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April 18, 2003

Consuela Washington
Energy & Commerce Committee
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20515

Re: Wall Street Abuses of SEC Rule 144A Exemption

Dear Ms. Washington:

We have been suing large investment banks on behalf of corporate borrowers whom we believe have paid excessive fees for "144A" placements", which placements were subject four years ago, to scrutiny by the SEC and Congress for possibly "bypassing" the protections in place for direct underwritings to the public.

In the course of the litigation, we have determined that Wall Street is regularly abusing 144A placements by leading the borrower to believe that the transaction is a "firm commitment underwriting," meaning once the purchase agreement is signed, the money will be raised (subject to customary outs), when in fact, an arbitrary and unilateral "out" (found only in 144A placement agreements) is inserted in attachments to the "purchase" agreements. This out, which consists of the securities firms' execution and delivery of a "Registration Rights Agreement" gives these firms unilateral discretion as to whether or not they wish to close the deal right up to Closing. Both the SEC and the federal courts have ruled that such an "out" renders these transactions "best efforts placements", meaning that the securities firms must escrow the funds of the institutional investors prior to closing, so that the funds can be returned if the deals are not

completed. However, all the 144A offerings researched, the securities firms simply hold the funds of institutional investors in "clearing accounts." Moreover, they have vigorously denied that these transactions are "best efforts placements", while failing to address the presence of the above-referenced "out".

Our litigation has also led us to situations where the corporate borrowers correctly perceive the securities firm to be their "placement agents" in a "placement agreement," and characterize them as such in the relevant documents. In these cases, the securities firms, while doing nothing at the time of the transaction, now vigorously deny they were "placement agents," but insist that they are "principals" and "purchasers" of the securities entitled to discounts in excess of statutory limits on placement fees.

It is not just the borrowers who might be damaged if they believe they are getting a firm commitment; investors might have been damaged if they had purchased stock in companies announcing the raising of billions of dollars of debt, only to see the securities firms back out because they were not committed to the deal. In one example, the company issued a press release on the day it had purportedly entered into an agreement with several firms to "purchase" $1.2 billion in bonds. Not only did these firms have the unilateral "out" discussed above which meant no real purchase had taken place, <u>the "purchase" agreement had not even been signed and was not until four days later</u>. In short, that press release, no doubt approved by the investment banks, was misleading to investors.

The defendants have managed to obfuscate these issues to such a degree that a federal judge concluded it was proper for them to use their clients' money to satisfy the firms <u>own</u> purchase obligations. We are fairly confident the securities firms told these institutional investors neither that their money was being used in this manner, nor that if these funds were actually in the "possession" of the securities firms, they (or their proceeds, ie the bonds issued) might be attached or characterized as "preferences" by creditors of the securities firms.

I conclude in this regard that I have reviewed scores of 144A transactions over the past four years, and believe that these misrepresentations and arbitrary outs are an industry wide practice.

The abuses of 144A deals are not limited to misrepresenting best efforts placement as firm commitment underwriting. In one case, the investment banks in question (half of the major firms on Wall Street) raised almost $2 billion in this country, collected $40 million in fees, then transmitted those fees to their "offshore" affiliates in the UK, for the likely purpose of evading federal and state taxation of this income. When accused of this conduct, the banks in question only counter that such activity is "irrelevant" (and our discussions with the IRS have lead us to conclude that agency may lack the resources to investigate these deals).

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I would be pleased either to discuss these issues with you in more detail at your convenience, or provide you with the voluminous documents which support these contentions.

Sincerely yours,

Thomas C. Willcox

cc:
The Honorable John Dingell
U.S House of Representatives
2328 Rayburn House Office Building
Washington, DC 20515-2215

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