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January 31, 2005

Via E-mail – rule-comments@sec.gov

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

Re: Securities Offering Reform (File No. S7-38-04)

Dear Mr. Katz:

The Federal Regulation and Capital Markets Committees of the Securities Industry Association ("SIA")[1] are pleased to submit this response in strong support of Release No. 33-8501 ("Release") on behalf of SIA.[2] SIA believes that the proposals (the "Proposals") in the Release will achieve the SEC's goal of modernizing the regulation of public capital-raising in the United States, and should be adopted as soon as possible.

SIA believes the capital-raising process for well-known seasoned issuers will become more efficient if the Proposals are adopted, while appropriately protecting investors. The many proposed reductions in communications barriers also properly recognize the role today of the Internet and other electronic communications. Overall, the Proposals should enhance the competitiveness of the U.S. public capital markets as a forum for capital-raising over the Rule 144A and other private markets and the Regulation S offshore markets.

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[1] SIA brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals. Industry personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2003, the industry generated an estimated $213 billion in domestic revenue and $283 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

[2] The Federal Regulation and Capital Markets Committees received comments and suggestions from various other SIA committees, and this response has received the approval of SIA's Board of Directors.

SIA congratulates the SEC in crafting the Proposals in the Release to balance the relevant interests – reducing processing hurdles and avoiding creation of new "speed bumps" in the registered offering process, protecting investors through mandated availability of statutorily-prescribed information and disclosure liability for creators of offering communications and freeing up communications for the benefit of investors, issuers and underwriters. The Release avoids the major problems that led SIA and many others to oppose the 1998 Aircraft Carrier proposal. Nevertheless, SIA recognizes the important contribution of the 1998 proposal to the debate on the appropriate way forward in modernizing the securities offering process.

SIA endorses the SEC's self-described "incremental" approach of the Proposals. Building upon the current regulatory regime, although necessarily complicated in its details, allows the improvements to be introduced without disrupting the current system – investors and offering participants need not learn an entirely new set of rules and the risk of unintended consequences is minimized.

SIA does have some suggestions on specific aspects of the Proposals to enable them better to achieve their objectives. Our principal suggestions are summarized first.

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PRINCIPAL SUGGESTIONS

1. Free-Writing Prospectuses

SIA supports the Proposals as generally achieving the goal of taking Section 5 "off the table" – in other words, most mistaken written communications during a public offering would be subject to heightened disclosure liability for the sender and possible SEC filing, but would not give rise to Section 12(a)(1) rescission rights, potential risk factor disclosure in the prospectus or forced inclusion of the offending writing in the registration statement that subjects even innocent offering participants to Section 11 disclosure liability on it. SIA also supports the concept in the Proposals that only the party that sent or used the writing should have liability on it. SIA has some suggestions below, largely relating to the "cure" procedures, to enable the Proposals more fully to achieve the objectives of eliminating rescission liability for mistaken communications and eliminating cross-liability for non-users.

SIA believes, however, that in their current form the Proposals are unlikely to encourage the use of intentional free-writing prospectuses as a part of the offering process. SIA believes that cross-liability concerns will continue to lead to reluctance to use permitted free-writing in the offering process. SIA has some suggestions below about how the Proposals may be modified to clarify that non-users will not have liability on free-writing prospectuses.

a. Suggestions to Address More Fully Section 5 Problems of Unintentional Written Offers – Revisions to the Cure Procedure

i. Clarify "good faith and reasonable effort" includes having policies and procedures

Proposed Rules 163 (permitting pre-filing free-writing by WKSIs) and 164 (permitting post-filing free-writing) contain identical conditions for curing unintentional failures to file and failures to comply with the legend requirements. These conditions include that "a good faith and reasonable effort was made to comply with" the filing or legend requirement.

SIA suggests that the SEC clarify by example in the adopting release the types of actions that would constitute a good faith and reasonable effort. Specifically, SIA requests the SEC to confirm that the conditions for curing would be satisfied if an SEC-registered broker-dealer adopts firmwide policies and procedures reasonably designed to achieve compliance with the filing and legend conditions. Likely elements of such policies and procedures would include (a) a requirement that non-routine communications with information about the securities or issuer be approved in advance by supervisory personnel – either specifically or through use of templates or automated systems – to confirm whether filing is required and that the legend has been included, (b) a process to inform likely creators of free-writing about the firm's policies and procedures and the SEC's requirements, and (c) periodic after-the-fact surveillance or

spot-checking of compliance with the firm's policies and procedures and the SEC's requirements.

ii. Clarify that "unintentional" failure refers to the firm and not the sender

The cure procedure is available only for "unintentional" violations of the filing or legend requirements.[3] SIA requests that the SEC confirm that an "unintentional" violation by an SEC-registered broker-dealer is a violative communication that is not authorized for the person making it. We further request that the SEC confirm that action taken in violation of the firm's policies and procedures, described in i. above, would not be considered intentional even if the communication was intended by the person making it.

We recognize that the cure provisions in proposed Rules 163 and 164 are essentially the same as those in Rule 165 in the Regulation M-A regime for business combination communications. We believe, however, that clarification of the operation of the cure provisions in the context of the securities offering process as requested above is nevertheless appropriate due to the different considerations involved. In the business combination context, the creators of the communication will almost always be the two companies party to the transaction, not their financial advisors. The companies themselves would normally have tight policies on external communications about the transaction, whether as part of their disclosure controls and procedures, their Regulation FD policies or *ad hoc* policies. The number of individuals with incentives to communicate will be small in number and generally senior. Financial advisors may have only a behind-the-scenes role. Even where they are engaged as dealer-managers to solicit investors, the number of personnel involved will be relatively small. Interpretive questions about "unintentional" failures, "good faith and reasonable efforts" to comply and "discovery" are less likely to arise in the business combination context.

In contrast, during the securities offering process large numbers of salespersons at underwriters may communicate with potential investors. Managing that effort consistent with legal requirements is a very different process and effort for these broker-dealers than for the principals in a business combination. With large numbers of sales personnel involved, small mistakes are more likely to happen despite internal policies and procedures. SIA expects that through the cure provisions these mistakes need not become Section 5 violations and believes the clarifications sought above are consistent with the SEC's intentions.

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[3] "Immaterial" failures of the filing requirement are also covered by the cure procedures, but that provision is not likely to be used because any immaterial failures would generally also be unintentional.

iii. Clarify that "discovery" of failure applies at a supervisory level

Under the proposed rules, the corrected filing or legending must occur as soon as practicable after "discovery" of the violation. SIA requests the SEC to clarify that for an SEC-registered broker-dealer "discovery" occurs only when there is actual knowledge of the violation by compliance or senior supervisory personnel who, by virtue of their job function and position within the firm, can be expected to know and understand the filing and legend requirements of proposed Rules 163 and 164 and the operation of the cure provisions.

iv. Extend the cure procedures to IPOs before the price range is filed

As currently drafted, in initial public offerings there is a gap in the protection afforded by proposed Rule 164 from the time of filing the registration statement until the date it is amended to include a price range, which is typically only a few weeks before the end of the overall SEC processing period that lasts two months or more. SIA accepts the SEC's policy that active marketing and intentional free-writing in IPOs should not commence until a price range is on file. However, SIA requests that Rule 164 be modified to add a reasonable cure provision for unintentional free-writing during the pre-price-range filing period. We suggest that a cure be permitted under the following two conditions:

- The maker of the communication has policies and procedures reasonably designed to prohibit the issuance of free-writing prospectuses in IPOs prior to the filing of the price range; and
- The offending communication is filed with the SEC, even where a filing would not be required for use of the same communication after the price range has been filed.

We also suggest that the same cure be made available for inadvertent failures to accompany or precede the communication with the Section 10 prospectus in the case of IPOs and unseasoned reporting issuers.

v. Allow generic legends

The form of legend required by proposed Rules 163 and 164 as currently drafted would require insertion of the issuer's name in the legend itself. SIA requests that, in order to facilitate automation of affixing the legend, and therefore facilitate compliance, the requirement to name the issuer in the legend be changed to a requirement that the issuer be identifiable elsewhere in the free-writing prospectus. The legend could then read: "The issuer to which this communication relates has filed [or "may file"] a registration statement … ." Also, the reference in proposed Rule 433 (for Rule 164 free-writing) to "and clicking on ____" should be deleted in order to enable use of generic legends. (The Rule 163 legend does not include this extra requirement.)

Each underwriter could create a standardized version of the legend to be used firmwide for all offerings in which the firm participated, with a single toll-free number that could be used to fulfill all requests made to that firm for the statutory prospectus.

We believe that the efficiency and compliance benefits of permitting a generic legend are important goals and that permitting a generic legend in no way detracts from its purpose of identifying the free-writing prospectus as such. We note that the legend required by Rule 134, both in its current form and as it would be amended by the Proposals, is already generic.

vi. Clarify that non-U.S. communications are not free-writing prospectuses

Communications during an SEC-registered public offering occurring outside the United States are not offers for purposes of Section 5 and may continue today without implicating rescission rights under Section 12(a)(1).[4] Under the Proposals, those communications outside the United States should also be able to continue without implicating the free-writing prospectus provisions of Rules 163 and 164. SIA believes that a communication should be deemed to occur outside the United States for this purpose if the sender has not taken steps to cause it to be recommunicated into the United States. In other words, compliance with Rule 901 of Regulation S, or the Rule 903, 904 or Rule 135e safe harbors, should be sufficient to avoid the communication being treated as a free-writing prospectus. SIA requests that the SEC confirm this in the adopting release.

b. SIA Acknowledges Section 12(a)(2) Liability Is Appropriate for Free-Writing Prospectuses

Under the Proposals, 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. SIA acknowledges the SEC'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 in subsection c.i. below, that liability should take into account other information conveyed to an investor. Also, as the Proposals are currently formulated, we believe that uncertainty about potential cross-liability will discourage intentional free-writing. We make suggestions in c.ii.-iv. below to reduce this uncertainty and possibly lead to greater use of free-writing prospectuses.

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[4] Rule 901 of Regulation S provides that: "For purposes only of Section 5 of the Act, the terms 'offer,' 'offer to sell,' 'sell,' 'sale,' and 'offer to buy' … shall be deemed not to include offers and sales that occur outside the United States."

c. Suggestions to Encourage Intentional Free-Writing

SIA believes that the Proposals are workable and can succeed without implementing the suggestions below. We make them for consideration by the SEC if it wishes to encourage use of the newly permissible form of communication called free-writing prospectuses.

Although SIA supports the Proposals and believes they should generally allow issuers and offering participants to avoid most Section 5 problems arising from mistaken written communications, SIA believes that the Proposals, as currently formulated, are not likely to encourage intentional free-writing as a part of the securities offering process. The principal reason, we believe, is that the relevant parties will remain concerned about potential cross-liability because the Proposals do not delineate responsibility sufficiently clearly. Issues that we believe remain include:

(1) If an issuer creates and files a free-writing prospectus, is it clear that an underwriter has no liability on it if the underwriter does not refer to it or otherwise use it, even though the existence of the free-writing prospectus in the public SEC file could arguably act to boost overall interest in the offering?

(2) Suppose the issuer free-writing prospectus referred to in example (1) above has a material error. In order to avoid liability, must an underwriter correct that error in communicating with customers, even if the underwriter does not use the free-writing prospectus?

(3) If an underwriter creates and uses a free-writing prospectus that is not considered "by or on behalf of" the issuer and otherwise meets the conditions to avoid filing, is it clear that the issuer has no liability on it to recipients of the writing?

(4) Suppose an underwriter creates and distributes to a potential investor a free-writing prospectus as described in example (3) above. If a second underwriter actually makes the sale to that investor but did not use the first underwriter's free-writing, is it clear that the second underwriter has no liability on it? This scenario could readily occur in the institutional sales context, where the same institutions may be covered by several underwriters.

(5) Suppose a prospective underwriter broadly distributes a free-writing prospectus to the public, thereby triggering the filing requirement, and is then excluded from participating in the offering. Is it clear that the issuer and other underwriters that do not use the writing are not liable on it merely because it was filed?

As a result of uncertainty about the answers to the above and other questions, SIA believes that issuers may seek contractually to prohibit underwriters from using free-writing prospectuses, and underwriters may seek similarly to restrict issuers and each other.

SIA recommends the following clarifications, which we believe reflect the SEC's intentions in the Proposals, in order to reduce uncertainty and possibly lead to greater use of free-writing prospectuses:

i. Liability for free-writing prospectuses also takes into account other information

SIA suggests that Rule 433 or another rule provide expressly that in testing Section 12(a)(2) liability for a free-writing prospectus or oral communication, whether it contains a materially false or misleading statement or whether the purchaser knew if the statement was false or misleading (thereby defeating liability under the statute) is a facts and circumstances analysis that can take into account other information conveyed to the investor orally or in writing, including information conveyed through access to the SEC EDGAR file. The purpose of such a provision would be to confirm that each individual free-writing prospectus or oral communication is not tested under Section 12(a)(2) in isolation.

For example, if the traditional "Summary" and "Risk Factors" section of a prospectus were separately distributed as a free-writing prospectus accompanied by a statement that the statutory preliminary prospectus was available on EDGAR, that information should be evaluated for Section 12(a)(2) purposes against the backdrop of the entire preliminary prospectus. The mere omission of material facts that are in the preliminary prospectus, as necessarily occurs in any summary, should not be regarded as creating *per se* liability under Section 12(a)(2). We note for just those reasons that there has been reluctance among offering participants to use summary prospectuses, even though they are already contemplated by Rule 431.

SIA further suggests that Rule 433 provide that any SEC-filed documents expressly referred to in the free-writing prospectus *must* be taken into account for purposes of the facts and circumstances analysis for Section 12(a)(2) liability purposes.

Finally, we suggest that the final rules expressly acknowledge that for Section 12(a)(2) liability purposes a statement in a free-writing prospectus may be superseded by a statement in a subsequent free-writing or statutory prospectus that is conveyed to the recipient of the first prior to the time of sale, in order to confirm that mistakes can be cured and information updated for new developments.

The above suggestions are extremely important to resolving liability concerns with free-writing prospectuses.

ii. The issuer is not liable for an underwriter free-writing prospectus meeting the conditions for non-filing

SIA suggests that Rule 433 state that an issuer is not liable for a free-writing prospectus created and used by an underwriter that meets the rule's conditions for non-filing. This would, in effect, be the converse of proposed Rule 159A,

which makes the issuer a Section 12(a)(2) seller on the registration statement and any free-writing prospectus prepared "by or on behalf" of the issuer. For example, if the free-writing prospectus contains no material non-public information and is furnished only to the underwriter's customers, it would be helpful to have an express statement that the issuer has no Section 12(a)(2) liability to the underwriter's customers for that communication.

The above suggestion would assist in resolving question (3) above.

iii. A person is not liable for an underwriter free-writing prospectus if the person does not use or refer to it

SIA suggests that Rule 433 state that a person will not be liable under Section 12(a)(2) in respect of any underwriter free-writing prospectus as to which the person is not a seller, and that a person will not be deemed a seller for this purpose if the underwriter free-writing prospectus is not delivered or referred to by the person in making offers or sales. While this result is implicit in the Section 12(a)(2) liability structure, we believe offering participants would be more likely to create and use free-writing prospectuses if there were an express statement about the absence of cross-liability.

Also, where a prospective underwriter broadly distributes a free-writing prospectus to the public, triggering the filing requirement of Rule 433, but then withdraws and does not participate as an underwriter in the offering, the rules should confirm that the issuer and other underwriters are not sellers in respect of the communication. That result would be consistent with current practice, in which a prospective underwriter that violates Section 5 may withdraw from the offering to enable the issuer and underwriters to proceed on the basis that the violation is not attributable to them.

Whether or not this recommendation is followed in the final rules, we further suggest that the Rule 433 filing requirement not apply in cases where the prospective underwriter has withdrawn and does not become an underwriter. The withdrawal should act as a sufficient remedial step. In that case, it should not be necessary also to increase the potential liability of the issuer and underwriters through a filing requirement that expands the universe of potential claimants.

The above suggestions would address questions (4) and (5) above.

iv. The structure of the offering should not affect liability for free-writing prospectuses

SIA suggests that Rule 433 contain an express statement that the underwriter's contractual relationship with the issuer does not affect filing obligations or Section 12(a)(2) liability for free-writing prospectuses. In other words, the mere fact that in a medium-term note program the underwriter is acting as the issuer's agent in making

a best efforts offering should not cause the underwriter's communications to be deemed "by or on behalf of the issuer" for any purpose under the Proposals, including whether the free-writing prospectus must be filed and whether the issuer is a seller with respect to it for Section 12(a)(2) purposes. If the free-writing prospectus would not be "by or on behalf of the issuer" in a firm commitment underwriting, it should also not be so in an agency MTN program.

2. Suggestions to Expand Proposed Rule 134

SIA notes that the new limitation making Rule 134 unavailable in IPOs until the price range has been included will disrupt current practice by prohibiting a press release and similar basic communications upon filing. We strongly urge that this change be reversed in the final rule.

SIA supports the proposed expansion of information that may be included in a Rule 134 notice. We have some suggested additional items for inclusion as permissible information, which we believe are consistent with the SEC's purpose in expanding Rule 134.

Finally, SIA requests the SEC to confirm that the Proposals do not change the procedures applicable to electronic offerings made in reliance on Rule 134(d) permitting written conditional offers to buy.

a. Price Range Requirement in IPOs

Current Rule 134 is not conditioned on the existence of a price range in the filed prospectus. Thus, upon the initial filing of the registration statement the issuer may, and customarily does, issue a press release announcing the filing and disclosing other limited Rule 134 information, including the names of the lead underwriters. The press release and similar notices (such as e-mails to employees or suppliers intended only to convey optimism about the issuer's prospects to retain their goodwill and not for the purpose of interesting them in investing) can be important to the company's existing constituencies. These notices also permit underwriters to get the offering on the calendars of potential investors, so they will be in a position to receive sales calls when the marketing process is launched.

As proposed, Rule 134 would be unavailable in IPOs until the price range has been reflected in the filed preliminary prospectus, which occurs relatively late in the process, usually just before the roadshow commences during the final weeks of the public offering. SIA understands that the SEC wishes to prevent the start of a sales campaign until a price range is available. We believe that can be achieved by conditioning the ability to use free-writing prospectuses on the filing of the price range, as already reflected in the Proposals, and by prohibiting the use of Rule 134(d) (written indications of interest and conditional offers to buy) until the filing of the price range, as also already reflected in the Proposals.

Accordingly, SIA strongly urges the SEC to revert to the existing approach in Rule 134, so that it remains available in IPOs upon filing the registration statement. Changes to accomplish this are marked on the proposed version of Rule 134 attached as Exhibit A to this letter.

b. Expansion of Rule 134

We suggest that the following additional information items be permitted in a Rule 134 communication:

Issuer Information

- Number of years in operation
- Status as a non-reporting, reporting, seasoned (Form S-3 or F-3 eligible) or well-known seasoned issuer
- Market capitalization

Securities and Offering Information

- CUSIP number or other security identification code
- Use of proceeds
- Firm commitment or best efforts underwriting
- Existence and size of an underwriters' over-allotment (green shoe) option
- Market prices and trading volume of the offered securities
- For fixed income securities, anticipated spread over specified U.S. Treasuries or other benchmark securities

Attached as Exhibit A to this letter is a copy of proposed Rule 134, marked to show the above additions. The reasons for these specific proposed additions are discussed below.

We believe that the addition of this information is consistent with the philosophy of Rule 134 – to permit factual information intended to identify key attributes of the offering but not sales-oriented or other qualitative disclosure more appropriate for a communication to which heightened Section 12(a)(2) liability attaches, including the proposed new free-writing prospectus. The items of information we propose are neutral, non-qualitative, not subject to distortion and in some cases merely administrative – in other words, not the kind of information that forms the basis for an investment decision. Because of an increasing array of potential investments, investors are more frequently making fast initial screening decisions based on these basic factual attributes about the issuer or the offering. The purpose of the screening is to decide whether to learn more, or to move on to another potential investment.

Because of our concerns that intentional use of free-writing prospectuses may be limited, as described above in Section 1.c., Rule 134 notices may be the primary practical means to disseminate basic factual information even in offerings for WKSIs and other seasoned issuers. The fact that Rule 431 summary prospectuses and Rule 434 term sheets are generally not utilized today is a possible indicator that free-writing prospectuses may not be widely used.

Also, as a practical matter, a Rule 134 notice is the only means to distribute the information broadly in written (non-electronic) form for an offering by a non-reporting or unseasoned issuer, given the requirement in those offerings that free-writing prospectuses be accompanied or preceded by a statutory prospectus.

i. Issuer information

As noted, one purpose of a Rule 134 communication is to convey enough basic information about the issuer to a potential investor, generally an institutional investor, to permit the investor efficiently to determine whether the offering falls within the investor's potential investment universe. For example, some investors, including many mutual funds, cannot or will not invest in a company having fewer than a certain number of years of operating history. Other investors may be interested only in initial public offerings (in other words, offerings by non-reporting issuers) or only in offerings by reporting or seasoned issuers. Some investors are interested only in securities of issuers of a certain size market capitalization, such as small-cap, mid-cap or large-cap. The new well-known seasoned issuer category could also become a proxy for screening size.

ii. Securities and offering information

Some investors may wish to know at the screening stage whether an offering is conducted on an underwritten or best efforts basis. Other relevant information, in addition to the overall size of the offering, would include the existence and size of any underwriters' overallotment option. The notice should also be permitted to include the CUSIP or other security identification code (such as the Common Code and ISIN number used in Europe) of the offered securities, in order to facilitate automated lookups of relevant information by the investor.

We also believe that, as a substitute for the previously required disclosure about whether the offering is a new financing or a refinancing, the notice should be permitted to describe briefly the use of proceeds.

Some additional pricing related information would also be appropriate. For example, in fixed income offerings the anticipated yield or yield range over U.S. Treasuries or similar benchmark securities is a common way to express pricing information. If there is an existing trading market for the offered securities, a market price or prices should also be permitted, as should trading volume information (computed

in the same manner as ADTV in Regulation M), which investors may use as a measure of liquidity of the offered security.

c. Electronic Offerings Under the Wit Capital Procedure

The *Wit Capital* line of no-action letters[5] and related SEC staff practice permit the use of electronic offering procedures in reliance on Rule 134(d). SIA believes that the changes to Rule 134 and the other elements of the Proposals do not affect the availability and usefulness of the procedures. Accordingly, SIA requests that the SEC expressly confirm in the adopting release that the procedures described in the *Wit Capital* no-action letter and related procedures worked out individually by broker-dealers with the SEC staff remain unaffected by adoption of the Proposals, and may continue. This confirmation is especially important in light of the SEC's statement in the Release that the electronic roadshow line of no-action letters will not be continued following adoption.

3. Treatment of Roadshows

Roadshows are an essential and central element of the offering process. SIA supports the goal of the SEC that the Proposals not disrupt current roadshow practices, while creating incentives to expand them in new ways. We describe below some suggestions and concerns about the manner in which the Proposals achieve this goal.

a. Live Roadshows

SIA believes it is very important that existing practices for live roadshows not be disrupted. It is not clear whether some aspects of the Proposals achieve this objective. We seek clarification of the following matters.

i. Slides should be confirmed as "oral"

SIA believes it is the SEC's intention in the Proposals that slides projected on a screen to a live roadshow audience, projected video material and other graphics continue to be considered "oral" communications under the Securities Act, and that they will not be treated as free-writing prospectuses. This apparent intention is implied by the fact that the Release seeks comment whether these visual presentations should be considered free-writing prospectuses. SIA strongly believes that these materials are not considered free-writing prospectuses (but instead are oral), and that the matter is sufficiently important that the conclusion should be expressly confirmed by the SEC in the adopting release and not left open for any doubt or debate.

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[5] See *Wit Capital Corporation* (July 14, 1999), *W.R. Hambrecht & Co.* (July 12, 2000), Bear, Stearns & Co., Inc. (July 19, 2000) and *Wit Capital Corporation* (July 20, 2000).

The consequence of slides being considered free-writing prospectuses is that they would have to be filed publicly, which would create exactly the chilling and disruptive effect the SEC has sought to avoid by permitting institutional electronic roadshows to contain more detail and different emphasis than the public version. SIA notes that roadshow slides remain subject to Section 12(a)(2) liability regardless of their status as oral or written.

A further reason for SIA's belief that the oral status of roadshow visual presentations used in live audience presentations should be expressly confirmed by the SEC is that similar slides and other visual presentations have the opposite status for purposes of the Regulation M-A regime.[6] Given the different policies of the regulation of business combinations and of securities offerings, discussed below, this differing treatment is certainly appropriate. However, without express SEC clarification confusion about the oral status of these roadshow visuals could arise.

There are inherent differences between business combination transactions and securities offerings that justify their current separate regulatory regimes and continued differing treatment of the filing status of visual presentation materials such as slides. In the business combination context, the two combining companies are the primary actors and communicate with their existing investors about deal terms that have already been established. On the other hand, in a securities offering the underwriters play an essential role in finding new investors and communicating with them to gauge their interest as an essential element of price discovery to determine the terms that should be set.

In the business combination context, there is thus generally no need for a price discovery function or gatekeeper function analogous to underwriters. The information is one-way and investors make a binary decision – whether or not to vote for the deal. In the capital-raising context, the nature of the communications, including the roadshow and related discussions, is more two-way and interactive, because it is part of the process of discovering the price and other terms on which investors are willing to purchase the offered securities. That is necessarily interactive and a matter of fine-tuning. A filing requirement would force issuers to make the information suitable for a broad audience, diminishing the utility of group roadshow presentations in the price discovery process with institutional investors. A decrease in the quality and quantity of information available to institutional investors would be detrimental to the quality of the price setting process.

These inherent differences in the two types of transactions also have important implications for the risk-benefit analysis in considering various communications. In the business combination context, a filing requirement for visual presentation materials and scripts does not chill the communication, because getting the

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6 *See* Final Rules: Regulation of Takeovers and Security Holder Communications, Rel. No. 33-7760 (Oct. 22, 1999), at text accompanying note 44.

deal done on its announced terms is an overriding need for the combining companies, which control the communications decisions. In the securities offering context, a requirement to file roadshow visual presentation materials or scripts would have a very chilling effect. First, these materials are by their nature shorthand, designed to be presented only together with the accompanying oral explanation. Filing and viewing in isolation could lead to misunderstanding by investors by whom they were never intended to be seen. Secondly, the underwriters are, through their access to investors, a necessary party in the decision about whether to permit various types of communication. Given that underwriters could face potential Section 12(a)(2) liability on these communications in the securities offering context, public filing of these materials would expand the universe of potential claimants to include all investors who purchased in the offering rather than the more limited institutional investor groups to which they were presented. SIA believes it is not in the interests of investors or efficiency of the capital formation process to reduce the flow of lawful information to investors in securities offerings or to narrow the universe of investors to which that information is communicated.

ii. Overflow room is oral

In the Release, the SEC asks whether the rules should treat the use of electronic media to transmit a live oral roadshow to an audience overflow room also as an oral communication, even if the presentation to the overflow room is not interactive. SIA strongly believes that the overflow room transmission is also appropriately treated as an oral communication, and that the adopting release should expressly confirm this point. This result should be compelled both by the policy of not disrupting current roadshow practices and by logic. As to the former, the use of an overflow room is a common technique that enables issuers and managing underwriters to avoid artificial constraints on the size of the roadshow audience. Regarding the latter, a closed-circuit live audio/video transmission should no more be considered a writing than the live presentation itself, which will almost always involve the use of a public address system (in other words, audio amplification equipment) to enable the live audience to hear the speakers and sometimes involves live video projection of the speakers on a screen to enable the live audience in the back of the room better to see the speakers.

SIA believes that the treatment of a live closed-circuit transmission as oral is consistent with the overall structure of the Proposals and the reality of what it is – just an extension of the live audience. If a live telephone call is considered oral (as it properly is under the Proposals), then so should a live closed-circuit roadshow transmission, just as if another party at the investor's end were listening to the telephone call on a telephone extension.

If the SEC decides to implement this concept through an exception in Rule 433, it is essential to except the transmission not only from filing but also from the

record retention requirement.[7] Otherwise recording of the live roadshow would be required where it otherwise would not occur. The likely result of that recording requirement would be a chilling of the overflow room practice that would render the exception ineffective. As previously noted, the transmission is subject to Section 12(a)(2) liability regardless of whether it is considered written or oral.

SIA also believes that even more remote participation in a live roadshow, such as by remote closed-circuit connection to another office or multiple offices, should also be considered oral – it is clearly functionally identical to a feed to an adjacent room.

iii. Live audio and video roadshows are oral

Finally, SIA believes the existence of a live in-person audience in the same room as the presenters is not an essential element of a live oral roadshow. In some rapidly-executed fixed income and convertible offerings, marketed over a day or two, it is currently the practice to utilize a live mini-roadshow. Under this approach, the issuer's management, participating underwriter representatives and the audience members are connected by a live closed-circuit audio connection (in other words, a live telephone conference call) or sometimes an audio/video connection (typically, through an access-controlled webcast). There should be no reason why the presenters must even all be in the same room. Slides are presented in a similar access-controlled manner, with no downloading or copying permitted. This is an extremely efficient process for these rapidly-executed offerings. Since the presentations are live, no recording would normally be made. SIA believes this practice should continue, and that, as long as they are *live*, roadshows should be considered oral regardless of whether the presentation format involves remote audio or video transmission. Again, SIA believes such a conceptual approach is most consistent with the treatment of live individual telephone calls as oral.

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7 Under the Proposals, the consequence of any roadshow presentation being deemed a writing is that, because of the degree of issuer involvement, it would have to be publicly filed, which will have the practical effect in most cases of preventing or chilling the communication. Analytically there are two ways to modify the proposed rule to avoid the filing consequence for a particular communication. One is to interpret, or even revise, the definition of "graphic communication" or "written communication" to exclude the communication, thereby treating it as oral. The other is to except the communication from the filing, legending and recordkeeping requirements of Rule 433. The latter approach has been taken for recorded electronic roadshows (if the condition to publish an unrestricted "bona fide" roadshow is satisfied), except that only filing has been excepted. The requirement to include the prescribed legend and to retain the electronic roadshow recording for three years would still apply.

iv. Suggested revision to "graphic communication" definition

As proposed, the definition of "graphic communication" in Rule 405 does not clearly exclude even live individual telephone calls, although it is clear in the Release that these are considered oral (as they should be).[8] SIA believes the definition itself should be revised to clarify that, as stated in the Release, live telephone calls are not graphic communications, whatever the transmission medium. The clarification should also extend to live videophone calls, whatever the transmission medium. Use of phone equipment with video capability could increase more significantly in the near future, and we believe it is important to acknowledge from the outset that video capability does not cause a live, unrecorded telephone call to be a graphic communication.

Furthermore, while SIA understands the SEC's desire to avoid future interpretive questions about the oral versus written status of emerging and future technologies, the approach taken in the proposed "graphic communication" definition of treating all such technology as written appears unduly restrictive, as illustrated by the fact that, literally read, the definition does not deal well with live telephone calls. SIA believes the touchstone for determining the status of a communication as written should not be merely whether electronic media are *involved* in making the communication, but in addition (a) that the communication must be recorded or retained as an inherent part of the communication, *or* (b) that the communication is being made available to an unrestricted audience. This formulation would treat live telephone calls as oral, but recorded and replayed electronic roadshows as written. It would also apply oral status to live roadshow activities, including the overflow room and live conference call/closed webcast situations described above. Clarification of specific examples in the Release would continue to be appropriate, particularly to the effect that slides presented at live in-person roadshows and live closed-circuit transmitted roadshows, but not distributed (and not permitted to be downloaded or retained by the recipient), are considered oral.

b. Electronic Roadshows

SIA supports the Commission's decision in Rule 433 to permit multiple versions of electronic roadshows that can be tailored for specific audiences and not required to be shared through public filing with potential investors for whom they were not designed.

4. State Law Should Govern Time of Sale for Section 12(a)(2) Liability

SIA supports the policy behind the SEC's interpretation and proposed Rule 159 that investors in a public offering should be informed before making their investment decision. However, we believe that a clarification is appropriate to reflect the sales process as conducted today and in order to avoid the creation of unnecessary and unintended "speed bumps" in the offering process.

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[8] *See* Release at text accompanying note 61.

SIA recommends that proposed Rule 159 be modified to state, in the rule itself, that "time of sale" and "contract of sale" are defined by state law and not federal securities law, including the anti-waiver provisions of Section 14 of the Securities Act and Section 29 of the Exchange Act. The purpose of the modification is to clarify that the parties are free to define the time when the buyer is unconditionally obligated to purchase the offered securities.

For example, the underwriter and buyer may agree that the buyer's obligation to purchase is conditioned on the absence of objection after receiving a subsequent communication of new material adverse information within a specified period, such as by the buyer's close of business on the same day. Under such an agreement, the buyer would not be obligated to purchase the securities if material adverse information is so communicated and the buyer notifies the underwriter it does not wish to consummate the sale. While this approach may be implicit in many securities offerings, it is essential to the offering process for registered block sales, which arise and can be consummated within minutes. In deciding not to so notify the underwriter, the buyer in effect makes a new investment decision and that should be deemed the time of the contract of sale. Accordingly, in this situation the underwriter's Section 12(a)(2) liability should be based on the information conveyed at that latter time, not as of the earlier time. SIA believes many of today's public offering transactions are conducted in this fashion, either explicitly or implicitly. We believe our suggested revision is entirely consistent with the Release, which expressly notes that if the underwriter and buyer revise their first contract of sale in light of new subsequent disclosure and enter into a second contract of sale, the time of sale for Section 12(a)(2) purposes would be the time of the second contract of sale.[9]

We believe it should be made clear under the new rules that the above practice may continue, on the basis that it is entirely consistent with the Rule 159 principle that an investor should be informed before making an investment decision that commits the investor to a securities purchase. In the absence of such a clarification, it is possible that a federal law of contract of sale could develop – or could be feared to develop – for Section 12(a)(2) purposes that would cause underwriters to avoid use of the above approach. That result would introduce a "speed bump" into the offering process that in no way benefits investors and would be contrary to a stated goal[10] of Rule 159 and the related interpretation to avoid "speed bumps". Given the significance of potential Section 12(a)(2) liability and its effect on conduct, SIA believes the requested clarification that state law governs the existence of a contract of sale should be implemented in a manner that will have the greatest effect – in other words, embodied in Rule 159 itself.

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[9] *See* Release at text accompanying note 247.

[10] *See* Release at third paragraph following paragraph accompanying note 251.

5. Shelf Reforms for Well-Known Seasoned Issuers

SIA strongly endorses the automatic shelf registration process and other shelf reforms in the Proposals. We believe they have the potential to draw more offerings from the Rule 144A and other unregistered markets into the public market, to improve the efficiency of the U.S. public market, and possibly to enhance the global competitiveness of the U.S. public capital markets. We describe below some constructive and technical suggestions intended to enable the Proposals more fully to achieve these goals. These include expanding the class of WKSIs eligible for the automatic shelf process, modifying the three-year restatement requirement so it does not operate to black out seasoned non-WKSIs from market access, modifying the "ineligible issuer" definition to avoid the problematic retroactive disqualifying effect of government settlements and orders, and addressing underwriter due diligence in the context of even faster automatic shelf offerings.

a. Suggestions regarding automatic shelf procedures

i. WKSI eligibility

SIA recommends that the Commission expressly undertake to revisit after two years the parameters for WKSI eligibility – $700 million common equity public float or $1 billion in registered debt over three years – in light of experience with automatic shelf registration. Whether the eligibility criteria should be changed for some or all types of offerings can really only be known after the Commission, issuers, underwriters and investors have gained experience under the new automatic shelf registration system. The Commission followed this approach when it initially adopted the Rule 415 shelf registration system in 1982, making it permanent in 1983, with some modifications.

ii. Modify the three-year restatement requirement

Eliminate blackout for seasoned non-WKSIs. Today a seasoned shelf issuer is limited to registering the amount of securities reasonably expected to be sold over two years, but at the end of the two years may continue to offer unsold securities. Under the Proposals as currently drafted, any seasoned issuer that is not a WKSI will after three years be blacked out from being able to use its shelf until it has filed and had declared effective a restated shelf. SIA suggests that the Proposals be modified to permit the non-WKSI seasoned issuer to continue to use the existing shelf as long as it has filed the restatement shelf before the end of the three-year period (even though not yet effective). While the non-WKSI seasoned issuer could avoid any blackout risk by filing its restatement shelf six or twelve months before the end of the three-year period, we believe many issuers will for one reason or another not do that, for example, because the three-year deadline is all that is remembered, not that the deadline is for effectiveness rather than filing. We believe the rules should be constructed so that if they are observed by an issuer there will never be a blackout, and not, as now proposed, structured to require an unstated early voluntary filing in order for an issuer to achieve that result. We therefore recommend that the three-year deadline relate only to filing the restatement.

Clarify the restatement process. SIA understands that the purpose of the proposed three-year restatement requirement for shelf registration statements is to simplify the SEC record so that investors and the SEC staff can more readily identify relevant information. We suggest that the SEC confirm in the adopting release that the restatement is limited to restated disclosure about the classes of securities registered and the issuers that are registrants, and does not extend to any issuer disclosure that is updated at the filing of each annual report on Form 10-K or 20-F.

b. Concerns about operation of the "ineligible issuer" definition to parents of broker-dealers subject to settlements and consents

The proposed definition of "ineligible issuer" in Rule 405 includes a new disqualification, not used in other SEC rules, if an issuer or any of its subsidiaries within the past three years (a) entered into a settlement with any governmental agency involving allegations of violations of the federal securities laws or regulations, or (b) was subject to a judicial or administrative order finding violations of the federal securities laws or prohibiting violations or conduct relating to those laws. Upon adoption of the Proposals, the disqualification would retroactively apply to any issuer that within the past three years has itself or through a subsidiary entered into the described settlements or been made subject to the described orders. As a result, most financial institution issuers having significant broker-dealer or investment advisory businesses will be disqualified from use of the automatic shelf procedure and the ability to use free-writing prospectuses (even if accompanied or preceded by a statutory preliminary prospectus), including use of electronic roadshows. Included among these disqualified financial institutions would be the public parent companies of many SIA member firms.

The reason for the disproportionate effect of these disqualification provisions, of course, is that broker-dealer and investment advisory subsidiaries are regulated by the federal securities laws and as part of their business must address the fact that regulatory violations will often be violations of the federal securities laws. Particularly in recent years, all major broker-dealers and many investment advisers have been the subject of orders or settlements that would disqualify their parent companies from WKSI status under the Proposals.

SIA believes it is not necessary or appropriate in the public interest to create such a blanket disqualification, the likely result of which will be that the SEC will be inundated with exemption or waiver requests. For example, it would be unfair to the issuer and unhelpful to investors to disqualify an issuer and its underwriters from the ability to send final term sheets (which are free-writing prospectuses) to investors as part of the sales process upon pricing due to the fact that a salesman at the issuer's broker-dealer subsidiary had committed a federal securities law violation that resulted in a Commission consent decree for the broker-dealer within the prior three years.

The SEC should limit disqualifying consents or orders to those to which the issuer itself (not merely a subsidiary) is a party or is the subject *and* that involve

alleged violations of the antifraud provisions of the federal securities laws. Those parameters would more closely track the provisions of the statutory safe harbors for forward-looking statements in the Securities Act and the Exchange Act, which according to the Release were the inspiration for the disqualifications in the Proposals relating to consents and orders, and would better tie the remedy to the problem.[11]

Also, the disqualification should apply only with respect to orders and settlements entered after the effective date of the new rules. That will give issuers an opportunity to negotiate a waiver or exemption at the time of the settlement or order.

c. Due Diligence Matters

SIA respectfully requests that the SEC revisit the subject of underwriter due diligence to recognize expressly that the opportunity for reasonable due diligence is less in today's fast-paced shelf takedowns and will be even less in tomorrow's faster automatic shelf takedowns. We were, frankly, surprised at the complete absence in the Release of any discussion about due diligence, especially given the separate focus in the Release on a variety of Section 11 and Section 12(a)(2) liability issues, and the fact that the 1998 Aircraft Carrier proposing release discussed the subject.

SIA respectfully urges the SEC to extend Rule 176 to Section 12(a)(2). Currently, the Rule lists relevant factors in considering whether a "reasonable investigation" has been performed for Section 11 purposes. No similar rule exists to address factors relevant to what constitutes "reasonable care" for Section 12(a)(2) purposes. We believe the same factors should be relevant, and that Rule 176 should be amended so to provide. We note that the 1998 Aircraft Carrier proposing release contained such a proposal, and believe the change is even more appropriate today, given the applicability of Section 12(a)(2) to free-writing prospectuses and the SEC interpretation and Rule 159 regarding information at the time of sale.

SIA also believes the SEC should carry forward in the adopting release the statement in the 1998 Aircraft Carrier release that: "Section 11 requires a more diligent

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[11] The Release states that this disqualification was drawn from the statutory safe harbors for forward-looking information in Section 27A of the Securities Act and Section 21E of the Exchange Act. *See* Release at text accompanying note 163. However, the Proposals go beyond those provisions in two key respects:

- The statutory safe harbors base disqualification on violations of the "antifraud provisions" of the federal securities laws, whereas the Proposals base disqualification on violations of *any* provisions of those laws.
- The statutory safe harbors base disqualification on only orders to which the issuer is subject, whereas the Proposals also base disqualification on orders and settlements to which *subsidiaries* are subject.

investigation than Section 12(a)(2) … ."[12] The purpose is to avoid any implication that, by silence in the release adopting proposals on the same subject as the 1998 release, the SEC is somehow changing its view on that matter.

Furthermore, SIA believes the SEC should expressly acknowledge, at least in the adopting release, that the process of underwriter due diligence in shelf offerings and in the non-shelf context are appropriately different. First, shelf due diligence is not a single activity conducted in a specific period of time just before the offering. Instead, it includes a variety of activities conducted over time, including due diligence in recent prior offerings, participation in issuer earnings and other calls with securities analysts and consultations with the firm's own research analyst in vetting a proposed offering, as well as due diligence activities specific to the proposed offering.

Second, because shelf offerings can arise and be completed more quickly than non-shelf offerings, what is reasonable due diligence in the circumstances will necessarily involve less than in a slower paced, non-shelf offering. Underwriters are not in a position to slow these offerings, but instead can perform only the due diligence that is reasonable under the circumstances.

Accordingly, SIA believes the foregoing reality of the limitations on the underwriters' gatekeeper function should be expressly recognized by the SEC.

OTHER COMMENTS

1. Non-Offering Communications

a. Ordinary Communications Safe Harbors

SIA recommends that the SEC modify Rules 168 and 169 to state expressly the non-exclusive nature of these safe harbors for ordinary communications. A similar approach has been taken in Preliminary Note 3 of Regulation D, exempting private offerings, and Preliminary Note 5 of Regulation S, exempting offshore offerings.

b. 30-day Safe Harbor

SIA supports the 30-day safe harbor for pre-filing communications in proposed Rule 163A. Such a bright line rule will be a useful aid in planning communications prior to an offering.

We note that the Rule 163A safe harbor is available only for issuer communications. SIA suggests that the scope of "by or on behalf of the issuer" be clarified in the adopting release as extending to participation by broker-dealer personnel in issuer investor presentations occurring more than 30 days before filing a registration

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[12] *See* Proposed Rules: The Regulation of Securities Offerings, Rel. No. 33-7606A (Nov. 13, 1998), at text accompanying note 460.

statement. Research personnel (or, alternatively, investment banking personnel) may have a presentation role at an issuer's investor conference. Their involvement should not undermine the Rule 163A protection for the entire conference, as long as the rule's conditions are satisfied (*i.e.*, there is no reference to the offering and the conference is held 30 days before filing the registration statement).

c. Research

i. Research safe harbors should not be limited to written research

The Proposals would narrow the research safe harbors (Rules 137, 138 and 139) by limiting them (a) to research that is "written" within the meaning of the proposed Securities Act definition of that term in Rule 405, and (b) to research providing sufficient information upon which to base an investment decision. The current research safe harbors are not limited in that fashion and extend to qualifying oral communications and to opinions and recommendations that contain no additional information, in each case because the current safe harbors apply to "information, opinions and recommendations." SIA believes the research safe harbors should continue to be available for research communications that are oral or do not contain sufficient information on which to base an investment decision. Both of these objectives could be readily accomplished by replacing the proposed definition of "research report" with the phrase used in the current rules, "information, opinions and recommendations."

For example, there is currently a practice among some research analysts to conduct audio conference calls or video webcasts for interested customers about issuers that would be considered research reports under the proposed definition except for their being live and therefore oral. Although not likely for efficiency reasons, such a presentation could also be made to an audience in person. If conducted during an offering under conditions satisfying the safe harbors, today those communications could continue under protection of the safe harbors. Under the Proposals, they could not.[13] That limitation is inconsistent with the goal of the Proposals to liberalize restrictions on research during offerings.

ii. Clarify "writing" can differ for Securities Act and Exchange Act research rules

SIA recommends that the SEC confirm that electronic communications that would constitute a writing for Securities Act purposes under the Proposals would not automatically be "written research" for Regulation AC purposes under the Exchange Act. For example, neither the live research presentation described in subsection i. above nor a

[13] Ironically, even though the live version would not be protected, a taped replay would arguably be protected by the safe harbors in the Proposals, because the replay would be more likely a written communication under the proposed definition of "graphic communication" in Rule 405.

recorded replay are considered "research" under Exchange Act Regulation AC, and therefore certification and the other requirements of the regulation do not apply, because Regulation AC applies only to "written" research reports. Even though "written" is not defined for purposes of the regulation, today's practices do not treat conference calls, webcasts and their recorded replays as written.[14]

Under the proposed Securities Act definitions of "written communication" and "graphic communication" in Rule 405, the recorded replay of the presentation would likely be considered a writing. SIA recommends that in the adopting release the SEC should confirm that the Rule 405 definition of "written communication" is not applicable in the Exchange Act context, including for Regulation AC purposes. This potentially differing treatment would be consistent with the SEC's acknowledgement in the Release that what constitutes a "research report" for purposes of the two regulatory regimes may differ because of their different purposes.[15]

iii. Clarify that initiation is the only intended limitation in Rule 139

In the Release, the SEC explains that the reason for replacing the "reasonable regularity" requirement in Rule 139 with the requirement that the broker at the time of use have distributed or published research reports about the issuer or its securities is to eliminate uncertainty about availability of the safe harbor while continuing to exclude from the safe harbor a report initiating coverage.[16] SIA supports this change, but we believe the new requirement is not sufficiently clear. In particular, use of the plural "reports" suggests that multiple prior reports must have been published, whereas excluding solely a report initiating coverage implies that only one prior report need have been published.

Accordingly, we recommend that the text of the proposed changes to Rule 139(a)(1)(iii) be modified to replace "publishing or distributing research reports about the issuer or its securities" with "has published or distributed at least one research report about the issuer or its securities." A similar change should also be made to Rule 139(a)(2)(v).

iv. Extend the issuer-specific research safe harbor to all reporting issuers

SIA supports the extension of the industry research safe harbor (proposed Rule 139(a)(2)) to all reporting issuers, not merely seasoned issuers. We also strongly recommend that the safe harbor for issuer-specific research (proposed Rule 139(a)(1)) be

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14 Although Regulation AC includes "electronic communications" as written, that is presumably to pick up e-mailed versions and website postings, not conference calls, webcasts and their replays.

15 *See* Release at text accompanying note 219.

16 *See* Release at text accompanying note 227.

similarly extended. The Release states as justification for relaxing some of the other safe harbor restrictions a variety of structural and regulatory changes that have reinforced the independence of the research function.[17] Given the Regulation AC analyst certification requirements and the new SRO research analyst rules, including independence of analyst compensation and disclosure about issuer relationships, and the effects on the industry of the global research settlement, the independence of the research function should be accepted for purposes of Rule 139(a)(1). We note also that once research coverage has been initiated on a non-seasoned reporting company following its IPO, disruption of that research due to a pending follow-on offering, possibly for a considerable period, is a disservice to investors, who will have come to expect coverage. In our view, the structural and regulatory changes to reinforce the independence of the research function also justify extending the issuer-specific safe harbor to research on non-seasoned reporting issuers.

If desirable, an additional condition could be imposed that the issuer must be eligible for use of Form S-3 or F-3 except that the one-year reporting history requirement (or, in the case of certain foreign private issuers, the 12-month offshore trading history requirement) would not apply. In other words, the common equity public float requirement would apply but the one-year reporting requirement, which is the most problematic aspect of the seasoned issuer limitation in Rule 139(a)(1), would not apply.

v. Do not limit seasoned non-reporting foreign issuers to those trading on a "designated offshore securities market"

Rules 138 and 139(a)(1) would be available to a non-reporting foreign private issuer if seasoning conditions are met. One of those is that the issuer's securities have traded on an offshore market for 12 months. To the extent that condition is not eliminated, as we suggest above, we believe there is not sufficient reason to limit the eligible offshore markets to those designated by the SEC as "designated offshore securities markets" for Regulation S purposes. There are several significant offshore markets that have not been so designated, such as the Athens Stock Exchange.

The purpose of the research safe harbor is to permit research to continue during an offering where there is a legitimate existing investor base that expects and needs the research. The purpose of designating a market for Regulation S purposes is quite limited – to allow Rule 904 resales in non-prearranged trades executed through the facilities of the market without requiring that the seller form a reasonable belief that the buyer is outside the United States. For Regulation S purposes, an important element of designation as an offshore market is trade reporting to and oversight by a governmental or self-regulatory body. The limitations relevant to the Regulation S designation should not be carried over to the research rules, where they do not conceptually apply. Trade reporting and local regulation do not determine whether there is a legitimate investor base.

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[17] *See* Release at text accompanying notes 206-211.

vi. Do not condition Rule 138 on publishing on same types of securities

The Commission proposes to add to Rule 138 a condition that, in addition to publishing the report in the regular course of business, the broker-dealer must have previously published research on the same types of securities. SIA believes addition of this condition is contrary to the Proposals' philosophy of expanding the research safe harbors and has not been shown to be needed. We believe the same structural and regulatory changes to the independence of the research function cited in the Proposals as support for expanding the safe harbors will adequately protect against any abuse to which this proposed new condition is directed. Moreover, it is unlikely that initiation of debt research could be used to condition the market for an equity offering, or *vice versa*, given the different issuer information in which these two investor groups are interested.

Finally, the reference to "the types of securities in question," in the proposed new condition is ambiguous. It could be misread to make the safe harbor unavailable for initiation of debt research on the particular issuer during a common stock offering even if the broker-dealer has already been publishing debt research on other issuers. We understand that instead the condition is intended to deny the safe harbor only where a broker-dealer that has not been publishing research on the type of security (*i.e.,* debt or equity) for *any* issuer begins doing so for an issuer engaged in an offering of the other type. If the condition is retained, we recommend that it be clarified.

vii. Extend issuer-specific safe harbor to exchange-traded funds

SIA recommends that the issuer-specific research safe harbor (proposed Rule 139(a)(1)) be extended to closed-end investment companies and exchange-traded funds (which are organized as open-end funds or unit investment trusts and generally based on a fixed index, basket or commodity).[18] Focused research on these types of issuers is currently ineligible for the safe harbor for the purely technical reason that they do not utilize Form S-3, but rather Form N-1A, N-2 or N-8B-2, even though they may satisfy all the relevant substantive conditions, such as market capitalization and one-year reporting history.

The problem is of particular concern in the case of exchange-traded funds because they are engaged in continuous distributions and most major broker-dealers act as authorized participants to distribute newly created units as an essential part of the operation of these funds. Thus, issuer-specific research on exchange-traded funds by most broker-dealers can never benefit from the safe harbor.

Such a limitation is neither necessary nor appropriate. Instead, Rule 139(a)(1) should be available to closed-end investment companies and

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[18] The Release invites comment on this issue. *See* Release at text accompanying note 228.

exchange-traded funds satisfying the substantive conditions of the safe harbor, without regard to technical Securities Act registration form requirements.

We note that if Rule 139(a)(1) is extended to research on all reporting issuers as we recommend in subsection iv. above, the issue addressed in this subsection vii. would also be resolved.

viii. Extend research safe harbors to all private offerings

SIA supports the extension in the Proposals of the research safe harbors to Rule 144A and Regulation S offerings. However, we recommend that the safe harbors be made further available in any kind of exempt private offering, whether conducted in reliance on Rule 144A, Section 4(2), Section 4(1½) or Regulation D. The nature of the research as not constituting an offer or general solicitation or advertising should not depend on the technical exemption being relied on.

For example, research during a Section 4(2) placement to qualified institutional buyers should also be covered by the safe harbors. The structure of the offering as a direct sale through a broker acting as agent under Section 4(2) or Regulation D *vs.* a purchase by a dealer and simultaneous resale under Rule 144A to the same institutions should not affect the availability of the research safe harbors. Similarly, if the private purchase and resale is made in reliance on Section 4(1½), such as because the class of offered security is already publicly traded, rather than in reliance on Rule 144A, the availability of the research safe harbors should not be affected. In all cases the character of the research communication is the same – it is neither an offer nor a general solicitation or advertising.

2. Offering Process

a. Shelf Mechanics

i. Further ease traditional shelf mechanics

SIA recommends that the following aspects of the automatic shelf registration system for WKSIs be made available for traditional shelf registration by any seasoned issuer:

- ability to omit the plan of distribution from the base prospectus;
- application of the "universal" shelf approach to selling securityholders – in other words, registration without allocating dollar amounts among classes of securities or among the issuer, subsidiaries and selling securityholders; and
- ability to add new classes of securities and new majority-owned subsidiaries by automatically effective post-effective amendment.

We believe there is nothing about these provisions that is inherently appropriate only for WKSIs.

ii. Superseded documents

SIA supports the change to Rule 412 that permits subsequently filed incorporated Exchange Act reports to modify statements in the registration statement and prospectus. In order to assist readers of the SEC EDGAR file to be on notice that a document has been modified or superseded by a subsequent document, it would be helpful for the SEC to provide for an optional mechanism to identify superseded documents or superseded portions of documents. For example, the SEC could permit an issuer to modify the superseded document to insert special EDGAR tags that also point to the replacement disclosure.

It would be important that the SEC confirm that such a modification is not considered an amendment for any purposes under the federal securities laws, and that the special EDGAR tags are not considered "filed" for any purpose. Thus, questions about the need to update or provide new certifications, experts consents, etc. would be avoided. It is important that the tags be optional so that an issuer and others will get "credit" for the superseding document for liability purposes whether or not the tags are inserted.

iii. Pay-as-you-go fees in MTN programs

SIA suggests that the SEC confirm in the adopting release that in MTN programs and other continuous offerings, a registrant may pay the filing fee in advance and make the filing contemplated by proposed Rule 456(b)(1)(iii) for any amount of securities, and then sell those securities until the fee is used up. A registrant should not have to pay a small filing fee and make the related filing each time it sells a medium-term note or files a pricing supplement under Rule 424 to reflect new interest rates and/or offering prices, which can occur weekly or more frequently.

b. Prospectus Delivery Reforms

i. Do not penalize underwriters for issuer's late prospectus filing

SIA supports the goal in the Proposals to eliminate the link between delivery of the final prospectus and delivery of the confirmation of sale.[19] However, we note that as currently drafted proposed Rule 172 does not fully accomplish that objective. If the issuer's Rule 424 filing of the final prospectus, which is required within two business days, is late, the Section 5 exemption in proposed Rule 172 will not be available for the confirmations that the underwriters have already sent out. Because there is no cure provision for this situation, the underwriters would remain exposed to allegations of Section 5 violations.

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[19] *See* Release at text accompanying note 351.

SIA recommends that the Rule 172 exemption be made available without the condition that the final prospectus be filed pursuant to Rule 424. Late filing by an issuer can be addressed through SEC enforcement action for violations of Rule 424. Penalizing underwriters could result in their delaying the sending of confirmations until the final prospectus has in fact been filed. That delay is contrary to the goal of reducing systemic risk through accelerating the securities confirmation and settlement process, and would frustrate the Rule 172 goal of de-linking confirmations from the final prospectus.

ii. Eliminate prospectus delivery for dealers during 25-day post-IPO aftermarket period

In view of the electronic availability of final prospectuses, SIA recommends that the SEC consider amending Rule 174 to eliminate the requirement for dealer prospectus delivery in aftermarket sales following an IPO where the securities are listed on a national securities exchange or the Nasdaq Stock Market. Currently, dealers must survey the marketplace and maintain databases for all IPOs, even where the dealer was not an underwriter, in order to comply with their prospectus delivery obligations for 25 days after the IPO under Rule 174. (Longer delivery periods apply for non-listed offerings, but they are sufficiently rare that we are addressing only listed offerings in this comment.) While proposed Rule 173 will reduce the mailing costs by substituting notice for the final prospectus, it will not reduce the need to maintain a database for all IPOs and maintain computer systems to place the required notice in confirmations.

SIA respectfully submits that public availability of the final prospectus on the internet via the EDGAR system sufficiently addresses the goal of Section 4(3) and Rule 174 – that following an IPO the marketplace be given sufficient information about the issuer – to justify easing the burden on dealers to track all IPOs. Because Rule 173 notices are driven by prospectus delivery requirements under Rule 174, we believe our suggestion should be implemented by amending Rule 174 rather than Rule 173. While the main practical impetus for our suggestion is the burden on dealers that did not participate in the IPO as underwriters, we believe it would be inconsistent to eliminate only some dealers. Thus, we urge elimination of this requirement for all dealers.

3. Liability

SIA supports the rule changes in the Proposals to bring the timing of Section 11 liability of issuers, directors and signing officers into line with that of underwriters in shelf offerings and into line with the Section 11 liability timing of all parties in non-shelf offerings.

4. Coordination With Other Regulators

SIA recommends that the SEC coordinate with other regulators overseen by the SEC concerning their rules affecting communications and the offering process in order to avoid any unintended conflicts with the goals of the Proposals. For example, the NASD's proposed revisions to Rule 2710 and its other rules relating to shelf offerings do

not reflect the changes in the Proposals. Under proposed amended NASD Rule 2710,[20] NASD filing and review would be required for each equity or high yield debt takedown from an automatic shelf registration statement by a WKSI that is in years two and three following its initial public offering, in cases where the WKSI is not eligible for the rule's four-year maturity investment grade debt exemption because it has no outstanding debt, only under-four year maturity debt or only high yield debt.[21]

As another example, the PCAOB's current standard for comfort letters (AICPA Statement on Auditing Standards No. 72, as amended, which was adopted by PCAOB Rule 3200T) does not contemplate comfort letters on free-writing prospectuses, which did not exist when the standard was issued.

CONCLUSION

SIA strongly supports the Proposals. In the same spirit of incrementalism that guided the Proposals, we have in this letter made suggestions intended to shape the Proposals modestly. We respectfully request the SEC to consider these suggestions in the constructive spirit in which they are offered.

*   *   *

[20] SEC File No. SR-NASD-2004-022.

[21] Also, it is not clear whether free-writing prospectuses used by NASD members are exempt from NASD filing under Rule 2210(c)(8)(E), which excludes from filing and spot-check procedures prospectuses, offering circulars and similar documents that have been filed with the SEC.

The Committees appreciate very much this opportunity to present our views. Should you have any questions, please feel free to communicate with our SIA staff advisor Scott Kursman, Vice President & Associate General Counsel of SIA, at (212) 618-0508, or with counsel to our task force, John T. Bostelman of Sullivan & Cromwell LLP, at 212-558-3840. We would be happy to arrange a meeting between the Staff and members of the Federal Regulation and Capital Markets Committees or their `33 Act Reform Task Force to explain our views more thoroughly.

Very truly yours,

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Carlos Morales, Co-Chairman,
SIA Federal Regulation Committee

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Howard Steinberg, Co-Chairman,
SIA Federal Regulation Committee

____

John Faulkner, Chairman,
SIA Capital Markets Committee
and Co-Chairman, SIA `33 Act Reform Task Force

____

Edward F. Greene, Co-Chairman,
SIA `33 Act Reform Task Force[22]

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[22] This letter was prepared on behalf of the Federal Regulation and Capital Markets Committees by their `33 Act Reform Task Force, consisting of representatives of the following member firms:

ABN AMRO Incorporated
Ameritrade Holding Corporation
Banc of America Securities LLC
The Bank of New York
Bear, Stearns & Co. Inc.

(Enclosure)

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
Giovanni Prezioso, General Counsel, Office of General Counsel
Alan Beller, Director, Division of Corporation Finance
Martin Dunn, Deputy Director, Division of Corporation Finance
Amy Starr, Senior Special Counsel, Division of Corporation Finance
Annette L. Nazareth, Director, Division of Market Regulation
Paul F. Roye, Director, Division of Investment Management

Canadian Imperial Bank of Commerce
C.E. Unterberg, Towbin
Charles Schwab & Co., Inc.
Citigroup Global Markets Inc.
Credit Suisse First Boston LLC
Deutsche Bank Securities Inc.
First Albany Capital, Inc.
Goldman, Sachs & Co.
Instinet Corporation
J.P. Morgan Chase & Co.
Legg Mason Wood Walker
Lehman Brothers
Bernard L. Madoff Investment Securities LLC
Merrill Lynch, Pierce, Fenner & Smith Incorporated
Morgan Stanley
Piper Jaffray & Co.
Prudential Equity Group
RBC Capital Markets
Raymond James Financial Inc.
Ryan Beck & Co.
SunTrust Capital Markets, Inc.
UBS Securities LLC

EXHIBIT A

SIA's Suggested Changes to Proposed Rule 134

§230.134 Communications not deemed a prospectus.

Except as provided in paragraph (f) of this section, the terms "prospectus" as defined in section 2(a)(10) of the Act or "free writing prospectus" as defined in Rule 405 (§230.405) shall not include a communication limited to the statements required or permitted by this section, provided that the communication is published or transmitted to any person only after a registration statement ~~(which includes a prospectus satisfying the requirements of section 10 of the Act, including a price range where required)~~ has been filed.

(a) Such communication may include any one or more of the following items of information, which need not follow the numerical sequence of this paragraph:

(1) Factual information about the legal identity and business location of the issuer limited to the following: the name of the issuer of the security, the address, phone number and e-mail address of the issuer's principal offices and contact for investors, the issuer's country of organization, ~~and~~ the geographic areas in which it conducts business, and the number of years the issuer has been in operation;

(2) The title of the security or securities, ~~and~~ the amount or amounts being offered, whether the underwriting is on a firm commitment or best efforts basis, and the amount of any underwriters' over-allotment (green shoe) option;

(3) A brief indication of the general type of business of the issuer, limited to the following:

(i) In the case of a manufacturing company, the general type of manufacturing, the principal products or classes of products manufactured, and the segments in which the company conducts business;

(ii) In the case of a public utility company, the general type of services rendered, a brief indication of the area served, and the segments in which the company conducts business;

(iii) In the case of an asset-backed issuer, the identity of key parties, such as sponsor, depositor, issuing entity, servicer, and trustee, the asset class of the transaction, and the identity of any credit enhancement or other support; and

(iv) In the case of any other type of company, a corresponding statement;

(4) The issuer's status as non-reporting, reporting (*i.e.*, required to file reports under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) or voluntarily reporting thereunder) seasoned (*i.e.*, eligible for Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter)) or well-known seasoned issuer (as defined in Rule 405 (§239.405));

(5) A value of the issuer's aggregate market value of voting and non-voting common equity (computed in the same manner as the $75 million condition for eligibility to use Form S-3 (§239.13 of this chapter) or Form F-3 (§239.33 of this chapter) for primary offerings, except that holdings by affiliates as well as non-affiliates are to be included);

(6) The price of the security, or if the price is not known, the method of its determination or the bona fide estimate of the price range as specified by the issuer or the managing underwriter or underwriters;

(7) A market price or prices for securities of the same class as the securities being offered;

(8) A value of ADTV (as defined in Rule 100(b) of Regulation M (§242.100(b) of this chapter)) for securities of the same class as the securities being offered;

(9) In the case of a fixed income security, the final maturity and interest rate provisions or, if the final maturity or interest rate provisions are not known, the probable final maturity or interest rate provisions, as specified by the issuer or the managing underwriter or underwriters;

(10) In the case of a fixed income security with a fixed (non-contingent) interest rate provision, the yield or, if the yield is not known, the probable yield range, as specified by the issuer or the managing underwriter or underwriters, ~~and~~ the yield of fixed income securities with comparable maturity and security rating as referred to in paragraph (a)(20) of this section, and the yield spread or, if the yield spread is not known, the probable yield spread range, as specified by the issuer or the managing underwriter, above a specified series and maturity of U.S. Treasury securities or other specified benchmark securities;

(11) A brief description of the proposed use of proceeds of the offered securities;

(12) The name and address of the sender of the communication and the fact that it is participating, or expects to participate, in the distribution of the security;

(13) The names of underwriters participating in the offering of the securities, and their additional roles, if any, within the underwriting syndicate;

(14) The anticipated schedule for the offering (including the approximate date upon which the proposed sale to the public will begin) and a description of marketing events (including the dates, times, locations, and procedures for attending or otherwise accessing them);

(15) A description of the procedures by which the underwriters will conduct the offering and the procedures for transactions in connection with the offering with an underwriter or participating dealer (including procedures regarding account-opening and submitting indications of interest and conditional offers to buy);

(16) Whether, in the opinion of counsel, the security is a legal investment for savings banks, fiduciaries, insurance companies, or similar investors under the laws of any State or Territory or the District of Columbia;

(17) Whether, in the opinion of counsel, the security is exempt from specified taxes, or the extent to which the issuer has agreed to pay any tax with respect to the security or measured by the income therefrom;

(18) Whether the security is being offered through rights issued to security holders, and, if so, the class of securities the holders of which will be entitled to subscribe, the subscription ratio, the actual or proposed record date, the date upon which the rights were issued or are expected to be issued, the actual or anticipated date upon which they will expire, and the approximate subscription price, or any of the foregoing;

(19) Any statement or legend required by any state law or administrative authority;

(20) With respect to the securities being offered:

(i) Any security rating assigned, or reasonably expected to be assigned, by a nationally recognized statistical rating organization as defined in Rule 15c3-1(c)(2)(vi)(F) of the Securities Exchange Act of 1934 (§240.15c3-1(c)(2)(vi)(F) of this chapter) and the name or names of the nationally recognized statistical rating organization(s) that assigned or is or are reasonably expected to assign the rating(s); and

(ii) If registered on Form F–9 (§239.39 of this chapter), any security rating assigned, or reasonably expected to be assigned, by any other rating organization specified in the Instruction to paragraph A.(2) of General Instruction I of Form F–9;

(21) The names of selling security holders (if included in the prospectus filed at the time of the communication);

(22) The names of securities exchanges or other securities markets where any class of the issuer's securities are, or will be, listed;

(23) The ticker symbols, or proposed ticker symbols, of the issuer's securities; and

(24) The CUSIP number or other security identification code of the securities being offered;

(25) Information disclosed in order to correct inaccuracies previously contained in a communication made pursuant to this section.

(b) Except as provided in paragraph (c) of this section, every communication used pursuant to this section shall contain the following:

(1) If the registration statement has not yet become effective, the following statement:

"A registration statement relating to these securities has been filed with the Securities and Exchange Commission but has not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective"; and

(2) The name and address of a person or persons from whom a written prospectus for the offering meeting the requirements of section 10 of the Act~~, including a price range where required,~~ may be obtained.

(c) Any of the statements or information specified in paragraph (b) of this section may, but need not, be contained in a communication:

(1) Which does no more than state from whom a written prospectus meeting the requirements of section 10 of the Act~~, including a price range where required,~~ may be obtained, identify the security, state the price thereof and state by whom orders will be executed; or

(2) Which is accompanied or preceded by a prospectus or a summary prospectus, other than a free writing prospectus as defined in Rule 405 (§230.405), which meets the requirements of section 10 of the Act~~, including a price range where required,~~ at the date of such preliminary communication.

(d) A communication sent or delivered to any person pursuant to this section which is accompanied or preceded by a prospectus (other than a free writing prospectus as defined in Rule 405 (§230.405)) which meets the requirements of section 10 of the Act, including a price range where required, at the date of such communication, may solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate whether he might be interested in the security, if the communication contains substantially the following statement:

> "No offer to buy the securities can be accepted and no part of the purchase price can be received until the registration statement has become effective, and any such offer may be withdrawn or revoked, without obligation or commitment of any kind, at any time prior to notice of its acceptance given after the effective date."

Provided, that such statement need not be included in such a communication to a dealer.

(e) This section does not apply to a notice, circular, advertisement, letter, or other communication relating to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(f) A section 10 prospectus included in any communication pursuant to this section shall remain a prospectus for all purposes under the Act.