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January 9, 2003

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Office of Risk Management and Control
Division of Market Regulation
Attention: James A. Brigagliano

SECURITIES AND EXCHANGE COMMISSION
RECEIVED

JAN 9 2003

DIVISION OF MARKET REGULATION

Re: Request for Exemption from Rule 14e-5

Dear Mr. Brigagliano:

We are writing on behalf of our client, Merck & Co., Inc. ("Merck"), and its subsidiary, Banyu Pharmaceutical Co., Ltd. ("Banyu"), a Japanese joint stock corporation, to follow up on our recent conversations and to request that the Securities and Exchange Commission grant a limited exemption from compliance with the provisions of Rule 14e-5 under the Securities Exchange Act of 1934 for certain purchases required by Japanese law in connection with the proposed tender offer by MSD (JAPAN) Co., Ltd. ("MSD"), an indirect wholly-owned subsidiary of Merck, for the outstanding shares of common stock, no par value, of Banyu.

As previously discussed with members of the staff of the Commission, the offer will be made in cash to all holders of common stock and is expected to be for all of the outstanding shares of Banyu not already held by Merck and its affiliates, with settlement occurring in Japan and the cash purchase price expressed in Japanese yen. The offer will be structured so as to comply with the laws of Japan, the jurisdiction with the primary nexus to Banyu and the greatest interest in the conduct of the offer. See "Background". In addition, except for the limited exemption requested herein, the offer will also comply with the applicable provisions of Regulation 14E under the Exchange Act and the other applicable rules and regulations promulgated under the Exchange Act. The offer will be coordinated by Nomura Securities Co., Ltd. and J.P. Morgan Securities Asia Pte. Limited as tender offer agents.

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Background

Merck

Merck, a company organized under the laws of New Jersey, is a leading global research-driven pharmaceutical company that discovers, develops, manufactures and markets a broad range of human and animal health products, directly and through its joint-ventures, and provides pharmaceutical benefit services through Merck-Medca Managed Care, L.L.C. Merck's shares are listed on the New York Stock Exchange. Merck plans to consummate the acquisition of Banyu's shares by means of the offer through its indirect wholly-owned subsidiary, MSD, a Japanese joint stock corporation.

Banyu

Banyu, a joint stock corporation organized under the laws of Japan, is a pharmaceutical company, engaged in research and development, manufacturing and sales of pharmaceutical products in Japan. All of Banyu's operations are conducted in Japan, all of Banyu's assets and its executive offices are located in Japan, and all of its revenues are derived from its sales activities in Japan. The principal trading market for Banyu's common stock is the Tokyo Stock Exchange ("TSE"). Banyu is a foreign private issuer as defined in Rule 3b-4(b) under the Exchange Act. Banyu has no class of securities registered under Section 12 of the Exchange Act and is *not* and has never been subject to the periodic reporting requirements of the Exchange Act,

The Common Stock and the Statutory Put

Banyu presently has outstanding 263,992,688 shares. Merck and certain of its subsidiaries own beneficially 134,295,000 shares, or approximately 50.87% of the outstanding shares. Based upon Banyu's most recently available shareholder list as of September 30, 2002 and large shareholder filings in Japan, there are no holders of five percent or more of Banyu's common stock other than Merck and its affiliates.

The Japanese Commercial Code provides for a unit share system under which a certain number of shares of a joint stock corporation as specified in its Articles of Incorporation constitute a unit. Banyu's Articles of Incorporation provide that 100 shares constitute a unit. The Commercial Code imposes significant restrictions and limitations on holdings of common stock that do not represent one unit or integral multiples of a unit. For example, under the Commercial Code, companies may choose not to issue certificates for shares representing less than one unit by providing so in their Articles of Incorporation, in which case certificates for shares representing less than one unit may only be issued in certain limited circumstances. Because the transfer of shares requires delivery of share

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certificates, fractions of a unit for which no certificates have been issued are not transferable. In addition, a holder of shares representing less than one unit cannot exercise **any** voting rights with respect to such shares.

Due to such limitations and restrictions, the Commercial Code grants a holder of shares representing less than a unit a right to require the company to purchase such shares. Pursuant to such provision of law, Banyu is required to purchase, at any time, at the **request** of a holder, such holder's common stock representing less than a unit (the "Statutory Put"). Banyu must make such purchases at a price equal to the closing price of the shares on **the** TSE on the day when such request is served on Banyu's transfer agent.

With respect to the number of shares held as less than a unit, the shareholder list indicates that, as of September 30, 2002, there were 273,588 such odd-lot shares, representing only 0.1% of Banyu's outstanding shares.

Offer

The Japanese laws and regulations governing tender offers are set forth in the Securities and Exchange Law of Japan ("SEL"), as amended, the Securities and Exchange Law Enforcement Order, various Ministerial Ordinances issued by the Ministry of Finance of Japan, the Commercial Code of Japan relating to joint stock corporations and certain related legislation, and the Business Regulations of the TSE.

At a meeting of the Board of Directors of MSD to be held early in January 2003, the Board of Directors is expected to consider taking appropriate action to conduct the offer for all of the outstanding publicly held shares of the common stock of Banyu not held by Merck or its affiliates in accordance with the SEL. The cash purchase price will be expressed in yen with settlement in Japan.

It is presently contemplated that the offer will commence early in January 2003. Merck and its affiliates will not tender their shares in response to the offer.

In Japan, holders of common stock may tender shares pursuant to the offer by submitting to the tender offer agent a completed tender offer application form accompanied by share certificates representing the number of shares to be tendered pursuant to the offer. In order to participate in the offer, holders of common stock outside of Japan will have to notify their respective standing agents in Japan. Such standing agents will submit completed tender offer application forms and share certificates to the tender offer agent on behalf of such foreign holders who wish to tender into the offer.

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Request for Exemption Under Rule 14e-5

Rule 14e-5

Pursuant to Rule 14e-5 under the Exchange Act, as an affiliate of MSD, Banyu may not purchase any shares outside of the offer while the offer remains open. As noted above, the Japanese Commercial Code mandates the Statutory Put for all holders of shares constituting less than a unit. The Statutory Put enables a holder of less than a unit to require Banyu to purchase such shares at any time, including during the offer. As discussed above under "The Cominon Stock and the Statutory Put," the aggregate number of shares held in such odd-lots is only 0.1% of the number of shares outstanding.

Basis for Exemption

It is our view that a limited exemption from the application of Rule 14e-5 with respect to purchases by Banyu pursuant to the Statutory Put is consistent with policy statements of the Commission in connection with the adoption of Rule 14e-5 in January 2000. We note also that in the past the staff of the Commission has granted substantially similar requests for exemptive relief for the Statutory Put under Rule 10b-13 prior to the adoption of Rule 14e-5.¹

Rule 14e-5 is designed to protect the investors 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."² The Commission has recognized that a strict application of Rule 14e-5 could disadvantage U.S. security holders in some situations. In this context, the Commission has noted that "flexible application of Rule 14e-5 is necessary and appropriate to encourage offerors for the securities of foreign private issuers to extend their offers to U.S. security holders."³ In addition, we note that, in adopting Rule 14e-5, the Commission excepted other purchases by a covered person which, **like** the Statutory Put, are made pursuant to an obligation that

¹ See, Letter of the Staff Regarding Tender Offer for Shares of Japanese Issuer (available November 15, 1999) and Letter of the Staff Regarding Amway Japan Limited Issuer Tender Offer (available July 15, 1996).

² Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings, Release No. 34-42054, International Series Release No. 1208 (October 26, 1999), Section II.C.1.

³ Id.

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existed prior to the public announcement of a tender offer without any exercise of discretion during the offer period on the **part** of the covered person.⁴

Requested Exemption

As a result of the statutory requirements of Japan's Commercial Code and the immaterial number of shares held by odd-lot holders, Merck requests, on behalf of Banyu, that the Commission grant a limited exemption from Rule 14e-5 under the Exchange Act to enable Banyu to comply with the Commercial Code in the event that one or more odd-lot holders exercise the Statutory Put prior to the expiration of the offer. In the event that this exemption is granted, MSD intends to include appropriate disclosure in the Japanese offering materials regarding the possibility of the exercise by odd-lot holders of the Statutory Put during the offer.

In accordance with Rule 0-12 of the Exchange Act, five copies of this letter have been submitted to the Commission.

Very truly yours



Alan M. Klein

cc: George Shiebler, Esq.
Ken Fujinawa, Esq.
David Sneider
Alan Cannon

⁴ Rule 14e-5(b)(7) provides an exception for purchases pursuant to a contract entered into before public announcement of the tender offer if the contract is unconditional and binding on both parties and certain other conditions are met.