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September 14, 2006

Via Electronic Filing (rule-comments@sec.gov)

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

Re: Release No. 34-54154; File No. S7-12-06

Dear Ms. Morris:

Leerink Swann & Co., Inc. ("Leerink")[1] is submitting this letter in response to the request by the Securities and Exchange Commission ("SEC" or "Commission") for comments on its proposed amendments to Regulation SHO under the Securities Exchange Act of 1934[2].

We appreciate and thank you for the opportunity to comment on the Release, and, for purpose of this letter, will focus the firm's comments and recommendation on a narrow and important issue relating to the close-out requirement for Rule 144 and other similarly restricted threshold securities (such as Rule 145, Rule 701 and securities acquired as a result of a PIPE transaction pursuant to a S-3 filing) and not to a distribution. Specifically, we believe, and recommend below, that the close-out requirement for all restricted securities be extended to 35 settlement days. We note that that period of time is proposed as an optional solution in the Release to delivery problems through no fault of the seller[3]. We understand that comments from others will address other parts of the proposed amendments.

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[1] Leerink Swann & Co., Inc. is a SEC-registered broker-dealer and a member of NASD.
[2] SEC Release 34-54154 (July 14, 2006) (the "Release")
[3] See Release at p. 14

Regulation SHO[4], which became fully effective in January 2005, provides a regulatory framework for governing short sales. Regulation SHO, *inter alia,* imposes a close-out requirement related to failures to deliver stock on settlement date and targets abusive "naked" short selling (e.g., selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three-day settlement period).[5] In commenting on the proposed amendments relating to the treatment of restricted securities, we note that the short selling abuses Regulation SHO was adopted to address do not generally come into consideration. The Commission describes a short sale as "the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[6] The Commission has also described the intended purpose of short selling is "to profit from an unexpected downward price movement".[7] We would respectfully suggest that maintaining a mandatory close-out after a 13 day period for restricted securities caused by a failure on the part of someone other than the seller is not getting at the problems intended by the Commission in adopting Regulation SHO.

In reviewing information provided to investors on the Commission's website[8] concerning the sale of Rule 144 restricted securities, it is evident the Commission distinguishes such securities from those normally associated with short selling. In describing restricted securities, the SEC indicates they are typically acquired in unregistered, private sales from the issuer or from an affiliate of the issuer through private placement offerings, Regulation D offerings, employee stock benefit plans, as compensation for professional services, or in exchange for providing "seed" money or start-up capital to a company.[9] Restricted securities are normally stamped with a restricted legend providing notice to the market that the stock is not freely saleable. To sell restricted securities, Rule 144 imposes certain conditions, including a one year holding period and sale limitations based on recent trading volume. Conditions not normally associated

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[4] See Release No. 34-50103 (July 28, 2004) ("Adopting Release")
[5] See Release at pp. 1-2
[6] See Release at pp. 1-2, footnote 1
[7] Id
[8] www.sec.gov/investor/pubs/rule144.htm
[9] Id, p.1

with someone hoping to benefit from a drop in the stock price. Even if all of pre-conditions are met, the holder of restricted securities cannot sell to the public until the restricted legend is removed from the certificate.[10] The transfer agent can remove the legend but requires the issuer to consent to the removal. The consent is usually evidenced by the issuer's counsel providing an opinion letter permitting the legend removal. Without the necessary consent, the transfer agent will not remove the legend, thus preventing the certificate holder from completing a transaction in the marketplace. In providing this information to the investing public, the Commission advises that "removing the legend can be a complicated process … and it would be wise to consult an attorney who specializes in securities law."[11]

In a similar vein, issuers use the PIPE (Private Investment in Public Equity) market when more traditional means of financing may not be practical. Because PIPE securities are most often issued pursuant to an exemption under the Securities Act (such as Regulation D), PIPE purchasers receive restricted securities when the transaction closes. The purchaser cannot sell PIPE holding until a resale registration statement has been declared effective by the SEC – a process that may take 60 to 120 days to complete. In fact, a PIPE purchaser, as a pre-condition of participation, has to represent that he will not sell, transfer or dispose of the PIPE shares other than in compliance with the registration provisions of the Securities Act of 1933. Consequently, PIPE purchasers have to wait an undefined period of time before they can freely trade the securities purchased in a PIPE. As compensation to purchasers for this temporary liquidity, PIPE issuers customarily offer the restricted securities at a discount to the market price.

Anticipating that disputes can arise in attempting to get a legend removed by the issuer, the Commission advises investors it will not intervene as the "removal of the legend is solely in the discretion of the issuer of the securities."[12] In these circumstances, is it appropriate to potentially punish the owner of restricted securities who has met all of his obligations but becomes stymied by the issuer in attempting to deliver a clean certificate? We

[10] Id, p. 2
[11] Id, pp. 2-3
[12] Id, p. 3

urge the Commission to amend Regulation SHO so that these situations do not punish investors. Set out below is an example of how the current thirteen (13) day period works against the restricted stockholder making delivery within that timeframe a challenge.

Example: A customer of Leerink Swann sells 1,000,000 shares of Acme Industries on behalf of investors in a partnership on Monday, June 1. The stock is already on the threshold list because another firm sold 1,000,000 shares ten days earlier.

Delivery needs to be completed within 13 business days (Wednesday, June 17) to avoid a buy-in by the clearing broker on Thursday, June 18.

Assume the certificate is in safekeeping with the clearing broker, Pershing, on the June 1 trade date. It will still take two business days to get the certificate to Pershing's legal transfer area (Wednesday, June 3). At that point, Pershing would arrange to have a copy of the certificate faxed to Leerink Swann (adding at least another day) - Thursday, June 4. At that point, the firm can start the process of obtaining the legal opinion from the issuer's counsel. It can take up to one week to obtain the legal opinion, bringing us to Thursday, June 11. The certificate with the opinion attached is over-nighted to the transfer agent arriving on Friday, June 12. The transfer agent would hopefully process the removal of the legend by Wednesday, June 17 and then overnight a clean certificate stock back to Pershing with the certificate arriving on Thursday, June 18.

If everything works without any delays in the example above, a buy-in would still be made through no fault of the certificate holder and certainly not because of any intention to not deliver the certificate or engage in a "naked" short transaction. What hurdles could be encountered to cause delays? A list of frequently encountered problems includes: issuer's counsel on vacation; issuer's counsel raises questions about the seller's representation letter and requests a new letter; new corporate or partnership resolutions requested by transfer agent; certificate held away from clearing broker; lost stock power; misplaced certificate at transfer agent or issuer; inexplicable delays at the transfer agent; and courier delays. Thirteen days does clearly not provide a

sufficient period to complete delivery. In rare instances, even thirty-five days may not be sufficient. We recognize, however, that some defined period needs to be established and we support a thirty-five period to complete settlement in situations where the seller is in possession of a certificate.

There are certain issuers who are willing to expedite the issuance of the counsel's opinion. While helpful, this is only one step in the initiative to remove the legend.

The financial implications to a seller can be significant if a buy-in is required, especially in a thinly-traded stock. For example, a large block transaction that has failed to settle while the seller awaits removal of the restricted legend forces the clearing broker to cover in the market at a price that reflects the market's supply and demand. If a million share block in a stock whose average daily volume is less than one million shares is sold at $10, the clearing broker would probably be unable to find the necessary shares at $10 as the market supply would push the per share price to a higher dollar amount. If the average share price for the buy-in was $1.00, the seller faces a loss of $1 million. While some would argue this example represents an extreme case, even smaller- size investors face similar issues.

We appreciate your consideration of this narrow, but important, issue relating to the proposed amendments to Regulation SHO, and would be pleased to make ourselves available to the Commission or any members of the staff if you would like to discuss any aspects of our comments. My direct line is 617-918-4564.

Sincerely,

/s/
John I. Fitzgerald
Compliance Officer

JIF/gct