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Via E-Mail to: rule-comments@sec.gov

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

Re: Exemption of Compensatory Employee Stock Options From Registration Under Section 12(g) of the Securities Exchange Act of 1934 (Release No. 34-56010; File No. S7-14-07)

Dear Ms. Morris:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association in response to the request for comments by the Securities and Exchange Commission (the "Commission") in its release (the "Release") relating to the proposed exemption referenced above (the "Proposal").

The views expressed in this letter have not been approved by the American Bar Association's House of Delegates or Board of Governors and should not be construed as representing policy of the Association. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee.

Overview

We commend the Commission's efforts to provide an exemption for private, non-reporting issuers from the registration requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), for compensatory stock options that conform to certain requirements. Consistent with comments from the Advisory Committee on Smaller Public Companies ("Advisory Committee") in its Final Report to the Commission, we believe that the number of holders of compensatory stock options should not control the point at which an issuer becomes subject to the Exchange Act reporting requirements and accordingly we support the

concept of providing exemptive relief from Exchange Act registration and reporting requirements for compensatory stock options.

We believe the fundamental consideration in this rulemaking project is whether the exemption should be available broadly or sparingly. With respect to each condition considered for the exemption, the question is whether that condition is necessary to protect investors. Given that these are instruments that do not trade and were provided in a compensatory context, and given that we are not aware of any evidence of harm to investors that has arisen in situations where options are held by hundreds, but less than 500, holders, we believe that a policy decision can -- and should -- be made to make the exemption broadly available with only traditional non-transferability restrictions and information that is sufficient to satisfy Rule 701 considerations.

The extensive list of conditions to the exemption specified in the Proposal makes the proposed relief overly burdensome and, in many cases, unattainable as a practical matter. We urge the Commission to eliminate a number of the proposed conditions for the exemption that go beyond those necessary to provide adequate protections to investors, so as to provide an exemption that is both meaningful and useful. We also support the Proposal's new exemption for compensatory stock options of reporting companies, but do not believe that any conditions to the exemption are necessary.

Under current practice, a non-reporting issuer must arbitrarily limit the number of holders of compensatory stock options to fewer than 500 optionholders to avoid becoming subject to the registration requirements under the Exchange Act. An issuer that determines that it may in the near future have 500 or more optionholders must either prepare to register the options under the Exchange Act on Form 10 or timely seek and obtain favorable no-action relief from the staff of the Commission (the "Staff") with respect to not so registering the options. In developing any exemption for this issue, it is important to note that companies often do not plan in advance to be in a position of having 500 or more optionholders, but instead often encounter the situation when their plans to go public are delayed due to market conditions.

In our experience, most private companies that have found themselves in this situation limit grants of compensatory stock options to fewer than 500 optionholders due to the burdensome conditions that, in the absence of a clear regulatory exemption, the Staff has placed on its no-action relief. However, the practice of limiting the number of compensatory stock optionholders to avoid Exchange Act registration requirements may mean that newly hired employees who would otherwise be granted options are not, which in turn can make it difficult for the issuer to recruit employees. In most cases this has deleterious effects on attracting and retaining talented employees and frustrates strategic planning objectives of the issuer, such as planning for business expansion or an initial public offering of its common stock.

We appreciate the efforts of the Commission to improve upon the standards reflected in the Staff's current no-action positions. While the Staff's no-action position has helped some companies , we believe that the Commission can and should in the context of rulemaking provide

an exemption that more appropriately balances the goals of protecting investors with the costs and additional burdens that the exemption would impose on emerging and growth companies that find themselves in a situation where they are about to, or desire to, issue options to 500 or more employees. As the Commission states in the Release, "Section 12(g) was aimed at issuers that had sufficiently active trading markets and public interest." Likewise, the factors expressly listed in Section 12(h) that may serve as the basis of exemptions under that provision include "the number of public investors [and the] amount of trading interest in the securities." For stock options and other equity-based arrangements that are non-transferable, that are provided for compensatory purposes generally without the payment of consideration by the recipient and where there is not a public trading market for either the options or the underlying securities, we believe that certain of the proposed requirements for the exemption are not necessary and would reduce the utility of the exemption for most private issuers. For the reasons set forth below, we urge the Commission to modify the Proposal in the following manner to create a practical and more useful exemption.

A More Effective Exemption

As discussed in more detail in part IV of this comment letter, we believe that the objectives of the Advisory Committee could be implemented more fully, without any increased risk to investors, by providing an exemption that:

1. applies to restricted stock units and other similar compensatory rights to acquire common stock of the issuer, as well as to options;

2. relies upon the requirements contained in Rule 701 promulgated under the Securities Act of 1933, as amended (the "Securities Act") for purposes of establishing what information must be delivered and when;

3. requires limitations on transferability only for compensatory options and similar rights, not for the underlying shares; and

4. provides for automatic increases in exemption thresholds in the event of similar changes to Rule 701 thresholds.

Comments on Proposed Rule 12h-1(f)

I. Proposed Exemption for Compensatory Employee Stock Options of Issuers That Are Not Exchange Act Reporting Issuers

Our comments on the proposed exemption for private, non-reporting issuers generally address the proposed informational requirements, including the scope of such information and the timing of its delivery , and limitations on the terms of options and restrictions on the

transferability of underlying shares. We address a number of the specific questions included in the Release at the end of part I of this comment letter.

A number of themes underlie our comments. First, because the exemption is only needed when an issuer has 500 or more optionholders, it should be of a nature that is capable of being satisfied at that time. As noted above, most issuers do not intend or plan to end up with 500 or more optionholders. Thus, exemptive conditions that require contractual or other restrictions in the terms of an original option grant would make the exemption unavailable for issuers who had not from the very beginning planned on having to satisfy the conditions of the exemption, including non-public issuers that currently have options outstanding. Second, given the non-transferable and compensatory nature of options, it is unclear why the exemption presupposes that optionholders need information at times other than what would be required under Rule 701 of the Securities Act ("Rule 701"). Third, because the exemption does not extend to shares underlying compensatory stock options, we believe it inappropriate to have the exemption require restrictions on that class of equity securities beyond those that arise under the Securities Act and the Exchange Act.

For ease of reference we generally will refer to compensatory stock options in this letter. Nevertheless, as discussed further below we believe that the exemption should not be limited to stock options, but, as with Rule 701, should be available for other compensatory rights to acquire common stock (or the equivalent), including stock appreciation rights, restricted stock units, performance units and all similar compensatory rights. In this regard, we strongly object to the language in the Note to paragraph (f)(1)(ii) of the exemption, which as proposed eschews analysis of relevant facts and broadly states that all compensatory options on the same class of equity securities will be deemed a single class of securities for purposes of Section 12. We believe it is inappropriate to set forth a significant definition in a "note" to a proposed exemption, as this context would cause uncertainty and confusion as to its potential application for issuers who are not relying upon the exemption. While the broad and indiscriminate standard proposed in the Note would be particularly inappropriate if applied across all forms of compensatory rights, even when applied only to stock options it does not reflect any regard for the considerations set forth in the definition of "class" set forth in Exchange Act Section 12(g)(5). Instead, the determination of what constitutes a "class" in this context should continue to rely upon a factual inquiry on a case-by-case basis, and the proposed Note to paragraph (f)(1)(ii) should be omitted from the final rule.[1]

A. Required Information

The proposed exemption would require the issuer (i) to provide risk and financial information, and (ii) to make available the books and records of the issuer, including corporate governance documents, to optionholders and holders of shares received upon exercise of

[1] Likewise, the corresponding Note to proposed Rule 12h-1(g)(1)(ii) should not be adopted.

compensatory options. For the reasons set forth below, we believe that the scope of the disclosure requirements included in the Proposal is too broad and, together with the required timing of the disclosures, makes the exemption impractical.

1. Scope of Information

a. Risk Factors and Financial Statements

The proposed exemption requires the issuer to provide the same information about risk factors and financial statements that would be required by Rule 701 where securities sold in reliance on Rule 701 in a 12-month period exceed $5 million. Further, the financial statements required by the proposed exemption cannot be more than 180 days old. This extensive, on going disclosure requirement applies regardless of whether the issuer would be required to provide such information to employees and consultants in connection with compensatory issuances of securities under Rule 701 (*for example,* because the issuer did not sell more than $5 million of securities in a 12-month period in reliance on Rule 701). We believe that, at a minimum, the proposed exemption should not require disclosures in excess of (or earlier than) those required under Rule 701.[2]

Complying with the conditions of the proposed exemption would significantly expand the disclosure requirements for many private, non-reporting issuers. The Preamble in the Release states, "The Securities Act Rule 701 information provisions provide optionholders and other persons who purchase securities without registration under Rule 701 with important information. We believe that the ongoing provision of the same information is necessary and appropriate for purposes of the proposed exemption from Exchange Act registration."[3] However, the proposed exemption goes further than Rule 701 since it would require this disclosure even where the issuer has not exceeded the 12-month, $5 million limit under Rule 701. Thus, the proposed rule would represent a return to the regime that existed prior to the 1999 amendments to Rule 701, under which all outstanding options were aggregated for purposes of determining when the information conditions had to be satisfied. Because the Commission moved away from that approach when it adopted the 1999 amendments to Rule 701, we do not believe it should be reintroduced through the proposed Exchange Act exemption.

In our experience, some private issuers intentionally avoid crossing the 12-month, $5 million threshold under Rule 701 because they are very concerned about the competitive risks of providing financial information, especially to former employees. The Proposal would

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[2] Our view in this regard answers most of the specific questions included in the Proposal on page 29 thereof. The Commission also asked for comment on the means of delivery of the required information. We believe it is appropriate to allow an issuer to choose the appropriate means of providing information, and that availability of the information through a password-protected Internet site should be a permissible but not mandatory means of disclosure.

[3] See Preamble of the Release, at page 26.

eliminate the benefit of the Rule 701 standards that these issuers have planned for once they have 500 or more optionholders.[4] The Release does not elaborate on what regulatory goal is to be served by imposing a more extensive information requirement as a condition to an exemption for options that are non-transferable (other than for certain donative transfers without consideration) and not subject to a trading market. The primary time that information is relevant for holders of compensatory stock options is when they are deciding whether to exercise the options, a decision that is addressed by the Securities Act. Requiring an issuer to provide financial information on an ongoing basis otherwise is appropriate only if one is seeking to promote a trading market in the securities, a goal which is antithetical to the goal of the Proposal. Instead, relying on the protections afforded by the Securities Act and on general antifraud considerations[5] is adequate to protect securityholders under non-transferable compensatory arrangements in the private company context.

We also believe that issuers should not be required to provide confidential financial information to an optionholder unless the optionholder signs a non-disclosure agreement with the issuer. As indicated above, private companies have serious concerns about disclosing their financial information to employees and former employees. Nevertheless, even in sales to investors in capital-raising transactions, issuers typically condition disclosure of financial information on the recipient agreeing to keep the information confidential. Moreover, investors in capital-raising transactions typically have strong incentives to maintain the confidential nature of the financial information, as they are generally in the business of investing in private companies, and would certainly not want to jeopardize their ability to receive confidential information in the future about companies in which they may want to invest. Thus, even if they ultimately decide not to invest in a particular company, it is highly unlikely that the potential investors would disclose the confidential information that they received while considering possible investment in that company, for fear that it would tarnish their reputation as an investor. Clearly the investors who do invest and have a significant stake in the success of the issuer understand how important it is to keep the issuer's financial statements and other proprietary information strictly confidential for as long as possible, typically until the initial public offering of the issuer's securities, in order to avoid competitive harm.

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[4] We assume that the information supplying requirement contemplated under the Proposal would begin only once an issuer seeks to rely upon the exemption; that is, only once it had 500 or more optionholders. This timing issue would be clarified if as we urge the Commission relies on the standards under Rule 701. If the Commission takes a different approach, it should clarify when the information obligations commence. The Proposal would also require that the issuer "agree in the written compensatory stock option plan or the individual written compensatory stock option agreement" to provide the required information. We do not believe that issuers should have to amend their plans or obligations to bind themselves to satisfy whatever information supplying obligation is adopted, and instead that the exemption should be available as long as issuers in fact satisfy that obligation.

[5] See note 59 of the Release.

On the other hand, while a company is still private, most optionholders do not exercise their options, because there is significant uncertainty as to whether there will ever be a path to liquidity for the stock they purchase upon exercise of the option. Rather, they take advantage of the "wait-and-see" aspect of options, exercising their options only after the company has gone public and there is a public market for the stock. In fact, the scenario in which an optionholder is most likely to exercise an option while the issuer is still private is when the optionholder's employment is terminated or the optionholder otherwise leaves the employ of the company. In that case, there is typically a very limited time during which the former employee can exercise the option before it expires. We frankly are not sanguine that employees and former employees who are provided with financial information will maintain its confidentiality absent a company's ability to impose a contractual obligation to do so. In addition, we believe that a broad requirement to make financial information available on an on-going basis (and even in the absence of an investment decision by the optionholder) may in fact promote the development of trading interest in an issuer's securities and thus undermine the goals of this exemption. It is fairly common for employees to leave a company, in the worst case to join a competitor, increasing the probability that financial information required under the proposed exemption would leak into the marketplace. In short, permitting optionholders who refuse to sign non-disclosure agreements to inspect the company's confidential information opens the door to improper disclosure of the information to third parties and is not necessary or appropriate under the circumstances.

b. Books and Records

In addition to the information required under Rule 701, the proposed exemption would require issuers to make their books and records available to optionholders and to holders of shares received upon exercise of the options to the same extent the books and records are available to all shareholders of the issuer. The need for confidentiality in order to avoid competitive harm discussed above with respect to financial information applies *a fortiori* to material contracts and other books and records of a private company.

Access to an issuer's books and records is a matter of state corporate law and the availability of the Exchange Act exemption should not be conditioned on disclosure that goes beyond the requirements of applicable state law. If a person is a stockholder, not merely an optionholder, that person will be provided with access to books and records to the extent required by state corporate law if the conditions of such requirements are met. For example, Delaware General Corporation Law §220 provides stockholders with the right of inspection of the issuer's books and records. It does <u>not</u> provide such rights to optionholders. Delaware law also limits access to books and records to stockholders who make a written demand under oath, stating the purpose of such request, which must be truly related to their interest as a stockholder. (*BBC Acquisition Corp. v. Durr-Fillauer Medical, Inc.*, 623 A. 2d 85 (Del. Ch. 1992))

The proposed exemption would require a private, non-reporting issuer to open its books and records automatically to optionholders without the protections provided under state law,

imposing administrative burdens and costs on the issuer that are not justified by any proper purpose, while simultaneously exposing the issuer to the risk of competitive harm if the confidential information contained in its books and records is improperly disclosed by optionholders to third parties. Again, the Release does not explain why it believes it appropriate to create a right in optionholders that goes beyond what is required under Rule 701 and under state law,[6] and we do not believe that it is necessary or appropriate for the protection of compensatory optionholders.

2. Timing of Delivery and Access to Information

The timing of delivery of the required information specified in the Proposal, together with the requirement to provide ongoing information, would make the proposed exemption unavailable to most private companies as a practical matter.

a. Optionholders

Even if the 12-month, $5-million threshold is exceeded, Rule 701(e)(6) only requires delivery of the necessary disclosures a reasonable period of time before option exercise. This timing requirement is sensible because there is no investment decision by the optionholder until the option is exercised. We see no reason why the Exchange Act registration exemption should trigger disclosure at a time earlier than the Securities Act registration exemption. The timing of required disclosure under the exemption should be no earlier than is required under Rule 701.

b. Holders of Compensatory Shares

The Proposal includes an ongoing requirement to provide financial statements that are no more than 180 days old. This requirement goes beyond Rule 701, where the information supplying requirement applies only to optionholders and not to holders of shares received in a compensatory transaction. We see no reason that a private, non-reporting issuer should be obligated to provide periodic financial statements to holders of compensatory shares when there is no market for such shares (and therefore no continuing need to make an investment decision). Once the options have been exercised, the holders of compensatory shares should have the same rights to information as all other shareholders, and we do not believe it is necessary or appropriate to expand those rights for this subgroup of shareholders in order to obtain an exemption from registration under the Exchange Act. Because the Proposal does not contain an exemption for the equity security that underlies compensatory stock options, the registration and

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[6] The Release asks what books and records a private, non-reporting issuer generally provides to optionholders. In our experience, little or no information is provided unless and until an option exercise is imminent, such as, for example, on termination of employment, and even then the information is carefully controlled to protect the issuer and its stockholders from misuse or abuse. The exact information then provided varies depending on the specific facts and circumstances, but typically focuses on financial information. Additional information that may be provided generally would not go beyond the issuer's certificate of incorporation and bylaws.

information supplying requirements of the Exchange Act will separately apply to the equity once it is held by 500 or more investors.

B. Transferability of Options and Shares

The Proposal includes transferability and ownership restrictions that must be satisfied in order for an issuer to qualify for the exemption. Although we agree that restrictions on transferability and ownership are an appropriate condition for the compensatory options, we discuss below the bases for our belief that a number of the proposed conditions on options and underlying securities are unnecessary, may be impossible to implement and could vitiate the advantages of the proposed exemption for most issuers.

The restrictions on transferability set forth in proposed clause (iv) of the exemption should not apply to shares issued under stock options. Many issuers with outstanding options would be unable to satisfy this condition, as they would not be able to amend options to impose this additional restriction without each optionholder's consent. Going forward, companies would be able to satisfy this condition only if they had planned from the very beginning to eventually have 500 or more optionholders and had built the restriction into every one of their option agreements.

The strict restrictions proposed would disadvantage persons who acquire stock under compensatory options, diminishing the utility of options as a form of compensation for private companies. The adverse consequences to holders of compensatory options could include:

- Restricting an employee shareholder from selling shares at a time that other company investors are realizing liquidity on their investment.

- Restricting an employee shareholder from participating in a change-of-control transaction that is structured as a tender offer or sale of shares to a third party.

- Restricting resales for a protracted period of time and eliminating the ability to resell stock under Rule 144(k) promulgated under the Securities Act so long as the company remains a private company, even though other shareholders are free to sell.

- Prohibiting one of the common methods of dealing with options in a merger or change-of-control transaction – specifically, paying the holder of an option the difference between the option exercise price and the per share transaction value.

Because we believe that it is customary to allow optionholders to participate in the types of events described above, we are concerned that a blanket prohibition on transferability of the underlying securities in the final rule would cause most issuers to fail to satisfy the terms of the

exemption. We believe instead that the Commission should rely on issuers' determinations as to whether and what conditions to impose upon transferability of the underlying shares, and the fact that Exchange Act registration will be required if a company ends up with 500 or more holders of the underlying equity securities. We think it likely that issuers would believe that a requirement to impose such onerous restrictions on employee holders is substantial and adverse enough to outweigh the benefits of the exemption.

Moreover, we do not believe that such transferability restrictions on the underlying securities are necessary to protect the optionholders. First, in view of the limited types of persons who are able to receive compensatory options and the limits on transferability of the options as a result of Securities Act, Exchange Act and Internal Revenue Code rules, a market in the options will not develop. Second, because the proposed exemption would not extend to the class of securities underlying the options, holders would continue to benefit from the protection offered by Exchange Act registration in the event that the number of holders of such class equaled or exceeded 500. The registration regime in place today provides sufficient protection to address the concerns raised by issuers having fewer than 500 holders of a class of securities, and that regime does not require the transferability limitations now being proposed for stock issued upon exercise of compensatory options. Moreover, if there are 500 or more holders of compensatory options, they can all exercise their nontransferable options and thereby trigger the Exchange Act registration requirements for the class of underlying securities.

The proposed restrictions in clause (vi), which would prohibit the holder of an option or option shares from receiving "any consideration or compensation for the options, the shares issuable on exercise of the options or shares of the same class of equity security as those underlying the options" are overly broad, vague and unnecessary. This restriction is phrased so broadly that it would prevent employees from receiving dividends or dividend-equivalent rights, would prevent an issuer from being able to repurchase shares in connection with a holders' termination of employment and would prevent cancellation and substitution of other equity securities for options in a change-of-control

Finally, it is unnecessary to extend transferability and anti-hypothecation restrictions (including a restriction on puts and calls) to shares of the same class as those received upon exercise (even if such shares were not received for compensatory purposes), as would be required under clauses (v) and (vi) of the Proposal. As with other conditions noted above, this proposed condition would in many cases be impossible for an issuer to satisfy, as it would require an issuer from the very first day that it might have offered stock to an employee (even if in a non-compensatory transaction) to anticipate the requirement and impose contractual restrictions on its shares. The result would be particularly punitive to the employee holder, who would suffer transfer restrictions that are not applicable to other types of shareholders (even others who acquired shares at or about the same time and for the same price). The prohibition on put and call equivalent positions could conflict with standard repurchase rights, rights of first refusal and other provisions that are common terms for stockholder agreements in private

companies. The restrictions also, for example, would prohibit arrangements where employees are permitted to invest in a company, paying with a promissory note and pledging their shares to the company (or to a controlling stockholder) to support that loan. To restrict pledges and transfers of these non-compensatory shares as a condition for exemption from Exchange Act registration of other compensatory options is such an extreme burden that it will make use of the exemption impractical and unattractive. Given that, by definition, there will not be a public trading market in the underlying equity securities, we believe that any concern that there may be hedging or pledging of shares is unwarranted and does not justify the conditions proposed.

The Proposal poses several specific additional questions relating to transferability, which we would like to address. For your convenience, throughout this comment letter we have retyped questions from the Proposal in italics.

- *Should an optionholder be allowed to enter into agreements to transfer the shares to be received on exercise of the compensatory employee stock options or shares of the same class of equity security as the shares underlying those options prior to the exercise of those options while the issuer is relying on the exemption? If yes, why should an optionholder be able to enter into such arrangements and how would such arrangements affect whether an optionholder has received value for the compensatory employee stock options?*

As noted above, we do not believe that transfer of the underlying shares or shares of the same class should be restricted by the proposed exemption, because the interests of employee shareholders are sufficiently protected by the requirement that the issuer register the class of underlying shares if the number of holders becomes sufficiently large, and by other Securities Act and antifraud protections. We do not oppose a condition that restricts optionholders' ability to pledge, hypothecate or otherwise enter into an agreement with respect to the underlying shares prior to exercise of the option. In most cases, such agreements would be prohibited by the terms of the option plan and/or option agreement in any event.

- *Should there be restrictions on permitted transferees of compensatory employee stock options being able to further transfer such options? Should the permitted transferees be able to further transfer such options to other permitted transferees by gift, pursuant to domestic relations orders, or on death or disability? What types of other transfers, if any, should be permitted and why?*

We do not believe that the exemption should impose restrictions on permitted transferees other than those imposed under Rule 701. The types of transfers that Rule permits (whether by initial holder or transferee) are so limited that it is implausible that a trading market in the options would develop. Any further limitations would impose significant hardships on the

subsequent transferee (such as, for example, prohibiting transfers upon such transferee's death) that are not merited.

- *Do the proposed restrictive provisions sufficiently cover hedging transactions by optionholders or holders of shares received on exercise of the options that would permit such persons to circumvent the proposed transferability conditions in the proposed exemption?*

As discussed above, we believe that the proposed rule is inappropriately broad and vague in this respect.

- *Should the restrictive provisions of the proposed exemption apply to the securities received on exercise of the compensatory employee stock options for so long as the issuer is relying on the proposed exemption? If not, please explain.*

For the reasons described above, we do not believe restrictions on transferability of shares received on exercise should be imposed as a condition of the exemption.

- *Should the transfer restrictions on the shares received on exercise of the compensatory employee stock options, following such exercise, be a condition to the proposed exemption only if the issuer does not restrict the transferability of any of the shares of the same class of its equity security prior to the issuer becoming subject to the reporting requirements of the Exchange Act?*

We think that making such a distinction between shareholders who acquired their shares under compensatory plans and other shareholders would be a serious mistake. Employee shareholders should not be relegated to the status of second class citizens who cannot transfer their stock when non-employee shareholders can. Requiring an issuer to restrict transferability of shares received upon exercise of compensatory options will result in issuers being unable to meet the exemption and should not be made a condition to the Exchange Act exemption.

As a result of these concerns, we recommend that the Commission consider:

1. eliminating any requirement that transferability and ownership of the class of securities received on exercise of the options be restricted;

2. not imposing any restrictions on shares of the same class of equity securities as those underlying options; and

3. eliminating the limitations on receipt of compensation or consideration for compensatory options.

We believe these changes are necessary to provide issuers with "useful certainty" in making compensation decisions.

C. Other Matters Impacting Non-Reporting Issuers

The Proposal poses several specific questions relating to types of issuers, types of options, and related matters, which we would like to briefly address.

- *Should the proposed exemption be available to any private, non-reporting issuer? If not, which categories of non-reporting issuers should be ineligible for the exemption?*

We believe the exemption should be available to any issuer that does not have a class of equity securities registered under Section 12 of the Exchange Act. Although debt-only issuers often temporarily become reporting issuers under Section 15(d) of the Exchange Act, we do not believe such issuers should forfeit their exemption for compensatory options as a result of what may be a transitory status as a reporting company. Obviously, compensatory optionholders will have the benefit of the additional level of disclosure that issuers will file with the Commission while they are reporting under Section 15(d) even without the issuer losing its exemption under Section 12 with respect to the options.

- *Should the proposed exemption be available to those issuers that file Exchange Act reports and, thus, hold themselves out as Exchange Act reporting issuers, but who have neither a class of securities registered under Exchange Act Section 12 nor an existing reporting obligation under Exchange Act Section 15(d) (also known as "voluntary filers")? Should "voluntary filers" be treated differently under the proposed exemption if they do not have any public shareholders of any class of their equity securities?*

The Commission decided in connection with Securities Offering Reform to exclude voluntary filers from being considered reporting companies. It would be consistent, therefore, to treat voluntary filers as non-reporting issuers for purposes of the proposed exemption.

- *Should the exemption cover all compensatory employee stock options issued under all employee stock option plans of a private, non-reporting issuer?*

Yes. In fact, it should cover all compensatory rights to receive securities (such as restricted stock units, stock appreciation rights, performance units and all other similar compensatory rights). The exemption should not cover "restricted stock," which is common stock that is issued (either physically or by book entry) in compensatory arrangements but which

carries voting and other rights of a common stockholder, and instead restricted stock should be counted with other underlying equity security issuances in determining whether an issuer must register its stock under Section 12(g).

- *Are there employee stock option plans that are not written that should be included? If so, what types of unwritten plans should be included and why?*

We are not familiar with unwritten stock option plans, and would not oppose a requirement that an unwritten plan be reduced to writing for purposes of the exemption.

- *Are there employee stock options issued under written stock option contracts, other than written stock option plans, that should be included? If so, what types of written stock option contracts should be included and why?*

We believe that all employee stock options and other compensatory rights issued under any "employee benefit plan," as defined under Rule 405 of the Securities Act, including individual written stock option contracts, should be eligible for the exemption. The Securities Act Rule 405 definition of "employee benefit plan" is sufficient to encompass written stock option contracts.

- *Should the class of options covered by the proposed exemption include only options issued by the issuer under its written compensatory plans or should the class of options covered by the proposed exemption also include options on the issuer's securities that are issued under written compensatory plans of the issuer's parent, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer? Please explain.*

The compensatory plans of the issuer's parent, and the issuer's and the parent's majority-owned subsidiaries, should be included in the exemption as they all involve the issuance of the securities of the issuer for compensatory purposes. As noted above, however, we disagree with the Proposal to effectively adopt a definition of "class" through the proposed Note to clause (f)(1)(ii). We do not believe that the availability of the exemption should depend on which entity "issued" the options and instead recommend that clause (f)(1)(ii) be simplified to read, "The stock options have been issued [delete: ~~by the issuer~~] pursuant to one or more written compensatory stock option plans established by the issuer, its parents, its majority-owned subsidiaries or majority-owned subsidiaries of the issuer's parents;"

- *Do the proposed conditions affect an issuer's ability to value compensatory employee stock options for purposes of Statement 123R? If so, how would the valuation ability be affected? If affected, what alternative provisions should we consider that would not interfere with such valuation, yet not permit an optionholder or holder of shares received*

on exercise of an option to monetize or profit from the option, the shares received or to be received on exercise of the options, or shares of the same class of equity security as those underlying the options, prior to the issuer becoming subject to the reporting requirements of the Exchange Act?

We are not aware of any adverse accounting treatment from imposing reasonable and traditional restrictions on the transferability of options (although we defer to accountants on this point) and believe that the need for and benefit of an exemption from registration under the Exchange Act outweigh any collateral accounting implications.

- *Should there be any restriction on the exercisability of the compensatory employee stock options while an issuer is relying on the proposed exemption?*

No. We note that such restrictions would make the exemption unavailable for many companies with options currently outstanding and for companies that did not build such restrictions into their option terms from the very beginning. Exercisability restrictions also may be inconsistent with various states' laws. As discussed above, once the option or other compensatory right is exercised, the optionholder becomes a stockholder and is protected by the Exchange Act registration requirements applicable to the underlying shares.

- *Should the compensatory employee stock options be required to terminate if the optionholder is no longer an employee, director, consultant or advisor of the issuer? If so, under what conditions should the options terminate?*

No. So long as the options or other rights were issued in a compensatory context, the subsequent change in position of the optionholder should be irrelevant. We note that often, under typical option granting practices, there is a very limited time during which the former employee can exercise the option before it expires (although a limited time to exercise should not be a condition of the exemption as we believe that companies will develop the most effective terms for their situation, since companies' interests in not having many options held by former employees align with the Commission's goals).

- *Should the proposed exemption be available only if the compensatory employee stock options are exercisable only for a limited time period after the optionholder ceases to be an employee, director, consultant or advisor of the issuer? If so, should such a limitation on exercise be different if such a cessation is because of death or disability, or because of a termination with cause or without cause? What limited time period should apply and why?*

No. See our response to the prior request for comment.

- *Should the proposed exemption require that the conditions be contained in a particular written document or should the proposed exemption allow the conditions to be contained in any agreement between the issuer, the optionholders, and the holders of shares received on exercise of an option?*

As noted above, any requirement that terms other than traditional option transferability restrictions be set forth in particular documents will make the exemption impossible or difficult to satisfy. We believe the exemption should allow transferability restrictions and any other required conditions to be satisfied in practice and not to prescribe the forum or means of implementing those restrictions.

- *Should the proposed exemption permit any of the conditions, including the transferability restrictions on the shares received on exercise of the compensatory employee stock options, to be included in the issuer's by-laws or certificate of incorporation?*

See our response to the prior request for comment. So long as any transferability restrictions on compensatory options and other compensatory rights are enforceable, it should make no difference which document sets forth the restrictions. We are concerned, however, that some of the conditions that the Proposal would apply to underlying shares of common stock could not be implemented through a company's by-laws or certificate of incorporation, as they would result in discriminatory treatment of securityholders, and thus could be of questionable enforceability under state law.

As to each of the previous five requests for comment, we do not see any reason why the exemption should require changes in existing option grant practices, nor do we see any reason why restrictions on exercise should be required to be included in specific documents.

Comments on Proposed Rule 12h-1(g)

II. Proposed Exemption for Compensatory Employee Stock Options of Exchange Act Reporting Companies

The Commission's observation in note 66 to the Proposal that "[p]ublic reporting issuers may be unclear regarding the need to comply with the Exchange Act Section 12(g) registration requirements for compensatory employee stock options" is quite understated. The members of our group are unaware of any company that has registered its stock options under Section 12(g) once the underlying common stock has been registered under Section 12. To our knowledge, the Commission has never previously raised this as an issue, including during 2000-2001 when the Staff began suggesting that the standard under Exchange Act Section 16(a), which treats options with different exercise prices and expiration dates as each involving a different "class" of securities,[7] may not apply in the Section 12(g) context.

In light of the technical argument that Section 12(g) potentially applies to stock options of public reporting issuers, we agree that a broad exemption should be adopted in order to formalize the appropriateness of the current practice of public reporting companies not registering their stock options as a separate class of equity security under Section 12(g). Given that the Commission has not cited any harm or abuse that has resulted from the past, almost universal practice among public companies to not separately register stock options under Section 12(g) (and we in fact are not aware of any harm to optionholders that has arisen from the absence of registration), we see no compelling reasons to impose any restrictions on such an exemption.

We strongly agree with the Commission that the availability of the exemption should not be conditioned on the issuer being current in its Exchange Act reporting. Appropriately, the text of Rule 12h-1(g) as proposed by the Commission does not require that the issuer be current in its reports under the Exchange Act. We urge the Commission to reiterate in the final rules that the exemption is not conditioned on the issuer being current in its Exchange Act reporting.

As with the corresponding provision in the proposed exemption for compensatory options granted by non-reporting issuers, we again strongly disagree with the Note to paragraph (g)(1)(ii), which would indiscriminately have the effect of defining all stock options issued under an issuer's written compensatory benefit plans as being the same "class" of securities for purposes of Section 12(g), and we do not believe that this definition is necessary in order to implement the proposed exemption.

If the Commission continues to believe that some conditions are appropriate, we offer responses below to some of the specific requests for comment included in the Proposal. However, we believe that no conditions are necessary, and we strongly believe that, in the absence of *any* evidence of potential abuse from non-registration, several of the proposed

[7] Thompson, Hine and Flory, SEC No-Action Letter, Q&A 2 (avail. March 29, 1991).

eligibility conditions for the exemption are clearly overly restrictive. Specifically, as discussed below in detail, we believe:

1. the exemption should be expanded to include companies that are required to file reports under Section 15(d) of the Exchange Act; and

2. a company should not lose the exemption simply because some of its options are held by persons who are not described in Rule 701(c).

- *Should the proposed exemption apply to any issuer that is required to file Exchange Act periodic reports, whether or not the issuer has registered the class of equity security underlying the compensatory employee stock options under Exchange Act Section 12? If so, why?*

We believe the exemption should apply to any issuer that is subject to the requirement to file reports pursuant to Section 13 or 15(d) of the Exchange Act, which is the standard that applies for use of Form S-8. The key factor is that the issuer is required to file periodic and current reports under the Exchange Act, not the reason such reports are required to be filed. Accordingly, we believe that being subject to the requirement to file Exchange Act reports is what the proposed exemption should focus on, regardless of whether that reporting obligation arises under Section 13 or 15(d).

We believe expanding the proposed exemption to include companies that are required to file Exchange Act reports pursuant to Section 15(d) will not disadvantage optionholders. Rule 13e-4 of the Exchange Act, which governs issuer self tenders, already defines "issuer" to include companies that are required to file reports pursuant to Section 15(d). Accordingly, optionholders will continue to receive the benefits of Rule 13e-4 even if the exemption is expanded as we suggest. Similarly, the tender offer protections afforded by Section 14(e) of the Exchange Act will apply to optionholders regardless of whether the exemption is expanded as we suggest.

Companies that are required to file reports under Section 15(d), but do not have a class of equity securities registered under Section 12, are not subject to Section 14(a) or Section 16 of the Exchange Act and the beneficial owners of their securities are not required to file reports under Sections 13(d) or 13(g). However, the provisions of these sections are of limited significance to optionholders and therefore we do not believe the exemption should be affected by whether or not these sections are applicable to the issuer and its beneficial owners. Sections 13(d) and 13(g) are primarily intended to alert the marketplace and the issuer's management of a potential change in corporate control.

We believe the value of this information is not critical to optionholders given the lack of a significant trading market in the issuer's stock (as evidenced by the absence of a class of Exchange Act registered equity securities) and also note that optionholders will receive information about stock ownership and changes in control in the Forms 10-K, 10-Q and 8-K that reporting companies must file. Optionholders are not entitled to vote at shareholder meetings and, as a class, are generally not required or permitted to consent to corporate actions, so the proxy provisions of Section 14(a) are not important to optionholders. We also note that optionholders would receive the disclosures about management, including compensation, that are typically included in Part III of the Form 10-K that reporting companies must file, even though the company is not subject to the proxy rules. In addition, if securities issued under the written stock option plan have been registered on Form S-8 under the Securities Act, the optionholders will be receiving on a regular basis the information sent to shareholders, including proxy statements and annual reports to shareholders, pursuant to the requirements of Rule 428(b)(5) promulgated under the Securities Act. The provisions of Section 16 do not affect the decision optionholders make about whether to exercise their option, because even if they were subject to Section 16, the exercise of an option is exempt pursuant to Rule 16b-6(b) so long as it is not out-of the-money. In addition, we note that optionholders would have access to information about director and officer stock ownership and equity awards in the Forms 10-K and 8-K that reporting companies must file and that Rule 10b-5 would serve as a deterrent against insider trading.

- *Should the proposed exemption be available only to issuers that are current in their Exchange Act reporting obligations? Should the proposed exemption be available only to issuers that, at the end of their fiscal years, are current in their Exchange Act reporting obligations? If so, why? If not, why not?*

We do not believe there would be any benefit to conditioning the exemption on the issuer being current in its Exchange Act reporting obligations. Issuers already have significant incentives to remain current in their reporting (including complying with their reporting obligations under Sections 13 or 15(d), availability of Rule 144 under the Securities Act, complying with covenants in indentures, financing documents and other contractual arrangements, and maintaining positive investor relations). Conditioning the exemption on the issuer being current would not increase the likelihood that an issuer will remain current nor would the absence of such a condition create an incentive for any issuer to stop being current. Conditioning the exemption on the issuer being current would merely be punitive and counterproductive, as it would give issuers one more thing to do (*i.e.*, file an Exchange Act registration statement for their options) at a time when all investors would be better served by having the issuer focus on becoming current in its reporting.

- *Should the proposed exemption be available to issuers that are required to file reports under the Exchange Act solely pursuant to Section 15(d)? If so, why?*

As discussed above, we believe the proposed exemption should be expanded so that it is available to issuers that are required to file reports under the Exchange Act solely pursuant to Section 15(d).

- *How would the exclusion from the proposed exemption affect issuers required to file reports solely pursuant to Section 15(d) of the Exchange Act? How many issuers would be affected?*

As discussed above, we believe the proposed exemption should be expanded so that it is available to issuers that are required to file reports under the Exchange Act solely pursuant to Section 15(d) and that optionholders in such companies would not be harmed by extending the proposed exemption to include Section 15(d) issuers. We do not have any data regarding the number of issuers that would be affected, but our anecdotal observations suggest that there are very few reporting companies with options held by 500 or more persons that do not have a class of securities registered under Section 12, other than issuers that may be subject to Section 15(d) on a transitory basis as a result of having registered debt under the Securities Act in the context of an exchange offer.

- *Should the proposed exemption be available to those issuers that are not required to file Exchange Act reports but file such reports on a voluntary basis (also known as "voluntary filers") and, if so, why?*

We recognize that excluding "voluntary filers" from the exemption would be consistent with the Commission's approach in other recent rulemaking, including the decision, as part of Securities Offering Reform, to exclude voluntary filers from being considered reporting companies.

- *Should the proposed exemption apply only to the reporting obligations under Section 13(a) of the Exchange Act and not to the application of other Exchange Act provisions, such as the tender offer provisions of Section 13(e) and Section 14(e) of the Exchange Act? Please explain.*

We believe the exemption should exempt public reporting companies from having to register their stock options under Section 12(g) as a separate class of equity. This exemption would have no impact on the fact that these companies must file Exchange Act reports (since the exemption would be conditioned on the issuer otherwise having reporting obligations). As discussed above, we do not believe this exemption would affect the application of Rule 13e-4 (which currently applies to any issuer that has a class of equity securities registered under Section 12 or that is required to file periodic reports under Section 15(d)) or Section 14(e) (which currently applies to all tender offers).

- *Is the use of the Securities Act Rule 701 definitions of eligible participants appropriate for purposes of the proposed exemption? If not, what definitions should be used to characterize the eligible optionholders? Should the eligible optionholders only be those persons permitted to be offered and sold options pursuant to a registration statement on Form S-8? If so, why?*

We have two concerns with the proposed use of the Rule 701 definition as a condition to the exemption for reporting companies.

First, and more broadly, we do not believe the exemption should be conditioned on the identity of the optionholders, particularly in light of the proposed Note to paragraph (g)(1)(ii) indicating that the issuer must look to all of its plans in applying the exemption. We do not believe it would be appropriate for a company to be denied the Exchange Act exemption simply because it has granted a small number of options that are held by persons who do not fall into the definition included in the exemption. For example, a public reporting company should not be denied the exemption because it granted a single option prior to going public to a consultant who was not covered by Rule 701 under a plan that permitted such a grant (regardless of whether that plan is a separate plan relating to the grant or the same plan generally used by the company to grant compensatory employee stock options). Similarly, a public reporting company should not be denied the exemption because it allowed the transfer of a single option to a person who is not considered to be an acceptable transferee under current Rule 701. This potential problem could be cured if the Commission confirms in the final rule that the fact that options granted under the plan (or outside it) are not held by Rule 701 persons does not eliminate the availability of the exemption for the options that <u>are</u> held by Rule 701 persons. Rather, the non-Rule 701 persons would count against the 500-holder threshold, but the Rule 701 persons would not. We are also concerned that this condition requiring holders to be Rule 701 persons could result in a public reporting company being ineligible for the exemption as a result of assuming options of a target company in a merger that are held by someone who does not become an employee of the acquirer. Because this number of optionholders could be large if the issuer is an acquisitive company, it requires a special exception permitting such persons to be excluded from the 500-holder threshold. Because there is no demonstration of investor harm when this situation has arisen in the past and at the many companies where it exists now, any limitations on the nature of holders should take this potential situation into account.

Second, if the Commission is unwilling to eliminate this condition, at a minimum we believe the condition should be expanded to allow options to be held by anyone within the definition of either Rule 701(c) or Form S-8. The public companies seeking to rely on this exemption may have granted options under Rule 701 prior to going public and likely will have granted options under Form S-8 registration statements after going public. While the definitions in Rule 701 and Form S-8 are currently similar, there are differences (such as the explicit reference to "executors, administrators or beneficiaries of the estates of deceased employees, guardians or members of a committee for incompetent former employees, or similar

persons duly authorized by law to administer the estate or assets of former employees" in Form S-8, but not in Rule 701; and the explicit reference to majority-owned subsidiaries of the issuer's parent in Rule 701, but not in Form S-8). Limiting the definition used in the exemption to that used in either Rule 701 or Form S-8 will only create a trap for the unwary. Similarly, at a minimum, we believe the exemption must address the practical issue of options assumed in a merger that are held by someone who does not become an employee of the acquirer.

- *Should there be any restrictions on the transferability or ownership of the compensatory employee stock options, the shares received on exercise of those options, or shares of the same class of equity security as those underlying those options under the proposed exemption for reporting issuers?*

We do not believe the exemption for public reporting companies should be conditioned on any of the items identified in the question. We believe the focus of the exemption should be on the fact that the company is required to file Exchange Act reports.

III. Proposed Transition Provisions

The Proposal poses questions relating to transition, which we would like to address.

- *Do the proposed transition provisions of 60 calendar days provide enough time for private, non-reporting and reporting issuers to comply with the Exchange Act Section 12 registration requirements upon the loss of an exemption for the compensatory employee stock options? Should it be 30 calendar days? 90 calendar days? If not, what time frame should be provided and why?*

As to reporting issuers, as noted above, we believe that a broad exemption should be adopted in order to formalize the appropriateness of the current practices of such issuers not to register their stock options as a separate class of equity security under Section 12(g). In that regard, we see no compelling reasons to impose any restrictions on the exemptions, so there would be no need for a transition period.

As to non-reporting issuers, in our experience 60 days would not be adequate time for most of them to prepare a Form 10 registration statement under the Exchange Act, and even 90 days would be extremely difficult for many private companies. Instead, we suggest that the transition period for non-reporting companies relying on the Exchange Act exemption should be 120 days. The statute itself provides companies with 120 days following the first fiscal year end at which they meet the number of holders and asset tests to prepare and file a registration statement under the Exchange Act. So should a private company that is relying on the new Section 12(g) exemption be provided with the same 120-day transition period.

- *Should the proposed exemptions be exclusive exemptions for Section 12 registration of compensatory employee stock options?*

No, as with Rule 701, we do not believe that the exemptions should be exclusive exemptions for Section 12 registration of compensatory options.

IV. Request for Consideration of a More Effective Exemption Tied to Rule 701

We request that the Commission consider a slightly different approach to the proposed Exchange Act registration exemption for non-reporting issuers. Our proposed alternative exemption would be tied more closely to Securities Act Rule 701, as it would eliminate the additional informational requirements and restrictions on transferability of shares contained in the Proposal, include both options and other compensatory rights to acquire common shares, and track future changes in Rule 701.

A. Summary of Modified Exemption

In summary:

1. The exemption should include all compensatory rights to acquire common shares of the issuer, including stock options, restricted stock units, stock appreciation rights, performance units and all similar compensatory rights (referred to collectively as "rights");

2. The informational requirements should be identical to Rule 701, both with respect to the required timing of information access and delivery and the scope of the information provided (*i.e.*, eliminate the books and records condition);

3. The limitations on transferability should only apply to compensatory options and other compensatory rights, not to shares acquired pursuant to the compensatory award or other shares in the same class; and

4. To the extent the 12-month, $5 million threshold for mandatory disclosure under Rule 701 is subsequently increased (or other conditions are otherwise changed), the threshold (or other similar conditions) of the Exchange Act registration exemption should automatically track such increases (or other changes).

B. Discussion of Modified Exemption

Rule 701 provides an exemption from Securities Act registration for the offer and sale of securities and rights to acquire securities to employees, directors and consultants in a compensatory context. It is not limited to stock options as the Commission's proposed Exchange Act exemption for non-reporting companies is. We do not see any meaningful difference among various types of compensatory rights, and suggest that the non-reporting company exemption

from Section 12(g) of the Exchange Act not be limited to stock options. Such exemption should cover the same rights to acquire securities that are covered by Rule 701.

Our proposed alternative approach to an exemption from registration under the Exchange Act is grounded on the underlying premises of the Exchange Act. As reflected in the legislative history of Section 12(g) and the language of Section 12(h), discussed above, the purposes of the Exchange Act are to provide ongoing disclosure to market participants. Registration under Section 12 also provides protections through Section 14(a) to shareholders' voting rights. Holders of nontransferable compensatory stock options and other nontransferable compensatory rights granted by non-listed companies have no market in which to sell their rights and are not yet shareholders, so they cannot vote. Under the Securities Act, they are guaranteed that they will receive whatever information they need to decide whether and when to exercise their rights and become shareholders. It is only when they exercise their rights that they acquire securities for which there may someday be a trading market and with respect to which there is a right to vote. Once there are 500 or more holders of the underlying voting securities, the issuer must register such class of securities under the Exchange Act. Prior to such time, there is no need for the protections afforded by the registration requirements of the Exchange Act.

Moreover, we do not believe there is any compelling reason to restrict the transferability of the shares issued upon exercise of compensatory rights. Upon exercise of the option, the holder will become a holder of the underlying security. There is already the same built-in protection afforded to the Rule 701 persons as to the investors: as soon as there are 500 or more holders of the class of underlying securities, the issuer will have to register that class under Section 12 of the Exchange Act. We see no need to require that such securities be nontransferable.

We also believe that the type of information that must be provided in order to qualify for the new Section 12(g) exemption should be the same information as is required under Rule 701. Rights holders are not shareholders and should not be entitled to inspect the books and records of the issuer. Corporate law of the state of jurisdiction of the issuer should be the sole determinant of who is entitled to receive or view such information.

In addition, the timing of providing the information that is required should be the same as it is under Rule 701; *i.e.*, (i) such information would not be required unless the 12-month, $5 million threshold under Rule 701 has been crossed and (ii) even then, it would only be required to be provided a reasonable period of time prior to exercise of the rights.[8] This approach would leave the informational requirements of Rule 701 in place, as well as provide protection for these

[8] We note that there is no Commission guidance of which we are aware that directly addresses when information is required to be delivered under Rule 701 for grants of restricted stock units that are not able to satisfy the standards for application of the "no-sale" doctrine, as addressed in Verint Systems Inc., SEC No-Action Letter (avail. May 24, 2007). We request that the Commission confirm when in such circumstances the information supplying obligations are to be satisfied.

holders when faced with an investment decision, without jeopardizing the prospects of the issuer in a competitive environment by expanding the rights of holders of compensatory rights to information and access beyond their immediate needs.[9]

Finally, we believe that the Section 12(g) exemption for non-reporting companies should automatically track any future changes in Rule 701. For example, if the $5 million threshold for required disclosure under Rule 701 is increased to $25 million, so should the threshold for disclosure under the Section 12(g) exemption. This is in keeping with the Commission's proposals in other contexts to provide for periodic adjustments of amounts contained in various rules for inflation.

Following this line of reasoning, an exemption from registration under the Exchange Act could simply provide that holders of compensatory options and other rights issued in compliance with Rule 701 would not count against any 500-holder threshold on such classes of securities, but the underlying voting securities issuable upon exercise thereof would count. Individuals or entities holding securities (whether options, warrants, rights or voting securities) not issued in compliance with Rule 701 (such as options issued to consultants engaged in capital-raising activities and stock issued to investors), however, would be counted toward the 500-threshold limit for the relevant class of securities.

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[9] While we considered whether it might be a reasonable compromise to provide for the information required under Rule 701 to be delivered a reasonable period of time prior to an optionholder making an investment decision once there are 500 or more optionholders, this approach fails to recognize the fundamental point that the number of optionholders does not justify a need for such information when the options are compensatory and non-transferable, and the standards of investor protection established under the Securities Act should be sufficient as well in this context.

We appreciate the opportunity to provide these comments. Members of the Committee are available to discuss them should the Commission or the Staff so desire.

Respectfully submitted,

/s/ Keith F. Higgins

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Keith F. Higgins, Chair of the
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