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July 21, 2004

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

Mr. Jonathan G. Katz,
Secretary,
Securities and Exchange Commission,
450 Fifth Street, N.W.,
Washington, D.C. 10549-0609.

Re: Proposal to Publicly Release Staff Comment Letters and Non-Confidential Response Letters (File No. S7-28-04)

Dear Mr. Katz:

We are pleased to respond to Press Release No. 2004-89, dated June 24, 2004 (the "*Release*"), in which the Securities and Exchange Commission solicited comments on the new policy of its staff to begin making comment letters issued by the Divisions of Corporation Finance and Investment Management on public filings, as well as non-confidential response letters, publicly available through its EDGAR database. The Release provides a broad overview of the Commission staff's new policy, but does not address several important aspects of how the policy will be applied in practice. Set forth below are comments providing our views on application of the new policy to specific factual circumstances and requesting clarification as to how the Commission's staff will interpret the policy.

1. The Staff Should be Mindful of Potential Public and Investor Relations and Disclosure Issues Raised by Its Comments

One effect of the new policy will be to broaden the audience an issuer can expect will read and react to its written dialogue with the staff. The public, press, investors and competitors will be able to access comment and response letters easily and free of charge as soon as 45 days following completion of the staff's review. In public disclosure filings, issuers are able carefully to draft language to ensure technical compliance with the Commission's disclosure rules, prevent misunderstandings and ensure that issues are appropriately put in context. Issuers cannot exercise the same editorial discretion over the staff's comments, even though broadened public readership under the Commission staff's new policy may raise significant public and investor relations and disclosure issues.

In view of the increased public availability of staff comment letters, we urge the staff to adopt the following principles:

- The staff should exercise restraint in making factual suggestions that are not supported by, or are inconsistent with, an issuer's public disclosures;

- Staff comment letters should not repeat information for which confidential information has been requested under the Freedom of Information Act;

- Where the staff believes a comment may create significant public or investor relations or disclosure issues, it should consider first resolving or refining the comment through oral dialogue with the issuer; and

- When an issuer identifies a written staff comment as creating significant public or investor relations or disclosure issues, the staff should consider issuing a clarifying comment in a subsequent-round comment letter.

Staff comment letters generally include a statement that the review process is meant to assist the issuer in its compliance with applicable disclosure requirements and enhance overall disclosure in the filing. In order to prevent public misunderstanding of staff comments and issuer responses, we urge the staff to add a statement that staff comments requesting different or additional disclosure do not necessarily indicate that disclosure is defective, and that changes to disclosure in response to staff comments should not be interpreted as an admission that previous disclosure was defective.

In addition, we urge the staff to continue its current practices of returning supplemental information provided to the staff under Rule 418(b) under the Securities Act of 1933 and Rule 12b-4 under the Securities Exchange Act of 1934.

2. Comments and Responses Relating to Disclosure Filings in the Context of Public Offerings and Business Combinations Should Not be Released Prior to Completion of the Underlying Transaction

The Release states that the Commission will make disclosure filings publicly available no sooner than 45 days following completion of the staff's review of each filing. In the context of disclosure filings relating to business combination transactions (*e.g.,* Forms S-4 and F-4 and Schedule TO), the staff may complete its review long before the transaction to which the filing relates, which may require shareholder or regulatory approval, is completed. Disclosure of communications with the staff regarding a business combination, even if not protected under the Freedom of Information Act, could disrupt the often sensitive process of obtaining all necessary consents and approvals in order to complete the underlying transaction. In addition, despite best intentions, registrant concern about premature disclosure could detract from the collaborative nature the comment process should have.

We believe that the staff's review of a transactional disclosure filing should be non-public until the underlying transaction has adequately "cooled". The Commission's new policy appears to be meant to make the public disclosure process more transparent, not to supplement the public record. Allowing a transaction to cool before publicly disclosing related comment and response letters will help distinguish required public disclosures from related staff communications, which should not be considered part of, or presented to the public at the same time as, required disclosure documents. In addition, public proceedings and regulatory approvals relating to business combination transactions could be inappropriately influenced by staff comments, which are made in a disclosure-oriented regulatory environment and may not be sensitive to the often adversarial nature of business combination substantive approval proceedings.

In the context of public offerings of securities for cash, we believe a fixed number of days following effectiveness of the registration statement – provided that it is long enough to allow for completion of selling efforts – adequately addresses this concern. In the context of business combinations, comment and response letters should remain non-public until completion of the transaction, even if there are many months between completion of the staff's review and completion of the transaction. In any event, we believe that comment and response letters should not be released before the shareholder meeting, or expiration of the tender offer, to which a business combination filing relates.

Accordingly, we urge the staff to delay public release of comment and response letters relating to business combination transactions until the later of 45 days following completion of the staff's review and the completion of the underlying transaction. Alternatively, the Commission could establish a fixed period of time much longer than 45 days following completion of its review before comment and response letters relating to business combination transactions are released. Due to the significant amount of time required for completion of transactions in highly regulated industries – the banking industry in particular – we believe that one year would be an appropriate waiting period, at least for industries or particular situations where such regulatory approvals are required.

3. The New Policy Should Not Apply to Securities Act Registration Statements of

Foreign Private Issuers Reviewed on a Confidential Basis

We believe the Commission's new policy should not apply to comment and response letters relating to initial draft registration statements under the Securities Act of 1933 ("*Securities Act*") of foreign private issuers that are reviewed by the Commission's staff on a confidential basis and not filed via EDGAR. Foreign private issuers often face difficulty complying for the first time with U.S. disclosure standards. This may be due to the issuer's lack of familiarity with the U.S. compliance environment, or to differences between home-country and U.S. disclosure requirements. In addition, there may be home-country regulatory or disclosure issues that would discourage the issuer from accessing the U.S. capital markets without a procedure to confidentially resolve significant disclosure issues before making a public filing.

In response to these concerns, it is the staff's practice to permit foreign private issuers that are not already subject to reporting requirements under the Securities Exchange Act of 1934 ("*Exchange Act*") confidentially to submit drafts of Securities Act filings for the staff's review and comment. Following one or more rounds of confidential review of the registration statement, it is filed via EDGAR and made publicly available. The issuer may at any time prior to filing the document via EDGAR decide not to proceed with the filing.

We believe that communications between the staff and foreign private issuers during confidential pre-filing reviews should remain non-public following completion of the review and declaration of effectiveness of the registration statement. These reviews often involve discussion of sensitive accounting and disclosure issues that, if publicly disclosed after declaration of effectiveness of the registration statement, would discourage non-U.S. issuers from accessing the U.S. capital markets.

4. The New Policy Should Not Apply to Registration Statements Withdrawn Prior to Effectiveness or Proxy Statements Never Submitted in Definitive Form

We believe the Commission's new policy should not apply to comment and response letters relating to Securities Act filings that are withdrawn without being declared effective. Non-public issuers that are "in registration" may, at any time prior to effectiveness of their registration statement, avoid further public disclosure requirements by withdrawing the registration statement. With no public holders of the issuer's securities, public release of communications with the staff would do little to serve the interests of the investing public, and would be inconsistent with the ability of non-public companies voluntarily to avoid further public disclosure by withdrawing the registration statement.

For similar reasons, we believe that the Commission should not publicly release comment letters relating to proxy statements filed or submitted in preliminary form that are never filed in definitive form. Comments and responses relating to a proxy statement

for a transaction that has not been completed could present an inaccurate or incomplete picture to the public, because the dialogue with the staff may be incomplete and the transaction has not occurred.

5. Issuers Should be Notified of the Timing of Public Release

As a result of the increased public availability of comment and response letters, issuers may need to address inquiries from the public and press when letters are released. In order to help issuers prepare their public relations and investor relations personnel for these inquiries, we urge the staff to provide issuers with advance notice of at least five business days before comment and response letters are made publicly available. In addition, we believe issuers should receive an automatic notification – for example, an email to a contact person designated by the issuer – notifying the issuer when each comment and response letter is actually released.

* * *

We appreciate the opportunity to comment on the proposed rules, and we would be pleased to discuss any questions the SEC or its staff may have about this letter. Any questions about this letter may be directed to John T. Bostelman (212-558-3840) or Robert E. Buckholz, Jr. (212-558-3876).

Very truly yours,

SULLIVAN & CROMWELL LLP