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September 4, 2007

Via Email

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.W.
Washington, D.C. 20549-1090

Re: File No. S7-11-07

Dear Ms. Morris:

We are submitting this letter to respond to the request of the Securities and Exchange Commission (the "SEC") for comments on the SEC's proposed revisions to Rule 144 and 145 under the Securities Act of 1933 (the "Securities Act"). The proposed revisions were discussed in Release No. 33-8813 (the "Release"). We appreciate the opportunity to comment on the matters discussed in the Release.

I. Defining "Control Securities"

We have always been puzzled by the absence of the definition of the term "control securities" in Rule 144. Such absence has on occasion caused confusion to the very persons and entities to which such term is intended to apply – affiliates. Given that the Release indicates that the SEC wishes to "simplify and clarify . . . and incorporate plain English principles" in Rule 144 and contains a definition of the term "control securities," we believe that it would be helpful to incorporate such term in Rule 144. In this regard, the Release states that "[a]lthough it is not a term defined in Rule 144, 'control securities' is used commonly to refer to securities held by affiliates of the issuer, regardless of how the affiliates acquired the securities."[1]

Moreover, although we believe that the clarification in the proposed revisions to Rule 144 that sales by "[a]n affiliate or any person who sells restricted or other securities on behalf of an affiliate . . . [emphasis added]" that comply with Rule 144 will result in the purchaser of such securities not receiving restricted securities is helpful, we believe that it

[1] See Part I of the Release.

would be clearer if Rule 144 contained a definition of the term "control securities" and the statement quoted above indicated that the safe harbor benefits of Rule 144 will inure to sales by affiliates of "restricted and control securities."

Finally, by defining and more openly using the term "control securities" in Rule 144, affiliates of issuers should be put on more explicit notice of the hurdle posed by the definition of the term "underwriter" in Section 2(a)(11) of the Securities Act on their reliance on the exemption provided by Section 4(1) of the Securities Act in connection with their sales of such issuers' securities.

II. Codification of Staff Position

Given the obvious benefits of the codification of well-established positions issued by the staff of the SEC's Division of Corporation Finance (the "Staff") with respect to Rule 144, we believe that the SEC should codify the Staff position initially taken in the no-action letter issued by the Staff to Hygeia Sciences, Inc. (March 13, 1986) and subsequently followed in at least five other no-action letters issued by the Staff.[2]

Specifically, Hygeia Sciences, Inc. and its progeny permit "tacking" in connection with the reorganization of limited partnerships or other business entities (such entities being sometimes referred to herein as the "predecessor entities") into corporations (such corporations being sometimes referred to herein as the "successor corporations"). Such reorganizations are generally carried out in contemplation of initial public offerings by the predecessor entities. Based on these no-action letters, holders of equity interests in the predecessor entities, who demonstrate that their reorganization meets the conditions set forth in the no-action letters, are permitted to tack the holding period of their equity interests in the predecessor entities to the holding period of the equity securities they receive in the reorganizations of the predecessor entities into the successor corporations. The Staff's position in these no-action letters requires the satisfaction of the five following conditions as a prerequisite to such tacking:

(i) the organizational documents of the predecessor entity must contemplate the reorganization into a corporation;

(ii) the holders of the equity interests in the predecessor entity who seek to tack must not have veto or meaningful decision-making authority with respect to the reorganization;

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[2] See Staff No-Action Letter Cravath, Swaine & Moore (February 11, 2000); Juno Online Services, Inc. (November 17, 1999); The Goldman Sachs Group, L.P. (August 24, 1998); Peapod, Inc. (November 10, 1997); and Staff Leasing, Inc. (October 1, 1997).

(iii) in the reorganization, the holders of the equity interests in the predecessor entity must receive a number of equity securities in the successor corporation proportionate to the equity interests they held in the predecessor entity;

(iv) the successor corporation must carry on substantially the same business as the predecessor entity; and

(v) the holders of the equity interests in the predecessor entity must not have provided any additional consideration for the equity securities in the successor corporation that they receive in exchange for their equity interests in the predecessor entity.

We believe that the clearly defined parameters of the above-described Staff position as well as the fact that the types of reorganizations described in Hygeia Sciences, Inc. and its progeny are commonly undertaken by entities contemplating initial public offerings makes a strong case for the codification of such Staff position.

III. Form 144

While we understand the need to retain the requirement that affiliates of an issuer file a Form 144 (or some other form which contains the information generally required by Form 144) with the SEC in connection with the sale of such issuer's securities, we believe that the SEC should clarify in Rule 144 that the failure of an affiliate to **timely** transmit a Form 144 for filing with the SEC will not result in the loss of the ability of the affiliate to rely on the safe harbor provided by Rule 144. Such a provision could be modeled after Rule 508 under Regulation D of the Securities Act, which provides that certain **insignificant** deviations from a "term, condition or requirement of Rule 504, 505 or 506, will not result in the loss of the exemption from the requirements of Section 5 of the Act for any offer or sale to a particular individual or entity . . . ."

In this regard, the ministerial (and non-significant) nature of Form 144 is evidenced by the fact that it must only be "transmitted for filing concurrently" with the entry of a sell order in a broker's transaction or the execution of a sale directly to a market maker (i.e., it is not required to be available publicly at the time of the Rule 144 sale but only at some later date to document certain facts regarding the Rule 144 sale). Notwithstanding such fact, we have witnessed a number of Rule 144 transactions that had to be unwound because of the reluctance by issuers' counsels to issue an opinion or instruction letter to the issuers' transfer agents regarding the availability of Rule 144 for such transactions solely due to the failure by the sellers to timely file their Forms 144 (i.e., all of the requirements of Rule 144 were satisfied in connection with such sales except for the requirement to transmit a Form 144 for filing with the SEC concurrently with the entry of a sell order in a broker's transaction or the execution of a sale directly to a market maker). We do not believe that such a result is warranted given the ministerial nature of Form 144 as well as the fact that the timely filing of a Form 144 does not appear to have any bearing on whether such seller

is acting as an "underwriter" in connection with such sale (which is, after all, the purpose of Rule 144).[3]

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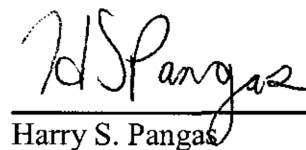
We appreciate your consideration of these comments. Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,



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[3] We also note that Rule 144 requires a seller of restricted or control securities to transmit a Form 144 for filing concurrently with "the principal exchange on which such securities are so admitted." We believe that the qualification discussed above with respect to the filing of the Form 144 with the SEC should also be made with respect to the filing of the Form 144 with "the principal exchange on which such securities are so admitted."