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December 30, 2008

Ms. Michele M. Anderson, Chief
Office of Mergers and Acquisitions
Division of Corporation Finance
Securities and Exchange Commission

Mr. Nicholas P. Panos, Senior Special Counsel
Office of Mergers and Acquisitions
Division of Corporation Finance
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Calculation of Sections 13(d) and 13(g) Beneficial Ownership

Dear Ms. Anderson and Mr. Panos:

On behalf of our client, Goldman, Sachs & Co. (“GS&Co.”), we request interpretive guidance from the staff (the “Staff”) of the Securities and Exchange Commission (“SEC”) concerning the calculation of “beneficial ownership” for purposes of Rule 13d-3 under the Securities Exchange Act of 1934 (the “1934 Act”) with respect to GS&Co.’s filing obligations under Sections 13(d) and 13(g) of the 1934 Act. In particular, we request the Staff to confirm that GS&Co. may calculate beneficial ownership without giving effect to internal positions¹ reflected in its Stock Record as described below.

Background

The Stock Record

GS&Co., in accordance with Rule 17a-3 under the 1934 Act, maintains a stock record (the “Stock Record”). The Stock Record reflects proprietary long and short trading positions by account and facilitates risk management and profitability measurement. GS&Co.’s Stock Record is not designed to reflect, and does not necessarily reflect, the ability of a proprietary account to vote or dispose of securities.

¹ Internal positions are positions reflected on GS&Co.’s Stock Record as to which GS&Co. lacks voting and dispositive rights.

Rather, the Stock Record is designed to reflect the account's economic exposure to a security. GS&Co.'s Stock Record does not reflect equity swaps or single stock futures.

Meeting Delivery Obligations

At the end of every business day GS&Co. determines its securities delivery obligations. These obligations may arise from, among other things, long sales or short sales of securities by proprietary accounts. GS&Co. seeks to meet its delivery obligations by using securities held in proprietary accounts or, to the extent permitted by Rule 15c3-3 under the 1934 Act, by borrowing and rehypothecating securities held in customer accounts or by borrowing securities from third parties. This process may result in GS&Co. using securities from one proprietary account to meet the delivery obligations from a sale in another proprietary account.

As a result, in a very simple example, if one proprietary desk at GS&Co. held 100 shares of XYZ long in its account and a second proprietary desk sold short 100 shares of XYZ,² GS&Co.'s end of the day processes would result in GS&Co. using the 100 share long position in the first account to meet the 100 share delivery obligation in the second account. The use of the 100 shares to meet the delivery obligation would dispose of GS&Co.'s voting and dispositive rights in those shares, and GS&Co. would treat the delivery as a disposition for purposes of analyzing its amendment obligations under Section 13(d). GS&Co.'s Stock Record, however, would continue to show the first desk long 100 shares of XYZ and the second desk short 100 shares of XYZ.

GS&Co.'s internal settlement and delivery processes are designed so that GS&Co. will not, at the end of business on any day, have a long securities proprietary position and a short securities proprietary position at the same time, a so-called "short-against-the-box" position, although the Stock Record would continue to reflect both a long and short position.³ Rather, GS&Co.'s internal processes are designed to use the long securities proprietary position to meet GS&Co.'s delivery obligations on any short sale. This process is performed to minimize transaction volume, securities borrow transactions and funding needs.

² For purposes of simplicity, this example assumes that these are the only two transactions effected by GS&Co. proprietary or customer accounts in the shares of XYZ and that no other proprietary or customer account at GS&Co. has a position in shares of XYZ.

³ This method of reporting positions in the Stock Record is consistent with GS&Co.'s historical practices of maintaining its Stock Record and is intended to satisfy GS&Co.'s books and records requirements under the 1934 Act.

Offsetting Orders

In order to provide the best and most efficient execution of customer and proprietary transactions, GS&Co. has order handling systems that match purchase and sale orders for both customer and proprietary accounts. Thus, in a simple example, if one GS&Co. proprietary desk placed a proprietary order to buy 100 shares of XYZ and another desk simultaneously placed an order to sell 100 shares of XYZ at the same price, GS&Co.'s internal processes and systems would match the buy and sell orders.⁴ In such a case, no transaction with the market will have occurred – there will have been no third-party purchase, sale or borrowing of shares of XYZ. Yet, because GS&Co.'s Stock Record reflects economic exposure (and not voting or dispositive rights), the Stock Record would reflect a long position of 100 shares of XYZ in the first account and a short position of 100 shares of XYZ in the second account.

Analysis

Rule 13d-3 defines beneficial ownership for purposes of Sections 13(d) and 13(g) of the 1934 Act as being present where a person, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares voting power or investment power over a security. Rule 13d-3, by its terms, requires either “voting power” or “investment power” over a security.

The definition of beneficial ownership in Rule 13d-3 is used in a number of circumstances. For example, the definition is used to determine:

- when a person is obligated to make a Schedule 13D or Schedule 13G filing;⁵
- when 1% or more of the outstanding subject securities have been acquired for purposes of determining when a Schedule 13D must be amended;⁶
- when more than 2% of a class of subject securities has been acquired for purposes of determining the need to make a filing pursuant to Section 13(d)(6)(B) of the 1934 Act;

⁴ This example assumes neither account has a pre-existing position in shares of XYZ and that there are no other customer or proprietary transactions in the shares of XYZ.

⁵ See Rule 13d-1. Rule 16a-1(a)(1) under the 1934 Act also uses beneficial ownership for purposes of determining when a person is a greater than 10% beneficial owner for purposes of Section 16 of the Exchange Act.

⁶ See Rule 13d-2(a) (last sentence).

- when a passive investor under Rule 13d-1(c) must file on Schedule 13D;⁷ and
- when a Schedule 13G filer must file an amendment due to acquisitions of subject securities.⁸

Our request for interpretive advice applies in each of these cases where beneficial ownership is used.

Beneficial ownership under Rule 13d-3 does not encompass the mere right to receive a cash payment from the increase or decrease of the price of a subject security.⁹ Rule 13d-3 requires at least one of voting or dispositive rights in a subject security. As a result, we believe that, in calculating beneficial ownership, positions that do not give GS&Co. any voting or dispositive rights over the subject securities should be excluded from the calculation. (We refer to proprietary positions where GS&Co. lacks voting and dispositive rights as “internal positions”.)

As applied to GS&Co.’s Stock Record, we believe that GS&Co. should not simply add up all long positions in the Stock Record. Because GS&Co.’s Stock Record reflects economic ownership (and not voting or dispositive rights), adding up all the long positions may result in GS&Co. reporting purely internal positions. In order to avoid this result, we believe that GS&Co. should eliminate internal positions by adding all the long proprietary positions and then subtracting the aggregate short proprietary position (by security) on its Stock Record. In our view, this treatment is appropriate since GS&Co. will use any long securities proprietary position to settle any sale, either long or short, by another proprietary desk. Any long position so used to settle a sale, either long or short, would be a disposition of GS&Co.’s voting and dispositive rights over the long position and would, in our view, constitute a disposition for purposes of Rule 13d-3 and for purposes of determining any amendment obligation under Section 13(d) or 13(g) and Rule 13d-2 thereunder. We believe that this method of calculating beneficial ownership under Rule 13d-3 will better reflect when GS&Co. has voting or investment power.

⁷ See Rule 13d-1(c)(3).

⁸ See Rule 13d-2(b)-(d).

⁹ See Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules Thereunder to Trading in Securities Futures Products, Exchange Act Release No. 46,101, [2002 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,704, at Question 18 (June 21, 2002) (cash-settled security futures do not provide beneficial ownership of the underlying securities for purposes of Section 13(d)); *accord.* Section 3A(b)(1) of the Exchange Act (2006) (excluding security-based swap agreements from the definition of “security”).

For example, assume one GS&Co. proprietary account is long 200 shares of XYZ, a second desk sells short 100 shares of XYZ and GS&Co. uses 100 shares of XYZ from the first account to settle the short sale by the second account.¹⁰ In such a case, GS&Co. has voting and dispositive rights over only 100 shares of XYZ. However, if GS&Co. determined its long position solely by reference to the long positions in its Stock Record, it would report beneficial ownership of 200 shares of XYZ. Reporting the beneficial ownership of 200 shares of XYZ by GS&Co. would appear inconsistent with the focus on voting and investment power in Rule 13d-3.¹¹

We believe that it is important to stress that, when GS&Co meets a delivery obligation to the market, it ceases to exercise voting and investment power over those securities upon delivery. Upon delivery, the purchaser of the shares acquires voting and investment power over the shares while GS&Co. disposes of voting and investment power over the shares for Rule 13d-3 purposes. In such a case, we believe that the purchaser acquires beneficial ownership of the shares for Rule 13d-3 purposes while GS&Co. disposes of beneficial ownership of the shares for Rule 13d-3 purposes. We believe that this distinguishes our request for interpretive advice from the SEC's historical position that a short sale does not effect a change in beneficial ownership.¹²

Our interpretive request is analogous to the position the Staff has taken in the context of Section 13(d)(6)(B) of the Exchange Act. In applying the 2% acquisition test in Section 13(d)(6)(B), the Staff has not objected to the netting of purchases and sales as of each calendar month end to determine whether the 2% threshold had been exceeded by a person eligible to file on Schedule 13G pursuant to Rule 13d-1(b)(1).¹³ Our request for interpretive advice is more limited than the Staff's position in this context since our

¹⁰ Once again this example assumes no other customer or proprietary account of GS&Co. owns any shares of XYZ and that these are the only two transactions in the shares of XYZ by any GS&Co. customer or proprietary account.

¹¹ If in the future, the short proprietary account purchased 100 shares of XYZ to close out the short position, the second account would then have no position in XYZ on the Stock Record, but the first account would continue to have a 200 share long position in XYZ. As a result, the purchase would, under the proposed calculation methodology, result in GS&Co. being long 200 shares of XYZ, which would be consistent with the number of shares of XYZ over which GS&Co. at that point in time would have voting or dispositive rights over.

¹² Public Disclosure of Material Short Security Positions, Exchange Act Release No. 29, 278, [1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,806, at 81,799 n. 26 (June 7, 1991) (“Although short sales by a 13D reporting person normally will not change that person’s Rule 13d-3 beneficial ownership (since *such sales do not change the amount of shares over which the reporting person has voting or investment power*)....”) (emphasis added); Division of Corporation Finance, Manual of Publicly Available Telephone Interpretations O.16 (July 1997) (same).

¹³ See, e.g., J.P. Morgan & Co. Incorporated, SEC No-Action Letter, 1993 WL 155506 (May 7, 1993); George K. Baum & Company, SEC No-Action Letter, 1986 WL 67674 (Oct. 4, 1986).

request relates only to the exclusion of internal positions from the calculation of beneficial ownership, and not the netting of actual changes in beneficial ownership. Our request, however, also applies to GS&Co.'s initial filing obligations under Section 13 and applies to situations where GS&Co. may not be eligible to file on Schedule 13G.¹⁴ We believe that these distinctions are irrelevant to the analysis for two reasons.

First, the Staff has not objected to netting among members of a Schedule 13D group.¹⁵ Second, control is typically exercised through voting rights. Our request for interpretive guidance is limited to those situations where GS&Co. lacks voting or dispositive rights. Purely internal positions provide GS&Co. with no ability to control the issuer. Thus, we believe it is appropriate to extend our request to both initial and subsequent filing obligations under Schedule 13D.

Our request for interpretive guidance will only extend to GS&Co.'s obligation to file Schedules 13D and 13G, and amendments thereto, pursuant to Sections 13(d) and 13(g), and Rules 13d-1 and 13d-2 thereunder, that occur after GS&Co. has determined to implement the new calculation methodology. GS&Co. will not amend any outstanding Schedule 13D or 13G solely to reflect its adoption of the new calculation methodology, but rather will only amend these filings when otherwise required. GS&Co. will indicate in the first amendment to any Schedule 13D or Schedule 13G filed subsequent to GS&Co.'s adoption of the new calculation methodology that beneficial ownership with respect to that filing is being calculated in accordance with this letter.

We wish to stress that our request for interpretive guidance is limited and only applies to internal proprietary positions of GS&Co. Our request does not extend to equity swaps or single-stock futures.

For the foregoing reasons, we respectfully request the Staff to confirm that GS&Co. may calculate beneficial ownership for purposes of Rule 13d-3 by excluding the internal positions reflected in its Stock Record as described above.

* * * *

¹⁴ This could occur where GS&Co. acquired the subject securities with an intent to influence control of the issuer.

¹⁵ *See, e.g.*, Morgan Stanley Group Incorporated, SEC No-Action Letter, 1989 WL 246332 (Aug. 24, 1989); G.F. Business Equipment, Incorporated, SEC No-Action Letter, 1979 WL 13977 (June 22, 1979).

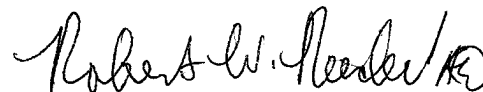
We have been authorized by GS&Co. to advise you that they have in place policies and procedures reasonably designed to ensure that:

- the long and short positions in its Stock Record are properly reflected; and
- GS&Co. at the end of each business day meets its securities delivery obligations as described above.

* * * *

We appreciate the Staff's consideration of our request, and if you have any questions concerning our request, please do not hesitate to contact the undersigned at 212-558-3755 or, in my absence, Pamela Root, at GS&Co., at 212-902-2203.

Sincerely,



Robert W. Reeder

cc: Pamela Root
(Goldman, Sachs & Co.)

Frederick Wertheim
David B. Harms