CLEARY GOTTLIEB STEEN & HAMILTON LLP

ONE LIBERTY PLAZA
NEW YORK, NY 10006-1470
(212) 225-2000
FACSIMILE (212) 225-3999
WWW.CLEARYGOTTLIEB.COM

WASHINGTON, DC • PARIS • BRUSSELS
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September 5, 2007

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

Re: Comments on Proposed Rules Relating to Revisions to Rule 144 and Rule 145 to Shorten Holding Period for Affiliates and Non-Affiliates (File No. S7-11-07)

Dear Ms. Morris:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the Commission's proposal (the "Proposing Release") to amend Rule 144 and Rule 145 under the Securities Act of 1933, as amended (the "Securities Act").[1] We appreciate the opportunity to comment on the matters discussed in the Proposing Release.

The most significant change proposed by the Commission in the Proposing Release is to shorten the holding period under Rule 144 generally to permit sales of restricted securities after six months (or up to one year for securities that have been subject to hedging) in the case of issuers that are reporting companies with current information, and after one year in the case of other issuers, while at the same time substantially relaxing the other restrictions currently applicable to the resale of restricted securities by non-affiliates. The proposal would, however, maintain the two-year holding period for certain purposes in respect of asset-backed securities backed by restricted securities. The Commission is also proposing to revise the Rule's Preliminary Note, to eliminate manner-of-sale restrictions with respect to sales of debt securities by affiliates, to codify various staff interpretive positions relating to Rule 144 and to revise the Form 144 filing requirements. With respect to Rule 145, in addition to proposing to eliminate the presumptive underwriter provisions in most cases, the Proposing Release suggests

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[1] SEC Release No. 33-8813 (June 22, 2007), 72 Fed. Reg. 36822 (July 5, 2007).

harmonizing the restrictions of Rule 145(d) with those of proposed Rule 144 in those limited cases in which Rule 145 would continue to apply.

We generally support the Commission's proposed rule changes, and believe they are a positive and significant step toward both reducing the regulatory requirements applicable to the resale of securities initially sold in private placements and simplifying the process of reselling those securities. The proposed amendments should reduce the cost to issuers of raising capital through private placements, by increasing the liquidity, and thus the value, of restricted securities, thereby reducing the discount that investors charge to purchase restricted securities.

The Proposing Release does, however, raise a number of specific questions and concerns, in particular regarding the proposal to reinstitute tolling (both conceptually and practically) and certain related matters (in particular, tacking of holding periods), which we have outlined below. We have also set forth below comments with respect to certain aspects of the rule proposal that address more specific concerns or in some cases suggest additional changes to Rule 144 that we believe should not compromise investor protections.

I. The Proposed Tolling and Tacking Rules Raise A Number of Concerns

A. <u>We Do Not Support the Reintroduction of Tolling</u>

We strongly support the Commission's efforts to shorten the restricted security holding periods for both reporting and non-reporting companies from those set out in current Rule 144. We also support the elimination of most of the other requirements of Rule 144 applicable to non-affiliate security holders, so they can resell securities freely after the holding period (subject only to the continued availability of public information during a holding period of six months to one year).

We are concerned, however, by the Commission's proposal to require security holders to suspend, or "toll", the holding period during times in which they (or prior holders) have entered into certain hedging transactions, despite the proposal to limit the tolling period to a maximum of six months and to apply tolling only to securities of reporting companies (meaning that the maximum holding period for such securities would be one year). In particular, we believe the reinstitution of tolling is likely to be generally problematic from a practical, operational standpoint, will impose unnecessary additional costs on capital raising and is unnecessary to achieving the Commission's stated purpose.

At the outset, we note that the Proposing Release does not provide any evidence that justifies the reintroduction of tolling. In particular, the Commission does not identify any abuses or indeed any consequences arising from hedging activities relating to restricted securities that would provide a basis for the conclusion that hedging should result in tolling or other less favorable treatment under Rule 144. Similarly, the Commission does not identify any abuses that have arisen in connection with the shorter restricted security holding periods introduced in 1997, nor does it provide any data suggesting that abuses would result from shortening those periods even further.

Contrasting sharply with the absence of any evidence of abuse to support the reintroduction of tolling, the Commission's doing so can be expected to impose significant costs on market participants. The capital markets and the various transactional relationships among market participants have become significantly more complicated and intricate than they were in 1990, when the Commission eliminated tolling, or even than they were in 1997, when the Commission first suggested the possibility of reintroducing tolling (a suggestion opposed by many of the industry associations and market participants that chose to comment on that proposal). We believe tolling would impose significant operational and compliance costs that will outweigh at least some of the benefits likely to be derived from the introduction of a shorter holding period.

In particular, as discussed in more detail below, there will be significant operational and compliance difficulties in tracking securities subject to hedging transactions in a DTC environment or other clearance, settlement and custodial environment where constituent securities are fungible and positions netted. There will also be those difficulties in tracking securities subject to hedging at complex financial institutions where hedging takes place across numerous securities positions and changes daily or even intra-day. And there are hedging strategies that simply do not fit neatly into the proposal, especially in the area of debt securities. In the face of these and other difficulties, the potentially draconian penalty under Section 5 of the Securities Act for being wrong about the holding period—a strict liability right of rescission for the purchaser—leads us to believe that for many private offerings, especially those under Rule 144A, the *de facto* holding period could be one year rather than the six months in the Commission proposal. The Commission can say, as it appears to have in the Proposing Release, that even a one-year holding period is better than the existing rule. However, the Commission should recognize that the greater benefit of a shorter, six-month holding period that it intends to achieve through the proposed amendments simply will not be achieved in these significant circumstances, while the countervailing benefits of tolling to markets and investors are conjectural at best.

In short, we strongly oppose the reintroduction of the holding period tolling concept in any form, as we believe it is unnecessary and will prove unduly burdensome. Instead, we urge the Commission to adopt the restricted security holding periods as proposed (*i.e.*, six months for reporting companies, one year for non-reporting companies), while continuing to monitor resulting market developments. This reflects the approach the Commission took in 1997 when it shortened the previous holding periods under Rule 144 to those that currently apply, and would provide an opportunity for the Commission to evaluate (and modify if necessary) the new holding periods after some experience has been gained in their application and effect on the securities market.

B. <u>If Tolling Were to Be Reintroduced, Additional Clarifications to its Implementation Would Be Necessary</u>

For the reasons discussed above, we do not support the adoption of tolling. We are nonetheless commenting below on certain specifics of the Proposing Release relating to the application of tolling in the event the Commission continues its consideration of these aspects of the Proposing Release:

No Firm-Wide Aggregation. If tolling is reinstated, the Commission should provide guidance on how holders that may have multiple long, short or hedged positions in a security should calculate their positions in those securities. Many institutional holders, in particular, are likely to have multiple accounts, portfolios and/or trading desks that hold different positions in restricted and unrestricted securities of the same class. Aggregation of these various holdings is likely to be difficult from a practical standpoint; indeed, in some cases, different parts of the same entity may well be independent from one another (or even subject to informational barriers for regulatory reasons). In order to address this, we believe the tolling proposal should be modified to provide that a holding of restricted securities is tolled only to the extent that the restricted securities and any related hedge position are held or controlled by the same trading desk or investment unit, along the lines of the approach reflected in the separate accounts exception in the recently revised Rule 105 of Regulation M.[2]

Net Notional Amounts. Trading strategies have continued to evolve significantly since tolling was first eliminated in 1990. As a result of these increasingly complicated strategies, even individual trading desks or business units will often have multiple long and short positions with respect to the same securities. If tolling were to be reinstated, each of these separate parts of the organization would need to be able to determine the magnitude of the position subject to tolling (an exercise that would presumably need to be done on a daily basis). To assist holders of restricted securities in doing so, we respectfully propose that the Commission clarify, either in the rule or in the adopting release, that tolling would be measured from day to day with respect to a number of shares equal to the net notional amount of a holder's hedged position (or the position of the individual trading desk or investment unit in the circumstances noted above).

Effect of Partial Hedging. If tolling were to be reinstated, the Commission should provide further guidance to market participants with regard to how tolling would work in the case of a restricted securities position in the securities of a reporting company that is partially hedged during the initial six-month period (or thereafter, up to one year). We believe the Commission should clarify that tracing whether a particular security has been hedged at any point during the holding period is not necessary, and specify in the rule that, after the six-month holding period, a holder may freely sell a number of restricted shares equal to the portion of any restricted security holding that has been unhedged during the prior six months. We believe this approach would be in keeping with prior Commission guidance on tolling, in particular Q&A

2 *See* Rule 105 of Regulation M (permitting the purchase of an offered security in an account of a person where such person sold short during the Rule 105 restricted period in a separate account if decisions regarding transactions for each account are made separately and without coordination of trading or cooperation among or between the accounts).

#29 in the Commission's 1979 interpretive release relating to resales of restricted and other securities.[3]

By way of example, assume that a holder purchases 500 restricted shares from the issuer, and subsequently enters into various separate hedging arrangements: (i) a one-month hedge covering 200 shares, entered into three months after the purchase date; (ii) a two-month hedge covering 100 shares, entered into three months after the purchase date; and (iii) a two-month hedge covering 200 shares, entered into five months after the purchase date. While hedging arrangements covering 500 shares would have existed over the course of the initial six-month period, the hedged position would never have exceeded 300 shares, meaning that the holder should be able to resell freely 200 shares at the end of the six-month holding period.

In addition, the Commission should further clarify that, during the period from six months to twelve months, a holder should be able to sell a number of restricted shares equal to the portion of the restricted security holding that remained unhedged for a six-month holding period. Under the example above, which involved a hedge position on 300 shares during the fourth month after purchase, 100 shares during month five, 200 shares during month six and 200 shares during month seven, if the holder were to sell the 200 shares eligible for resale at the end of the six-month holding period, it should then be able to resell an additional 100 shares at the end of each of the seventh, ninth and tenth months after the purchase date.[4] The length of the holding period applicable to a holder's restricted shares may, however, depend on whether that holder sells any shares eligible for resale at the time they first become eligible for resale.[5] In any event, we understand from the proposal that where no hedging takes place during the first six months, the holding period has run and the securities will remain eligible for sale under Rule 144 notwithstanding any subsequent hedging activity.

<u>Tolling Should Be Limited to Hedging with Fungible Securities</u>. If tolling is reinstated, we believe the tolling requirements should be more narrowly tailored than those proposed by the Commission in the Proposing Release, and should only be applicable to securities that are fungible (*i.e.*, securities with identical terms), rather than simply to securities

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[3] SEC Release No. 33-6099 (Aug. 2, 1979).

[4] The shares eligible for sale at the end of month seven would be 100 of the 300 shares that were hedged in month four. Assuming those 100 were sold at that point, the holder would have 200 shares remaining. Of those 200 shares, 100 were covered by hedging transactions with an aggregate period of three months and 100 were covered by hedging transactions with an aggregate period of four months.

[5] Turning again to the example, a holder could sell 200 shares at the end of month six, but assume that it chooses not to do so. At the end of month seven, the holder could take the view that those 200 shares were the shares subject to the one-month hedge covering 200 shares entered into at the end of month three. After seven months, however, those shares would still be eligible for resale even with tolling. Tolling related to the holder's remaining 300 shares (resulting from the other two non-contemporaneous two-month hedging periods, one of which covered 100 shares from the end of month three to the end of month five and the other of which covered 200 shares from the end of month five to the end of month seven) would cease at end of month eight.

of the same class or securities convertible into securities of such class (in the case of equity securities) or nonconvertible debt securities generally (in the case of debt securities). While the Commission's proposal reflects pre-1990 tolling language, we believe that if tolling were implemented in this manner at this time it would have a significantly detrimental effect on the securities market.

The Commission has moved away from overly broad prohibitions of this nature in the interest of market efficiency in other circumstances. For example, when the Commission adopted Regulation M and eliminated Rule 10b-6 in 1996, it narrowed the focus of the anti-manipulation rules in certain respects. In the proposing release for Regulation M, the Commission noted that "same class and series" concept originally used in the old rule was overbroad, particularly with regard to its application to debt securities.[6] In the final rule, the Commission replaced the concept of "same class and series" with the concept of "reference securities", defined as "a security into which a security that is the subject of a distribution ... may be converted, exchanged or exercised or which, under the terms of the subject security, may in whole or in significant part determine the value of the subject security." The Commission explicitly noted that "Rule 101 [of Regulation M] would not apply to bids for and purchases of nonconvertible debt or preferred securities of the same issuer that are not identical in their principal features to the securities being distributed", and went on to state its belief "that the benefit of reducing compliance costs and maintaining a normal trading market for these other securities outweighs the possibility that bids for and purchases of such securities could be used to facilitate a distribution."

The following are specific examples of where the Commission's proposed rule could potentially require tolling but where we believe tolling would be inappropriate:

- Credit Default Swaps. A credit default swap ("CDS") is a derivative instrument designed to transfer the credit exposure relating to fixed-income securities between counterparties. Under a CDS, one counterparty pays a fee to the other counterparty in exchange for a contingent payment by the seller upon a credit event (such as a payment default). CDSs can be either cash settled or, in some cases, physically settled. We believe, however, that holding a CDS should not toll any holding of any restricted debt securities (convertible or otherwise), even if the CDS could technically be settled by means of delivery of those restricted securities, because the conduct of the CDS counterparty bears too attenuated a relationship to the initial private placement.

- Nonconvertible Debt Securities. Under proposed Rule 144, if a holder enters into any hedging transaction with respect to any nonconvertible debt security of an issuer, it would require that holder to toll the restricted securities holding period

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6 *See* SEC Release No. 33-7282 (Apr. 11, 1996) ("The same class and series language has been construed broadly to encompass similar securities of an issuer even though there is no inherent mathematical relationship between the prices of those securities. This has led to some complicated and not very clearly defined distinctions in applying the rule to offerings of debt.").

of any restricted nonconvertible debt security of such issuer that it holds. Such a broad imposition of tolling would, we believe, have a significant and negative impact on the market for debt securities. For the reasons given above, in such cases tolling should require that the debt securities in question be fungible.

- Baskets of Securities. One of the financial instruments that has become more widely used in the past 20 years since hedging was first eliminated are index funds and other similar baskets of securities. The use of these products is widespread, and many investors use them (and related derivative products) as part of their investment or hedging strategies. The Commission has recognized in a variety of contexts that transactions in an appropriately constructed basket should not be treated as transactions in the component securities of that basket. Rule 101 of Regulation M, for example, explicitly permits "basket transactions"[7] during a distribution of a component security in that basket. The staff has also granted no-action relief to permit brokers to sell equity securities of which they or their affiliates are the issuer without registration under the Securities Act in cases in which those securities formed part of a basket.[8] We believe the situation under Rule 144 is analogous and that the Commission should specify that hedging activities involving a basket of securities should not toll any of that holder's restricted security holding periods with respect to any of the individual securities included in that basket.

Use of "Put Equivalent Position" Generally in the Context of Debt Securities. The Commission has asked whether the concept of "put equivalent position" should be used in the tolling context. We note that, as defined in Rule 16a-1(h), the term "put equivalent position" applies only to equity (and not debt) securities. Accordingly, the Commission will need to establish a separate definition for these purposes, or to otherwise modify the existing definition.

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7 Under Rule 102(b)(6), basket transactions include bids or purchases, in the ordinary course of business, in connection with a basket of 20 or more securities in which a covered security does not comprise more than 5% of the value of the basket purchased. *See also PowerShares Exchange-Traded Fund Trust* (avail. Oct. 24, 2006) (expanding the scope of class relief for exchange-traded funds that include 20 or more component securities, where no component constitutes more than 25% of the total value of the basket, with respect to Rules 10a-1, 10b-17 and 14e-5 under the Securities Exchange Act of 1934, Rules 101 and 102 of Regulation M and Rule 200(g) of Regulation SHO).

8 *See, e.g., J.P. Morgan Securities, Inc.* (avail. June 5, 2007) (permitting broker subsidiary to sell its parent's equity securities without registration under the Securities Act, as part of an integrated set of transactions relating to a basket of S&P 500 securities, where the stock of the parent and its affiliates would comprise no more than 5% of the basket); *New York Stock Exchange, Inc.* (avail. Oct. 26, 1989) (permitting exchange members to engage in agency and proprietary transactions in baskets of securities that include equity securities issued by such member or its affiliate without compliance with Section 5 of the Securities Act, where the stock of the member and its affiliates would comprise 5% of the basket or less).

C. Assessing "Reasonable Belief" Regarding Historical Tolling Activity.

In addition to the changes suggested above with respect to the treatment of tolling under the Proposing Release, we believe that, should tolling be reinstituted, the practical application of the rules relating to tacking also needs to be further clarified. In particular, we believe the Commission should provide additional guidance as to how the requisite "reasonable belief" regarding a seller's historical tolling activity can be established. Proposed Rule 144(d)(3)(xi)(C) essentially provides that holding periods of previous owners should be excluded insofar as they were hedged by a put equivalent position unless "the person for whose account the securities are sold reasonably believes that no such position was held by a previous owner." While proposed Rule 144(g)(3) provides that the reasonable inquiry required by that rule should include information about any short position or put equivalent position of the seller or any prior holder, it does not indicate whether the reasonable belief required by Rule 144(d)(3)(xi)(C) can be established through that inquiry, nor does it explain how a purchaser other than a broker might establish such a belief. The failure to establish an appropriately reasonable belief could potentially result in a violation of Section 5 of the Securities Act, were a broker's or subsequent purchaser's belief subsequently deemed unreasonable following a public resale of restricted securities at a time when those securities in fact continued to be restricted.

In order to obviate this concern, the Commission should provide (either in the rule or in the adopting release) additional guidance as to what steps a broker or purchaser should take in order to establish the requisite reasonable belief. In setting those standards, however, the Commission should bear in mind that it may be difficult (if not impossible) for brokers or purchasers to get information other than by making inquiries of the seller. In the case of a broker, even if the broker's personnel are directly aware of hedging activity by a seller, those personnel cannot be expected to be aware of the full extent of a seller's hedging activities, the entirety of its holdings, the extent of its hedging positions, or the holding period(s) applicable to each restricted security holding or net hedge position. This issue is exacerbated by the fact that brokers have multiple desks and units that interact with customers – some of which may be on the other side of informational barriers – and many customers have accounts with multiple brokers. And purchasers who are not brokers may have little if any ability to conduct independent investigations or otherwise obtain information about a seller's hedging activities other than through inquiries of the seller.

Accordingly, we believe the most practical way to address this issue would be to provide that, in order to establish a reasonable belief, a broker or purchaser can rely solely and without further inquiry on the immediate seller's representation as to the relevant facts. Absent such a provision, significant additional risk will be associated with the determination of holding periods in a tacking context. Even if the purchaser requires a written representation from the seller that his or her holding period has not been tolled, absent the safe-harboring of this requirement the purchaser would ultimately bear the risk of engaging in a public distribution when he or she attempts to sell the securities of a reporting company pursuant to Rule 144 upon the expiration of the restricted security holding period (unless, of course, the holder simply determines to hold the securities for one year, thus eliminating the benefit of the shorter holding period). Notably, this risk did not exist when tolling was required under pre-1990 Rule 144, as tacking by unaffiliated holders was not permitted under the rule at that time.

We also note that the very need for a potential purchaser to obtain additional certifications or representations or to make additional inquiries of a seller will decrease the efficiency of the market. As a general matter, a requirement to make representations in connection with a sale of securities imposes additional costs and decreases the liquidity of those securities. Such a requirement will also have significant implications on the trading markets for restricted securities, including in particular the market for securities that are resold pursuant to Rule 144A. In August 2007, the SEC approved a NASDAQ rule change and issued a related exemptive order that, among other things, will permit NASDAQ to establish a market to enable anonymous trading in Rule 144A securities by brokers and dealers using the PORTAL system.[9] The Commission indicated its belief that these activities would be "another step to improve the institutional resale markets for unregistered securities" and that it would "serve the public interest by providing a central (but not an exclusive) location for the quotation, trade negotiation, and trade reporting of Rule 144A securities." If Rule 144 is amended to impose a "reasonable belief" requirement with respect to tacking, that requirement would impair the liquidity of the Rule 144A market, by essentially requiring that any securities traded anonymously on PORTAL be held for one year before they could be publicly sold without registration.

II. Further Revising the Manner-of-Sale Conditions and Volume Limitations

A. Manner-of-Sale Conditions

We support the Commission's proposal to eliminate the manner-of-sale conditions both for non-affiliates generally and for affiliates with respect to debt securities, preferred stock and asset-backed securities. In this regard, we note our belief that the holding period requirements of Rule 144 should generally suffice to achieve the non-distribution purposes of the rule. Consequently, we believe it would also be appropriate for the Commission to consider further liberalization of the manner-of-sale requirements applicable to affiliates in certain circumstances. In particular, we ask that the Commission explicitly state that certain categories of transactions are by their nature not consistent with a distribution. These transactions would include:

- VWAP Transactions. We recommend that the Commission modify the manner-of-sale requirements to include all variable-weighted average price ("VWAP") sales of equity securities by affiliates. Specifically, we recommend that the Commission include a transaction based on a VWAP price over a minimum period of time (*e.g.,* two hours) sufficient to prevent the VWAP trade being at a price anything other than reflective of general market conditions for the security in question. This modification would enhance the ability of investors, particularly

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9 *See* SEC Rel. No. 34-56172 (July 31, 2007); SEC Rel. No. 34-56176 (July 31, 2007).

institutional investors, to effectuate transactions based on VWAP prices while achieving the "non-distribution" purposes of the rule.

- Riskless Principal Transactions. A "riskless principal" transaction is one in which, after receiving a customer's order to buy a security, the broker purchases the security as principal from another member or customer to satisfy the buy order, or after receiving a customer's order to sell, the member sells the security as principal to another member or customer to satisfy the order to sell. Although the staff has previously, in response to a request for no-action relief, stated that riskless principal transactions are not equivalent to Rule 144 brokers' transactions,[10] we urge the Commission to reconsider this point, to reverse that prior no-action response and to permit riskless principal sales of equity securities by affiliates to be treated in the same manner as brokers' transactions. We believe as a practical matter there is no meaningful distinction between riskless principal transactions and agency transactions constituting brokers' transactions, and permitting riskless principal trades as an equivalent alternative to agency transactions would provide meaningful flexibility in facilitating the resale of restricted securities.

B. Volume Limitations Applicable to Debt Securities

In addition to the changes proposed by the Commission in the Proposing Release, we believe the Commission should also consider eliminating or modifying the volume tests for determining the amount of debt securities that may be sold within the time periods specified by Rule 144(e). Unlike equity securities, which generally are listed on a national securities exchange or quoted on an inter-dealer quotation system, debt securities generally trade over-the-counter, and thus the applicable volume test is limited to 1% of the outstanding amount during any three-month period. We believe this limit is overly restrictive and, if not expanded, will significantly undermine the benefits the Commission seeks to achieve by eliminating the manner-of-sale restrictions on sales of debt securities by affiliates.

III. Harmonization of the Holding Period of Regulation S With Restricted Security Holding Periods

As noted above, we strongly endorse the Commission's proposal to shorten the restricted security holding periods under Rule 144. As part of that initiative, the Commission should also shorten the amount of time an offshore purchaser would be required to hold the security before selling it to a U.S. purchaser pursuant to Regulation S.

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10 *See Goldman, Sachs & Co.* (avail. Dec. 16, 1993) (noting that the staff "...is unable to concur with your view that the described riskless principal transactions ... may be effected as 'brokers' transactions' within the meaning of paragraphs (f) and (g) of Rule 144" and that "principal transactions are not contemplated by the Section 4(4) brokers' exemption").

The Commission has asked whether it would be appropriate to shorten to six months the Category 3 distribution compliance period for equity securities of U.S. domestic issuers. We support that change to Regulation S because there is no logical basis for imposing more burdensome restrictions on offshore sales than on private placements in the United States. We also respectfully suggest that, even if it otherwise determines to adopt tolling, the Commission should not do so for purposes of the distribution compliance period under Regulation S, given the practical difficulties in monitoring hedge positions and the even greater likelihood that persons outside the United States will be unable to do so.

IV. Matters Affecting Non-Affiliate Holders

We support the Commission's proposal to eliminate the conditions of Rule 144 for non-affiliates other than the current information reporting requirement for securities of reporting companies in the period from six months to one year after the initial purchase of the securities from the issuer or its affiliate. We do not believe any additional conditions should be imposed on non-affiliates. We respectfully suggest, however, that in addition to the changes proposed for non-affiliates in the Proposing Release, the Commission also make clear that once restricted securities become eligible for unrestricted resale, they may be de-legended immediately and without regard to any present intention to transfer them.

In order to ensure that restricted securities are not freely traded, a market practice of legending restricted securities has evolved. Although Rule 144 does not specifically require that restricted securities be legended, the Commission originally encouraged issuers to legend their securities when the rule was adopted, and most issuers have taken this advice to heart.[11] In the past, when asked to clarify the interpretation of Rule 144(k) in respect of de-legending restricted securities in advance of sale, the staff has advised that determining whether or not to remove a legend is a matter for the issuer to determine.[12] It would, however, facilitate the resale process if the Commission were to state in the adopting release that it would not object if a restricted securities legend were removed from securities held by a non-affiliate whenever the securities cease to be restricted, even absent an immediately pending resale of those securities. We do not believe providing this guidance would undermine investor protections in any way. It would, however, provide a significant benefit to market participants by increasing transaction certainty, reducing delays associated with the removing of legends and decreasing both the number of failed trades and the length of such failures in those cases in which securities are subsequently delivered after the settlement date.

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11 *See* SEC Rel. No. 5223 (Jan. 11, 1972) ("...Although such assurance cannot be obtained merely by the use of an appropriate legend on stock certificates or other evidences of ownership, or by appropriate instructions to transfer agents, 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.").

12 The Commission's website states that "[t]he removal of a legend is a matter solely in the discretion of the issuer of the securities." (http://www.sec.gov/investor/pubs/rule144.htm).

V. Revisions to Form 144 and Form 4

The Commission has proposed amendments to Form 144, and has also asked for comment on whether and to what extent Form 144 can or should be combined with Form 4. We note that, as a result of the other rule changes proposed by the Commission, the only persons who would be required to file a Form 4 would be affiliates (as Rule 144(h) would no longer apply to non-affiliates under proposed Rule 144). Accordingly, the only time a Form 144 filing would be required when a Form 4 filing would not is the unlikely circumstance that a seller is an affiliate due only to some mechanism of control that does not involve significant share ownership or status as a director or executive officer. This is at best a remote possibility, and we believe the Commission should consider whether the filing of Form 4 alone would suffice to protect investors, and therefore whether it should simply eliminate Form 144 entirely.

If, however, the Commission determines to keep Form 144 in some format (whether or not combined with Form 4), we believe it would be inappropriate to amend Form 144 to require selling securityholders to disclose the existence of prior hedging transactions. This information is superfluous to investors, as any securities that are publicly sold by affiliates pursuant to Rule 144 will need to have been sold after the relevant restricted securities holding period has expired, regardless of whether tolling has taken place. The existence of past tolling thus will have no impact on the securities going forward.

VI. Other Matters

A. SEC Staff Interpretations of Rule 144

We generally support the Commission's proposal to codify a number of existing staff interpretive positions relating to Rule 144. By formalizing these positions, the Commission will make it easier for market participants to understand and comply with the Rule, thereby increasing market and regulatory efficiency. We do, however, believe the staff should consider making certain additional changes in codifying those interpretations.

We fully support the Commission's proposal to codify the position that the holding period of restricted securities that underlie warrants or options may be tacked to the holding period of the exercised securities, so long as the underlying securities are received in connection with a "cashless" exercise of the original securities (*i.e.*, the underlying securities are issued in a transaction involving no consideration other than the surrender of the relevant warrant or option). There are, however, certain circumstances in which a company may not be able to issue options that do not require any consideration upon exercise, but may be able to issue options that require only a nominal payment when exercised. Accordingly, we believe the proposed rule should be expanded to include warrants and options that have a *de minimis* exercise price (*e.g.*, less than 1% of the market value of the security to be received on exercise).

In addition, the Commission should consider clarifying the language of proposed Note 2 to Rule 144(d)(3)(x) to make clear that, where an option or warrant initially is not purchased for cash or property, and thus creates no investment risk, but is subsequently resold to a purchaser for value, the holding period for those securities would begin to run from the date of that subsequent resale.

B. Proposed Amendments to Rule 145

We generally support the Commission's proposed changes to Rule 145, including in particular the elimination of the "presumptive underwriter" provisions contained in Rule 145(c) and (d).

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We very much appreciate this opportunity to provide you with our thoughts on the Proposing Release. We would be pleased to respond to any inquiries you may have regarding this letter or our views on the Proposing Release more generally. Please contact Leslie N. Silverman, Alan L. Beller or Michael D. Dayan at (212) 225-2000.

Very truly yours,

Cleary Gottlieb Steen Hamilton

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: Securities and Exchange Commission
Hon. Christopher Cox, Chairman
Hon. Paul S. Atkins, Commissioner
Hon. Roel C. Campos, Commissioner
Hon. Annette L. Nazareth, Commissioner
Hon. Kathleen L. Casey, Commissioner

Securities and Exchange Commission – Division of Corporation Finance
Mr. John W. White, Director