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Business Law Section
Committee on Securities Regulation

February 10, 2005

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

E-mail address: rule-comments@sec.gov

Attention: Jonathan G. Katz, Secretary

Re: File No. S7-38-04
Securities Offering Reform
Release Nos. 33-8501 and 34-50624

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the invitation in Release Nos. 33-8501 and 34-50624 (the "Release") to comment on the proposed Securities Offering Reform.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, are those of the Committee and do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

Introduction

The Committee strongly supports the Commission's efforts to reform the securities offering process. We commend the Commission for undertaking this long-needed reform of the rules under the Securities Act of 1933. Although this letter sets forth various comments and

suggestions relating to the Commission's proposals set forth in the Release, they are not intended in any way to detract from our strong overall support for the Commission's initiative. Our comments and suggestions are instead intended to identify specific areas where we believe the Commission's proposals should be revised to improve the efficiency of the offering process, to avoid unintended consequences, and to anticipate and respond to issues that may arise in the future. We believe that all of the suggestions set forth in this letter are consistent with the Commission's goal of enhancing investor protection.

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Discussion

1. Definitions – Proposed Amendments to Rule 405

(a) The Definition of "Automatic Shelf Registration Statement" Should Be Changed

As discussed below in Section 5(f), we believe that the definition of "automatic shelf registration statement" should be changed to permit automatic shelf registration by seasoned issuers and Schedule B issuers.

(b) The Definitions of "Written Communication" and "Graphic Communication" Should Be Clarified

The Committee agrees that it would be helpful to include in Rule 405 definitions of "written communication" and "graphic communication," and that the scope of the definitions should be sufficiently broad to encompass new technologies without the need to revisit the rules in the future. We believe it would be helpful for the Commission to clarify that the determination of whether a communication is an oral communication or a written communication (including a graphic communication) should be made by reference to the person making the communication, rather than by reference to the conduct of any recipient. In our view an oral communication, such as a telephone call, conversation, individual voice message, or oral presentation, should not be transformed into a written communication because a recipient, without the prior approval of the person making the communication, records or transcribes the oral communication. We believe this clarification would be appropriate in view of the responsibilities imposed under the proposed rules on persons making written communications and the issuers and sellers on whose behalf such written communications are made. We agree that if the person making the communication has arranged for or explicitly approved the recording or publication of the communication, such communication would be appropriately within the category of written communication.

(c) The Definition of "Ineligible Issuer" Is Unnecessarily Broad And Should Be Limited

An ineligible issuer is subject to a variety of disabilities under the proposed rules, including the inability to rely upon (1) proposed Rule 163, (2) proposed Rule 163A, (3) proposed Rule 433, (4) automatic shelf registration, (5) eligibility as a well-known seasoned issuer ("WKSI") and (6) eligibility to incorporate by reference into Forms S-1 and F-1. We have a number of comments relating to the proposed definition of "ineligible issuer." In addition, we do not believe that ineligible issuer status should be applicable to the use of free writing prospectuses pursuant to proposed Rule 433, as more fully discussed in Section 2(c)(iii)(F) of this letter.

(i) In our view, as a matter of fairness, we would urge the Commission to provide that the ineligible issuer criteria set forth in clauses (1) (viii), (ix) and (x)

regarding bankruptcy, violations of law, settlements and decrees and orders should apply prospectively only (i.e., only to bankruptcies, violations of law, settlements, decrees and orders that are entered into after the effective date of the new rules). This is particularly critical in the case of settlements, consent decrees and similar orders or decrees, because at the time issuers entered into such arrangements they would not have been aware of the proposed ineligible issuer status and its consequences. It is entirely possible that, had such issuers been aware of the implications of such matters under the proposed Rules, they either would not have entered into such settlements or other arrangements, or sought to negotiate different terms.

(ii) The disqualifications associated with ineligible issuer status should bear a logical relationship to the quality of the issuer's reporting and the nature of its conduct in the context of an offering registered under the Securities Act of 1933 (the "Securities Act"). We believe that a number of the proposed criteria that would trigger ineligibility have no bearing on the quality of reporting by an issuer or on the offering process. These criteria, discussed in more detail below, include violations of securities laws not related to antifraud protections, and conduct by subsidiaries of issuers. We encourage the Commission to exercise restraint in imposing disqualification criteria that will hinder capital raising without offering meaningful investor protection.

(iii) We believe that clauses (1) (viii), (ix) and (x) regarding violations of law, settlements and decrees and orders should be limited to violations of the antifraud provisions of the federal securities laws. As currently drafted, these clauses will very likely have a disproportionately harsh effect on financial institutions as a class, because the business and operations of most financial institutions are subject to significantly more pervasive regulation under the securities laws than the business and operation of other public companies. We seriously question whether regulatory issues arising in the everyday business operations of a broker-dealer or investment adviser – as opposed to matters arising in connection with an issuer's Exchange Act reporting or its compliance with applicable disclosure obligations as an issuer under the Securities Act – have a logical connection to the institution's status as a Securities Act issuer. We do not believe these other regulatory issues should affect the basis for permitting use of the communications proposals or the eligibility of a WKSI to use automatic shelf registration. We would therefore urge the Commission to revise its proposals to provide that only violations of the antifraud provisions of the federal securities laws would subject an issuer to ineligible issuer status.

(iv) The status or conduct of a subsidiary should not cause a company to be an "ineligible issuer" under clauses (1) (viii), (ix) and (x) of the proposed definition. Clause (1)(viii) would impose ineligible issuer status on a parent company if any of its subsidiaries had, within the past three years, been convicted of an enumerated felony or misdemeanor, and clauses (1)(ix) and (x) would impose ineligible issuer status on a parent if any of its subsidiaries had entered into certain settlements or was made subject to certain judicial or administrative decrees or orders. In view of the significant implications of ineligible issuer status, we believe it would be appropriate for the Commission to eliminate subsidiaries from clauses (1)(viii), (ix), and (x) of the proposed definition of "ineligible issuer." The proposed definition would taint the parent without regard to the significance of the subsidiary to the parent or the degree of involvement (if any) by the parent in the matters giving rise to the violation. Unless the parent is also party to the

conviction, settlement, decree or order, it is unreasonable to impose ineligible issuer status on the parent, with all of the adverse consequences of such status.

(v) If, notwithstanding the comment made in (iv) above, the Commission determines to retain a reference to the conduct of subsidiaries in connection with ineligible issuer status, the Commission should limit the disqualifying criteria to actions occurring only while the entity was a subsidiary of the parent, and not to actions which may have occurred prior to the time the entity became a subsidiary. More specifically, the disability should not apply to a subsidiary unless the events giving rise to the enumerated felony, misdemeanor, settlement, decree or order (rather than the consequences of such conduct) occurred at the time the entity was a subsidiary of the parent. For example, in the absence of such a limitation, an entity would be unable to acquire a subsidiary within any of the prohibited categories without in the process subjecting itself to various disqualifications for as long as three years. We believe this result would unfairly penalize an acquiring company with no involvement in the illegal conduct. A similar result would occur if a company were to seek to increase its ownership in another entity from a minority interest to a control interest. The very reason for the increase may be to protect its investment and to impose proper internal controls.

An even more unfair consequence would ensue under the proposed definition if the criminal charges or proceedings are initiated against the subsidiary after the subsidiary is acquired by the parent, and the events giving rise to the conviction, settlement, decree or order occurred prior to the date of the acquisition. In this instance, any acquisition would become a potential time bomb, carrying with it the risk that misdeeds by the acquired entity prior to the acquisition could have a profound adverse effect on the ability of the parent to access the capital markets.

The inequity of the proposed definition is yet more pronounced because the disqualification occurs regardless of how insignificant the subsidiary may be when compared to the parent, and also because the entire disability could be avoided had the acquisition been effected as a purchase of assets, rather than as a purchase of the stock of the subsidiary. We do not believe that the securities law considerations relating to ineligible issuer status should determine that an acquisition should be effected as an asset transaction if a stock purchase or merger transaction would otherwise be move favorable to parent company shareholders.

For all of these reasons, as we recommended in (iv), above, we believe that it would be most appropriate for the Commission to eliminate the references in clauses 1(viii), (ix) and (x) to subsidiaries, or, if the Commission is unable so to do, to provide that the disability does not apply to a subsidiary unless the events giving rise to the enumerated felony, misdemeanor, settlement, decree or order occurred at the time the entity was a subsidiary of the parent and the consequences of the matter are indisputably material at the parent level.

(vi) In addition to our view expressed in (iv) above that conduct by a subsidiary should not affect the status of a parent entity, we also do not believe that the subsidiary's conduct should affect the subsidiary's status where the subsidiary is technically an issuer but where its status is not material to an investor's investment decision, such as in the case of public debt issued by a parent and fully and unconditionally guaranteed by its subsidiaries, or

public debt issued by a subsidiary and fully and unconditionally guaranteed by its parent, or by its parent and one or more of the parent's subsidiaries (with respect to the issuer status of the subsidiary, see, for example, the Note to proposed paragraph (C) to Form S-3). In these cases, investment decisions with respect to the guaranteed securities being registered are made on the basis of the parent entity's consolidated financial condition, and the offering is typically registered on the form for which the parent is eligible, with very limited information being provided about the subsidiary. In the absence of revisions to proposed Rule 405, ineligible issuer status relating to the subsidiary would be determined by reference to all of the identified criteria, and not only clauses 1(viii), (ix) and (x). Imposing restrictions in this instance could significantly restrict the parent entity's access to the capital markets because in many cases (due to indenture or bank credit agreement considerations) the parent does not have the ability simply to exclude a subsidiary from a guarantor structure. Because of these disproportionate consequences, we believe the Commission should provide that a subsidiary that is an issuer or guarantor of public debt in the circumstances described above should not be deemed to be an ineligible issuer.

(vii) Under existing and the proposed Rules, parent entities can file universal shelf registration statements including as issuers or possible issuers subsidiaries within the parent's consolidated group. Even if the Commission agrees to exclude reference to subsidiaries from clauses 1(viii), (ix) and (x), it is not entirely clear to us from the proposed Rules whether the ineligible issuer status of a subsidiary included as a possible issuer in a universal shelf registration statement would be deemed to affect the ability of the parent entity to engage in otherwise permitted offering communications, or automatic shelf registration if the parent is a WKSI. In our view, ineligible issuer status of a subsidiary should have no effect on the status of the parent in connection with offerings not including securities of the subsidiary. We suggest that the Commission clarify in the rules that any disability associated with conduct by a subsidiary as issuer should apply only with respect to registration statements relating to securities of the subsidiary (other than guaranteed debt discussed in (vi) above), and will not affect the status of the parent or other company in the corporate group.

(viii) If the Commission determines to retain a reference to the conduct of subsidiaries in connection with ineligible issuer status, the Commission should consider excluding subsidiaries that are themselves reporting companies with U.S. listed equity securities. A subsidiary in this category is subject to the governance requirements of the listing body, including requirements of an independent audit committee, and has its own independent obligations to its security holders. In our view, it may be inappropriate to subject a parent to disabilities by reason of the conduct or status of the public subsidiary, especially where the situation giving rise to the ineligibility may not have been due to the conduct of the parent.

(d) <u>Definition of "Well-Known Seasoned Issuer"</u>

We support the Commission's proposed definition of "well known seasoned issuer" with the following additional suggestions:

(i) The Commission should confirm that, for the purpose of determining whether the equity eligibility criterion has been satisfied, the market value of

outstanding common equity held by non-affiliates should be based on aggregate global equity, held both inside and outside the United States.

(ii) In the case of securities trading on non-U.S. markets, the Commission should provide guidance as to the conversion rate to be used to convert foreign currency denominated trading values to U.S. dollars, such as the noon buying rate for foreign currencies as certified for customs purposes by the Federal Reserve Bank of New York.

(iii) The Commission should clarify the valuation to be used in connection with debt issuances involving an original issue discount, such as zero coupon notes. We would propose that the value be determined by reference to the aggregate price paid by the public with respect to the registered securities.

(iv) We urge the Commission to consider the imposition of a lower equity criterion than the proposed $700 million threshold. We believe that a criterion of $300 million, which is four times the Form S-3 and F-3 eligibility thresholds, would be reasonable.

(v) The eligibility to be a WKSI and to use Forms S-3 and F-3 require an issuer to have filed in a timely manner all reports required to be filed pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act") during the 12 calendar months prior to the date of determination, subject to certain limited exceptions. We believe the period should be based on the time it takes for information to be disseminated and absorbed by the marketplace, rather than reflecting punitive purposes. We strongly urge the Commission to reduce this period to the 30 day period prior to the date of determination. This reduction would assure that all relevant information will be available to all prospective investors at the time they make their investment decisions, without imposing a lengthy and substantial penalty on issuers. A 30 day requirement would be sufficient to avoid the possibility that an issuer could "dump" previously due information into the marketplace immediately prior to the filing of a registration statement, and assure that such information could be properly disseminated prior to a Securities Act filing. We make this suggestion because the disclosure burdens imposed on reporting companies have increased significantly over the past few years, both in terms of the number of reportable matters and the shortened timetables for filing many reports, and the effect of even inconsequential noncompliance has had and could impose additional burdens on the capital raising process and adversely affect an issuer's security holders. To the extent the Commission believes an issuer has willfully violated the securities laws, the Commission has adequate remedies available to it through enforcement proceedings. We note that the implementation of our proposed change would require modifications both to the definition of WKSI, and also to the eligibility criteria applicable to the use of Forms S-3 and F-3. We would encourage the Commission to consider also making this change applicable to the use for Forms S-3 and F-3 by seasoned issuers who are not WKSIs.

2. Communications

(a) Permitted Continuation of Ongoing Communications During an Offering

The Committee strongly supports the Commission's efforts to expand the scope of communications permitted to continue during an offering.

(i) Proposed Rule 168

We strongly support the creation of a safe harbor for communications permitted to continue during an offering, and the Commission's effort to expand the scope of prior staff positions relating to such permitted communications. We have the following suggestions with respect to proposed Rule 168:

(A) The safe harbor provided by proposed Rule 168 should be expanded to include all factual and forward-looking information (other than offering-related information) an issuer discloses pursuant to applicable laws or regulations, or by the rules of any stock exchange on which its securities are listed, if the issuer believes in good faith that such disclosure is required, whether or not that information has been "regularly released" in the past. Just as the condition of regular prior release of information serves to provide assurance that a current release of similar information, on a voluntary basis, is not motivated by a desire to condition the market for an offering, we believe there are ample reasons why mandated disclosures should be within the scope of the proposed safe harbor. These reasons are perhaps even more compelling than those applicable to voluntary disclosure, because the failure on the part of the issuer to make such disclosures could result in significant adverse consequences to the issuer. Among the disclosures within this category would be disclosures required to be made pursuant to the Securities Act and the Exchange Act, including information in proxy and information statements (which is not encompassed by the proposed Rule), and also disclosures required by other laws and regulations and stock exchange requirements. The safe harbor should be available for disclosures required by laws, regulations and stock exchange rules of governmental authorities and stock exchanges both within and outside the United States. Reporting issuers should not be subject to the risk that a mandated disclosure, such as a disclosure required in a Form 10-K or Form 8-K (especially in view of the recent expansion of the requirements of such Form) or in another governmental filing, will be deemed to be outside the safe harbor provision of Rule 168, and subject such issuers to the choice of either failing to comply with the mandated disclosure obligation or risking a gun-jumping violation. The "regularly released" condition should not be applicable not only because the disclosures are mandated, but also because companies may be required to make disclosures in order to comply with new or amended legislation or rules, or in connection with transactions in which such companies may not have regularly engaged in the past. We appreciate that the safe harbor defines a body of communications that is not made in anticipation of, or in connection with, an offering. In our view, the Commission should acknowledge, and the Rule should reflect, that mandated communications (other than those relating to the registered offering) should be included in the safe harbor.

(B) The safe harbor provided by proposed Rule 168 should be expanded to include factual business information of a type regularly released by public companies, if it is issued in a manner consistent with the disclosure of comparable information by other public companies. The safe harbor would apply even if such information had not been regularly released by the issuer. An example of information falling within this category would

be a dividend notice, in a case where a company has not paid regular dividends previously. We believe there may be other circumstances where the appropriateness of an issuer's disclosure should be based on market practices and expectations, rather than on the prior conduct of the issuer.

(C) Proposed Rule 168, rather than the more limited safe harbor contained in proposed Rule 169, should apply to non-reporting foreign and domestic issuers that have securities listed on trading markets outside the United States. Proposed Rule 169 is premised on the notion that a more restricted safe harbor should be applicable to non-public issuers. However, as drafted, proposed Rule 169 would unfairly disadvantage non-reporting issuers with public trading markets abroad, which have many of the same disclosure practices, both mandated and as a matter of custom and market expectations, as apply to U.S. reporting companies. Such issuers regularly release a broad range of factual business and forward-looking information. It does not seem reasonable to us to subject foreign listed companies to the limitations of proposed Rule 169, which would eliminate dividend and forward-looking information from the safe harbor, and also eliminate information disclosed to investors. In our view, regularly released information by non-reporting issuers having public trading markets for their securities, wherever located, should be entitled to the safe harbor provisions contained in Rule 168, rather than the more restrictive provisions of Rule 169. If the Commission is not amenable to expanding the scope of proposed Rule 168 to all companies with securities traded on foreign markets, we would encourage the Commission, in the alternative, to include companies with securities trading on a "designated offshore securities market," as defined in Regulation S.

(D) Proposed Rule 168, rather than proposed Rule 169, should apply to voluntary filers. Voluntary filers have generally entered into contractual commitments requiring that they either file reports with the Commission or furnish investors with the information that would have been included in a Commission filing. As a result, such registrants regularly disclose a range of factual business information as well as forward-looking information. In view of their contractual reporting obligations, and the expectations of their existing investors to be able to continue to receive such information, we believe voluntary filers should be considered in the same category as reporting issuers for the purposes of the proposed Rule 168 safe harbors.

(ii) Proposed Rule 169

The Commission proposes in the Release a more limited safe harbor applicable to non-reporting issuers than would apply to reporting issuers. We believe the proposed Rule 169 safe harbor should be expanded beyond the scope of the Commission's proposals in a number of respects, and that such expansion would not adversely affect investor protections. Our suggestions relating to Rule 169 are as follows:

(A) Regularly released forward-looking information and regularly released factual information disseminated to investors or potential investors should be included within the safe harbor of Rule 169. We do not perceive any valid reason to exclude from the proposed Rule 169 safe harbor information regularly released to persons in their

capacity as existing investors, or regularly released forward-looking information. Many non-reporting issuers regularly disclose information to holders of their debt or equity securities. To the extent that such issuers have regularly released such information in the past, in our view they should be entitled to continue to release such information in the manner contemplated by proposed Rule 169 (i.e., consistent with the frequency and regularity of releasing the same type of information in the past), notwithstanding a pending or anticipated securities offering.

(B) The exemption of Rule 169 should apply to all information (other than offering related information) required to be disclosed by law or regulation. As discussed above in our comments relating to proposed Rule 168, we believe non-reporting issuers should also be entitled to the benefit of the safe harbor for any information the issuer discloses pursuant to applicable laws or regulations under circumstances where the issuer believes in good faith that such disclosure is required.

(b) Other Permitted Communications Prior to Filing a Registration Statement

We support strongly the proposals set forth in proposed Rules 163 and 163A, subject to the following comments:

(i) Proposed Rule 163

(A) We suggest that the Commission clarify that proposed Rule 163 would be available to a WKSI notwithstanding an unintentional failure to include the required legend in a free writing prospectus. As proposed, we are concerned that the requirement of "good faith and reasonable effort" would exclude reliance by a WKSI on the proposed Rule in the case of an unintentional failure to include the legend set forth in the proposed Rule. It seems to us that the imposition of Section 5 liability would be too harsh a penalty as a result of the unintentional failure of an issuer to provide a legend, and that the Commission should consider a formulation for the proposed Rule which does not lead to this consequence.

(B) The status of media publications under proposed Rule 163 should be clarified and harmonized with proposed Rule 433. We would propose the following clarifications:

(1) Proposed Rule 163 should be clarified to expressly include media publications. Although proposed Rule 433(f) contains explicit references to media publications, we note that proposed Rule 163 does not contain any comparable provisions, leaving the status of media publications under proposed Rule 163 unclear.

(2) Proposed Rule 163 should provide that media publications are not themselves required to contain a legend. If it is assumed that media publications are within the scope of proposed Rule 163, that Rule, unless modified, would require media publications to contain a legend, even though proposed Rule 433 does not required media publications to be legended provided that a legend is included in the document filed with the Commission. We believe that, except in the case of a paid

advertisement, it is unreasonable to expect the imposition of a legend on a media publication (whether or not the media entity transmitting the publication is affiliated with the issuer).

(C) The Commission should clarify that proposed Rule 163 applies to both primary and secondary offerings. We do not see any reason not to make proposed Rule 163 applicable to both primary and secondary offerings.

(D) The Commission should reconsider the exclusion of Form S-8. We question whether communications in connection with offerings registered on Form S-8 should be excluded from the scope of proposed Rule 163. Because current Commission rules do not require the filing of prospectuses used in connection with offerings registered on Form S-8, we understand that it would perhaps be inconsistent to require the filing of free writing prospectuses relating to S-8 (or proposed S-8) offerings. We believe the Commission should confirm, however, that a communication that would be within the scope of the proposed Rule 163 exemption and not constitute a Section 5(c) violation in connection with an offering registered on Form S-3, would also not constitute a Section 5(c) violation in connection with an offering registered on Form S-8.

(E) The Commission should confirm that if no registration statement is filed the Section 5(c) exemption would be available and no filing obligation would exist under proposed Rule 163. The use of free writing prospectuses by WKSIs in the pre-filing period is conditioned upon filing such free writing prospectuses promptly upon the filing of the registration statement covering the securities being offered. There would be no need or rationale to require a filing if a registration statement is not filed.

(ii) Proposed Rule 163A

(1) Proposed Rule 163A should be expanded to exempt non-offering related communications delivered more than 30 days prior to the filing of a registration statement from Section 12(a)(2) and Section 17 liability, in addition to Section 5(c) liability. We believe this expanded exemption is appropriate because the relationship between a pre-30 day communication and a later offering pursuant to a prospectus is too attenuated for the communication to be treated as a liability document relating to the propectus.

(2) We encourage the Commission to clarify what it would expect an issuer to do in order to "take reasonable steps within its control to prevent further distribution or publication of such communications during the 30 days immediately preceding the date of filing of the registration statement." In the absence of such clarification, it will, in many instances, be extremely difficult for an issuer or others involved in the offering process to satisfy themselves that a communication made prior to the 30 day period that is distributed or published during that 30 day period is within the scope of the Rule.

(c) Relaxation on Written Offering Related Communications –Rules 134, 164 and 433.

The Committee strongly supports the Commission's efforts to expand the universe of permitted written offering-related communications and, specifically, to offer relief from potential Section 5 violations for communications meeting the requirements of the proposals.

(i) Rule 134

As proposed to be revised, Rule 134 would exclude from the definitions of "prospectus" in section 2(a)(10) of the Securities Act and "free writing prospectus" in proposed Rule 433, communications limited to the items enumerated in the Rule. The exclusion would be applicable, however, if the communications are published or transmitted only after a registration statement has been filed which includes a prospectus satisfying the requirements of Section 10 of the Act, including a price range where required. This condition is not contained in current Rule 134, and we believe this limitation is neither necessary nor appropriate in the context of the proposed revised Rule, and would disrupt current practice. In view of the time period between filing and effectiveness, market volatility and other factors, many initial public offerings are filed without a price range. A bona fide price range is often not included until shortly before prospectuses are delivered, within a few weeks prior to expected effectiveness. Were issuers unable to make Rule 134 disclosures, the offering communications process would be unnecessarily restricted. This result seems unnecessarily harsh, especially in view of the very limited information permitted to be included in communications pursuant to proposed Rule 134. Although we understand that the staff of the Commission believes strongly that issuers should include price range information in prospectuses at the earliest possible time, many issuers justifiably believe that market confusion would result from the inclusion of a price range which is not necessarily indicative of the price range at the time the offering is actively marketed. As the Release indicates, the Rule was intended originally to provide an identifying statement that could be used to locate persons who might be interested in receiving a prospectus. We believe that IPO issuers should continue to be entitled to the protections provided by Rule 134, notwithstanding the unavailability of a prospectus containing a bona fide price range. As is the case under current Rules, under the proposed Rules issuers would be obligated to provide prospective investors a Section 10 prospectus prior to the time any investment decision is made.

(ii) Proposed Rule 164

The first two comments set forth above with respect to proposed Rule 163 - compliance with the legend requirement in (A), media publications in (B), and secondary offerings (C) - also should apply to proposed Rule 164. The reasons for those two comments apply equally to proposed Rule 164.

(iii) Proposed Rule 433

Proposed Rule 433 would represent a fundamental conceptual change to the offering process, seeking to assure that written offering-related communications outside the statutory prospectus are fair, rather than proscribing all such communications. Although we have doubts as to whether issuers and offering participants will use free writing prospectuses, we acknowledge that there may be circumstances where issuers or offering participants determine to

disseminate offers outside the scope of the prospectus. The relief granted from Section 5 liability to those issuers who comply with proposed Rules 433 and 164 would be welcome.

Our comments in this area relate to (i) the treatment of media publications as free writing prospectuses, (ii) obligations relating to translation of foreign-language communications, (iii) the implication of proposed Rule 433 to offers and sales outside the United States; (iv) the disparate treatment of affiliated and unaffiliated media publications, (v) the requirement of actual delivery of a statutory prospectus prior to or concurrently with a free writing prospectus in certain cases, (vi) the application of "ineligible issuer" status to the ability to use free writing prospectuses, (vii) the Section 5 liability consequences of the failure to include a required legend; (viii) the proposed filing requirements and (ix) certain technical suggestions.

(A) The provisions relating to media publications as free writings should be modified in order to make them workable and more practical.

Although we agree that advertisements, "infomercials" and other directly sponsored communications should properly fall within the definition of free writing prospectuses, we do not believe that the definition should be expanded to include all media publications pursuant to information provided by an issuer or offering participant about the issuer or the offering if dissemination of the same information by the issuer or offering participant would constitute a free writing prospectus. Our view is based on both practical and conceptual considerations:

It is unreasonable to expect that an issuer is necessarily able to monitor and assemble the multitude of news articles that could be generated from a single release of information by an issuer or offering participant. For example, an interview given by an officer of the issuer to a local newspaper may be distributed or broadcast by national and international media outlets and redistributed, in various formats and with a variety of editorial changes, throughout the world and in many languages. It would not only be difficult for an issuer to physically obtain, organize and review each appearance and permutation of the articles, but it would also be difficult, if not impossible, for an issuer to comply with the one-day filing requirements related to each such publication. As an alternative or clarification to the Commission's proposal we would propose that: (i) in the event a media publication is based upon a press release or other specifically authorized communication, the document that would constitute the free writing prospectus would be limited to the press release or other authorized communication, regardless of the manner in which the communication is published by the media; (ii) in the event a media publication is based upon an interview, the document that would constitute the free writing prospectus would be limited either to a transcript of the complete interview or, at the election of the issuer, to the specific article or articles published by the media entity or entities to which the interview was granted. This clarification would resolve the practical issues associated with media publications, while providing for the filing of free writing prospectuses in the media context.

(B) The Commission should clarify whether translation of foreign-language publications is required.

It is possible that a free writing prospectus or media publication may be in a language other than English or, if the issuer is a foreign company, a language other than its home country language. It is not clear from the proposed rule whether an issuer would be required to translate into English, and file within the requisite time period, a free writing prospectus originally issued in a foreign language.

(C) The Commission should confirm that Proposed Rule 433 is not intended to impose obligations with respect to offers and sales outside the United States.

Offers and sales of securities outside the United States are not subject to Section 5 of the Securities Act. It is our understanding that it is not the intent of the proposed Rules to extend liability under the Securities Act to offerings or communications not currently subject to such liability. In this respect, we believe it would be appropriate for the Commission to specifically state that offering-related communications outside the United States in connection with offers and sales outside the United States do not constitute free writing prospectuses. In this respect, we believe the provisions of Rule 135e may offer guidance as to the concepts that should underlie such clarification by the Commission.

(D) The disparate treatment of affiliated and unaffiliated media publications should be eliminated.

We believe that the disparate filing and distribution requirements applicable to affiliated and unaffiliated media publications in proposed Rule 433 is unwarranted. Under proposed Rule 433, a publication, if made by a media enterprise that is affiliated with the issuer, that constitutes a free writing prospectus, would be required to contain the legend set forth in the proposed rule and to be filed with the Commission no later than the date of first use. In the case of unseasoned and non-reporting issuers, such a publication would also be required to be accompanied or preceded by a statutory prospectus. The exact same publication, if made by an unaffiliated media business, would not be subject to filing until one business day following publication, would not be required to contain the proposed legend (except when filed) and would not be subject to the statutory prospectus delivery requirements.

A number of issuers have affiliated media businesses or are themselves media enterprises. In many cases, the editorial function of the media business is completely independent from the business management of the issuer, and the issuer may not be provided any opportunity to review, comment upon or approve the publication related to the issuer. As proposed, Rule 433 could lead an issuer (contrary in many instances to independent editorial policy) to affirmatively restrict any affiliated media from publishing certain reports relating to the issuer or the offering, and could have the anomalous effect of excluding affiliated media from speeches, press conferences and other communications hosted by the issuer, or from the receipt of press announcements relating to the issuer, while at the same time permitting the participation or receipt of such information by unaffiliated media.

We believe that these requirements are unnecessary from an investor protection standpoint. In our view (and subject to appropriate limitations in cases where

management of the issuer does in fact exercise editorial control over the content of the publications), the requirement relating to the application of the definition of free writing prospectus to media publications should draw no distinction between affiliated and unaffiliated media.

(E) The Requirement of Actual Delivery of a Statutory Prospectus Prior to the Use of a Free Writing Prospectus should be Limited to Non-reporting Issuers

We understand the investor protection benefits to be derived by assuring the non-reporting issuers deliver a statutory prospectus to investors prior to the use of a free writing prospectus. In the absence of prior reporting by an issuer, an investor may not be fully informed about the nature of the issuer's business and the risks associated with an investment unless there can be a means to insure that the investor has also received the statutory prospectus. However, we do not believe that actual delivery of the statutory prospectus should be precondition to the use of a free writing prospectus in the case of an unseasoned issuer. Investors considering investments in an unseasoned issuer will be able to access on EDGAR the statutory prospectus relating to the offered securities, as well as prior Securities Act and Exchange Act filings by the issuer. We do not believe actual delivery of a statutory prospectus should be a condition to use of a free writing prospectus in the case of an issuer already subject to Exchange Act Section 15(d) or 13 disclosure obligations.

(F) Ineligible Issuer Status Should Not Preclude Use Of Rule 433 Free Writing Prospectuses

Proposed Rule 433 provides, in our view, a very sensible approach to permitting the use of free writing following the filing of a registration statement, and assuring that the communication constituting the free writing will be a prospectus permitted under Section 10(b) of the Securities Act for purposes of sections 2(a)(10), 5(b)(1) and 5(b)(2) of the Securities Act. We believe that the only conditions to the use of a free writing prospectus should be those having to do with the nature of the information in the free writing prospectus, and compliance with the legend, filing and record retention requirements of proposed Rule 433. Application of the ineligible issuer provisions to Rule 433 seems to us punitive, and not necessary for the protection of investors.

(G) Failure to Include a Required Legend Should Not Result in Section 5 Liability

We believe that omission of the prescribed legend from a free writing prospectus should not, in and of itself, give rise to a violation of Section 5 of the Securities Act, and would encourage the Commission to fashion a less burdensome remedy for the failure by an issuer to deliver a free writing prospectus bearing the required legend. As proposed, the issuer and (subject to available defenses) others would have absolute liability for the contents of a defective free writing prospectus, notwithstanding that other free writing prospectuses or disclosures made by the issuer to investors may have provided those investors ample notice of the required Commission filings and the availability of the offering documents. It seems sensible to us to

remove the legend requirement from proposed Rule 433, and instead provide for the free writing prospectus legend in a separate rule which does not refer to Section 5.

(H) Free Writing Prospectus Filing Requirements

We do not believe that filing requirements are necessary or appropriate in the context of free writing prospectuses. Unlike issuer's obligations under Regulation F-D or Regulation M-A, where filing with the Commission is necessary to insure that investors are appropriately informed about material information (and in the case of Regulation M-A, to reflect the practical concern that it is often impossible to have filed a registration statement prior to the time a business combination transaction is announced), an issuer is not permitted to include material information in a free writing prospectus that is not also included in (or incorporated by reference into) a registration statement. While we hope that all issuers will be cautious and conscientious in connection with their preparation and use of free writing prospectuses, we believe it is possible that issuers may tailor the disclosures in certain free writing prospectuses for limited or targeted dissemination to specific recipients or groups of recipients, who may have a pre-existing knowledge of the issuer or the industry in which the issuer is engaged (including, for example, risks associated with the industry and business developments affecting the industry). Such free writing prospectuses may be fully appropriate in connection with the disclosure obligations of the issuer to the targeted recipients, but may not include all the information that would or should be contained in a free writing prospectus intended for distribution to the general public. While the issuer would assume Section 12(a)(2) and Section 17 liability with respect to all of its free writing prospectuses, we are concerned that a public filing obligation could create liability even though no liability would have accrued had the document been restricted to its intended audience. In addition, the dissemination of a document to a wider group through public filing could increase the number of investors who may rely (or claim to rely) on the document, and thereby the liability exposure of the issuer. If the Commission believes that issuers should be permitted to use free writing prospectuses that are carefully drafted to address certain recipients, we urge the Commission not to undermine this belief by requiring issuers to file publicly such free writing prospectuses.

(I) Technical Comments

We have two additional technical comments with respect to proposed Rule 433.

First, as drafted, proposed Rule 433(f) does not appear to be limited to writings that would constitute offers or solicitations of an offer to buy securities. Proposed Rule 433(f) would deem all written communications (e.g., articles, editorials and television interviews) relating to an issuer or its securities that are published by media entities unaffiliated with the issuer or any offering participant, but for which the issuer or offering participant provides information, to be a free writing prospectus. For example, an issuer's press release regarding a new product would not constitute a free writing prospectus by an issuer, but the publication of the information in the release by the media would appear (by the language of the proposed Rule) to transform the information into a free writing prospectus. We suggest that the paragraph should be revised to clarify that proposed Rule 433(f) is intended to relate only to

media reports that constitute an offer of securities, which are themselves based on information furnished by an issuer that would constitute a free writing prospectus if issued directly by the issuer.

Second, proposed Rule 433 refers to a "statutory prospectus", and Rule 134(f) refers to a "section 10 prospectus." We suggest that in both cases the terms, which are undefined, be clarified to provide that the terms means a prospectus meeting the requirements of Section 10, other than by reason of Rules 431 or 433.

(iv) Rule 408

We support the amendment of Rule 408 to make clear that a failure to include information that is included in a free writing prospectus in a prospectus filed as part of a registration statement would not, solely by virtue of including such information in a free writing prospectus, be considered an omission of material information required to be included in a registration statement.

(v) Rule 418

We suggest the Commission exclude from the scope of the proposed amendment to Rule 418 any free writing prospectus an issuer has filed on EDGAR (to the extent the final Rules contain any filing requirement), and any free writing prospectus an issuer is not required to retain beyond the retention period provided by proposed Rule 433. In addition, we believe the proposed amendment should be limited to any free-writing prospectus prepared or used by an issuer, and not impose obligations on an issuer with respect to a free writing prospectus prepared and used by an underwriter or participating dealer (which is not also used by the issuer). As proposed in the Release, in most cases there would be no condition that underwriters and participating dealers file free writing prospectuses they prepare. As the Commission notes, some of this information could include information that is proprietary to an underwriter. The lead-in language of Rule 418 requires a registrant to furnish the requested information to the Commission or its staff promptly upon request. In order to avoid an obligation of an issuer to furnish information to the Commission to which it does not have access, we believe the obligation should be limited to free writing prospectuses used by an issuer. This limitation should not affect the ability of the Commission or its staff to obtain any free writing prospectus upon request, in view of the provisions of proposed Rule 433 requiring issuers and offering participants (including underwriters and participating dealers) to retain for three years all free writing prospectuses they have used.

3. Use of Research Reports

(a) Definition of Research Report

(i) The proposed definition of “research report” should not be limited to written communication.

We agree with the Commission that it would be appropriate to include a definition of "research report" in proposed Rules 137, 138 and 139, and agree with the proposed expansion of the availability of these safe harbors. We do not believe, however, that the definition of "research report" should be limited to written communications, and see no reason why communications in any form should not be considered within the scope of the definition for Rule 137, 138 and 139 purposes.

(ii) The proposed definition of "research report" should not be limited to information reasonably sufficient upon which to base an investment decision. The proposed definition would narrow the current concept of what constitutes a research report, and exclude from the scope of proposed Rules 137, 138 and 139 reports which do not contain sufficient information on which to base an investment decision. We believe that a broker's or dealer's publication or distribution of any information, report or opinion which complies with the other requirements of Rule 137, 138 and 139 (subject to the comments below), should be entitled to safe harbor protection.

(b) Proposed Amendment to Rule 137

We support the expanded availability of Rule 137, as proposed by the Commission.

(c) Proposed Amendment to Rule 138

We support the expanded availability of Rule 138, as proposed by the Commission, with the additional suggestion that the Commission clarify that the required history of publishing or distributing research reports on the types of securities in question in the regular course of business includes research published or distributed by predecessor entities of the broker or dealer, and that the reference to the types of securities in question is intended to refer to general classes of securities, such as common stock, and convertible or non-convertible debt securities or preferred stock, and not to securities having characteristics similar to the more specific or detailed provisions of the securities in question.

We also believe that Rule 138 should be extended to apply to voluntary filers, in view of the prior public reporting by such issuers and investor expectations regarding the availability of investment-related research regarding such issuers.

(i) Proposed Amendment to Rule 139

We support the expanded availability of Rule 139, as proposed by the Commission, with the additional suggestions that the Commission extend the Rule to Schedule B issuers, and consider expanding the permitted issuer-focused research to include all reporting issuers. In the case of industry reports, which are not focused on the issuer of securities, we believe the Rule should apply to any issuer.

As discussed in connection with Rule 138, we believe the scope of industry research reports pursuant to Rule 139(a)(2) should be extended to include voluntary filers.

4. Liability Issues

The liability provisions set forth in the Release require close scrutiny in order to assure that such provisions are both reasonable and clear. We are concerned that ambiguity inherent in certain of the proposals, relating to when and to whom liability attaches, may, unless remedied in the final rules adopted by the Commission, open the door to inconsistent and perhaps unintended court determinations relating to liability. We would suggest that the Commission address the following matters in the final rules:

(a) The Release indicates that the time at which an investor enters into a contract of sale, and therefore becomes committed to purchase the securities, is the appropriate time to apply the liability standards of Section 12(a)(2) and Section 17(a)(2). Pursuant to proposed Rule 159 and the proposed revision to Rule 412, subsequently provided information would not modify or supersede any information conveyed to an investor at the time of sale (including the time of the contract of sale). While we acknowledge that a seller should not be able to limit its Section 12(a)(2) or 17(a)(2) liability by providing material information to an investor who is already unconditionally bound to purchase securities, we believe that the time an investor enters into a contract of sale may not necessarily be the time an unconditional obligation arises if the seller is willing to permit the investor to change its investment decision subsequent to the date of the contract of sale. If, for example, a material adverse change were to occur to an issuer (or be identified) after certain investors have committed to purchase, and the seller (including an underwriter or dealer) permits a purchaser to change or terminate its purchase order after the material adverse change has been announced, we do not believe it would be fair to impose liability on the seller by reason of the information available to the investor at the time it entered its purchase agreement. We believe that a determination as to whether the investor was provided an opportunity to change or terminate its investment should be subject to the same facts and circumstances decision that applies to any determination as to whether or not information has been conveyed to an investor by a seller, and that the imposition of a standard based on the time of the entry into a contract imposes what might be an artificial criterion.

(b) More fundamentally, the Commission should confirm that a determination as to whether an investor has entered into a binding contractual commitment is to be made on the basis of applicable state law. We believe it would be inappropriate for the Commission to impose its own determination as to when an agreement would be binding, which may be inconsistent with state law provisions or precedents relating to the formation of contracts.

(c) The Release reflects the Commission's concerns with recent court rulings that have held an issuer not to be a seller for Section 12(a)(2) liability purposes in certain circumstances. Although we understand the Commission's desire, reflected in proposed Rule 159A, to provide clearly that an issuer is a seller with respect to certain communications in connection with primary offerings of the issuer's securities, we believe the proposed Rule requires further clarification. Among other things, it is not sufficiently clear to us from the

language of the proposed Rule that the only persons who are entitled to the benefit of the proposed Rule are those purchasers who acquired the securities in the primary offering. We are concerned that, as drafted, the proposed Rule would impose seller liability on an issuer for statements made in connection with a specific primary offering of securities, even if the purchaser seeking to impose liability acquired its securities in another (perhaps contemporaneous) primary offering by the same issuer. We also note that certain purchasers may acquire securities with a view to further distribution, and others may acquire such securities with the purpose of longer term investment. In our view, the proposed Rule should clearly indicate that once the primary distribution has ended with respect to any purchaser, the issuer would no longer be considered a seller in connection with any further disposition of the securities by that purchaser.

(d) In Title II of the Private Securities Litigation Reform Act of 1995, Congress amended Section 11(f) of the Securities Act and Section 21D of the Exchange Act to increase the standards of culpability required to impose liability on outside directors. Notwithstanding that the Act is almost ten years old, the Commission has never defined the term "outside director", as was contemplated by the Act. Especially in view of the expressed intention of the Commission to address liability issues in these reform proposals, we would encourage the Commission to adopt a reasonable definition of the term, and thereby to implement the clear intent of Congress with respect to outside director liability.

5. Securities Act Registration Proposals

(a) Procedural Changes Regarding Shelf Offerings – Proposed Rules 430B and 430C

We support in general proposed Rules 430B and 430C, and agree that they will add clarity to the information that may be excluded from a base prospectus, as well as clarifying the liabilities associated with prospectus supplements, subject to the following comments:

(i) Proposed Rule 430B(a) should be revised to permit seasoned issuers, as well as WKSIs, to use a form of prospectus that omits information as to whether an offering is a primary or secondary offering, the plan of distribution for the securities, and the identification of other issuers unless known. In view of the desire of the Commission to enhance the flexibility of the offering process, we believe such expanded ability would be appropriate.

(ii) The registration statement should not be required to identify transactions in which securities were acquired by potential selling security holders who may be identified in later prospectuses. We do not believe that the ability to identify security holders after effectiveness should be available only if the resale registration statement identifies the specific private transaction or transactions pursuant to which the securities were sold. We doubt that this information is useful to investors, and in our view this disclosure is inconsistent with the goal of including only material information in a securities offering document. In the case of an issuer that has engaged in a significant number of securities offerings, or has issued securities to a large number of investors in private transactions, the disclosure required by this section could become more lengthy than many other sections of the document that are more relevant to investors. We

would also note that if an issuer has issued the same security in more than one unregistered transaction, it may be difficult or impossible to identify the transactions in which such securities were originally issued. This would be the case if the securities are held by a nominee in book entry form, and if there have been intermediate transfers of securities (such as transfers between qualified institutional buyers).

(iii) Only Selling Security Holders who are Affiliates of the Issuer should be Required to be Named in a Registration Statement or Prospectus Supplement. We suggest that the Commission eliminate the requirement that individual securities holders be named in a registration statement or prospectus supplement unless such persons are affiliates of the issuer. We do not believe this information is material to securities holders, and note that a similar suggestion was made in 1996 in the Report of the Task Force on Disclosure Simplification. In that Report, the Task Force stated:

> "Under Item 507, if any of the securities are to be offered for the account of security holders, the registrant must name each security holder, and related information. The Task Force recommends that Item 507 be modified to require that only affiliates (as defined by Rule 144) within the last two years and beneficial holders of a certain percentage (e.g., five percent) of the registrant's securities be identified individually. The Task Force further recommended that if the provisions of Rule 144 were thereafter amended, as they were, to reduce the Rule 144 holding period from two years to one year, the Commission should consider conforming the period of time for disclosure of affiliates under Item 507 from two years to one year. We believe the recommendations of the Task Force are no less valid today than they were in 1996. For purposes of clarity, however, we would welcome the specific enumeration by the Commission of those classes of persons for whom disclosure would be required (e.g., holders of 5% or more of the issuer's voting power, holders of 5% or more of the class of securities subject to the registration statement, executive officers and directors (other than independent directors))."

(iv) The Rules Regarding Integration Should be Updated. Although we agree that the provisions of Rule 152 would need to be complied with in connection with resale registration statements, we respectfully request that the Commission review the issues associated with integration of public and private offerings, and propose rules which not only codify existing staff positions, but also reflect the availability of current technologies in connection with private offering practices.

(b) Proposed Amendments to Rule 415

(i) We support the elimination of a limitation on the amount of the securities that may be registered pursuant to Rule 415.

(ii) We support the ability to effect immediate takedowns from a shelf registration statement filed under Rule 415(a)(1)(x).

(iii) We support the elimination of "at the market" offering restrictions.

(c) Proposed Amendments to Rule 424 and Rule 434

(i) We support the proposal to amend Instruction 2 to Rule 424 to require that any prospectus supplement filed pursuant to Rule 434 must be filed at the same time as other prospectus supplements for shelf registration takedowns.

(ii) We support adding a requirement to Rule 424 that in cases of offerings where information regarding the terms of the securities or the plan of distribution or other information related to the offering is included in Exchange Act reports incorporated by reference, the prospectus supplement filed pursuant to Rule 424 would be required to disclose on its cover page the Exchange Act report or reports containing such information.

(iii) We believe the Commission should clarify the meaning of the phrase "date it is first used" in the proposed amendments to paragraph (2) of Rule 424(b). In the absence of such a clarification, we believe the proposed amendment could lead to significant confusion. The SEC Release refers to "first use" in footnote 276, relating to proposed Rules 430B and 430, which states that first use for purposes of Rule 424 is not the date the prospectus supplement is given to a purchaser in connection with a sale, but is instead the date that the prospectus is available to the managing underwriter, syndicate member or any prospective purchaser. The Commission cites a 1987 release in connection with its position. We do not believe it makes sense, in the context of the proposed amendments, to require securities practitioners to consult the Commission releases in order to understand the meaning of a Rule. We suggest that the Commission include in the Rule a clear statement as to when "first use" occurs under Rule 424 (such as the date the prospectus is available to any underwriter or prospective purchaser) and propose that the Commission provide in the Rule for filing "no later than the second business day following the date of determination of the offering price (or if earlier, the second business day following the first date such prospectus is available to any underwriter or prospective purchaser), or transmitted by a means reasonably calculated to result in filing with the Commission by that date."

(iv) We support the proposal to amend Rule 434 to make similar changes to the timing of a prospectus supplement filing.

(d) Proposed Amendments to Item 512 of Regulation S-K

(i) We support the proposal to revise the Item 512 undertaking to clarify that for shelf registration statements filed on Forms F-3 and S-3 in reliance on Rule 415(a)(1)(x), all the disclosures required by the undertaking can be contained in any filed prospectus supplement deemed part of and included in a registration statement or any Exchange Act report that an issuer files that is incorporated into the registration statement.

(ii) We also support the proposal to revise the undertaking to allow automatic shelf issuers to include in the manner described above all other information that has been omitted from the base prospectus.

(iii) Although we understand the Commission's purposes in proposing a new undertaking in which an issuer would agree that information in filed prospectus supplements is deemed part of and included in registration statements and that new effective dates would occur, and setting forth additional acknowledgements, we believe these matters can be better reflected in a Rule setting forth the substantive effects of these undertakings and acknowledgements, rather than imposing a burden on each issuer to replicate the language in each relevant registration statement it may file. We believe these matters will be as appreciated and respected in the form of a Rule as they would in the form of an undertaking.

(e) Changes to Forms S-3 and F-3

We support the amendment of Forms S-3 and F-3 to expand the categories of majority-owned subsidiaries that would be eligible to register their non-convertible securities or guarantees under General Instruction I.C. of the respective forms.

(f) Automatic Shelf Registration for Well-Known Seasoned Issuers should be Extended to all Seasoned Issuers; Modification of Payment Provisions

We strongly support the changes streamlining the registration process for WKSIs, and endorse the Commission's rationale for these changes. Indeed, we believe that this rationale, and the logic underlying some other of the reform proposals, suggest that the streamlined procedures should, if anything, be extended more broadly. For one thing, we believe that these procedures should be extended to Schedule B issuers, or at least to those Schedule B issuers filing annual reports on Form 18-K in accordance with the procedures set forth in the no-action letter issued to Canada (available April 16, 1991) and other similar no-action letters. More fundamentally, we do not believe that there is any real reason to distinguish between WKSIs and other seasoned issuers for purposes of automatic shelf registration. The principle that "access equals delivery" applies as well to small as to seasoned large issuers, since both small and large issuers will have a complete set of current and readily-accessible filings available on the EDGAR system. We also expect that in terms of the review process, the Commission's staff will be overseeing smaller seasoned issuers in much the same way as WKSIs, and that for both categories, absent some publicity or other triggering event, staff review will generally occur on the "once-every-three-years" basis prescribed by Section 408 of the Sarbanes-Oxley Act. We therefore believe there is no real practical reason why the benefit of automatic shelf registration should not be extended to all seasoned issuers.

Our other comments generally relate to mechanical and implementation points. We suggest that the "pay-as-you-go" provision of proposed Rule 456(b) be clarified to permit, at the registrant's option, partial payment in advance. Issuers that use the shelf for, among other things, frequent small sales – for example, in a medium-term note program – may find it administratively much easier, and not economically disadvantageous, to pay in advance the filing fee in respect of that portion of the shelf registration. This advance payment provision should

also address the situation in which the filing fee rate changes, so as to avoid uncertainty as to whether the filing fee is based on the rate at the time of payment, or at the time of sale of securities. We believe that provision for partial advance payment would be a useful convenience for some registrants.

We have a number of concerns with the definition of "ineligible issuer" which, as proposed, would preclude many issuers from the availability of automatic shelf registration in cases which we believe are not justified. We would refer you to the discussion above in Section 1(c) of this letter with respect to these concerns.

(g) Rule 401(g)

We support amendment of Rule 401(g) to provide that an automatic shelf registration statement would be deemed to be filed on the proper form unless the Commission notifies the issuer of its objection to the use of such form.

(h) Unseasoned Issuers and Non-Reporting Issuers - Proposed Amendments to Form S-1 and Form F-1 - Expanded Use of Incorporation by Reference

We do not believe the Commission should require that an issuer make its Exchange Act reports and other documents readily accessible on its web site as a condition to incorporating by reference in a Form S-1 or F-1. We believe the availability of information filed on the Commission's EDGAR site provides investors and others in the investment and research community broad access to all materials filed by an issuer, as well as a ready means to review disclosures by other public companies that may serve to assist investors in comparing and assessing the disclosures of any particular issuer. We support the expanded flexibility permitted in connection with offerings registered on Forms F-1 or S-1, and in this spirit suggest that the Commission consider permitting forward incorporation by reference in such registration statements. If the Commission concurs that access to the Internet is widespread (an assumption that appears to underlie certain of the proposed Rules), we see no reason to distinguish between the incorporation into a registration statement of previously filed documents, and the forward incorporation of documents filed subsequently. In either case, they form part of the registration statement, and are required to be accurate and complete. We believe that the actual date of contract of sale should be adequate to determine which documents have been filed with the Commission in order to fix the contents of the registration statement. Further, we believe that later filed information updating previous information should be included for accuracy and completeness.

(i) We Support Elimination of Form S-2 and Form F-2

We agree that Forms S-2 and F-2 should be eliminated because they are infrequently used and would be rendered superfluous were the Proposals to be adopted.

6. Prospectus Delivery Reforms

(a) Proposed Revised Rule 153

Proposed revised Rule 153 would make available for dealers in transactions effected through a trading facility of a national securities association or a registered alternative trading system the constructive prospectus delivery rule available under current Rule 153 for dealers effecting transactions on a national securities exchange, in that the filing of a complying final prospectus with the Commission would satisfy the dealer prospectus delivery requirement. The Commission is to be commended for making this change, which will eliminate burdensome and uncertain prospectus delivery procedures currently employed for non-exchange transactions.

(b) Proposed Rule 172

Proposed Rule 172 relates to delivery of prospectuses after the effective date of a registration statement. The Commission is to be commended for eliminating the costly and in many cases unnecessary actual delivery obligation of a statutory prospectus. One of the questions raised by the Commission in the Release was whether the proposed rules should be available for continuous and best efforts offerings, where the final prospectus may be used by the issuer and underwriters or placement agents to offer and sell the securities. In our view, the proposed rules should be available to both continuous and best efforts offerings. We believe that technological advances which have led to widespread access by investors and others in the investment and research communities to documents filed with the Commission is the principal reason for concluding that access should equal delivery in these situations, and that this conclusion should apply equally to preliminary and final prospectuses of all but non-reporting issuers. Eliminating the final prospectus delivery requirement is also appropriate in view of the limited investor benefit achieved by furnishing a document after an investment decision has been made. If an investor is made aware of the public availability of a prospectus (be it preliminary or final), and has access to the prospectus either through the Internet or by the ability to request physical delivery, actual delivery should not be required in all cases.

We do not believe that proposed Rule 172 should include a condition that the issuer has filed a prospectus within the time prescribed by Rule 424. In view of the benefits to be achieved by the Rule, and the inadvertent nature of most late Rule 424 filings, we do not believe the condition is appropriate.

(c) Proposed Rule 173

We support proposed Rule 173 permitting the delivery of notice to purchasers relating to the availability of a final prospectus, in lieu of requiring the delivery of a final prospectus in each instance.

(d) Proposed Revision to Rule 174

We support the proposed revision to Rule 174 to provide that during the aftermarket period, dealers can rely upon proposed Rule 172 to satisfy any aftermarket delivery obligations (other than for blank check companies).

7. Additional Exchange Act Disclosure Proposals

In general, we support the proposed additional Exchange Act disclosure proposals, subject to the comments set forth below:

(a) Proposed risk factor disclosure in Form 10-K and updated risk factor disclosure in Form 10-Q:

(i) We believe risk factor disclosure should only be required where appropriate, and see no meaningful benefit to adopting an Exchange Act standard which is more rigorous than that required under the Securities Act. Accordingly, we believe the disclosure requirements should be no more extensive than those currently set forth in Item 503(c) of Regulation S-K.

(ii) We believe that Exchange Act risk factor disclosure may be as, and perhaps more, beneficial, to investors in smaller companies. We therefore suggest that the Commission consider amending Form 10-KSB to provide for risk factor disclosure, in accordance with the provisions of Item 503(c) of Regulation S-K, and that Form 10-QSB be amended to provide for updated risk factor disclosures consistent with such provisions.

(b) Proposed disclosure of unresolved staff comments:

(i) We suggest that issuers be given an alternative to requiring accelerated filers to disclose material unresolved staff comments in their Form 10-K and 20-F reports. Specifically, we would suggest that such disclosure be permissive, but that an issuer which has not disclosed material unresolved staff comments (relating to the applicable periods) in its Form 10-K or 20-F would be prevented from having a registration statement (other than a registration statement on Form S-8) being declared effective (including effectiveness pursuant to automatic shelf registration procedures) until either the comments have been resolved or the disclosure is made by the issuer on an Exchange Act periodic report or Form 8-K. This suggestion is based on a number of factors. First, it may be difficult to ascertain whether a staff comment is material, and in some cases it is not clear to an issuer whether the Commission staff considers a matter resolved, or is merely deferring further comment. If an issuer believes it is not subject to unresolved staff comments, and therefore does not include Form 10-K or 20-F disclosure, the issuer would be substantially prejudiced were the staff to take a contrary position and requires an amendment to the issuer's annual report. In addition, we are concerned under the proposed amendment that an issuer may delay its annual report filing until it has resolved prior staff comments. Although we encourage the resolution of material comments, we believe that a stronger argument exists for issuers to file their annual reports as promptly as possible, and not to subject such filings to possible delay until staff comments can be resolved. We also note that the unresolved staff comments the Commission proposes to require an issuer to disclose would be at least six months old, and may be much older. We question how materiality is to be determined under circumstances where the passage of time may itself result in some comments becoming less important to an issuer.

(ii) Proposed Item 4A to Form 20-F is applicable to registrants that are accelerated filers. As a technical matter in connection with the proposed disclosure of material

unresolved staff comments, foreign private issuers do not generally assess their status as accelerated filers because of the inapplicability of the concept to such issuers' Form 20-F filing deadlines. Although we acknowledge the willingness of the Commission to exempt smaller foreign private issuers from the obligation to disclose unresolved staff comments, we believe, for a number of reasons, that foreign private issuers should not be subject to this obligation. Comments relating to foreign private issuers may be unresolved because of the complexities faced by such issuers under multiple disclosure regimes. Mandating disclosures regarding unresolved staff comments may be viewed unfavorably by such issuers. In view of the current sensitivity by foreign issuers to their United States disclosure obligations, we question whether the benefits to be derived from requiring this disclosure outweigh the potential negative effects. In addition, we note that it may be burdensome for certain foreign issuers (in the absence of any other need to do so), to determine whether, as of a particular date, they had more than $75 million aggregate market value of the voting and non-voting common equity held by non-affiliates.

Synopsis of Comments

For the ease of reference, our major comments to the Commission's proposals, described more fully above, are set forth below. These comments follow the order of the proposed changes in Section XV of the Release:

- Item 512 – Regulation S-K
    - We support the proposed amendments to Item 512 clarifying the permissibility of expanded incorporation by reference
    - We suggest that the proposed undertakings providing, among other things, that information in filed prospectus supplements is deemed part of and included in registration statements, and that new effective dates would occur, should be included in a specific Rule rather than as undertakings
- Rule 134
    - We do not believe that use of the Rule should be subject to condition relating to the availability of a Section 10 prospectus
- Rules 137, 138 and 139- Definition of Research Report
    - We do not believe that the definition of "research report" in Rules 137, 138 and 139 should be limited to written communications
    - The proposed definition of "research report" should not be limited to information reasonably sufficient upon which to base an investment decision, but instead should cover any information, report or opinion published or distributed by a broker or dealer in accordance with the condition of the proposed Rules
- Rule 137

- We support the expanded availability of Rule 137, as proposed by the Commission

- Rule 138
  - We support the expanded availability of Rule 138, with the additional suggestion that the Commission clarify that the required history of publishing or distributing research reports in the regular course of business includes research published or distributed by predecessor entities of the broker or dealer, and that the reference to the types of securities in question is intended to refer to general classes of securities and not to securities having characteristics similar to the more specific or detailed provisions of the securities in question
  - We believe Rule 138 should be extended to apply to voluntary filers
- Rule 139
  - We support the expanded availability of Rule 139, as proposed by the Commission, with the additional suggestions that the Commission extend the Rule to Schedule B issuers, and consider expanding the permitted issuer-focused research to include all reporting issuers. In the case of industry reports, which are not focused on the issuer of securities, we believe the Rule should apply to any issuer.

  - We believe that industry research reports under Rule 139(a)(2) should be expanded to include voluntary filers.

- Rule 153
  - We support the proposed revision to Rule 153 on prospectus delivery by dealers
- Rule 158
  - We support the conforming change to Rule 158 to include conforming changes with respect to the effective date for purposes of Section 11(a)
- Rule 159
  - We believe that liability under this proposed rule should be based on the facts and circumstances as to when an investor became unconditionally bound to purchase securities. This determination should be based both on applicable state law contract formation principles, and on the actual conduct of the seller in permitting purchasers to cancel or change their purchase orders
- Rule 159A
  - In our view, the proposed Rule should be clarified to provide that the only persons entitled to rely on the Rule

are purchasers in the distribution with respect to the issuer's primary offering of securities

- Rule 163
  - We strongly support Proposed Rule 163 subject to certain modifications:
    - We suggest that the Commission clarify that proposed Rule 163 would be available to an issuer notwithstanding an unintentional failure to include the required legend in a free writing prospectus
    - The status of media publications under proposed Rule 163 should be clarified and harmonized with proposed Rule 433
    - The Commission should clarify that proposed Rule 163 applies to both primary and secondary offerings
    - The Commission should confirm that if no registration statement is filed, the Section 5(c) exemption would be available and no filing obligation would exist under proposed Rule 163
- Rule 163A
  - Rule 163A should be expanded to exempt non-offering related communications delivered more than 30 days prior to the filing of a registration statement from Section 12(a)(2) and Section 17 liability
  - We encourage the Commission to clarify the meaning of "reasonable steps within [an issuer's] control" to prevent further distribution or publication of communications"
- Rule 164
  - We strongly support proposed Rule 164, subject to the comments made above in connection with proposed Rules 163 and 163A
- Rule 168
  - The safe harbor should be expanded to include all factual and forward-looking information (other than offering-related information) an issuer discloses pursuant to applicable laws or regulations, or by the rules of any stock exchange on which its securities are listed, if the issuer believes in good faith that such disclosure is required, whether or not that information has been "regularly released" in the past
  - The safe harbor should be expanded to include factual business information of a type regularly released by public companies even if not previously released by the issuer
  - Proposed Rule 168, rather than the more limited safe harbor contained in proposed Rule 169, should apply to non-reporting foreign and domestic issuers that have securities

listed on trading markets outside the United States, as well as to voluntary filers.

- Rule 169
    - Regularly released forward-looking information and regularly released factual information disseminated to investors or potential investors should be included within the safe harbor of Rule 169
    - The proposed Rule 169 safe harbor should apply to all information required to be disclosed by law or regulation, whether or not such information has been regularly released
- Rule 172
    - We support proposed Rule 172 on access equals delivery of the prospectus and urge its extension to best efforts offerings and delivery of preliminary prospectuses under Rule 15c2-8 by unseasoned issuers
    - We do not believe that the proposed Rule should contain a condition that the issuer has filed a prospectus within the time prescribed by Rule 424
- Rule 173
    - We support proposed Rule 173 permitting the delivery of notice to purchasers relating to the availability of a final prospectus, in lieu of requiring the delivery of a final prospectus in each instance
- Rule 174
    - We support the proposed revision to Rule 174 to provide that during the aftermarket period, dealers can rely upon proposed Rule 172 to satisfy any aftermarket delivery obligations (other than for blank check companies)
- Rule 401
    - We support amendment of Rule 401(g) to provide that an automatic shelf registration statement would be deemed to be filed on the proper form unless the Commission notifies the issuer of its objection to the use of such form
- Rule 405
    - Definition of "automatic shelf registration statement"
        - Automatic shelf registration for well-known seasoned issuers should be extended to all seasoned issuers
    - Definition of "graphic communication"
        - clarify that the determination of whether a communication is a graphic communication is to be made by reference to the conduct of the person making the communication
    - Definition of "ineligible issuer"

        - the ineligible issuer criteria regarding bankruptcy, violations of law, settlements and decrees and orders should apply prospectively only.
        - limit ineligibility criteria relating to violations of law, settlements and decrees and orders to violations of the antifraud provisions of the federal securities laws
        - eliminate provisions which would result in ineligible issuer status of a parent by reason of the status or conduct of subsidiaries, including provisions where a subsidiary is an issuer of a guaranteed debt security
    - Definition of "well-known seasoned issuer"
        - Clarify that the market value of outstanding common equity held by non-affiliates should be based on aggregate equity held both inside and outside the United States
        - Provide a means for conversion of foreign-denominated securities into US dollars
        - Clarify the valuation to be used in connection with debt issuances involving an original issue discount
        - Consider reduction of the $700 million equity criterion to $300 million
        - Reduce the period during which an issuer is required to have timely filing of Securities Exchange Act reports in order to be a WKSI to the 30 day period prior to the determination date.
    - Definition of "written communication"
        - clarify that the determination of whether a communication is a written communication (as opposed to an oral communication) is made by reference to the conduct of the person making the communication
- Rule 408
    - We support the amendment of Rule 408 to make clear that a failure to include information that is included in a free writing prospectus in a prospectus filed as part of a registration statement would not, solely by virtue of including such information in a free writing prospectus, be considered an omission of material information required to be included in a registration statement
- Rule 412
    - We believe that liability under this proposed rule should be based on the facts and circumstances as to when an investor became unconditionally bound to purchase securities. This determination should be based both on applicable state law

contract formation principles, and on the actual conduct of the seller in permitting purchasers to cancel or change their purchase orders

- Rule 413
  - We support the conforming amendments to Rule 413
- Rule 415
  - We support the elimination of a limitation on the amount of the securities that may be registered pursuant to Rule 415.
  - We support the ability to effect immediate takedowns from a shelf registration statement filed under Rule 415(a)(1)(x)
  - We support the elimination of "at the market" offering restrictions
- Rule 418
  - We suggest the Commission exclude from the scope of the proposed amendment to Rule 418 any free writing prospectus an issuer has filed on EDGAR (to the extent the final Rules contain any filing requirement), and any free writing prospectus an issuer is not required to retain beyond the retention period provided by proposed Rule 433. In addition, we believe the proposed amendment should be limited to any free-writing prospectus prepared or used by an issuer, and not impose obligations on an issuer with respect to a free writing prospectus prepared and used by an underwriter or participating dealer (which is not also used by the issuer).
- Rule 424
  - We support the proposed two changes to Rule 424
  - We believe the Commission should clarify in the Rule the meaning of the date of "first use"
- Rule 430A
  - We support the conforming amendment to Rule 430A
- Rule 430B
  - In general we support, proposed Rule 430B, subject to the comments set forth below
  - Proposed Rule 430B(a) should be revised to permit seasoned issuers, as well as WKSIs, to use a form of prospectus that omits information as to whether an offering is a primary or secondary offering, the plan of distribution for the securities, and the identification of other issuers unless known
  - The registration statement should not be required to identify transactions in which securities were acquired by potential selling security holders who may be identified in later prospectuses

- Only selling security holders who are affiliates of the issuer should be required to be named in a registration statement or prospectus supplement

- Rule 430C
  - In general we support proposed Rule 430C, subject to the comments made with respect to proposed Rule 430B above which would also be applicable to Rule 430C
- Rule 433
  - The requirements for media publications as free writings should be modified in order to make them workable and more practical
  - The Commission should clarify whether translation of foreign-language publications is required
  - The Commission should confirm that Proposed Rule 433 is not intended to impose obligations with respect to offers and sales outside the United States
  - The disparate treatment of affiliated and unaffiliated media publications should be eliminated
  - Unseasoned issuers should not be required to deliver a statutory prospectus prior to the use of a free writing prospectus
  - The permitted use of a free writing prospectus should not be conditioned on an issuer not being an ineligible issuer
  - We do not believe that filing requirements are necessary or appropriate in the context of free writing prospectuses
- Rule 434
  - We support the amendment to Rule 434 to make changes to the timing of a prospectus supplement filing
- Rule 439
  - We support the conforming amendment to Rule 439(b)
- Rule 456
  - The "pay-as-you-go" provision of proposed Rule 456(b) be clarified to permit, at the registrant's option, partial payment in advance
- Rule 457
  - We support the conforming addition of Rule 457(r)
- Rule 462
  - We support the addition of clauses (e) and (f) relating to automatic effectiveness of registration statements and post-effective amendments in connection with automatic shelf registration statements
- Rule 473
  - We support the conforming amendment to Rule 473 relating to delaying amendments
- Rule 902

- We support the amendment to Rule 902 to reflect Rules 138 and 139

- Forms S-1 and F-1
  - We do not believe the Commission should require that an issuer make its Exchange Act reports and other documents readily accessible on its web site as a condition to incorporating by reference in Forms S-1 and F-1
  - We suggest that the Commission consider permitting forward incorporation by reference in Forms S-1 and F-1
- Form S-2/F-2
  - We support the elimination of Forms S-2 and F-2
- Form S-3
  - Reduce the period during which a WKSI is required to have timely filing of Securities Exchange Act reports in order to be eligible to use Form S-3 to the 30 day period prior to the determination date; consider extending this change to seasoned issuers
  - We support the amendment of Form S-3 to expand the categories of majority-owned subsidiaries that would be eligible to register their non-convertible securities or guarantees
- Forms S-4 and F-4
  - We support the conforming amendments to these forms
- Form F-1
  - We do not believe the Commission should require that an issuer make its Exchange Act reports and other documents readily accessible on its web site as a condition to incorporating by reference in Form F-1
- Form F-3
  - Reduce the period during which a WKSI is required to have timely filing of Securities Exchange Act reports in order to be eligible to use Form F-3 to the 30 day period prior to the determination date; consider extending this change to seasoned issuers
  - We support the proposed amendment of Form F-3 to expand the categories of majority-owned subsidiaries that would be eligible to register their non-convertible securities or guarantees
- Form 10
  - We support the proposal to require risk factor disclosure on Form 10
- Form 20-F
  - We suggest that issuers be given an alternative to requiring disclosing material unresolved staff comments in Form 20-F reports

- Foreign private issuers do not generally assess their status as accelerated filers because of the inapplicability of the concept to their filing obligations. We suggest that the Commission not extend to foreign private issuers the obligation to disclose unresolved staff comments

- Form 10-K
  - We support the proposal to require risk factor disclosure on Form 10-K, but believe the disclosure requirements should be no more extensive than those currently set forth in Item 503(c) of Regulation S-K
  - We suggest extending the risk factor disclosure requirement to reports on Form 10-KSB
  - We suggest that accelerated issuers be given an alternative to disclosing material unresolved staff comments in Form 10-K
- Form 10-Q
  - We support the proposal to require updated risk factor disclosure on Form 10-Q, but believe the disclosure requirements should be no more extensive than those currently set forth in Item 503(c) of Regulation S-K
  - We suggest extending the risk factor disclosure requirements to reports on Form 10-QSB

Conclusion

We believe the Commission has taken a bold and welcome step in proposing reforms to the securities offering process, and commend the Commission for the thoroughness of the proposals, the conscientiousness of the discussion in the Release, and the quality of the questions raised in the Release for which the Commission sought additional comment. We hope that the comments discussed above will assist the Commission in making the public capital raising process both more efficient and more responsive to investor protection needs.

We hope the Commission finds these comments helpful. We would be happy to discuss these comments further with the Staff.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

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