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FINANCIAL REPORTING COMMITTEE
and
SECURITIES REGULATION COMMITTEE

July 22, 2004

Via email: rule-comments@sec.gov
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Attention: Jonathan G. Katz, Secretary

Re: File No. S7-28-04
Press Release No. 2004-89
Press Release: Release of Comment Letters and Responses

Ladies and Gentlemen:

This letter is submitted on behalf of both the Financial Reporting Committee and the Securities Regulation Committee of The Association of the Bar of the City of New York in response to Press Release No. 2004-89, dated June 24, 2004 (the "Release"), in which the Securities and Exchange Commission (the "Commission" or "SEC") announced the public release of comment letters and filer responses beginning as soon as August 1, 2004 (the "Proposed Policy"). Our Committees are composed of lawyers with diverse perspectives on financial reporting and securities issues, including members of law firms, counsel to corporations, investment banks and investors and academics.

We fully expect that the Commission will follow through on its announced intention to release publicly SEC comment and response letters, and so we are limiting our comments to technical suggestions.

1. **Comment Letter Process Suggestions**.

Staff comment letters on registration statements typically include a paragraph describing the purpose of the review process -- to assist the registrant in its compliance with the applicable disclosure requirements and to enhance the overall disclosure in the filing -- and offering to work with the registrant in those respects. This paragraph typically indicates that the Staff welcomes questions about its comments and the review process, and invites telephone inquiries. We agree completely that this is the way the comment and response process ought to

work. Given the greater transparency of this process under the new approach, we would urge the Staff to ensure that this philosophy is fully reflected in its written comments and its processes. Whether intended or not, SEC comments, even if subsequently modified or withdrawn, may be viewed by investors as highly authoritative. We hope that the SEC Staff will bear this in mind and take extra care when issuing comment letters to insure the following concerns (all of which reflect actual past experience) are addressed:

(a) **Comment Letter Process Should be More Iterative**. Given the public release of comment letters, we believe the Staff should take extra care to insure that comment letters do not include assertions based on conjecture. Consequently, we believe the comment letter process should become more iterative, and that any material assertions, such as a request to restate, should not be issued until a significant dialogue has occurred, including the submission of additional facts in order to determine whether a particularly controversial comment is warranted. We would hope that the SEC will increasingly engage in on-going dialogues with companies by telephone calls and conferences to check facts before issuing comments that could have broad impacts on companies, and that informal dialogues will be encouraged.

(b) **Comments Should Not Reflect Confidential Information**. The SEC Staff should be especially vigilant in not repeating, in subsequent comment letters, information submitted under a Rule 83 Confidentiality Request or information supplementally provided.

(c) **Consistency**. We would encourage the SEC to coordinate previously issued comments with comments issued in subsequent reviews. Occasionally comments issued in subsequent reviews conflict with previously issued comments, and we have observed that this more often occurs when different types of documents are being reviewed, such as when a company's Form S-4 merger proxy is reviewed after that company's Securities Exchange Act documents previously have been reviewed.

(d) **Comment Withdrawal Process**. We believe the SEC should consider indicating a particular comment in a comment letter has been withdrawn in a subsequent comment letter where the initial comment, after consideration of additional information, is inapplicable. This would be particularly important where the implications from a withdrawn comment mistakenly could be viewed as material by the marketplace.

2. **Limited Automatic Bar on Public Release of Certain Categories of Information and Rule 83 Confidentiality Requests**.

We believe that companies will have significant requests under Rule 83 (17 CFR 200.83) ("Rule 83 Confidentiality Requests"), the Commission's rule that allows filers to request confidential treatment for some portions of a written response to a Staff comment letter and, given the Commission's announced intention to review these requests for appropriateness, that will shift the Commission's administrative burden to the beginning of the process instead of

reviewing as many FOIA requests at the end of the process. In light of this anticipated increase in Rule 83 Confidentiality Requests, we would suggest the following (a) automatic exemptions from public release and (b) changes to the confidentiality request process:

(a) **Certain Materials Should Receive Automatic Confidential Treatment**. We believe certain very limited areas of comments and responses should receive automatic confidentiality treatment without Rule 83 Confidentiality Requests. This would significantly reduce the inevitable flood of Rule 83 filings and reviews in areas that the Commission may already agree these limited types of materials should not be released. Those areas include:

(i) **Supplemental Information**. The SEC asks for supplemental information to become educated on various issues through the comment letter process. Under Rule 418, companies can identify that information as supplemental and request that information be returned. Returned Rule 418 material is not subject to FOIA requests. All Rule 418 supplemental information should be returned promptly automatically by the SEC and therefore be automatically exempt from public disclosure, as should supplemental information provided in connection with Exchange Act or Investment Company Act filings (e.g., Schedule TOs for cash tender offers, proxy statements for cash mergers and Schedule 14D-9s).

Furthermore, all supplemental information furnished via EDGAR should receive automatic exemption from public release.

(ii) **Novel and Unique Products Information**. When companies come to the SEC on a voluntary basis to discuss novel and unique products, that information should remain confidential.

(iii) **Foreign Private Issuers' Initial Proposed Filings**. Foreign private issuers that do not file SEC reports are permitted to submit their initial proposed filings in draft form for full review and comment on a confidential basis. The purpose is to allow such issuers to resolve comments that may uniquely arise from their foreign status before the document is filed publicly. An ancillary purpose is to facilitate access to U.S. public markets by foreign private issuers that in the past have avoided our public markets. The Release is unclear as to whether comment letters on such draft submissions by foreign private issuers will be publicly posted. We believe the Commission should clarify that they never will be posted. Public disclosure of such comment letters would completely undermine the purpose of the confidential draft submission that is currently permitted, and would make it more likely that foreign private issuers would avoid the U.S. public markets entirely.

(iv) **A Limited Set of Significant First Round Comments**. We believe it is preferable to have the Staff be circumspect in drafting initial comments. Nonetheless, in order to avoid confusion among investors, we request that the Commission consider keeping first round SEC Staff comments related to very sensitive areas, such as revenue recognition, cheap stock, critical accounting policies, segments, disclosure of projections in business combination transactions, characterization of business combination transactions as "Rule 13e-3 transactions", etc., confidential automatically unless those comments survive to the second level of comments. We are suggesting that the Commission consider implementing a procedure that would prevent from becoming public areas of inquiry that are immediately dropped upon further clarification as being inapplicable.

(b) **Time Period Guidelines for SEC Responses to Rule 83 Confidentiality Requests**. There should be a set time limit, such as a week or two, when companies can expect a response on Rule 83 Confidentiality Requests, similar to the benchmark guidelines issuers now use to gauge when it is likely first round comments from the SEC Staff on offering documents will be issued.

3. **Notice and Opportunity to Review Material to be Publicly Released for Companies before Public Release.**

We have anecdotally heard that some of the correspondence obtained through FOIA by public purveyors of information have included supplemental internal SEC staff memos, draft comment letters and other inappropriate materials. We respectfully request that the Commission make available to a company a complete package of materials the Commission plans to publicly release a specified number of days ahead of the release, perhaps 14 days, so that a company can confirm the correct materials will be posted. The SEC should make available to each company the comment and response letters that the SEC plans to publicly release for a set period of time beforehand so that the company can confirm that the correct materials will be posted.

4. **Time Periods Before Release Should Generally Be the Later of One Year or the Next Form 10-K**.

We believe the appropriate purpose of the Proposed Policy is to make the Staff's process more transparent as opposed to supplementing companies' disclosure. The SEC process is not time sensitive. Therefore, we believe expanding the time before pubic release of materials is in the best interests of both the SEC and companies.

(a) **Comment and Response Letters Related to Offerings Should Occur After One Year.** We respectfully request that the Commission consider adopting a one year holding period for comment and response letters related to offerings The Release says the correspondence will be released not less than 45 days after the Staff has completed a filing review. Releasing hundreds or thousands of pages of

comment and response letters a number of weeks after the offering has priced may create market uncertainty during the important after-market trading period. With the accelerated release schedule, companies and underwriters may believe it is necessary to summarize in risk factors and elsewhere in offering documents the nature and tenor of the comments and the responses even where comments have been resolved with the Staff and subsequently withdrawn. What are now already in some cases long and complicated offering documents may become even more cumbersome and unnecessarily confusing to potential investors. Offering documents should continue to speak for themselves, and the SEC should not encourage reliance on documents other than offering documents by releasing numerous pages of background information close to the time of offerings.

(b) **Comment and Response Letters Related to Securities Exchange Act Filings Should Occur After the Later of One Year or the Filing of the Next Form 10-K**. For comments and responses related to Securities Exchange Act filings (other than those related to business combination transactions), we respectfully suggest that the Commission release the comment and response letters after the later of one year or the filing of the next Form 10-K. This time frame would, among other things, allow companies to have several filing and disclosure opportunities to work out disclosure issues with the Staff. Since many SEC comments relate to disclosure requirements on a prospective basis, we believe it is inappropriate for the SEC to release information about the content of a future Securities Exchange Act filing before the registrant makes the filing. In isolation, this information could be confusing and potentially misleading.

(c) **Comment and Response Letters Related to Securities Act Filings and Securities Exchange Act Filings for Business Combination Transactions Should Occur One Year After the Closing or Termination of the Transaction**. We respectfully suggest that the Commission not release comments or response letters related to Securities Act filings or Securities Exchange Act filings made in connection with business combination transactions until one year has elapsed from the closing or termination of the transaction in question. We would also respectfully suggest that, no matter what position the Commission may take regarding our suggestion of a one-year holding period, in no circumstance should comment or response letters related to business combination transactions be released before the closing or termination of the transaction in question. In business combination transactions that face significant regulatory hurdles or other time consuming conditions to be satisfied prior to closing, substantially more than 45 days may elapse from the date of the final staff comments until the transaction is closed. Releasing comment and response letters during the pendency of such transactions, in particular prior to a shareholder vote, would expose the transactions to greater litigation risks prior to closing and potentially jeopardize their successful completion. The prospect of such increased risk could also inhibit parties from engaging in such transactions. In contested business combination transactions, the release of comment and response letters during the pendency of a transaction could provide information valuable to one or more of the contesting parties and potentially place parties who made

filings early at a disadvantage to those who filed later. With respect to the suggested one-year holding period, we believe the justification is very similar to what we have suggested in connection with offerings. The business combination disclosure documents should speak for themselves, and the SEC should not encourage reliance on documents other than the disclosure documents.

(d) **Notice SEC Reviews Are Complete**. The SEC should provide notice to companies when a review is completed so companies can accurately calculate the holding period and anticipate the public release of comment and response letters. Another approach would be to deem a review of a registration completed when it is declared effective and a review of Securities Exchange Act filings complete when the staff indicates or, if no indication is given, 45 days after the receipt by the SEC of a response to a comment letter and no further indication by the SEC that there are any unresolved issues.

5. **Tandy Letters Should be Limited to SEC Enforcement, Not Civil, Actions**.

The origin of Tandy letters was, in certain limited circumstances where the SEC had an outstanding issue with a company, to condition the SEC's acceleration of a registration statement upon the registrant's agreement not to assert the SEC's acceleration as a defense to any action under Federal law by the SEC. Tandy letters are usually requested by the SEC when outstanding issues exist between the SEC and a company and the SEC does not want its effectiveness order to be deemed a waiver of those issues.

If the SEC believes that Tandy letter representations should now be applied to all companies, that these limitation should be extended to any actions by the SEC "or any person" or that the Tandy letter should limit the ability of a company to raise the fact that a back and forth comment process existed, these positions are potentially so significant that they should be subject to normal rule-making procedures and the SEC should propose a rule on these issues and request public comment.

We believe companies should not be precluded from offering comment and response letters into evidence in any proceedings where such letters are relevant to the subject matter of the proceeding.

6. **There Should be a Safe Harbor**.

The Commission should consider providing a limited safe harbor similar to the safe harbor provided in the recent Form 8-K amendments (Release Nos. 33-8400 and 34-49424) that would be applicable to all comment and response letters. The safe harbor should provide that there is no private right of action for any information included in comment and response letters that is not reflected in final Securities Act offering documents or Securities Exchange Act disclosure documents. The offering and disclosure documents would of course be subject to potential liability under Sections 11 and 12 of the Securities Act and Section 10(b) and Rule 10b-5 and, if applicable, Section 14(e) and Rule 14a-9 under the Securities Exchange Act. We believe the Commission should clarify that comment and response letters:

- are not by themselves subject to Section 10(b) and Rule 10b-5 liability or Section 14(e) or Rule 14a-9 liability,

- are not "prospectuses" for Securities Act purposes,

- are not "selling material" and are not deemed to "offer" any security,

- are not deemed "filed" for Securities Exchange Act purposes,

- are not "tender offer material" for the purposes of Rule 14d-1(g)(9) under the Securities Exchange Act, and

- are not a "solicitation" for the purposes of Rule 14(a)-1(1).

7. **Miscellaneous**.

We believe the Proposed Policy will lead to increased litigation, misguided reliance on documents other than prospectuses and periodic filings, increased FOIA requests, increased stock price volatility and the potential for mischaracterizations and misunderstandings of portions of letters. We hope, however, the suggestions we have made in this comment letter will help make the implementation of the Proposed Policy as smooth as possible.

In response to the Commission's invitation for comment on the procedural aspects of this plan, the Committees wish to encourage the Commission, in recognition of the substantial burden that the Proposed Policy may be imposing, to monitor the implementation of the Proposed Policy and periodically to evaluate whether rule revisions are necessary to avoid unintended outcomes with costs and complexity to the market that far exceed any perceived benefits to investors.

Please note that this letter does not necessarily reflect the individual views of all members of the Committees.

Please note that Mark K. Schonfeld of the United States Securities and Exchange Commission, a member of the Association's Committee on Securities Regulation, did not participate in the preparation of this letter or the decision by the Committees to submit this letter to the Commission

Members of the Committees would be pleased to answer any questions you might have regarding our comments, and to meet with the Staff if that would assist the Commission's efforts.

Respectfully Submitted,

/s/ N. Adele Hogan
N. Adele Hogan, Chair of the Committee on Financial Reporting

/s/ Matthew Mallow
Matthew Mallow, Chair of the Committee
on Securities Regulation

ABCNY COMMITTEE ON FINANCIAL REPORTING MEMBERSHIP

Not all of the Committee members participated in the preparation of this letter, nor did the participation of a member mean that he or she supported the views expressed in this letter. Moreover, the Committee members acted only as individuals and not as representatives of the organizations to which they belong or by which they are employed, and therefore the views expressed in the letter are not to be considered the views of any governmental, commercial or private organization other than the Association.

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