

**Securities Industry Association**

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September 19, 1995

Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W. Mail Stop 6-1
Washington, DC 20549

**Re: File No. S7-17-95,
Revision of Holding Period Requirements under Rule 144**

Dear Mr. Katz:

The Capital Markets Committee and the Federal Regulation Committee (the "Committees") of the Securities Industry Association ("SIA")¹ welcome the opportunity to respond to the above-captioned release issued on June 27, 1995 (the "Release") by the Securities and Exchange Commission (the "Commission" or "SEC"). In the Release, the SEC proposes to amend the holding period requirements contained in Rule 144 under the Securities Act of 1933 (the "Securities Act") to reduce by one year both of the holding periods related to restricted securities. The Commission also seeks comment in the Release on whether to reintroduce the holding period tolling concepts under Rule 144 to address new trading strategies, such as the use of equity swaps and similar investment strategies, and reminds persons subject to reporting obligations under Section 16 of the Securities Exchange Act of 1934 (the "Exchange Act") about their need to report such transactions.

For the reasons set forth below, the Committees: (i) support the proposed reduction of the holding period requirements under Rule 144; (ii) strongly oppose a reintroduction of the holding period tolling concepts under Rule 144 with respect to hedging transactions; and (iii) suggest that the SEC adopt two changes related to Rule 144 not covered in the Release, one regarding Form 144 and the other regarding the de minimis standard under subsection (h) of Rule 144.

A. REDUCTION OF THE HOLDING PERIODS UNDER RULE 144

1. Background

Rule 144 contains a safe harbor for resales of "restricted securities" and "control securities." The term "restricted securities" generally refers to securities that are issued in private placements,² whereas the term "control securities" is commonly used for securities owned by affiliates of the issuer.³ If a holder of restricted or control securities sells such securities in compliance with the terms and conditions of Rule 144, that holder can be assured that it is not "engaged in a distribution" and, therefore, is not an

underwriter for purposes of Section 4(1) of the Securities Act. Section 4(1) provides an exemption from the registration requirements under the Securities Act for ordinary trading transactions by persons who are not issuers, underwriters or dealers. Although Rule 144 is a non-exclusive safe harbor and sellers of restricted securities may rely on the general exemption provided by Section 4(1), the terms and conditions of Rule 144 have come to be the starting point for most sellers of restricted securities.

One of the conditions under Rule 144 is that an investor must hold restricted securities for a sufficient amount of time in order to establish that he or she purchased such securities for investment and not with a view toward an unregistered public distribution. Under the current rule, restricted securities must be held at least two years (measured from the time the securities are purchased from either the issuer or an affiliate) before they can be resold at all.

After restricted securities have been held for at least two years (but prior to three years), such securities can be resold but only under certain conditions. For example, adequate current public information must be made available concerning the issuer, the amount of securities sold in any three-month period must be limited, resales must be effected in ordinary brokerage transactions or directly with a market-maker and the seller must notify the Commission of the resale by filing Form 144 with the SEC (these requirements under Rule 144, excluding the holding period requirements, are referred to collectively herein as the "General Conditions"). After a three-year holding period, Rule 144 permits holders of restricted securities who are not affiliated with the issuer to resell such securities freely without complying with any of the General Conditions.

In contrast to restricted securities, no holding period requirements apply to the sale of control securities. Control securities are subject to resale restrictions not because of the type of transaction in which they were purchased, but because of the nature of the purchaser. Affiliates of an issuer are subject to a host of provisions under other securities laws and regulations to protect against their misuse of inside information that might stem from their affiliation. In any event, a seller of control securities must satisfy each of the General Conditions regardless of the amount of time the securities have been held. As a result, a sale of control securities for the account of an affiliate is subject to the same requirements (other than the holding period) as a sale of restricted securities by or for an affiliate of the issuer, or by a non-affiliate that has held the restricted securities for less than three years.

2. Proposal to Reduce the Holding Periods

The Commission proposes in the Release to reduce by one year the two holding periods applicable to resales of restricted securities. In particular, the holding period applicable to limited resales in compliance with the General Conditions under Rule 144(d) would be reduced from two years to one year and the holding period applicable to unlimited resales by non-affiliates under Rule 144(k) would be reduced from three years to two years. The proposed amendments to Rule 144 would not change the requirements applicable to resales of control securities because the rule imposes no holding period requirements with respect to such securities.

3. Committees' Position

The Committees support the proposal to reduce the holding periods applicable to resales of restricted securities. The Committees share the Commission's belief that the holding periods proposed in the Release are sufficiently long to establish that securities were not purchased with a view toward participating in an unregistered public distribution. A reduction in the holding period for restricted securities will reduce the cost of raising capital in private placements because it will decrease the discount investors require as compensation for the market risk of being locked into an investment for the duration of the requisite holding period. The Committees concur with the SEC's conclusions that the proposal will enhance the utility of Rule 144's safe harbor and reduce costs for private capital formation without compromising investor interests. Further, the impact on Rule 144A securities of a reduction of the holding period will enhance the utility of this important financing option.

When the SEC adopted Rule 144 in 1972, its use of a two-year holding period as a condition to limited resales of restricted securities was, in retrospect, overly cautious. In the view of some other authoritative sources, a shorter holding period would have sufficed to prove investment intent.⁴ The Committees understand that the Commission was exercising extreme care in 1972 regarding the limitations because the SEC adopted Rule 144 on an experimental basis and it represented the first "safe harbor" crafted by the SEC. As the Commission has gained experience with Rule 144, a number of its limitations have been relaxed since 1972. The Committees believe that the proposal in the Release to reduce the holding periods is an appropriate further relaxation of the limitations under Rule 144 because it will make the safe harbor more widely available with no offsetting harm to the investing public.

B. EQUITY SWAPS AND SIMILAR INVESTMENT STRATEGIES

1. Background

Prior to 1990, Rule 144 provided for a tolling of the holding period when a holder engaged in short sales, puts or other options to sell securities. By way of example, assume that an investor (who was a non-affiliate) held 1,000 shares of restricted equity securities for three years, but had a short position in 750 of such shares for two of those three years. Under the former provisions of Rule 144, that holder would satisfy the holding period requirements for the safe harbor with respect to only 250 shares of his or her 1,000-share holding and could resell only those 250 shares under the rule. However, the holder would need to hold 750 shares for an additional one year before he or she could resell them because the holder's holding period with respect to those shares would have been tolled during the period he or she had a short position in 750 shares. The holding period would recommence only after the short position was closed out.

The Commission made substantial amendments to Rule 144 in 1990. One of the most significant changes was to allow one holder to tack to his or her holding period the length of time that any prior holder who was not an affiliate held rather than requiring each holder to independently hold the securities for the entire two or three-year holding period.

As part of the amendments to Rule 144 in 1990, the SEC deleted the provision in

paragraph (b)(3) requiring the tolling of the holding period if the holder engaged in short sales, puts or other options to sell securities. In the release adopting the changes with respect to tolling the holding period, the SEC stated that "the question whether the initial or any subsequent holder sold short or otherwise held a contingent position in restricted securities is irrelevant, provided the person acquiring the securities from the issuer or an affiliate of the issuer paid full consideration for the securities and the prescribed period has run."⁵ The Committees believe that this provision was deleted, at least in part, because it was excessively complex to administer (especially for institutional and other holders of diverse portfolios with components managed by independent portfolio managers) and required burdensome compliance mechanisms on the part of securities holders and issuers.

2. Proposal to Reintroduce Holding Period Tolling Concepts

The Release seeks comments as to whether the holding period tolling concepts should be reintroduced for periods during which the SEC believes the holder is not at risk.⁶ The Release refers to a variety of investment strategies associated with separating the bundle of rights that make up a security, including the use of equity swaps, forward contracts, derivatives and other financial tools (such investment techniques are referred to collectively herein as "Hedging Strategies").⁷ The SEC's concern about Hedging Strategies appears to be that they allow the holders of restricted securities to shift the risk of holding such securities to counterparties in the public markets while retaining legal title to the underlying securities.

3. Committees' Position

The Committees strongly oppose the suggestion to reintroduce the holding period tolling concepts. The Committees believe that the SEC's concern with respect to the use of Hedging Strategies is misguided because the use of such techniques: (i) does not permit holders of restricted securities to shift their entire risk; (ii) does not result in leakage of the restricted securities into the public markets; (iii) is consistent with the purposes underlying Rule 144 and its holding periods and those underlying Rule 144A; (iv) does not harm participants in short sales effected in connection with Hedging Strategies; and (v) offers many important benefits to investors and capital markets generally.

(a) Non-Transferability of Entire Investment Risk. One of the premises that apparently underlies the SEC's concern is that hedging permits a holder of restricted securities to shift the entire investment risk to another party. In practice, this assumption is not correct. A holder of restricted securities cannot use Hedging Strategies to transfer all of the risk of holding the securities until the holding period has run. The holder will continue to bear certain risks even after entering into a transaction to effect Hedging Strategies. The Committees can identify at least four such risks: (i) the risk that the restricted securities will appreciate in price during the time the holder engages in a short sale and the time his or her restricted stock becomes tradable under Rule 144, because the holder has, in effect, sold to a counterparty the opportunity to participate in such capital appreciation;⁸ (ii) the risk that the lender of any unrestricted shares sold short will call back its shares in whole or part prior to the time that the holder's restricted securities become tradable under Rule 144 (which would require the holder to purchase publicly traded securities in

the open market and at the current market price in order to cover his or her short position), because the holder would be prohibited under Rule 144 from selling his or her restricted securities;⁹ (iii) the risk of being required to pay additional cash to collateralize the holder's short position in the event the current market price of the publicly traded stock rises (much like a margin call);¹⁰ and (iv) the risk that the holder's hedge cannot be closed out without cost, because his or her restricted securities were not eligible for sale when the hedge was established and cannot be delivered to close the short sale (in other words, the holder might need to pay more to purchase unrestricted securities to close his or her hedge than that holder will receive for selling the restricted securities after they become free to sell).

(b) No Leakage into Public Markets. A holder's use of Hedging Strategies results in no leakage of restricted securities into the public markets. All Hedging Strategies employed with respect to restricted securities rely on a strict separation between restricted shares and publicly traded shares sold short in connection with such trading techniques. Each different type of strategy varies from the others in certain respects. Nevertheless, all Hedging Strategies use a short sale (which can be effected either by the holder or a counterparty) of borrowed shares of another stockholder's securities of the same class as the restricted securities held by the holder. The Committees must emphasize, however, that these short sales are separate and distinct transactions from the position in the restricted securities. The short positions created by such short sales are covered strictly with other shares of another stockholder's securities -- not with restricted securities. This holds true both before and after the resale restrictions under Rule 144 apply.¹¹

(c) Purpose of Rule 144 and its Holding Periods. The Release states that the SEC adopted Rule 144 in 1972 "to provide an objectively determinable safe harbor for resales of 'restricted' securities and 'control' securities." The aim of Rule 144 is to provide clear guidance for concluding that a person is not a "underwriter," as that term is broadly defined in Section 2(11) of the Securities Act, when that person sells restricted or control securities. The significance of not being an underwriter is that the person may then qualify for the transactional exemption from registration requirements under Section 4(1), which provision exempts from the Securities Act's registration requirements transactions by a person other than an issuer, underwriter or dealer. If restricted or control securities are sold in accordance with the conditions of Rule 144, the seller will be not deemed to be engaged in a distribution of securities and, therefore, will not be deemed to be an underwriter for purposes of the Securities Act and will not be subject to the statute's registration requirements.

The Release further states that the purpose of the holding periods is "to establish that the holder did not purchase with a view to an unregistered public distribution." The purpose of the holding periods, therefore, is not to put the holder of restricted securities at risk for some substantial period of time. The holding periods are meant simply as a way of establishing that the holder did not acquire the securities with the mere intent of acting as a conduit to further distribute the securities to public capital markets. As explained above, the Committees believe that a one-year period suffices to establish investment intent.

Based on the purpose and effect of the holding period requirements, the focus in the Release on Hedging Strategies is misplaced. Although hedging, by definition, results in a

holder shifting at least part of the risk of holding the underlying securities, it is not in any way the equivalent of actually selling those securities as part of a distribution. If the true purpose of the holding period requirements is to prevent a holder of restricted securities from acting as a conduit, its goal is served if the investor holds the underlying securities for the full length of the holding period regardless of any degree of hedging by that holder during such period. The fact that the holder has mitigated his or her economic risk of ownership is irrelevant as long as a measure of temporal distance continues to exist between the holder's acquisition in a private placement and his or her eventual resale of the underlying securities into the public markets after the required holding period.

(d) Effects on Participants and Issuers. Neither the issuer nor any of the participants (e.g., the purchaser, the seller and the lender) in a short sale effected in public markets in connection with Hedging Strategies are harmed by the transaction. The purchaser of securities sold short has voluntarily chosen to bear the risk of a price decline in exchange for the opportunity to benefit from any price appreciation. Like any other investor acquiring shares in the secondary market, such purchaser will be able to transfer freely his or her securities because the securities received will not be restricted.

The seller of securities sold short can either be the holder of restricted securities or a counterparty participating in a Hedging Strategy initiated by a holder of restricted securities. The seller can create the potential of securing the spread between his or her purchase price of the restricted securities and the sales price of the shorted publicly traded securities by selling short borrowed shares of another stockholder's securities. As described above, however, the seller is not able to transfer his or her risk through the use of Hedging Strategies.

The lender of securities sold short is typically a financial institution that lends to the seller unrestricted securities held by the institution in its portfolio. In exchange for the loan, the lender receives the proceeds of the short sale as collateral and the right to participate in the investment income generated from the reinvestment of such proceeds. The lender has the right to call its loan at any time. In such case, the seller must redeliver unrestricted securities to the lender.

The issuer of securities sold short in connection with Hedging Strategies is not affected anymore than in the case of an ordinary short sale of its securities. The issuer is not a participant in the short sale and exercises no control over its timing or magnitude.

The Committees believe that no harm results to the issuer or any direct participants in short sales effected in connection with Hedging Strategies as long as a strict separation is maintained between restricted securities and shares of unrestricted securities used to cover short positions. In fact, as noted below, the inability to hedge Rule 144A positions would significantly impair issuers' ability to raise capital through this means insofar as secondary market liquidity would be undermined.

(e) Benefits of Hedging. The use of Hedging Strategies offers many meaningful benefits to securities holders and the capital markets generally. As far as capital markets, hedging promotes the general safety and soundness of the system because it decreases volatility and increases liquidity in the markets. Hedging offers a useful means of shifting part of

the risk that accompanies every investment. Indeed, one of the benefits of many derivatives transactions, whether they involve listed options or over-the-counter derivatives, is that they permit an investor to assume precisely the levels and kinds of risk (and the corresponding opportunities for profit) that the investor deems appropriate for himself or herself. Furthermore, hedging is often entirely consistent with a long-term investment intent. The holder of restricted securities with a demonstrated intent to hold such securities may nevertheless have legitimate reasons to hedge the risks of such holding for all or part of the duration of the investment. As long as that holder can demonstrate investment intent (which, in our view, is established by holding the restricted securities for the requisite period of time), the use of Hedging Strategies should have no bearing on his or her ability to satisfy the holding period requirements under Rule 144.

As noted above, to the extent that the ability to hedge restricted securities placed pursuant to Rule 144A is affected by any revisions to Rule 144, significant deterioration would result in the secondary markets for such issues. It is axiomatic that market makers' willingness to provide liquidity is a function of their ability to manage the market risk attendant to these positions through hedging. It should be clearly acknowledged that such liquidity is an important and desirable goal and that market makers' ability to hedge these beneficial activities should be promoted by applicable regulations and not jeopardized by any such rules.

The Committees believe that a reintroduction of the tolling periods in connection with equity swaps or similar investment programs would be contrary to the objectives underlying the Release. One of the purposes of the proposed amendments to Rule 144 is to reduce the cost of raising capital in private placements. Reinserting the tolling periods in connection with Hedging Strategies would undermine this goal by attaching undesirable results to the use of very important investment strategies. The need of holders of restricted securities to engage in Hedging Strategies results not from the length of the holding period, but, at least in part, from the existence of such requirement. This need can continue as long as any holding period is required under Rule 144, regardless of its duration. The Release fails to set forth any analysis or provide any evidence as to any abuses related to hedging. Without such justification, the Committees cannot support the adoption of a change to Rule 144 that would reduce the value of legitimate investment and trading strategies.

4. Fungibility

The Commission seeks comment in the Release on whether the concept of "fungibility" should be reintroduced. Under such a concept, the holding period under Rule 144 would be measured from the time of the most recent acquisition of securities of the same class as the restricted securities. The concept is based upon the premise that one share is replaceable or fungible with another because each share represents the same economic interest in the issuer as any other share. The Commission considered the concept of fungibility in connection with Rule 144 at the time it adopted the safe harbor but decided against including it.

The Committees firmly oppose any reintroduction of the concept of fungibility. The premise underlying the concept is flawed. Restricted and unrestricted securities are not

fungible because of their different risk, transferability and liquidity attributes. Application of the concept would lead to operational nightmares because of the burdensome tracing that would be required, probably requiring reliance on physical certificates, which is inconsistent with strongly supported risk reduction measures to ensure efficiency and prompt settlement of transactions. The idea of reintroducing the concept of fungibility is inconsistent with the current trend at the SEC (as reflected by the Release and other recent SEC proposals) to consider the costs of regulation together with its benefits and to provide relief for burdensome regulation to the extent consistent with investor protection. Accordingly, the Committees urge the SEC to confirm its earlier determination to leave the concept of fungibility out of Rule 144.

C. *DE MINIMIS* STANDARD IN RULE 144(h)

Although the Commission did not seek comments in the Release on Rule 144 generally, the Committees urge the SEC to consider two other changes regarding Rule 144. First, the Committees ask the SEC to consider revising the *de minimis* standard set forth in Rule 144(h).

Subsection (h) requires the filing with the SEC of a notice on Form 144 if the amount of securities to be sold in reliance on Rule 144 during any period of three months exceeds 500 shares or other units or has an aggregate sale price in excess of \$10,000. The use of an either/or standard of 500 shares or \$10,000 implies an average per share price of \$20. The threshold set forth in Rule 144(h) has not been changed since the adoption of the safe harbor (through subsection (h) was last amended in 1981). Nevertheless, the average per share price of securities sales has increased steadily since 1972. In addition, the average number of authorized shares has increased during such time.

In light of these occurrences, the Committees urge the SEC to consider amending the *de minimis* standards of Rule 144(h). The Committees recommend that the thresholds be increased from 500 shares or \$10,000 to 1000 shares or \$40,000. These higher thresholds are more consistent with the increases to the average per share price and number of authorized shares.

D. FORM 144

The Committees further ask the SEC to consider an amendment to Form 144, the form used to provide notice of resales above a threshold level in compliance with Rule 144. The Committees suggest that a box be added to Form 144 that could be checked voluntarily by a filer to indicate that the sales reported on Form 144, when matched against all purchases effected or to be effected by the filer during the period covered in the Form 144 filing, result in a net increase in the filer's beneficial ownership of the issuer whose securities are the subject of the filing.

The problem is mainly one of perception. Form 144 currently provides space only to list sales of securities and certain information about such sale and the filer. In certain cases, a person is selling securities simply to use the proceeds to fund the exercise of an option to buy securities of the same class. The net result of the related transactions, after the sale of the securities is matched against the purchase of additional securities as part of the exercise of the option, typically is an increase in the person's beneficial ownership of the issuer in question. Notwithstanding this increased ownership level, the filing of a Form 144 reporting the sale often results in the perception that the filer is decreasing its ownership level because the notice

provides no place to indicate the related purchase.

If the person filing a Form 144 is subject to the reporting obligations under Section 16 of the Exchange Act, he or she generally will be required to file a Form 4 to report his or her change in beneficial ownership. The filing of the Form 4, however, typically will occur later than the filing of Form 144. In addition, Form 144 and Form 4 filings may have different audiences. In other words, the people interested in who has filed, and the media coverage given to the matter of who has filed, a Form 144, may or may not be the same as a Form 4.

Accordingly, the Committees recommend that the SEC consider amending Form 144 to provide space to allow filers to indicate that their sale actually is part of a set of related transactions that will result in a net increase in their beneficial ownership of the issuer in question. The inclusion of a box for such purposes (which box filers would have the option of checking) would result in less confusion and better disclosure to the public.

E. CONCLUSION

The Committees support the proposal to reduce the holding periods under Rule 144 but oppose the suggestion to reintroduce tolling of the holding periods in connection with Hedging Strategies. A reduction in the length of both holding periods for restricted securities will reduce the costs of raising capital in private placements because investors will demand less of a discount to offset the market risk of the illiquidity of their investments during such holding periods. This change will enhance the utility of the safe harbor under Rule 144. The Committees are convinced that the proposed holding periods are sufficient to assure that persons relying upon Rule 144 are not engaged in a public distribution of securities inconsistent with the ordinary trading transaction exemption available under Section 4(1) of the Securities Act.

The Committees firmly oppose a reintroduction of the tolling of the holding periods in connection with hedging because they believe that such a change would undercut the utility of Rule 144 and frustrate the goal behind the proposal in the Release to reduce the length of the holding periods. The use of Hedging Strategies should be immaterial for purposes of Rule 144 because such activity does not result in leakage of restricted securities into the public markets, is not inconsistent with the purposes underlying either Rule 144 generally or the holding period requirements thereunder, does not harm the issuer or participants in short sales and offers many meaningful benefits to investors and capital markets generally. Hedging can be used as an important tool in an investor's overall investment approach. The Committees are not aware of any abuses related to hedging in connection with restricted securities, nor were any abuses cited in the Release. The legitimate use of Hedging Strategies can be entirely consistent with a long-term investment intent. Hedging the market risks related to holding restricted securities is not equivalent to selling such securities. The fact that a holder shifts part of the economic risk inherent in any investment to a counterparty should have no bearing on whether that holder has participated in an unregistered distribution.

If you have any questions or would like further information regarding this letter, please feel free to contact Mark A. Egert, Assistant General Counsel at SIA and Staff Adviser to the Capital Markets Committee, at 212-618-0508.

Very truly yours,

Perry L. Taylor, Jr.,
ChairmanCapital Markets Committee

Robert F. Price, ChairmanFederal Regulation Committee

cc:

Richard K. Wulff, Office of Small Business Policy, Div. of Corporate Finance
Linda C. Quinn, Director of Div. of Corporate Finance
Steven M.H. Wallman, Commissioner, SEC

Footnotes

¹ The Securities Industry Association is the trade association representing more than 700 securities firms headquartered throughout North America. Its members include securities organizations of all types--investment banks, brokers, dealers, specialists, and mutual fund companies. SIA members are active in all markets, and in all phases of corporate and public finance. Collectively, they provide investors with a full spectrum of investment services and account for approximately 90% of the securities industry's revenue in the United States.

² The actual definition of "restricted securities" in Rule 144(a)(3) is as follows:

(i) securities that are acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving any public offering; or (ii) securities acquired from the issuer that are subject to the resale limitations of Regulation D or Rule 701(c) under the [Securities] Act; or (iii) securities that are subject to the resale limitations of Regulation D and are acquired in a transaction or chain of transactions not involving any public offering; or (iv) securities that are acquired in a transaction or chain of transactions meeting the requirements of Rule 144A.³ Rule 144 contains no definition of the term "control securities."

⁴ See Opinion of General Counsel on applicability of Rule 142, Securities Act Release No. 33-1862, 1 Fed. Sec. L. Rep. (CCH) ¶ 1531-1534 (Dec. 13, 1938) (stating that retention of securities for one year sufficed to show a strong inference of the requisite "investment intent" necessary to disprove underwriter status).

⁵ See Securities Act Release No. 33-6862, [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,523 (Apr. 23, 1990), at text immediately following text accompanying footnote 76 (emphasis added).

⁶ The Committees assume that the portion of the Release relating to a reintroduction of the holding period tolling concept amounts to a concept release (as opposed to a rule-making proposal) and that, if the SEC determines--after reviewing the comments received--to formally propose such a rule, it will publish for comment any such proposal and provide for the rule to be applied on a prospective basis so as not to interfere with pre-existing risk-reduction transactions or contractual relationships.

⁷ For purposes of this letter, the term "Hedging Strategies" also includes a number of hedging techniques not mentioned in the Release but which the Committees recognize may be used by some market participants in connection with restricted securities, including out-of-the-money call options and cash-settled collars.

⁸ The Committees recognize that this will not hold true for all types of Hedging Strategies. For example, in the case of a put, the holder retains the opportunity for upside price appreciation.

⁹ Again, the Committees acknowledge that this risk can be shifted through the use of certain Hedging Strategies. If a holder hedged his or her position with a swap rather than a short sale, for instance, the holder could shift the risk to the swap counter-party.

¹⁰ Once more, the Committee is aware that a holder might employ certain Hedging Strategies, such as a swap or put, to avoid the need to post additional cash as collateral.

¹¹ The Committees acknowledge that the use of restricted stock to cover such short position or the immediate short sale of restricted stock after its acquisition as part of a rearrangement or understanding between the holder and the issuer would each be unlawful.