

# 2006 BCSECCOM 180

February 10, 2006

## Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 114(2) Takeover Bids - Exemption from the formal take over bid requirements in Part 13 of the Act - General - An issuer wants to complete a take over bid that meets some, but not all of the conditions set out in s. 98 (1)(e) of the Act required for an exempt take over bid - The offeror is making the bid complying with the law of a jurisdiction that the Commission has not recognized for the purposes of s. 98(1)(e); the target does not maintain a share register, but the offeror believes the number of the target's shareholders in B.C. is *de minimis*; the bid will satisfy all other conditions required for an exempt take over bid

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, ss. 105-110, 114(2)

In the Matter of  
the Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova  
Scotia, New Brunswick and Newfoundland and Labrador  
(the "Jurisdictions")

and

In the Matter of  
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of  
RAG Projektgesellschaft mbH  
(the "Filer")

MRRS Decision Document

## Background

The local securities regulatory authority or regulator (the "Decision Maker") in each of the Jurisdictions has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the "Legislation") that the formal take-over bid requirements contained in the Legislation, including the provisions relating to delivery of an offer and take-over bid circular and any notices of change or variation thereto, delivery of a directors' circular and any

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notices of change or variation thereto, minimum deposit periods and withdrawal rights, take-up of and payment for securities tendered to a take-over bid, disclosure, financing, restrictions upon purchases of securities, identical consideration and collateral benefits (collectively, the “Take-over Bid Requirements”) shall not apply to trades made in connection with the proposed offer (the “Offer”) by the Filer for the acquisition of up to 14,465,662 shares (the “Shares”) of Degussa AG with registered office Düsseldorf, Germany (the “Target”).

Under the Mutual Reliance Review System for Exemptive Relief Applications (the “System”):

- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 have the same meaning in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts represented by the Filer:

1. The Filer is a limited liability company incorporated under the laws of the Federal Republic of Germany. The indirect parent of the Filer, RAG Aktiengesellschaft (“RAG AG”), is a stock corporation incorporated under the laws of the Federal Republic of Germany.
2. The Filer’s and RAG AG’s registered office is located at Rellinghauser Str. 1-11, 45128 Essen, Germany.
3. Neither the Filer nor RAG AG is a reporting issuer or the equivalent in any of the Jurisdictions. Neither the Filer’s nor RAG AG’s securities are listed or quoted for trading on any Canadian stock exchange or market or anywhere else.
4. The Target is a corporation incorporated under the laws of the Federal Republic of Germany, with its Shares traded on the official market (*Amtlichen Markt*) (Prime Standard) of the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse*) and furthermore on the regulated unofficial market (*Freiverkehr*) of other German stock exchanges in Berlin-Bremen, Düsseldorf,

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Hamburg, Hannover, Munich and Stuttgart. The Target is a multinational company with a strong focus on specialty chemicals, and is one of the large listed companies in Germany.

5. The Target's registered office is located at Bennigsenplatz 1, D-40474 Düsseldorf, Germany.
6. The Target's issued share capital registered in the commercial register consists of 205,623,590 Shares. The Shares of the Target constitute "equity securities" for the purposes of the definition of "take-over bid" in the Legislation as applicable.
7. The Target is not a reporting issuer or equivalent in any of the Jurisdictions. The Target's securities are not listed or quoted for trading on any Canadian stock exchange or market.
8. The Filer currently holds (rounded) 50.1% of the Shares of the Target. In addition, E.ON Finanzanlagen GmbH with registered office at E.ON-Platz 1, 40479 Düsseldorf, Germany, which is controlled by E.ON AG with registered office at E.ON-Platz 1, 40479 Düsseldorf, Germany, holds (rounded) 42.86% of the Shares of the Target. E.ON Finanzanlagen GmbH and E.ON AG are corporations acting jointly with the Filer. E.ON Finanzanlagen GmbH has committed not to tender its shares to the Filer's Offer for the Target.
9. On December 19, 2005, the Filer announced its intention to make a voluntary public tender offer for the acquisition of the Shares of the Target for cash consideration. Under German law, the Offer does not qualify as a "take-over offer" as the Filer already made a take-over offer in 2002/03 and controls the Target (and hence is not acquiring control through the Offer). The Offer is directed to the entire free float (approximately 7.04%), i.e. up to 14,465,662 Shares. The Filer intends to offer €42.00 per Share of the Target in cash, implying a total offer consideration of up to €607,557,804. The implementation of the Offer and the purchase and ownership transfer agreements resulting from acceptance of the Offer are subject to satisfaction of the following conditions precedent (Offer Conditions):
  - (1) The Federal Republic of Germany and the German state of North Rhine-Westphalia must have granted approval (Official Approval) for the transaction outlined in Section 6.2 of the Offer Document (acquisition of all Shares of Target). Official Approval must be received by March 31, 2006, at the latest.

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- (2) At the end of the acceptance period the Filer holds voting rights from at least 195,342,411 Shares (95%), including (i) the Shares already held by the Filer and the persons acting jointly with the Filer (in total approximately 92.96%) or acquired in another manner before the end of the acceptance period, and (ii) the Shares for which the Offer has been effectively accepted (and no rescission has been declared and taken effect).
10. The Offer is being made and the Offer Document reflecting the terms of the Offer is being prepared exclusively in accordance with the laws of the Federal Republic of Germany (in particular, in compliance with the German *Securities Acquisition and Takeover Act* and (*Wertpapiererwerbs- und Übernahmegesetz, WpÜG*) statutory regulations based on the WpÜG), and in accordance with the provisions of Regulation 14E of the U.S. *Securities Exchange Act of 1934* applicable to this Offer and applicable exemptions (Tier I Exemption and Tier II Exemption).
11. The Offer Document has been submitted for review to the applicable securities regulatory authority in Germany. It is expected that the Offer Document will be made available to the holders of the Shares of the Target immediately after approval by the German regulator, on January 27, 2006. In accordance with German law, the Offer Document (and an English convenience translation) will be available on the Internet at <http://www.rag.de>, and a notification regarding the publication of the Offer Document will be published in a national German newspaper also specifying where and how the shareholders may obtain a copy of the Offer Document free of charge. For further details on the publication see paragraph 13 below.
12. As permitted by German law, the Target has issued bearer securities and does not maintain a share register. Accordingly, any information about the Shares of the Target held by shareholders in Canada can only be determined on a limited enquiry basis. Based on such enquiry, the Filer believes that as of December 31, 2005 there were nine holders of Shares of the Target resident in Canada, holding in total 1,487 Shares representing approximately 0.0007% of the entire issued share capital of the Target, and approximately 0.01% of the Shares not held by the Filer and parties acting jointly with the Filer. The Filer believes that at least one of these shareholders is located in each of British Columbia, Alberta, Ontario and New Brunswick. As a result of the fact that the Target has issued bearer shares, the Filer is unable to determine conclusively where the holders of the Shares of the Target reside.
13. The Offer Document will be published on January 27, 2006, in accordance with section 14 para. 3 of the WpÜG. The German version of the Offer Document and its non-binding English convenience translation will be

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published on the internet at <http://www.rag.de>. In addition, an announcement regarding the publication of the German Offer Document will be published in the Frankfurter Allgemeine Zeitung and the Börsen-Zeitung. Copies of the Offer Document and its English translation will be available free of charge at the financial print office Bowne Frankfurt GmbH, Bettinastr. 30, 60325 Frankfurt am Main, Germany (fax +49 69 971476-84), and the settlement agent Morgan Stanley Bank AG, Junghofstrasse 13-15, 60311 Frankfurt am Main, Germany (email and fax requests may be made at [ragdegussa@morganstanley.com](mailto:ragdegussa@morganstanley.com) and +49 69 2166 7361). An announcement of the publication of the Offer Document and the availability of its English translation will also be made in the Wall Street Journal in the United States of America, and will indicate the above email address and fax number for requesting the Offer Document. The settlement agent, Morgan Stanley Bank AG, will provide the Custodian Banks with copies of the Offer Document to be sent to their customers. While the Filer will also publish a non-binding English convenience translation of the Offer Document, the English translation has not been reviewed by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin), and the German Offer Document shall be the only binding offer document. Beyond that, as permitted under German law, the Filer does not expect to deliver any materials to the holders of the Shares of the Target in general (as the Target has issued bearer shares and does not maintain a share register or other record of the addresses of its shareholders). However, in the event that any material relating to the Offer is sent by the Filer generally to holders of the Shares of the Target in Germany, such material will also be sent to holders of Shares of the Target residing in the Jurisdictions (if addresses are known), along with an English translation for convenience purposes.

14. A public announcement in English in a national Canadian newspaper and in French in a newspaper that is widely circulated in Québec, made at the same time as the public announcement in the national German newspaper or as soon as practicable after issuance of this order, will specify where and how the shareholders may obtain a copy of the Offer Document or an English convenience translation free of charge. As soon as practicable after such date, the Filer will also file a copy of the Offer Document with the Decision Makers.
15. The *de minimis* take-over bid exemptions found in certain of the Jurisdictions are not available to the Filer since the bid is not being made in compliance with the laws of a jurisdiction that is recognized by the applicable Decision Makers for the purposes of the *de minimis* take-over bid exemptions. Also, because the Target does not maintain a share register, the Filer is unable to determine conclusively the number of holders of the Shares of the Target

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resident in each of the Jurisdictions, or the number of Shares of the Target held by any such persons.

16. In accordance with German law (home jurisdiction of both, the Filer and the Target) and with the provisions of Rule 14d-1(c) of the U.S. *Securities Exchange Act 1934* (Tier I), the Offer treats all shareholders (including Canadian holders) equally.

### **Decision**

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the Decision has been met.

The decision of the Decision Makers under the Legislation is that the Filer is exempt from the Take-over Bid Requirements in making the Offer to the shareholders of the Target who are resident in the Jurisdictions provided that:

- (i) the Offer and all amendments to the Offer are made in compliance with the laws of the Federal Republic of Germany,
- (ii) any material relating to the Offer that is sent by the Filer generally to the holders of the Shares of the Target in Germany will be sent by the Filer to the holders of the Shares of the Target resident in the Jurisdictions (if addresses are known) together with an English convenience translation, and
- (iii) the Filer makes a public announcement in English in a national Canadian newspaper and in French in a newspaper that is widely circulated in Québec specifying where and how holders of the Shares of the Target in the Jurisdictions may obtain a copy of the Offer Document (or an English convenience translation) free of charge, and files copies thereof with the Decision Maker in each Jurisdiction.

Paul M. Moore  
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Ontario Securities Commission

Wendell S. Wigle  
Commissioner  
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