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September 7, 2007

Ms. Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F. Street, NE,
Washington, DC 20549-1090

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

Dear Ms. Morris:

We are pleased to submit this comment letter to the Securities and Exchange Commission (the “SEC” or the “Commission”) in response to the SEC’s solicitation of comments on Release No. 34-56010 (the “Release”), which proposes certain amendments to the rules governing the exemption of compensatory stock options from registration under Section 12(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

As the Commission has noted in the Release, many companies grant compensatory stock options as non-cash compensation in order to attract, retain and motivate employees, directors and consultants. Currently, Section 12(g) of the Exchange Act requires any company that issues compensatory stock options to more than 500 holders and has assets in excess of \$10 million at the end of its most recently ended fiscal year to register such compensatory stock options as separate securities under the Exchange Act. As the Commission has acknowledged, private companies without registered common stock that fall within the purview of Section 12(g) of the Exchange Act incur a significant burden in connection with the mandatory registration of the compensatory stock options. In particular, private equity investors that purchase mature public companies often inherit work forces that consider stock options to be a critical element of the compensation structure. When the work force of such a company has more than 500 employees who would generally expect to receive compensatory stock options, the private equity investors must either significantly overhaul the compensation structure of the purchased company or incur significant costs by complying with public reporting obligations for a company that is privately held. In fact, many of the no-action letters granted by the Office of Chief Counsel, Division of Corporation Finance, have been granted to issuers that are portfolio companies of private equity firms (the “Precedent Letters”).

We strongly support the efforts by the Commission to revise and limit the applicability of Section 12(g) of the Exchange Act with respect to compensatory stock options and we generally support the proposed amendments in the Release. We note several areas of concern, however, with respect to the application of the proposed rules in certain circumstances and would like to call the Commission's attention to these points.

Exemption for Issuers that are not Exchange Act Reporting Issuers

Change in Control

The Precedent Letters generally condition relief from registration on the requirement that compensatory stock options and shares underlying compensatory stock options be non-transferable until the earlier of (i) an initial public offering or (ii) a change in control of the company in which the company's stockholders receive cash or marketable securities. Currently, the Release exempts from registration only compensatory stock options where the options and the shares of common stock underlying the options ("compensatory stock") are non-transferable until the issuer becomes subject to the reporting requirements of the Exchange Act. Unlike the Precedent Letters, however, the Release does not contemplate exemption from registration for options when the terms of the options and the compensatory stock allow for a transfer upon a change in control of the issuer. We note that the Commission has previously recognized the importance of transferability to employee optionholders and stockholders in connection with a change in control and we recommend that the final rule amendment contain a similar provision, as contemplated by the Precedent Letters, which would permit optionholders to transfer options or the compensatory stock in sale-of-company or other change-in-control transactions.

The transfer restrictions currently contemplated in the Release are "intended to limit the possibility for a trading market to develop for the compensatory employee stock options or the securities issued on exercise of those options," with the objective that "there are no public investors in the compensatory employee stock options that need the full range of protections that Exchange Act registration and reporting afford." In a change-in-control context, the purchaser of the shares of common stock would acquire the shares in a privately negotiated transaction and not be relying on the information disclosure provisions of the Exchange Act, outside a "market" environment, where the prospective transferee has the resources to conduct a thorough and diligent review of the issuer and access to sufficient information with respect to the issuer to conduct such review and make an informed decision. Therefore, as we suggest above, employee investors should be permitted to sell their compensatory stock or options in the event of a change in control where the issuer has not otherwise incurred public reporting obligations, because such a sale does not necessitate additional public disclosure for the protection of the purchaser.

Other Corporate Transactions

In addition to providing for transferability upon a change in control discussed above as accommodated by the Precedent Letters, we believe the Commission also should provide for limited transferability in connection with certain specified non-ordinary course sales of the issuer's common stock. As we suggest above, employee investors should be permitted to sell their shares or options in the event of a change in control, even when the company does not become an Exchange Act filer, because the transaction would not involve trading in a public market. The same rationale should, we believe, also apply to privately negotiated non-ordinary course transfers of common stock even when they do not rise to the level of changes in control.

Employee equity holders often have contractual "tag-along" rights or "drag-along" obligations which would permit them or require them, as the case may be, to participate in certain transfers of shares of common stock by major stockholders. In a "tag-along" sale, an employee investor is presented with an opportunity to participate in a sale by a large investor, in which the large investor has had an opportunity to negotiate beneficial terms, including at times a premium with respect to its large position. Such a "tag-along" sale would not result in a trading market developing for the common stock (or the compensatory stock options), and a restriction on the employee investors' ability to participate on an equal basis with more sophisticated stockholders is not necessary to prohibit such a market from developing. Furthermore, in a "tag-along" context, similar to a change-in-control transaction, the purchaser of the shares of common stock would acquire the shares in a privately negotiated transaction and would not require the information disclosure provisions of the Exchange Act. The purchaser would have negotiated for an opportunity to conduct a thorough and diligent review of the issuer, with access to sufficient information with respect to the issuer to conduct such review and make an informed decision.

In contrast to a "tag-along" sale, in a "drag-along" sale, an employee investor has previously agreed to participate in certain designated sales by larger stockholders and at the time of the transaction, the employee investor is obligated to participate in the sale at the option of that larger stockholder. Similar to a "tag-along" sale, in a "drag-along" context, there is no public market trading of common stock and the purchaser has had sufficient informational review without the need for the protection of the Exchange Act.

Thus, the final rule should permit transfers in privately negotiated transactions of shares received upon exercise of compensatory stock options pursuant to a "tag-along" or "drag-along" right or obligation. Enabling employee equity holders to participate in such transactions through "drag-along" or "tag-along" provisions would not result in the creation or fostering of a trading market of any kind. Additionally, the Release already contemplates the delivery of Rule 701-based information to employee investors, and thus there should be no concern about the availability of sufficient information to either

party in a transfer of common stock. Should the Commission fail to recognize the importance of participation by employee stockholders in these types of fundamental corporate transactions, it will prevent many optionholders from recognizing compensatory income in connection with significant transactions and limit the effectiveness of compensatory stock options as a desirable means of employee compensation. Further, to prohibit such participation would be to deny employee investors the opportunity to realize a similar return on their investments as that obtained by the larger stockholders of the issuer and would relegate employee investors to the status of second-class stockholders within privately held companies.

Comparison to Existing Regulations

The Release says that the “proposed transfer restrictions for the compensatory employee stock options and the shares received or to be received on exercise of those options are consistent in most respects with the transfer restrictions on compensatory securities in Securities Act Rule 701.” We note, however, that the proposed restrictions in the Release currently impose transfer restrictions that are far more restrictive than the general transfer restrictions on compensatory stock or options when such stock or options are issued pursuant to Rule 701. An employee receiving stock or options pursuant to Rule 701 receives “restricted securities” which may not be transferred except “in compliance with the registration requirements of the Securities Act or an exemption from those requirements.” Rule 701(g). There are, however, exemptions from the Securities Act that would permit transfers of the stock or options awarded to employees pursuant to Rule 701 — which the Release would not permit — that in most cases would likely allow for the types of transactions contemplated above.

In addition to a more restrictive transfer regime than Rule 701 as described above, we note that in the Release the SEC has provided for a more restrictive transfer regime for compensatory stock than would generally apply under the Exchange Act for common stock that is issued outside the compensatory stock option framework, even though once issued, compensatory stock is identical to stock otherwise issued by the same nonreporting issuer. Outside the compensatory stock framework, an issuer would only be required to report publicly when there are more than 500 holders.

Exemption for Issuers that are Exchange Act Reporting Issuers

The Release currently provides relief from registration under the Exchange Act for issuers only if the common stock underlying the compensatory stock options is currently registered under the Exchange Act. Given that the goal of the Commission is to ensure availability of current information, however, we note that such goal also is met when an issuer is required to report as a result of the sale of debt securities registered under the Securities Act (“Reporting Debt Securities”), rather than as a result of the Exchange Act registration of common stock. In the case of Reporting Debt Securities, the issuer is

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obligated to file periodic and current reports with the Commission. While such an issuer would not currently be obligated to file proxy statements or Section 13 or 16 filings such an issuer would be providing essentially the same information as if it were required to register the common stock under the Exchange Act. Because the informational delivery requirements of an issuer with Reporting Debt Securities are, for the purpose of optionholders, substantially similar to the requirements of an issuer with registered common stock, we believe the Commission should expand the exemption from registration to issuers with Reporting Debt Securities or common stock registered under the Exchange Act.

Conclusion

We appreciate the opportunity to comment on the Release. We view the Release as a commendable effort by the Commission to improve issuer efficiency and equityholder return while at the same time continuing to ensure that adequate public information is available when necessary. Overall, the proposed amendments to the applicable rules of the Exchange Act will provide much-needed relief to private issuers from the burdens of periodic reporting in certain situations with respect to compensatory stock options. We believe certain changes to the Release (as described above), however, are necessary in order to ensure that employees are able to realize the economic benefits intended from the grant of compensatory stock options without placing undue burden on private companies to undertake public reporting.

We would be happy to discuss any of these matters with you or any questions relating to this comment letter. Please contact Vincent Pagano, Jr. or Jennifer Nadborny in our New York office at 212-455-2000.

Very truly yours,

SIMPSON THACHER & BARTLETT LLP