August 1, 2007

<u>via e-mail to:rule-comments@sec.gov</u>

Ms. Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: File No. S7-11-07
Comments on Release No. 33-8813

Dear Ms. Morris:

I am submitting this letter as someone with the perspective of having been involved with brokerage firm compliance with Rule 144 since its inception as well as the recipient of more Rule 144 interpretive letters from the Staff than any other person. In addition, I have provided ongoing interpretive and practical guidance to practitioners over the years as publisher/editor of *The Corporate Counsel* newsletter as well as the Rule 144 Q&A Discussion Forum on TheCorporateCounsel.net. The following is also being published in the July-August 2007 issue of *The Corporate Counsel*.

<u>Our Take</u>

We are pleased with most of the proposed changes to Rule 144, many of which we have suggested in the past, particularly combining Forms 4 and 144 (see, e.g., the January-February 1997 and May-June 2007 issues of *The Corporate Counsel* at pgs 4 and 10, respectively) and eliminating the application of the rule to non-affiliates after a maximum one-year holding period (see our May-June 1997 issue at pg 4), both of which should save countless dollars and wasted resources. However, we are concerned that, as currently proposed, the amendments would open up one gaping loophole and one keeperless gate for the unscrupulous and the creative.

<u>The Loophole—Hedging</u>

Throughout the release, the Commission correctly expresses concerns about hedging transactions, which transfer the risk of ownership of the seller's securities and, thus, undermine the underlying concept that the securities are "held for investment and not with a view to distribution." These concerns were expressed in the Commission's 1997 Rule 144 proposing release, and we endorsed them in a comment letter on the proposal (dated March 3, 1997 and available on sec.gov). Unfortunately, the Commission's proposed "solution" to the hedging problem (i.e., partially re-instituting pre-1990 tolling, for no more than six months) does not take into account the abuses which assuredly will happen (in part, because of other, laudable proposed changes to the rule).

<u>Here's How</u>

On day one, purchaser acquires restricted securities from the issuer (e.g., at a discount), and immediately enters into a short sale (or other hedging transaction), thus eliminating the economic risk of the investment. After only a maximum one-year cut-off, purchaser submits the restricted securities to the transfer agent to remove the 1933 Act legend and then delivers the "clean" shares to close out the short position. Under current Rule 144, the purchaser cannot deliver the shares that were previously acquired (see Rel. No. 33-6099, August 2, 1979, Q.82).

Instead, he/she must sell those shares in the open market pursuant to Rule 144 (i.e., after the holding period), and then buy other shares to use to close out the short position—what we dubbed the "two-step" (see our March-April 1992 issue at pg 5.) Now, however, because the proposals would eliminate all the Rule 144 restrictions after one year for non-affiliates, it will be easy to avoid the two-step. As a result, a non-affiliate can effect a risk-eliminating transaction immediately after acquiring restricted securities, which may result in an immediate sale of securities into the market place. In short, the purchaser need not have any investment intent at the time of the purchase, and need not provide any notice of the sale to the unsuspecting public.

Our Fix

The way to fix this is simple: Apply consistently to all hedging transactions the Staff's interpretive position set forth in Goldman Sachs I and II and further embraced in Microsoft and Google (see our May-June 2007 issue at pg 1). In Goldman Sachs I (December 20, 1999), the Staff took the position that, because an affiliate's prepaid forward-sale contract resulted in a sale into the market, that sale would have to comply with all the requirements of Rule 144. (See our January-February 2000 issue at pg 4.) In Goldman II (October 9, 2003), the Staff said that, where an issuer enters into a forward-sale contract or option relating to its own securities, the broker's hedging short sales must be registered as a primary offering by the issuer. (See our January-February 2004 issue at pg 3.)

Unfortunately, many observers have limited the application of Goldman I to pre-paid forwards, and the Staff has not stepped up here. As we said in our January-February 2004 issue (at pg 2), the Staff needs to apply Goldman I consistently to all hedging transactions. This position should be added to the rule, or at least included in the adopting release as a key interpretation. That would prevent abuses of the" investment intent" underpinnings of Rule 144, because the shares sold into the market (whether through a short sale or by a counterparty) would also be subject to the holding period, i.e., must be eligible for sale under 144. Without this, there will be a road map for circumvention of the purposes of Rule 144.

To its credit, the Staff asks for comments on hedging that go to these important issues. Even those few brokerage firms that in the past lobbied the Staff to permit hedging transactions without Rule 144 compliance should now realize that there is little to be gained. First, the proposed elimination of the "dribble" restrictions on sales of shares received in Rule 145 mergers will wipe out the greatest source of 144/5 related hedging business that brokers have pursued. Thus, affiliates of acquired companies looking to hedge their newly acquired shares will no longer need to do so as they will be free to sell without restriction.

Secondly, because most responsible companies are now prohibiting their insiders from engaging in hedging transactions in their own company stock (and, at the very least, providing full disclosure of any such transactions and outstanding positions), it would not be politic to advocate otherwise. We would urge the Commission to take advantage of this opportunity in the adopting release (and the Staff's upcoming proxy disclosure guidance) to make clear to issuers that whenever they disclose their executives' holdings, that it is misleading to do so without also including hedged positions (in addition to pledging—see our September-October 2002 issue at pg 9).

The Brokerless/Keeperless Gate—Selling Restricted Securities Without Complying with Rule 144

Upon reflection, even though we had previously suggested the elimination of all the requirements of Rule 144 from non-affiliates' sales of restricted securities after a one-year holding period (see our May-June 1997 issue at pg 4), we are concerned that, without a Form 144 or broker's transaction requirement, there may be no way to prevent the unscrupulous from dumping restricted securities.

Here's How

The following are a few situations to help explain our concerns (drawing from our experience, including our own (pre-Rule 144) stint in Enforcement dealing with unregistered sales of securities).

"No Legend, No Restrictions." Even today under Rule 144, some people assume that no legend means no restrictions. Without express language in the new rule (or at least in the adopting release) addressing legends, we can see the unscrupulous seizing upon the absence of such language (which was in the 1972 Rule 144 adopting release) as providing some leeway. Without legends, it would become easier to engage in unregistered distributions and to sell restricted securities without any holding period. [It is also troublesome that Note (ii)(a) to Rule 144(g)(3) (obligating brokers to ascertain the length of time the securities have been held, including physical inspection of the stock certificate) would not apply to sales of restricted securities by non-affiliates because, as it stands, the Note would only apply to sales made by affiliates in "brokers' transactions."] In addition, creative counsel could look to the absence of legend language in the new release or rule as comfort to, e.g., remove legends when shares of non-reporting companies are pledged or hedged after, say, a six-month period, and resurrect the old "change in circumstances" doctrine (see our March-April 1989 issue at pg 7) as justification.

No More Two-Stage. What makes the new six-month (or one-year) holding period different from the current 144(k) two-year cutoff is that currently most holders of restricted securities begin to sell under Rule 144 once the current one-year holding period is met, complying with the brokers' transaction requirement. Thus, the broker knows the restricted nature of the securities and can determine when the two-year cut off has been met. Under the new rule, the broker will not have the benefit of sales in these two stages to know that the securities being sold are restricted securities.

Our Fix
The Form 144, coupled with the brokers' transaction requirement, have served as an effective policing/gatekeeping function that has kept sunlight on transactions and assured compliance with Rule 144, preventing many illegal distributions, especially with the possible "underwriter" exposure keeping the broker's eye on the ball (see our May-June 2005 issue at pg 7). A possible alternative might be to have much stronger language in the Preliminary Note to the rule and in the adopting release making it clear to, and placing the onus on:

(a) issuers to place and maintain legends on all restricted securities until the applicable Rule 144 periods have been satisfied. [The Commission would do well here to include the paragraph from the 1972 adopting release entitled "Use of Legends and Stop Transfer Instructions," with additional strong language underscoring the greater importance of legends following elimination of the protective benefits of the Form 144 and brokers' transaction requirements. That paragraph says: "Precautions by issuers are essential to assure that a public offering does not result from resale of securities initially purchased in transactions claimed to be exempt under Section 4(2) of the Act. … Although such assurance cannot be obtained merely by the use of an appropriate legend on stock certificates of other evidences of ownership, or by appropriate instructions to a transfer agent, these devices serve a useful policing function, and the use of such devices is strongly suggested by the Commission and will be considered a factor in determining whether in fact there has been a private placement."]

(b) transfer agents to ensure that legends cannot be removed from restricted securities until the holding period/cut-off has been satisfied, and

(c) brokers—as the last line of defense—to continue to police the holding period. Without clear accountability set forth in unambiguous language—and without all three players involved in the process put on the line—we could find ourselves slipping into the fast and loose ways of the past.

Need for Brokers' Transaction Requirement
We understand that some commenters may suggest retaining the brokers' transaction requirement (in addition to the current information requirement) after the six-month holding period is met, with a one-year cut off. We like the idea of keeping the brokers' transaction requirement during this "transition period" because it brings a gatekeeper into the picture. In this way, brokers will have procedures in place and be on the alert to make sure that restricted securities have met the holding period requirement and will police the current information requirement. (Whether or not the brokers' transaction is retained, the adopting release should state that legends must be maintained on the securities until the one year period is met.) This also would address our concern about the two-stage.

Non-Reporting Issuers
We are particularly concerned about dropping all the Rule 144 requirements after just one year, even for non-reporting issuers. Sales of restricted securities of non-reporting issuers

usually involve sellers who are close to and knowledgeable about the company and public buyers who are not knowledgeable. We would urge the Commission to retain all the current Rule 144 requirements for those securities, including the two-year 144(k) cut-off.

Combining Forms 144 and 4

As the first to advocate combining Form 144 with Form 4, we are extremely pleased to see the Commission take a serious look at eliminating a large body of duplicative filings. We recognize that, if the Form 144 filing requirement is retained for non-affiliates (as we recommended for non-reporting companies, i.e., during year two after purchase), many filers of Form 144 will not have a corresponding Form 4 filing obligation. Moreover, many transactions reported on Form 4 (e.g., option grants and exercises, and open-market purchases) do not trigger an obligation to file a Form 144.

As a result, the combined form needs to be simple enough that it does not confuse filers who do not need to complete all of the columns or boxes included in the form, while still providing the information essential to both regulatory schemes. We understand that the Staff concluded that combining the forms is sufficiently complicated that it is better to request input on the concept rather than attempt to create and propose a form or other approach of its own. We, too, are interested in hearing dialogue on the question. We expect to submit a comment letter to the Staff once we have worked through all the issues.

Timing

Because the proposed changes to Rule 144 will require extensive revisions of brokerage firm, issuer and transfer agent procedures as well as the forms and representation letters that accompany Rule 144 transactions and transfers of legended securities -- and in view of the fact that issuers will be very busy in the months ahead addressing and complying with their proxy statement disclosure obligations and other time consuming year-end matters. It is important not to rush the adoption of the Rule 144 changes.

In addition, if an amended Form 4/144 is adopted requiring third parties to undergo modifications of their current Form 4 filing systems, time will have to be provided to make the necessary changes to those systems. As a result, we would urge the Commission not to adopt final Rule changes until January or February and to provide for a 120-day period before effectiveness.

A Final Comment

The above is intended to focus attention on what we view as the most important aspects of the proposals requiring fixes. From our hands-on experience with the rule over the past 35 years, we view the above suggestions as essential to maintaining the purposes and integrity of the rule.

Respectfully,

/ *Jesse M. Brill* /

cc: Christopher Cox, Chairman
Paul S. Atkins, Commissioner
Roel C. Campos, Commissioner
Kathleen L. Casey, Commissioner
Annette L. Nazareth, Commissioner
John W. White, Director, Division of Corporation Finance