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

Re: File No. S7-20-06 (Release No. 34-54888)

Ladies and Gentleman:

Millennium Partners, L.P. ("Millennium") is grateful for the opportunity to comment on the Securities and Exchange Commission's (the "Commission") recent proposed amendments to Rule 105 ("Rule 105") of Regulation M (the "Proposal").[1] By way of background, Millennium is a multi-billion dollar private investment company, or hedge fund, that engages in a significant amount of U.S. equity trading. Millennium is a multi-strategy hedge fund, which means it employs a variety of trading strategies including, among other things, various model-based arbitrage strategies and strategies involving fundamental analysis. Many of these strategies involve short selling, and Millennium devotes significant resources to monitor its compliance with applicable short selling rules, including Rule 105. As a hedge fund market participant that actively trades in the U.S. equity markets, we believe that Millennium has a well-informed perspective from which to comment on the Proposal.

I. Overview of Comments Regarding the Regulation M Proposal

As a general matter, we commend the Commission's proactive approach to reviewing and, where appropriate, revising its regulation of short sales to be consistent with its underlying goal of preventing manipulation and balancing the

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[1] *See* Securities Exchange Act Release No. 34-54888 (Dec. 2006).

needs of today's market environment. The Commission's approach during these past few years of studying the application of the existing tick/bid test rules through a pilot program is but one example of the Commission's proactive efforts, and we support the Commission's recent proposal to eliminate the tick/bid tests.[2] We likewise commend the Commission's willingness to explore a new approach to the operation of Rule 105 with the Proposal. Millennium fully agrees with the Commission's stated goals of reducing the risk of manipulation in connection with the pricing of offerings and eliminating "sham" type arrangements designed to avoid compliance with existing Rule 105. However, for the reasons stated below, we have significant concerns with some of the practical effects of the Commission's approach in the Proposal. We believe that completely prohibiting a person who sells short during the restricted period from participating in an offering (as opposed to the existing prohibition on covering such short sales) is overly broad, would significantly hamper legitimate corporate financing efforts and would unnecessarily harm liquidity -- the life blood of our markets -- without any clear need or benefit.

First, the Proposal is problematic because in many instances a number of market participants would have no reason to know the exact commencement date of a Rule 105 restricted period, such as in the case of "bought deals" or "spot offerings," which can be offered, announced, and closed all within 24 hours, well within the five day restricted period under Rule 105. The Proposal, therefore, would have the consequence of precluding a market participant from participating in an offering merely because the market participant happened to have sold short in the normal course during the restricted period prior to any announcement of the offering. Such shorting, absent knowledge of the deal, would not be manipulative activity, and yet the Proposal would preclude the seller from participating in the offering.

Second, there may be many situations in which a market participant shorts during the restricted period with knowledge of the offering and subsequently wishes to participate in the offering, but the short was clearly not designed to manipulate such that it should be restricted under Rule 105. If, for example, a market participant sells short as part of an isolated hedging or statistical-based strategy without regard to the offering, the subsequent participation in the offering (whether decided by the same or different investment decision maker within the firm) should not be prohibited as manipulative conduct under Rule 105, as the short sales were not related to the offering in any way. Consequently, Millennium believes that short sales in connection with hedging, statistical-based strategies or other demonstrably independent strategies should not preclude participation in an offering.

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2 *See* Securities Exchange Act Release No. 34-54891 (Dec. 2006).

Even if the shorting was not part of an isolated hedging or statistical-based strategy, it does not mean that such shorting was intended as, or was in fact, a form of manipulation that Rule 105 should seek to curtail. For example, large capitalization issuers with significant daily trading volume under most circumstances are not susceptible to this kind of manipulation, so short sales prior to offerings by such issuers are extremely unlikely to be for manipulative purposes.

Third, the Proposal seems certain to hamper issuer capital raising efforts and harm liquidity without enhancing any effective market control on manipulation. Existing Rule 105 provides a mechanism for a market participant to participate in an offering while allowing legitimate shorting prior to the offering by restricting the manner in which the shorts are covered. Under the Proposal, however, all legitimate shorting during the restricted period would be treated as potentially manipulative conduct and penalized. This approach, in our view, does not appear to be a prudent approach for a robust U.S. market structure, especially where there is no clear need or benefit.

The prime motivation behind the Proposal seems to be that the Commission has detected instances of persons attempting to conceal that they shorted prior to an offering with the intention of covering those short sales with offering securities - conduct that is clearly contrary to Rule 105 and the Commission's related interpretive advice. Rule 105 is clearly written and interpreted to outlaw the harmful activity the Commission seeks to prevent, and this is evidenced by the numerous recent enforcement actions based upon such conduct. If the problem is that persons are violating the current rule as written, the answer is not to expand the prohibitions of Rule 105, especially where such expansion has deleterious effects. Continued enforcement of the existing rule might be all that is required - not a rule change that will have significant adverse consequences and might require no less enforcement effort on the part of the Commission. Furthermore, there is no reason to believe that those persons who would take steps to conceal violations of current Rule 105 would be dissuaded from seeking to hide or disguise violations of the proposed Rule 105.

We suggest that a more practical approach to reaching the Commission's aim of reducing the risk of manipulation in connection with secondary offerings and eliminating "sham" type arrangements designed to avoid compliance with the existing Rule would be to maintain the existing Rule's covering aspect, but revise the Rule to address specifically the manner in which a person who sold short during the restricted period may cover or close-out the short position when the person desires to participate in an offering. The Commission should seek to ensure that offering securities are not used to cover short positions created immediately prior to an offering, and this can be accomplished by mandating a

specific waiting period between open market purchases to cover a short sale and open market sales of the securities received in an offering. We propose, for example, for all but the most illiquid securities, a two-hour waiting period between sales of the securities received in the offering and purchases to cover pre-offering short sales. We believe that the two "legs" in this scenario should be permitted in either order (*i.e.*, it is irrelevant whether the purchase to cover occurs before or after the open-market sale of the securities received in the offering), provided enough time elapses between the two legs to ensure market risk.

Below, we set forth our specific responses to those of the Commission's requests for comment relevant to our business.

II. Responses to Specific Request for Comment in the Regulation M Proposal

1. **Allow a Close-Out Exception.** As indicated above, Millennium believes that a market participant should be allowed to effect a short sale prior to the pricing of an offering, receive the offering shares, and then close-out these positions after the offering in the manner described in Section I above. However, if the Commission adopts the Proposal and prohibits restricted period short sellers from purchasing offering shares, then the rule should have an exception permitting such short sellers to cover short sales during the restricted period by purchasing the relevant security in the open market up until the pricing of the offering. By allowing a person to make an open market purchase to cover the short sale before the pricing, the rule would neutralize any supposed price damage caused by the short sale.

2. **Sufficiency of Restricted Period.** Millennium believes the restricted period of Rule 105 should match the restricted period specified elsewhere in Regulation M (one or five days, depending on public float and ADTV), and that actively traded securities (those with an ADTV of at least $1 million and issued by an issuer whose common equity securities have a public float value of at least $150 million) should be exempt completely from Rule 105 just as they are exempt from Rule 101 of Regulation M[3] since they are so much less susceptible to manipulation.

3. **Application to PIPEs.** In order for an offering to qualify under Regulation D as a PIPE, the offering may not be made through a general solicitation and therefore cannot be publicly announced. When a market participant is approached to participate in a non-public, PIPE transaction, such information (that is, the knowledge of the deal) is frequently viewed as material, non-public information. Persons who obtain knowledge of, and sell short prior to, a PIPE

[3] *See* 17 C.F.R. § 242.101(c) (2007).

offering, have implicated Section 10(b) of the Exchange Act whether or not they participate in the offering. Thus, Section 10(b) and Rule 10b-5 would generally preclude those who receive knowledge of a PIPE from selling short prior to the offering. Rule 105 should not be revised to also restrict those persons who sell short prior to a PIPE without knowledge of the deal, as it will greatly hinder the ability of issuers to raise capital through such offerings, and will not provide any more protection than the anti-fraud rules already provide.

We do not agree with those commenters who have stated that Section 5 of the Securities Act of 1933 already addresses selling short prior to the effectiveness of a registration statement to the same extent as Rule 105 does or should. Section 5 is typically applied in the PIPE context where a selling security holder who sold short prior to an effective registration statement (with respect to the holder's own shares) seeks to cover prior short sales with the now-registered shares. Rule 105 applies where a short seller sells prior to an offering and seeks to cover such short sales with securities purchased in the offering. However, we do believe that Section 5 and Rule 105 should be consistent in terms of how the two provisions govern the covering of short sales. Under guidance issued by the Commission and its staff with respect to Section 5 and Rule 144, selling security holders are permitted to sell short prior to the registered sale of their restricted securities or Rule 144 sales provided they do not cover their short sales with the previously restricted shares that become freely saleable due to registration or compliance with Rule 144. This is the same standard typically applied under current Rule 105, and we suggest that the Commission or the staff issue clear guidance to market participants addressing the question of covering short sales under both existing regulatory frameworks. Strict time guidelines, such as those suggested in Section I above, would be very helpful.

4. **Conversion Rights, Rights Offerings, and Equity Line Financing Arrangements.** Although the Commission has not specifically proposed extending Rule 105 in the context of conversion rights, rights offerings, and equity line financing arrangements, Millennium does not believe Rule 105 should be expanded to these areas absent a clear need which has not been demonstrated. We believe the Commission should study the need and possible impact of such an expansion before making any such proposal.

5. **Long Sales.** Consistent with our comments above, Millennium believes the proposed Rule 105 should not be expanded even further to also restrict long sales. Although a long sale may in fact have the same impact on the price of an offering as a short sale, expanding Rule 105 to cover pre-offering long sales would further adversely impact capital formation. The anti-manipulation

provisions under the Federal securities laws should suffice with respect to persons who try to manipulate an offering through long sales.

6. **Definition of "Short Sale."** Millennium believes that the definition of the term "short sale" under Rule 105 should parallel the definition of that term under Regulation SHO.[4] Any variation in the definition will lead to confusion and misinterpretation. Rather, the Commission should make clear that the term (and related staff interpretations) apply equally under Regulation SHO and Regulation M.

7. **Aggregation Units.** Millennium believes that the concept of aggregation units, as defined under Rule 200(f) of Regulation SHO, should be extended under appropriate circumstances to non-broker-dealer entities whether or not the Proposal is adopted.[5] Although the Commission has not previously expressed explicitly that separate aggregation units need not be aggregated for purposes of the restrictions of Rule 105, the Commission has clearly done so in the Proposal. As currently structured, then, Rule 105 provides an advantage to broker-dealers versus other institutional investors by allowing broker-dealers to sell short and also participate in an offering without needing to worry about Rule 105's "covering" limitation, provided such activity is conducted in separate aggregation units. Currently, separate units of an institution that is not a broker-dealer are still able to sell short and participate in registered offerings, but they must ensure that, viewed as a single entity, they do not cover the short sales with offered securities. The advantage given to broker-dealers by Rule 105 would be greatly magnified if the Proposal were adopted since non-broker-dealers would be completely precluded from participating in offerings while broker-dealers employing aggregation units would face little additional restriction. Therefore, especially if the Commission adopts the Proposal, Rule 105 should be amended to permit institutions that are capable of following Rule 200(f) to do so.

   Large market participants, such as ERISA plans and many hedge funds, employ numerous investment management groups (including internal and external managers) to manage investor assets, each pursuing separate and independent investment and trading strategies. Typically, these investment management groups, whether internal or external, are allocated a prescribed

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[4] Under Regulation SHO, the term "short sale" means any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller. *See* 17 CFR § 242.200(a) (2007).

[5] *See* 17 C.F.R. § 242.200(f) (2007).

capital base or position limits and are compensated based on their profitability. Their strategies and trading are different across groups, and personnel and information are not typically shared by the groups. In short, they operate as entirely separate businesses, and are treated as such at the management level. To the extent that this level of separateness exists, Millennium believes that such business units should be allowed, and in fact should be required, to employ aggregation units for purposes of both Regulation SHO and Regulation M. To the extent current regulation requires different trading groups to aggregate their positions, particularly where they are external, there is an increased risk of proprietary information leaks that could raise other business and regulatory concerns. We do not believe it makes sense, from either a regulatory policy or business perspective, for separate trading units to share position information, but the current structure effectively mandates some level of information sharing. The Commission should, therefore, extend the aggregation unit concept as indicated above to avoid these information sharing concerns.

We understand the Commission's concern with respect to regulatory oversight and testing of such information barriers between various units outside of broker-dealers, so we understand the Commission's initial approach in Regulation SHO of limiting such treatment to those entities that are subject to self-regulatory authority oversight. However, we believe the use of aggregation units by institutional investors should be permitted, provided the Commission has adequate assurance the requirements of Rule 200(f) are respected. Millennium believes oversight and testing can be accomplished through the use of external legal/compliance consultants, internal or external auditors, or other regulatory bodies. For example, non-broker-dealers who wish to maintain aggregation units may be required to retain an outside consulting service to perform an annual review, perhaps even unannounced, of compliance with the aggregation unit requirements.

8. **Underwriter Certification.** Millennium is not opposed to the concept of providing an underwriter a certification as to compliance with Rule 105. In our view, certifications of compliance with applicable law promote a heightened sense of awareness of regulatory responsibility, and to the extent that it is operationally feasible, should be welcomed by the investor community as an added compliance control.

9. **Liquidity/Market Efficiency Impact.** As discussed above, we believe that the approach reflected in the Proposal will have a significant negative impact on the capital formation process, and will reduce liquidity, in the U.S. capital markets. Millennium has suggested in Section I above an alternative approach that will not unduly impede our markets while achieving the Commission's

goal in the Proposal of reducing the risk of price manipulation in the offering process.

10. **Compliance and Operational Challenges.** We believe that it is important for the Commission to understand that, in order to ensure compliance with the Proposal, a large trading organization would need to implement significant changes to its trading infrastructure. Such changes would include the need to implement a mechanism, on a real time basis, to identify and track all offerings subject to Rule 105, and immediately upon being offered participation in the offering, determine whether, on a firm-wide basis, the firm has any short sales that would preclude participation in the offering. Provided there were no short sales that precluded participation, then the firm would have to decide either (A) to allow firm shorting and not participate in the offering or (B) restrict firm shorting and participate in the offering. Depending on the ultimate trading decision, a system would also need to be in place to implement the appropriate directives across the firm. The only alternative to all this compliance effort is for firms simply not to participate in any offerings that are subject to Rule 105. This approach, if adopted by firms, would greatly harm capital raising and cause significant liquidity reduction in our capital markets, and would not serve to benefit investors, market participants or the U.S. capital markets generally.

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We very much appreciate the opportunity to submit our comments and to provide our suggestions regarding the Proposal. Millennium commits significant resources to ensure our compliance with applicable rules, and we are committed to maintaining such compliance in the future. We hope that you will consider our views with respect to the Proposal. Please feel free to contact us if you wish to discuss our comments and suggestions.

Respectfully submitted,

Simon Lorne
Vice Chairman, Chief Legal Officer

Martin Schwartz
Chief Compliance Officer

Cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette Nazareth, Commissioner
The Hon. Kathleen L. Casey, Commissioner
Erik R. Sirri, Director, Division of Market Regulation
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