Kraft Foods ("Voluntary Extensions") or as may be mandated ("Mandatory Extensions") by the provisions of Regulations 14D and 14E under the Exchange Act (subject to any exemptive relief granted) or the City Code (as so extended, the "Initial Offer Period"). The Offer shall provide that Kraft Foods may declare the Offer wholly unconditional and terminate the Initial Offer Period at or at any time after the 20th U.S. business day after the Offer commences (but not before expiration of any Mandatory Extension), whether or not on a scheduled expiration date of the Offer. Holders will have withdrawal rights throughout the Initial Offer Period. However, at Day 60 Kraft Foods may suspend withdrawal rights while securities tendered into the Offer are being counted; provided that, (i) at the time withdrawal rights are suspended, all the Conditions will have been satisfied or waived, except for the Acceptance Condition; and (ii) the withdrawal rights will be suspended only until the securities tendered into the Offer are counted, and, to the extent such securities are not accepted for payment, because Kraft Foods determines that the Acceptance Condition has not been satisfied, the Offer will lapse and tendered securities will be returned to holders thereof. If Kraft Foods waives a material Condition, it will make appropriate disclosure and will extend the Offer, in each case, to the extent necessary to comply with the Exchange Act. In accordance with Rule 31.8 of the City Code, payment for any security with respect to which the Offer has been validly accepted as of the end of the Initial Offer Period would be made within 14 days after the later of the date at which the Offer becomes or is declared wholly unconditional or receipt of a validly completed acceptance.

**C. *Subsequent Offer Period***

In accordance with the City Code, once the Offer becomes or is declared wholly unconditional, the Offer must, among other things, remain open for acceptances for at least 14 days and may remain open for such longer period (the "Subsequent Offer Period") as Kraft Foods deems appropriate. In practice, transactions in the United Kingdom are nearly always structured so as to keep the Subsequent Offer Period open for a period longer than the mandatory 14 days under the City Code. In accordance with Rule 31.8 of the City Code, payment for any security with respect to which the Offer is validly accepted during the Subsequent Offer Period would be made within 14 days after the later of the date at which the Offer becomes or is

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declared wholly unconditional or the date of the receipt of a complete acceptance in respect of that security. Payments for Cadbury securities with respect to which the Offer is validly accepted during the Subsequent Offer Period will therefore be made on a rolling basis.

**D. *Mix and Match Facility***

The Offer provides for a standard entitlement of 300 pence and 0.2589 of a share of Kraft Foods common stock for each Cadbury ordinary share (which amounts to 1,200 pence and 1.0356 shares of Kraft Foods common stock for each Cadbury ADS).<sup>5</sup> Kraft Foods will provide a "mix and match facility," whereby Cadbury shareholders may request to receive either more shares of Kraft Foods common stock or more cash than the standard entitlement. However, the mix and match facility will be available only to the extent that off-setting elections have been made by other holders in the same off-setting pool who accept the Offer. To the extent that elections cannot be satisfied as a result of such off-setting elections, entitlements to shares of Kraft Foods common stock and cash in excess of the standard entitlement will be reduced on a pro rata basis. Once the share allocations have been determined, the cash element of the consideration will be reduced or increased (as the case may be) for each Cadbury shareholder who has been allocated an increased or reduced number of shares of Kraft Foods common stock. All calculations in respect of Cadbury shareholders who accept the Offer during the Initial Offer Period will be made by reference to the number of valid acceptances and elections received by Kraft Foods as of the termination of the Initial Offer Period. Kraft Foods also plans to provide a mix and match facility in the Subsequent Offer Period, to be available during the entire Subsequent Offer Period. However, as referenced above, Rule 31.8 of the City Code would require payment for securities tendered in the Subsequent Offer Period to be made within 14 days of the date of the receipt of a complete acceptance in respect of that security. As a result of this rolling payment requirement, and assuming that the Subsequent Offer Period extends beyond 14 days, Kraft Foods will need to have multiple "take-up dates" on which it will settle and pay for Cadbury securities tendered in the Subsequent Offer Period. Accordingly, in order to make the mix and match facility available during the entire Subsequent Offer Period and concurrently

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<sup>5</sup> The depositary for the Cadbury ADSs will assess a \$0.05 withdrawal fee per Cadbury ADS purchased in the Offer. This withdrawal fee will either (i) be deducted from the cash consideration payable to holders of such Cadbury ADSs or (ii) if the cash consideration payable to such holders is not sufficient to cover the withdrawal fee, such holders' elections under the mix and match facility will be adjusted to the extent necessary to increase the cash consideration payable to cover the withdrawal fee.

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comply with the payment provisions of the City Code, Kraft Foods will need to provide separate off-setting pools for elections made between each take-up date in the Subsequent Offer Period (such that all mix and match calculations in respect of Cadbury shareholders who accept the Offer during the Subsequent Offer Period will be made by reference to the number of valid acceptances and elections received by Kraft Foods, which are to be settled as of the applicable take-up date). The maximum amount of cash and shares of Kraft Foods common stock payable in the Offer will not vary as a result of the availability of the mix and match facility during the Initial Offer Period and/or Subsequent Offer Period.

If Kraft Foods were to become entitled to acquire minority shares compulsorily, Kraft Foods would also need to provide a mix and match facility during any compulsory acquisition period provided for in Chapter 3 of Part 28 of the U.K. Companies Act 2006 (the "Companies Act") as it is required to do pursuant to the Companies Act. This mix and match facility would be made only among the Cadbury shareholders that are subject to the compulsory acquisition process. Therefore, the ability to satisfy any elections requested by a Cadbury shareholder subject to the compulsory acquisition will depend upon the elections made by other Cadbury shareholders that are subject to the compulsory acquisition, and the maximum amount of cash and Kraft Foods shares payable in the Offer will not vary as a result of this mix and match facility.

**E. *Irrevocable Undertakings***

Certain large institutional shareholders, non-U.S. holders, may be asked, as is typical in United Kingdom takeovers, to undertake irrevocably to accept the Offer in respect of their holdings of Cadbury's ordinary shares. Consistent with the strict requirements of the City Code in this respect, no additional compensation will be paid to these shareholders and they will receive their offer consideration at the same time (or within the same timeframe, in the case of the Subsequent Offer Period) as the other Cadbury shareholders that accept the Offer.

Under United Kingdom practice, an irrevocable undertaking is an agreement of a shareholder to accept an offer when made and, in some cases, not to accept a competing offer during the pendency of the first offer. An irrevocable undertaking is not treated by the City Code as a purchase, and the City Code permits bidders to enter into irrevocable undertakings at any time, subject to certain limitations. We note for emphasis that any Cadbury ordinary shares subject to an irrevocable undertaking would be purchased in the Offer, and consequently, count towards satisfying the Acceptance Condition under the City Code. Acceptance of the Offer in respect of Cadbury ordinary shares that are the subject of irrevocable undertakings represent tenders subject to both the terms and conditions of the Offer and the City Code. Accordingly we

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are not requesting exemptive relief from Rule 14e-5 with respect to such shareholders entering into irrevocable undertakings in connection with the Offer.<sup>6</sup>

#### IV. DISCUSSION OF ISSUES

##### A. *Rule 14e-5: To Permit Purchases of Cadbury Ordinary Shares Outside the Offer*

Subject to certain exceptions, Rule 14e-5 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 (the "Restricted Period").<sup>7</sup> Rule 14e-5 under the Exchange Act 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 (i) and (ii) above 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 any subject securities or any related securities.

However, Rule 14e-5(b)(12)(i) 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, subject to certain conditions (including that the covered person reasonably expects that the tender offer is subject to Tier II Relief). In the present case, all such conditions will be satisfied, except for, given the uncertainty surrounding the actual level of ownership of Cadbury ordinary shares by U.S. holders, the condition regarding the availability of Tier II Relief. If Tier II Relief were

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<sup>6</sup> See *AstraZeneca plc Offer for Cambridge Antibody Technology Group plc (May 23, 2006)* ("AstraZeneca/Cambridge No-Action Letter"); *UCB S.A. Offer for Celltech Group Plc (May 19, 2004)* ("UCB/Celltech No-Action Letter"); *RWE Aktiengesellschaft Offer for Innogy Holdings plc (July 22, 2002)* ("RWE/Innogy No-Action Letter"); and *Celltech Group plc Offer for Oxford GlycoSciences plc (March 3, 2003)* ("Celltech/Oxford No-Action Letter"). See also *Manual of Publicly Available Telephone Interpretations, Third Supplement, I Regulation M-A, L. 14e-5, Question 4 (SEC Division of Corporation Finance, July 2001)*.

<sup>7</sup> See *Rule 14e-5(a)*.

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unavailable in connection with the Offer, purchases of Cadbury ordinary shares by Kraft Foods (or other covered persons acting for the account or benefit of Kraft Foods) outside the Offer would not fall within any of the excepted activities specifically outlined in Rule 14e-5. Accordingly, in the absence of Tier II Relief or other exemptive relief, such purchases would be prohibited after the public announcement of the Offer.

In the United Kingdom, purchases of a target's securities by a bidder or a person acting for the account or benefit of the bidder outside an offer are permitted, subject to certain limitations, and such "stake building" or purchases are common practice in connection with takeovers. Under the City Code, Kraft Foods and its advisors and brokers are permitted to purchase Cadbury ordinary shares in the open market or otherwise prior to and during the conduct of, but outside, the Offer, subject to certain limitations, including as to price (as described below).

Although the goal in a typical offer for a United Kingdom company is to receive tenders of at least 90% of a target's shares, in most cases it is not possible to achieve that result without first reducing the Acceptance Condition and declaring the offer unconditional (thereby providing non-accepting shareholders with a certainty of outcome that the Offer will close) as to acceptances, in part because certain institutional investors in the United Kingdom are precluded from tendering until after an offer has become unconditional as to acceptances and in part because there is limited incentive to tender during the Initial Offer Period since there will need to be a Subsequent Offer Period.

In addition, Rules 6.1 and 6.2 of the City Code provide protections similar to those provided by Rule 14e-5 under the Exchange Act, making exemptive relief appropriate in the circumstances of the Offer, by requiring that the Offer price be increased to the level of any higher purchase price outside the Offer. Furthermore, under Rule 8.1 of the City Code, any purchases outside the Offer by any party to the transaction (including the offeror and any advisor, broker or other financial institution acting as its agent or who are otherwise associated with the offeror) are required to be disclosed on a next-day basis to a Regulatory Information Service, as set out in Appendix 3 to the United Kingdom Financial Services Authority Listing Rules, and the U.K. Takeover Panel. Disclosures of these purchases attract significant publicity by their very nature and they are disseminated on dealers' trading screens throughout the London market.

Kraft Foods intends that any purchases of Cadbury ordinary shares outside the Offer by Kraft Foods and any advisor, broker or other financial institution acting as its agent (the

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"Prospective Purchasers") that would otherwise be prohibited by Rule 14e-5, would be subject to the following conditions:

- no purchases or arrangements to purchase Cadbury ordinary shares, otherwise than pursuant to the Offer, will be made in the United States;
- prominent disclosure of the possibility of such purchases by the Prospective Purchasers, otherwise than pursuant to the Offer, will be included in the U.S. Offer Documents;
- prominent disclosure of the manner in which information regarding such purchases will be disseminated will be included in the U.S. Offer Documents;
- the Prospective Purchasers shall disclose in the United States information regarding such purchases to the extent such information is made public in the United Kingdom pursuant to the City Code;
- the Prospective Purchasers shall comply with any applicable rules in the United Kingdom, including the City Code, the rules against insider dealing and the rules and regulations of the United Kingdom Listing Authority (in particular, the rules regulating market conduct/market abuse);
- in the event that the Prospective Purchasers purchase or make arrangements to purchase Cadbury ordinary shares for a consideration greater than the Offer price, the Offer price will be increased to match the higher price paid outside of the Offer.
- upon request of the Division of Trading and Markets of the Commission (the "Division"), the Prospective Purchasers shall disclose to it a daily time-sequenced schedule of all purchases of Cadbury ordinary shares made by any of them during the Offer, on a transaction-by-transaction basis, including: (i) a description of the size, broker (if any), time of execution and purchase price; and (ii) if not executed on the London Stock Exchange, the exchange, quotation system or other facility through which the purchase occurred;
- upon request of the Division, the Prospective Purchasers shall transmit the information specified in clauses (i) and (ii) of the bullet above to the Division at its offices in Washington D.C. within 30 days of its request;

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- the Prospective Purchasers shall retain all documents and other information required to be maintained pursuant to this exemption for a period of not less than two years from the date of the termination of the Offer;
- representatives of the Prospective Purchasers shall be made available (in person at the offices of the Division or by telephone) to respond to enquiries of the Division relating to such records; and
- except as otherwise exempted herein, the Prospective Purchasers shall comply with Rule 14e-5.

Finally, we note the existence of the Memorandum of Understanding on Exchange of Information between the Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and the United States Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry in Matters Relating to Futures dated September 25, 1991.

We are hereby requesting an exemption to Rule 14e-5 in order to permit purchases of Cadbury ordinary shares outside the Offer as described above. In the context of the Offer, we believe the relief requested under Rule 14e-5 is consistent with relief the Commission has afforded to bidders in similar circumstances in the past, including in transactions that did not independently qualify for Tier II Relief.<sup>8</sup>

Please note that, in our view, there are serious doubts as to whether 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 Kraft Foods, or financial institutions

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<sup>8</sup> See *AstraZeneca/Cambridge No-Action Letter*, *supra*; *Barrick Gold Corporation Offer for NovaGold Resources Inc. (October 10, 2006)* ("*Barrick Gold/NovaGold No-Action Letter*"); and *Rio Tinto plc Offer for Alcan Inc. (July 24, 2007)* ("*Rio Tinto/Alcan No-Action Letter*") (in each case, Rule 14e-5 relief granted where transaction did not qualify for Tier II Relief). See also *UCB/Celltech No-Action Letter*, *supra*; *RWE/Innogy No-Action Letter*, *supra*; *Celltech/Oxford No-Action Letter*, *supra*; and *Royal Bank of Scotland Group PLC, Banco Santander Central Hispanico SA and Fortis SA/NV and Fortis N.V. Offer for ABN AMRO Holding NV (July 20, 2007)*.

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acting on its behalf, made purchases of, or arrangements to purchase, Cadbury ordinary shares outside the United States. We nonetheless apply, on behalf of such persons, for exemptive relief for such purchases from the provisions of Rule 14e-5, on the conditions set forth above. We have been requested by Kraft Foods to emphasize that this letter does not reflect an admission that Rule 14e-5 would apply to such purchases of Cadbury ordinary shares outside the United States in the absence of such exemptive relief.

**B. *Section 14(d)(5) and Rule 14d-7(a)(1): Withdrawal Rights in the Initial Offer Period***

Pursuant to Rule 14e-1(a), it is unlawful to hold a tender offer open for less than 20 U.S. business days. A procedure for the extension of a tender offer beyond its initial expiration date is set forth in Rule 14e-1(d). Section 14(d)(5) together with Rule 14d-7(a)(1) provide 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 remains open and any time after 60 days from the date the offer is first published or sent to security holders.

Under the City Code, an offer must be open for acceptance for at least 21 days but in the majority of bids, will be extended thereafter until further notice or even indefinitely. Once an offer becomes or is declared unconditional as to acceptances (or in this case, pursuant to the requirements of the U.K. Takeover Panel, is declared unconditional as to acceptances and upon satisfaction of all other conditions), withdrawals are not permitted, as the accepting shareholders' shares become the beneficial property of the offeror when the offer becomes wholly unconditional or, if later, at the time of an acceptance.

As the Exchange Act requires a 20 U.S. business day period during which withdrawals are possible, the Offer provides that the Offer cannot become or be declared wholly unconditional until the end of the first 20 U.S. business day period. After the first 20 U.S. business day period, if the Offer has still not become or been declared wholly unconditional, the Offer will remain open for acceptances and a new closing date will be specified (unless Kraft Foods at that time determines that the Offer should lapse). Kraft Foods will make a public announcement of any extension of the Offer no later than 8:00 a.m. London time and 3:00 a.m. New York City time on the business day following the date on which the Offer was scheduled to expire. Additionally, in accordance with United Kingdom practice, Kraft Foods intends to declare the Offer wholly unconditional as soon after the 20th U.S. business day as possible when all of the Conditions have been fulfilled or waived, even if prior to the expiration of any Voluntary Extension. Kraft Foods will not declare the Offer wholly unconditional, however, before the expiration of any Mandatory Extension.

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After the Offer becomes wholly unconditional, the Initial Offer Period will end and the Subsequent Offer Period will begin. Valid acceptances in respect of Cadbury ordinary shares, including those represented by Cadbury ADSs would cease to be capable of withdrawal at the time when the Offer becomes wholly unconditional (other than in circumstances requiring a supplemental prospectus, in which case accepting shareholders who have not been paid their consideration may withdraw). We believe that the termination of the Initial Offer Period prior to the expiration of any Voluntary Extension and the related removal of withdrawal rights thereafter, each as described in this Letter, are consistent with the Commission's interpretation of the Tier II Relief as set forth in Section II.C. of the 2008 Release.

Based on the foregoing, we hereby request exemptive relief from the provisions of Section 14(d)(5) and Rule 14d-7(a)(1) with regard to the termination of the Initial Offer Period prior to the expiration of any Voluntary Extension and the related removal of withdrawal rights thereafter, each as described in this Letter. We believe that the relief requested from Section 14(d)(5) and Rule 14d-7(a)(1) is consistent with relief the Commission has afforded to bidders in similar circumstances in the past, including in cases where Tier II Relief was unavailable.<sup>9</sup>

**C. *Rule 14e-1(c) and Rules 14d-11(c) and (e): Prompt Payment of Offer Consideration***

Exchange Act Rule 14e-1(c) requires that the consideration offered in a tender or exchange offer be paid "promptly" after the termination of such offer. In addition, Rule 14d-11(c) requires, as a condition to a subsequent offering period contemplated by the first paragraph of Rule 14d-11, that an offeror immediately accept and promptly pay for all securities tendered during the initial offer period. Rule 14d-11(e) requires that an offeror immediately accept and promptly pay for all securities as they are tendered during the subsequent offering period.

Rule 31.8 of the City Code requires payment for any security with respect to which the Offer has been validly accepted as of the end of the Initial Offer Period to be made within 14 days after the later of the date at which the Offer becomes or is declared wholly unconditional or

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<sup>9</sup> See *AstraZeneca/Cambridge No-Action Letter, supra*; and *Singapore Technologies Semiconductors Pte Ltd. Offer for STATS ChipPAC Ltd. (March 15, 2007) ("Singapore/STATS No-Action Letter")*. See also *SERENA Software, Inc. Offer for Merant plc (April 13, 2004) ("SERENA/Merant No-Action Letter")*; and *TU Acquisition PLC Offer for The Energy Group PLC (March 27, 1998)*.

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receipt of a valid acceptance.<sup>10</sup> In the event that the Offer is terminated or withdrawn, under the City Code, Kraft Foods would also be required to return the shares tendered into the Offer within 14 days of the notice of termination or withdrawal. Further, payment for any security with respect to which the Offer is validly accepted during the Subsequent Offer Period would be required to be made within 14 days of the date of the receipt of a complete acceptance in respect of that security. Accordingly, payments for Cadbury securities with respect to which the Offer is validly accepted during the Subsequent Offer Period will need to be made on a rolling basis. The 14-day payment period is the maximum permitted by the City Code and is a well-settled market practice in the United Kingdom. Each of the participants in the series of events that results in the payment of consideration, namely the United Kingdom registrars and the settlement systems, operate on that basis and any change to that period may be considerably disruptive to the United Kingdom market place.

Kraft Foods will pay the consideration under the Offer before the 14-day payment deadline permitted by the City Code and, to the extent practicable, within 7 to 10 days. Kraft Foods currently anticipates that such payment cannot be made in less than 7 days, as the process for settlement of consideration in the Offer is complicated by a number of factors, including, among others, the need to (i) calculate tendering Cadbury shareholders' entitlements to cash and shares, including taking into account elections under the mix and match facility and (ii) ensure that the proper settlement mechanics are in place on Kraft Foods' register prior to allocating individual entitlements to tendering Cadbury shareholders.

We note that the Tier II Relief provides that payment made in accordance with the home jurisdiction law or practice will satisfy the requirements of Rule 14e-1(c), and that payments for

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<sup>10</sup> Holders who tender Cadbury ordinary shares will receive the cash portion of the offer consideration in pounds sterling, unless such holders specifically elect to receive it in U.S. dollars. Holders who tender Cadbury ADSs will receive the cash portion of the offer consideration in U.S. dollars, unless such holders specifically elect to receive it in pounds sterling. If the cash portion of the offer consideration is received in U.S. dollars, the cash amount payable in pounds sterling to which the tendering holder is entitled pursuant to the terms of the Offer will be paid, subject to any conversion expenses, in U.S. dollars based on the exchange rate obtainable on the spot market in London on the date the cash consideration is made available by Kraft Foods to the relevant exchange agent for delivery in respect of the Cadbury ordinary shares or Cadbury ADSs.

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securities tendered during any subsequent offering period within 20 U.S. business days of the date of tender will satisfy the prompt payment requirements of Rule 14d-11(e).

In turn, we hereby request exemptive relief from the provisions of Rule 14e-1(c) and Rules 14d-11(c) and (e) with regard to payment for Cadbury securities pursuant to the Offer as described in this Letter. We believe that the relief requested from Rule 14e-1(c) and Rules 14d-11(c) and (e) is consistent with relief the Commission has afforded to bidders in similar circumstances in the past in cases where Tier II Relief was unavailable.<sup>11</sup>

**D. *Rules 14d-10(a)(2) and (c) and Rules 14d-11(b) and (f): Mix and Match Facility***

Pursuant to Rule 14d-10(a)(2) under the Exchange Act, no bidder shall make a tender offer unless the consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer. Pursuant to Rule 14d-10(c) under the Exchange Act, where an offeror offers more than one type of consideration in a tender offer, security holders must be afforded an equal right to elect among each of the types of consideration offered and the highest consideration of each type paid to any security holder must be paid to any other security holder receiving that type of consideration. As a result of the elections and allocations pursuant to the mix and match facility, some Cadbury shareholders may receive more cash or more Kraft Foods shares than other Cadbury shareholders, though every Cadbury shareholder will have the same right to receive the standard entitlement.

Pursuant to Rule 14d-11(b) under the Exchange Act, where an offeror is offering security holders a choice of different forms of consideration, the offeror may elect to provide a subsequent offering period only where there is no ceiling on any form of consideration offered. Pursuant to Rule 14d-11(f) under the Exchange Act, during a subsequent offer period, the bidder

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<sup>11</sup> See *Harmony Gold/Goldfields No-Action Letter, supra*; *Alcan Inc. Offer for Pechiney, S.A. (October 8, 2003)*; *Banco Bilbao Vizcaya Argentaria, S.A. Offer for BBVA Banco Francés (April 19, 2001)*; *AstraZeneca/Cambridge No-Action Letter, supra*; *Singapore/STATS No-Action Letter, supra*; *Rio Tinto/Alcan No-Action Letter, supra*; *Barrick Gold/NovaGold No-Action Letter, supra*; *EGS Acquisition Co LLC Offer for eTelecare Global Solutions, Inc. (November 5, 2008)*; *Repsol-YPF, S.A. Offer for YPF S.A. (July 21, 2000)*; and *Technip, S.A. Offer for Coflexip, S.A. (August 30, 2001)*.

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must offer the same form and amount of consideration to security holders in both the initial and the subsequent offering periods. The terms of the Offer provide for a maximum number of shares of Kraft Foods common stock to be issued under the Offer and a maximum amount of cash to be paid under the Offer, which will not vary as a result of the mix and match facility. These maximum amounts of Kraft Foods shares and cash could be viewed as a ceiling on the forms of consideration offered in the Subsequent Offer Period. As noted above, Kraft Foods will create an off-setting pool for the mix and match facility during the Initial Offer Period (which will end at the termination of the Initial Offer Period) and separate off-setting pools for Cadbury securities tendered in the Offer between each take-up date in the Subsequent Offer Period (if the Subsequent Offer Period extends beyond 14 days). As a result, all mix and match calculations in respect of Cadbury shareholders who accept the Offer during the Subsequent Offer Period will be made by reference to the number of valid acceptances and elections received by Kraft Foods, which are to be settled as of the applicable take-up date.

We do not believe that the principles underlying the Exchange Act would be compromised by the granting of the exemptive relief requested herein. While the Offer consists of more than one type of consideration, the ratio between cash and shares of Kraft Foods common stock being offered is the same for each Cadbury shareholder. Each Cadbury shareholder shall be entitled to receive cash and shares of Kraft Foods common stock in the same ratio offered by Kraft Foods regardless of when such holder accepts the Offer. In the United Kingdom, a mix and match facility is not regarded as an alternative offer that would be subject to specific regulation under the Takeover Code, but merely as an additional facility available to target shareholders. The purpose of the mix and match facility is to facilitate exchanges between Cadbury shareholders. The maximum number of shares of Kraft Foods common stock to be issued under the Offer and the maximum amount of cash to be paid under the Offer would not vary as a result of the mix and match facility. The ability of a Cadbury shareholder to make a mix and match election would depend on the extent to which other Cadbury shareholders in the same off-setting pool would make opposite elections.

We note that the Cross-Border Amendments explicitly permit mix and match elections and provide that separate off-setting pools may be used for mix and match elections made in an Initial Offer Period and a Subsequent Offer Period. However, the payment provisions in Rule 31.8 of the City Code require payment for shares validly tendered in the Subsequent Offer Period 14 days after receipt of a complete acceptance in respect of that security. As a result, in the event Kraft Foods provides for a Subsequent Offer Period that extends beyond 14 days, Kraft Foods will need to provide for more than one off-setting pool for mix and match elections in the Subsequent Offer Period to maintain compliance with the City Code payment provisions.

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Accordingly, we hereby request exemptive relief from the provisions of Rules 14d-10(a)(2) and (c), and Rule 14d-11 with regard to the Mix and Match Facility and related off-setting pools as described in this Letter. We believe that the relief requested from Rules 14d-10(a)(2) and (c) and Rule 14d-11 is consistent with relief the Commission has afforded to bidders in similar circumstances in the past, including where Tier II Relief was unavailable.<sup>12</sup>

#### V. REQUESTED EXEMPTIVE RELIEF

Based on the foregoing, we respectfully request that the Commission grant Kraft Foods exemptive relief from the provisions of the following rules under the Exchange Act to allow Kraft Foods to conduct the Offer as described in this Letter:

- Rule 14e-5: *To Permit Purchases of Cadbury Ordinary Shares Outside the Offer;*
- Section 14(d)(5) and Rule 14d-7(a)(1): *To Permit the Removal of Withdrawal Rights After Termination of the Initial Offer Period Prior to the Expiration of a Voluntary Extension;*
- Rule 14e-1(c) and Rules 14d-11(c) and (e): *To Permit Prompt Payment of the Offer Consideration in Accordance with United Kingdom Law and Practice;* and
- Rules 14d-10(a)(2) and (c) and Rules 14d-11(b) and (f): *To Permit the Use of a Mix and Match Facility in Accordance with United Kingdom Law and Practice.*

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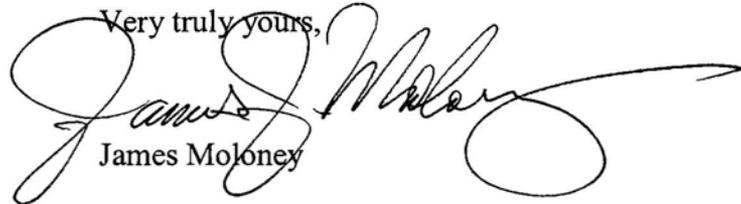
<sup>12</sup> See *Teck Cominco Limited Offer for Inco Limited, (June 21, 2006) (Rule 14d-10(a)(2) and Rule 14d-11 relief granted where transaction did not qualify for Tier II Relief); Smith & Nephew Group plc and Smith & Nephew plc Offer for Centerpulse AG and InCentive Capital AG, (April 24, 2003); SERENA/Merant No-Action Letter, supra; and Barrick Gold Corporation Offer for Placer Dome Inc., (January 19, 2006).*

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We respectfully request that the Commission issue the requested exemptive relief as soon as practicable.

Very truly yours,



James Moloney

JJM/ydc

cc: Marc Firestone  
Carol Ward  
*Kraft Foods Inc.*  
Amy Goodman  
Barbara Becker  
*Gibson, Dunn & Crutcher LLP*

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