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April 8, 2024

Ms. Tiffany Posil  
Chief, Office of Mergers and Acquisitions

Ms. Christina Chalk  
Associate Chief, Office of Mergers and Acquisitions

Ms. Laura McKenzie  
Special Counsel, Office of Mergers and Acquisitions

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

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

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

On February 5, 2024 (the “Commencement Date”), the Bidder announced its decision to commence a voluntary public takeover offer (*freiwilliges öffentliches Übernahmeangebot*) for an all cash consideration (the “Offer”) for all of the issued no-par value bearer shares (*auf den Inhaber lautende Stückaktien*), each representing a participation in the registered share capital of MorphoSys AG, a publicly listed stock corporation (*Aktiengesellschaft*) incorporated under the laws of Germany (“MorphoSys”), with a notional amount (*rechnerischer Anteil*) of EUR 1.00 (the “Shares”). The Offer will be made in accordance with a business combination agreement (the “BCA”), dated February 5, 2024, between the Bidder Entities and MorphoSys.



We respectfully request on behalf of the Bidders that the Staff grant exemptive relief from<sup>1</sup>:

- a) Section 14(d)(5) of and Rule 14d-7 under the Exchange Act, to permit the Bidders to suspend and terminate withdrawal rights in respect of securities tendered in the Offer at the expiration of the Acceptance Period (as defined below) and during (i) the Initial Tabulation Period (as defined below) and (ii) the corresponding Initial Settlement Period (as defined below);
- b) Rule 14e-1(c) under the Exchange Act, to permit the Bidders to pay for securities tendered during the Acceptance Period after the Initial Tabulation Period and publication of the Offer results in accordance with German law and practice;
- c) Rule 14d-11(c) and (e) under the Exchange Act, to permit, in accordance with German law and practice, the Additional Acceptance Period (as defined below) to proceed notwithstanding the relief granted under Rule 14e-1(c) above, and to follow the same tabulation period and settlement period cycle as described in paragraph (a) above (referred to in this Letter as the “Subsequent Tabulation Period” and the “Subsequent Settlement Period”);
- d) Rule 14d-11(d) under the Exchange Act, to permit, in accordance with German law and practice, the commencement of the Additional Acceptance Period after the Initial Tabulation Period following the Acceptance Period;
- e) Rules 14e-1(b) and 14d-4(d)(2)(ii) under the Exchange Act, to permit compliance with German law and practice regarding extensions of the Acceptance Period in the event of an amendment to the terms of the Offer;
- f) Rule 14e-1(d) under the Exchange Act, to permit the Bidder to announce any extensions of the Offer in accordance with the timing and notice requirements of German law and practice; and
- g) Rules 14e-5 and 14e-1(b) under the Exchange Act, to permit the Prospective Purchasers (as defined below), to purchase Shares outside of the Offer in accordance with applicable German securities laws and to allow for any resulting increase in the Offer Price (as defined below) (if relevant) without a ten (10) business day extension of the Acceptance Period.

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

## Background

### MorphoSys

MorphoSys is a stock corporation (*Aktiengesellschaft*) incorporated under the laws of Germany, with its registered office in Planegg, Germany, and registered with the commercial register (*Handelregister*) of the local court (*Amtsgericht*) of Munich under company number HRB 121023.

MorphoSys is a commercial-stage biopharmaceutical company devoted to the development and commercialization of innovative therapies for patients, with a focus on cancer. MorphoSys has a broad pipeline in which it invests in and develops product candidates, primarily in the hematology and oncology area.

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<sup>1</sup> We believe that the relief requested in this Letter is consistent with the relief granted by the Commission in similar transactions. See *Tender Offer by Thermo Fisher Scientific Inc. for QIAGEN N.V.*, SEC No-Action Letter, (May 15, 2020); *AIXTRON SE*, SEC No-Action Letter, File No. 5-84994 (August 17, 2016) and *Bayer AG*, SEC No-Action Letter, File No. 5-59757 (April 28, 2006). See also *Corporation Services Company Tender Offer for Intertrust N.V. Request for Relief under Exchange Act Rules 14e-1(c), 14e-1(d) and 14e-5*, SEC No-Action Letter (March 25, 2022); *Tender Offer by China National Chemical Corporation and CNAC Saturn (NL) B.V. for all Publicly-held Shares and ADSs of Syngenta AG*, SEC No-Action Letter (March 21, 2016); *Oak Leaf B.V., Acorn B.V. and Acorn Holdings B.V. Offer for all Ordinary Shares of D.E. Master Blenders 1753 N.V.*, SEC No-Action Letter (May 21, 2013) (“Oak Leaf”); *Cash Tender Offer by International Business Machines Corporation for Ordinary Shares and ADSs of ILOG S.A.*, SEC No-Action Letter (October 9, 2008); *Axel Springer AG Offer for ProSiebenSat. 1 Media AG*, SEC No-Action Letter (September 12, 2005) (“Axel Springer”); *Offer by BCP Crystal Acquisition GmbH & Co., et al. for Celanese AG*, SEC No-Action Letter, File No. 5-57467 (February 3, 2004); *The Royal Bank of Scotland Group Plc Offer for Shares and ADSs of National Westminster Bank Plc*, SEC No-Action Letter, File No. 5-55229 (December 30, 1999) and *Vodafone Airtouch Plc Offer for Mannesmann Aktiengesellschaft*, SEC No-Action Letter, File No. TP 00-29 (December 22, 1999). We also believe that the relief requested in this Letter is consistent with the Commission’s guidance set forth in the Commission’s releases. See *Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions*, Release Nos. 33-8957, 34-58597 (September 19, 2008) (the “2008 Cross-Border Release”) and *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Exchange Act Release Nos. 33-7759, 34-42054, 39-2378, International Series Release No. 1208 (October 22, 1999) (the “1999 Cross-Border Release” and, together with the 2008 Cross-Border Release, the “Cross-Border Releases”).



MorphoSys was founded in 1992 in Martinsried, Germany, and was, with effect from June 30, 1998, converted to a stock corporation under the laws of Germany with an indefinite duration. In 1999, MorphoSys was listed on the Frankfurt Stock Exchange (the “FSE”). In 2014, MorphoSys joined the TecDAX index, and since September 2021, MorphoSys is part of the SDAX Index. In April 2018, following a U.S. initial public offering, MorphoSys’ American Depositary Shares (“ADSs”) began trading on the Global Select Market of NASDAQ Stock Market LLC (“Nasdaq”).

Based on information contained in MorphoSys’ Annual Report on Form 20-F for the fiscal year ended December 31, 2023, filed with the Commission on March 13, 2024 (the “MorphoSys Form 20-F”), during the fiscal year ended December 31, 2023, MorphoSys generated total revenues of approximately €238.3 million and as of December 31, 2023, MorphoSys had 524 employees.

## The Shares and ADSs

The principal trading market<sup>2</sup> for the Shares is the FSE, where the Shares trade under the symbol “MOR.” In addition, MorphoSys’ Shares and ADSs are registered under Section 12(b) of the Exchange Act. The ADSs issued under MorphoSys’ sponsored American Depositary Receipt program (the “ADR Facility”) established pursuant to a deposit agreement (the “Depositary Agreement”) with the Bank of New York Mellon (“BNY Mellon”), each evidencing one quarter (1/4) of a Share, are listed on Nasdaq and trade under the symbol “MOR.” MorphoSys is subject to the listed company rules of Nasdaq and the informational reporting requirements of the Exchange Act, in each case that are applicable to foreign private issuers (as defined in Rule 3b-4(c) promulgated under the Exchange Act).

Based on information published by MorphoSys pursuant to Section 41 of the German Securities Trading Act (*Wertpapierhandelsgesetz*), as of February 29, 2024, there were 37,674,555 Shares issued and outstanding.

## The Bidder Entities

The Bidder Entities consist of the following entities:

- Novartis BidCo AG – a stock corporation (*Aktiengesellschaft*) incorporated under the laws of Switzerland, with its registered office in Basel, Switzerland and registered with the commercial register office (*Handelregisteramt*) of the Canton of Basel City.
- Novartis AG – a stock corporation (*Aktiengesellschaft*) incorporated under the laws of Switzerland that directly owns all of the shares of Novartis BidCo AG, with its registered office in Basel, Switzerland and registered with the commercial register office (*Handelregisteramt*) of the Canton of Basel City.

Novartis is an innovative medicines company. Its purpose is to reimagine medicine to improve and extend people’s lives. Novartis focuses on high-value, innovative medicines that alleviate society’s greatest disease burdens through technology leadership in research and development and novel access approaches in four core therapeutic areas: cardiovascular, renal and metabolic; immunology; neuroscience; and oncology.

Novartis AG was incorporated on February 29, 1996, under the laws of Switzerland as a stock corporation with an indefinite duration. On December 20, 1996, its predecessor companies, Ciba-Geigy AG and Sandoz AG, merged into a new entity, creating Novartis. Its ordinary shares are listed in Switzerland on the SIX Swiss Exchange under the symbol “NOVN” and its ADSs, each representing one (1) ordinary share, are traded on the New York Stock Exchange under the symbol “NVS.”

As disclosed in its Annual Report on Form 20-F for the fiscal year ended December 31, 2023, filed with the Commission on January 31, 2024, Novartis achieved net sales from continuing operations of \$45.4 billion, and net income from continuing operations amounted to \$8.6 billion in 2023. As of December 31, 2023, Novartis employed 76,057 full-time equivalent employees. Its products are sold in approximately 130 countries around the world.

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<sup>2</sup> For the twelve-(12) month period ended December 31, 2023, the average daily trading volume in the United States in the Shares (including Shares represented by ADSs) as calculated in accordance with Instruction 3 to paragraphs (c) and (d) of Rule 14d-1(c) was 11.7% of the average daily trading volume of the Shares on a worldwide basis.



## Governing Law

As discussed above, MorphoSys is incorporated in Germany and its Shares are listed on the FSE and its ADSs are listed on Nasdaq. As such, MorphoSys' "home jurisdiction" under Section 14(d) of the Exchange Act, and the rules and regulations promulgated thereunder, is Germany as its jurisdiction of incorporation and principal foreign market where its securities are listed. As the Shares are listed on the FSE, the Offer is subject to the terms and conditions of the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) (the "German Takeover Act").

## Tier I / Tier II Analysis

The Bidder Entities have considered whether or not the Offer qualifies for the Tier I or Tier II exemptions codified in Regulation 14D promulgated under the Exchange Act. Although MorphoSys is a foreign private issuer with its foreign home jurisdiction Germany, based on the information and inquiries regarding U.S. ownership of Shares summarized below, the Bidder Entities believe that the Offer does not qualify for the Tier I or Tier II exemptions.

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

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

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

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

Given the results of the Analysis referred to above indicating that U.S. ownership exceeds 40%, in accordance with paragraph (iii) of Instruction 3, the Bidder Entities have determined that the Offer does not meet the conditions in paragraph (d)(1) of Rule 14d-1 and as a result, the exemptive relief provided by paragraph (d)(2) of Rule 14d-1 is not available.

In addition and for completeness, in respect of the ADSs, Nasdaq obtained from the Bank of New York Mellon a security position reports ("SPR") list of all DTC participants holding MorphoSys ADSs as of February 16, 2024. ADSs were held in custody by 93 custodians for a total of 19,906,300 ADSs (representing 4,976,575 Shares). Nasdaq contacted the domestic and global custodians listed on the SPR to obtain domicile information on the account holders holding MorphoSys ADSs, and received information in the aggregate, by account country-of-domicile, as well as individually on an account-by-account basis, listing the account name and address. Overall, of the 6,826,136 ADSs (representing 1,706,534 Shares) for which Nasdaq received data directly from bank and

broker custodians, 4,289,672 ADSs (representing 1,072,418 Shares) were held by U.S. residents and 2,536,464 ADSs (representing 634,116 Shares) were held by non-U.S. residents. Applying the methodology used in respect of the Shares, the Nasdaq estimated that 15,371,526 ADSs, or 77.2%, of the issued ADSs (representing 3,842,881 Shares, or 10.2% of the issued Shares) were held by U.S. residents.

The Bidder Entities do not currently own any Shares or Shares represented by ADSs.

Accordingly, the Bidder Entities estimate that the percentage of outstanding Shares, including Shares held in the form of ADSs, held by U.S. residents is 52.0%.

While we recognize that this percentage exceeds the Tier II threshold, the Commission has stated that, when U.S. ownership is greater than 40%, it will consider exemptive and no-action relief on a case-by-case basis when there is a direct conflict between U.S. laws and practice and those of the home jurisdiction.

## **The Offer**

### Structure

The Offer will be made to the holders of all issued and outstanding Shares (including Shares held in the form of ADSs) at a cash price of EUR 68.00 per Share (the “Offer Price”) in accordance with the BCA. BNY Mellon, acting as ADS tender agent (the “ADS Tender Agent”), will convert the Offer Price received for the Shares that represent ADSs tendered in the Offer into U.S. Dollars by sale or in any other manner it may determine and will pay holders of ADSs in U.S. Dollars. All holders of Shares, including U.S. holders of Shares, tendered in the Offer will be paid the Offer Price in Euros. The Offer has been structured as a single offer made concurrently in Germany and the United States and, to comply with both (i) the German Takeover Act and the rules and regulations promulgated thereunder and (ii) except to the extent permitted pursuant to the relief requested herein, Sections 14(d) and 14(e) of the Exchange Act and the rules and regulations promulgated thereunder. Given these different regulatory schemes, the Bidder Entities intend to conduct the Offer in a manner that ensures equality of opportunity for, and treatment of, all holders of Shares.

### Commencement

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

The Offer will be commenced in Germany by publication of the German Offer Materials on the Internet on or around April 11, 2024 and an announcement that the German Offer Materials can be picked up free of charge at a specified location and will be mailed to investors free of charge upon request. The Offer will be commenced in the United States by publication of a summary advertisement in *The New York Times* (U.S. Edition) on or around April 11, 2024, including a statement that the Bidder will mail the U.S. Offer Materials to holders of the Shares and ADSs upon request, in accordance with Rule 14d-4(a)(2) under the Exchange Act. In addition, the Bidder will mail the U.S. Offer Materials to all holders of ADSs and all holders of Shares on record with addresses located in the United States.

The Offer will initially remain open for a period of approximately four (4) weeks (and not less than twenty (20) business days) following the date on which the Offer commences (such period, as it may be extended, the “Acceptance Period”). The expiration of the Acceptance Period is referred to as the “Initial Expiration Time” in this Letter. The Bidder Entities also have the option to extend (and MorphoSys may request the Bidder Entities to extend) the Acceptance Period by two (2) weeks in accordance with the German Takeover Act by changing the terms of the Offer within two (2) weeks prior to the expiration of the original Acceptance Period. If certain conditions are met, the Acceptance Period will be followed by a two (2) week subsequent offering period (the “Additional Acceptance Period”).





## Conditions to the Offer

The settlement of the Offer is subject to satisfaction or waiver of the following conditions, which will be described in the Offer Materials:

1. Minimum Acceptance. The total sum of Shares (including Shares represented by ADSs) (i) for which the acceptance of the Offer has been effectively declared during the Acceptance Period and for which no withdrawal of the agreement entered into as a result of the acceptance of the Offer has been effectively declared (“Tendered Shares”), (ii) for which the acceptance of the Offer has been declared during the Acceptance Period but only becomes effective after the end of the Acceptance Period by re-booking as Tendered Shares, (iii) held by the Bidder Entities or persons acting jointly with the Bidder pursuant to Section 2 para. 5 of the German Takeover Act, (iv) attributed to the Bidder or a person acting jointly with the Bidder pursuant to Sec. 2 para. 5 WpÜG under Section 30 of the German Takeover Act, and/or (v) for which the Bidder or persons acting jointly with the Bidder within the meaning of Sec. 2 para. 5 WpÜG have concluded an unconditional or conditional agreement outside of the Offer which entitles them to demand the transfer of title to these Shares within the meaning of Sec. 31 para. 6 WpÜG; equals at least 65% of MorphoSys’ issued Shares (excluding Shares held in treasury), issued as of the expiration of the Acceptance Period (the “Minimum Acceptance Condition”).
2. No Insolvency Proceedings. MorphoSys has not published an ad hoc announcement stating that (i) insolvency proceedings against all or substantially all of MorphoSys’ assets have been filed by it or opened by the competent court in Munich, Germany, or (ii) a reason has arisen that would, if not timely cured, require the filing of an application for the institution of an insolvency proceeding under applicable law.
3. No Prohibition or Illegality of the Offer. No law, administrative act, injunction, temporary restraining order, preliminary or permanent injunction, or other order issued by any governmental authority of competent jurisdiction in the United States, Germany or any other jurisdiction where either Novartis and its affiliates or MorphoSys and its subsidiaries operate their respective businesses or own any material assets prohibits or makes illegal the conduct or consummation of the Offer in accordance with its terms or the acquisition of ownership of Shares by the Bidder (including, for the avoidance of doubt, if the relief requested hereby has not been obtained).
4. No Material Compliance Violation. No criminal offense or material administrative offense (*Ordnungswidrigkeit*) relating to applicable corruption, embezzlement, anti-bribery, money-laundering or cartel laws or Healthcare Laws (as defined in the BCA) relating to data integrity by MorphoSys or its subsidiaries or a member of a governing body or officer of MorphoSys or its subsidiaries, while any such person was operating in their official capacity at or on behalf of such entity, shall have occurred, provided that any such offense constitutes or would constitute inside information for MorphoSys pursuant to Article 7 of the EU Market Abuse Regulation or has constituted inside information prior to its publication. The determination of whether a material compliance violation as described in the preceding sentence has occurred will be made by an independent expert as provided in the BCA.

If, as at the expiry of the Acceptance Period, all of the conditions to the Offer have been satisfied or waived, the Offer will proceed and the Bidder will be contractually bound to purchase the Tendered Shares.

## Tender Mechanics for Shares

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

## Tender Mechanics for Shares represented by ADSs

The Bidder has appointed BNY Mellon to act as ADS Tender Agent to receive tenders of Shares represented by ADSs pursuant to the Offer. BNY Mellon is also the depositary bank that administers MorphoSys’ ADS facility. In this regard the ADS Tender Agent will, among other things: (i) designate a book-entry account at DTC for the purpose of acceptances of the Offer in respect of Shares represented by ADSs tendered by book-entry delivery;



(ii) instruct its German custodian to effect book-entry transfers of the underlying Shares under a separate designated securities identification number for Tendered Shares within the Clearstream System; (iii) examine the documents required to be delivered to effect a valid acceptance of the Offer; (iv) answer procedural questions from holders of ADSs with respect to the Offer; (v) upon the request of the Bidder, from time to time, report the number of ADSs for which valid acceptances have been received and not withdrawn and the number of ADSs which have been so withdrawn; and (vi) perform any other related record-keeping tasks associated with the acceptances of the Offer by holders of ADSs. Holders of ADSs are required to deliver the appropriate documentation, which is specified in the U.S. Offer Materials, to the ADS Tender Agent in order to validly accept the Offer, and any irregularities in acceptances of the Offer by holders of ADSs may only be waived with the consent of the Bidder. Holders of ADSs will not be required to pay any fees to BNY Mellon in its capacity as ADS Tender Agent in connection with the tender of Shares represented by ADSs. The Bidder Entities will pay the fee associated with the cancellation of the ADSs representing Tendered Shares (\$0.05 per ADS) as provided in the Depositary Agreement to Bank of New York Mellon in its capacity as Depositary.

## Post-Offer Legal Integration Measures

The BCA includes arrangements that are intended to enable the Bidder Entities to take, with the support of the management of MorphoSys, certain measures to consolidate their control over MorphoSys following successful completion of the Offer. The BCA provides that MorphoSys shall, upon the reasonable request by the Bidder, take preparatory measures to facilitate (a) a squeeze-out pursuant to the German Stock Corporation Act (*Aktiengesetz*) or the German Takeover Act, potentially in conjunction with the German Transformation Act (*Umwandlungsgesetz*), (b) the conclusion of an enterprise agreement within the meaning of Section 291 of the German Stock Corporation Act (in particular, a domination and/or profit and loss transfer agreement (*Beherrschungs- und Ergebnisabführungsvertrag*) (“DPLTA”) between MorphoSys and the Bidder, which would permit the Bidder to issue binding instructions to the management board (*Vorstand*) of MorphoSys, subject to granting any remaining minority shareholders an election either (1) to continue to hold their Shares and receive an adequate fixed or variable annual compensation payment, or (2) to receive adequate cash compensation in exchange for their Shares, (c) a legal transformation under the German Transformation Act and/or Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), and/or (d) any other restructuring or reorganization of MorphoSys and its subsidiaries, in each case, proposed by the Bidder, provided that the closing conditions have been satisfied or, where permitted, waived.

In addition, immediately following completion of the Offer, the Bidder will be obligated to take all necessary steps to achieve, as soon as is reasonably possible, a delisting of the Shares from all regulated markets in the European Economic Area, and MorphoSys will be obligated to take all necessary steps under applicable laws, regulation and stock exchange rules to enable a delisting of the Shares and the ADSs from Nasdaq, as well as the deregistration of the Shares under the Exchange Act. A delisting from the FSE will require the Bidder to pursue a delisting procedure in accordance with Section 39 of the German Stock Exchange Act (*Börsengesetz*), in which case a delisting purchase offer would have to be made by the Bidder to the remaining MorphoSys shareholders to acquire their Shares against payment of an appropriate cash compensation.<sup>3</sup>

These post-Offer legal integration measures will be fully described in the Offer Materials (as defined below).

## Withdrawal Rights

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

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<sup>3</sup> We expect that any such delisting purchase offer or cash compensation offer pursuant to a DPLTA will constitute a tender offer subject to then-relevant provisions of the Exchange Act and the rules and regulations promulgated thereunder. As a delisting purchase offer or cash compensation offer will also be subject to German law, we may request further no action and exemptive relief (the scope of which will be dependent on the availability of the Tier I and Tier II exemptions at the time of any such offer and timing of the planned Nasdaq delisting and eligibility for deregistration pursuant to Rules 12g-4, 12h-3, or 12h-6 as applicable) from the then-relevant provisions of the U.S. federal securities laws which conflict with German law and market practice.



## Extension of the Offer

Under Section 21 (5) of the German Takeover Act, a change to the terms of the Offer (e.g., an increase in the Offer Price, offer of additional consideration, reduction of the Minimum Acceptance Condition, and waiver of conditions to the Offer) occurring during the last two (2) weeks of the Acceptance Period would require that the Acceptance Period remain open for an additional period of two (2) calendar weeks from the expiration of the Acceptance Period. If a change to the terms of the Offer occurs, and the Acceptance Period is extended, commencement of the Additional Acceptance Period will be delayed accordingly.

## Additional Acceptance Period

Section 16 (2) of the German Takeover Act provides that, if the conditions to the Offer are satisfied or waived prior to the expiration of the Acceptance Period, holders of Shares who have not accepted the Offer within the Acceptance Period may still accept the Offer at the Offer Price within a two (2) week Additional Acceptance Period. The Additional Acceptance Period begins only after the Bidder publishes the number of Shares tendered during the Acceptance Period indicating that the Minimum Acceptance Condition has been satisfied. Under German market practice, shares which are tendered in an Additional Acceptance Period as provided under the German Takeover Act are never settled and paid for on a rolling basis as they are tendered. Instead, payment for shares tendered during an Additional Acceptance Period is made on a single settlement date after expiration of the Additional Settlement Period. For more information, see “– Settlement” below.

Section 23 (1) of the German Takeover Act requires the announcement of the official results of an offer following the expiration of the Acceptance Period, and, with respect to the Minimum Acceptance Condition, the determination of such final results dictates whether the offer is successful or not. Under German practice, this determination cannot be made until after the Initial Tabulation Period (as defined below) following the expiration of the Acceptance Period. Therefore, the Additional Acceptance Period typically does not begin until the fifth (5<sup>th</sup>) or sixth (6<sup>th</sup>) day on which banks in Frankfurt am Main, Germany, are open for general business (each, a “Banking Day”) following the Initial Expiration Time. The expiration of the Additional Acceptance Period is referred to as the “Subsequent Expiration Time” in this Letter.

## Settlement

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

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<sup>4</sup> For the avoidance of doubt, there will be two settlement dates: one for Shares tendered during the Acceptance Period and one for Shares tendered during the Additional Acceptance Period.





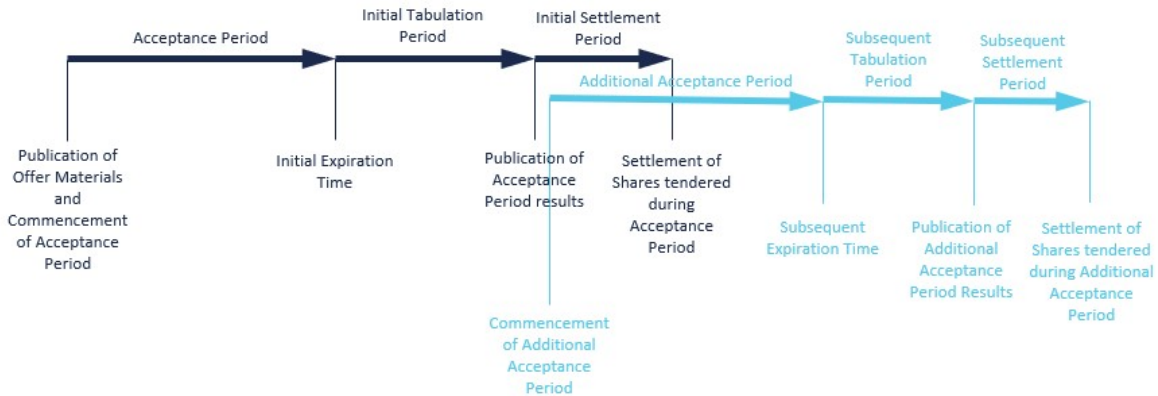
of Shares tendered during the Acceptance Period is referred to as the “Initial Settlement Period,” and the period from the end of the Subsequent Tabulation Period until settlement of Shares tendered during the Additional Acceptance Period is referred to as the “Subsequent Settlement Period” in this Letter. In accordance with German law and practice, the length of (i) the Initial Tabulation Period and the Subsequent Tabulation period and (ii) the Initial Settlement Period and the Subsequent Settlement Period are expected to be the same number of Banking Days, respectively.

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

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

### Illustrative Timeline

The graphic below provides an illustrative Offer timeline setting out the various periods and milestones discussed in this Letter.



### **Rationale for Relief Requested**

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

The Commission has recognized that strict application of its rules could disadvantage U.S. securities holders in some situations. As described above, a condition to the settlement of the Offer is that the Bidder is able to obtain the Minimum Acceptance Condition. As explained in more detail below, the Offer will be regulated by applicable German law and practice. However, all conditions for the exemptions provided in Rule 14d-1(d)(2) will be met except that the Offer does not meet the condition in Rule 14d-1(d)(1)(ii) as described in “The Offer – Tier I / Tier II Analysis.”

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

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



We understand that the Staff has taken the position that a tender offer must become unconditional not later than its expiration date and that all conditions to the offer must be satisfied (or waived), and the offer must be declared wholly unconditional before a bidder can terminate the withdrawal rights of tendering security holders. We also understand the Staff's position that an offer that remains subject to a post-expiration condition (including for these purposes the Minimum Acceptance Condition whose satisfaction as at the Acceptance Date is not determined until after the Initial Tabulation Period) might be deemed to "remain open" and, therefore, that security holders could be entitled to withdrawal rights under Section 14(d)(5) of the Exchange Act. *See, e.g., Compliance and Disclosure Interpretations, Cross-Border Exemptions, Question 105.01* (October 17, 2018).

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

Permitting withdrawals during a tabulation period would be inconsistent with German law and practice and could frustrate the success of the Offer. Because the Bidder will use the Initial Tabulation Period to determine the number of Shares tendered, permitting withdrawals during this period would conflict with the tabulation procedures envisaged under this transaction, permitted under German law and customary under German market practice. If withdrawals from the Offer during the tabulation process were permitted, they could frustrate the success of the Offer by adversely affecting the ability of the Bidder Entities to purchase pursuant to the Offer the number of Shares contemplated by the Minimum Acceptance Condition. Rule 14d-1(d)(2)(vii) under the Exchange Act provides that a bidder may suspend withdrawal rights at the end of the offer and during the period that securities tendered into the offer are being counted provided certain other conditions are met. All other conditions for the exemption provided in Rule 14d-1(d)(2)(vii) will be met except that the transaction does not qualify for the Tier II Exemptions. The Commission has granted relief under Rule 14d-1(d)(2)(vii) in other situations where the transaction did not qualify for the Tier II Exemption.<sup>6</sup>

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

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

### Request for Relief from Rule 14e-1(c) and Rules 14d-11(c) and (e)

Rule 14e-1(c) promulgated under the Exchange Act prohibits a person making a tender offer from failing to pay the consideration offered or to return the securities deposited by or on behalf of security holders promptly after the termination or withdrawal of such offer. Rule 14d-11 provides that a bidder in a tender offer may elect to provide a subsequent offering period if, among other things, the bidder immediately accepts and promptly pays

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<sup>5</sup> Under German law, a bidder does not "accept" tendered shares for payment as they are tendered in a takeover offer. Rather, upon the satisfaction (or waiver) of the conditions described under the heading "The Offer – Conditions of the Offer" above, the tender of Shares pursuant to the Offer creates a contract of purchase and sale which is binding on the Bidder upon the expiry of the Acceptance Period or the Additional Acceptance Period, as applicable.

<sup>6</sup> *See Offer by Vimpelcom Ltd., Altimo Holdings & Investments Ltd. and Telenor ASA for all outstanding common shares, preferred shares and American Depositary Shares Vimpel-Communications* (February 5, 2010) ("Vimpelcom"); *Offer by Kraft Foods Inc. Offer for all outstanding ordinary shares and ADSs of Cadbury plc* (December 9, 2009) ("Kraft Foods").

for all securities tendered during the initial offering period and the bidder immediately accepts and promptly pays for all securities as they are tendered during the subsequent offering period.

The Tier II Exemptions provide an exemption from the requirements of Rule 14e-1(c) and Rules 14d-11(c) and (e) where payment is made in accordance with the requirements of the home jurisdiction law or practice. However, as discussed above, based on available information concerning the U.S. holders of the shares, the Tier II Exemptions are not available for the Offer.

Prior to the adoption of the Tier II Exemptions, the Staff confirmed in a number of no-action letters that payment for, or return of, tendered securities in accordance with local law and customary local tender offer practice would satisfy the requirements of Rule 14e-1(c).<sup>7</sup>

Subsequent to the adoption of the Tier II Exemptions, the Staff has also provided relief from the requirements of Rule 14e-1(c) and Rules 14d-11(c) and (e) in respect of a number of transactions that did not satisfy the requirements of the Tier II Exemptions.<sup>8</sup>

As discussed above, in the Offer, payment would be made in accordance with German law and customary German market practice. Under the German Takeover Act, the determination and announcement of the final official results of the Offer in respect of Shares tendered during the Acceptance Period and Additional Acceptance Period, respectively, as described in “The Offer – Settlement” above, generally does not occur until the fourth (4<sup>th</sup>) or fifth (5<sup>th</sup>) Banking Day following the relevant Expiration Time, following which payment will occur, to the extent the conditions to the Offer have been satisfied or waived, in line with customary German settlement practices. German settlement practices normally provide for payment for Shares tendered during both the Acceptance Period and the Additional Acceptance Period to occur in a “timely” manner on a single settlement date following expiration of the Additional Acceptance Period (and customarily within ten (10) Banking Days of expiration of the Additional Acceptance Period). In order to facilitate more timely payment for the Shares, the Bidder Entities have arranged for two settlement dates in connection with the Offer: one within seven (7) Banking Days following expiration of the Acceptance Period and one within seven (7) Banking Days following expiration of the Additional Acceptance Period. As discussed above, to the extent that conditions to the Offer fail or the Offer is otherwise terminated, the Bidder will promptly return all Tendered Shares (including Shares represented by ADSs) by re-booked Tendered Shares under their original ISIN and the ADS Tender Agent will promptly return tendered ADSs.

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

Accordingly, the Bidder respectfully requests exemptive relief from the provisions of Rule 14e-1(c) and Rules 14d-11(c) and 14d-11(e) to permit the Bidder to accept and pay for Tendered Shares following expiration of the relevant Expiration Time in accordance with German law and customary German market practice in the manner described in this Letter.

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

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

<sup>8</sup> In *QIAGEN, AIXTRON and Bayer I*, the Staff granted relief under Rule 14e-1(c) and Rule 14d-11(d) and (e) to permit the offeror in each case to pay for shares tendered during the acceptance period or additional acceptance period, as applicable, no later than seven (7) Banking Days, in the case of QIAGEN, four (4) to twelve (12) Banking Days, in the case of AIXTRON, and four (4) to eight (8) Banking Days, in the case of Bayer I, after the expiration of such period. See also *Oak Leaf; Vimpelcom; Offer by Harmony Gold Mining Company Limited for all outstanding ordinary shares of Gold Fields Limited* (November 19, 2004) and *Offer by Alcan, Inc. for outstanding common shares, ADSs, Bonus Allocation Rights and OCEANes of Pechiney* (October 7, 2003).



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

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

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

#### Request for Relief from Rule 14d-11(d)

Rule 14d-11(d) promulgated under the Exchange Act provides that an offeror may provide a subsequent offering period if, among other things, the offeror "announces the results of the tender offer, including the approximate number and percentage of securities deposited to date, no later than 9:00 a.m. Eastern time on the next U.S. business day after the expiration date of the initial offering period, and immediately begins the subsequent offering period." Pursuant to U.S. practice, an approximate, rather than a final, number is announced, which number includes the shares subject to guaranteed delivery procedures.

As described in this Letter, however, the applicable German requirement relating to the commencement of the Additional Acceptance Period requires the publication of exact and final results. For this reason, German practice requires a tabulation period as described in this Letter. The Additional Acceptance Period would then commence on the Banking Day following the end of the Initial Tabulation and publication of the Offer results (i.e., the fifth (5<sup>th</sup>) or sixth (6<sup>th</sup>) Banking Day following expiration of the Acceptance Period).

We therefore request exemptive relief from Rule 14d-11(d) to permit, in accordance with German law and practice, the commencement of the Additional Acceptance Period as soon as practicable, but in any event on the Banking Day following the publication of the final results of the Offer after the Initial Tabulation Period (expected to be no later than the fifth (5<sup>th</sup>) or sixth (6<sup>th</sup>) Banking Day following the expiration of the Acceptance Period).

The requested relief is consistent with the relief granted in *Bayer I* and *QIAGEN*. In *Bayer I*, the final results of the Offer were expected to be published no later than the fifth (5<sup>th</sup>) Banking Day following the close of the Acceptance Period in accordance with German law and practice. In that case, the Staff granted an exemption from Rule 14d-11(d) to permit the Bayer Entities to commence the Additional Acceptance Period on the day after the publication of final results of the Offer. See also, *Offer by BCP Crystal Acquisition GmbH & Co., et al. for Celanese AG*, File No. 5-57467 (February 3, 2004). Similarly, in *QIAGEN*, the final results of the Offer were expected to be published no later than the fifth (5<sup>th</sup>) or sixth (6<sup>th</sup>) Banking Day following the expiration of the Acceptance Period in accordance with German law and practice. In that case, the Staff granted an exemption from Rule 14d-11(d) to permit the Qiagen Entities to commence the Additional Acceptance Period as soon as practicable, but in any event on the Banking Day following the publication of the final results of the Offer.



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

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

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

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

We therefore request an exemption to Rule 14e-1(d) to permit the Bidder Entities to extend the Acceptance Period in accordance with German law and practice. We believe that the relief requested herein is consistent with the relief granted by the Commission in *QIAGEN, Bayer I* and *Axel Springer*, as well as additional cases with facts similar to those of the present Offer. See *Cash Offer for Ordinary Shares of Braas Monier Building Group S.A.* (October 25, 2016) and *KKR and Pennira Offer for ProSiebenSat.1 Media AG* (January 30, 2007).

## Request for Relief from Rule 14e-5

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

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

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

Any purchases of Shares outside of the Offer will be regulated by German securities laws, including the German Takeover Act. The German Takeover Act allows the Bidder Entities to make such purchases, either directly or through any advisor, broker or other financial institution acting as their agent (together with the Bidder Entities, the “Prospective Purchasers”), subject to certain conditions meant to protect holders of securities issued by





MorphoSys. The Prospective Purchasers would be required to make available to all holders of the Shares subject to the Offer any more favorable terms, including price terms, agreed to in connection with any purchases of Shares by the Prospective Purchasers during the Offer. In addition, any such purchases by the Prospective Purchasers prior to the commencement of the Offer must be disclosed in the Offer Materials. Finally, pursuant to Section 23 para. 2 of the German Takeover Act, any such purchase by the Prospective Purchasers during the Offer must be reported to BaFin and announced publicly immediately following such purchase.

Any such purchases would be subject to the following conditions:

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

Please note that we believe that it is unlikely that the jurisdictional predicate for the application of the Exchange Act, namely that there be a purchase of a security “by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange,” would be satisfied if the Bidder Entities, or financial institutions acting on their behalf, made purchases of, or arrangements to purchase, Shares outside the United States. We nonetheless apply, on behalf of such persons, for exemptive relief for such purchases, or arrangements to purchase, from the provisions of Rule 14e-5, subject to the limitations set forth above. We have been requested by the Bidder Entities to emphasize that this Letter does not reflect an admission that Rule 14e-5 would apply to such purchases of the Shares outside the United States in the absence of such exemptive relief.

We hereby request an exemption to Rule 14e-5 to permit purchases of Shares outside of the Offer as described above. In the context of the Offer, we believe that the requested relief is consistent with relief the Staff has afforded to offerors in similar circumstances in the past, including in transactions that did not separately qualify for the Tier II Exemptions. See *QIAGEN; Offer by Stork Holdco L.P. for Songbird Estates Pie* (December 19, 2014); *Oak Leaf; Offer by UnitedHealth Group Inc. for all outstanding shares of Amit Participacoes S.A.* (November 20, 2012); *Offer by BHP Billiton for all common shares of Potash Corporation of Saskatchewan Inc* (August 26,



2010); *Vimpelcom Ltd; Kraft Foods; KKR and Permira Offer for ProSiebenSat.1 Media AG* (January 30, 2007); *Axel Springer and RWE Aktiengesellschaft Offer for Innogy Holdings* (July 22, 2002).

## Relief Requested from Rule 14e-1(b)

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

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

However, if the conditions to the Offer are satisfied or waived prior to the expiration of the Acceptance Period, there will be a two (2) week Additional Acceptance Period during which all holders of Shares who did not accept the Offer may accept the Offer and receive the highest price paid in purchases outside of the Offer. Accordingly, we respectfully submit that the spirit of Rule 14e-1(b) should be preserved because all holders of Shares will have the right to tender into the Offer for a period of two (2) weeks following the end of the Acceptance Period. If the two (2) week Additional Acceptance Period occurred over a period that included U.S. federal holidays, the Offer may not be open for at least ten (10) additional U.S. business days, although, as described above, because the Additional Acceptance Period would not begin until after the Initial Tabulation Period, holders will have a period of at least ten (10) U.S. business days between the end of the Acceptance Period and the end of the Additional Acceptance Period to decide whether to tender their shares into the Offer.

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

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

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

We believe that the exemptive relief requested is consistent with the relief granted by the Commission in *QIAGEN* and *Bayer I*. In *QIAGEN*, the offering parties requested relief under Rule 14e-1(b) in order to make purchases outside of the offer in the event that purchases are made outside of the offer prior to the expiration of the Acceptance Period for a purchase price above the offer parties, as such allowing the offering parties to increase the offer price payable to shareholders that tendered their ordinary shares during the Acceptance Period. Similarly, in *Bayer I*, the offering parties requested relief under Rule 14e-1(b) in order to make purchases outside of the offer in order to respond to market developments by making offers to purchase shares outside of the offer at prices



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higher than the offer price. In *QIAGEN* and *Bayer I*, as in the present case, the direct conflict between German law and U.S. law prevented the offering parties from extending the Acceptance Period.

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



\* \* \*

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

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

Sincerely,

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

Doug Smith

cc: Jenny Hochenberg  
Sabrina Kulenkamp  
Rick van Aerssen  
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Brian Breheny  
Jan Bauer  
Skadden, Arps, Slate, Meagher & Flom LLP