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September 6, 2007

Via email: rule-comments@sec.gov

Ms. Nancy M. Morris,
Secretary,
Securities and Exchange Commission,
100 F Street, NE,
Washington, DC 20549-1090.

Re: Proposed Amendments to Rule 144 and Rule 145 – File No. S7-11-07

Dear Ms. Morris:

This letter is in response to Release No. 33-8813 (the "*Proposing Release*") in which the Commission solicits comments on proposed amendments to Rule 144 and Rule 145.

As a general matter, we strongly support the proposed revisions and believe that they will remove unnecessary obstacles to the sale of restricted and control securities without diminishing investor protection. We do, however, have some concerns and some suggestions, as set forth below.

A. Rule 144 Manner of Sale Requirements

1. The manner of sale requirement should be eliminated for all securities.

We support the proposed elimination of the manner of sale requirement in Rule 144(f) for debt securities, and believe that the manner of sale requirement should also be eliminated for equity securities. The Proposing Release expresses the concern that "eliminating the manner of sale limitations for equity securities may lead to abusive transactions." The Proposing Release, however, fails to identify what those abusive transactions might be.

We agree with the previously stated view of the Commission that the manner of sale requirements "appear to impose obstacles to transactions that are not distributive in nature" and that so long as the other requirements of the Rule are met, "the manner in which that transaction is effected does not appear to be determinative of a distribution."[1] We believe that the manner of sale requirements do not advance investor protection. Our experience is that these requirements limit the form of offerings and the development of market practices (including the use of alternative trading systems, as discussed further below) and reduce liquidity. There is no reason to discourage privately negotiated transactions that are otherwise in compliance with the Rule. It is our view that there is no particular risk of abuse that would outweigh the benefits of removing unnecessary restraints on the manner in which otherwise permissible sales can take place.

The Proposing Release suggests that the manner of sale provisions prevent abuses by retaining brokers as "gatekeepers" to promote Rule 144 compliance. In our experience, Rule 144 compliance is primarily attained by the use of certificates bearing restrictive legends. A Rule 144 seller would need to obtain unlegended certificates to settle the Rule 144 transaction, and an issuer normally will not instruct the transfer agent to issue unlegended certificates unless the seller provides evidence of compliance with Rule 144. We believe this process will continue and provides reasonable assurance as to Rule 144 compliance, whether or not a broker is involved in the transaction.

2. Rule 144 should permit sales through alternative trading systems.

There is currently uncertainty as to the ability of a broker or dealer to effect a Rule 144 sale through an alternative trading system. While the Commission has sought to address the evolution of market systems in other ways, including through the adoption of Regulation ATS and Regulation NMS, we believe that the manner of sale requirement has not kept pace and, as discussed above, should be eliminated. If the Commission determines not to eliminate the manner of sale requirement entirely, we believe that the Commission should permit Rule 144 sales through alternative trading

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1 *Revision of Rule 144, Rule 145 and Form 144*, Rel. No. 33-7391, [1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,908, at 89,265 (Feb. 20, 1997), available at http://www.sec.gov/rules/proposed/33-7391.txt ("For example, a consequence of the manner of sale requirements is that a seller may not privately negotiate a sale of a public company's stock in reliance on Rule 144 without a broker even if the seller does not solicit the buyer's purchase of the securities, the holding period has been satisfied and the amount sold is within the volume limitations. Similarly, sellers are unable to use trading systems such as passive bulletin boards to contact potential buyers that have indicated an interest in buying the type of securities to be sold under Rule 144.")

systems. Without this relief, it is unclear to us how broker-dealers would comply with both Rule 144 and Regulation NMS.

3. Riskless principal transactions should satisfy the manner of sale requirement.

In Goldman, Sachs & Co. (Dec. 16, 1993) (the "*Section 4(4) Letter*") the staff of the Commission was not willing to agree that the manner of sale requirement should be interpreted to include riskless principal transactions. We believe that the position of the staff in the Section 4(4) Letter embodies a distinction with no practical difference and should be reversed or overruled by the Commission, in the event that the Commission determines not to eliminate the manner of sale requirement entirely. We perceive no policy reason to distinguish between "true" brokerage transactions and riskless principal transactions for purposes of Rule 144(f). In both cases, the securities are entering the market in ordinary trading transactions; no special sales or distribution efforts are occurring in either case.

The adoption of Regulation NMS has created an increased need for clarification of this issue. As we understand it, as a result of Regulation NMS, broker-dealers may be more likely to effect a portion of a traditional brokerage transaction as a riskless principal transaction. A broker-dealer should not be forced to choose between complying with Regulation NMS and Rule 144.

B. Treatment of Derivative Transactions

1. The Goldman, Sachs & Co. interpretive letter should be extended to Rule 144.

In the Goldman, Sachs & Co. interpretive letter (Oct. 9, 2003) (the "*Registered Hedging Letter*"), the staff of the Commission permitted the use of forward and option contracts to facilitate distributions of securities registered under the Securities Act of 1933 (the "*Securities Act*"). Under the Registered Hedging Letter, so long as the maximum number of securities underlying the forward or option contract are sold by the financial institution counterparty in compliance with the prospectus delivery requirements of the Securities Act, the securities underlying the forward or option contract may be used to close out short positions created by the financial institution counterparty in hedging the forward or option contract. The Registered Hedging Letter appropriately focuses on the manner in which the securities underlying the forward or option contract enter the market and not on the technical contractual means by which the distribution occurs. This, in our view, is the appropriate focus for Rule 144 as well.

From a policy perspective, the focus on Rule 144 should be on the manner in which the securities enter the marketplace and not on the contract causing the

distribution. So long as a broker-dealer sells the maximum number of securities underlying a forward or option contract into the marketplace in transactions that comply with Rule 144(f) and (g), we see no reason not to permit the underlying securities at settlement to be used to close out short positions created by the financial institution counterparty in hedging the forward or option contract.

Extending the Registered Hedging Letter in this manner would eliminate the current uncertainty as to the scope of Goldman, Sachs & Co. (Dec. 20, 1999) (*"GS& Co. 1"*), where the staff of the Commission indicated that variable share pre-paid forward contracts could be executed in accordance with Rule 144. The scope of GS&Co. 1 is unclear. Does it apply to post-paid forwards? Must pre-paid forwards have a minimum and maximum delivery obligation and, if so, how far apart can these delivery obligations be? Does it apply to a combined option transaction with the same economic effect? Extending the Registered Hedging Letter to Rule 144 would eliminate these difficult interpretational issues.

Finally, as a policy matter, we believe Rule 144 should be amended as set forth above to reflect the dramatic growth in the over-the-counter derivatives market that has occurred since Rule 144 was adopted. Substance (how the securities enter the market) should control over form (the nature of the contract that causes the securities to enter the market), and innovation should be encouraged and not discouraged.

C. Rule 144 Volume Limitations

1. Volume limitations should be eliminated for debt securities.

Under the proposed amendments, the volume limitations would no longer apply to non-affiliates, but would not be modified with regard to affiliate sales. We support the elimination of the volume limitations for sales by non-affiliates. With regard to affiliate sales, while we believe that the current volume limitations are reasonable and have worked well in the context of equity securities, it is clear that they present a significant obstacle to the utility of the Rule with regard to debt securities. Since debt securities rarely, if ever, trade through a national securities exchange or automated quotation system, Rule 144 sales of debt securities are effectively limited to 1% of a particular issuance of debt securities. For example, in the case of a debt security with $100 million principal amount outstanding, only $1 million could be sold under the Rule. This level of volume has, in our experience, rendered Rule 144 largely unavailable for debt securities. In light of the institutional, principal-to-principal nature of the trading market for debt securities, we believe that the application of a volume limitation does not serve any significant investor protection purpose. In a principal-to-principal transaction, the amount of securities sold does not increase the "distributive" nature of the transaction for Section 2(a)(11) purposes.

If the Commission nevertheless determines to retain the volume limitation with respect to debt securities, we believe that the limitation should be modified to be equal to 25% of the particular tranche of debt securities.

2. Acting-in-concert aggregation should be limited to affiliates.

Rule 144(e)(2)(vi) requires aggregation when two or more affiliates or other persons agree to act in concert for the purpose of selling securities. While we appreciate the policy behind aggregation for affiliates acting in concert, we do not see why, under the proposed amendments, this should apply to coordinated sales with non-affiliates. Unlike under current Rule 144, a non-affiliate under the proposed rule would never have a volume limitation. Since a non-affiliate is never subject to a volume constraint, it is unclear why a non-affiliate should effectively be subject to a volume limitation simply because he or she sells securities in concert with an affiliate. From a policy perspective, there is no avoidance or evasion issue with respect to coordinated sales between affiliates and non-affiliates since the non-affiliate securities may be sold into the market without limit and the affiliate is always subject to the applicable Rule 144(e) volume limit. Accordingly, in no case will additional securities enter the market through the coordinated sales effort than would have entered the market if the same transactions occurred in an uncoordinated manner.

D. Form 144

1. The failure to file or the untimely filing of a Form 144 should not result in a loss of the safe harbor.

The Commission has indicated that the filing of a Form 144 is "an integral part of the Rule."[2] We believe that neither the failure to file a Form 144 nor the failure to file a Form 144 within the required time period should preclude reliance on Rule 144. The filing of a Form 144 has no impact on how the securities enter the marketplace, which is the focus of Rule 144. The filing or non-filing of a Form 144 does not make a sale more or less like a "distribution" for Section 2(a)(11) purposes; the filing is a mere administrative matter. We believe that it is draconian for a seller to lose the benefit of the Rule 144 safe harbor just due to an administrative error. This change would be consistent with the Commission's position on the failure to file a Form D.[3]

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[2] *The Use of Form 144*, Rel. No. 33-5403, 1 Fed. Sec. L. Rep. (CCH) ¶ 2705G, at 2819-2 (June 14, 1973).

[3] Of course, Regulation D is unavailable to an issuer that is subject to an injunction for the failure to file a Form D. See Rule 507 under Regulation D.

2. The Form 144 deadline should match the Form 4 deadline for all filers.

The Proposing Release requests comment on whether the Form 144 deadline should be revised to coincide with the two-business-day deadline for filing a Form 4. We believe it should, and that this deadline should apply for all Form 144 filers, whether or not they are Form 4 filers. Under the current rule, a Form 144 generally must be mailed on the trade date of a transaction. Transactions often occur near the end of the day and it is often administratively difficult to complete, review, approve, execute and mail the Form 144 on the same day.

We believe the timing applicable to Form 4 is the best model for the timing of Form 144 disclosure. A filing within two business days is relatively prompt, but gives the filer a realistic amount of time to carefully prepare and review the filing after the reported transaction has occurred.

3. Form 144 and Form 4 should be combined and the scope of information required to be disclosed with respect to the Rule 144 transaction should be reduced.

We support the proposal to permit a Form 4 filing to satisfy the Form 144 filing requirement. The filing of two forms reporting the same transaction is an unnecessary administrative burden for both filers and the Commission.

We believe, however, that the Form 4 should not be revised to include all the information that is currently required by Form 144, as this information does not provide any significant benefit. The current Form 144 requires disclosure of information that is largely geared toward permitting readers to assess whether the Rule 144 requirements have been satisfied. The application of the Rule 144 requirements in certain situations can be complex, however, and we believe that no purpose is served by requiring details such as the broker executing the transaction, the person from whom the securities were acquired, the nature of the acquisition transaction, the details of past sales or, as is now proposed, the details of hedging transactions. This information is neither necessary nor sufficient for determining whether the transaction complied with Rule 144 and, in some cases, may be sensitive information regarding private transactions that the seller would not want publicly disclosed. We believe that the information currently required by page two of Form 144, and the name of the executing broker on page one, should be eliminated and replaced with a statement of the date the shares were acquired from the issuer or an affiliate of the issuer and an affirmation by the seller that the sale complied with the requirements of Rule 144. We believe these changes should be made to Form 144 itself and should be reflected in the revised Form 4.

E. Other Substantive Comments

1. The one-year distribution compliance period of Regulation S should be modified to conform to the reduced Rule 144 holding period.

In the case of Category 3 transactions involving equity securities of a domestic issuer, Regulation S provides that the equity securities may not be resold into the United States during a one-year distribution compliance period. The Proposing Release solicits comments as to whether this period should be reduced to six months to conform to the reduced Rule 144 holding period. We believe that it should, in order to maintain consistency between the two rules. Regulation S and Rule 144 have been designed to work together. Under Rule 905 of Regulation S, equity securities of a domestic issuer sold under Regulation S are "restricted securities" under Rule 144. In 1998, Regulation S was revised to conform the distribution compliance period to the one-year Rule 144 holding period. The adopting release for these revisions stated:

> The expiration of the one-year period will coincide with the period when limited resales may begin under Rule 144. At that point, the distribution compliance period is unnecessary. A two-year distribution compliance period, as originally proposed, could be confusing to apply because the distribution compliance period under Regulation S would cover a longer period than the holding period under Rule 144.[4]

The purposes of the two holding periods are the same – to ensure that resales following an unregistered offering by an issuer or an affiliate are not a distribution. We believe that the Commission should continue the historical concordance of these two holding periods by reducing the Regulation S period to six months to conform to the reduced Rule 144 period.

2. The Commission should codify the staff's position permitting tacking under Rule 144 when an issuer reincorporates to change the state of domicile.

The Proposing Release contains a number of codifications of existing staff positions, including several on tacking, designed to provide clarity and eliminate uncertainty as to these positions. It is a well-settled position of the SEC staff that tacking of the Rule 144 holding period is permitted in the case of a reorganization to change the

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[4] *Offshore Offers and Sales (Regulation S)*, Rel. No. 33-7505, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,006, at 80,161 (Feb. 17, 1998), *available at* http://www.sec.gov/rules/final/33-7505.htm.

issuer's state of domicile.[5] This is an exception to the general rule that tacking is not permitted between securities of different issuers.

We believe that the Commission should codify this staff position to provide certainty in its application. This would be consistent with Rule 145(a)(2) and with the codification of tacking for holding company formations in proposed Rule 144(3)(d)(ix).

3. The Commission should confirm that a non-affiliate pledgee may tack the holding period of an affiliate pledgor and sell the securities upon foreclosure pursuant to Rule 144.

The Commission staff has historically permitted a non-affiliate pledgee to tack the holding period of a pledgor of control securities and to sell the securities upon foreclosure pursuant to Rule 144(k), assuming the affiliate had held the control securities for at least two years.[6] Since this is a "constructive" interpretation of Rule 144(k), we believe that it would be advisable to codify this position.

4. The Commission should clarify that Rule 145 does not prevent a person who is not a presumptive underwriter from entering into hedging transactions.

The Proposing Release would generally eliminate the presumptive underwriter provision of Rule 145, except in the case of a transaction involving a shell company other than a business combination-related shell company. This change will cause affiliates of a target company to be accorded the same treatment as non-affiliates of the target company. Accordingly, like non-affiliates of the target, affiliates should, under the proposed amendment, be able, from a Section 5 perspective, to immediately engage in hedging transactions in the acquiror's securities. We believe the Commission should clarify, either through interpretive guidance in the adopting release or in the final rule

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5 *See, e.g.*, *Brewer Homes*, SEC no-action letter (Aug. 26, 1994). Also see Rule 145(a)(2), which provides that such reorganizations are not subject to Rule 145.

6 *See* Division of Corporation Finance, Rule 144 Compliance and Disclosure Interpretations, Question 209.01, *available at* http://www.sec.gov/divisions/corpfin/guidance/rule144interp.htm.

itself, that hedging transactions by a person who is not a presumptive underwriter are permissible.[7]

F. Technical Comments

1. *Preliminary Note*. In number 1 in the Preliminary Note, insert "or any person who sells restricted securities on behalf of that person" after "securities" and before "will."

2. *Note to Rule 144(d)(3)(ii)*. Delete ", so long as the conversion or exchange itself meets the conditions of this section." A conversion or exchange that is not made pursuant to Section 3(a)(9) of the Securities Act will never meet the requirements of Rule 144. This change would conform the Note to Note 1 to Rule 144(d)(3)(x).

3. *Note 2 to Rule 144(d)(3)(x)*. Delete "so long as the conditions of Rule 144(d)(1) and Rule 144(d)(2) are met at the time of exercise." The holding period of Rule 144(d)(1) will never be satisfied upon the exercise or conversion.

4. *Rule 144(d)(3)(xi)(A)*. Revise to make clear that tolling applies to the holding period of the convertible security if the underlying equity security is hedged.

5. *Rule 144(d)(3)(xi)(B)*. Substitute "not equity securities, as defined in § 230.405," for "nonconvertible debt securities" to ensure all securities are encompassed by (A) or (B) of clause (xi).

6. *Rule 144(d)(3)(xi)(C)*. Substitute "securities other than equity securities, as defined in § 230.405" for "nonconvertible debt securities" in each place it appears.

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We appreciate this opportunity to comment on the proposed amendments, and would be happy to discuss any questions with respect to this letter. Any such questions may be directed to John T. Bostelman (212-558-3840) or to Robert W. Reeder (212-558-3755) in our New York office.

Very truly yours,

SULLIVAN & CROMWELL LLP

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[7] We recognize, of course, that such hedging transactions could raise anti-fraud and disclosure issues.