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August 9, 2004

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

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

Dear Mr. Katz:

We are pleased to submit this letter in response to the Commission's request contained in Securities Act Release Nos. 34-49895, 35-27861 and IC-26471 (the "Release") for comments on proposed amendments to Rules 16b-3 and 16b-7 under the Securities Exchange Act of 1934 (the "Exchange Act").

We commend the Commission on these important proposals, which we believe represent a constructive step toward eliminating the uncertainty that has existed for issuers and insiders relying on Rules 16b-3 and 16b-7 after the decision by the U.S. Court of Appeals for the Third Circuit in *Levy* v. *Sterling Holding Company, LLC*, 314 F.3d 106 (3d Cir. 2002), *cert. denied*, 124 S. Ct. 389 (Oct. 14, 2003). We have some comments on the amendments, which we believe could be improved consistent with the purposes behind them. In particular, we suggest including the substance of proposed Note 4 to Rule 16b-3 in the text of the rule itself, adding statutory share exchanges to the text of Rule 16b-7 and including an explicit statement as to the retroactive application of the amendments to Rules 16b-3 and 16b-7 in the adopting release. We also suggest that the Commission consider amending Rule 16b-3 to clarify the conditions necessary to

exempt the conversion of shares and options in mergers and review other situations in which recent court decisions under Section 16 appear to conflict with published interpretations of the rules by the Commission or its staff.

Rule 16b-3

The Commission proposes to clarify Rules 16b-3(d) and (e) by adding a new Note 4 stating that the exemptions (i) apply to any securities transaction between an issuer and an officer or director of the issuer that satisfies the applicable conditions of paragraph (d) or (e) and (ii) are not conditioned on the transaction being intended for a compensatory or other particular purpose. We strongly support the purpose of this proposal, but we would suggest incorporating the substance of proposed Note 4 into the body of Rule 16b-3. Under Section 23(a)(1) of the Exchange Act, officers and directors are relieved from liability for "any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission . . . . notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason." Under Section 23(a)(1), it is unclear whether an explanatory note would be afforded the same deference as language in the body of the rule itself. By allowing persons to rely on the express text of Rule 16b-3 itself, the Commission would better achieve its goal of ensuring that legitimate transactions may be planned and executed by issuers and insiders with confidence.

We also suggest that the proposed amendments to Rule 16b-3 present an opportunity for the Commission to incorporate into the rule or the notes thereto elements from previous no-action letters, case law and staff interpretations so that issuers and insiders can more effectively plan transactions. For example, it would be helpful for the Commission to add a note to Rule 16b-3 stating that the availability of an exemption does not depend upon whether a transaction is directed by the issuer or the insider or whether the transaction takes place directly or indirectly in the name of the insider.

We also suggest that the Commission clarify the conditions necessary to exempt the types of transactions (*i.e*., between insiders and a corporation in connection with a merger) that were addressed in the Division of Corporate Finance's interpretative letter dated January 12, 1999 (the "1999 letter").[1] The 1999 letter interpreted Rule 16b-3 as providing an exemption for target securities converted into acquiror securities in such a transaction, provided that certain conditions were met. We believe that specification in the rule of the conditions necessary to obtain the exemption would help issuers and insiders to plan transactions with greater assurance. Under the 1999 letter, the Board of Directors (or appropriate committee) must approve the acquisition or disposition of the securities by the Section 16 reporting persons and in doing so must specify (i) the name of each person to whom the Rule 16b-3 exemption is to be applied, (ii) the number of securities to be acquired or disposed of by each named person, (iii) the material terms of any derivative securities to be converted or exchanged in connection with the transaction and (iv) the purpose of the approval (*i.e.,* to apply the exemption). As to the specificity of the Board (or committee) approval, we hope that the Commission would be prepared at this time to codify the position taken by the United States Court of Appeals for the Second Circuit in *Gryl* v. *Shire Pharmaceuticals Group*, 298 F.3d 136 (2nd Cir. 2002), *cert. denied*, 123 S. Ct. 1262 (Feb. 24, 2003), and reverse the requirement of the 1999 letter that the approval specify the name and number of securities to be acquired or disposed of by each person. This adds an unmistakable element of risk to persons attempting to rely on the 1999 letter, due to the possibility of changes in the transaction after the approval has been given as well as to the possibility of errors, and requires that information be obtained that does not appear to serve any purpose in assisting the Board's decision as to whether the Rule 16b-3 exemption is appropriate. We believe that merger agreements that use formulae to govern securities conversions, together with a

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[1] Skadden, Arps, Slate, Meagher & Flom L.L.P., SEC No-Action Letter [1999 Transfer Binder], Fed. Sec. L. Rep. (CCH) P 77,515 (Jan. 12, 1999).

description of the general identity of the individuals who will receive the converted securities and the conditions under which the conversion of the securities will occur, should provide a sufficient basis to justify application of the exemption, without the detail contemplated by the 1999 letter.

In response to the question raised by the Commission in the Release as to whether the identical exemptive treatment under paragraphs (d) and (e) of Rule 16b-3 is appropriate, we believe that not only is such treatment appropriate, but moreover that treating dispositions differently would result in unintended confusion over the exemptive relief available under Rule 16b-3.

Rule 16b-7

We strongly support the Commission's proposal to amend Rule 16b-7 by substituting "merger, reclassification or consolidation" in each place where it currently states "merger or consolidation" in order to make clear on the face of Rule 16b-7 that all reclassifications are included. We would also suggest that the Commission explicitly exempt statutory share exchanges in the text of Rule 16b-7, *e.g.* by changing "merger or consolidation" to "merger, reclassification, consolidation or statutory share exchange." Since statutory share exchanges operate essentially identically to mergers, their inclusion in the proposed amendment would further the Commission's goal of clarifying the scope of Rule 16b-7 by consistently treating transactions with equivalent economic substance.

Retroactive Application

In the Release, the Commission noted that the *Levy* v. *Sterling* decision required satisfaction of conditions that were neither contained in the text of the rules nor intended by the Commission. Accordingly, we suggest that the Commission include in the adopting release an explicit statement that the amendments to the rules are intended to have retroactive effect, since it is the Commission's belief that these amendments merely clarify what has always been the scope of the rule.

Other Suggestions

In addition, we hope that the Commission will review other areas in which recent court decisions have been rendered that appear to conflict with positions taken by the Commission or its staff on the proper interpretation of the Section 16 rules. In particular, the reporting of securities held by trusts has been the subject of some recent cases in which persons who may have been relying upon Rule 16a-8 in reporting under Section 16 have been subjected to unexpected liability.[2] We are not suggesting any particular amendments at this time but believe that the underlying situations should be reexamined by the Commission and its staff in order to provide proper guidance to persons attempting to comply in good faith with the Section 16 rules.

* * *

We appreciate this opportunity to comment on the proposed amendments to Rules 16b-3 and 16b-7, and we would be happy to discuss any questions the Commission or its staff may have with respect to this letter. Such questions may be directed to Richard R. Howe (212-558-3612) or Robert W. Reeder III (212-558-3755).

Very truly yours,

SULLIVAN & CROMWELL LLP

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[2] *See Morales* v. *Quintiles Transnational Corp.*, 25 F.Supp.2d 369 (S.D.N.Y. 1998), holding that an insider who exercised reacquisition rights to issuer securities previously placed in a grantor retained annuity trust (GRAT) had effected a purchase for purposes of Section 16(b) of the Exchange Act. This ruling appears to conflict with the no-action letter issued October 9, 1997 relating to *Peter J. Kight*. See also *Dreiling* v. *Kellett*, 281 F.Supp.2d. 1215 (W.D. Wash. 2003), holding that an insider who transferred issuer securities placed in trust to personal trading accounts and to an escrow account for the satisfaction of a personal obligation had effected a purchase for purposes of Section 16(b) of the Exchange Act.