SIFMA®

Securities Industry and
Financial Markets Association

SIFMA Guidance: Procedures, Covenants, and Remedies in Light of Revised Rule 144

OCTOBER 2008

SIFMA Guidance: Procedures, Covenants, and Remedies in Light of Revised Rule 144[1]

As a result of changes to Rule 144 under the Securities Act of 1933, as amended (the "Securities Act"),[2] restricted securities (such as those sold under Rule 144A)[3] may become freely tradable without restrictions by non-affiliates of the issuer at broadly the same time as they would have been registered pursuant to registration rights.[4] Accordingly, market participants in the Rule 144A investment grade, high yield, and convertible debt markets[5] have begun reconsidering their traditional approach to registration rights.[6]

This Guidance outlines proposed new procedures (along with alternative approaches) in Rule 144A offerings regarding global certificates, legends, CUSIPs, and related matters. This Guidance also addresses potential revisions to typical registration rights commitments, and remedies for breaches of those commitments.

The procedures generally disregard the flexibility afforded by the revised rule for reporting issuers for the period between six months and one year. The additional complexity, primarily in trading and compliance mechanics, introduced by the conditional nature of free tradability during this period (i.e., it continues only so long as the issuer remains current in its periodic reporting under the Securities Exchange Act of 1934, as amended (the "Exchange Act")) may outweigh the benefits it provides.[7]

---

1 *This Guidance reflects the work of the SIFMA Revised Rule 144 Task Force. Participants included representatives from 15 Securities Industry and Financial Market Association ("SIFMA") firms: Banc of America Securities LLC, Bear, Stearns & Co. Inc., Barclays Capital, CIBC World Markets, Citi, Deutsche Bank Securities, Goldman, Sachs & Co., J.P. Morgan, Lehman Brothers, Merrill Lynch & Co., Morgan Stanley, Oppenheimer & Co., RBC Capital Markets, UBS Investment Bank, and Wachovia Securities. Important input also was provided at Task Force meetings by representatives of Bloomberg, The Depository Trust Company ("DTC"), Lehman Brothers (regarding index products), Standard & Poor's (regarding CUSIPs), and SIFMA's Asset Management Group. The Task Force was chaired by Jack R. Wiener of SIFMA, and legal advisors to the Task Force were Leslie N. Silverman and Adam Fleisher of Cleary Gottlieb Steen & Hamilton LLP.*

2 *Further detailed background on revised Rule 144, which became effective February 15, 2008, and the issues discussed here is provided in the Cleary Gottlieb alert memo of January 31, 2008, "The Impact of Revised Rule 144 on Registration Rights" (http://www.cgsh.com/regrights.pdf).*

3 *The amendments to Rule 144 are relevant to Rule 144A offerings because Preliminary Note 6 to Rule 144A provides: "Securities acquired in a transaction made pursuant to the provisions of this section are deemed to be restricted securities within the meaning of Rule 144(a)(3)."*

4 *Under revised Rule 144, a non-affiliate of an issuer may resell freely between six months and one year after issuance, provided that the current public information requirement is still satisfied. After one year, a non-affiliate of any issuer (reporting or non-reporting) may resell freely. The restricted period should be measured from the date of the last issuance of the securities (i.e., the closing of the overallotment option exercise, if any, assuming it occurs after the initial closing).*

5 *Although Rule 144A preferred stock offerings are less prevalent in the market, the procedures described in this Guidance also should be applicable to them. In that context, debt-specific references should be read with appropriate adjustments (e.g., references to the indenture would instead be to the certificate of designation).*

6 *This Guidance is not intended to address PIPEs or similar private investments. As discussed in footnote 22, the Guidance also is not appropriate for issuers relying on certain exemptions from the Investment Company Act of 1940, as amended, and may not be suitable in other contexts (e.g., asset-backed securities) due to the complex nature of the instruments, which may make them inappropriate for trading outside institutional markets.*

7 *To take advantage of free transferability for the period between six months and one year for an issuer that remains current in its periodic reporting, it likely would be necessary for a separate, unrestricted global certificate (with an unrestricted CUSIP) to be established. This is because market participants generally rely on the CUSIP to determine whether a security is freely tradable. (In addition, for Rule 144A securities, such as convertible and high yield notes, that are required to be designated as PORTAL securities in order to be eligible for clearance and settlement through DTC, NASDAQ Rule 6502(b)(2) provides that once a PORTAL security is sold pursuant to Rule 144, it ceases being a PORTAL security and must be assigned a different CUSIP.) Implementing a two-certificate, two-CUSIP approach, however, would require a level of monitoring of sales and reporting to the trustee that we understand from DTC is not feasible in a global securities settlement system. It also would bifurcate the market for the securities. But see footnote 17 with regard to convertible debt.*

1. New Procedures

The proposed new procedures are as follows:

- **CUSIP.** The securities of an issuer, whether reporting or non-reporting, are issued using a single global certificate[8] that bears a restricted CUSIP.[9] An unrestricted CUSIP also would be assigned at the time the restricted CUSIP is assigned, and the securities would assume this unrestricted CUSIP in place of the original restricted CUSIP when they become freely tradable on an unconditional basis (as indicated by delivery of the free transferability certificate described below).

- **Registration rights agreement.** Subject to implementing the alternative approach described below in Section 2, a registration rights agreement would be entered into at closing. The agreement would set forth the covenants and remedies described below (e.g., additional interest beginning to accrue if the securities fail to become freely tradable when anticipated and the registration provisions pursuant to which the issuer could cure this failure).

- **Rule 144A transfer restrictions.** The global certificate would contain a legend imposing customary Rule 144A transfer restrictions on the securities for the first year following issuance.[10]

- **Free transferability certificate.** At the first anniversary of issuance, the issuer would be required to provide a certificate to the trustee / transfer agent / issuing and paying agent / registrar (the "trustee") for the securities certifying that the legend[11] could be removed because the securities had become freely tradable by beneficial owners that are not affiliates of the issuer.[12] (See Appendix A for a model free transferability certificate.)

- **Delegending.** Upon receipt of the free transferability certificate by the trustee, the legend on the global certificate would be deemed removed and the unrestricted CUSIP would be substituted automatically for the restricted CUSIP. No new global certificate would be required. (See Appendix B for a model global certificate legend, as well as a model provision that can be used for the automatic substitution of the unrestricted CUSIP for the restricted CUSIP in global certificates.)

---

8 *In practice, there may be more than one global certificate depending on the deal size. For ease of discussion in this Guidance, however, we have assumed that there is one global certificate, except where otherwise specified (see footnote 15).*

9 *References to CUSIPs in the Guidance should be construed as referring to ISINs and other securities identifiers used in various global clearing systems, as applicable.*

10 *In the adopting release for revised Rule 144, the SEC indicated that the removal of the legend remains a matter solely in the discretion of the issuer, and that disputes about the removal of legends are governed by state law and contractual agreements. The SEC also indicated, however, that it would not object if issuers removed restrictive legends from securities held by non-affiliates after all applicable Rule 144 conditions are satisfied. Given the continued reporting condition for reporting issuers, the earliest time at which all applicable Rule 144 conditions will be satisfied (for any issuer) is one year following the issuance of the securities.*

11 *As indicated in Appendix A, the first paragraph of the legend, which relates to the registered ownership of the global certificate and not the restricted status of the securities, would not be removed from the certificate. References in this Guidance to the removal of the legend assume that this paragraph will remain in place.*

12 *Because restrictions on resale of the securities would continue to apply to affiliates of the issuer, the free transferability certificate could be given only if the issuer has complied with the covenant customarily given not to permit the issuer's affiliates to resell any securities they have purchased. See footnote 16 and the accompanying text below.*

- **Market notification.** The issuer (or the trustee, at the direction of the issuer) would notify Bloomberg at the time the free transferability certificate is delivered, and provide it with a copy of the certificate.[13] Bloomberg would then adjust its screen page for the securities to indicate that they had become freely transferable, and replace the restricted CUSIP with the unrestricted CUSIP.[14] Bloomberg also would notify its subscribers of a corporate action, which would indicate the change in CUSIP.[15] (The issuer also may wish to make arrangements to ensure that market participants are informed of the change through any other information service that may be appropriate, as well as through a notice to holders communicated through the trustee or the relevant clearing system, particularly in jurisdictions where such notices are customary.)

- **Covenants.** The issuer would covenant as follows:

  - consistent with customary practice, that it will not, and will not permit any of its affiliates to, resell any securities they have repurchased;[16] and

  - to provide the free transferability certificate to the trustee on the first anniversary of issuance.

- **Remedies.** If the issuer violates the free transferability covenant, additional interest would begin to accrue from the first anniversary of issuance, and would continue to accrue until such time as the securities could be delegended—i.e., until:

---

13 *Bloomberg has indicated that it will accept notification from issuers or trustees, but would prefer to receive it from trustees because of their experience and institutional capabilities in performing activities of this sort.*

Contacts at Bloomberg to whom the notification may be made include: Steve Meizanis (609-279-3394; smeizanis@bloomberg.net); Daria Hice (609-279-3782; dhice@bloomberg.net); Mike Califano (609-279-5506; mcalifano@bloomberg.net); and Amy Staveley (+44-20-7673-2324; astaveley@bloomberg.net).

14 *Once the change is made to the unrestricted CUSIP, trade information in respect of the securities will not only be reportable to the TRACE system (as is generally the case for securities sold on a registered and a Rule 144A basis), but also will be disseminated by it, as provided by NASD Rule 6250 (which will become FINRA Rule 6750, effective December 15, 2008).*

15 *If an offering is sold pursuant to Regulation S concurrently with being placed under Rule 144A, as is often the case, and assuming that the Regulation S tranche has a CUSIP assigned to it (e.g., because it is clearing through DTC), then there should be no need to obtain a separate unrestricted CUSIP at the time the restricted CUSIP is initially assigned to the Rule 144A securities, as described above. Rather, the Regulation S CUSIP can be used instead, with the result that the Rule 144A securities, upon becoming unrestricted, will merge into the Regulation S securities. (Of course, this approach does not foreclose obtaining a separate unrestricted CUSIP if issuers or underwriters prefer not to merge the unrestricted securities into the Regulation S securities. In these circumstances, functional merger of the tranches, as described in the next paragraph, could be applied.)*

If a Regulation S tranche does not have a CUSIP assigned to it (e.g., because it is clearing only through one or more non-US intermediaries), then it is recommended that the issuer ensure that the Regulation S tranche be unified with the Rule 144A tranche when the Rule 144A tranche becomes unrestricted—either by merging the tranches into a single securities identifier and global certificate, or by functionally merging the tranches by eliminating restrictions on transfer between them. To ensure that market participants know how the unification will be effected, it is recommended that the issuer's offering documents describe clearly the procedures to be used. It also is suggested that arrangements be made to ensure that market participants are informed of the change through an appropriate information service, as well as through the trustee or relevant clearing system.

Ensuring that the Regulation S tranche is unified with the Rule 144A tranche when the Rule 144A tranche becomes unrestricted will contribute to the liquidity of the securities.

16 *If an issuer or an affiliate has purchased the securities, it would need to take steps to prevent the delegending of the global certificate with respect to its position (e.g., by instructing the trustee to continue to reflect the relevant amount on the restricted global certificate after delivery of the free transferability certificate). To allow for this possibility, the indenture could include an exception to the issuer's delegending obligation to cover the amount of any securities held by it or its affiliates. A new global certificate would then be required to reflect the unrestricted securities.*

Although this covenant traditionally has been included in the purchase agreement and not made for the benefit of, and therefore not been enforceable by, the securityholders, consideration should be given to making it enforceable by the securityholders by including it in the registration rights agreement or (if there is no registration rights agreement because the procedures in Section 2 are being followed) in the indenture (together with the free transferability certificate covenant).

- registration is effected in accordance with terms of the registration rights agreement entered into at closing; or
- the issuer provides the free transferability certificate.[17]

2. Alternative Approach: Additional Interest in Lieu of Registration Rights

As an alternative to the procedures set forth above in Section 1, market participants could choose to follow the same procedures, except the issuer would not enter into a registration rights agreement.[18] Instead, the issuer simply could agree in the indenture to pay additional interest if the free transferability certificate is not timely provided.

3. Reopenings

If an issuer reopens an issuance (i.e., issues additional, fungible securities with the same CUSIP), the practical effect will be to restart the restricted period for the originally issued securities, because it will be impossible to distinguish between the originally issued and newly issued securities. The issuer thus will be unable to provide the free transferability certificate on the anniversary of the original issuance.

Assuming that investors generally expect to receive securities that are freely tradable without conditions one year following the original issuance, this expectation can be met in several ways:

- **Separate CUSIP.** The securities sold in the reopening could be issued under a separate CUSIP until they become freely tradable without conditions, at which time they could be merged with the originally issued securities (i.e., assume the same CUSIP as, and become fungible with, the originally issued securities).
  - Although the securities sold in the reopening could vote together with the originally issued securities as a single class immediately following the reopening, they would not be fungible with the originally issued securities until they became freely tradable with and were merged into the CUSIP for the originally issued securities. The resulting liquidity costs, however, may outweigh the cost of protecting the free transferability of the originally issued securities by adopting the registration alternative described below (or the cost of agreeing to pay additional interest, as

17 *Notwithstanding the difficulties associated with establishing procedures to take advantage of the six-month to one-year post-issuance period described above in footnote 7, this period may be relevant in the context of convertible debt, where the underlying stock already bears an unrestricted CUSIP. So long as the issuer remains current in its periodic reporting, a non-affiliate beneficial owner could convert its debt and rely on revised Rule 144 to dispose of the underlying stock without having to deliver shares bearing a restricted CUSIP. Accordingly, in addition to the covenants and remedies described here, investors in the convertible debt market may seek to require the issuer to pay additional interest on the securities if the issuer does not remain current in its periodic reporting during the six-month to one-year period.*

In addition, even outside the convertible debt context, market participants may wish to pursue this remedy on the ground that they should be compensated for their inability to rely on revised Rule 144 during this period, despite the technical hurdles described above.

18 *One consequence of this approach is that initial purchasers would not have the benefit of the customary provisions in a registration rights agreement granting them resale registration rights in the event they hold unsold allotment securities. Nonetheless, initial purchasers may not object, as these rights are very seldom invoked. Reselling under a resale registration statement subjects the initial purchasers to potential liability under Sections 11 and 12(a)(2) of the Securities Act (in contrast to resales under Rule 144A), and initial purchasers may not wish to impose the incremental expense of a resale registration statement on the issuer, particularly when the need arises from the initial purchasers' failure to sell allotment securities.*

described below). Issuers and underwriters can make this assessment in light of the circumstances posed by particular transactions.

- **Registration.** The issuer could register the securities sold in the reopening by the first anniversary of the original issuance. Alternatively, the issuer could issue the securities in the reopening on a registered basis. The securities sold in the reopening would then be fungible with the originally issued securities as soon as the originally issued securities become freely transferable.

Similarly, if a reopening occurs after the securities issued in the original issuance have become unrestricted, the issuer could agree to carry out an A/B exchange for the securities sold in the reopening within a relatively short time in order to expedite these securities becoming fungible with the originally issued securities. The issuer also could issue the securities sold in the reopening on a registered basis, thereby making them immediately fungible with the freely transferable originally issued securities.

- **Additional interest.** The issuer can pay additional interest on both the originally issued securities and the securities sold in the reopening (because they will be fungible) from the anniversary of the original issuance until the anniversary of the issuance of the securities sold in the reopening (or such later time as the securities sold in the reopening become freely tradable without conditions by non-affiliates).

4. Traditional Alternative

In certain contexts it may be appropriate to retain a traditional approach to registration rights (i.e., it may not be sufficient for securities to become freely tradable at the same time that they otherwise would have been registered in an A/B exchange offer or become eligible for resale pursuant to a convertible debt resale registration statement). For example, traditional registration rights may be required in order for securities to be eligible for inclusion in certain important indices against which investors may measure their performance.[19] In addition, registration rights likely will continue to be necessary where the issuer has an investment bank affiliate that is expected to be a market-maker in the offered securities, or has an affiliate (e.g., an affiliated investment fund) that otherwise may purchase and sell the offered securities prior to the time they become freely transferable.[20]

Registration rights also are sometimes included in offerings by non-reporting issuers (e.g., first-time issuers of high yield securities) because investors wish to invest in companies that are subject to SEC reporting

19 *We understand that the Lehman Brothers U.S. Aggregate Bond Index, for example, currently requires securities to have traditional registration rights.*

Basket restrictions under insurance company or pension fund regulations, or in fund organizational documents or other guidelines, also may condition the investor's ability to acquire Rule 144A securities on their having traditional registration rights. Although no comprehensive survey of these limitations is available, we nonetheless understand that most U.S. institutional investors generally do not have any such restrictions.

We also understand that European Union regulation of Undertakings for Collective Investments in Transferable Securities (UCITS) permits trading in Rule 144A securities without specific basket limitations and without regard to whether the securities carry registration rights.

20 *Sales of any securities purchased by the affiliate would restart the restricted period for the originally issued securities.*

and related requirements. In this context, investors may insist on registration rights, so that the issuer becomes an Exchange Act reporter following an A/B exchange offer.[21]

Market participants are continuing to react to revised Rule 144, and it likely will be some time before it becomes clear how significant a role traditional registration rights will continue to play.

5. 144A-for-Life Securities

- **New Issuances.** Securities sometimes are issued as "144A-for-life" securities (i.e., without any registration rights granted to investors). Although these securities have in theory been eligible to become unrestricted after the two-year restricted period that previously applied, market participants historically have continued to treat them as restricted so long as they are outstanding, with trades typically occurring solely among qualified institutional buyers and the securities bearing a restricted CUSIP until maturity. Applying the procedures outlined in Section 2 to these securities may result in enhanced liquidity and pricing.[22]

- **Outstanding Securities.** To the extent 144A-for-life securities already are outstanding, issuers also could choose to implement a variant of these procedures to promote secondary market liquidity or eligibility for inclusion in indices:[23]

  - ***Free transferability certificate.*** At any time after the securities have been outstanding for one year, assuming the conditions for free transferability of the securities by non-affiliates are met, the issuer could provide a free transferability certificate to the trustee.

  - ***Unrestricted global certificate.*** Upon receipt of the free transferability certificate by the trustee, the trustee would arrange for the amount of securities held through the restricted global certificate to be reflected in a new, unrestricted global certificate prepared by the issuer, which also would bear a new, unrestricted CUSIP obtained by the issuer.

  - ***Market notification.*** The issuer (or the trustee, at the direction of the issuer) would notify Bloomberg at the time the free transferability certificate is delivered (and provide it with a copy of

---

21 *If an issuer has an Exchange Act reporting history (i.e., has suspended or terminated its Exchange Act reporting), the issuer will be eligible to file Exchange Act reports on a voluntary basis. See SEC, Division of Corporation Finance, Compliance and Disclosure Interpretations, Question 116.03 (Oct. 8, 2008). In these circumstances, it should not be necessary to require the issuer carry out an A/B exchange offer in order to become a reporting company. Rather, this result can be achieved more directly through a reporting covenant that requires the issuer to file Exchange Act reports on a voluntary basis. EDGAR will continue to accept Exchange Act reports filed on a voluntary basis by the issuer, and the issuer will be required to disclose that it is a voluntary filer on the cover of its Form 10-K or Form 20-F.*

22 *Of course, this approach would not be appropriate in the context of offerings by issuers relying on Section 3(c)(7) of the Investment Company Act of 1940, as amended. In general, Section 3(c)(7) excepts from the definition of "investment company" any issuer whose outstanding securities are held by "qualified purchasers" (e.g., natural persons with at least $5 million in qualifying investments, and most qualified institutional buyers, among others). Offerings relying on this exception contain transfer restrictions to ensure that the securities, so long as they are outstanding, trade only among qualified purchasers.*

There also may not be much impetus toward this approach in other contexts (e.g., asset-backed securities), due to the complex nature of the instruments, which may make them inappropriate for trading outside institutional markets.

23 *Prior to implementing these procedures, issuers should confirm that the procedures are not prohibited by the terms of the outstanding securities.*

the certificate). Bloomberg would then adjust its screen page for the securities to indicate that they had become freely transferable, and replace the restricted CUSIP with the unrestricted CUSIP. Bloomberg also would notify its subscribers of a corporate action, which would indicate the change in CUSIP. (As noted above in Section 1, the issuer also may wish to make arrangements to ensure that market participants are informed of the change through any other information service that may be appropriate, as well as through a notice to holders communicated through the trustee or the relevant clearing system, particularly in jurisdictions where such notices are customary.)

Model
Free Transferability Certificate

The following is a model free transferability certificate that the issuer can deliver to instruct the trustee that the legend should be deemed removed from the securities because they have become freely tradable by beneficial owners that are not affiliates of the issuer.

CUSIP:_____

Dear Sir/Madam:

Whereas the [name of securities] (the "Securities") have become freely tradable without restrictions by non-affiliates of [name of Company] (the "Company") pursuant to Rule 144(b)(1) under the Securities Act of 1933, as amended, in accordance with Section XXXX of the indenture (the "Indenture")[24] dated as of [date] between the Company and [name of Trustee], as Trustee (the "Trustee"),[25] pursuant to which the Securities were issued, the Company hereby instructs you that:

(i) the restrictive legends described in Section XXXX of the Indenture and set forth on the Securities [and Common Stock issued upon conversion of the Securities] shall be deemed removed from the Global Securities (as defined in the Indenture), in accordance with the terms and conditions of the Securities and as provided in the Indenture, without further action on the part of holders; and

(ii) the restricted CUSIP number for the Securities shall be deemed removed from the Global Securities and replaced with the unrestricted CUSIP number set forth therein, in accordance with the terms and conditions of the Securities and as provided in the Indenture, without further action on the part of holders.

Capitalized terms used but not defined herein shall have the meanings set forth in the Indenture.

Very truly yours,

[name of Company]

By:_____

Name:

Title:*

The signatory must be one of the officers authorized by the indenture to sign the certificate.

24 *As indicated in footnote 5 above, in the context of a Rule 144A preferred stock offering, debt-specific references in the model provisions should be adjusted as appropriate.*

25 *As indicated in Section 1 of this Guidance, appropriate adjustments should be made to reflect deal-specific facts (e.g., the use of an issuing and paying agent rather than a trustee).*

Model
Global Certificate Legend and Automatic CUSIP Substitution Provision

1. Model Global Certificate Legend

The following is a model legend for use on global certificates.[26] Upon receipt by the trustee of the free transferability certificate as outlined in this Guidance, the legend (other than the first paragraph thereof) will be deemed removed therefrom.

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION ("DTC"), TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE, OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE, OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

THIS SECURITY [AND THE COMMON STOCK, IF ANY, ISSUABLE UPON CONVERSION OF THIS SECURITY] [HAS][HAVE] NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "SECURITIES ACT"), AND MAY NOT BE OFFERED, SOLD, PLEDGED, OR OTHERWISE TRANSFERRED EXCEPT IN ACCORDANCE WITH THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF OR OF A BENEFICIAL INTEREST HEREIN, THE ACQUIRER:

(1) REPRESENTS THAT IT, AND ANY ACCOUNT FOR WHICH IT IS ACTING, IS A "QUALIFIED INSTITUTIONAL BUYER" (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT; AND

(2) AGREES FOR THE BENEFIT OF THE COMPANY THAT IT WILL NOT OFFER, SELL, PLEDGE, OR OTHERWISE TRANSFER THIS SECURITY OR ANY BENEFICIAL INTEREST HEREIN PRIOR TO THE RESALE RESTRICTION TERMINATION DATE (AS DEFINED IN THE NEXT PARAGRAPH), EXCEPT:

(A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF;

(B) PURSUANT TO A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT;

(C) TO A QUALIFIED INSTITUTIONAL BUYER IN COMPLIANCE WITH RULE 144A UNDER THE SECURITIES ACT; OR

(D) PURSUANT TO AN EXEMPTION FROM REGISTRATION PROVIDED BY RULE 144 UNDER THE SECURITIES ACT OR ANY OTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.

THE RESALE RESTRICTION TERMINATION DATE WILL BE THE DATE: (1) THAT IS AT LEAST ONE YEAR AFTER THE LAST ORIGINAL ISSUE DATE HEREOF; AND (2) ON WHICH THE COMPANY INSTRUCTS THE TRUSTEE THAT THIS LEGEND (OTHER THAN THE FIRST PARAGRAPH HEREOF) SHALL BE DEEMED REMOVED FROM THIS SECURITY, IN ACCORDANCE WITH THE PROCEDURES DESCRIBED IN THE INDENTURE RELATING TO THIS SECURITY.

PRIOR TO THE REGISTRATION OF ANY TRANSFER IN ACCORDANCE WITH PARAGRAPH 2(D) ABOVE, THE COMPANY AND THE TRUSTEE RESERVE THE RIGHT TO REQUIRE THE DELIVERY OF SUCH LEGAL OPINIONS, CERTIFICATIONS, OR OTHER EVIDENCE AS MAY REASONABLY BE REQUIRED IN ORDER TO DETERMINE THAT THE PROPOSED TRANSFER IS BEING MADE IN COMPLIANCE WITH THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT.*

**This legend (other than the first paragraph hereof) shall be deemed removed from the face of this Security without further action of the Company, the Trustee, or the holders of this Security at such time as the Company instructs the Trustee to remove such legend pursuant to Section XXXX of the Indenture.*

26 *The model global certificate legend assumes DTC clearing; if applicable, appropriate adjustments should be made to reflect clearing through other systems.*

2. Model Automatic CUSIP Substitution Provision

The following is a model provision to effect the automatic substitution of the unrestricted CUSIP for the restricted CUSIP, as described in this Guidance. The provision may be included as a footnote to the restricted CUSIP that appears on the initially issued global certificate:

CUSIP No. XXXXXXXX†

At such time as the Company notifies the Trustee to remove the legend (other than the first paragraph thereof) pursuant to Section XXXX of the Indenture, the CUSIP number for this Security shall be deemed to be CUSIP No. ZZZZZZZZ.