

# 2007 BCSECCOM 249

April 24, 2007

## 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 - 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, and 114(2)

In the Matter of  
the Securities Legislation of  
Ontario, British Columbia, Alberta, Saskatchewan, Manitoba,  
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  
Dr. Ing. H.C. F. Porsche Aktiengesellschaft  
(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 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 notices of change or variation thereto, minimum deposit periods and withdrawal rights, take-

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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”) do not apply to the proposed mandatory offer (the “Offer”) by the Filer for the all of the outstanding shares (“Target Shares”) of Volkswagen Aktiengesellschaft (“Target”) (the “Requested Relief”);

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (i) the Ontario Securities Commission is the principal regulator for this application; and
- (ii) this MRRS decision document evidences the decision of each Decision Maker.

### **Interpretation**

Defined terms contained in National Instrument 14-101 *Definitions* 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 stock corporation incorporated under the laws of the Federal Republic of Germany. Founded in Germany in 1931, the Filer, together with its affiliates, today sees itself as one of the leading international sports car makers. In addition to developing and building the Filer brand sports cars, the Filer also provides its high-end engineering knowledge to other automakers and other companies on a contractual basis.
2. The Filer’s registered office is located in Stuttgart, Germany.
3. The Filer is not a reporting issuer or the equivalent in any of the Jurisdictions. The Filer’s securities are not listed or quoted for trading on any Canadian stock exchange or market.
4. Target is a corporation incorporated under the laws of the Federal Republic of Germany. Target's common bearer shares (“Target Common Shares”) and Target's non-voting preferred bearer shares (“Target Preferred Shares”) have their primary listing on the Frankfurt (Prime Standard) stock exchange, with additional listings in Germany on the stock exchanges in Berlin-Bremen, Düsseldorf, Hamburg, Hanover, Munich and Stuttgart. In addition, the Target Common Shares and the Target Preferred Shares are listed in Switzerland on the Swiss Exchange (SWX), and on the stock exchanges in Luxembourg,

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London and Tokyo. American Depositary Receipts (each, an “ADR”) issued under Target's sponsored program, as well as the Target Common Shares and the Target Preferred Shares, are traded over the counter in the United States. Target is one of the leading automobile manufacturers in the world, and Europe's largest carmaker.

5. Target's registered office is located in Wolfsburg, Germany.
6. As of March 31, 2007, Target's issued and outstanding share capital consists of 287,333,807 Target Common Shares and 105,238,280 Target Preferred Shares.
7. Target is not a reporting issuer or equivalent in any of the Jurisdictions. Target's securities are not listed or quoted for trading on any Canadian stock exchange or market.
8. Prior to March 28, the Filer held approximately 27.3% of the Common Shares in Target. On March 24, 2007, the Filer's supervisory board authorized the management board to acquire further Target Common Shares and increase the Filer's total holding of Target Common Shares up to 31%. A respective public announcement was made on the same day. On March 26, 2007, the management board exercised a call option and acquired approximately 3.6% of the Common Shares in Target which were transferred to the Filer on March 28, 2007. As a result of such transfer, the Filer exceeded the threshold of 30% of the voting rights in Target, triggering the obligation under German law for the Filer to commence a mandatory public offer. Consequently, the Filer announced its obligation to make a cash tender offer on the day the transfer became effective. It is proposed that only the minimum price prescribed by law will be offered as part of the Offer. This is expected to amount to €100.92 per Target Common Share and €65.54 per Target Preferred Share.
9. The Offer is being made, and the Offer Document reflecting the terms of the Offer is being prepared, in accordance with the laws of the Federal Republic of Germany and, in particular, the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, or the “WpÜG”). It is made in compliance with the provisions of the statutory regulations based on the WpÜG and in compliance with any applicable provisions of US securities law.
10. The Offer Document is expected to be submitted to the applicable securities regulatory authority in Germany during the week of April 16, 2007. The Offer Document is expected to be made available to holders of Target Shares after approval by the German regulator which is expected within 10 business days

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of its submission to such regulator, although the regulator may extend the approval period by a further 5 business days. In accordance with German law, the Offer Document will be available on the internet at <http://www.porsche.com/germany/aboutporsche/investorrelations/> (a non-binding English convenience translation will be available at <http://www.porsche.com/canada/aboutporsche/investorrelations/>) and a public announcement in a national German newspaper will specify where and how the shareholders may obtain a copy of the Offer Document free of charge. A notice announcing the commencement of the Offer and the availability of the English translation of the Offer Document will further be published in the U.S. edition of The Wall Street Journal.

11. As permitted by German law, Target has issued bearer securities and does not maintain a share register. Accordingly, any information about shareholdings of Target Shares in Canada can only be determined on a limited enquiry basis. Based on a duly diligent review of available shareholder information prepared on February 15, 2007 by the Filer's financial advisor, the Filer believes that there are 9 holders of Target Common Shares resident in Canada, holding an aggregate of 1,720,121 Target Common Shares representing approximately 0.60% of the Target Common Shares outstanding (including 62,300 ADRs at a ratio of 5 ADRs to 1 Target Common Share) and 7 holders of Target Preferred Shares resident in Canada, holding an aggregate of 2,088,780 Target Preferred Shares representing 1.98% of the Target Preferred Shares outstanding. As a result of the fact that the Target has issued bearer securities, the Filer is unable to determine conclusively in which Jurisdictions the 9 holders of Target Common Shares and 7 holders of Target Preferred Shares reside.
12. A public announcement in a national Canadian newspaper and in a French newspaper that is widely circulated in Québec will specify where and how holders of the Target Shares in the Jurisdictions may obtain a copy of the Offer Document (or a non-binding 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 Maker in each of the Jurisdictions.
13. If any material relating to the Offer is required by law to be sent by the Filer to holders of Target Shares in Germany, such material will also be sent, as applicable, to holders of such shares residing in the Jurisdictions (if addresses are known), along with an English translation for convenience purposes, and in any event will be concurrently filed with each Decision Maker.
14. In accordance with the laws of the Federal Republic of Germany (the home jurisdiction of both the Filer and the Target), all of the holders of Target

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Shares to whom the Offer is made, will be treated equally under the terms of the Offer.

15. The *de minimis* take-over bid exemption as provided for in the Legislation is not available to the Filer because the Offer 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 exemption. Also, because the Target does not maintain a share register, the Filer is unable to determine conclusively the number of holders of the Target Shares resident in each of the Jurisdictions or the number of such shares held by any such persons.

### 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 Requested Relief is granted 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 and any amendments thereto that are sent to the holders of the Target Shares in Germany, will be sent to the holders of the Target Shares resident in any of the Jurisdictions (if addresses are known), together with an English convenience translation, and copies thereof filed with the Decision Maker in each Jurisdiction; and
- (iii) the Filer makes a public announcement in a national Canadian newspaper and in a French newspaper that is widely circulated in Québec specifying where and how holders of the Target Shares 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 of the Jurisdictions.

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