

May 12, 2004

Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549  
Attention: Jonathan G. Katz, Secretary

Via e-mail: rule-comments@sec.gov

**Re: Use of Form S-8 and Form 8-K by Shell Companies  
(Release Nos. 33-8407; 34-49566; File No. S7-19-04; RIN 3235-AH88)**

Ladies and Gentlemen:

The American Society of Corporate Secretaries, Inc. (ASCS) is a professional association founded in 1946 whose members serve more than 3,000 issuers. The responsibilities of our members include working with corporate boards of directors and senior management regarding corporate governance, assuring issuer compliance with securities regulations and listing requirements, and the administration of incentive and benefit plans, including the registration of such plans on the Commission's Form S-8.

We appreciate the opportunity to comment on the above-captioned release. The observation we have to make is very brief. Since the majority of ASCS members are attorneys who are actively involved in their company's merger and acquisition transactions, our recommendations are founded on actual experience.

Recommendation:

- The definition of "shell company" should not include any company which has previously been an operating company but has sold its business within the last 18 months.
- Use of Form S-8 during this 18 month period would, however, be limited to securities offered to actual directors, officers and employees of the company and would not be available for shares offered to consultants subsequent to the sale of the business.

Rationale: Registrants sometimes sell their entire businesses for value. They then enter into a transition period of perhaps a year or somewhat more during which they may seek to reinvest the proceeds or put themselves up for sale. Either way, the company still has a management and employees who have interests in incentive and benefit plans or in securities issued or to be issued under those plans. This is obviously a period of considerable stress for the management and employees and retention of key personnel is a major challenge until there is a final plan for exiting the transition period. Such employees, and their employer, should not be disadvantaged in devising legitimate incentive and benefit plans to retain those directors, officers and employees.

This approach satisfies legitimate business objectives of shell companies in transition while addressing the Commission's concern that Form S-8 is being misused to issue shares to persons for whom Form S-8 was not intended.

We have included as Exhibit A a case study of exactly the situation described in this letter where continued eligibility to use Form S-8 was a valuable tool to aid the company in transition without being abused to issue securities to persons who were actually part the general public or to facilitate the resale of securities by those persons. The continuation of S-8 eligibility for the shell company was not prolonged beyond the point where option plans and S- 8 protection were intended to apply. This case study is drawn from the experience of one of our members. We believe it is representative of the non-abusive uses of Form S-8 by a public company during a transition period following the sale of all or substantially all of its business.

We appreciate your consideration of the foregoing. Please call either of the undersigned should you have questions.

Respectfully submitted,

**American Society of Corporate Secretaries**  
Securities Law Committee

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cc: Hon. William H. Donaldson  
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EXHIBIT A TO COMMENT LETTER OF THE  
AMERICAN SOCIETY OF CORPORATE SECRETARIES  
File No. S7-19-04

Example: During 1997 Tseng Labs, Inc. decided to sell its business of designing computer graphics chips. It sold the business by the end of 1997 for about \$27 million. Tseng Labs, Inc. then reviewed many acquisition opportunities. It agreed to be acquired by an emerging private pharmaceutical company, Cell Pathways, Inc. In a registered S-4 transaction which closed in November 1998, Cell Pathways, Inc. issued to the stockholders of Tseng Labs, Inc. common stock equal to about 23% of the overall equity interest in Cell Pathways, Inc., and Tseng Labs, Inc. became a wholly owned subsidiary of Cell Pathways, Inc. Simultaneously with the closing, Cell Pathways, Inc. registered itself with Nasdaq, and trading of its common commenced on the Nasdaq National Market. Under the proposed new definition of "shell company," Tseng Labs, Inc. would have become a "shell company" near the end of 1997 - and both the company and its continuing employees would have been denied S-8 benefits with respect to issuance and resale of common stock pursuant to their several stock option plans during the one year transition period. Fortunately, S-8 was available for normal incentive and benefit plan purposes through closing of the acquisition by Cell Pathways, Inc. Any new rule should permit this.