

ANDREW M. ROSS
Partner

345 Park Avenue
New York, NY 10154

Direct 212.407.4838
Main 212.407.4000
Fax 212.504.3264
aross@loeb.com

September 6, 2007

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Re: File No. S7-14-07

Dear Ms. Morris:

This letter is being written in response to the request of the Securities and Exchange Commission (the "Commission") for comments with respect to its proposed rule (the "Proposed Rule" and, if adopted, the "Rule") regarding exemption of Compensatory Employee Stock Options from Registration under Section 12(g) of the Securities Exchange Act of 1934 (the "Exchange Act") published in Release No. 34-56010 (the "Proposing Release"). Please note that the opinions expressed in this letter are those of the undersigned and do not necessarily reflect the views of Loeb & Loeb LLP.

In the Proposing Release the Commission has proposed two exemptions from the registration requirements of the Exchange Act for stock options ("Compensatory Options") held only by those persons described in section (c) of Rule 701 ("Rule 701")¹ under the Securities Act of 1933, as amended (the "Securities Act"), including an exemption available solely with respect to issuers that are not required to file periodic reports under the Exchange Act (the "Private Issuer Exemption"). The purpose of the Private Issuer Exemption portion of the Proposed Rule is to provide an exemption from Section 12(g) under the Exchange Act for issuers which are not otherwise required to file periodic reports under the Exchange Act but have outstanding Compensatory Options held by in excess of 500 persons; provided that the conditions of the Proposed Rule are met. While the staff of the Division of Corporate Finance has previously issued no-action letters in this area, the Proposed Rule is presumably intended to alleviate the uncertainties involved in seeking or otherwise related to no-action letters.

Overview

The purpose of this letter is to comment upon and respectfully suggest (i) several modifications to the transfer restriction provisions of the Private Issuer Exemption, and (ii) a clarification regarding the point in time when the Private Issuer Exemption should commence to apply for any issuer.

¹ Rule 701 covers, *inter alia*, stock options granted to employees, directors, officers or consultants and advisors of the issuer, its parent and majority-owned subsidiaries, provided in the case of consultants and advisors, among other conditions, they provided *bona fide* services and the services are not in connection with the offer or sale of securities in a capital-raising transaction ("Covered Persons").

The author of this letter agrees with the purposes of the Proposed Rule and the relief proposed to be provided by the Commission pursuant to the Proposed Rule. However, there are several aspects of the Proposed Rule pertaining to the transferability of shares of stock of the issuer and the “kick-in” of the Proposed Rule that the undersigned believes are problematic but which the undersigned believes can be alleviated while still achieving the purposes of the Proposed Rule and maintaining the protections required under the Exchange Act.

Terms of Proposed Rule: Restrictions equate to Prohibition

The Proposed Rule would amend Rule 12h-1 under the Exchange Act by adding new paragraphs (f) and (g) thereto. Pursuant to paragraph (f)(1)(iv) and (v) of Rule 12h-1 as it would be amended by the Proposed Rule, in addition to restrictions on the transferability of the Compensatory Options themselves, the “shares issuable upon exercise of such stock options (“Option Shares”)” and “shares of the same class of equity securities as those underlying the options” held by the optionholder or holder of shares received on exercise of an option would be subject to various restrictions on transfer. In Part II.A.4.a. of the Proposing Release the Commission states that “we believe that the proposed transferability restrictions are necessary to limit further the possibility of a market developing in the securities issued or issuable on exercise of immediately exercisable compensatory employee stock options while the issuer is not reporting under the Exchange Act.”

Transfer Restrictions

While the foregoing is an important concern and one that must be adequately addressed, the Commission itself acknowledge in footnote 53 of the Proposing Release that “the transfer restrictions and the proposed exception are more restrictive than those in Rule 701”. The Commission is correct in its footnote that these restrictions are more restrictive than those required under Rule 701 in that under Rule 701 shares issued pursuant thereto are treated as restricted securities as to which transfers are permitted so long as the transfer is made in accordance with either the registration requirements of the Securities Act or an available exemption from registration thereunder. On the other hand, the Proposed Rule, subject only to its extremely limited exceptions, states that even if, absent the application of the Proposed Rule, an exemption from the registration requirement of the Securities Act would be available, the subject shares cannot be transferred except pursuant to the more limited exceptions under the Proposed Rule itself. The undersigned respectfully submits that in many common circumstances these restrictions on transfer are tantamount to a prohibition on transfer.

This prohibition on transfer, as compared to restriction on transfer, is an unusual position relative to positions generally taken by the Commission in its rules, and is one that could well have significant adverse affects on holders of Compensatory Options covered by the Rule, thus undercutting the purposes of Compensatory Options themselves and therefore the value of the Proposed Rule. For example, even under the most stringent requirements under Regulation S under the Securities Act, (“Reg. S”), equity securities of a domestic company issued pursuant to Reg. S may still be resold into the United State after a period of time. This limitation on time applies regardless of any numerical limitation regarding the number of shares issued, the consideration received or the number of non-US persons receiving the Reg. S shares and seeking to resell them in the United States.

Impact of Prohibition

Initially one must consider whether a flat prohibition on transfers is in fact necessary to accomplish the Commission's objectives. There are numerous scenarios wherein a transfer of shares issued upon the exercise of Compensatory Options would clearly be a transfer in what would otherwise be an exempt transaction and the undersigned respectfully suggests that no useful purpose would seem to be served by eliminating such transfers. For example, due to the customary terms of many options, upon termination of employment optionholders often find themselves obligated to exercise the options or forfeit them and thus lose the value earned by the optionholder. This is also true at the end of the term of the option. This can often have a meaningful adverse cash cost to the person exercising the option, especially in the case of a non-qualified stock option if the underlying shares of stock have appreciated in value significantly and there are therefore substantial income taxes to be paid in conjunction with the exercise. While in some cases the issuer has the right to repurchase such options upon exercise, it is often if not generally the case that the issuer as a matter of policy does not want to be in the position of repurchasing shares issued upon the exercise of options or as a matter of practicality does not have or cannot afford the cash to do so. In such situations a resale on an exempt basis is of particular significance in order to effect the initial purposes of the grant of the option and the Proposed Rule itself. In many cases the new stockholder may be willing to purchase such shares, but would be effectively precluded from doing so by the Proposed Rule. Moreover under Paragraph (f)1(iv) to be adopted by the Proposed Rule, even the issuer itself would only be permitted to repurchase the shares "if applicable law prohibits a restriction on transfer". The availability of this proviso will in fact be of limited utility to most issuers.

There are additional situations where transfers of the underlying shares should not be prohibited, for instance in the event of a merger or consolidation of the issuer with a third party or a purchase by a third party of the issuer's business by means of the purchase of its outstanding shares of stock. However on the face of the Proposed Rule any such transfer, apparently even those transfers occurring as a matter of operation of law, such as in the case of a merger or consolidation, would be prohibited. This prohibition seems to have the potential to force companies to modify their business decisions so as to be forced to seek to engage in a public offering rather than selling the company, regardless of whether the latter is otherwise in the best interest of the stockholders of the issuer as a whole². I believe that it is not the intention of the Commission to adopt rules which have the potential to modify legitimate business behavior in this manner.

Other Shares

In addition to substantially restricting (and thus effectively prohibiting) the transfer of the shares of stock issuable upon the exercise of Compensatory Options, the Proposed Rule also imposes restrictions on "any pledge, hypothecation, or other transfer" on "shares of the same class of equity securities as those underlying the options...[held] by the optionholder or holder of shares received on exercise of an option *[emphasis added]*." Rule §240.12h-1(f)(1)(v) as proposed by the Proposing Release. Presumably, the underlying rationale of this portion of the Proposed

² For that matter, many acquisitions are accomplished by having the effective buyer merge into the seller. This would result in a "transfer" of shares, even though that is not the effective business result, and the acquisition by the issuer of another company by this means would be prohibited under the Proposed Rule.

Rule is that “shares are fungible” and therefore to fail to restrict those transfers would be effectively the same as failing to restrict the transfer of the Option Shares and therefore undermine the intended effect of the Proposed Rule. However, in fact the adoption of the Proposed Rule would have the effect of penalizing those optionholders who in addition to receiving Compensatory Options also purchased or otherwise hold shares of stock since the grant of such options would impose a prohibition on the transfer of such shares rather than leaving those shares to transfer pursuant to an available exemption. This seems to undermine the purpose of encouraging or allowing the use of employee stock options and to discourage ownership of stock in private companies by Covered Persons.

Timing of Initial Application of the Rule to an Issuer

As set forth in the Proposing Release, the Proposed Rule could arguably be interpreted to mean that in order to take advantage of the application of the Rule, the issuer must comply with its terms from the date of the establishment of the applicable plan or the first grant of Compensatory Options thereunder. In order to avoid any such possible interpretation, it is respectfully suggested that the Rule state that these provisions (for instance the stricter Rule limitations on transfer of Option Shares and any restrictions on transfer under the Rule on other shares) do not apply until, and only so long as, the issuer has 500 or more holders of Compensatory Options. This way issuers could adopt plans which stated that the provisions required by the Rule would only apply during the foregoing period, rather than also applying even when the issuer does not have 500 or more holders of Compensatory Options. In the experience of the undersigned, most issuers which grant Compensatory Options do not do so with the expectation that they will find themselves with 500 or more holders of Compensatory Options. Nor does the Proposing Release indicate that this is an overly widespread occurrence.

Proposal

Accordingly, while the author of this letter applauds the Commission’s objectives in proposing this Rule and supports most of its provisions, the undersigned respectfully suggests that the Commission consider the following modifications to the Rule:

1. First, with respect to the Private Issuer Exemption it is respectfully suggested that the Commission consider treating shares of stock issuable upon the exercise of Compensatory Options no differently than any other shares of stock *i.e.*, they may be transferred only pursuant to registration under the Securities Act or an available exemption from registration under the Securities Act, rather than being subject to an effective prohibition on transfer unless or until the issuer becomes a reporting company under the Exchange Act.

2. In the event that the Commission concludes that it is not appropriate to make the changes in the Proposed Rule per suggestion number 1 above, it is respectfully suggested that with respect to the Private Issuer Exemption the Commission consider the addition of specific and limited exceptions to the prohibition on transfer, including permitting transfers to the issuer and its stockholders and their respective affiliates as well as in connection with any merger or consolidation of the issuer or as part of a sale of the issuer.

3. It is respectfully requested that the Commission amend the Proposed Rule with respect to the Private Issuer Exemption so as to not impose any restrictions under the Rule on

shares of stock held by an option recipient other than those shares issued or issuable upon exercise of the option. It is respectfully submitted that failure to amend the Proposed Rule to exclude any restriction or prohibition on transfer of other shares of the issuer's securities held by the option holder will in fact have an adverse affect on the legitimate business purposes intended to be served by option grants and by stock ownership by Covered Persons. In addition this will also impose severe practical limitations on issuers which will need as a condition of granting options to recover stock certificates representing shares which would be covered so as to provide for appropriate legends. Moreover in those circumstances where the employee has paid valid consideration for the shares, imposing a prohibition of this nature has the potential economic effect of overpayment with respect to the unrelated shares.

4. Fourth, it is respectfully suggested that the Rule specifically permit issuers to adopt plans which provide that the restrictions of the Rule apply only so long as, or once, issuers reach the threshold of having holders of 500 or more Compensatory Options, rather than require the issuer to have the restrictions of the Rule apply from the adoption of a plan or the first grant of any Compensatory Options thereunder.

The consideration by the Commission and the staff of the foregoing points is appreciated. I would welcome the opportunity to discuss any of these matters.

Very truly yours,

Andrew M. Ross
Partner