CLEARY GOTTLIEB STEEN & HAMILTON LLP

ONE LIBERTY PLAZA
NEW YORK, NY 10006-1470
(212) 225-2000
FACSIMILE (212) 225-3999
WWW.CLEARYGOTTLIEB.COM

WASHINGTON, DC • PARIS • BRUSSELS
LONDON • MOSCOW • FRANKFURT • COLOGNE
ROME • MILAN • HONG KONG • TOKYO

January 31, 2005

Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Stop 6-9
Washington, D.C. 20549

Re: SEC Release Regarding Securities Act Reform Proposals (File No. S7-38-04)

Dear Mr. Katz:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the Commission's proposals (the "Proposals") to make significant changes to the securities registration and offering rules under the Securities Act of 1933, as amended (the "Securities Act").[1] We appreciate the opportunity to participate in this important undertaking and intend our comments to be constructive to the Commission in its efforts to make significant changes to the registered securities offering process by building on the existing integrated disclosure and shelf registration systems.

We applaud the Commission and its staff for the creativity and care demonstrated in its approach to this endeavor, as well as for the enormous commitment of its time, resources and energy this effort required. Although the Proposals represent the culmination of the efforts of numerous individuals at the Commission over the years, we extend special recognition to the skillful leadership of those who have crafted the current Proposals, which carry forward and refine the advantageous elements of previous efforts at Securities Act reform, while avoiding the pitfalls that have derailed prior proposals.

We strongly support the Proposals as a whole, and believe those reforms regarding automatic shelf registration and other shelf registration reforms as well as the general liberalization of the communications rules applicable to registered offerings will be particularly successful in reshaping the securities offering process.

---

1 *See* SEC Release Nos. 33-8501; 34-50624; IC-26649 (Nov. 3, 2004) (the "Release").

We commend the Commission's disciplined approach of making more incremental changes than those proposed in the Commission's last set of proposals to reform the securities offering process, often referred to as the "Aircraft Carrier" proposals.[2] Although the Proposals will have far-reaching effects on the manner and timing of capital formation, the Commission's pragmatic approach will ensure limited confusion and cost in the marketplace as the various proposals will largely result in managed integration into the current practices of market participants. More importantly, the Proposals will increase the efficiency of the U.S. capital markets without sacrificing investor protection.

In this letter, we have set forth certain suggestions that are intended to aid the Commission in ensuring that the objectives set forth in the Release are realized. These suggestions include both broader, conceptual modifications to the Proposals as well as technical corrections and changes to the Proposals as set forth in the Release.

I. CATEGORIZATION OF ISSUERS

A. Well-Known Seasoned Issuers

The cornerstone of the SEC's proposed reforms would be the creation of a new category of issuers referred to as "well-known seasoned issuers," or "WKSIs." Under the proposal, WKSIs would generally be companies that (i) are eligible to register a primary offering of securities on Form S-3 or F-3; and (ii) either (1) have a public common equity float (*i.e.*, outstanding common stock held by non-affiliates) of at least $700 million or (2) have issued at least $1 billion aggregate amount of registered debt securities in the preceding three years, in which case such issuers would be WKSIs only with respect to debt securities. In addition, a majority-owned subsidiary of a WKSI may also qualify for WKSI status if certain conditions are met.

1. Rights Offerings by Foreign Private Issuers

We strongly support the introduction of the WKSI category of issuers as well as the criteria proposed for determining WKSI status. Nonetheless, we do not believe the criteria for WKSI status as proposed will significantly increase registered rights offerings by non-U.S. issuers, as many rights offerings are conducted by foreign private issuers in financial difficulty that will not meet the $700 million public float test due to recent declines in their stock price. In order to achieve the Commission's goal of encouraging more rights offerings by foreign private issuers to be conducted on a registered basis, and thereby allowing more U.S. investors to participate in such offerings, we believe WKSI status for foreign private issuer rights offerings should be based on whether such issuer qualified as a WKSI as of the last business day of its second fiscal quarter prior to the date of filing its Form 20-F within any of the past three years. This proposed exception would only apply to rights offerings and related standby underwritings, and would not extend to any other offerings by an issuer that seek to raise new capital.[3]

---

[2] *See* SEC Release Nos. 33-7606; 34-40632; IC-23519 (Nov. 3, 1998) (the "Aircraft Carrier Release").

[3] Rights offerings are typically undertaken with concurrent standby underwritings and both offerings are registered under the same registration statement.

2. *WKSI Status for Schedule B Issuers*

We believe it is appropriate, and consistent with the intent of the Proposals, to expand those issuers that are eligible for WKSI status to include any Schedule B issuer meeting the debt issuance criteria for WKSI status. A Schedule B issuer that satisfies the debt issuance requirements for WKSI status will have sufficient coverage in the marketplace to justify its ability to take advantage of the benefits conferred by WKSI status without sacrificing investor protection.

3. *WKSI Definition*

a. Inclusion of Non-Convertible, Non-Participating Preferred Securities for $1 Billion Debt Threshold

As proposed, only sales of registered debt would be applicable in determining satisfaction of the $1 billion debt threshold under the WKSI definition. We believe this criterion is too narrow. If an issuer would otherwise satisfy the WKSI requirements, this criterion should be expanded to include non-participating preferred stock. The Commission has recognized, in what we believe is the analogous context of Regulation S under the Securities Act, that the market treats non-participating preferred stock like debt rather than equity.[4] To be treated as a debt security for purposes of Regulation S, preferred stock must be non-convertible capital stock of the issuer, the holders of which are entitled to a preference in the payment of dividends and in a distribution of assets upon the winding up of the issuer but are not entitled to share in any residual earnings or assets of the issuer.

b. Inclusion of Participating Preferred Stock of Certain Foreign Private Issuers for $700 Million Equity Threshold

The proposed definition of WKSI would count only common equity for purposes of determining whether an issuer meets the $700 million public float requirement. The Commission states in the Release that the purpose of the WKSI definition is to determine which issuers are among "the most widely followed in the marketplace." In certain countries, participating preferred stock rather than common stock is the primary publicly traded equity security, either for legal reasons or as a result of market custom. For issuers in these jurisdictions, the market value of an issuer's participating preferred stock should be used for determining whether the $700 million threshold is met because the participating preferred stock is the equity security of that issuer most widely followed in the marketplace. Commission Chairman William Donaldson recently acknowledged the Commission's commitment to a "level playing field for all its issuers, foreign and domestic alike," and recognized that certain regulations applicable to foreign private issuers can "place an unnecessary burden on issuers, firms and investors."[5] Consistent with this position, we believe the $700 million public float

---

[4] *See* SEC Release Nos. 33-6863; 34-27942; IC-17458 (Apr. 24, 1990) (providing that non-participating preferred stock is included in the measurement of U.S. market interest in debt for purposes of Regulation S); *see also* SEC Release Nos. 33-7505; 34-39668 (Feb. 17, 1998) (providing that non-participating preferred stock would continue to be treated in the same manner as debt securities for purposes of the Regulation S safe harbors).

[5] Chairman William H. Donaldson, U.S. Capital Markets in the Post-Sarbanes-Oxley World: Why Our Markets Should Matter to Foreign Issuers (Jan. 25, 2005).

criteria should be modified to refer to "common equity, or participating preferred stock that is a foreign private issuer's primary publicly traded equity security based on public float."[6]

c. Technical Corrections

(i) Redundancy in Definition

WKSI status requires, among other criteria, that an issuer be timely in its filings under the Securities Exchange Act of 1934, as amended ("the Exchange Act"), and eligible for primary offerings on Form S-3 or F-3. The requirement to be timely in an issuer's Exchange Act filings is already a condition to eligibility to use Form S-3 or F-3 and is thus redundant and should be eliminated from the proposed rule.

(ii) Calculation of the Market Value of Outstanding Equity

The WKSI definition is based on the "market value of [the registrant's] outstanding common equity held by non-affiliates." The description of the market value of a registrant's equity under Form F-3, however, is based on the "aggregate market value worldwide of the voting and non-voting common equity held by non-affiliates of the registrant." In addition, the calculation in Form S-3 contains the same provision as in Form F-3 but omits the term "worldwide." These three provisions, which we believe are intended to apply the same test, all use different formulations. We suggest that the Commission conform all three definitions by adopting the formulation articulated in Form F-3—which we believe to be the clearest of the three—so these calculations are performed uniformly.

(iii) Location of Majority-Owned Subsidiary Criterion

As drafted, WKSI eligibility requires that an issuer meet *all* of the criteria set forth in subsections (1) through (7) of the proposed definition of "well-known seasoned issuer." We believe the inclusion in this list of the provision for majority-owned subsidiaries in subsection (2) was inadvertent as it creates a circular definition that would require *every* WKSI to be a majority-owned subsidiary of a WKSI. We suggest modifying the definition by removing this clause from the list of criteria in subsection (1) through (7) and adding it as its own, disjunctive section.

B. Ineligible Issuers

1. No Retroactive Application of Disqualification Criteria

Under the Proposals, an issuer would not be able to qualify for WKSI status or avail itself of the benefits of a number of the Release's communications proposals if any of the ineligibility criteria are applicable to the issuer. The retrospective application of the so-called "bad boy" disqualification provisions will unfairly burden issuers. In particular, we note that the disqualification for entry into a settlement during the preceding three years by an issuer or any of

[6] Although we do not believe this to be the case, if the Commission is concerned that participating preferred stock may not trade in the same manner or have as broad a market following as common stock, it could require that participating preferred stock meet a certain worldwide ADTV threshold—such as that used in Rules 101(c)(1) and 101(d)(1) of Regulation M—in order to be used for determining WKSI status.

its subsidiaries with any government agency involving allegations of violations of federal securities laws would disqualify the parent companies of all the largest broker-dealers, all of which have entered into settlements with government agencies in the past three years.[7] Although the Proposals expressly provide the Commission with the authority to grant waivers from ineligibility, the Release does not provide any guidance as to the circumstances under which the Commission would be inclined to grant them. Today, issuers would generally negotiate a waiver or exemption for the "collateral" consequences of a settlement, which going forward will likely include triggering the ineligible issuer disqualification. Without the benefit of hindsight in this case, however, we believe the more appropriate approach would be to apply the "bad boy" disqualifications prospectively so that issuers can factor the impact of such a disqualification into their settlement negotiations.

2. Ineligible Issuer Status Should Not Bar Issuers from Use of Communications Reform Proposals

As noted above, under the Proposals issuers would be prohibited from using the communications proposals if they fall within any of the ineligible issuer categories. We believe the effect of this prohibition would undermine a principal goal of the Proposals: to increase the amount and availability of ongoing issuer communications. By limiting an issuer's ability to communicate, this prohibition would essentially punish investors for an issuer's mistakes by reducing investor access to information. Instead, the ineligible issuer category should be directed solely at preventing ineligible issuers from availing themselves of the proposed automatic shelf registration process. This purpose is understandable. Disqualification from use of the proposed communications reforms, however, is unnecessary and, in the absence of demonstrated abuse, unwarranted. In fact, the better approach, even for "bad boy" issuers, would seem to be to encourage additional disclosure to the market, not prohibit it. Accordingly, we propose that an issuer's status as ineligible should have no bearing on its ability to avail itself of the proposed communications reforms.

II. LIBERALIZATION OF COMMUNICATIONS PROPOSALS

The Commission acknowledges in the Release that the existing regulatory scheme unnecessarily hinders legitimate communications that would be helpful to investors and provides different classes of investors with unequal access to issuer information. In addition, the Commission recognizes in the Release that the current distinction between permissible communications and illegal offers violating Section 5 of the Securities Act is unclear as each situation requires a "facts and circumstances" analysis. This has resulted in part because the term "offer" has been interpreted broadly and includes "the publication of information and statements, and publicity efforts, made in advance of a proposed financing which have the effect of conditioning the public mind or arousing public interest in the issuer or in its securities . . . ."[8]

---

[7] *See, e.g.*, SEC Litigation Release No. 18438 (October 31, 2003) (regarding global settlement of SEC enforcement actions alleging undue influence of investment banking interests on securities research at Bear, Stearns & Co. Inc., J.P. Morgan Securities Inc., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, U.S. Bancorp Piper Jaffray, Inc., UBS Securities LLC (f/k/a UBS Warburg LLC), Goldman, Sachs & Co., Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.), Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation) and Morgan Stanley & Co. Incorporated).

[8] *Guidelines for the Release of Information by Issuers Whose Securities are in Registration*, SEC Release No. 33-5180 (Aug. 16, 1971); *see also* Section 2(a)(3) of the Securities Act (defining "offer" as any attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value).

To reduce this uncertainty and promote the dissemination of more information regarding offerings to all investors, the Commission proposes in the Release to liberalize many of the current restrictions on communications prior to and during offerings. We generally are supportive of these proposed communications reforms.

A. Expansion of Factual Business Information Safe Harbor

We support the Commission's proposal to provide a safe harbor for factual business communications (which is largely a codification of existing guidance) but are concerned there will be uncertainty as to whether certain information disclosed by an issuer qualifies for this safe harbor due to the exclusive list of categories into which such information must be categorized to qualify for the safe harbor. For example, it is not clear from the Release whether management's explanations of its beliefs as to causes of historical results would satisfy the safe harbor's requirements because they may not be considered "factual." We believe the Commission intends to encourage disclosure by all issuers of historical MD&A-type information. Accordingly, we suggest that the definition of factual business information in Rules 168 and 169 be expanded to include any information contemplated by the Commission's rules regarding Management's Discussion and Analysis of Financial Condition and Results of Operations—*i.e.*, information required by Item 303 of Regulation S-K—that is not forward looking.

B. 30-Day Bright Line Safe Harbor

1. Clarification of "Scheme to Evade" Language

The Commission has proposed new Rule 163A, which would provide that a communication made by or on behalf of any issuer more than 30 days prior to the filing of a registration statement would not constitute an "offer" in violation of Section 5, provided that reasonable steps are taken by the issuer to ensure that the communication is not redistributed or republished during the 30-day period prior to filing. As proposed, this safe harbor contains an exception for any communication that, although in technical compliance with the safe harbor, is part of a plan or scheme to evade the requirements of Section 5. We believe the Commission should provide further guidance in the release adopting the final rules (the "Adopting Release") as to the types of circumstances about which it is concerned. For example, the Commission could clarify that, in a situation where the chief executive officer of an issuer that had already selected a lead underwriter for an initial public offering arranged, but did not pay, for the publication of an interview during which no mention of the contemplated offering was made and the issuer then filed a registration statement 31 days after the publication of that interview, the publication would qualify for the safe harbor.

2. Information Posted on an Issuer's Web Site

The proposed Rule 163A safe harbor would apply to information that is posted on an issuer's web site more than 30 days prior to the filing of a registration statement if such information is not further distributed or published during the 30 days before that filing. We suggest the Commission clarify that information on an issuer's web site prior to the 30-day period before filing that is not updated and that remains on the web site in exactly the same format, style and location (except for relocating to a less prominent location, consistent with the

issuer's past practice) throughout the duration of the 30-day period would not constitute a republication of that information. The treatment of such information on an issuer's web site should be analogous to the Commission's treatment of historical issuer information that is properly identified as such and that is segregated to a separate section of the issuer's web site in the context of proposed Rule 433. The Commission states in the Release that the exclusion in proposed Rule 433 for historical archived information would cover information on an issuer's web site that could be demonstrated to be previously published (*e.g.*, by being dated). We suggest the Commission adopt similar treatment for historical web site information in the context of the applicability of the proposed Rule 163A safe harbor.

3. Reference to "an Offering"

Proposed Rule 163A(a) states that "any communication made by or on behalf of an issuer more than 30 days before the filing of the registration statement that does not reference a securities offering" shall not constitute an offer for purposes of Section 5(c). By using the term "a securities offering," proposed Rule 163A suggests that in order to avail itself of the safe harbor an issuer cannot reference any securities offering, including, for example, an unrelated and contemporaneous (or previous) private placement, even if the reference falls within Rule 135(c) or is made to comply with Rule 155. Although we believe the intention of this provision in proposed Rule 163A is to preclude reliance on this safe harbor in connection with statements that reference the contemplated registered offering, we believe the Commission should clarify this in the adopted Rule 163A or in the Adopting Release.

4. Public Responses by Offering Participants

The proposed Rule 163A safe harbor would only be available for communications made by or on behalf of an issuer and would not extend to communications made by an underwriter. If, for example, the credibility or reputation of a potential offering participant were publicly impugned, the offering participant would not be able to respond to such criticism during the 30 days prior to filing of the registration statement without potentially violating Section 5. We believe it is important that potential offering participants who maintain relationships with issuers are able to preserve their right to respond to public statements by third parties that may implicate them. We suggest that the Commission consider expanding the scope of the 30-day safe harbor to include offering participants who have a previously established relationship with an issuer, so that they may make public comments regarding aspects of their relationship with the issuer more than 30 days prior to the filing of a registration statement by the issuer, provided that such communications make no reference to the offering.

5. Technical Clarification Regarding Rule 163A Safe Harbor

The Release indicates that permissible communications made by issuers outside the 30-day period in proposed Rule 163A would not constitute an "offer" for purposes of Section 5. The Commission does not, however, exclude such communications from the definition of a "prospectus" under Section 2(a)(10) of the Securities Act. As a result, such communications could result in Section 12(a)(2) liability, even if not made as part of a prospectus or a free writing prospectus (a "FWP"). In comparison, proposed Rules 138 and 139 as well as proposed Rules 168 and 169 specifically exclude the release of research reports and

permissible factual business and forward-looking information, respectively, from the definition of "prospectus" under Section 2(a)(10).

As a threshold matter, the cost in diminished communications by issuers concerned about potential liability, we believe, will greatly outweigh the benefit to investors of this heightened protection before a registration statement is filed. By operation, the 30-day requirement built into the safe harbor will also largely, if not entirely, eliminate the potential impact on the market for an issuer's securities as any communication will likely become stale or inaccurate by the time of effectiveness. In practice, WKSIs and seasoned issuers are also likely to already have filed shelf registration statements, leaving this safe harbor to be used principally by non-reporting and unseasoned issuers. As a result, the Commission will also have an opportunity to review the registration statements filed by these issuers and require any disclosure to be updated or revised to address any questions surrounding prior communications. In addition, we request that the Commission clarify that to the extent that these communications are made orally, such communications do not constitute oral statements for purposes of Section 12(a)(2).

C. Rule 134

1. Expansion of Scope of Safe Harbor

The Proposals contemplate expansion of the scope of Rule 134, which provides a safe harbor from the gun-jumping provisions for limited public notices about an offering made after an issuer files its registration statement. The Proposals would allow additional information to fall within this safe harbor, but we believe the Commission should consider permitting additional terms that are similar in nature and scope to those proposed in the Release. For example, we recommend that the Commission permit a Rule 134 notice to include (i) proposed use of proceeds from the registered offering; (ii) the number of years the issuer has been in operation; (iii) whether the offering includes an over-allotment option; (iv) whether the offering is being underwritten on a firm commitment or best efforts basis; (v) the CUSIP number or other security identification information; (vi) if the security being offered is a fixed income security, the spread to Treasury securities; and (vii) any other terms similar to maturity, such as conversion rights, call provisions, put options and redemption rights. It is our view that these terms are similar in nature to those that are currently permitted by Rule 134 as well as those that the Commission proposes to add in the Release, and the inclusion of such additional items would allow for issuers to provide information that is useful to potential investors in informing them about the existence of the offering.

2. Delivery of Prospectus in Connection with a Rule 134 Notice

In order to increase the use of information contained in a Rule 134 notice as well as the efficiency with which such information is distributed to investors, the Commission should allow issuers to satisfy the requirement to deliver a statutory prospectus in connection with a Rule 134 notice by supplying to investors the URL address where such a statutory prospectus may be obtained in lieu of physical delivery of such prospectus. This approach would be consistent with the "access equals delivery" approach that is proposed in the Release for final prospectus delivery under proposed Rule 172 as well as an issuer's most recent statutory prospectus under proposed Rule 433(b)(1)(i)(A).

3. Clarification on Use in Connection with an IPO

It is not clear that issuers conducting an initial public offering would be able to use Rule 134 unless a statutory prospectus precedes or accompanies a Rule 134 notice. It is our understanding that the Commission did not intend for the price range requirement to apply in this context, given that price information is not currently required in a Rule 134 notice for an initial public offering and may not be available in the case of all uses of a Rule 134 notice, such as an e-mail requesting potential investors to note the date for a road show. We request that the Commission confirm there is no such price range requirement in this context.

We do note, however, that the price range requirement would continue to apply in the context of an initial public offering where the issuer is relying on proposed Rule 134(d) to communicate a conditional offer to buy a security and that a Rule 134(d) communication must be accompanied by a preliminary prospectus that includes a price range.

4. Applicability of Wit Capital Corp. Line of No-Action Letters

In light of the Release's proposed changes to Rule 134, we believe it would be helpful for the Commission to confirm in the Adopting Release that the *Wit Capital Corp.*[9] and *W.R. Hambrecht & Co.*[10] line of no-action letters relating to the conditional offer regime in connection with Rule 134(d) will continue to reflect the views of the staff of the Commission's Division of Corporation Finance, in connection with both electronic and non-electronic offerings.

D. Rule 137, 138 and 139 Safe Harbors

1. Definition of Research Report

Currently, Securities Act Rules 137, 138 and 139 provide certain safe harbors with respect to the "publication or distribution" of "information, opinions or recommendations" (such rules collectively, the "communication safe harbors"). In an effort to add clarity as to the scope of the communication safe harbors, the Commission is proposing to adopt a definition of "research report" and to modify the communication safe harbors so that they refer expressly to the publication or distribution of "research reports." For consistency, the proposed definition would be based on the definition of "research report" set forth in Regulation AC, but would also include "broadcasts" and "graphic communications." Although we understand the Commission's desire to add clarity and maintain consistency with other rules, we believe this proposal will needlessly limit the scope of the communication safe harbors and thus will lessen their utility.

Limiting the scope of the communication safe harbors to the publication or distribution of "research reports" leaves in doubt the treatment of "information, opinions or recommendations" that do not rise to the level of a "research report." Rather than limiting the scope of the current rules by tying them solely to "research reports," we believe they should instead cover all communications, whether in written or oral form, that are provided by broker-

---

[9] *See Wit Capital Corp.* (avail. July 14, 1999); *Wit Capital Corp.* (avail. July 20, 2000).

[10] *See W.R. Hambrecht & Co*. (avail. July 12, 2000).

dealer personnel in the ordinary course of business and that do not relate specifically to the offering at hand.[11] If a definition of "research report" is included for purposes of the rule, it should be used only as an example of one type of ordinary course communication that should be permitted to continue even though the broker-dealer, through its investment banking personnel, is participating in an offering of the subject company's securities.

We believe our suggestion is supported by the Commission's own acknowledgment in the Release that Regulation AC and the communication safe harbors have different purposes.[12] In particular, because Regulation AC is focused on certification requirements with respect to research reports and public appearances, there is a desire to keep the scope of those terms quite limited. On the other hand, because the purpose of the communication safe harbors is to provide a degree of certainty to multi-service broker-dealers so that they may continue to conduct their ordinary course activities and not unnecessarily hamper the flow of information to investors, the scope of permitted communications under the communication safe harbors should be quite broad.[13]

2. Issues Arising as a Result of the Global Research Analyst Settlement

The Commission notes in the Release that the "proposed definition of research report would not include confirmations or account statements that contain rating information provided in accordance with the requirements of the global research analyst settlement." Further, in Note 219 of the Release, the Commission states that it does "not believe that the continued publication of these ratings on trade confirmations and on account statements, as required by the settlement, would raise concerns in that they would be provided in the ordinary course, and as to confirmations, after the sale of the securities." We agree that the inclusion of ratings of the settling firms and independent research providers as required by the global research analyst settlement should not raise concerns. However, stating that such ratings are not included in the proposed definition of "research report" would seem to have the opposite effect since, unless our suggestion to broaden the communication safe harbors to cover all ordinary course communications is adopted, the safe harbors would only address research reports.

---

[11] For purposes of Rules 137, 138 and 139, the Commission proposes to define the term research report to mean "a written communication as defined in Rule 405 (§230.405) that includes an analysis of a security or an issuer and provides information reasonably sufficient upon which to base an investment decision." We believe the safe harbors should apply equally to information provided with respect to a security or an issuer in the ordinary course, even though that information does not necessarily include an "analysis" or "information reasonably sufficient upon which to base an investment decision."

[12] *See* Note 218 of the Release.

[13] The Commission notes that Regulation AC contains a separate definition for "public appearances," but believes that its reference to "broadcasts" in the definition of "research report" obviates the need for a separate "public appearance" definition. We disagree. On the contrary, not all "public appearances" are "broadcast" or transmitted electronically, nor are all oral communications between broker-dealer personnel and investing customers considered "public appearances." *See, e.g.*, the Division of Market Regulation's Responses to Frequently Asked Questions Concerning Regulation AC in which the definition of "public appearance" is deemed to exclude oral communications with less than 15 persons. Accordingly, although we believe adopting a definition of "public appearance" for purposes of the communication safe harbors would be helpful in clarifying the scope of the rules, we do not believe that simply incorporating the Regulation AC definition is sufficient. On the contrary, for the same reasons noted above with respect to the definition of research report, the scope of the definition of "public appearance" for purposes of the communication safe harbors should be much broader than the definition included in Regulation AC and should include all ordinary course oral communications by broker-dealer personnel.

Moreover, we fail to understand why the Commission would be "concerned about the continued inclusion of ratings of . . . independent research provider[s] on the firms' web sites if the conditions to the safe harbors in Rules 137, 138, or 139 were not available to the firm at that time." As we have discussed previously with Commission staff, the global research analyst settlement permits settling firms, under certain circumstances, to post the firms' and independent research providers' ratings on a web site in lieu of providing them on confirmations and account statements. The purpose of the independent research provisions of the global research analyst settlement was to provide investors with access to independently prepared information at a time when they needed it most. Deeming the independent research providers' reports to, effectively, be the same as if they had been prepared by the firm appears to defeat the purpose of this portion of the settlement. Moreover, requiring firms to "take down" or affirmatively suppress the ratings and associated research reports prepared by independent research providers—which would likely continue to be available to investors through other (non-firm) sources—would inevitably signal the market that the firm has been mandated for an offering before such information has been made publicly available by the issuer. Such signaling could, among other things, cause speculators to short the issuer's stock.

Finally, we note that Rule 137 (currently and as proposed to be amended) provides that a broker or dealer relying on the safe harbor may not receive any consideration, directly or indirectly, from any participant in the distribution of the security that is the subject of the registration statement. To the extent that any independent research provider engaged by a settling firm under the global research analyst settlement is a "broker or dealer," the prohibition on receipt of any consideration would appear to bar such independent research provider from relying on the safe harbor with respect to reports on securities for which it is getting paid settlement dollars if the settling firm is a participant in the distribution. Given the mandated nature and purpose of this portion of the settlement, we believe the Commission should clarify that consideration consisting solely of settlement dollars will not preclude independent research providers from relying on the Rule 137 safe harbor.

3. Technical Correction to Rule 139

The Commission states in the Release that the proposed modifications to Rule 139 "would retain the most important element of the 'reasonable regularity' requirement, namely that the report initiating coverage of an issuer not benefit from an exemption under Rule 139." However, the last line of the proposed text of Rule 139(a)(1)(iii) includes the phrase "research reports," implying that the broker or dealer must have published or distributed multiple research reports about the issuer or its securities in order to rely on the safe harbor. We believe the prior publication or distribution of one research report should be sufficient to alleviate any concern that the broker or dealer would be able to rely on Rule 139 to initiate coverage on an issuer or its securities and, accordingly, suggest that the reference be changed to "research report."

4. Expansion of Application of Rules 138 and 139 to All Private Placements

We support the Commission's proposal to expand the safe harbors for research reports that comply with the requirements of Rules 138 or 139 to offshore offerings conducted pursuant to Regulation S and offers under Rule 144A. Nevertheless, we believe that the current restrictions on the use of research reports affect virtually all private offerings. Rules 138 and 139 were originally adopted by the Commission to provide guidance to brokers and dealers as to the

information, opinions and recommendations about securities of an issuer proposing to register securities that can be distributed without these communications constituting offers to sell such securities and thereby resulting in a violation of Section 5.[14] The Commission has stated that allowing a greater number of research reports assists in providing "a continuous flow of essential corporate information into the marketplace."[15] Consistent with this position, we do not believe the extension of the application of the research report safe harbors should be limited to Regulation S and Rule 144A offerings. Rather, the distribution of complying research simply should not constitute general solicitation (or directed selling efforts). We believe the various requirements of Rules 138 and 139, including, for example, to have previously published research on the same types of securities in Rule 138 and the prohibition on initiation of coverage of an issuer or its securities in Rule 139, as well as the recently adopted limitations on conduct by analysts in connection with offerings and analyst interactions with investment bankers, provide sufficient safeguards to justify the conclusion that complying research is not offering oriented.

5. Elimination of Designated Offshore Securities Market Requirement under Rules 138 and 139

Under the Proposals, the availability of Rules 138 and 139(a)(1) to a non-reporting foreign private issuer would be conditioned on the satisfaction of certain conditions of Form F-3. One of these criteria would require that the issuer's securities have traded on a designated offshore securities market, as defined in Regulation S, for 12 months. We do not believe this requirement remains necessary given the purpose of the safe harbors. The safe harbors are intended to permit issuer research during an offering period where there is little risk of that research conditioning the market. The $75 million public float and 12-month trading history requirements will ensure that non-reporting foreign private issuers benefit from sufficient market information and analyst coverage such that research does not condition the market in connection with an offering, regardless of the exchange or securities market on which an issuer's securities trade. Accordingly, we recommend the Commission eliminate the precondition that the issuer's securities have traded on a designated offshore securities market, and instead require only that the issuer's securities have been publicly traded for at least 12 months.

6. Allow Certain Schedule B Issuers to Use Rule 139(a)(1)

We believe it is also appropriate to extend the safe harbor under Rule 139(a)(1) to certain Schedule B issuers. If a Schedule B issuer's debt securities are "investment grade securities," as that term is defined in General Instruction I.B.2. of Form F-3, we believe it is appropriate to treat that Schedule B issuer in the same manner as other eligible issuers for purposes of the safe harbor under Rule 139(a)(1).

E. Clarification that Communications Safe Harbors are Non-Exclusive

Although the nature of a safe harbor implies that it is non-exclusive by operation, we believe it would be helpful if the Commission could confirm in the final rules that attempted compliance with each of these safe harbors does not represent the exclusive means of avoiding a

---

14 *See* SEC Release No. 33-5101 (Nov. 19, 1970).

15 SEC Release Nos. 33-6550; 34-21332 (Sept. 25, 1984).

Section 5 violation. The Commission has included similar clarifying language in a number of safe harbors, such as those in Regulation D, Regulation S, Rule 144A and Rule 155.

F. Elimination of Rule 434

The Commission has requested comment regarding whether Rule 434 should be maintained or eliminated. It is our belief that Rule 434 is rarely used, and we believe the allowance of FWPs as proposed by the Commission will make Rule 434 superfluous. We therefore believe that Rule 434 should be eliminated.

G. Interaction with Regulation FD

Currently, Regulation FD's requirements are inapplicable to disclosures made in connection with certain offerings under the Securities Act. We support the Commission's proposed revisions to Regulation FD that would specifically enumerate the types of communications excluded from its purview. We suggest, however, the Commission avail itself of the opportunity presented by these amendments to Regulation FD to also except from its operation all communications in firmly underwritten registered offerings by selling security holders, which we find indistinguishable in this context from registered primary offerings.

H. Free Writing Prospectuses

1. Definition of "by or on behalf of the issuer"

The term "by or on behalf" of an issuer is already used in existing rules under the Securities Act and would be used in a number of the new rules proposed by the Commission, including proposed Rules 159A, 163(c), 168(b)(3), 169(b)(2), 163A(c) and 433(h)(3). In response to the Release's request for comment, we suggest that the Commission adopt a single definition of this term to ensure consistency in application and understanding. The Commission has modeled the several definitions of this term on the language already used under Rule 146.[16] In connection with an offering document, "prepared by or on behalf of the issuer" under Rule 146 is intended to cover offering documents prepared with the issuer's *knowledge* and *consent*.[17] In the adopting release for Rule 146,[18] the Commission set forth a two-part test to determine whether a document was prepared by or on behalf of the issuer. First, the issuer must authorize the production of the document (either by the issuer's board of directors or its agent or representative). Second, the issuer, its agent or its representative must approve the use of the document. Although the proposed language in each of the different proposed rules is generally uniform, the definitions are not entirely consistent with the definition in Rule 146, as they do not explicitly require authorization for a document's production. Because a clear definition of this term is integral to the Proposals, a single definition of the term "prepared by or on behalf of the issuer" should be adopted covering both preparation and use. We suggest the following language be used for the definition of "prepared by or on behalf of the issuer:" "[information is provided or] [a] communication is made by or on behalf of an issuer if the issuer or an agent or

---

16 *See* Note 93 of the Release.

17 *See* SEC Release No. 33-7418 (Apr. 30, 1997).

18 *See id.*

representative authorizes the production of the [information or] communication and approves the [information or] communication before its provision or use."[19]

In addition, although we believe it is implicit in the concept of approval, we also request that the Commission confirm that a document or communication issued or approved by an issuer's representative contrary to the issuer's policies and procedures would not satisfy the "by or on behalf" test so long as these policies and procedures are reasonably designed to prevent this type of unauthorized action. We suggest, therefore, that the Commission include in the Adopting Release a concept similar to the definition of "person acting on behalf of an issuer" in Rule 101(c) of Regulation FD, which provides that "[a]n officer, director, employee, or agent of an issuer who discloses material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer."

2. Expand Use of Reliance on URL Address in Connection with Use of FWPs

Under proposed Rule 433, the most recent statutory prospectus must accompany or precede a FWP used by a non-reporting or unseasoned issuer. For electronic FWPs, the Proposals would permit non-reporting and unseasoned issuers to provide a URL address in an electronic FWP where the most recent statutory prospectus may be obtained. This would not be permitted for other FWPs used by a non-reporting issuer or unseasoned issuer. We suggest that non-reporting and unseasoned issuers be permitted to satisfy the preliminary prospectus delivery requirement by providing the URL address along with any FWP, regardless of whether it is disseminated electronically or in hard copy. Providing non-reporting and unseasoned issuers this latitude would be consistent with the Release's embrace of recent technological advances as well as its stated position that the FWP and a statutory prospectus do not have be delivered through the same medium.

If the Commission has proposed this requirement out of concern about non-independent media publication of FWPs by non-reporting and unseasoned issuers, we recommend that the Commission prohibit these issuers from using non-independent media publication FWPs, while, at the same time, allowing them to satisfy the delivery requirement for preliminary prospectuses by providing the URL address where the most recent preliminary prospectus may be obtained.

3. Redundancy in Rule 163 and Rule 405

There is a redundancy in the text of proposed Rule 163, which generally exempts communications by WKSIs from Section 5(c) of the Securities Act. Specifically, proposed Rule 163(b)(3)(iii) states that communications in offerings of securities of "ineligible issuers as defined in Rule 405" cannot rely on the exemption in proposed Rule 163(a). Rule 405, however, expressly excludes from the definition of "well-known seasoned issuers" those issuers that are ineligible issuers as also defined in Rule 405. As discussed in Part I.B.2. above, we believe the availability of the proposed liberalized communications provisions should not be determined based on whether an issuer is categorized as an ineligible issuer. Nonetheless, if the Commission decides to retain this eligibility requirement, we suggest eliminating the redundancy of the

[19] As the current proposals regarding this definition acknowledge, it will be necessary to include "information" provided by or on behalf an issuer for purposes of analyzing prospectus liability under proposed Rule 159A.

definition of "well-known seasoned issuer" and proposed Rule 163(b)(3)(iii) by deleting the latter in the final version of Rule 163.

I. Filing Conditions

1. Permit Generic Legends

Proposed Rule 163(b)(1) sets forth specific information that must be included as part of a legend in all FWPs, including issuer-specific information such as the issuer's name and a toll-free phone number to contact the issuer. Although we concur that a FWP should provide its recipient with a means to obtain a prospectus, we are concerned that the specific legend requirements proposed may have the effect of deterring offering participants from using FWPs, because they would require separate preparation in connection with each issuer and thus heighten the risk that FWPs would be disseminated without the appropriate legend. We believe a preferable approach—which would be consistent with the Commission's objectives to liberalize communications in connection with registered offerings and encourage dissemination of FWPs by underwriters—would be to permit a more generic legend that omitted the issuer's name and contact information and instead provided contact information, including a toll-free phone number, of the prospectus delivery department of an underwriter of the registered offering or a web site address where such prospectus could be obtained. We believe this approach would facilitate compliance and the timeliness with which FWPs could be delivered while still providing the same information about the fact that an offering is registered and an equally convenient means for a recipient of a FWP to obtain the statutory prospectus.

2. Allowance of Price-Range Cure

The Proposals do not provide a cure if a FWP is inadvertently distributed to investors in an initial public offering before a price range has been included in the preliminary prospectus. Such an inadvertent distribution would constitute a written offer that violates Section 5 of the Securities Act. We believe it is appropriate to allow issuers and underwriters to cure such an inadvertent distribution by recirculating the FWP along with a preliminary prospectus that includes a price range to each party that received the inadvertently distributed FWP. This change would ensure that investors receive an updated preliminary prospectus with a price range prior to making their investment decision, thereby curing any potential harm resulting from circulation of a written offer without critical price-related information.

3. Party Responsible for Filing a FWP

Proposed Rule 433(d)(1)(i)(D) requires that a FWP prepared by *any* person that contains only a description of the final terms of the issuer's securities must be filed by the issuer. As currently proposed, the rule would force issuers to file FWPs with final terms in cases where the terms of the issuer's securities were published by a ratings agency or newswire service, for example, which we believe imposes an undue burden on issuers. We believe the Commission should narrow this requirement to apply only to cases where the final term sheet is prepared by or on behalf of the issuer. We would suggest adding the following to the end of proposed Rule 433(d)(1)(i)(D): "and that is either used by the issuer or an offering participant or is prepared by or on behalf of the issuer."

4. Failure to Properly Retain Records

Proposed Rule 433 includes certain record retention requirements for FWPs. Unlike a failure to file or legend a FWP, however, proposed Rule 164 does not provide that an immaterial or unintentional failure to retain a FWP will not constitute a violation of Section 5 of the Securities Act or preclude reliance on proposed Rule 164. We suggest the Commission add to proposed Rule 164 a new clause (d) that explicitly provides that an unintentional or immaterial failure to satisfy the record retention requirements of Rule 433(g) will not result in a violation of Section 5(b)(1) of the Securities Act nor preclude an issuer from reliance on Rule 164.

J. Electronic Road Shows

We generally support the Commission's proposed change to the definition of "graphic communication" in Rule 405 to reflect modern methods of communication. Nonetheless, we believe it is important for the Commission to provide additional means of differentiating between oral and graphic communications in order to clarify that certain live road shows are not inadvertently treated as electronic road shows.

1. Clarification of Rules Regarding Communications During Live Road Shows

The Release provides that electronic communications, including electronic road shows, are intended to fall within the definition of "graphic communication" and thus be considered written communications and in turn FWPs. The Proposals do not, however, clarify whether slides and power point presentations that are used during a live road show would also be considered graphic communications that must be filed under the rules governing FWPs. We believe the Commission should confirm the continued application of its long standing position that the use of slides and power point presentations that are not distributed to investors during a live road show would still be considered oral communications and therefore would not fall within the definition of a FWP. Without this clarification, we are concerned that offering participants would feel compelled to file such presentations, and related visual aids, as written materials, which can be expected to chill their use as a result of concerns regarding possible Section 12(a)(2) liability to an expanded universe of potential litigants. Accordingly, we believe any reversal of this position under the guise of liberalizing communications will serve only to limit the information provided in future road show presentations to the detriment of prospective investors.

2. Communications Posted Simultaneously on a Web Site During Live Management Calls or Webcasts

Under the Proposals, it is also unclear whether slides and power point presentations that are posted on a web site, and which cannot be either downloaded or replayed, in connection with a live management telephone call or webcast would be considered graphic communications that would have to be filed as a FWP. Although we believe the Commission's intention is that such slides and power point presentations should not be treated as graphic communications, we request the Commission make this clear by explicitly stating so in the Adopting Release.

3. *Use of Electronic Media During Live Road Shows*

The Commission has requested comment as to whether the use of electronic media to transmit an oral presentation to an audience overflow room should be considered a written communication and therefore an electronic road show, even if the presentation is not interactive. We believe if the information presented through the use of electronic media in such circumstances cannot be replayed or downloaded, then the use of electronic media in the presentation, whether or not the presentation is interactive, would be incidental to the nature of the presentation, and accordingly, the presentation should not be considered an electronic—and therefore a written—communication. The use of electronic media in such cases would be necessary to ensure that all investors attending the live road show have equal access to the information presented and as such should not be deemed a written communication.

III. LIABILITY ISSUES

A. Information Conveyed by a FWP under Rule 159

Proposed Rule 159 would codify the Commission's interpretive position that liability for information conveyed to an investor under Sections 12(a)(2) and 17(a)(2) attaches at or prior to the time of sale (including the contract of sale). The Release is ambiguous, however, as to whether liability for information conveyed in a FWP will be based on *all* the information conveyed to an investor, whether by access, delivery or incorporating by reference other documents on file with the Commission, or solely on the information in such FWP. We believe the Commission intends that such liability be based on the entire body of information conveyed to an investor and not based on the information in the FWP alone; otherwise, the need to repeat information already conveyed to the investor would vitiate the purpose of a FWP. For the avoidance of doubt, however, we suggest the Commission confirm this interpretation in the Adopting Release.

B. Defining "Conveyance" for Purposes of Sections 12(a)(2) and 17(a)(2)

Proposed Rule 159 would codify the Commission's interpretation that the liability determination for purposes of Sections 12(a)(2) and 17(a)(2) as to an oral communication, prospectus or statement would not take into account information conveyed after the time of sale, including the contract of sale (*i.e.,* after the time the investment decision is made). This interpretation is intended to address the discrepancy between the information available to investors when making an investment decision and the subsequent availability of a final prospectus (including corrections or modifications contained in any final prospectus or Exchange Act filings filed after the time of sale). The Release notes that a determination as to the information "conveyed" to an investor at the time of sale is a facts and circumstances question under proposed Rule 159. There is limited guidance, however, as to what would constitute conveyance of information, and the Commission's interpretation does not clearly address under what circumstances information that has not been delivered to an investor would be considered "conveyed."[20]

---

[20] For purposes of Rule 159, the Release notes that conveyance of information to an investor "could include information in the issuer's registration statement and prospectuses for the offering in question, the issuer's Exchange Act reports incorporated by reference therein or information otherwise disseminated by means

To give issuers and offering participants a better understanding of the parameters of the prospectus liability regimes under Sections 12(a)(2) and 17(a)(2) and, in turn, to better equip them to operate within them, we strongly encourage the Commission to provide more detailed guidance as to what constitutes "conveyed" information for purposes of Rule 159. We recommend the Commission adopt a non-exclusive safe harbor that sets forth information that will be considered to have been "conveyed" for purposes of the Rule. The recommended safe harbor should provide that conveyance includes filings with the Commission, such as a Form 8-K (or a Form 6-K if it is incorporated by reference in the prospectus), as long as the filing is made prior to the open of business on the date of sale (or contract of sale).

C. Liability of Underwriters for FWPs

Proposed Rule 159A clarifies that an issuer will have liability under Section 12(a)(2) for issuer FWPs used by the issuer or any other offering participant. We believe it was also the Commission's intent to provide that an underwriter would *not* have cross-liability for a FWP used by other underwriters, as underwriters are not in a position to control or monitor the use of FWPs by other syndicate members. Nevertheless, to make this clear, particularly in circumstances where several underwriters offer securities to an investor, we recommend the Commission clarify in the Adopting Release that an underwriter is only liable for the FWPs it uses in connection with the offer or sale of a security and not FWPs used by other underwriters. Similar to the standard for determining when a FWP has been "prepared by or on behalf an issuer," we recommend that the Commission provide that an offering participant only be liable for the use of a FWP by another offering participant if such use has been approved.

D. Contract of Sale Determined by Agreement

Proposed Rule 159 would base disclosure liability under Sections 12(a)(2) and 17(a)(2) on the information made available to investors at the time of the "contract of sale." It is often not clear, however, when a contract of sale is entered into between an underwriter and its customers. In practice, underwriters may confirm sales with different purchasers at different times or even on different dates. In addition, conditional orders can be taken prior to effectiveness[21] and become binding orders if the potential purchaser does not take further action or if no material adverse events occur. We suggest that the Commission clarify that the time of contract of sale may be determined by mutual agreement between market participants pursuant to state law governing securities contracts. We believe that market participants should be able to determine the time of contract of sale just as they are able to mutually agree to a time for settlement pursuant to Rule 15c6-1(d) under the Exchange Act.

IV. REVISIONS TO REGISTRATION PROCESS

A. Form S-1

The Proposals introduce significant reforms to streamline and increase the flow of information available to investors in connection with registered offerings. We applaud the

---

reasonably designed to convey such information to investors . . ., [which] also could include information contained in free writing prospectuses."

[21] *See Wit Capital Corp.* (avail. July 14, 1999); *Wit Capital Corp.* (avail. July 20, 2000); *W.R. Hambrecht & Co*. (avail. July 12, 2000).

Commission for taking the initiative in this regard, and we have some additional suggestions to assist the Commission in meeting these objectives.

1. Forward Incorporation by Reference by Form S-1 and F-1 Issuers

The Proposals would permit issuers using Form S-1 or F-1 to incorporate by reference their past Exchange Act filings, but would not permit forward incorporation by reference by such issuer. The ability to forward incorporate by reference was originally formulated for the benefit of issuers eligible for Form S-3 or F-3 in order to allow the incorporation into a registration statement of documents filed at a future time, thereby eliminating the need to file post-effective amendments to such registration statement each time additional disclosure is made.[22] Although issuers in S-3 and F-3 shelf offerings likely would continue to use forward incorporation most frequently, we believe issuers only eligible to use Form S-1 or F-1 may also benefit from the ability to forward incorporate by reference. We believe allowing issuers eligible only to use Form S-1 or F-1 to forward incorporate by reference information already filed with the Commission presents no significant risk of overall decreased information about such issuers. Accordingly, we recommend the Commission provide in the final rules that forward incorporation by reference is permitted for issuers registering securities on Form S-1 or F-1.

2. Forward-looking Statements Safe Harbor

Section 27A of the Securities Act, which provides a non-exclusive safe harbor for certain forward-looking statements, is currently only available to issuers that are subject to the reporting requirements of Sections 13(a) or 15(d) of the Exchange Act. Consistent with the Commission's intent to liberalize communications in order to encourage issuers to provide more information to investors, the Proposals would broaden the information to which the Section 27A safe harbor applies. We support these proposed changes and believe they should be further broadened to include issuers conducting initial public offerings. We believe the same justifications for allowing reporting issuers to disseminate forward-looking information also apply to first-time reporting issuers—*i.e.*, investors benefit from the ability to review projections by an issuer of, among other things, its future earnings, performance and competitive environment. In order to ensure that such forward-looking information is not disseminated inappropriately, such forward-looking information should be permitted so long as the same information is also included in an issuer's prospectus or a FWP. We suggest adding to Section 27A(a)(1) "(i)" immediately before the phrase "An issuer that" and inserting "or (ii) an issuer that is not subject to such reporting requirements so long as such forward-looking statement is also included in such issuer's prospectus meeting the requirements of Section 10 or a free writing prospectus as defined in Rule 405."

3. Incorporation By Reference for Ineligible Issuers

A number of the reform proposals in the Release, including the inability to incorporate by reference information in a registration statement of an issuer eligible only to use Form S-1 or F-1, would not apply to ineligible issuers. Although we generally agree with the

---

[22] *See* SEC Release No. 33-6383 (Mar. 3, 1982); SEC Release No. 33-6423 (Sept. 2, 1982); SEC Release No. 33-6499 (Nov. 17, 1983).

rationale supporting the ineligible issuer designation and the resulting consequences other than as set forth in Part I.B. above, we do not believe it is appropriate to prohibit an ineligible issuer from incorporating information by reference unless such issuer is not current in its Exchange Act filings, since the other categories of ineligibility do not imply some inadequacy in the issuer's Exchange Act reports. We suggest deleting proposed General Instruction V.D. to each of Forms S-1 and F-1 in its entirety and replacing it with "D. The registrant is an ineligible issuer solely pursuant to clause (1)(i) of the definition of ineligible issuer in Rule 405."

B. Automatic Shelf Registration

1. Harmonization with Proposed NASD Rules

We support the concept of automatic shelf registration for WKSIs pursuant to proposed General Instructions I.D. and I.C. of Forms S-3 and F-3, respectively. In furtherance of this concept, we encourage the Commission to coordinate its efforts to adopt automatic shelf registration with the NASD, Inc., which has proposed changes to its rules regarding shelf offerings that do not contemplate the automatic shelf registration system.[23]

2. Control Over Timing of Effectiveness

Proposed General Instructions I.D. and I.C. of Forms S-3 and F-3, respectively, would allow certain shelf registration statements and post-effective amendments in connection with offerings by WKSIs on such forms to become effective immediately upon filing, without review by the staff of the Commission. Although, as discussed in Part IV.B.I. above, we strongly support the concept of automatic shelf registration for WKSIs, we note there may be some circumstances in which a WKSI will not want immediate effectiveness of its registration statement. For example, issuers occasionally enter into agreements, such as registration rights agreements, whereby the issuer undertakes to file a registration statement by a certain date to avoid payment of penalty interest. The issuer, however, may wish to file by such date but may not have all of the necessary information for the registration statement to become effective at such time. To accommodate such a situation and others in which a WKSI may not desire to have its registration statement declared effective automatically upon filing, we suggest the Commission grant WKSIs the ability to control the time of effectiveness of their registration statements.[24] The Commission could add to the end of the first sentence of each of proposed General Instruction I.D.5. of Form S-3 and proposed General Instruction I.C.5. of Form F-3 the phrase "unless the registrant elects to delay effectiveness pursuant to Section 8(a)." A Form S-3 or F-3 filed pursuant to this delaying language could include on the cover page of the registration statement the customary delaying language referencing Section 8(a).

C. Inclusion of Selling Security Holder Information by Prospectus Supplement

Under proposed Rule 430B(b)(2)(ii), a seasoned issuer would be able to include certain selling security holder information by means of a prospectus supplement filed post-

---

23 *See* SEC Release No. 34-50749 (Nov. 29, 2004).

24 The Commission would have provided issuers eligible for "Form B" under the Aircraft Carrier Release (*i.e.*, the registration statement for large, well-seasoned issuers) with the flexibility to control when the registration statement became effective under the Securities Act. *See* SEC Release Nos. 33-7606; 34-40632; IC-23519 (Nov. 3, 1998).

effectiveness so long as the "securities were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities." This condition would preclude a seasoned issuer from adding such selling security holder information by means of a prospectus supplement where the registered securities are convertible securities, such as notes convertible into the issuer's equity, since the securities into which the registered securities can be converted would not be issued and outstanding prior to the initial filing of the registration statement. In response to the Commission's specific request for comment on this matter, we suggest that the Commission modify proposed Rule 430B(b)(2)(ii) by adding to the end thereof the phrase, "or in the case of convertible securities, all of the securities that can be converted were issued and outstanding prior to the original date of filing the registration statement covering the resale of the securities and the securities into which the original securities can be converted."

D. Elimination of Paper Filing Requirement in Rule 424

Currently, Rule 424 has a number of references to filing multiple physical copies of final prospectuses with the Commission. In response to the Commission's specific request for comment and the enhancements in technology underlying the Proposals generally, we believe it is appropriate for the Commission to eliminate such references. Similarly, we encourage the Commission to remove other such references in the other rules and regulations promulgated under the Securities Act and Exchange Act to modernize those rules and regulations consistent with the Proposals.

E. Auditor Consent

In discussing the new effective date established by proposed Rule 430B, which provides that each shelf takedown constitutes a new effective date with respect to that takedown, the Release provides useful clarification that the new effective date does not by itself necessitate obtaining new Section 7 consents from experts unless the prospectus supplement contained information requiring such a consent. We believe this language is designed, among other things, to make clear that new auditor consents need not be delivered in connection with each shelf takedown. In response to the Commission's specific request for comment, we agree that questions may arise regarding the necessity of providing an auditor's consent for interim period takedowns for prospectus supplements that do not involve a change to the audited financial statements. Accordingly, we suggest the Commission make an explicit statement in the Adopting Release that auditor consent is unnecessary for such takedowns.

F. Filing Fees

1. Failure to Receive Payment

Proposed Rules 456(b) and (c) would provide WKSIs that register securities offerings on an automatic shelf registration statement with the ability to pay the registration fees under Rule 457(r) on a pay-as-you-go basis. We support this initiative, and we believe in order to provide the most incentive to WKSIs to use such new procedures, the Commission should also institute a cure provision for shelf takedowns in which the filing fee was not received by the Commission's lockbox account despite the good faith efforts by the issuer to make such payment. We believe such a cure provision should apply to failures by the Commission's bank to receive wires on a timely basis, for example due to heavy volume or malfunction, as well as an

inadvertent failure by the issuer to pay the fee in a timely manner. If no cure is provided for good faith efforts to pay filing fees, the consequence for such failure to pay on time could be a Section 5 violation, which may discourage WKSIs from making use of the pay-as-you-go filing fee option. We suggest the Commission add the following sentence to the end of proposed Rule 456(b)(2): "Notwithstanding the preceding sentence, an inadvertent failure to pay such fee, whether as a result of the registrant's error or otherwise, shall not result in a violation of section 5 of the Act so long as the registrant takes reasonable steps to correct such failure by paying such fee as soon as reasonably possible thereafter."

2. Medium Term Note Program Filing Fees

We note that medium term note ("MTNs") programs allow for multiple takedowns to occur in a single day. For frequent issuers of MTNs, prospectus supplements are typically filed together at the end of each applicable business day. Proposed Rule 456(b)(1)(ii) provides that registration fees will have to be paid, and prospectus supplements filed, on a one-by-one basis. This requirement may result in inefficient and time consuming filings throughout the day for such programs and additionally may risk overwhelming the Commission's lockbox account with a series of small wires of registration fees throughout the course of the day. We suggest it may be more appropriate to permit filing fees to be paid in the aggregate at the end of a business day based on the issuance activity over the course of that day. Although the alternative would be for issuers to pay in advance on an estimated daily or weekly basis, this alternative would eliminate a significant benefit of the pay-as-you-go system. We suggest replacing the words "at the time" in proposed Rule 456(b)(1)(ii) with the words "no later than the close of business on the date."

3. Clarification of Calculation of Fee Payment under Certain Circumstances

In certain cases, WKSIs may use the flexibility afforded under the proposed filing fee regime to pay registration fees in advance under proposed Rule 457(r) in anticipation of offering securities at a later time. During this period, the applicable fee rate for registering securities may change, resulting in an issuer paying different amounts, on a per security basis, to register its securities. In this case, when the securities are ultimately offered and a prospectus filed by the issuer with a calculation of the registration fee on the cover page pursuant to proposed Rule 456(b), it is unclear which fee rate would apply to such registered securities. We recommend the Commission clarify that when calculating the fees applicable to registered securities, such fees are based on the rate in effect at the time an issuer pays its fees, not at the time the securities are offered. This solution will ensure that issuers wishing to pay fees in advance of an offering will know the amount of securities that can be offered pursuant to such fees.

V. PROSPECTUS DELIVERY REFORM

A. Rule 172

1. Timeliness of Filing

Under proposed Rule 172, no final prospectus would be required to be delivered in connection with a registered securities offering unless an investor specifically requests that one be delivered to it. We support this proposal and believe it represents a necessary change in

the registration process given the systemic benefits of further reducing settlement delay and the availability of prospectuses through EDGAR and other means. We are concerned, however, that consequences for a failure to timely file a final prospectus pursuant to Rule 424(b) would be a violation of Section 5, an unnecessarily harsh result for a late Rule 424(b) filing. This is particularly true for underwriters, which generally must rely on issuers to file the final prospectus. We propose the Commission provide issuers with an ability cure their late filings if a good faith and reasonable effort was made to comply with the filing condition.[25] In addition, if an issuer fails to meet its requirement to timely file, offering participants should also be provided with a five business-day cure period in order to provide them with sufficient time to prepare and file a final prospectus themselves.

2. Application to Non-participants in Underwriting Syndicate

We do not believe that broker-dealers that are not members of the underwriting syndicate should be penalized for late filings made by the issuer. Therefore, we believe the Commission should remove the link between timeliness of filing the final prospectus and the ability of broker-dealers that are not members of the underwriting syndicate to rely on proposed Rule 172 to satisfy their aftermarket prospectus delivery obligations under Section 4(3) and Rule 174. Broker-dealers that are not members of the underwriting syndicate lack the right or practical ability to influence, or even to confirm, the timeliness of a Rule 424(b) filing. As a result of the foregoing, we suggest the Commission add a new clause (4) to proposed Rule 172(c) to state "(4) Notwithstanding anything in this section (c) to the contrary, a participating dealer's ability to rely on sections (a) and (b) of this rule shall not be affected by a failure by the issuer to timely comply with the requirements of section (c)(3) of this rule."

B. "Access Equals Delivery"

1. "Access Equals Delivery" Application to Preliminary Prospectus

Proposed Rule 172(b) would adopt an "access equals delivery" regime whereby the requirement to deliver a final prospectus would be deemed satisfied if the prospectus has been filed in accordance with the conditions in proposed Rule 172(c). We support this approach to liberalize delivery methods, as modern technology has made information filed with the Commission easily accessible and readily available through EDGAR and the Internet. In response to the Commission's specific request for comment, we recommend that the access equals delivery regime be extended to Exchange Act Rule 15c2-8(b), which requires the delivery of a preliminary prospectus by a broker or dealer in connection with an IPO. In light of the widespread and ever-expanding access to and use of the Internet, we believe the reasoning by which final prospectuses are deemed delivered when accessible on EDGAR applies equally to preliminary prospectuses, and we thus recommend they be treated in the same manner.

2. Inconsistency with 2000 Electronic Media Release

In light of the Release's proposed adoption of the "access equals delivery" regime for final prospectus delivery, the prior consent regime set forth in the Commission's release in

[25] The Commission proposes to adopt a similar standard in connection with the filing and legending of FWPs under proposed Rules 163 and 164.

2000 addressing electronic delivery[26] no longer seems appropriate. When the concept of access equals delivery was first introduced in the 2000 Electronic Media Release, the requirement to receive prior investor consent to electronic delivery was still deemed necessary, in part because investor access to the Internet was not as widespread as today. Without such a consent requirement, the Commission was concerned that certain investors would not realize that they had the affirmative duty to seek information on their own. Today, by contrast, investors expect to obtain a large quantity of their news and securities market information from the Internet. In addition, if the Release's access equals delivery regime is adopted largely as proposed, investors will likely be cognizant that relevant offering information will be located on EDGAR. We request the Commission affirm in the Adopting Release its intention to eliminate the 2000 Electronic Media Release's prior consent requirement.

3. "Access Equals Delivery" Application to Investment Companies

Proposed Rule 172(d)(1) would exclude investment companies from being able to rely on the "access equals delivery" regime available to most other types of issuers. Like investors in other securities, mutual fund investors have ready access via the Internet to investment company offering materials filed with the Commission. Although we acknowledge investment companies are subject to a separate framework governing communications with investors, we see little in that framework that would justify a decision not to extend the benefits of "access equals delivery" to investment companies. As a result, we believe the Commission should delete section (d)(1) of proposed Rule 172.

4. "Access Equals Delivery" Application to Schedule B Issuers

We believe it is also appropriate to extend the benefit of delivering written confirmations without a final prospectus under proposed Rule 172 to offering participants in offerings by Schedule B issuers, and recommend amending proposed Rule 172(c)(3) accordingly. We see no reason to treat these offerings differently from those conducted by other types of issuers.

C. Rule 153

Proposed Rule 153 would deem the prospectus delivery requirements of brokers or dealers effecting transactions on an exchange or through any trading facility registered with the Commission satisfied if certain conditions were met, including if the final prospectus has been filed with the Commission by the applicable filing date under Rule 424. Just as with the requirement for reliance on proposed Rule 172 discussed in Part V.A.1. above, we do not believe it is appropriate to condition a broker's or dealer's ability to rely on proposed Rule 153 on the timely filing of the final prospectus, since a broker or dealer has no ability to ensure the condition is met or to confirm its satisfaction. We suggest the Commission revise proposed Rule 153(b) by adding to the end thereof a new clause (4) that provides, "Notwithstanding anything in this section (4) to the contrary, a broker's or dealer's ability to rely on section (a) of this rule shall not be affected by a failure by the issuer to timely comply with the requirements of section (b)(4) of this rule."

---

[26] *See* SEC Release Nos. 33-7856; 34-42728; IC-24426 (Apr. 28, 2000) (the "2000 Electronic Media Release").

VI. EXCHANGE ACT DISCLOSURE

A. Publication of Unresolved Comments in Annual Reports

1. Disclosure of Unresolved Staff Comments

Proposed Item 1B of Form 10-K and proposed Item 4A of Form 20-F would require inclusion in an issuer's annual report of unresolved written comments from the staff of the Commission that were issued not less than 180 days before the end of the issuer's fiscal year covered by that annual report. In response to the Commission's specific request for comment, we suggest that issuers should continue to have the ability to make materiality judgments regarding whether or not to disclose unresolved staff comments in their disclosure documents. We understand the Commission's concern that by permitting registration statements to become effective automatically and bypass the staff review process, the Commission will lose the ability to require issuers to respond to unresolved comments as a condition to having their registration statements declared effective. There remain, however, other constraints on issuers to make appropriate disclosure, including underwriters, which would be aware of unresolved comments, and the Commission's stop order authority.

Nevertheless, if this proposal should be adopted, the Commission should clarify to whom it applies. The Release suggests this requirement would apply to all "accelerated filers," and the Commission's release adopting the accelerated filer definition implies the term is intended to apply only to domestic issuers, although the actual text of the definition is more ambiguous.[27] Proposed Item 4A, however, would be a requirement of Form 20-F, the form for annual reports of foreign private issuers. As a result, we seek clarification from the Commission whether the requirement to disclose unresolved staff comments is intended to apply to both domestic and foreign private issuers. We believe this disclosure requirement should only apply, if retained in some form in the Adopting Release, to WKSIs, the only registrants eligible for automatic registration statement effectiveness.

B. Mechanism to Confirm Resolution of Staff Comments

If either proposed Item 1B of Form 10-K or Item 4A of Form 20-F is adopted, we believe the Commission should provide a mechanism whereby issuers would receive confirmation that all staff comments have been resolved in order to ensure their disclosure is accurate. Without such a mechanism, we are concerned an undue burden would be imposed on issuers to continually check with the staff of the Commission regarding the status of unresolved comments. We recommend the Commission establish a mechanism whereby the staff will issue a letter to an issuer indicating that all comments have been resolved.

* * * *

[27] *See* SEC Release Nos. 33-8128; 34-46464 (Sept. 5, 2002) (providing that "[t]he definition of accelerated filer we are adopting today with a $75 million public float threshold excludes . . . all foreign private issuers that file on Form 20-F . . . .").

We would be pleased to respond to any inquires regarding this letter or our views on the Proposals and the Release generally. Please contact Leslie N. Silverman or Jeffrey D. Karpf at 212-225-2000.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP

cc: The Honorable William H. Donaldson, Chairman
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
Alan L. Beller, Director, Division of Corporation Finance
Martin P. Dunn, Deputy Director, Division of Corporation Finance
Amy M. Starr, Senior Special Counsel, Division of Corporation Finance