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September 28, 2004

**By email rule-comments @sec.gov**
Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

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

Ladies and Gentlemen:

This letter responds to the above-captioned press release in which the Commission solicited comments regarding its decision to post comment letters and filer responses to them on its EDGAR system commencing with the Staff's reviews of disclosure fillings made after August 1, 2004. This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the Business Law Section of the American Bar Association. It was prepared by a drafting group of the Disclosure & Continuous Reporting Subcommittee. The comments expressed in this letter represent the views of the Committee on Federal Regulation of Securities and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA or the official position of the ABA Section of Business Law nor do they necessarily reflect the views of all members of the Committee on Federal Regulation of Securities. We appreciate the opportunity to make the following comments.

While we believe that the release and EDGAR posting of comment letters and filer responses relating to disclosure filings will expand the transparency of the Staff comment process, several specific concerns may be expected to arise from such posting.

The release states that correspondence will be released not less than 45 days after the Staff has completed a filing review. When the Staff is reviewing Exchange Act filings only, and

there is not the certainty of the declaration of effectiveness of a Securities Act registration statement, it is not always clear when the review is completed. Although filers will obviously know that the information will be posted at some time, we believe it is important that they be advised approximately when the posting will take place. We hope that the technical modifications to your systems would include the ability to provide filers, in every case, with notice not only that the review is complete but also as to the anticipated posting date.

Supplemental Submissions

Comment letters frequently request that the company provide certain information supplementally to the Staff. In many instances the supplemental information that is provided convinces the Staff that no changed or expanded disclosure is necessary. If supplemental information that is provided in response to Staff comments is routinely posted on the EDGAR system, the purpose of seeking information supplementally and then determining whether disclosure is necessary would be defeated. The routine posting of supplemental information is likely to lead to a large increase in company requests to seek to discuss disclosure issues orally, which could impede the speed of the review process. Accordingly, we strongly recommend that supplemental information provided outside of response letters not be posted. If the Staff, upon reviewing such information, requests additional disclosure and the company concurs, the disclosure will speak for itself and the omission of the supplemental information from the posted correspondence is unlikely to reduce the transparency sought under the new policy. On the other hand, if the Staff concurs that based on the supplemental information provided the requested disclosure is not necessary, omitting the material from routine posting would, in our view, be wholly appropriate.

We note that under current rule 418(b) of Regulation C under the Securities Act of 1933 and also under Rule 12b-4 of Regulation 12B under the Securities Exchange Act of 1934, supplemental information is required to be returned to the filer if requested when the information is furnished and if certain other conditions are met. We strongly recommend that supplemental information provided outside of response letters be returned to filers in all cases. We note that Rule 418(b) requires that supplemental information that is requested to be returned not be filed in electronic format. If it is deemed desirable to discourage paper correspondence in connection with the review of the 1933 Act filings, consideration should be given to deleting Rule 418(b)(4) and making technical modifications to your systems to permit the "return" of supplemental information by deleting it from response correspondence filed electronically.

Future Comments and M&A Transactions

Comment letters frequently request information to be provided in future filings or future filing status frequently results from the exchange between the Staff and companies. Often, companies, at the Staff's request or on their own initiative, provide actual language to indicate what the future filing will contain. The purpose of future filing status would be undermined if the responses were posted before the time the future filing is due. The Staff should defer posting future filing responses until the future filing is due and then should post them only if the information is not contained in the filing. Alternatively, future filing responses could be treated as supplemental information that is not made public and, if filed separately, is returned to the company.

We also concur with the view expressed by some commenters that the Staff should not post comment letters and responses in connection with an Form S-4, F-4 or merger proxy statement until after the transaction is completed.

Tandy Letters

The Commission stated in the release that all comment letters will request that the response letter contain a so-called "Tandy" Letter representation, to the effect that the company will not use the comment process as a defense in any securities-related litigation against it. As originally developed, the Tandy Letter procedure reflected a compromise between the SEC Staff and a registrant seeking to go effective in circumstances where the SEC Staff has commenced an inquiry into possible securities law violations by the registrant. In that situation, it is reasonable to request the registrant to provide the representation so as not to jeopardize a possible enforcement proceeding or undercut private litigation based on similar facts.

We believe that the contemplated approach of requiring all registrants to provide a Tandy Letter will greatly change the nature of the Tandy Letter process. It will transform the previous case-by-case accommodation into a rule of general applicability. Under the new procedure, the Tandy Letter representation would be required of all registrants, not just those that are subject to an enforcement inquiry, and apparently the representation will be requested in connection with the review of a periodic report, even though the Commission is not being asked to declare a filing effective. Such an across-the-board procedure would best be implemented only through general rulemaking under the Administrative Procedures Act, after notice and comment.

Section 23 of the Securities Act and Section 26 of the Exchange Act prohibit any person from making certain representations concerning the effect of the SEC registration and review process, including that, as a result of the comment process, the Commission is deemed to have:

1. found that the registration statement or report is true and accurate on its face;

2. found that it does not contain an untrue statement of fact or material omission; or
3. passed on the merits of, or given approval to, the security or the transaction.

Evidence and testimony regarding the fact that the SEC Staff has examined a disclosure statement could be relevant to issues arising in litigation, however, that are not prohibited by Section 23 or 26 (otherwise there would not have been a need for the Tandy Letter process). For example, the fact that the Staff considered, but did not require, certain disclosure could be relevant to a defendant's scienter regarding the materiality of that information. Also, the fact that the Staff agreed to, or insisted upon, a particular accounting treatment for a transaction could be evidence that the accounting treatment reflected generally accepted accounting principles.

The Commission's intention to require a Tandy representation in connection with all filings would greatly expand the prohibitions in the statute and would do so without the benefit of notice and comment. In addition, the Commission's approach does not create any mutuality. Nothing would prevent a private plaintiff from arguing to a court or jury that a particular SEC comment indicates bad faith on the part of the defendant, but the Tandy Letter would impose a gag on the defendant from replying that the fact the comment was not pursued should support the opposite inference. If the Commission believes it has the authority to adopt a rule that restricts reference to the comment process by a party in litigation, the rule should apply to all parties in the litigation. For example, the Commission could adopt a general statement of policy through a rulemaking process that would explain the significance of the Staff's raising and resolving issues in the comment process. Alternatively, the required Tandy Letter representation should only extend to SEC proceedings, not private litigation. In any event, because this issue involves civil litigation that could have significant consequences for many filers, we believe that the SEC should publish and solicit comment on the actual content of the required representation, just as the undertakings in Item 512 of Regulation S-K were subject to a rulemaking process..

The Commission's purpose to require a Tandy Letter in connection with all filings apparently is to prevent the release of a comment or response letter containing such a request or representation from signaling the existence of a pending enforcement inquiry. An approach that would be more limited and consistent with original purposes of the Tandy Letter would be for the Staff to request orally the Tandy Letter and accept it on a supplemental basis subject to a confidential treatment request pursuant to Rule 83 of the Commission's rules under the Freedom of Information Act.

Thank you for this opportunity to comment on the Commission's planned release of comment letters and responses. Members of the Committee are available to discuss these comments. If you believe that such discussions would be helpful, please contact the undersigned.

Respectfully submitted,

Committee on Federal Regulation of Securities

/s/ Dixie L. Johnson
Committee Chair

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