

**Securities Exchange Act of 1934
Rule 14e-1(b)**

Exemptive Request Letter: Bayer Entities

**Response of the Office of Mergers and Acquisitions,
Division of Corporation Finance**



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549-0303

June 29, 2006

Via Facsimile (202) 637-2200 and U.S. Mail

John J. Huber
Latham & Watkins
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Re: Bayer Entities' Tender Offer for Schering AG

Dear Mr. Huber:

We are responding to the letter from your colleague John Sorkin dated June 12, 2006 addressed to Mauri L. Osheroff, Brian V. Breheny, Christina E. Chalk and Daniel F. Duchovny, as supplemented by telephone conversations with the staff, with regard to your request for exemptive relief. This letter describes and confirms the relief previously provided orally in connection with the transaction listed above. To avoid having to recite or summarize the facts set forth in your letter, our response is attached to the enclosed photocopy of your letter. Unless otherwise noted, capitalized terms in this letter have the same meaning as in your June 12, 2006 correspondence.

On the basis of the representations made and facts presented in your June 12, 2006 letter, the Commission hereby grants an exemption from Rule 14e-1(b) under the Securities Exchange Act of 1934 to permit the Bayer Entities to raise the Offer Price during the

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Acceptance Period (as defined in the Bayer offering materials) without extending the term of the Acceptance Period, as would be required by Rule 14e-1(b). In granting this exemption, we note in particular your representations that:

- German law does not permit the Bayer Offer to be extended at this time in the Offer period;
- German law does not permit the Bayer Entities to reduce or waive the 75% minimum tender condition at this time in the Offer period;
- German law and the relief granted by the Division of Market Regulation provide that the Bayer Entities may purchase Schering Shares on the open market during the Offer, but must raise the Offer Price to the highest price paid outside of the Offer;
- Purchases of Schering Shares outside of the Offer and at prices possibly in excess of the Offer Price are necessary to respond to market increases in prices of Schering Shares;
- If all conditions to the Bayer Offer are satisfied by the scheduled expiration date of the extended Acceptance Period on June 14, 2006, a subsequent offer period of two weeks must be provided to allow additional tenders of Schering Shares;
- The Bayer Entities will immediately publish an advertisement in a newspaper with national circulation in the United States disclosing the possibility that the Bayer Entities may purchase shares outside of the Offer at a price higher than the Offer Price; and

The Bayer Entities will issue a press release to disclose publicly the number of Schering Shares acquired, the highest price paid per Schering Share, and if applicable, any resulting increase in the Offer Price before the beginning of trading on the New York Stock Exchange on the day following any such purchases.

The foregoing exemption is based solely on the representations and the facts presented in your June 12, 2006 letter, as supplemented by telephone conversations with the Commission staff. The relief is strictly limited to the application of the rule listed above to this transaction. You should discontinue this transaction pending further consultations with the staff if any of the facts or representations set forth in your letter change.

We also direct your attention to the anti-fraud and anti-manipulation provisions of the federal securities laws, including Section 10(b) and 14(e) of the Exchange Act, and Rule 10b-5 thereunder. The participants in this transaction must comply with these and any other applicable provisions of the federal securities laws. The Division of Corporation

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Finance expresses no view on any other questions that may be raised by the proposed transaction, including but not limited to, the adequacy of disclosure concerning and the applicability of any other federal or state laws to the proposed transaction.

Sincerely,

For the Commission,
By the Division of Corporation Finance
pursuant to delegated authority,

Mauri L. Osheroff
Associate Director, Regulatory Policy
Division of Corporation Finance

Enclosure

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June 12, 2006

VIA EMAIL AND FACSIMILE

Mauri L. Osheroff, Esq.
Associate Director, Regulatory Policy
Division of Corporation Finance

Brian V. Breheny, Esq.
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Special Counsel, Office of Mergers and Acquisitions
Division of Corporation Finance

Securities and Exchange Commission
100 F Street, N.W.
Washington, D.C. 20549

Ladies and Gentleman:

Pursuant to our conversations with the staff (the "Staff") of the Securities and Exchange Commission (the "Commission"), we are writing on behalf of our clients, Bayer Aktiengesellschaft, a German stock corporation ("Bayer"), and Dritte BV GmbH, (the "Offeror" and, together with Bayer, the "Bayer Entities").

On March 23, 2006, the Offeror, a German limited liability company and a wholly-owned subsidiary of Bayer, announced its decision to commence a cash tender offer (the "Offer") for all outstanding ordinary shares with no par value (the "Ordinary Shares"), including all Ordinary

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Shares represented by American Depositary Shares (the “ADSs” and, together with the Ordinary Shares, the “Shares”), of Schering Aktiengesellschaft, a German stock corporation (“Schering”). The Offer is supported by the Schering Board of Management. A description of the terms and conditions of the Offer, as well as certain background information relating to the Bayer Entities, Schering and the Shares, is set forth in our letter dated April 12, 2006 and in the Offer Document filed as Exhibit (a)(1)(A) to the Schedule TO filed by the Bayer Entities on April 13, 2006, as amended. As described in the Offer Document, the offer price is Euro 86 per Ordinary Share or ADS (the “Offer Price”). The acceptance period for the Offer was originally scheduled to expire on May 31, 2006, but was subsequently extended to June 14, 2006 in accordance with German law. Under German law, the acceptance period cannot be further extended by the Bayer Entities.

We are U.S. and German counsel to the Bayer Entities in connection with the Offer.

On March 13, 2006, Merck KGaA (“Merck”), a German partnership limited by shares, announced its intention to commence an unsolicited cash tender offer for all outstanding Ordinary Shares and ADSs at a price of Euro 77 per Ordinary Share or ADS. The principal business of Merck is the manufacture and/or distribution of pharmaceuticals, chemicals and laboratory products. On March 24, 2006, Merck announced that it had decided not to pursue its planned takeover of Schering. However, notwithstanding these statements, Merck increased its ownership position in the Shares from approximately 5.1% to approximately 18.6% between May 30, 2006 and June 9, 2006. Given Merck’s prior disclosures, the Bayer Entities did not contemplate that Merck would seek to acquire additional Shares or engage in such a rapid accumulation of Shares.

The Offer is subject to, among other things, a condition (the “Minimum Condition”) that, as of the expiration of the acceptance period, the number of Shares for which the Offer shall have been accepted and not withdrawn, when taken together with the Shares owned by the Bayer Entities as of the expiration of the acceptance period, constitutes at least 75% of the outstanding Shares as described in the Offer Document. The purpose of the Minimum Condition is to assure that, upon completion of the Offer, the Bayer Entities own a sufficient number of shares to approve a domination agreement at a meeting of Schering shareholders and thereby accomplish the purpose of the Offer. In addition, if the Bayer Entities acquire at least 95% of the outstanding share capital of Schering, they will be able to effect a “squeeze-out” as described in Section 10.2.5 of the Offer Document.

Because the Ordinary Shares are trading at prices above the Offer Price (and, in fact, Merck has disclosed today that it has acquired Ordinary Shares at an average price in excess of the Offer Price) and there is significant confusion in the market about the potential impact that an increase in the price of the Shares and Merck’s purchases will have on the Offer, the Bayer Entities believe they need the flexibility to respond to these market developments.

Under Section 21 (6) of the German Securities Acquisition and Takeover Act of December 20, 2001 (“WpÜG”), the Bayer Entities are no longer able to increase the purchase price under, or otherwise amend the terms of, the Offer (including the Minimum Condition)

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unless a third party launches a competing offer pursuant to German law.¹ However, under Section 31 (4) of WpÜG, the Bayer Entities are permitted to purchase Ordinary Shares outside of the Offer and, if they pay a price higher than the Offer Price for Ordinary Shares in transactions outside of the Offer, then the per Share price to be paid pursuant to the Offer is automatically increased by operation of German law. Pursuant to relief previously granted by the Commission under Rule 14e-5 on April 7, 2006, the Bayer Entities and persons acting on their behalf have the right to purchase Ordinary Shares outside of the Offer.²

Based on this situation, the Bayer Entities believe that they may have to respond by taking advantage of their ability under German law to purchase Ordinary Shares outside the Offer at prices higher than the Offer Price. Such purchases will have the effect that the Offer Price would be automatically increased. Assuming purchases above the Offer Price will have to be made, Rule 14e-1(b) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), requires that the Bayer Entities keep the acceptance period open for at least 10 business days following any increase in the Offer Price. Unfortunately, the Bayer Entities do not believe that they will be able to comply with Rule 14e-1(b) without violating German law. As we have discussed with the Staff, the German Federal Financial Supervisory Authority has confirmed that it does not have the ability to grant an exemption from the provisions of German law that prohibit the Offeror from extending the acceptance period beyond June 14, 2006.

We therefore request that the Commission grant exemptive relief to the Bayer Entities under Rule 14e-1(b) under the Exchange Act.

Given the confluence of market forces beyond the control of the Bayer Entities and the Bayer Entities' inability to further extend the acceptance period under German law, it has become necessary for the Bayer Entities to be able to acquire Shares at prices in excess of the Offer Price in order to respond to this situation. Absent the prohibition under German law, the Offeror would amend the Offer to directly increase the Offer Price and extend the acceptance period. As described above, the direct conflict between German law and U.S. law prevents the Bayer Entities from doing so.

Under Sections 21 (5) and (6) of WpÜG, the Offeror would have been able to voluntarily increase the Offer Price and extend the Offer on only one occasion during the final two weeks of the Offer. As a result, formally amending the Offer would not resolve the direct conflict between Rule 14e-1(b) and German law as the market could move beyond any amended Offer Price and the Bayer Entities would have no ability to respond. Accordingly, we respectfully submit that the only way the Bayer Entities can effectively respond to market developments is to purchase

¹ If Merck had launched a formal offer under German law, then the Offer would automatically have been extended by operation of German law.

² The Bayer Entities disclosed that they had commenced such purchases of Ordinary Shares outside of the United States on June 9, 2006.

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Shares outside the Offer at prices higher than the Offer Price based on prevailing market conditions.³

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

- publish an advertisement in a newspaper of national circulation on June 13, 2006 disclosing the possibility that purchases of Shares may occur at prices above EUR 86.00 per share;
- disclose the number of Shares acquired, the highest price paid per Share and, if applicable, the increased offer price in the United States at approximately the same time such disclosure is made in Germany in accordance with German law (specifically, information regarding such purchases will be published in the *Börsen-Zeitung* each morning in accordance with German law and posted on Bayer's website at <http://www.bayer.de>); and
- the information described above will also be disclosed by press release in the United States prior to the opening of the New York Stock Exchange on any given day and an amendment to Schedule TO will be filed with the Commission.

As discussed in our April 12, 2006 letter and described in the Offer Document, if the conditions to the Offer are satisfied and the Offeror purchases Shares pursuant to the Offer, then there will be a two-week subsequent offering period during which all holders of Ordinary Shares and ADSs 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) will be fulfilled because all holders of Shares will have the right to tender into the Offer for a period of two weeks following the successful completion of the Offer.

We acknowledge that our request is uncommon. The current circumstances, however, are unprecedented under German practice. Further, we respectfully submit that failure to grant the requested relief under these circumstances (where the Bayer Entities have complied with both the word and spirit of both U.S. law and German law and practice) might have the unanticipated effect of bidders excluding U.S. shareholders from tender offers in the future, rather than promoting the goals of the Commission expressed in the Commission's release on *Cross-Border Tender and Exchange Offers, Business Combinations and Rights Offerings*, Release Nos. 33-7759, 34-42054, 39-2378, International Series Release No. 1208 (Oct. 22, 1999).

³ We acknowledge that this could result in successive increases in the Offer Price, but, based on the proposed disclosures described herein and the availability of the two-week additional acceptance period described below, we believe that holders of Shares would be both adequately informed of the process by which the Offer Price would effectively be increased and have a sufficient opportunity to obtain any higher Offer Price even if they do not tender during the initial acceptance period.

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Based on the foregoing, we respectfully request that the Staff grant exemptive relief to the Bayer Entities from the provisions of Rule 14e-1(b) under the Exchange Act if the Offer is conducted as described in this letter.

If you require any further information, please contact the undersigned at (212) 906-1656 or John Huber at (202) 637-2242.

Sincerely,



John E. Sorkin
of LATHAM & WATKINS LLP

cc: Paul Dudek, Esq.
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