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September 20, 2007

By E-Mail to: rule-comments@sec.gov

Ms. Nancy M. Morris
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3, Release No. 33-8812 (File No. S7-10-07)

Ladies and Gentlemen:

This letter is submitted on behalf of the Committees on Federal Regulation of Securities and State Regulation of Securities of the American Bar Association (the "ABA") Section of Business Law (the "Committees") in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Release No. 33-8812 (June 22, 2007), 72 Fed. Reg. 35118 (the "Proposing Release"). In this release, the Commission has proposed to amend the eligibility requirements of Form S-3 and Form F-3 to allow a larger group of domestic and foreign reporting companies to conduct primary offerings of securities on these forms without regard to the size of their public float or the rating of the debt that they may be offering.

The views expressed in this letter have not been approved by the American Bar Association's House of Delegates or Board of Governors and should not be construed as representing policy of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committees.

Introduction and Overview

Overall, the Committees strongly support the Commission's proposal to extend the benefits of short-form registration on Forms S-3 and F-3 to smaller and/or less widely-held public companies. The ability of these companies to incorporate into streamlined registration statements both prior and subsequently filed reports under the Securities Exchange Act of 1934, as amended ("Exchange Act"), and to conduct primary shelf offerings on a continuous or delayed basis under Rule 415(a)(1)(x) of the Securities Act of 1933, as amended ("Securities Act"), should allow these companies greater and more cost-effective access to the public securities markets, without compromising investor protection. We commend the Commission for thus substantially accepting the recommendation of its Advisory Committee on Smaller Public Companies (the "Advisory Committee")[1] that the minimum public float requirement of Form S-3 be eliminated for smaller reporting companies – at least for primary offerings.[2]

In some respects, the Proposing Release picks up where the Commission's Securities Offering Reform amendments of 2005[3] left off. Although the Commission apparently was not ready then to expand the availability of short-form registration, it displayed a willingness to place greater reliance, for Securities Act regulatory purposes, on the dramatic improvements in the quality of Exchange Act reporting that have been made in recent years, and the pervasive availability of information through the Commission's EDGAR website and other "open" sources. Still, these regulatory improvements have benefited, for the most part, larger, more widely-held issuers – in particular, "Well Known Seasoned Issuers" as defined in Rule 405 under the Securities Act and other seasoned issuers.[4] We agree with the Commission that the time has come to extend more of these benefits to smaller and/or less widely-held public companies. Accordingly, while we offer some suggestions for modification of the proposed amendments to Forms S-3 and F-3, we are convinced that the core element of these proposed amendments -- easing the eligibility requirements for the use of Forms S-3 and F-3 to allow a wider spectrum of reporting companies to register primary offerings of equity and unrated debt on those forms and make continuous or delayed offerings under Rule 415(a)(1)(x) -- strikes an appropriate balance between improving the efficiency of capital formation for smaller and/or less widely-held public companies and safeguarding investors' interests.

We outline below the Committees' more specific comments on the Proposing Release. In summary, the Committees strongly support expanding the availability of short-form S-3 and F-3

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[1] *See* Recommendation IV.P.3. of the Final Report of the Advisory Committee on Smaller Public Companies (Apr. 23, 2006)("Final Report"), available at http://www.sec.gov/info/smallbus/acspc-finalreport.pdf.

[2] As part of Recommendation IV.P.3., the Advisory Committee's Final Report further recommended that the Commission extend Form S-3 eligibility for secondary, or resale, transactions to reporting companies whose securities are quoted on the Over-the-Counter Bulletin Board ("OTCBB"). "Notwithstanding the Advisory Committee's recommendation," however, the Commission indicated that it was "not at this time proposing to amend the Form S-3 eligibility rules for secondary offerings because of the potential for abusive primary offerings disguised as secondary offerings." Proposing Release, *supra*, at note 28. We address this issue below.

[3] *See* Securities Offering Reform, Release No. 33-8591 (July 19, 2005), 70 Fed. Reg. 44722, as corrected, SEC Rel. No. 33-8591A (Feb. 6, 2006), 71 Fed. Reg. 7411. *See also* Letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, to John W. White, Director of the Division of Corporation Finance, U.S. Securities and Exchange Commission, dated Mar. 22, 2007, at 1.

[4] While the Commission's 2005 securities offering reform initiatives did extend incorporation by reference for previously filed reports to a larger class of reporting issuers (*i.e.* unseasoned issuers that have filed at least one annual report and are current in their Exchange Act reporting), the benefits of forward incorporation by reference and short-form shelf registration were not extended below the level of "Seasoned Issuer" at that time.

registration to enable smaller and/or less widely-held companies to conduct primary offerings registered on those forms on a delayed or continuous basis. However, we believe that the proposed amendments will come up short in serving their stated goal of reducing capital formation costs for such companies, because short-form shelf access will be subject to an arbitrarily low cap on the amount of securities that the issuer may sell within a given 12-month period, and is not permitted for resale transactions involving the securities of many of these companies. In addition, we are concerned that the smaller domestic companies that otherwise might benefit from access to delayed shelf offerings under this proposal will encounter significant difficulties in conducting these offerings under applicable state securities or "Blue-Sky" laws. Accordingly, we offer some suggestions on how these problems can be addressed.

Specific Comments

The Commission Should Amend Forms S-3 and F-3 to Eliminate the $75 Million Minimum Public Float Condition.

We support the Commission's proposed broadening of the eligibility requirements for the use of Forms S-3 and F-3 to allow domestic and foreign private issuers to conduct primary offerings of securities without regard either to the size of their public float or exchange-listed status or, in the case of debt securities, without regard to the rating of the debt to be offered. The Commission's proposed exclusion of "shell" companies and voluntary filers provides sufficient protection to investors against possible abuse.

We fully concur in the Commission's judgment that "great advances in the electronic dissemination and accessibility of company disclosure transmitted over the Internet over the last several years"[5] warrant expansion of the class of companies permitted to use Forms S-3 and F-3 for primary offerings. Indeed, as the Advisory Committee observed in its April 2006 report to the Commission, "investor protection would not be materially diminished if all reporting companies [whether or not listed] … were permitted to utilize Form S-3 and the associated benefits of incorporation by reference."[6] In addition, permitting these companies to use streamlined shelf registration will expand their financing flexibility and afford them an alternative to private financing transactions, some of which have raised regulatory concerns.

Before the advent of EDGAR, the Commission reasoned that information could be incorporated by reference into short-form registration statements for primary offerings, rather than requiring the information to be physically included in the document, only when the issuer's public float was high enough to indicate that analysts would follow the issuer and, as a result, the information in the issuer's public filings would be reflected in the marketplace. Whatever utility the public float eligibility criterion may have had in the past as an indicator of market following, this basis to determine which companies should be able to use short-form registration is no longer necessary or appropriate for the protection of investors in light of the dramatic

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[5] Proposing Release, *supra*, at 11.

[6] Final Report, *supra* n. 2, at 69.

technological advances, including the widespread availability of SEC filings on EDGAR on a real-time basis over the Internet.[7]

Not only is the information about reporting companies substantially more widely available than it was when the Commission last expanded the availability of short-form registration, the information itself is substantially more comprehensive and timely. The Commission has implemented a wide variety of Exchange Act reporting enhancements over the past five years, and has focused its staff resources to a much greater degree on review of Exchange Act reports.[8] For all of these reasons, we agree with the Commission that public float is no longer a necessary test for deciding when companies should be able to enjoy the benefits and flexibility of short-form registration and delayed shelf offerings.

We see no reason to draw a distinction between domestic and foreign registrants for purposes of the proposed expansion of short-form registration eligibility. Foreign private issuers file annual reports on Form 20-F with the Commission, and submit under cover of Form 6-K all material information supplied to home-country investors. All such documents are freely available on a real-time basis on the Commission's EDGAR website, as are those documents filed or submitted by domestic issuers. The Commission has developed a workable Exchange Act reporting regime for foreign private issuers and has determined in the past that this regime provides an appropriate basis to permit foreign private issuers to use short-form and shelf registration. We do not believe that it is necessary or appropriate to deviate from that approach in connection with further enhancing access to Forms S-3 and F-3 at this time.

Finally, as noted, we support the Commission's decision to exclude "voluntary" filers and shell companies in light of the less comprehensive public information regarding these companies. It is equally appropriate, as the Commission has proposed, to require shell companies to go through a complete annual reporting cycle, once they cease being shell companies, before becoming Form S-3/F-3 eligible for primary offerings.

The Commission Should Not Impose Any Limitation on Amounts Sold Within a Twelve-Month Period; If the Commission Nevertheless Decides to Do So, That Limitation Should Be Raised From 20% to One-Third of the Issuer's Public Float At the Time of Sale, and Should Only Apply to "At-the-Market Offerings".

Under the proposed Form S-3/F-3 amendments, the new transaction requirement that would permit an issuer with a public float of less than $75 million to use Forms S-3 and F-3 on a primary basis for sales of securities (whether debt or equity) limits the amount of sales to no more than the equivalent of 20% of its public float over any period of 12 calendar months. We

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[7] The Commission's shift two years ago to an "access-equals-delivery" model for final prospectus delivery for registered offerings by virtually all issuers – whatever their public float or reporting histories – demonstrates the degree of confidence the Commission has justifiably gained, in light of these technological and regulatory advancements, since it last reduced the public-float predicate for short-form offerings to $75 million in the early 1990's (1992 for Form S-3, and 1994 for Form F-3).

[8] The Commission itself observed, in connection with the adoption of the 2005 securities offering reform amendments, that "[w]ith the enactment of the Sarbanes-Oxley Act and our recent rulemaking and interpretive actions, we have enhanced significantly the disclosure included in issuers' Exchange Act filings and accelerated the filing deadlines for many issuers."

do not believe there is a rational basis for imposing such a limitation. The Proposing Release identifies as a concern the possible negative effects of sales of securities exceeding the 20% cap on "the market for a thinly traded security." No distinction is drawn in this regard between equity and debt securities, although the cap itself is calculated in terms of the value of the registrant's public equity float.

Any concern the Commission may have about liquidity of a thinly-traded security would not be alleviated through the imposition of a cap on the sale of securities may not even be of the same class as the thinly-traded securities. If there is greater potential for market manipulation or other abuses in the trading markets for smaller-cap issuers, there are other regulatory tools at its disposal to discourage such abuses.[9] The Securities Act has always been primarily a "disclosure" statute. If the Commission determines that, because of the dramatic technological and regulatory improvements made in recent years, there is sufficient reliable, readily accessible information about an issuer to permit it to use a short-form registration statement and have access to delayed shelf offerings, there should be no limit on the amount of securities – properly disclosed – that the issuer can sell.

Even assuming some limitation on the amount that can be sold were justified – and we do not believe that the Commission has articulated an adequate rationale for imposing such a limitation – the Commission has not explained why 20% of public float sold over any 12 calendar-month period is an appropriate ceiling. We note in this regard that the Commission's staff has used the review-and-comment process to establish a higher ceiling of one-third of the issuer's public float in an area of longstanding staff concern – large resale transactions involving equity derivatives with variable conversion ratios or exercise prices that might constitute indirect primary offerings by issuers that themselves are ineligible to use Form S-3 or F-3 for primary offerings.[10] Whether the particular numerical cap is 20% on all primary offerings conducted over a 12-month period regardless of the type of securities involved, or one-third of an issuer's publicly-held equity securities sold in "disguised" or indirect primary offerings, the choice appears somewhat arbitrary and unrelated to the regulatory predicate for allowing smaller and/or less widely-held companies access to short-form and shelf registration.

Should the Commission nevertheless decide to adopt a numerical cap, the Committees recommend that it be raised to at least one-third of the issuer's public float over a 12-month period as calculated at the time of sale. Furthermore, we believe that the cap – as thus raised -- should only apply in the case of equity "*at-the-market offerings*" as defined in Rule 415(a)(4). The currently proposed cap of 20% is much too low to be of much, if any, utility to smaller companies – particularly when the complexity of the calculation itself is considered. We are concerned that smaller companies will be discouraged from taking advantage of this new access to short-form registration when they weigh the relatively small amount of securities that they will be allowed to sell against the expense of putting up a shelf registration statement and the potential negative market reaction that may result from the filing. Limiting the application of the

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[9] For example, the Commission's anti-fraud and anti-manipulation rules under the Exchange Act, including Rule 10b-5, Regulation M and Regulation SHO, more appropriately address concerns about manipulation of markets than a cap on the amount of securities that can be registered on a Form S-3.

[10] *See* S. Keller & W. Hicks, Unblocking Clogged PIPEs: SEC Focuses on Availability of Rule 415, 21 INSIGHTS 2 (May 2007).

cap to at-the-market offerings more closely tailors the restriction to address the market liquidity concern the Commission identifies as a reason to impose a cap. By contrast, the cap would not apply, for example, to a fixed-price underwritten offering, which should raise less of a concern.

We do not believe that any concerns the Commission may have relating to investor protection and potential market manipulation militate in favor of a different approach to calculating the numerical cap, such as tying the requisite determination to when the registration statement is filed (one of the alternatives suggested by the Commission), rather than the time of sale (as proposed). In any event, it is difficult for us to see how such a detailed and complex formula as that proposed by the Commission could be manipulated – the greater risk is that issuers and their advisors will not understand the formula and make mistakes in its application. Moreover, we agree with the Commission that this calculation should reflect increases in the issuer's public float during the period that its short-form shelf registration statement is effective.

In response to specific Commission comment requests, we believe that the numerical limitation should be calculated only with respect to the securities actually sold pursuant to the new Form S-3/F-3 eligibility criterion, in the event the amendments are adopted as proposed. Accordingly, the limitation should not include any securities sold by the issuer or any selling security holder pursuant to any other registration statement, or pursuant to any exemption, prior to the effective date of such amendments.

The Commission has asked for commenters' views on "the consequence of an issuer exceeding the 20% restriction on sales." Should the Commission decide to establish a numerical limitation, we urge it not to penalize issuers for innocent or inadvertent errors in applying a very complicated formula – as illustrated by the examples set forth in the Proposing Release itself. So long as the issuer makes a good-faith and reasonable attempt to comply with all applicable terms and conditions to use of a short-form registration statement, sales in excess of any percentage limitation on the aggregate sales amount should not expose the issuer to the risk of Section 5 liability, including a potential rescission right for purchasers of the "excess" securities.[11] Accordingly, we recommend that the Commission not revise current Rule 401(g) so that issuers will continue to be deemed to have filed on the correct form if otherwise eligible to use that form at the time of filing (absent Commission objection under the Rule). In the event an issuer goes over the numerical cap, and it is able to demonstrate that it acted reasonably and in good faith as described above, the Commission should require only that the issuer cease using the Form S-3 or F-3 for the remainder of the 12-month period. Even if the issuer cannot rely on this "good-faith" defense, we believe that the only consequence (in addition to a possible Commission enforcement action for violating its rules) should be a bar to using the Form S-3 or F-3 for the greater of 12 months, or six months after the particular limitation period expires. Absent some evidence of collusion with the issuer, the purchasers of any "excess" securities should be deemed to have taken them under a valid registration statement.

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[11] *Compare* Rule 508 of Regulation D, 17 C.F.R. 230.508 (2007)(noncompliance with a term, condition or requirement of the safe harbor that was not directly intended to protect the individual or entity will not result in the loss of safe-harbor protection where the error was insignificant, other material terms of the safe harbor were met, and a good-faith effort was made to comply with all terms, conditions and requirements).

In closing, the Committees recognize that the Commission may have concerns about extending the availability of short-form registration and delayed shelf offerings to smaller and/or less widely-held companies, but believe that the solution is not to impose constraints on the type or amount of securities that can be sold. The Commission and its staff have ample resources at their command to prevent the development of manipulative or abusive practices. In this connection, we note that Forms S-3 and F-3 filed by reporting companies with smaller public floats would not become automatically effective, and therefore would remain subject to pre-effective review and comment by the Commission's staff.

The Commission Should Allow Inclusion of Secondary Offerings of Securities of Unlisted Companies Eligible to Use an Expanded Form S-3/F-3

We urge the Commission to reconsider its decision not to accept at this time the recommendation of the Advisory Committee to expand Form S-3/F-3 eligibility to enable unlisted reporting companies – that is, reporting companies whose securities are traded on the Over-The-Counter Bulletin Board ("OTCBB") and so-called "Pink Sheets" markets -- to make secondary offerings on these short-form registration statements regardless of the magnutude of the particular company's public float.[12] By way of explanation, the Commission states that it is not taking this step "because of the potential for abusive primary offerings disguised as secondary offerings."[13] We believe the question presented is whether the listed versus unlisted status of a reporting company with less than $75 million in public float should dictate whether it is eligible to use a short-form registration statement.

In our view, the Commission's concerns about potential abuse of short-form registration of resales can be met in a more carefully-calibrated manner without impairing investor protection. First, the Commission and its staff now have at their disposal a variety of potent regulatory weapons to address the perceived problem of indirect primary offerings "disguised" as resales. Such offerings cannot be made on an unallocated basis from the shelf, and the post-effective identification or addition of selling shareholders is subject to specified conditions. Moreover, as discussed above, the Commission's staff has been able, through refinement of the existing review and comment process, to analyze whether such ostensibly problematic transactions as PIPEs involving variably priced equity derivative securities constitute "sham secondaries" and impose safeguards to address the staff's concerns (including, but not necessarily limited to, requiring enhanced disclosure).

The Commission has traditionally treated resale registrations at least as favorably as primary shelf-registered offerings. Thus, the Commission codified an interpretation of the staff that permits unlisted companies that are primarily eligible to use Form S-3 under the current rules to register resale transactions.[14] Companies that are not primary S-3-eligible likewise can use these registration statements for resales if securities of the same class are "listed and

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[12] *See* n. 2, *supra*. We acknowledge that the Advisory Committee's recommendation was limited to secondary offerings of securities of OTCBB-traded companies, but believe that the same logic should apply to Pink Sheets companies that are subject to a mandatory Exchange Act reporting obligation.

[13] Proposing Release, *supra*, at note 28.

[14] *See* General Instruction I.B.1. of Form S-3, which codified Interp. #56 in the Division of Corporation Finance's 1997 Manual of Publicly Available Telephone Interpretations.

registered on a national securities exchange or are quoted on the automated inter-dealer quotation system of a national securities association."[15] In sharp contrast, there is no listing or quotation requirement in Form F-3 for "[o]utstanding securities to be offered for the account of any person other than the [foreign private] issuer, including securities acquired by standby underwriters in connection with the call or redemption by the issuer of warrants or a class of convertible securities."[16] Should the Commission allow smaller-cap reporting companies whose equity (or debt) is traded in the over-the-counter markets to use short-form registration statements on Forms S-3 and F-3 and to make delayed primary offerings on these forms, we respectfully submit that there is no sound rationale for excluding resales of the securities of unlisted domestic companies – particularly given that resales of the unlisted securities of foreign private issuers already can be made from Form F-3 without satisfying a minimum public float test.[17]

In any event, as noted, the Commission's staff has devised an approach to dealing with indirect primary offerings that could be applied effectively here to prevent abuse if the Commission were to expand eligibility for secondary offerings to unlisted domestic issuers. We believe it would be preferable to require an unlisted issuer to name the selling security holders as "underwriters", and otherwise to be subject to any limitations on primary offerings the Commission or its staff might decide to impose should the staff reject an argument that a particular resale transaction should be treated as a genuine secondary offering, than for the Commission to exclude resale transactions involving unlisted securities entirely from Form S-3 as currently proposed.[18]

Assuming that the Commission determines that both listed and unlisted reporting companies should be able to make primary offerings on these forms, as now proposed, we believe the same approach should be applied to resale transactions without regard to whether the issuer is domestic or foreign and, if the former, has listed securities. Because the Commission has identified no meaningful grounds for drawing a distinction based on listed status in the Proposing Release, we recommend that the Commission accept the recommendation of its Advisory Committee and liberalize the use of Forms S-3/F-3 for resales by security holders of all smaller-cap reporting companies so that <u>all</u> companies that gain access to primary Form S-3 and F-3 also would be able register their resale transactions on those forms for delayed or continuous offerings.

We Recommend that the Commission Address State Blue-Sky Issues Raised by Extending Short-Form Registration to OTCBB and Pink Sheets Companies in the Future, But That it Not Delay Adoption of the Pending Proposals for this Purpose.

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[15] General Instruction I.B.3 of Form S-3.

[16] General Instruction I.B.3. of Form F-3.

[17] In the event the Commission reconsiders its decision to exclude resales of OTC securities of domestic reporting companies as proposed, we recommend that the Commission also evaluate the benefits of amending Rule 430B to enable both domestic and foreign issuers that would become primarily eligible to use short-form registration statements on Forms S-3 and F-3, respectively, to add selling security holders by prospectus supplement rather than post-effective amendment.

[18] We note that it would be anomalous to deprive a true resale transaction of the benefits of short-form registration, while still permitting "sham resales" that cause the Commission concern to be made via short-form registration if characterized as "disguised primary offerings."

As described above, the Committees support the Commission's proposal to make Forms S-3 and F-3 available to issuers whose securities are listed on the OTCBB or traded in the Pink Sheets markets, provided that such issuers otherwise meet the revised eligibility criteria.

Offerings made by OTCBB and Pink Sheets issuers under a more flexible federal short-form registration system would continue to be subject to state securities or " Blue-Sky" laws because these securities would not be "covered securities" within the meaning of Section 18 of the Securities Act. As a result, the timing flexibility that derives from access to delayed shelf and the cost savings arising from incorporation by reference could be substantially diminished as these companies deal with state registration requirements. We are concerned that this may discourage use of the expanded Forms S-3/F-3.

In response to the Commission's specific comment request, we believe that the effect of continued state blue-sky regulation could make it "prohibitively difficult" for companies to make primary offerings on the streamlined Forms S-3/F-3, and we encourage the Commission to explore ways to address that problem. We note that the Commission has the authority under Section 18 of the Securities Act to establish definitions of "qualified purchasers" in both registered and unregistered offerings.[19] Under Section 18, sales to qualified purchasers as defined by the Commission would be exempt from state securities law registration requirements. We believe that the Commission could define a class (or classes) of purchasers that it determined could purchase in various kinds of offerings – including offerings registered on expanded Forms S-3 and F-3 – without state regulation in a manner consistent with Section 18, and the exercise of this authority could significantly enhance the utility of the proposed expansion of Forms S-3 and F-3 without compromising investor protection. However, we recommend that adoption of the proposed amendments not be delayed pending the Commission's evaluation of how best to exercise its existing preemptive authority in this context.[20]

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[19] *See* H.R. Rep. No. 104-622, 104th Cong., 2d Sess. 1996, 1996 U.S.C.C.A.N. 3877 ("[T]he Commission may define the term 'qualified purchaser' differently with respect to different categories of securities…. [T]he qualified purchaser provision allows State preemption, State exemptions and State registrations to be tacked together to comply with State requirements. Thus, sales to qualified purchasers would qualify for preemption without regard to whether, in the same offering, offers and sales are also made to non-qualified purchasers."

[20] We expect to address this issue further in our comment letter relating to Release 33-8828 (August 3, 2007).

We appreciate the opportunity to provide these comments to the Commission. Members of the Committees are available to discuss these comments should the Commission or the Staff so desire.

Respectfully submitted,

/s/ Keith F. Higgins

Keith F. Higgins, Chair
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