



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

May 31, 2006

David B. Harms, Esq.
Sullivan & Cromwell, LLP
125 Broad Street
New York, NY 10004-2498

Re: In the Matter of Certain Auction Practices File No. HO-9954
**Goldman, Sachs & Co.— Waiver Request of Ineligible Issuer Status under
Rule 405 of the Securities Act**

Dear Mr. Harms:

This is in response to your letter dated May 3, 2006, written on behalf of The Goldman Sachs Group, Inc. (Company) and its subsidiary Goldman, Sachs & Co. (GS&Co.), and constituting an application for relief from the Company and GS&Co. being considered “ineligible issuers” under Rule 405(1)(vi) of the Securities Act of 1933 (Securities Act). The Company and GS&Co. each request relief from being considered an “ineligible issuer” under Rule 405, due to the entry on May 31, 2006, of a Commission Order (Order) pursuant to Section 8A of the Securities Act and Section 15(b) of the Securities Exchange Act of 1934, naming GS&Co. as a respondent. The Order finds, among other things, that GS&Co. violated Section 17(a)(2) of Securities Act and requires that GS&Co. cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act.

Based on the facts and representations in your letter, and assuming the Company and GS&Co. will comply with the Order, the Commission, pursuant to delegated authority has determined that the Company and GS&Co. have made a showing of good cause under Rule 405(2) and that the Company and GS&Co. will not be considered ineligible issuers by reason of the entry of the Order. Specifically, we determined under these facts and representations that the Company and GS&Co. have shown that the terms of the Order were agreed to in a settlement prior to December 1, 2005. Accordingly, the relief described above from the Company and GS&Co. being ineligible issuers under Rule 405 of the Securities Act is hereby granted. Any different facts from those represented or non-compliance with the Order might require us to reach a different conclusion.

Sincerely,

A handwritten signature in cursive script that reads "Mary Kosterlitz".

Mary Kosterlitz
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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May 3, 2006

Via Federal Express

Mary Kosterlitz, Esq.,
Chief of the Office of Enforcement Liaison,
Division of Corporation Finance,
Securities and Exchange Commission,
100 F Street, N.E.,
Washington, D.C. 20549.

Re: In the Matter of Auction Rate Securities Practices,
File No. HO-09954 (Goldman, Sachs & Co.)

Dear Ms. Kosterlitz:

We are writing on behalf of our client, The Goldman Sachs Group, Inc. (“GS Group”) and its subsidiary, Goldman, Sachs & Co. (the “Firm”), which is a respondent in the captioned proceeding brought by the Securities and Exchange Commission (the “Commission”). The proceeding relates to certain practices involving auction-rate securities. A number of other investment-banking firms are also respondents in this proceeding and, together with the Firm, are negotiating a settlement of the proceeding with the Division of Enforcement.

GS Group and the Firm hereby request, pursuant to amended Rule 405 under the Securities Act of 1933 (the “Securities Act”), that the Division of Corporation Finance, on behalf of the Commission, determine that GS Group and the Firm shall not be considered “ineligible issuers” as defined in Rule 405 as a result of the order to be entered in the captioned proceeding, as described below. GS Group and the Firm request that this determination be made effective upon entry of the order. It is our understanding that the Division of Enforcement supports our request for such a determination.

BACKGROUND

In connection with the captioned proceeding, which was brought pursuant to Section 8A of the Securities Act and Section 15(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), the Firm and the Division of Enforcement have reached an agreement in principle to settle the captioned proceeding as described below, and the Firm expects to submit to the Commission an offer of settlement in which, for the purpose of this proceeding, it will consent to the entry of an order by the Commission (the “Order”) without admitting or denying the matters set forth in the Order (except as to the jurisdiction of the Commission and the subject matter of the proceeding). We expect the Order to be entered in the coming weeks.

In the Order, the Commission will make findings, without admission or denial by the Firm, that the Firm willfully violated Section 17(a)(2) of the Securities Act in connection with certain practices relating to auction-rate securities. Based on these findings, the Order will require the Firm to cease and desist from committing or causing any current or future violations of Section 17(a)(2) and to pay a civil money penalty of \$1.5 million.

DISCUSSION

Under a number of new Securities Act rules that became effective on December 1, 2005, a company that qualifies as a “well-known seasoned issuer” as defined in Rule 405 will be eligible, among other things, to register securities for offer and sale under an “automatic shelf registration statement”, as so defined, and to have the benefits of a streamlined registration process under the Securities Act. Companies that qualify as well-known seasoned issuers will be entitled to conduct registered offerings more easily and with substantially fewer restrictions. Pursuant to Rule 405, however, a company cannot qualify as a well-known seasoned issuer if it is an “ineligible issuer”. Similarly, the new Securities Act rules will permit an issuer and other offering participants to communicate more freely during registered offerings by using free-writing prospectuses, but only if the issuer is not an ineligible issuer.¹ Thus, being an ineligible issuer will disqualify an issuer from a number of significant benefits under the new rules.

¹ Being an ineligible issuer will disqualify an issuer under the definition of “well-known seasoned issuer”, thereby preventing the issuer from using an automatic shelf registration statement (see new Rule 405) and limiting its ability to communicate with the market prior to filing a registration statement (see new Rule 163). In addition, being an ineligible issuer will disqualify an issuer, whether or not it is a well-known seasoned issuer, under new Rules 164 and 433, thereby preventing the issuer and other offering participants from using free-writing prospectuses during registered offerings of its securities. Consequently, this request for relief is being made not only for the purpose of qualifying as a well-known seasoned issuer but for all purposes of the definition of “ineligible issuer” in Rule 405 – *i.e.*, for whatever purpose the definition may now or hereafter be used under the federal securities laws, including SEC rules.

Rule 405 defines “ineligible issuer” to include any issuer of securities with respect to which the following is true: “Within the past three years . . . , the issuer or any entity that at the time was a subsidiary of the issuer was made the subject of any . . . administrative . . . order arising out of a governmental action that . . . [r]equires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws”. The definition excludes for this purpose any administrative order agreed to in a settlement before December 1, 2005. In addition, notwithstanding the foregoing, paragraph (2) of the definition provides that an issuer “shall not be an ineligible issuer if the Commission determines, upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer”. The Commission has delegated authority to the Division of Corporation Finance to grant waivers from any of the ineligibility provisions of this definition.²

The Order may be deemed to be an administrative order of the kind that would result in GS Group, as well as the Firm and any other company of which it is a subsidiary, becoming an ineligible issuer for a period of three years after the Order is entered. This result would preclude GS Group (and such other entities) from qualifying as a well-known seasoned issuer and having the benefit of automatic shelf registration and other provisions of the new rules for three years. This would be a significant detriment for GS Group. GS Group is one of the most frequent issuers of registered securities.³ It offers and sells securities under a shelf registration statement in both one-off transactions and in an ongoing medium-term note program. For GS Group, the shelf registration process provides an important means of access to the U.S. capital markets, and these markets are an essential source of funding for the company’s global operations. Consequently, automatic shelf registration and the other benefits available to a well-known seasoned issuer will be significant for GS Group.⁴

As described above, Rule 405 authorizes the Commission to determine that a company shall not be an ineligible issuer, notwithstanding the fact that the company becomes subject to an otherwise disqualifying administrative order. GS Group and the Firm believe that there is good cause for the Commission to make such a determination in their case, with respect to the Order, on the basis that the Firm reached an agreement in principle with the Division of Enforcement before the December 1 “grandfather” date of Rule 405.

² See 17 C.F.R. § 200.30-1. See also note 215 in Release No. 33-8591 (July 19, 2005).

³ During 2004 and the first nine months of 2005, GS Group issued over \$31 billion of securities pursuant to effective registration statements.

⁴ While the Firm does not currently issue securities registered under the Securities Act, it is possible that they could do so during the three years after the Order is entered. Therefore, the relief being requested for GS Group is also being requested for the Firm.

As noted above, subparagraph (vi) of the definition of “ineligible issuer” provides that any “decree or order agreed to in a settlement . . . before December 1, 2005” will not result in any entity being an ineligible issuer. In this case, the Firm and the other settling respondents reached an agreement in principle with the Division of Enforcement to settle the captioned proceeding prior to December 1, 2005.⁵ Although the Order will not have been entered before the December 1 “grandfather” date, this agreement in principle was reached before that date. Moreover, the captioned proceeding was commenced in May 2004, well before the new Securities Act rules were adopted or even proposed. A determination that the entry of the Order should nevertheless, in these circumstances, result in GS Group or the Firm being an ineligible issuer would be inconsistent with the purpose of the grandfather clause in subparagraph (vi).⁶

In addition, we have been informed by the Division of Enforcement that they have discussed our request for a Rule 405 waiver with some of your colleagues and that, in the view of the Division of Corporation Finance, the fact that the agreement in principle described above was entered into before December 1 would be an important and helpful fact in considering whether to grant our request. The Firm entered into the agreement in principle prior to December 1 with the understanding that this would be the case. Under these circumstances, GS Group and the Firm should be treated as if the Firm were the subject of an order agreed to in a settlement prior to December 1, 2005. Accordingly, GS Group and the Firm should be determined not to be an “ineligible issuer” within the meaning of Rule 405.

* * * * *

In light of the foregoing, we believe that disqualification of GS Group or the Firm as an ineligible issuer is not necessary under the circumstances, either in the public interest or for the protection of investors, and that GS Group and the Firm have shown good cause for the requested relief to be granted. Accordingly, we respectfully request that the Division of Corporation Finance, on behalf of the Commission, pursuant to Rule 405, determine that it is not necessary under the circumstances that GS Group or the Firm be an “ineligible issuer” within the meaning of Rule 405 as a result of the Order. We request that this determination be made for all purposes of the definition of “ineligible issuer”, however it may now or hereafter be used under the federal securities laws and the rules thereunder.

⁵ In a letter sent to Kenneth R. Lench, Andrew B. Sporkin and Melissa E. Lamb of the Division of Enforcement on behalf of some of the respondents (including the Firm) prior to December 1, 2005, respondents confirmed that an agreement in principle had been reached with the Staff to settle the captioned proceeding on terms outlined in the letter, subject to continued negotiation of the specific language of the draft Order.

⁶ We note that the Commission has granted relief under Rule 405 for similar reasons in a letter to MetLife, Inc. (SEC No-Action Letter, Feb. 21, 2006).

Mary Kosterlitz, Esq.

-5-

If you have any questions regarding this request, please contact the undersigned at (212) 558-3882.

Sincerely,

A handwritten signature in black ink that reads "David Harms" followed by a stylized flourish or initials.

David B. Harms, Esq.

cc: Kenneth R. Lench, Esq.
(Division of Enforcement)