



August 13, 2004

VIA E-MAIL (rule-comments@sec.gov)

BOSTON

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

BRUSSELS

CHARLOTTE

Re: Proposed Amendments to Rules 16b-3 and 16b-7 – File No. S7-27-04

FRANKFURT

Dear Mr. Katz:

HARRISBURG

We represent defendants Sterling Holding Company, LLC (“Sterling”) and National Semiconductor Corporation (“National”) in *Levy v. Sterling Holding Company, LLC, et al.*, Civil Action No. 00-994-GMS (D. Del.). We submit these comments to support the Commission’s proposed amendments to Rules 16b-3 and 16b-7 and to respond briefly to comments submitted on August 5, 2004 by Jeffrey S. Abraham and Mitchell M.Z. Twersky of the law firm Abraham Fruchter & Twersky LLP.

HARTFORD

LONDON

LUXEMBOURG

Section 16(b) expressly authorizes the Commission to exempt transactions and classes of transactions “not comprehended within the purpose” of the statute. 15 U.S.C. § 78p(b). The power to promulgate exemptive rules necessarily includes the power to amend them to clarify their meaning. Indeed, the Commission *should* clarify its rules when a court states, as the Third Circuit did in *Levy*, that the rules are so unclear that a court cannot be certain of the Commission’s intent.

MUNICH

NEW YORK

NEWPORT BEACH

PALO ALTO

The Third Circuit’s decision to allow the *Levy* case to progress past the pleading stage was based on what the court viewed as inadequate guidance from the Commission as to the meaning of the Commission’s own rules. *See, e.g., Levy v. Sterling Holding Co., LLC*, 314 F.3d 106, 112 (3d Cir. 2002) (“the SEC has not set forth its interpretation [of Rule 16b-7] clearly so our threshold challenge is to ascertain what in fact was its interpretation”); *id.* at 114 (noting “the absence of specific SEC guidance” regarding the application of Rule 16b-7 to reclassifications); *id.* at 124 (concluding that certain statements in the adopting release “strongly suggest that the SEC intended, in Rule 16b-3(d), to exempt ‘grants, awards, and other acquisitions’ with some compensatory nexus,” but acknowledging that another statement in the release “appears to cut against our position”). The proposed amendments to Rules 16b-3 and 16b-7 remove any doubt as to the meaning of the rules and thus supply the guidance that the Third Circuit believed was lacking.

PARIS

PHILADELPHIA

PRINCETON

SAN FRANCISCO

WASHINGTON

Many of the arguments Messrs. Abraham and Twersky make in opposition to the proposed amendments have been briefed extensively in *Levy* in connection with the parties’ cross-motions for summary judgment and/or a motion by Sterling and National to stay the case pending final action on the Commission’s proposed amendments to Rules 16b-

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3 and 16b-7.¹ Indeed, Messrs. Abraham and Twersky represent the plaintiff in the *Levy* case, and therefore have a personal financial interest in the outcome of that litigation. As active members of the Section 16(b) plaintiffs' bar, *see* Peter J. Romeo & Alan L. Dye, *Comprehensive Section 16 Outline* § III.C.3.a, at 224 (April 2003), they also stand to benefit generally from the uncertainty and confusion created by the Third Circuit's opinion in *Levy* – *i.e.*, the very uncertainty and confusion that the Commission's proposed amendments are designed to remedy.

In sum, we urge the Commission to adopt the proposed amendments to Rules 16b-3 and 16b-7.

Sincerely,

/s/ Steven B. Feirson
/s/ Carolyn H. Feeney

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¹ These motions are all fully briefed but have not yet been decided by the court. A trial, if necessary, is currently scheduled for November 1, 2004.