360 Madison Avenue
New York, NY 10017-7111
Telephone 646.637.9200
Fax 646.637.9126
www.bondmarkets.com

1399 New York Avenue, NW
Washington, DC 20005-4711
Telephone 202.434.8400
Fax 202.434.8456

St. Michael's House
1 George Yard
London EC3V 9DH England
Telephone 44.20.77 43 93 00
Fax 44.20.77 43 93 01

January 31, 2005

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: Securities Offering Reform (file No. S7-38-04)
Impacts of Proposal in the Corporate Debt Markets

Dear Mr. Katz:

The Bond Market Association (the "Association")[1] is submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission" or "SEC") for comments on its proposals to modify the registration, communications and offering processes under the Securities Act of 1933 (the "Securities Act"), which are set forth in Release No. 33-8501; 34-50624; IC-26649 (Nov. 3, 2004) (the "Release"). According to the Release, the proposed modifications are intended to eliminate unnecessary restrictions on offerings, provide more timely investment information to investors and further integrate the disclosure processes under the Securities Act and the Securities Exchange Act of 1934 (the "Exchange Act"). The Association believes that the proposals contained in the Release represent a significant step toward achieving these goals, and we hope that our comments will be useful to the Commission as it finalizes the proposals. We appreciate the continuing efforts of the Commission and its staff to modernize the securities offering process, and we are happy to have the opportunity to participate in this important undertaking.

The comments in this letter are related to the fixed income markets generally. The fixed income market includes securities issued in the form of "pure" debt instruments, as well as hybrid instruments such as preferred stock and convertible or exchangeable securities. Because preferred stock and convertible or exchangeable securities are often treated by issuers and the securities markets in many respects as if they were fixed income

[1] The Association is an international trade association representing approximately 200 securities firms and banks that underwrite, distribute and trade in fixed income securities internationally. More information about the Association and its members and activities is available on its website www.bondmarkets.com.

instruments,[2] in this letter, our discussion of fixed income or debt securities includes preferred stock and convertible or exchangeable securities, unless the context requires otherwise.

A separate letter is being submitted by the Association to focus more specifically on the issues raised by the Release with respect to the mortgage-backed and asset-backed securities markets. The Association believes that the ABS markets, the non-ABS fixed income markets and the equity markets are fundamentally different, including in respect of the offering and sale process. In addition, the regulatory framework of the federal securities laws has been modified over the years to better fit the ABS markets, including with the recent adoption of Regulation AB. As a result of these factors, the Association believes that the ABS market warrants different approaches to various issues from those taken by the non-ABS fixed income markets, including the liability issues discussed in both letters.

This letter consists of three sections. In the first section, the Association comments on two general policy issues raised by the Commission's proposals – the increased pressure brought to bear on underwriters in their function as gatekeepers as a result of automatic shelf registration, and the chilling effect Section 12(a)(2) liability will have on the Commission's communications proposals. In the second section, the Association comments on specific aspects of the Release and responds to certain specific questions posed by the Commission in the Release. The final section contains drafting and technical comments.

I. General Policy Comments

A. The increased speed of the automatic shelf registration system will exacerbate the pressures underwriters already face in performing their gatekeeper function.

The Association strongly supports the Commission's desire to liberalize the shelf registration process by instituting an automatic shelf registration system and making other changes to the existing shelf registration architecture. The automatic shelf registration system will make the capital formation system for eligible issuers more efficient, which will benefit not only issuers but also investors. However, the Association also recognizes that the automatic shelf registration system will place additional burdens on underwriters and other distribution participants, who may have less time to conduct the kind of reasonable investigation that is necessary to establish their due diligence defense and may face increased pressure from issuers to limit their diligence procedures. The ability of unseasoned issuers to incorporate by reference information from previously

[2] Like straight debt, these hybrid instruments trade primarily on the basis of yield and the issuer's rating. In addition, issuers seeking to access the capital markets often elect to issue convertible securities in lieu of straight debt.

filed Exchange Act reports into their Form S-1/F-1 registration statements also increases these burdens.

When shelf registration and the integrated disclosure system were first adopted, underwriters' diligence practices adapted to the improved registration system. At the time, the Commission acknowledged that underwriters may need to use different due diligence techniques because of the limited preparation time available in the context of shelf offerings.[3] The Commission also recognized that due diligence procedures properly reflect the character of the issuer and the nature of the form of registration statement the issuer uses, noting that it expected that "the techniques of conducting due diligence investigations of registrants qualified to use short form registration, where documents are incorporated by reference, would differ from due diligence investigations under other circumstances." We believe these positions remain true today and are equally applicable to the automatic shelf registration proposals and the newly-created category of WKSIs, and suggest that the Commission explicitly reaffirm them so as not to suggest otherwise by silence.[4]

While most issuers and their counsel understand the importance of the diligence investigation, and well-advised underwriters will not proceed if they are not permitted to conduct this investigation, our members report that there are a limited but increasing number of instances in which issuers attempt to limit or truncate this review. The Association believes that the Commission could also helpfully comment on the continuing importance of the underwriters' role as gatekeeper, and concomitant importance of the diligence process, in the adopting release. For example, in the context of acknowledging the variable nature of reasonable diligence procedures as noted above, the Commission could emphasize that the automatic shelf registration system is not intended to lessen underwriters' obligation to conduct meaningful diligence as part of the offering process.

B. The imposition of Section 12(a)(2) liability on free writing prospectuses should take into account other information conveyed to the investor.

The Association has previously supported the Commission's proposals to liberalize free writing. When the Commission proposed broad modification of the communication requirements as part of its proposal to modernize the securities offering process in 1998 (the "1998 Release"),[5] the Association urged the Commission to pursue adoption of the free writing proposals contained therein. We continue to be of the view that this step is

---

[3] Rel. No. 33-6335; 34-18011; IC-11889 (Aug. 6, 1981) at Section IV.

[4] Rel. No. 33-6499; 34-20384 (Nov. 17, 1983) at Section IV.B.2. See also Brief of the Securities Industry Association and The Bond Market Association, Amici Curiae, In re WorldCom, Inc. Securities Litigation 346 F.Supp. 2d 628 (S.D.N.Y. 2004) (02 Civ. 3288 (DLC); Report of the Task Force on Sellers' Due Diligence and Similar Defenses under the Federal Securities Laws, 48 Bus. Law. 1185 (1993).

[5] Rel. No. 33-7606A; 34-40632A; IC-23519A (Nov. 13, 1998).

critical in conforming the Securities Act's regulatory structure to the current reality of electronic communication. The internationalization of the securities markets and the demands for more information and fewer restrictions on information flow that have been fostered by technological advances leave the Commission and the capital markets with little choice but to adapt. The Association recognizes that many of the most serious objections that we raised in our comments to the 1998 Release's communication proposals have been addressed in the Release, and applauds the Commission for proposing to expand the ability to engage in free writing during an offering. This will ensure that unintentional communications do not constitute violations of Section 5 of the Securities Act.

Under the Release, a free writing prospectus permitted by Rules 163 and 164 is subject to liability under Section 12(a)(2) by virtue of its being considered a Section 2(a)(10) prospectus under Rule 163 and a Section 10(b) prospectus under Rule 164. The Association acknowledges the Commission's decision to impose Section 12(a)(2) liability on free writing prospectuses, in addition to general antifraud liability under Exchange Act Section 10(b) and Rule 10b-5. This approach is consistent with the philosophy and structure of the Securities Act — written material intended to offer securities in a public offering should be subject to the Section 12(a)(2) liability standard. However, as discussed below, that standard liability should take into account other information conveyed to an investor. Also, as the proposals are currently formulated, we believe that the Section 12(a)(2) liability standard, coupled with uncertainty about potential cross-liability, may discourage intentional free writing (other than to cure discovered defects in previously delivered communications relating to the offering). We note that fixed-income market participants may be more likely than equity market participants to rely upon free writing prospectuses, particularly in investment grade transactions, which typically do not utilize preliminary prospectuses. We therefore urge the Commission to focus closely on the issues relating to the imposition of Section 12(a)(2) liability on this form of communication, which we discuss below.

II. SPECIFIC COMMENTS

A. The Association agrees that established issuers should be afforded greater flexibility under the communication and offering proposals but believes that the Commission's categorization of issuers requires modification in certain respects.

Under the Commission's proposal, an issuer would qualify as a well-known seasoned issuer, or a "WKSI,"[6] if, among other requirements, it had a minimum equity float held by non-affiliates of $700 million. The Commission correctly recognized that this

[6] In response to the Commission's request at the open hearing at which the Release was announced, we have attempted to identify an acronym for this concept that is less unwieldy. Unfortunately, we have been unable to identify a better alternative.

standard would exclude issuers that are frequent participants in the capital markets, but the equity securities of which are owned by a parent corporation. These subsidiary registrants, such as General Electric Capital Corporation, General Motors Acceptance Corporation and Ford Motor Credit Company, will be eligible to qualify for the benefits accorded to WKSIs if they have issued $1 billion of debt in registered offerings in a trailing three-year period. According to the Release, the Commission's rationale for choosing these thresholds is that they capture the issuers that are most closely followed by institutional investors, analysts, rating agencies and the press. The Association agrees with the Commission's premise that more liberal communication rules and registration processes are appropriate for issuers that have a large and sophisticated audience that can supplement the Commission's reviews of periodic reports and registration statements. The Association believes, however, that the Commission's proposal excludes certain categories of issuers who have the requisite following.

1. ***The Association disagrees with the Commission's requirement that an issuer relying upon the debt issuance component of the definition of WKSI must be rated investment grade.***

In addition to the requirements noted above, the Commission's proposal requires that a WKSI be eligible to file a registration on Form S-3 or Form F-3 for primary offerings of its securities relying on General Instruction I.B.1, I.B.2 or I.C of those forms. The result of this requirement is that an issuer that does not have the requisite public equity float required by General Instruction I.B.1 would be precluded from qualifying as a WKSI for a high yield offering, regardless of whether it satisfied the $1 billion debt issuance threshold.[7] The Association believes that issuers some or all of the debt securities of which are not rated investment grade by at least one of the nationally recognized statistical rating organizations (an "NRSRO") should be eligible to be WKSIs if they meet the WKSI debt issuance requirement.[8]

We believe that the architecture of the Form S-3/F-3 requirements continues to justify the exclusion of high yield debt from the transactional eligibility provisions of those forms.

---

[7] The references to General Instruction I.B.2. of Form S-3 and General Instruction I.B.2. of Form F-3 (and the respective accompanying parentheticals) in paragraph (1)(i) of the proposed definition of WKSI in Rule 405 impose the requirement that any debt securities issued by a WKSI relying upon the debt issuance test must be rated investment grade by at least one nationally recognized statistical rating organization.

[8] We note that the Release does not explicitly require that the $1 billion of registered debt securities that must have been issued by a company in the past three years to qualify as a WKSI must have been rated investment grade by at least one NRSRO. However, we believe that this distinction, if intended, is not meaningful. It would be of little benefit to an active high yield issuer that easily meets the debt issuance threshold but falls short of the equity float requirement on any WKSI measurement date to learn that it would be eligible to issue debt securities as a WKSI at least for the next twelve months (until the next WKSI measurement date) but only if it is upgraded to investment grade by at least one NRSRO during that period.

However, we do not believe that this rationale applies to the definition of WKSIs. Under Form S-3/F-3, if an issuer does not meet the equity float requirement (currently $75 million), there is no volume or other limit that would serve to exclude debt-only issuers that have issued infrequently and lack any meaningful following by the analyst, rating agency, institutional investor or journalistic communities. Requiring that such issuers possess at least one investment grade rating, even in this day of well-developed high yield markets, continues to ensure that unseasoned issuers are forced to use Forms S-1/F-1. In the case of WKSIs, however, issuers that do not meet the $700 million equity float test must meet a separate debt security test that is calibrated to issuance volume. The Association's experience is that high yield debt issuers that have issued $1 billion of debt securities in a three-year period are followed at least as closely as companies with equity floats in the $700 million range, and thus merit inclusion in the definition of WKSIs.[9]

We also believe that the evolution of the high yield debt market since the adoption of the integrated disclosure system supports this position. As noted above, Forms S-3/F-3 have, since their adoption in 1982, provided that issuers that fail to meet the forms' equity float requirement may only issue debt securities on that form if the securities are rated investment grade by at least one NRSRO. This requirement made sense at the time of adoption in that the high yield markets were in their infancy. Research coverage of high yield issuers was virtually nonexistent and the secondary markets for high yield securities were extremely volatile and at times very illiquid, which in turn contributed to pricing of new issuances that may not have been supported by the metrics of the market. Today, high yield markets have matured into well-developed, liquid and closely followed markets. There exist numerous mutual funds that invest solely or predominantly in high yield debt. Virtually all national investment banks employ fixed income analysts who solely follow high yield markets and issuers. Thus, there is no longer a meaningful difference in the scope of analyst or related coverage between high yield and investment grade debt or equity issuers. Furthermore, high yield markets remain almost exclusively institutional. Therefore, we do not believe that the existing Form S-3/F-3 structure on this point is relevant for the new category of WKSIs proposed in the Release. In addition, the absence of retail holders supports the appropriateness of permitting high yield issuers that frequently access the market to be deemed to be WKSIs. To the extent investor protection is an issue, these institutional investors in question can far better fend for themselves than the retail investors that may participate in registered investment grade offerings.

---

[9] We believe that the foregoing analysis would apply equally to a high yield issuer that is a so-called voluntary filer if it meets the debt issuance test contained in the definition of WKSI.

2. The Association believes that the Commission's definition of WKSI should clarify the types of debt securities that count toward the $1 billion threshold.

For purposes of meeting the $1 billion threshold for issuances of debt securities in the definition of WKSI, the Association believes that the definition of "debt securities" should be clarified in three ways. First, the threshold should not be limited to registered issuances, but should be expanded to include unregistered offerings of Rule 144A securities.[10] Second, non-convertible, non-participating preferred securities, including trust preferred stock and similar securities, are not now clearly "debt securities" for purposes of the threshold, but should be.[11] Finally, while we recognize that for many purposes convertible securities are considered by the Commission to be equity securities, the Association believes for purposes of measuring issuances of debt, convertible securities should be categorized as debt securities if, at the time of issuance, such securities have an effective conversion premium of at least 10%.[12] We believe that this is appropriate since the underlying common stock would not be considered to be outstanding for purposes of determining the issuer's equity float. Under the current formulation, convertible and exchangeable securities would not count in any manner toward satisfaction of an issuer's WKSI status, and the Association believes that this gap will needlessly deter their issuance. Moreover, the Association's proposed approach is consistent with the Commission's fungibility analysis set forth in Rule 144A(d)(3)(i) under the Securities Act, which recognizes that in certain situations a convertible security is more akin to debt than the underlying equity. As noted above, these securities, like traditional fixed income instruments, are primarily traded on the basis of yield and rating of the issuer. Therefore, the Association believes that this treatment would be appropriate here as well.

3. Issuers that only satisfy the $1 billion debt threshold should also be eligible to offer equity securities as WKSIs.

The Association disagrees with the proposal that issuers with publicly held equity that do not meet the public equity float test but satisfy the $1 billion debt threshold (and otherwise satisfy WKSI eligibility requirements) be considered WKSIs solely for purposes of debt offerings. The Association believes that there is a significant number of

---

[10] If the Commission declines to follow this approach, the Association urges the Commission to recognize that debt securities subsequently registered in an *Exxon Capital* exchange offer (or, in the case of issuances of convertible or exchangeable securities, in a resale shelf registration statement) should be counted in the $1 billion threshold if the registration statement is declared effective within the three-year measurement period.

[11] Treating these securities as debt securities is consistent with the approach taken by the Commission in other circumstances. See, e.g., Rel. No. 33-8220; 34-47654; IC-26001 (Apr. 9, 2003) at note 138 and accompanying text, where for purposes of compliance with self-regulatory audit committee requirements, such a non-convertible, non-participating preferred security is not considered to be an equity security.

[12] This analysis would apply equally to exchangeable and similar equity-linked securities.

issuers with outstanding publicly held equity that have a market float at or near the $700 million threshold, but who are also active participants in the fixed income capital markets. If the equity float test is not met but the debt issuance test is, the Association believes that these issuers would demonstrate comparable depth of following among the institutional investor, analyst, rating agency and press communities sufficient to merit their ability to avail themselves of the benefits of WKSI status for all purposes, including issuances of equity securities.

We believe that this issue can be potentially quite troublesome for a publicly held company with an equity float that is in the vicinity of $700 million. Assuming this issuer meets the equity float test at the relevant measurement date prior to filing its shelf registration statement, it is then eligible for automatic effectiveness. Even if the issuer's equity float were to drop below $700 million thereafter (including after the measurement date but before filing), the issuer would be entitled to automatic effectiveness and to continue to utilize the registration statement until such time that it is required to update the underlying prospectus pursuant to Section 10(a)(3) of the Securities Act. At that time, the issuer would be required post-effectively to amend its registration statement, shifting from an automatically effective Form S-3/F-3 to a traditional Form S-3/F-3, to reflect the fact that it is no longer a WKSI, and would not be able to utilize the registration statement unless and until the post-effective amendment was declared effective by the Commission. Given the greatly increased volatility of the equity markets in recent years, it is entirely possible that an issuer that files as a WKSI could find that it ceases to meet the equity float requirement, possibly by a significant margin, for reasons having little if anything to do with the underlying fundamentals of its financial results or business prospects. While such an issuer's issuance activity, and concomitant following by the analyst and other constituencies, would not necessarily abate, for purposes of WKSI status the issuer would find that it is now viewed as lacking sufficient following to justify continued WKSI eligibility. As a result of this uncertainty, such an issuer may decide to file initially on the basis of its status as a seasoned issuer meeting the $75 million equity float test of Form S-3/F-3 rather than risk the uncertainty of filing as a WKSI.[13]

The Association recognizes that there will always be difficult situations created by numerical eligibility thresholds and is not suggesting that the basic structure of WKSI eligibility is flawed. However, we do believe that the difficulty of situations such as those described above can be ameliorated in part by permitting issuers with publicly held equity that meet the fixed income issuance volume component of the test to qualify as WKSIs for all purposes. In short, the Association believes that frequency of issuance is a

---

[13] The uncertainty surrounding WKSI status for these issuers could also create an incentive for these issuers to issue fixed income rather than equity securities in an effort to reach and maintain WKSI status, since they can control the quantity of debt they issue with far greater certainty than they can control the size of their equity float. We believe that regulatory structure ought not to affect capital raising decisions by issuers, and fear that this structure may produce such an unintended consequence.

roughly accurate predictor of the depth of coverage of a particular issuer and, therefore, that frequent fixed income issuances by a publicly held company suggests active coverage of that company's securities including fixed income (whether or not investment grade) and equity securities.[14]

4. Some of the proposed "bad boy" disqualifications to WKSI status will unnecessarily cause certain issuers to be "ineligible issuers" or otherwise ineligible to be WKSIs.

Under the Commission's proposal, an "ineligible issuer" is faced with two significant disadvantages ─ it may not be a WKSI and it is precluded from using free writing prospectuses after the filing of a registration statement. The Association believes that the following aspects of the proposed definition of "ineligible issuer" under Rule 405 could have unintended adverse consequences that are inconsistent with the stated aims of the Release.

Periodic Reporting. As currently proposed, the failure to file any reports (or certifications required by any report) required pursuant to Section 13, 14 or 15(d) of the Exchange Act would render an issuer ineligible for WKSI status for so long as the omitted filing remains unfiled, absent an order of the Commission. We interpret the rule to provide that this requirement must be met on any day on which WKSI eligibility is determined ─ the last business day of the most recently completed second fiscal quarter prior to the date of either the filing of an issuer's Form 10-K or 20-F or the subsequent amendment of an issuer's registration statement for purposes of complying with Section 10(a)(3) of the Securities Act (a "WKSI eligibility determination date").[15]

We note that this requirement differs from two aspects of the definition of WKSI. Paragraph (4) of that definition requires the issuer to have filed all materials it was required to file pursuant to Section 13, 14 or 15(d) of the Exchange Act during the 12 calendar months immediately preceding a WKSI eligibility determination date. Paragraph (5) of that definition requires the issuer to have filed in a timely manner all materials it was required to file pursuant to Section 13, 14 or 15(d) of the Exchange Act during the 12 calendar months and any portion of a month immediately preceding a WKSI eligibility determination date, except for filings required by certain items of Form 8-K. Unlike Paragraph (4) of the proposed definition of WKSI, the ineligible issuer provision does not have a 12-month time

---

[14] We note that with respect to the statistical analysis of the $1 billion debt issuance threshold in the Release, the Commission only considered issuers that had no public equity outstanding.

[15] As we will discuss below, we believe there is some ambiguity as to the accuracy of the foregoing statement with respect to determining WKSI eligibility for purposes of Rule 433.

limit, and also includes certifications. Unlike Paragraph (5) of the proposed definition of WKSI, the ineligible issuer provision does not require timely filing and does not exclude filings required by certain items of Form 8-K. The net result is that an issuer that fails to file any materials required by Section 13, 14 or 15(d) remains an ineligible issuer for so long as that material remains unfiled, absent a Commission order. In addition, if an issuer's CEO or CFO is unable to provide a certification required to be included with an Exchange Act periodic report, then the issuer will be ineligible unless it obtains a Commission order.

We have the following comments on the definitional provisions noted above:

- We believe that the ability to seek a Commission waiver should apply equally to paragraphs (4) and (5) of the proposed definition of WKSI. Assume that an issuer with a WKSI eligibility measurement date of September 30 inadvertently files a Form 8-K one business day late, on October 1. On its WKSI eligibility measurement date, the issuer violated each of paragraph (1)(i) of the proposed definition of ineligible issuer and paragraphs (4) and (5) of the proposed definition of WKSI. Pursuant to paragraph (3) of the proposed definition of ineligible issuer, the issuer could seek a Commission order waiving its ineligible issuer status. However, the absence of a comparable provision in the proposed definition of WKSI suggests that a Commission waiver of the violation of paragraphs (4) and (5) of that definition could not be sought, despite the similarity of the provisions in question.

- The Association agrees that being current in Exchange Act reports is an important factor in determining whether an issuer is eligible for WKSI status. However, there have been many instances in recent years in which well-regarded, highly-rated issuers have missed one or more periodic report filing deadlines due to accounting or other issues. In most instances, these issuers have resolved their issues, continued as going concerns and regained their Form S-3/F-3 eligibility 12 months after they cured their filing delinquency. In a not insignificant number of instances, issuers that have missed multiple prior filings, working closely with the staff of the Division of Corporation Finance, have filed some, but not all, of their omitted reports as part of their efforts to regain their Form S-3/F-3 eligibility. To impose the new requirement of obtaining an order of the Commission to enable such an issuer to regain WKSI status will, we believe, unnecessarily complicate these already complicated situations, and also increase the Commission's administrative burden without providing any corresponding benefit to investors. We recommend that the Commission delegate to the staff of the Division of Corporation Finance the ability to waive violations of paragraph (1)(i) of the proposed definition of ineligible issuer (including situations in which any required certifications were not filed) and paragraphs (4) and (5) of the proposed definition of WKSI.

- If the Commission elects to adopt this aspect of the definition of ineligible issuer as proposed, then the Association urges the Commission to clarify Rule 405 to make clear that unfiled periodic reports that were due prior to the effective date of definitive rules would not cause an issuer to be an ineligible issuer under Rule 405 after expiration of the 12-month look back period currently imposed pursuant to Form S-3/F-3. We believe that it would be unfair to impose the requirement of obtaining a formal Commission order to regain WKSI status in this situation, in what could be argued to be a retroactive manner.

- We believe that the Commission intends that WKSI eligibility for all purposes is determined as at the most recent WKSI eligibility determination date. We believe that the proposed definition of WKSI in Rule 405 makes this clear. However, the language of proposed Rule 433 introduces ambiguity into this analysis, which we believe is unintentional. Rule 433(b)(2) requires that:

  > at the time of the filing of the registration statement and at the time of an amendment to the registration statement for purposes of complying with section 10(a)(3) of the [Securities] Act, the issuer of the securities that are the subject of the registration statement is a well-known seasoned issuer as defined in Rule 405 . . ..

  It is unclear whether this reference to "at the time" should be read to refer to the issuer's status under its then-current WKSI eligibility determination date, or if this reference requires a new determination be made as of each such subsequent date that a registration statement is filed or deemed to be post-effectively amended for purposes of Section 10(a)(3) of the Securities Act. This confusion is exacerbated by Rule 433(b)(4), which provides that Rule 433 is not available "if the issuer is an ineligible issuer as defined in Rule 405." As noted above, the proposed definition of ineligible issuer in Rule 405 does not contain a temporal element. Instead, the WKSI eligibility determination date is imposed on determinations of ineligible issuer status under Rule 405 by virtue of paragraph (6) of the proposed definition of WKSI under Rule 405, which is clearly subject to the timing provision set forth in that definition. By providing separately for the ineligible issuer point in Rule 433, this temporal element is lost, suggesting that the measurement might need to be made at each of the dates referenced in the above-cited language from Rule 433(b)(2).

  The Association respectfully submits that this is not the result intended by the Commission. We believe that it would be unworkable to impose this requirement on variable and multiple dates over the course of an issuer's fiscal year. We also believe that requiring a WKSI, as part of a transaction under an otherwise valid automatic shelf registration statement, to re-verify its WKSI status to establish that it can rely on the benefits of Rule 433 would impose an unnecessary and inefficient speed bump into the offering process. We see no

reason for treating the ability to utilize an already effective automatic shelf registration statement differently than the ability to rely upon the benefits of Rule 433 for an offering thereunder. Finally, we note that the Commission's brief discussion of the measurement of WKSI status in the Release does not suggest this differential timing.[16]

Therefore, we suggest that the Commission clarify Rule 433 to make clear that determinations of WKSI status, including whether an issuer is an ineligible issuer, are made at the time specified in the first paragraph of the proposed definition of WKSI in Rule 405. To that end, we suggest that sub-paragraph (b)(4) of proposed Rule 433 be deleted, so that the concept of ineligible issuer is captured by virtue of sub-paragraph (6) of the proposed definition of WKSI in Rule 405.

Settlements, Consent Decrees and Similar Arrangements. The entry by an issuer into a settlement, consent decree or similar arrangement with a government agency involving allegations of violations of the federal securities laws or regulations render an issuer "ineligible" under Rule 405 for a period of three years under the proposed rules. While the Association supports suspension of WKSI status for any conviction of violating the federal securities laws or regulations, we believe that a three-year suspension for settlements, consent decrees or similar arrangements may unduly penalize issuers that agree to such an arrangement.[17] Unlike a conviction, entry into a settlement, consent decree or similar arrangement does not involve an admission of guilt, and therefore the issuer is still entitled to the presumption of innocence enshrined in our Constitution. To impose an inflexible penalty that is no different than that imposed on issuers that have been convicted of violating the securities laws appears to be an overly punitive approach.[18]

If the Commission elects to adopt this aspect of the definition of ineligible issuer as proposed, then the Association urges the Commission to adopt a transition rule so that settlements, decrees or orders entered into within three years of the effective date of definitive rules should not cause an issuer to be an ineligible issuer under Rule 405. Any such issuer would not have been aware of this consequence when it was negotiating settlement terms.

---

[16] See footnote 42 and accompanying text.

[17] The Association notes that the practical effect of the proposal is that most parent companies of broker-dealers would not qualify as WKSIs as a result of settlements and consent decrees entered into with the Commission in recent years with respect to a variety of alleged securities laws violations.

[18] Of course, the Commission could affirmatively impose loss of WKSI status for a prescribed period of time as part of any settlement, consent decree or similar arrangement.

Bankruptcy Filings. The Commission's proposed definition of ineligible issuer would also exclude an issuer if, within the prior three years, a bankruptcy petition was filed by or against the issuer. The proposal does not address the possibility of a frivolous or bad faith involuntary proceeding being brought against an issuer. While the bankruptcy code permits the target of such a filing to recover punitive damages plus reimbursement of costs incurred in the case of such a bad faith filing, and the Commission could waive such an event by formal order, we believe that an issuer faced with such a situation would derive little benefit from this bankruptcy code provision and should not have to go to the time and expense, and face the uncertainty, related to seeking a formal order of the Commission waiving this event. We therefore suggest that the proposed amendments to Rule 405 be modified such that, in the case of an involuntary bankruptcy, the issuer would become an ineligible issuer upon the earlier of (i) 90 days following the date of the filing of the involuntary petition (if the case has not been earlier dismissed) or (ii) the conversion of the case to a voluntary proceeding.

5. The failure to timely file a current report required by Form 8-K should not disqualify an issuer from being a WKSI.

As noted above, under the Commission's proposal, to qualify as a WKSI, an issuer must have filed in a timely manner all reports required to be filed under the Exchange Act during the 12 calendar months and any portion of a month preceding a date of determination, other than reports required solely pursuant to Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(a) of Form 8-K. The Association strongly believes that a late 8-K filing should not compromise an issuer's status as a WKSI once the omitted report has been filed. We recognize that the list of Form 8-K items excluded from the 12-month timely filing requirement of the WKSI definition conforms to the limited safe harbor added to Form S-3 (and Rule 13a-11 under the Exchange Act) at the time of the adoption of the recent amendments to Form 8-K.[19] However, as issuers and the Commission's staff have grappled with these requirements since their adoption, we believe it has become apparent that there are additional items in the form that also require management to quickly assess the materiality of an event or determine whether a new disclosure obligation has been triggered.[20] As more time passes, and issuers and the staff gain further experience with these new requirements, we anticipate that additional issues may continue to arise. Therefore, rather than attempt to predict now whether a particular 8-K item merits inclusion in this list, in the context of issuers with the following implied by meeting the WKSI definition, we believe that it would be unwise to impose the severity of the 12-month timely filing requirement in the WKSI definition on inadvertent failures to timely file any current report on Form 8-K. We note that if a required Form 8-K were to remain unfiled on any WKSI eligibility determination date, then the issuer would be an

---

[19] Rel. No. 33-8400; 34-49424 (Mar. 16, 2004) at Section II.E.

[20] See Division of Corporation Finance, Current Report on Form 8-K — Frequently Asked Questions (Nov. 23, 2004) at www.sec.gov/divisions/corpfin/form8kfaq.htm.

ineligible issuer (pursuant to paragraph (1)(i) of the proposed definition of that term) and would also fail to meet the requirement of paragraph (4) of the proposed definition of WKSI. Therefore, our proposed modification would not permit issuers that willfully fail to file a required Form 8-K to continue to qualify as a WKSI.

If the Commission is unwilling to exclude all Form 8-K filings from the 12-month timely filing requirement of the WKSI definition, then the Association recommends that Items 5.02(a)-(b) of Form 8-K be added to the list of excluded items in paragraph (5) of the proposed definition of WKSI. The Association believes that departures of directors or principal officers reportable under Items 5.02(a)-(b) also belong in this category, as these filing requirements are triggered in unusual ways, including ways that are outside the control of the issuer. In addition, we recommend that the Commission and its staff continue to monitor developments in the application of these new Form 8-K filing requirements, and consider further expanding this list, at least for purposes of the 12-month timely filing requirements of the WKSI definition, as experience warrants.

B. The Association supports many of the Commission's efforts to modernize the Securities Act rules governing communication and agrees that a broad liberalization of the "gun jumping provisions" is necessary and appropriate.

The Association has long supported efforts to modernize the provisions of the Securities Act governing communication during a registered offering and believes that the Release makes great strides in this regard. However, we believe that there remains room for improvement in certain areas, as described below.

1. The Association agrees with the Commission's proposed creation of safe harbors to permit continuing on-going business communication, but the definitions of the phrases "factual business information" and "forward-looking information" require refinement.

The Association agrees with the Commission's proposed creation of safe harbors from the gun jumping provisions for a reporting issuer's continued use of regularly released factual business information and forward-looking information and for a non-reporting issuer's use of factual business information that had been regularly released to persons other than in their capacity as investors or potential investors.

Factual business information and forward-looking information are both inherently subjective concepts – what constitutes "factual" or "forward-looking" information will differ from one issuer to the next. Defining these terms by reference to specific categories of information will almost certainly be deficient in some respect. We believe that the more appropriate approach is for the Commission to define these terms using broad conceptual language rather than narrow lists. The specific categories of information listed in proposed Rule 168(b)(1)(i) through (v) and proposed Rule 168(b)(2)(i) through (iv) should instead serve as examples of the types of information intended to be covered by the safe harbor. Alternatively, we would suggest that the Commission affirmatively state in the definitive rule or in the adopting release that these safe harbors are non-exclusive, and no inference should be drawn that communications

that are outside the precise limits of the safe harbors constitute impermissible gun jumping.[21]

2. Proposed Rule 168(d)(2) would prevent issuers from utilizing technological advances that allow for more efficient methods of disseminating information, even if such method does not increase the prominence of the released information.

The availability of the safe harbor contained in proposed Rule 168 is conditioned upon a determination that the timing, manner and form in which the information is released or disseminated is "materially consistent" with similar past disclosures. The Association recognizes that a change in the manner in which information is disseminated could, in some circumstances, have the effect of increasing the prominence of such information, and we agree that such conduct should not be entitled to the safe harbor protection afforded by Rule 168. A requirement that distribution methods be consistent with prior practice casts doubt, however, on whether an issuer could ever take advantage of advances in information technology. The Association is concerned that, as drafted, Rule 168(d)(2) will lock issuers into outmoded and inefficient communication practices. The Association believes that instead of focusing on consistency between the two methods, the rule should focus on the prominence that the method in question generates for the announcement. To that end, we propose that the Commission specifically acknowledge in the definitive rule or in the adopting release that any changes in the manner in which information is disseminated will not be presumed to fail the requirement of Rule 168(d)(2) so long as the new method does not materially increase the prominence of the distributed information. We believe that such an approach would strike an appropriate balance between protecting investors from inappropriate "hyping" during an offering and giving issuers the flexibility to use the most efficient information technology available.

3. The Association agrees that there should be a "bright line" safe harbor for communication made by issuers during the pre-filing period but believes that certain modifications are merited.

Proposed Rule 163A would create a bright line time period, ending 30 days prior to filing a registration statement, during which issuers may communicate without risk of violating the gun jumping provisions. While the Association strongly supports the creation of this safe harbor, we believe that certain modifications to the proposal are merited.

---

[21] Similar language is contained in the adopting release for the Commission's 2003 amendment to Rule 10b-18 under the Exchange Act, relating to open market purchases made after the announcement of a merger, acquisition or similar transaction involving a recapitalization (See Rel. No. 33-8335; 34-48766; IC-26252 (Nov. 10, 2003) at footnote 39 and accompanying text). See also the Note to Rule 502(a) of Regulation D under the Securities Act for an example of language included in the text of a rule clarifying the scope of a safe harbor.

Subjective Nature of the Safe Harbor. The requirement that an issuer take reasonable steps within its control to prevent distribution or publication of communications during the 30 days preceding the filing of a registration statement adds uncertainty and significantly blurs the "bright line." An issuer cannot be expected to control publication schedules of periodicals or newspapers, and the Association is doubtful that many members of the financial press or media will give an issuer this degree of control. This requirement will therefore chill communication with the media and limit the amount of information available to investors. In situations where issuers do speak with the media, the Association remains concerned that the uncertainty surrounding whether the issuer's efforts to control re-publication were "reasonable" will have the effect of artificially delaying offerings. To address this concern, we suggest that the Commission acknowledge that if an issuer seeks in good faith to prevent publication within the 30 days preceding the filing of a registration statement, and the publication is not part of a scheme on the part of the issuer to evade the gun jumping requirements of the Securities Act, then the safe harbor will be available. We also suggest that the Commission acknowledge in the definitive rule or in the adopting release that this is a non-exclusive safe harbor and failure to comply with its requirements shall not create an inference that the communication in question constituted impermissible gun jumping by the issuer.[22]

While these changes would not remove all subjectivity from the safe harbor, they would clarify that the availability of the safe harbor requires a facts and circumstances determination (as it does today), such that an issuer and its advisers can reasonably determine that publication on the 28th day prior to filing, for example, despite the issuer's good faith efforts to prevent such publication, would not necessarily constitute impermissible gun jumping.

Unavailability of Safe Harbor for Prior References to Non-integrated Private Offerings. The proposed safe harbor would not be available for communications that reference any securities offering. The Association notes that if an issuer completes an unrelated (and non-integrated) private placement more than 30 days prior to the filing of a registration statement, a press release or other public disclosure regarding that transaction in a communication that would otherwise qualify under Rule 163A would arguably make the safe harbor unavailable. The Association suggests that the Commission clarify that a reference to an unrelated completed private (or otherwise exempt) offering does not affect the issuer's ability to rely upon Rule 163A for a proposed registered offering.[23]

---

[22] See footnote 21 and accompanying text above.

[23] The Association recognizes that any such clarification would not address whether such a communication may constitute a general solicitation for purposes of the completed private offering.

Unavailability of the Safe Harbor for Comments by Prospective Underwriters. In response to the Commission's specific query, the Association disagrees with the proposal that the 30-day safe harbor not be available for underwriters and other offering participants. The Association believes that the unavailability of the safe harbor to offering participants does little to protect investors and could, albeit inadvertently, delay offerings or disqualify underwriting firms from participation in those offerings. For example, if an investment banking firm with a strong relationship with a particular issuer were to sponsor an investor conference at which the issuer is featured, and the issuer files a registration statement for a capital formation transaction substantially more than 30 days later naming the investment bank as an underwriter, could the investment bank's statements at the conference be deemed to constitute impermissible gun jumping? If so, then issuers may be forced to exclude certain investment banks from capital formation transactions due to prior involvement with, or discussion of, the issuer, which could chill these otherwise beneficial activities. We submit that such an outcome would offer no significant protection to investors. While we acknowledge that much of what an underwriter may do or say will relate to an ongoing or anticipated distribution of securities, we believe that this example demonstrates that underwriters can also engage in a range of other activities that are beneficial to the markets. We suggest that the proposed exclusion of underwriters from the safe harbor will create unneeded uncertainty and potentially cause underwriters to cease to provide otherwise beneficial services.

4. The Association supports the Commission's proposed expansion of Rule 134 but believes that the Commission should further expand the safe harbor.

The Association strongly supports the Commission's proposal to expand the safe harbor in Rule 134 for limited information about an offering made after an issuer files its registration statement. The proposed amendments to Rule 134 would, among other things, permit more information about the terms of the securities being offered. The Association urges the Commission, however, to further expand the types of information that can be made available to potential investors in fixed income offerings.

According to the Release, the proposed amendments to Rule 134 are intended to include within that rule "information that issuers, underwriters, and investors would find helpful and to permit the types of written communications during an offering that we would not consider to be prospectuses." The Commission also noted in the Release that Rule 134 was originally intended to provide an "identifying statement" that could be used by issuers and distribution participants to locate potential offerees that might be interested in receiving the prospectus. Unlike a debt security, the rights associated with stock ownership are well known in the investment community since they are established by statute (and to a lesser degree by the issuer's publicly available charter documents). Debt securities, on the other hand, are individualized contractual arrangements, the terms of which are specifically negotiated by the issuer and the underwriters. Potential investors in debt securities need to understand the basic parameters of the security before they can decide whether the security meets their investment needs and whether they might be

interested in receiving a prospectus. We believe that the proposed amendments to Rule 134, which would permit disclosure of the final maturity, interest rate and yield of a fixed income security, do not achieve this goal.

We propose, therefore, that in addition to the expansions proposed for Rule 134 in the Release, the rule be amended to permit the disclosure, in a summary fashion, of the following information concerning the nature of the securities offered:

- Anticipated pricing information such as an anticipated spread (potentially expressed as a range) over Treasury or other benchmark securities (it is customary for investors to evaluate investment options on this basis — yield information without correlative spread information would be of little use to investors); and
- The presence of put, call and change of control features, including timing and prices.

In addition we would propose including the following additional categories to the extent the Commission seeks to incent issuers and underwriters in high yield offerings to issue these securities in registered offerings as opposed to Rule 144A offerings:

- Whether the securities are guaranteed, and the identity of any guarantor;
- The ranking of the securities;
- Whether the securities are secured, and the general nature of any collateral; and
- Cursory identification of the covenants that the securities will carry (including references to specific financial ratios in any maintenance covenants).

Currently, the vast majority of high yield offerings are executed under Rule 144A. One of the factors affecting this is the inability to use Rule 134 to convey information that would be meaningful to a potential investor. Particularly if WKSI eligibility is expanded as we propose, issuers and underwriters may find initial (as opposed to follow-on) registration to be a viable option, but we believe this will only be the case if Rule 134 is available to permit the conveyance of the fundamental information a prospective high yield investor needs to receive to be able to determine whether it might be interested in receiving a prospectus.

We wish to point out that we are not proposing the expansion of Rule 134 to permit the use of term sheets nor are we proposing that an expanded Rule 134 communication include detail on any of the provisions mentioned above. For example, we do not propose that covenants be described, or that defined terms be used (including, in the case of financial maintenance covenants, the meaning of the financial terms comprising the ratios). Nor do we propose that a detailed description of any collateral be permitted. For example, if the securities are guaranteed by a large group of subsidiaries, we would propose that the Rule 134 communication be limited to reference to the guarantors by category (*e.g.*, "substantially all of the issuer's operating subsidiaries") rather than by listing all guarantors by name. Attached as Annex A to this letter are additional examples of the type of disclosures that we propose be permitted under the Rule.

The Association believes that the Commission can reasonably determine that a communication that includes the additional information proposed above does not constitute a prospectus. The additional information is non-qualitative, factual information that will merely assist the recipient in understanding the most important attributes of the security. The additional information that we propose to include within the safe harbor would not be sufficient for a reasonable fixed income investor to make an investment decision and could not circumvent the complete disclosure contained in the prospectus. Our proposal would simply provide potential investors with enough information to determine whether reading the full prospectus is worthwhile.

Furthermore, the Association believes that an expansion of Rule 134 as we propose will present little risk to investors. Well-advised offering participants have historically taken a very conservative view of Rule 134. A subsequent determination that a document failed to satisfy Rule 134's requirements could render the writing an illegal prospectus in violation of Section 5(b)(1). We believe that the potential for a Section 5 violation will be sufficient reason for offering participants not to abuse any additional flexibility afforded by the Commission.

If the Commission is unwilling to extend Rule 134 as we propose, we believe that this change could be made available to WKSIs on a test basis. This would permit the Commission to monitor whether the utilization of an expanded safe harbor results in increased evidence of abuse. We are mindful that this alternative would introduce additional complexity, but we believe that such complexity is preferable to not being able to use Rule 134 to effectively communicate the basic elements of the securities offered.

5. The Association supports the Commission's proposals to permit the use of free writing prospectuses but urges the Commission to re-evaluate the related liability standards.

Given the increasing speed of the markets, improvements in technology and investors' demands for access to information, the liberalization of offering communication is a necessary and important goal. The Commission's proposals in this regard represent a major advancement. The Association has long been a proponent of liberalizing communications outside of the statutory prospectus, and we welcome the Commission's efforts in this area.

As discussed in Section I.B above, the Association is concerned that the imposition of Section 12(a)(2) liability for information contained in a free writing prospectus may result in substantially less utilization of this commendable disclosure innovation than would otherwise be the case. If so, this may undercut the Commission's goals of rapidly providing more information to investors beyond that contained in the statutory prospectus.

In addition, we have the following specific comments on the free writing prospectus proposals:

Underwriter Liability in Syndicated Offerings. Beyond the general liability standards, the Association is also concerned that the Release creates ambiguous obligations that (in syndicated offerings at least) may result in one offering participant taking liability for the conduct of another. For example, a deficient free writing prospectus prepared and distributed by one underwriter could easily wind up in the hands of an investor who purchased its allotment from another syndicate member. That free writing prospectus could form the basis for allegations of liability on the part of the selling underwriter, even though it had no role in the preparation of the document and no opportunity to review it or object to its use. This illogical result could be exacerbated in syndicates that include pot sales.[24]

The Association urges the Commission to clarify how liability on free writing prospectuses prepared by members of the underwriting syndicate would be allocated among offering participants. On this front, we recommend that the Commission adopt a rebuttable presumption that a free writing prospectus prepared and used by an offering participant (other than the issuer) is not considered "used" for purposes of Section 12(a)(2) by any other participant in the offering, whether or not the offending underwriter in fact remained in the transaction.[25] Establishing such a presumption would give underwriters substantial comfort that participation in a syndicate would not expose them to Section 12(a)(2) liability for free writing materials that they did not prepare and of which they may not have been aware. It would not, however, preclude plaintiffs from pursuing a Section 12(a)(2) claim if there were evidence of culpability on the part of the selling underwriter. Certainly, the plaintiff would also be free to pursue claims under Section 10(b) of the Exchange Act against the underwriter who prepared the deficient free writing prospectus.

Record Retention Requirements for Free Writing Prospectuses. Proposed Rule 164 provides that, after the filing of a registration statement, a free writing prospectus that satisfies the conditions of proposed Rule 433 would be a permitted prospectus under Section 10(b) for purposes of Securities Act Section 5(b)(1).

---

[24] In pot sales, the book-running lead manager will reserve a portion of the securities for sale to selected dealers that are not members of the syndicate and to institutional investors that prefer to deal directly with the syndicate rather than with a particular underwriter. If a non-member dealer selling from the pot were to utilize a deficient free writing prospectus, it could be alleged that other syndicate members share in this potential liability despite having no role in, or knowledge of, the preparation or distribution of this document.

[25] The Association recognizes that it is common practice for underwriters in a syndicated offering to request indemnification from a syndicate member that engage in unilateral conduct that might result in allegations of a Section 12(a)(2) violation. In certain situations, however, offending underwriters have refused to provide such an indemnity and have dropped out of the syndicate prior to pricing, leaving the remaining members potentially exposed to allegations of liability from recipients of the defective prospectus.

Proposed Rule 433 requires, among other things, that issuers and distribution participants retain all free writing prospectuses for a period of three years following the initial bona fide offering of the securities in question. The Association recommends that the Commission add a provision to proposed Rule 164 that an immaterial or unintentional failure to comply with such record retention requirement will not result in a violation of Section 5(b)(1) or a loss of the ability to rely upon Rule 164. Such a provision would parallel proposed Rule 164(b) and (c), which provides that an immaterial or unintentional failure to file a free writing prospectus with the Commission or to include the required legend will not result in a violation of Section 5(b)(1) of the Securities Act. We submit that the obligations to make such a filing and include such a legend are of greater significance to prospective investors than the record retention requirement of Rule 164, yet only with respect to this latter requirement is there no provision of relief for inadvertent failures to comply. Absent such an exception, an inadvertent violation of the record retention requirement might result in a free writing prospectus retroactively becoming a non-compliant Section 10(b) prospectus, in turn resulting in a potential retroactive violation of Section 5(b)(1).[26]

6. Comments Regarding Electronic Road Shows.

In response to the Commission's specific queries relating to electronic road shows, the Association:

- Does not believe that the Commission should require that electronic road shows be made available to all potential investors. It is unclear what would constitute "availability" for these purposes and the resultant risk is that a good faith attempt to utilize the provisions relating to electronic road shows could result in an inadvertent failure to achieve this standard. This will either prove to be a significantly costly undertaking or, more likely, will provide a substantial disincentive to the utilization of electronic road shows.

- Agrees that issuers should be specifically permitted to edit a retransmitted road show if the edits do not, individually or in the aggregate, constitute material changes to the road show as initially broadcast.

- Does not agree that the proposed definition of a "bona fide electronic road show" is adequate, since it provides no guidance on which categories of information may properly be excluded from the posted version of the road show.

- Believes that utilization of an overflow room at a live road show, with a closed circuit, non-interactive live feed of the live road show, should not constitute an

[26] The anomalous result in this situation might be that the retroactive Section 5(b)(1) violation gives rise to a rescission right several years following the conclusion of the offering.

electronic road show, but instead should be viewed as a live road show on the same basis as the main presentation.

7. The Association does not agree that it is appropriate to limit the Regulation FD exclusion to those communications that are directly related to a registered capital-raising securities offering.

Currently, Regulation FD does not apply to disclosure made in connection with a registered securities offering under the Securities Act, whether written or oral, other than an offering described in Rule 415(a)(1)(i)-(vi) under the Securities Act. The Commission's proposal would narrow this exclusion to registered offerings involving capital formation for the account of the issuer and underwritten offerings that constitute both an issuer capital formation transaction and a selling security holder offering (without providing any guidance as to how much of a combined primary/secondary offering must be primary to constitute a capital formation transaction for the issuer, and whether this is measured as a percentage of the total offering or as a specified dollar threshold). The Association recognizes that it is not necessarily appropriate to presume that investors will become aware of information that is material and made public solely by inclusion in a technical registration statement, such as an *Exxon Capital* exchange offer, a resale registration statement or a market making registration statement. However, the Association does not believe that the Commission has articulated a meaningful policy reason for distinguishing between registered offerings that involve capital formation and those that do not. The Commission's proposal calls into question the Regulation FD status of a wide range of registration statements that we believe are likely to be viewed as important by the market, and thus could fairly be presumed to convey to the market material and otherwise non-public information contained therein. Examples of such arguably "non-capital formation" registration statements include (i) combined primary and secondary offerings, to the extent the lack of clarity in this standard creates uncertainty, (ii) merger proxy statements, and (iii) offerings by one issuer of securities exchangeable into securities of another issuer. The Association proposes that the Commission take a more narrow approach, and specifically exclude from the Regulation FD exception only those registered offerings that are likely to raise selective disclosure issues. The Association proposes that this category of excluded offerings be limited to *Exxon Capital* exchange offers, resale registration statements and market making registration statements.

8. The concepts of "individually distributed" and "widely distributed" communications, insofar as they relate to voicemail distributions, are unnecessarily vague.

The definition of "graphic communication" is proposed to be amended to include any form of electronic media. Graphic communications, in turn, constitute written communications for purposes of determining whether the communications provisions of the Securities Act are applicable. Oral communications, such as live telephone calls or voicemail messages that are "individually distributed," are not considered to be written communications. However, according to the Release, the Commission considers "widely

distributed" messages on telephone answering machines or voicemail systems to be more like broadcasts than oral communications and thus to constitute a graphic communication.

The Association acknowledges that standardized "blast" voicemails sent indiscriminately to a large number of clients lack the individualized nature of oral communications that merit exclusion from the communication restrictions under the Securities Act. However, we fear that the lack of guidance in the Release as to the distinction between "individually distributed" and "widely distributed" could lead to unintended results. On the one hand, it is clear that a standardized voicemail sent to a large portion of a brokerage firm's clients would be "widely distributed" and thus would constitute a written communication. On the other hand, it is also clear that a standardized voicemail sent by a broker to a dozen clients would constitute an individually distributed message – there would be no need to record 12 slightly different variations of the message. It is unclear where the line between these two extremes is drawn. For example, if two brokers (one with many clients, the other with far fewer) each were to send a standardized voicemail to each of his or her clients, the broker with more clients could be deemed to have "widely distributed" his or her message whereas the other might have "individually distributed" his or her message. To address this issue, the Association proposes that the Commission provide that standardized voicemails (or similar communications) distributed to clients of an individual broker would constitute an individually distributed message, regardless of the actual number of recipients.[27]

C. The Association agrees with the Commission's view that materially accurate and complete information should be available to investors when they enter into a contract of sale but encourages the Commission to provide additional guidance in this area.

1. The Commission should clarify what constitutes "information that is conveyed to an investor at or prior to the time of the contract of sale."

In the Release, the Commission has taken the interpretive position that, under Section 12(a)(2) and Section 17(a)(2) of the Securities Act, materially accurate and complete information regarding an issuer and the securities being sold should be available to investors at the time of the contract of sale, when they make their investment decision. The Association agrees with the Commission's interpretive position that the liability standards of Section 12(a)(2) and Section 17(a)(2) should be applied at the time of the contract of sale and also agrees that this position reflects current best practices among capital markets participants in the fixed income markets.

---

[27] This provision would, of course, be subject to the qualification that any distribution of voicemails made in literal compliance with this provision but as part of a scheme to evade regulation of communications under the Securities Act would not be entitled to the benefits of this interpretation.

However, the Association believes that it would assist market participants if the Commission were to provide further guidance as to what is considered "information that is conveyed to an investor at or prior to the time of the contract of sale" beyond information that is conveyed directly to an investor. Such guidance could include confirmation of the following:

- Any document incorporated by reference in the registration statement prior to entry into the contract of sale is deemed to be included in the information conveyed to the investor at that time.

- Any free writing prospectus that is filed with the Commission prior to entry into the contract of sale or is otherwise available to the investor prior to the entry into the contract of sale and not required to be filed is deemed to be included in the information conveyed to the investor at that time.

- Information specifically conveyed orally to the investor at the time of entry into the contract of sale is deemed to be included in the information conveyed to the investor at that time, with the issuer or transaction participant that was the counterparty to such conversation bearing the burden of proof for establishing such conversation. This would enable conversations in which pricing and other material terms are confirmed (for example, as part of "circling" offerees immediately prior to pricing) to constitute part of this body of information. We would expect that these conversations would almost always occur telephonically, and these conversations could be taped if deemed appropriate by the broker/dealer, providing adequate evidence to establish that the conversation took place.

2. Passage of a prescribed period of time should not determine whether an Exchange Act document or free writing prospectus filing constitutes part of the information available to an investor at the time of the contract of sale.

In response to the Commission's question about whether passage of a certain period of time should be required for Exchange Act document or free writing prospectus filings to be considered part of the information available to an investor at the time of the contract of sale, the Association believes that this should continue to be a facts and circumstances determination to be made by the issuer and distribution participants at the time. We believe that any rule that attempts to capture a more specific, definitional prescription will be arbitrary and in many instances unsuited to the specific situation. We note that documents filed with or furnished to the Commission via EDGAR are virtually instantaneously available on the Commission's website. Therefore, a prospective investor is presently able to check this source to see if any recent filings have been made that might affect an imminent investment decision.

3. The Association believes that market practice will continue to develop to bring more certainty to the question of when a contract of sale arises.

The Commission notes in the Release that, under existing case law, the time of sale for purposes of Section 12(a)(2) and Section 17(a)(2) is the time when the investment decision is made and the parties to the transaction are committed to one another. Consistent with the provisions of Section 8-113 of the UCC, this commitment need not be reduced to writing to be enforceable. Therefore, liability under Section 12(a)(2) and Section 17(a)(2) can arise based on oral communications.[28] It is, of course, conceivable that market participants could disagree as to when, and whether, a contract of sale has been created. To the extent appropriate, the Association believes market practice will continue to evolve to reduce any risk of uncertainty regarding when a contract of sale is created that may arise from the Commission's interpretation. For example, we would expect that brokerage account or other blanket agreements governing the relationship between a distribution participant and its customer could provide that, with respect to any securities transaction between such parties, the customer will not be committed, and so a contract of sale will not arise, unless and until the customer confirms its intent to purchase the securities in question on the terms specified.

D. The Association strongly supports the Commission's proposed improvements to the registration process and has recommendations for how the process can be further improved.

The Commission has proposed a number of rules intended to streamline the registration process under the Securities Act for most types of reporting issuers. The Association strongly supports the Commission's efforts in this area and has the following recommendations.

1. All issuers, including unseasoned issuers and voluntary filers, should be permitted to use prospectus supplements to identify selling security holders after a registration statement becomes effective.

The Commission proposes that issuers registering resales of securities sold in a private offering be permitted to identify selling security holders after the registration statement becomes effective via a prospectus supplement. The Association strongly favors this proposal. Under the Commission's proposal, however, this option would only be available to seasoned issuers eligible to use Form S-3/F-3 in primary offerings. We believe that voluntary filers as well as unseasoned issuers should be permitted to use prospectus supplements to identify selling security holders or otherwise update selling security holder information after a resale registration statement has become effective. The Association sees no reason to treat voluntary filers and unseasoned issuers differently

---

[28] Section 12(a)(2) explicitly so states.

from seasoned issuers with respect to this point and believes that investors in such entities would not be disadvantaged by making this option available.

The Association also believes that the staff should be willing to commence review of a resale registration statement involving a large number of selling security holders that omits selling security holder information in its entirety from the initial filing, provided that the information is provided to the staff sufficiently in advance of requesting acceleration to permit meaningful review. Information solicited from selling security holders may go stale during any staff review of the registration statement, requiring re-solicitation prior to effectiveness, which is costly and time consuming, and can be confusing to security holders.

2. The Commission should clarify that auditors are among those experts from whom additional consents are not required in connection with a takedown from a shelf registration statement.

In discussing proposed Rule 430B in the Release, the Commission has provided very helpful language clarifying that, while a takedown of a shelf registration statement does establish a new effective date for liability purposes, it does not, by itself, require the filing of additional consents of experts unless new information provided in connection with the takedown itself requires consents. The Association strongly supports the Commission's view on this point and asks that the Commission expand its comments to make explicit that the lack of need for additional consents applies to auditors, as well as other types of experts. The Association believes it would be helpful for the Commission to address that point in the Release directly to prevent future confusion among market participants.

3. The Commission should reconsider the eligibility threshold for automatic shelf registration statements in two years.

The Association strongly supports the Commission's proposal to implement an automatic shelf registration system for WKSIs. The Association recommends that the Commission undertake in the adopting release to reconsider the eligibility for automatic shelf registration in two years. After the Commission, issuers, distribution participants and investors have gained experience under this new registration system, and assuming that concerns whether the new system provides adequate opportunity for underwriters to conduct due diligence investigations have been sufficiently addressed, it may be apparent that the benefits of automatic shelf registration can safely be extended to all seasoned issuers.[29] Experience may also demonstrate that maintaining two distinct shelf registration systems — one for WKSIs, the other for seasoned issuers — is confusing for

---

[29] We note that the Section 408 of the Sarbanes-Oxley Act, which requires the SEC to review each public company's filings no less frequently than once every three years, applies to all public companies, including seasoned issuers that are not WKSIs. This may result in sufficient oversight of periodic reports filed by seasoned issuers that are not WKSIs to warrant consideration of this extension.

market participants. Such a re-evaluation is consistent with the Commission's two stage adoption of the Rule 415 shelf registration system in 1982 and 1983.

4. Certain aspects of automatic shelf registration should be extended to seasoned issuers filing shelf registration statements.

The Association believes that certain elements of automatic shelf registration should be made available to seasoned issuers filing shelf registration statements as part of the initial adoption of these provisions. In particular, any seasoned issuer should be permitted:

- To omit the plan of distribution from the base prospectus and provide it by means other than a post-effective amendment to the registration statement;

- To register classes of securities without allocating between the issuer, issuing subsidiaries and selling security holders, leaving that allocation to be included in a prospectus supplement or incorporated by reference from its Exchange Act reports; and

- To add additional classes of securities and eligible majority-owned subsidiaries after a shelf registration statement becomes effective.

Whether or not an issuer is widely followed by the market seems to have no logical connection to these particular elements of automatic shelf registration. These elements increase an issuer's access to the capital markets, and it is not clear how investors are disadvantaged if the benefits are made available to a broader universe of issuers.

5. Issuers utilizing the pay-as-you-go fee payment system should be permitted to cure inadvertent failures to pay filing fees on time and should also be permitted to pay filing fees at the end of each business day, rather than before a prospectus supplement is filed.

The Commission has proposed that WKSIs using the automatic shelf registration system be permitted to pay filing fees at the time of the offering. The Association strongly supports the pay-as-you-go system but believes that the proposal can be improved in two respects.

Cure Opportunity For Inadvertent Failure to Effect Payment on Time. There should be some protection for issuers if a filing fee is not received by the Commission on time despite a good faith effort by the issuer to make the payment. Such a failure could arise due to malfunction of the Commission's lock box, systemic malfunction in the wire system as a whole or on a regional basis, or inadvertent error on the part of the issuer. A failure to pay the filing fee under the current system would constitute a Section 5 violation, and there is nothing in the proposed pay-as-you-go rules that would lessen this potential impact. Therefore, issuers may choose not to use the pay-as-you-go system for fear that a similarly draconian consequence could arise in the case of a failure to

pay on time that arises either through no fault of the issuer or through inadvertent error.

Ability to Pay Filing Fees At the End of Each Business Day. The Association also recommends that filing fees be permitted to be paid at the end of the business day, based on the aggregate amount of securities sold by an issuer during the course of that day, to accommodate issuers that engage in multiple takedowns of their shelf registration statement during the course of the day or that are uncertain as to the size of their offering until shortly before the prospectus supplement is filed. For instance, in the case of issuers of medium-term notes, prospectus supplements are typically filed for several transactions at the end of the business day. Many of these transactions arise from reverse inquiry, and are thus not anticipated by the issuer and are also typically in precise and unround amounts. Rather than requiring such an issuer to send a separate wire transfer with each prospectus supplement, which would be time consuming and risks overwhelming the Commission's filing fee system, the issuer should be permitted to send one wire covering all of the issuances at the end of the day. In addition, in some cases, the size of an offering fluctuates until pricing, which makes it difficult for issuers to determine the amount of fees that will be owed beforehand. Issuers could, of course, pay in advance on an estimated basis, but this would eliminate a significant benefit of the pay-as-you-go system and would impose an administrative burden on issuers, who would be required to keep track of any under-payments (and may not be able to recover inadvertent over-payments).

6. The Commission should consider updating Rule 176 of the Securities Act to include additional circumstances that should be taken into account in determining whether a person has made a reasonable investigation under Section 11(c) of the Securities Act and should expand Rule 176 to address the reasonable care standard under Section 12(a)(2) of the Securities Act.

The Association believes that the Commission should consider updating Rule 176 under the Securities Act to reflect changes to the Exchange Act reporting process since the rule was adopted in 1982. The Association believes that the following additional items merit inclusion in Rule 176:

- The auditors' internal control attestations pursuant to Section 404 of the Sarbanes-Oxley Act;

- The certifications required by Sections 302 and 906 of the Sarbanes-Oxley Act; and

- Whether the issuer's independent auditor expressed in its report on the issuer's financial statements substantial doubt about the issuer's ability to continue as a going concern.

If, for example, a CEO and CFO provide the certifications required by Section 302 and 906, then the conduct of the person in question should be viewed in a very different light for purposes of determining the reasonableness of their investigation for purposes of Section 11(c) of the Securities Act than if either officer were unable to provide those certifications.

The Association also believes that the Commission should amend Rule 176 so that it also applies to the reasonable care standard under Section 12(a)(2) of the Securities Act. The Association believes that the factors relevant to determining whether the reasonable investigation standard of care has been met under Section 11(c) of the Securities Act are also relevant to determining whether the reasonable care standard has been met under Section 12(a)(2) of the Securities Act. The proposed imposition of Section 12(a)(2) liability on free writing prospectuses may expose underwriters to greater potential liability if the difference between these standards remains unexplained.[30] The Commission proposed in the 1998 Release to extend Rule 176 to the reasonable care standard of Section 12(a)(2), noting that any practices or factors that could be considered favorably under Section 11 also should be considered as favorable under Section 12(a)(2).[31] We agree with this statement, and believe that it is no less true now than it was in 1998. However, by not reintroducing this proposal (and not explaining the reasons for declining to do so), we fear that this can be interpreted to mean that the Commission now believes that Rule 176's factors are inapplicable to the reasonable care standard of Rule 12(a)(2). Particularly in light of the Commission's proposal to impose Section 12(a)(2) liability on free writing prospectuses, we believe that it is extremely important that market participants be provided with additional clarity as to the parameters of the reasonable care defense under Section 12(a)(2).

7. The existence of unresolved comments from the Commission should not prevent the filing of an automatic shelf registration statement or post-effective amendment to an automatic shelf registration statement.

One of the principal attractions of the automatic shelf registration system is that registration statements and post-effective amendments to registration statements will become automatically effective upon filing for qualified issuers. An issuer will obviously need to consider any unresolved comments it has with the staff of the Commission before filing a shelf registration statement or post-effective amendment that will become effective automatically. In response to the Commission's solicitation of comments at pages 169-70 of the Release, the Association strongly disagrees with the suggestion that the existence of unresolved comments should prevent the filing of an automatic shelf

---

[30] We acknowledge the Commission's position, as stated in the 1998 Release, that Section 11 requires a more thorough investigation than Section 12(a)(2). However, we note that the promised explanation of this distinction in final regulation was never provided since these proposals were not adopted, and we are not aware of any staff or Commission discussion of this issue since the 1998 Release.

[31] See 1998 Release at footnote 460 and accompanying text.

registration statement or post-effective amendment thereto. The Association believes that if any outstanding comments are not material to investors, or are material but have been publicly disclosed to investors, such comments should not preclude the issuer from filing an automatic shelf registration statement or post-effective amendment thereto. In either of those circumstances, investors are not disadvantaged. However, restricting an issuer's access to the capital markets while open comments are resolved (which, even when the comments are immaterial, can be time consuming) would be extraordinarily burdensome to issuers and defeat the Commission's stated goal of increasing issuers' ability to take advantage of favorable market conditions. We believe that these determinations should be the province of issuers and their counsel, as is currently the case. Issuers and their counsel (and underwriters and their counsel) can best determine whether unresolved comments preclude accessing the capital markets. Of course, should the staff feel particularly strongly about a comment, it could indicate as part of delivery of the comment that it would consider it inappropriate for the issuer to file a new automatic shelf registration or post-effective amendment thereto, or otherwise utilize an effective registration statement, until the comment is resolved.

8. The Association believes issuers should be protected from liability in private causes of action that are based on disclosure of unresolved comments and does not believe disclosure of resolved comments is necessary or advisable.

<u>*Need for a Safe Harbor.*</u> The Commission proposes that issuers be required to disclose material unresolved staff comments that have remained outstanding for more than six months in their annual reports on Forms 10-K or 20-F. Issuers would need to disclose the comments in sufficient detail so that investors could understand their substance, but issuers would also be permitted to include their position regarding any unresolved comments. We believe that if unresolved material comments exist, an issuer will feel compelled to include their position regarding the comments in the Form 10-K, if only to justify to investors why the comment has remained unresolved for this period of time.

While we do not disagree that the presence of unresolved material staff comments that have been outstanding for more than six months merits disclosure to investors, we believe that the disclosure of these comments could expose issuers to additional material liability. Although comment letters and issuer responses will soon be available on EDGAR, correspondence between the SEC and an issuer does not provide investors with a private cause of action under the liability provisions of the Securities Act or the Exchange Act. However, if an issuer discloses the comments in its Form 10-K, this disclosure could be sought to be used against the issuer by plaintiffs' lawyers should the issuer's stock price subsequently fall, even if the price decline bore no relation to the unresolved staff comment. To the extent the issuer includes in the disclosure its position with regard to the unresolved comment, this may provide additional potential bases for allegations of liability by subsequent litigants. If, as would typically be the case, the Form 10-K were to be incorporated by reference into registration statement, then this disclosure would carry liability under Section 11 and 12(a)(2) of the

Securities Act. We believe that without safe harbor protection for these statements, issuers will find themselves compelled to capitulate to staff comments as the six-month deadline nears rather than risk the liability that forced inclusion of the unresolved comment in the Form 10-K could create. We therefore propose that a safe harbor protecting issuers from liability based on the disclosure of material undisclosed comments is warranted. The safe harbor should provide that, in any private action based on an untrue statement of a material fact or omission of a material fact necessary to make a statement not misleading, an issuer will not be liable with respect to disclosure of unresolved comments received from the Commission required by Item 1B of Form 10-K or of the issuer's position with respect to those comments.

Miscellaneous Issues Regarding Staff Comments. In response to the Commission's query regarding whether issuers should be required to disclose resolved staff comments in their annual reports, the Association does not believe that such disclosure is advisable. The Association also does not believe that disclosure of resolved staff comments is necessary. If the comments have been resolved, the comments have either been reflected in the issuer's filings, in which case investors have received the benefit of the comments; are of a type that the Commission has concluded can be reflected in future filings, in which case the Commission has determined investors are not in immediate need of the benefit of the comments; or are of a type that the issuer has been able to persuade the Commission would not be helpful to investors.

E. The Association strongly supports the Commission's access equals delivery model.

The Association strongly supports the Commission's proposal of an access equals delivery model in the context of final prospectuses. The Commission's proposal illustrates the ways in which technological developments can be incorporated into the securities regulatory process to make the process more efficient while continuing to protect investors. Another example of the way in which technology has altered the capital-raising process is the current market practice of issuers and underwriters satisfying their obligation to deliver preliminary prospectuses by sending them to investors electronically. While the Commission's access equals delivery model obviously addresses a different point, the Association believes that it would be helpful for the Commission to confirm that the practice of distributing preliminary prospectuses electronically is acceptable, provided the practice does not extend to transactions covered by Rule 15c2-8(b) of the Exchange Act and hard copies are provided upon request in the same fashion as is required by Rule 15c2-8(c).

With respect to the proposed access equals delivery model itself, the Association thinks that market participants should have the right to cure any failure on the part of an issuer to file a final prospectus as required by Rule 424 of the Securities Act or on the part of an underwriter or other distribution participant to provide written confirmation of a sale as required by proposed Rule 173. Given the consequences of such failures, the Association

believes that it is important to protect issuers and other market participants from inadvertent and unintentional non-compliance with those rules.

The Association further notes that the access equals delivery model is also relevant to the municipal securities market, for the same reasons the concept is relevant to the registered market. As in the registered market, an access equals delivery model in the municipal securities market would decrease transaction costs, permit a shorter settlement cycle and ultimately lead to greater access to electronic documents. Accordingly, the Association urges the Municipal Securities Rulemaking Board to consider conforming its rules accordingly if these rules are adopted.

III. DRAFTING AND TECHNICAL COMMENTS

In addition to the comments raised above, the Association offers the following technical and drafting comments on the Release.

- In footnote 270 on pages 140-41, we recommend adding the phrase "in the aggregate" immediately prior to the phrase "a de minimis." We believe without this change, this footnote would reflect a change in the staff's position as expressed in interpretation I.59 of the July 1997 version of the Telephone Interpretation Manual.

- In proposed Rules 168-69:

    - In sub-paragraph (b)(3) of Rule 168, add "by or" immediately preceding "on behalf" and add "of the issuer" immediately preceding "authorizes," with corresponding changes to Rule 169(b)(2).

    - In sub-paragraph (d)(2) of Rule 168, change the last word from "disclosures" to "disclosure practices," with a corresponding change to Rule 169(d)(2).

    - Revise Rule 169(d)(1) by deleting "this type" and replacing it with "the type described in this section" to conform to Rule 168(d)(1).

- The proposed definition of WKSI in Rule 405 contains several inaccurate cross-references:

    - The reference to "paragraph (1)(i)(A)" in the fourth line of paragraph (1)(i) of the definition should read "paragraph (1)(ii)(B)."

    - The reference to "or I.D. of Form S-3" in the fourth line of paragraph (1)(i) of the definition should read "or I.C. of Form S-3." General Instruction I.C. of Form S-3 addresses eligibility requirements of majority-owned subsidiaries. If General Instruction I.C. is not included, then wholly-owned subsidiary registrants that issue investment grade securities would not be eligible to be WKSIs.

    - The reference to "paragraph (1)(i)(B)" in the fifth line of paragraph (1)(i) of the definition should read "paragraph (1)(ii)(B)."

- The reference to "or I.C. of Form F-3" in the fifth line of paragraph (1)(i) of the definition should read "or I.A.5. of Form F-3." This change effects the same substantive correction relating to wholly-owned subsidiary registrants as noted for Form S-3 above.

In addition, the proposed definition of WKSI contains seven numbered sub-paragraphs setting forth requirements for WKSI status. As drafted, these apply conjunctively — the use of the word "and" at the end of sub-paragraph (6) of the proposed definition operates to require compliance with all seven sub-paragraphs in order to meet the definition of a WKSI. We believe that the Commission intends the definition to require compliance with either sub-paragraph (1) or sub-paragraph (2) and compliance with each of sub-paragraphs (3), (4), (5), (6) and (7).

- The definitions of "free writing prospectus" and "written communication" in proposed Rule 405 contain the phrase "except as otherwise specifically provided or the context otherwise requires." The Association believes that this phrase introduces an unnecessary level of subjectivity into the definitions and should be removed.

- In the proposed amendments to the Instructions to Rule 412 on page 304, delete the reference to "and (e)" in Item 25.c. and delete the "s" from "paragraphs" in same item.

- In the proposed revisions to Rule 412(a), the use of the word "may" in the penultimate line is confusing. We suggest that it be replaced with the phrase "shall be deemed", as in third line of that paragraph.

- In proposed Rule 412(d), we suggest adding the phrase "that document" in the second line following "part of" and preceding the comma.

- In proposed Rule 433(b), we recommend adding the phrase ", subject to the provisions of Rule 164(b)-(c)" following "paragraphs (c) — (g) of this Section" in the paragraph. We believe this change is necessary to make clear that the relief afforded by those paragraphs of Rule 164 also preserves the issuer's ability to rely upon Rule 433, including the references in Rule 433(a) to Sections 2(a)(10) and 5(b)(2) of the Securities Act, which do not appear in Rule 164.

- The Association notes that the Commission may wish to consider seeking amendments to NASD Rule 2210(d)(8) to clarify that an electronic road show (or any other free writing prospectus) that is not filed with the Commission in accordance with the relevant provisions of the Release as enacted is not subject to the filing, record retention and other requirements of NASD Rule 2210.

* * * * * * * * * *

The Association appreciates this opportunity to provide its views to the Commission in connection with this important project. If it would be helpful to the Commission and its staff, we would be happy to make Association staff and member firm personnel available to meet and discuss any of the points raised in this letter. Please address any questions or requests for additional information to Sarah M. Starkweather of the Association at 646-637-9292 or David B.H. Martin or Bruce C. Bennett of Covington & Burling, the Association's special outside counsel in connection with this project, at 202-662-5128 or 212-841-1060, respectively.

Very truly yours,

THE BOND MARKET ASSOCIATION

By: /S/ SARAH M. STARKWEATHER
Sarah M. Starkweather
Regulatory Counsel

cc: The Honorable William H. Donaldson, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmidt, Commissioner
Alan L. Beller, Director, Division of Corporation Finance
Amy M. Starr, Senior Special Counsel, Division of Corporation Finance
Consuelo Hitchcock, Special Counsel, Division of Corporation Finance
Andrew D. Thorpe, Special Counsel, Division of Corporation Finance
Daniel Horwood, Special Counsel, Division of Corporation Finance
Anne Nguyen, Staff Attorney, Division of Corporation Finance

RULE 134

Set forth below are examples of statements that the Association believes should be permitted in a Rule 134 Notice:

Anticipated pricing information such as the anticipated spread over benchmark securities:

> "100-125 basis points over the [identify the comparable Treasury Security]"

Put and call features, including timing and prices.

> "The notes will not be redeemable."
>
> "The notes will not be callable by the issuer for the first five years after issuance and thereafter at prices declining to par."
>
> "The note will be puttable at par at years 3,5 and 7."

Whether the securities are guaranteed, and the identity of any guarantor.

> "The notes will be guaranteed by substantially all of the operating subsidiaries of the issuer."

The ranking of the securities.

> "The notes will be the senior unsecured obligations of the issuer."
>
> "The notes will be subordinated to senior unsecured obligations of the issuer."

Whether the securities are secured, and the general nature of any collateral.

> "The notes will be unsecured."
>
> "The notes will be secured by substantially all of the accounts receivable of the issuer and its consolidated subsidiaries."

Identification of covenants and change of control features.

> "
> - Incurrence of additional indebtedness or issuance of redeemable preferred stock;
> - Payment of dividends, making of distributions in respect of its capital stock or making certain other restricted payments or investments;
> - Incurring liens;
> - Selling assets;

- Incurring restrictions on the ability of its subsidiaries to pay dividends or to make other payments to its parent;
- Entering into transactions with affiliates;
- Entering into sale/leaseback transactions; and consolidating, merging, selling or otherwise disposing of all or substantially all of its assets.
- Maintenance of a minimum consolidated net worth of at least $[___];
- Maintenance of consolidated EBITDA of at least $[____]; and not permitting its ratio of consolidated senior secured indebtedness to consolidated EBITDA to be greater than [___];
- Obligation to consummate and offer to repurchase notes at [101% of par] upon a change of control."