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February 11, 2005

Via Electronic Transmission: rule-comments@sec.gov

Securities and Exchange Commission
Attn: Jonathan G. Katz, Secretary
450 Fifth Street, N.W.
Washington, DC 10549-06

Re: File No. S7-38-04 – Securities and Exchange Commission ("Commission")
Proposing Release Nos. 33-8501; 34-50624; IC-26649;
International Series Release No. 1282, dated November 3, 2004,
69 Fed. Reg. 67392 (Nov. 17, 2004) ("Release")
Securities Offering Reform – Comments of Alston & Bird LLP

Ladies and Gentlemen:

This letter responds to the Commission's request for comments on the regulatory amendments proposed in the Release (the "Proposals"), which would significantly transform the registration, communications and offering process under the Securities Act of 1933, as amended (the "Securities Act"), and improve integration of the disclosure requirements and procedures under the Securities Act and the Securities Exchange Act of 1934, as amended (the "Exchange Act").

The comments expressed in this letter reflect the views of certain partners of this law firm who participated in the preparation of this letter and who regularly represent issuers, underwriters and investors. Our letter does not reflect the views of all attorneys in the firm or the views of our clients.

I. Overview

We strongly support the Proposals, in particular because of their recognition of advances in information and communications technology and the efficiencies made possible by such advances. We believe that the Proposals appropriately address market behavior and expectations related to active issuers which receive a high degree of scrutiny by analysts and the marketplace generally. We have a number of specific recommendations for modifications to the Proposals, discussed below, which we believe are consistent with the Commission's underlying policies.

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II. Comments on the Proposals

A. Offering Related Communications

1. 30-Day Safe Harbor Rule (Proposed Rule 163A)

While we agree with the policy underlying proposed Rule 163A, we believe that, unless the proposed rule is amended to exclude pre-30-day communications from the definition of "offer" in Securities Act Section 2(a)(3), the rule will not provide issuers with any greater certainty regarding their pre-offering activities and communications than currently exists. Under the proposed rule, if communications made prior to the 30-day period do not qualify for other safe harbors (*i.e.*, regularly released factual business information or forward-looking information), issuers will still be subject to Securities Act Section 12(a)(2) liability for such communications and, therefore, still be in the position that they are today, having to assess whether such communications can be deemed to be "offers" under Section 2(a)(3). If the Commission does not wish to exclude such communications from Section 2(a)(3), we suggest it consider other changes (such as excluding the communications from the Section 2(a)(10) definition of "prospectus") to provide issuers with greater certainty regarding what communications may or may not be deemed offers or prospectuses.

We believe that an issuer should be able to rely on the 30-day exclusion in proposed Rule 163A for information that is released by the issuer and posted on its website prior to the 30-day period, even if such information is not eligible for the regularly-released factual business or forward-looking information safe harbors under proposed Rule 168 or 169. Specifically, we recommend that the Commission revise proposed Rule 163A to provide that the posting and maintenance on an issuer's website of information that otherwise meets the requirements of the proposed rule would not be considered to be "further distribution or publication" of such information.

Further, we recommend that the Commission provide specific guidance on procedures an issuer should take to constitute "reasonable steps" to archive information previously published on the issuer's website that does not qualify for the regularly released factual business or forward-looking information safe harbors under proposed Rule 168 or 169. However, we urge the Commission to recognize certain standard features of corporate websites, and not require relocation of materials that are not presented in a manner intended to facilitate marketing of an offering. For example, press releases are typically located in an area of the company's website apart from other content, usually displayed in reverse chronological order. We do not believe that such dated materials need to be relocated in order to avoid investor confusion.

Finally, we note that, for the 30-day safe harbor to be available, the communication may not "reference a securities offering." We would recommend that this phrase instead read "reference the registered offering." This would conform proposed Rule 163A to the phrasing used in proposed Rules 168(c) and 169(c).

2. Expanded Rule 134

We support the proposed expansion of information that Securities Act Rule 134 permits to be communicated, without such communications being deemed to be "prospectuses" or "free writing prospectuses." We believe, however, that the categories of permitted information should be further broadened to include brief statements about the manner and purpose of an offering, including the use of proceeds therefrom. As the Release notes, proposed revised Rule 134 is intended to allow limited public notice about an offering after an issuer files its registration statement so that persons who might be interested in receiving a prospectus can be located.[1] Some general information about the purpose of and use of proceeds from an offering is critical to investors' making an initial decision as to whether to investigate an offering. Limiting the permitted information to a *brief* statement of the purpose of and use of proceeds from the offering would prevent Rule 134 notices from being used to solicit offers to buy.

We also note that existing Rule 135(a)(2)(v) already permits the inclusion, in a communication deemed not to be an "offer" under such rule, of "a brief statement about the manner and purpose of the offering, without naming the underwriters." We suggest that both Rule 134 and Rule 135 be amended to remove any uncertainty that a brief statement regarding the purpose of the offering is permitted to include information about the anticipated use of proceeds from the offering.

We suggest that the Commission clarify that a Rule 134(d) communication required to be accompanied or preceded by a statutory prospectus may utilize an "access equals delivery" approach, and simply refer the reader to a location (including a website location) where the statutory prospectus may be accessed, to the same extent that under Proposed Rule 433(b)(1)(i)(A) a free writing prospectus of such issuer may refer the reader to a location where the statutory prospectus may be accessed. Since both free writing prospectuses and notices under proposed revised Rule 134(d) may solicit an offer to buy or an indication of interest, we believe that the requirement of the communication being accompanied or preceded by a statutory prospectus should apply consistently.

3. Electronic and Live Roadshows

The Release proposes to treat all methods of communication other than oral communications as written communications for purposes of the Securities Act, and to deem all electronic communications (other than certain telephonic communications) to be "graphic communications," and therefore "written communications," as such terms are proposed to be defined under revised Rule 405 for purposes of the Securities Act. Thus, forms of electronic media "such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, Internet websites,

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[1] Release, Part III.D.3.a, fn. 122, 69 FR 67407. **All references herein to the Release and the Proposals are to the text published in the Federal Register, 69 Fed. Reg. 67392 (Nov. 17, 2004) ("FR")**.

and computers, computer networks and other forms of computer data compilation" would be "graphic communications."[2]

We urge the Commission to clarify the treatment of transient communications generally. For example, we are concerned that the references to "electronic media," "computers" and "computer networks" in the proposed Rule 405 definition of "graphic communications" potentially clouds the treatment of all forms of telephone communication, notwithstanding the statement in the Release that the "definition would not cover oral communications, such as live telephone calls (whatever the medium by which they are carried, including the Internet)."[3] With the rapid shift of voice communications from traditional circuit-switched technology to Internet-based IP telephony, traditional one-on-one telephone calls, interactive conference calls, and large group telephone presentations may be inadvertently captured by the definition. In our view, the proposed rule should focus less on the manner of communication and more on its permanence. If the communication is intended to be as ephemeral as an in-person conversation, it should be regarded as oral. This should be true regardless of whether the communication in question is one-way or interactive. If, however, the communication is in a form that the investor is expected to retain indefinitely, it should be regarded as "graphic."

The Commission states in the Release that live road shows would continue to be considered "oral communications," although electronic road shows would constitute "graphic communications" and therefore would be deemed "written communications." This raises a question related to the proposed Rule 405 definition of graphic communication in the context of live road shows. Live road shows often use power point and slide presentations as part of the oral communication process. These communication tools are important and helpful in clearly conveying information at live road shows. However, since the proposed definition of a "graphic communication" includes any form of "electronic media," power point and slide presentations might be deemed to be "graphic communications," and therefore "written communications" which could not be used in a live road show or, if used, would have to be filed as free writing prospectuses, which would chill their use. We urge the Commission to clarify and confirm that power point and slide presentations used in live road shows are not graphic communications (and instead are understood to be part of live road show oral communications) for purposes of the Securities Act, so long as road show participants are not permitted to copy or retain the power point or slides. If the communication cannot readily be reduced to a form that can be retained or replayed by a road show attendee, it should not constitute a "graphic communication" any more than would a transient blackboard or easel presentation. This would be consistent with the current practices of road show participants.

In addition, while we support the Commission's efforts to reduce or eliminate selective disclosure, we are not convinced that electronic road shows should be treated differently from live road shows. The technology associated with electronic road shows makes them virtually indistinguishable from live road shows, undermining the Proposal that electronic road shows

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[2] See discussion, Release, Part III.B.2 and fn 62, 69 FR 67399, 67400.
[3] See discussion, Release, Part III.B.2 and fn 62, 69 FR 67399, 67400.

should be treated as "written communications," while live road shows would be treated as "oral communications."

We support the Proposal that would permit issuers to make at least one version of a *bona fide* electronic road show readily available electronically to the general public, as a condition under proposed new Rule 433(d)(b)(i) to relief from filing the road show,[4] but only with respect to initial public offerings, as it would provide more information valuable to retail investors. However, we believe the Proposal should be revised with respect to offerings beyond initial public offerings. There is generally little interest by retail investors in such offerings. Further, follow-on offerings are often conducted in a very short time period that would not provide sufficient time for issuers to prepare a version of the electronic road show to be made publicly available. We suggest that the Commission revise proposed new Rule 433 so as not to require that a *bona fide* version of the electronic road show be made available to the general public, but to give issuers the option to make a *bona fide* version available. If the Commission adopts the rules as proposed, we believe it may discourage the use of electronic road shows in follow-on offerings. Because of the minimal retail interest and limited time to prepare a retail version of an electronic road show, issuers and their underwriters may begin to rely again only on live road shows. This would be a setback for many institutional investors, as electronic road shows are now an important component of the offering process outside of initial public offerings, and provide significant access to information for investors not residing in major financial centers.

B. Liability

1. §12(a)(2) and §17(a)(2) Interpretation and Proposed Rule 159

We support the principle underlying proposed new Rule 159 that materially accurate and complete information regarding an issuer and the securities being sold should be available to an investor at the time the investor becomes obligated to purchase a publicly offered security.[5] However, under modern securities underwriting practices, an investor may not become unconditionally obligated to purchase a publicly offered security until a date after the initial contract of sale. Further, whether or not a "contract of sale" has been entered into and the "time of sale" are matters governed by state law contract principles and not the federal securities laws.

If proposed Rule 159 is adopted, we urge the Commission to make clear that the relevant point in time under the rule is the time that the investor becomes unconditionally obligated to purchase the security under state law, rather than the "time of sale" or the time of the "contract for sale." We believe that such determination should be based on a facts and circumstances analysis and not defined terms.

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[4] See discussion, Release, Part III.D.3.b.iii(A)(3)(b) ("Electronic Road Shows"), text accompanying fn 185, 69 FR 67415.

[5] See discussion, Release, Part IV.A, 69 FR 67423.

The Commission should also clarify what is meant by information being "conveyed" to the investor under proposed Rule 159(a). The Release states that the determination is based upon the facts and circumstances, however, we believe it would be helpful for the Commission to provide further interpretive guidance. For instance, information filed on EDGAR one day before the day that the investor is obligated to purchase should be considered "conveyed" to the purchaser before the time of sale under proposed Rule 159. Would it be sufficient to file the information on EDGAR the day the investor becomes obligated to purchase so long as the filing on EDGAR is accompanied by a press release before the market opens that day?

2. Proposed Rule 159A

We also generally support the principle underlying proposed new Rule 159A that the issuer shall be regarded as a "seller" for purposes of Section 12(a)(2) of the Securities Act with respect to specified offering materials. However, we are concerned that the standard (reflected in Note 1 to proposed Rule 159A) as to when a communication is "made by or on behalf" of the issuer is overbroad. We are particularly concerned (especially given the breadth of clause (d) of proposed Rule 159A) about the attribution to an issuer of actions taken and statements made by the issuer's agents and representatives (even if such actions are not authorized by the issuer). We urge the Commission to consider attributing to an issuer only those communications that are approved by appropriately designated officers, agents or representatives of the issuer who have the authority to do so. An issuer should be permitted the same flexibility in designating persons permitted to authorize offering-related communications as is provided under Regulation FD.

In a similar vein, we are concerned about the breadth of clause (c) of proposed Rule 159A. In the ordinary course of the due diligence process, issuers authorize their officers and employees to disclose to underwriters considerable information about the company, including forward-looking information, that is not intended by the issuer to be included in any free writing prospectus or otherwise communicated to investors. As proposed, clause (c) would subject an issuer to potential liability for the contents of free writing prospectuses prepared by other offering participants containing issuer-related information "provided by or on behalf of an issuer," regardless of whether the issuer authorized such information to be included in the other offering participant's free writing prospectus. We believe clause (b) is written broadly enough to capture free writing prospectus for which an issuer should be responsible, and would recommend that the Commission delete clause (c) in its entirety. At a minimum, we recommend that clause (c) be revised to require specific issuer authorization for the inclusion of issuer-provided information in another offering participant's free writing prospectus.

We are also concerned that the treatment of free writing prospectuses published or distributed by media creates an unreasonable risk of issuer liability and has the potential to undercut many of the benefits of the proposed Rule 134, 163A, 168 and 169 safe-harbors. Under proposed Rule 433(f), any media report that discusses the issuer or its securities, for which an issuer or a participant in the offer or sale of securities of their representatives provided information, whether or not such media report is solicited or otherwise facilitated by the issuer, will be a free writing prospectus that is prepared by or on behalf of the issuer, and, therefore, one

for which the issuer would be liable under proposed Rule 159A(b). In fact, as written, it appears that the entire media report would be regarded as an issuer free writing prospectus, not just the portions of the report that contain issuer information, without the benefit of the exclusion in proposed Rule 433(d)(1)(C) for "information prepared by a person other than the issuer on the basis of that issuer information." So, it would appear that a media report that consisted of nothing more than (1) information reproduced from an issuer communication that qualified for the Rule 163A, 168 and/or 169 safe-harbors and (2) information reproduced from an issuer communication that qualified for the Rule 134 safe-harbor would, because it is a "written communication about an issuer or its securities for which an issuer … provided information," be an issuer free writing prospectus, subject not only to a prompt filing requirement, but potential issuer liability under proposed Rule 159A for both the issuer information lifted from the earlier Rule 134, 163A, 168 or 169 communications, and any other information contained in the report. We do not believe such an extreme departure from current law is necessary or appropriate.

The Commission should state that any third-party communication that was not actively solicited or encouraged by authorized personnel of the issuer or another offering participant is not a free writing prospectus and need not be filed, under proposed Rule 433(f) or otherwise. Further, for third-party communications that are actively solicited or encouraged, the Commission should clarify that such communications are covered by proposed Rule 433(d)(1)(C), and not Rule 433(d)(1)(A), and that, notwithstanding the current phrasing of the proviso to Rule 433(f), the provisions of proposed Rule 433(d)(3), (4) and (5) apply to communications required to be filed pursuant to proposed Rule 433(f).

For similar reasons, we urge the Commission to eliminate any filing requirements for free writing prospectuses under proposed Rule 433(d) or otherwise. The only purpose we can discern for a filing requirement is to provide a convenient evidentiary repository for the issuer's free writing prospectuses. However, we are concerned that requiring issuers to publicly file their free writing prospectuses will subject issuers to risk of liability to investors other than the investors to whom those free writing prospectuses were delivered, without meaningful investor benefit. We would suggest that the proposed record-retention requirement (as is currently the case for form S-8 prospectuses) is sufficient.

3. Section 11 Liability for Shelf Registration Statements

Under proposed Rule 430B(f) and the proposed revisions to Rule 412, the liability of issuers and their related persons under Section 11 would be made contemporaneous with that of underwriters.[6] The Proposals would provide that, when securities are sold off a shelf registration statement, a new effective date is deemed to occur at the earlier of the date and time of the first contract of sale of such securities or the date of first use of a form of prospectus relating to such securities. This would extend the measurement time for Section 11 liability for issuers and their directors, principal officers and experts by the period between the filing of the issuer's most recent annual report on Form 10-K and the date referenced above.

[6] See discussion, Release, Part IV.A.1, 69 FR 67424, Part V.B.1.b.i to iv, 69 FR 67426.

This Proposal would cause issuers' periodic and current reports and proxy statements to be subject to Section 11 liability. As a result, directors will have Section 11 liability for Forms 10-Q and 8-K, proxy statements, and prospectus supplements filed after the initial effectiveness of the shelf registration statement, none of which do directors currently sign and none of which currently carry Section 11 liability. Under the present shelf registration statement scheme, directors only have Section 11 liability for the effective registration statement and the Form 10-K, both of which they sign. Further, with respect to outside directors and experts, there is little likelihood that they will have much, if any, opportunity to review such documents before they are filed with the Commission. We believe that the Proposals, if adopted, would be unduly burdensome for outside directors and experts and urge the Commission to modify the proposals so that Section 11 liability of outside directors and experts is determined as it is under the current system.

Lastly, with respect to the specific text of the Proposals, it would be more clear and concise to confine to Rule 430B all of the provisions regarding the relation-back of prospectus supplements for Section 10 purposes and Section 11 liability purposes. Subsection (d) of proposed new Rule 412, regarding modified or superseded statements, relates solely to the Section 11 liability provisions of Rule 430B and can be understood only when read together with Rule 430B. We suggest Rule 412(d) be moved to Rule 430B.

C. Changes to the Offering Process

1. Well-Known Seasoned Issuers

We support the creation of the new class of "well-known seasoned issuers" and the flexibility afforded those issuers in communications and the offering process. We suggest that the proposed Rule 405 definition of WKSI be modified to expand the group of issuers eligible to benefit from this increased flexibility, as follows:

- Permit the qualitative aspects of the definition to be satisfied at any time, rather than annually;
- Allow companies to determine public float more frequently, perhaps quarterly, rather than annually;
- Allow companies to qualify on the basis of a high percentage of institutional ownership of their equity securities as an alternative to the level of public float;
- Eliminate the "investment grade" requirement, the three-year look-back, and status limitations for debt-only WKSIs; and
- Modify the definition of "ineligible issuer," as discussed below.

a. Permit the Qualitative Aspects of the Definition to be Satisfied at Any Time, Rather Than Annually

While we generally agree with the components of the proposed Rule 405 WKSI definition, the Proposals establish the same measurement date for all aspects of the definition – the last business day of the issuer's most-recently-completed second fiscal quarter. We recommend that such measurement date not be applied to qualitative components of the definition, which should be satisfied as of the date an issuer seeks to take advantage of a rule available only to WKSIs, and that a measurement date apply only to quantitative components, which as a practical matter require some prior determination.[7]

In particular, we recommend that the qualitative components of the proposed Rule 405 WKSI definition, which would apply as of the date an issuer seeks to rely on WKSI status, should include the requirements that:

- The issuer is eligible to file a registration statement on Form S-3 or Form F-3 for primary offerings, as described with particularity in clause (1)(i) of the proposed WKSI definition;[8]

- The issuer is a majority owned subsidiary of a WKSI and, as to the subsidiary's securities that are being or may be offered:

  i. the WKSI parent has fully and unconditionally guaranteed (as defined in Rule 3-10 of Regulation S-X) the payment obligations under the subsidiary's securities and the securities are non-convertible obligations;

  ii. the securities are guarantees of (A) non-convertible obligations of the issuer's WKSI parent; or (B) non-convertible obligations of another majority owned subsidiary where such non-convertible obligations are fully and unconditionally guaranteed (as defined in Rule 3-10 of Regulation S-X) by the WKSI parent; or

  iii. the securities are non-convertible obligations fully and unconditionally guaranteed (as defined in Rule 3-10 of Regulation S-X) by another majority owned WSKI subsidiary of the same parent that is a WSKI, other than pursuant to paragraph (2) of the WSKI definition;

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[7] In this connection, the quantitative components would include the proposed requirement that the issuer either (A) has a market value of its outstanding common equity held by non-affiliates of $700 million or more (as discussed below, we recommend that companies be permitted to determine this component as of the end of any fiscal quarter), or (B) has issued in the last three years at least $1 billion aggregate amount of debt securities in offerings registered under the Securities Act (determined as of the last business day of its most-recently-completed second fiscal quarter) and will register only debt securities.

[8] We note that the internal references in clause (1)(i) of the WKSI definition, to Paragraphs (1)(i)(A) and (1)(i)(B) of the definition, should be to Paragraphs (1)(ii)(A) and (1)(ii)(B), respectively.

- The issuer must file reports pursuant to Section 13 or 15(d) of the Exchange Act and has been required to file such reports for at least the last 12 calendar months;[9]

- The issuer has filed all materials required to be filed during the last 12 calendar months under Sections 13, 14 or 15(d) of the Exchange Act;

- The issuer has filed in a timely manner all material required to be filed during the preceding 12 calendar months and any portion of a month immediately preceding the date of determination, other than a report that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 or 4.02(A) of Form 8-K, and if the issuer has used (during such period) Rule 12b-25(b) of the Exchange Act with respect to a report or a portion of a report, it has actually filed that report or a portion thereof within the time period prescribed by that section; and

- The issuer is not an ineligible issuer as defined in proposed revised Rule 405.[10]

b. Allow Companies to Determine Public Float More Frequently, Perhaps Quarterly, Rather than Annually

We support requiring an issuer to perform the public float test as of the last business day of each fiscal quarter and to publish the results of that test in the appropriate Form 10-Q or in the Form 10-K, to document an issuer's WKSI status at that time. Such an issuer would then be deemed to satisfy the quantitative requirements for WKSI status until the earlier of the due date or the actual filing date of the issuer's next Form 10-Q or Form 10-K. At a minimum, if the Commission elects to use the end of the second fiscal quarter as the measurement date for WKSI status, an issuer should be permitted to utilize the benefits of WKSI status during the remainder of that fiscal year, rather than waiting until its next Form 10-K is filed. Alternatively, an issuer should be able to meet this requirement after filing any Form 10-Q in which it has included, on the cover page, the same information about public float as currently provided on the cover page of Form 10-K, except that for purposes of Form 10-Q such information would be provided as of the end of the applicable quarterly period.

Although using the same public float calculation used in the determination of accelerated filer status to determine WKSI status has the benefit of simplicity, we believe that the different purposes served by those computations justify different measurement dates. The current requirement to test the public float as of the end of the second fiscal quarter to determine if an issuer is an "accelerated filer" under existing Rule 12b-2(1) is necessary to allow an issuer to prepare to file on an accelerated basis its annual report for that year and its quarterly reports for

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[9] Note, however, our comment regarding the requirement in the context of voluntary filers, below at Section II.D.2 hereof.

[10] Although we are not generally commenting on the application of the Proposals to issuers of asset-backed securities, we generally endorse the comments of others to the effect that issuers of asset-backed securities should be able, under certain circumstances, to qualify as WKSIs.

the following year, which may require the issuer to change its disclosure controls and procedures to ensure timely compliance.

While there may be some correlation between an issuer having "accelerated filer" status and its receiving substantial scrutiny in the marketplace for purposes of the WKSI designation, one does not necessarily follow from the other. In any event, WKSI status is intended to afford an issuer the benefits of certain streamlined offering procedures.

c. Allow Companies to Qualify on the Basis of a High Percentage of Institutional Ownership of Their Equity Securities as an Alternative to the Level of Public Float

The Release states that institutional investors accounted for an average of 56% of the equity ownership, prior to offerings, by issuers with market capitalizations above $700 million which were involved in registered offerings during the period 1997 to 2003 and were listed on a major exchange or equity market,[11] and requests comment as to whether percentage of institutional ownership should be an alternative standard to public float. In light of the sophistication and influence of institutional investors generally, and the proactive approach taken by many such investors in monitoring issuers in which they invest, issuers should be permitted, as an alternative to meeting the public float test, to meet a test based on a certain level of institutional ownership. We believe a 50% institutional ownership level, held by four or more institutional investors, would be appropriate for this approach, and that a definition of "institutional investor" similar to the existing definition of "qualified institutional buyer" included in existing Securities Act Rule 144A could be devised to clarify application of the criterion.

d. Eliminate the "Investment Grade" Requirement, the Three-Year Look-Back, and Status Limitations for Debt-Only WKSIs

We note that a WKSI must be eligible to use Form S-3 or F-3 for primary offerings under General Instruction I.B.1, I.C.2 or I.C of those forms, which effectively require an issuer seeking to qualify as a WKSI on the basis of its prior debt issuances to either satisfy the $75 million equity public float requirement or offer and sell only investment grade debt. We urge the Commission to eliminate the investment grade qualification requirement for issuers that would otherwise satisfy the requirements to be a debt-only WKSI. We do not believe there is any meaningful difference in the level of analyst interest in high-volume issuers of high-yield debt, as compared to issuers with a $700 million public equity float.

We also believe that the amount of registered debt securities issued during the past three years is less relevant to the amount of investor and analyst interest in the company than the aggregate amount of debt outstanding, regardless of when it was first offered and sold. Accordingly, we recommend that the Commission eliminate the three-year look-back

[11] Release, Part II.A, text following fn 46, 69 FR 67396, 67397.

requirement in favor of a static, outstanding registered debt test. For this purpose we would also recommend that the Commission clarify that debt originally issued in an exempt offering and that was subsequently the subject of a registered *Exxon Capital* exchange offer or a resale registration statement should be regarded as registered debt, and that "debt" for purposes of this test would also include registered capital securities issued by trust subsidiaries (whether or not such subsidiaries are required to be consolidated), registered non-convertible preferred stock, and registered convertible debt or preferred stock that was issued with at least a 10% conversion premium (and, therefore, could have been issued under Rule 144A(d)(3)(i)).

Finally, we would recommend that an issuer that qualifies as a WKSI on the basis of its prior debt issuances and is otherwise a seasoned issuer (*i.e.*, has at least $75 million public equity float) should be regarded as a WKSI for all purposes.

2. Ineligible Issuers

"Ineligible issuers" are prohibited from using most of the innovations of the Proposals, including free writing prospectuses, the safe harbor for communications made more than 30 days prior to the filing of a registration statement, the automatic shelf registration procedure, and incorporation by reference into Forms S-1 and F-1. In addition, ineligible issuers are expressly excluded from the definition of a WKSI and not eligible for the benefits that WKSIs would receive under the Proposals.

We generally agree with the definition of "ineligible issuers" in the proposed amendments to Rule 405 but believe that clauses (viii), (ix) and (x) of the definition are too broad and include a number of activities that should not justify exclusion of an issuer from the benefits of the Proposals. If the Commission retains these components of the definition, we believe they should be narrowed in certain respects. In particular, many settlements, decrees and orders relate to less egregious alleged or determined violations of the federal securities laws, which we believe should not affect an issuer's status under the Proposals. Examples might include settlements, decrees and orders which relate to prospective technical compliance efforts of a subsidiary of an issuer involved in broker-dealer, insurance or other financial business that is subject to regulation under the federal securities laws. In this regard, we note that the comparable exclusion in Section 27A of the Securities Act does not extend to settlements, does not apply to subsidiaries, and covers only violations of the anti-fraud provisions of the federal securities laws. We believe that the intent and scope of the definition should be to disqualify only those issuers who have violated the substantive disclosure or antifraud provisions of the federal securities laws, and not the regulations governing other activities of the issuer's businesses. We also urge the Commission to exclude settlements by an issuer's affiliates and subsidiaries. To the extent the Commission retains settlements by subsidiaries generally, it should, at a minimum, exclude any subsidiary where the underlying violations occurred prior to the issuer's acquisition of such subsidiary.

Under the proposed definition, many financial institutions would be considered ineligible issuers because of recent settlements under the federal securities laws relating to various non-

disclosure related activities. These settlements often involved no admission of guilt and were made without knowledge that such a settlement would result in the issuer being categorized as an ineligible issuer under the Proposals. We suggest that, at the minimum, the Commission amend the definition of "ineligible issuer" so that clauses (viii), (ix) and (x) are applied prospectively only, beginning the date of the adoption of the proposed amendments.

3. Other Issuers

We support the retention of existing categories of issuers, including seasoned issuers, unseasoned Exchange Act reporting issuers, and non-reporting issuers, in the Proposals regarding communications and the registration process. We also support the Proposal to amend the Instructions under Forms S-3 and F-3 to expand the eligibility of majority-owned subsidiaries and allow such subsidiaries to use those forms if they are WKSIs.

We also believe that the current $75 million public float level generally required for short-form and delayed shelf registration should remain unchanged as this time, despite the fact that it has not been revised since 1992 and that many companies now meet this threshold. We believe that the increased access by investors to information about issuers that has occurred since that time, particularly via the Internet and on-line services, offsets the effects of a larger number of companies above the $75 million threshold.

4. Information Required in a Prospectus

We support the adoption of proposed Rules 430B and 430C as a means of clarifying and codifying what information must be included in a base prospectus and what information may be included later by other means. We also support the aspect of proposed Rule 430B that would provide shelf issuers with primary and automatic shelf registration statements the ability to add to a prospectus more information than is currently the case by means other than a post-effective amendment to the registration statement.

We note that in addition to codifying current requirements and practice for shelf registration statements, the Commission also intends Rule 430B to liberalize significantly the requirements for automatic shelf registration statements. For WKSIs, Rule 430B would permit the omission of information regarding whether the offering is a primary offering or an offering on behalf of persons other than the issuer, the plan of distribution for the securities, and the identification of other registrants unless known. We recommend that proposed Rule 430B be modified to permit all seasoned issuers, other than "ineligible issuers," to omit this information.

We also support the proposed amendments to Form S-3 and Form F-3 that would permit all information required in the prospectus about the issuer and its securities to be incorporated by reference from Exchange Act reports or to be contained in the prospectus or a prospectus supplement that would be deemed to be part of and included in the registration statement.

Finally, we believe that the proposed amendment to Rule 424, requiring an issuer to include on the cover page of the prospectus supplement directions as to the location of omitted information about the securities or plan of distribution, will be helpful to investors.

5. Shelf Registration Reload

We agree with the Proposals under Rule 415(x)(2) and (4) to replace the present limit on the amount of securities covered under a shelf registration (to the amount intended to be offered or sold within two years from the effective date) with a requirement to file a new shelf registration statement every three years. The Proposal will enable investors to determine what information is included in the registration statement without looking back for an unreasonably long time period.

For non-WKSI seasoned issuers the Proposal raises the risk of a "blackout" on offerings if the new shelf registration statement is selected for review. We would recommend that such issuers be permitted to offer securities off the old shelf registration statement (including filing any post-effective amendments or new registration statements under proposed revised Rule 462) until the new registration statement is declared effective, if the new registration statement was filed within the three-year period. Alternatively, if a non-WKSI seasoned issuer that has timely filed a new shelf registration is not permitted to continue conducting offerings off the old shelf registration, the Commission should permit the new shelf registration to be automatically effective upon filing (by analogy to existing Rule 462(b)), as long as the new shelf registration is for the registration of additional securities of the same class or classes included in the old shelf (including additional securities that are not differentiated as to class).

6. Automatic Shelf Registration

We support the creation of the automatic shelf registration process for WKSIs and their majority owned subsidiaries, and believe that these Proposals, as intended by the Commission, would provide those issuers eligible to utilize the process substantially greater latitude in registering and marketing securities. We support limiting the use of the automatic shelf registration process to WKSIs, noting in that regard the suggestions at Section II.C.1 above and II.D.2 below for broadening the WKSI definition to allow more issuers to meet its requirements and, as a result, be able to take advantage of the automatic shelf registration process.

We concur with the Proposal to permit issuers using automatic shelf registration statements on Forms S-3 and F-3 to pay filing fees at the time of a securities offering under proposed revised Rules 456 and 457, but recommend that, in addition to WKSIs, "seasoned issuers" also be afforded the ability to utilize the "pay-as-you-go" method.

We also support the amendment to Rule 401(g) to provide that an automatic shelf registration statement would be deemed filed on the proper form unless the Commission notifies the issuer of its objection to the issuer's use of such form. The Commission has adequately addressed the concerns raised in connection with the Commission's 1998 proposals to modernize

the securities offering process[12] by providing that sales made prior to such notification would not be deemed to have been sold in violation of Section 5.

The Release includes a Proposal to revise Item 1-B of Form 10-K and Item 4-A of Form 20-F to require disclosure by all accelerated filers of material written Commission staff comments on their Exchange Act filings, if such comments are received at least 180 days before the fiscal year end, and are unresolved at the time of filing of such forms. If this Proposal is adopted (and we recommend against its adoption – see Section II.E.3 below), we do not believe that issuers should be required to have resolved all such comments in order to take advantage of the automatic shelf registration process. We suggest that this disclosure should only be required of WKSIs, which are eligible to utilize the automatic shelf registration process, at the time of the filing of the Form, rather than to all accelerated filers.

7. Other Changes to the Offering Process

We support the Proposals to amend Forms S-1 and F-1 to permit certain issuers to incorporate by reference previously filed Exchange Act reports. With respect to the proposed requirement under General Instruction VI.F of each form that the ability to incorporate by reference should be conditioned on the issuer's Exchange Act reports being readily accessible through its website, we recommend that issuers be permitted to meet this requirement on an "access equals delivery" basis, by providing in the prospectus a uniform resource locator (URL) link to a location on any website, such as its own website or the Commission's EDGAR site, where those reports may be located. Requiring an issuer to maintain on its own website information that is available elsewhere is unnecessarily burdensome and does not add to the information available to investors.

We would also support expanding Forms S-1 and F-1 to permit issuers to utilize forward incorporation of subsequently filed Exchange Act filings. These filings are readily available to the public through the Commission's EDGAR system and commercial services, and investors are now quite used to referring to those documents. We would agree that an issuer seeking to utilize forward incorporation should have to satisfy a historical timely filing requirement, as is currently the case under Forms S-3 and F-3.

If the proposed changes are made to the ability to incorporate by reference on Forms S-1 and F-1, then we support the elimination of Forms S-2 and F-2.

8. Prospectus Delivery Reforms

We support the Proposals under new Rule 172 with respect to reforms to the prospectus delivery process, and believe that these proposals meet the Commission's goal of facilitating investors' effective access to information while taking into account advancements in technology and the practicalities of the offering process. We do not believe that the Proposals would have

[12] See *The Regulation of Securities Offerings*, Release No. 33-7606A (Nov. 13, 1998), 63 FR 67174.

the effect of shifting the costs of receiving a final prospectus to the investors in a manner that would lead investors to not access the final prospectus. We believe that giving investors the option to access the prospectus via the Internet or by requesting a copy provides ample flexibility. We also believe that requiring the issuer to file the prospectus with the Commission provides investors with sufficient access to the prospectus, and that it is not necessary to condition the availability of Rule 172 upon the issuer either posting the final prospectus on its website or providing a hyperlink directly to the final prospectus on EDGAR.

D. Issues for Special Types of Issuers

1. Foreign Private Issuers

As a general matter, the Release treats foreign private issuers consistently with domestic issuers; however, we have identified at least one area where characteristics particular to foreign private issuers merit additional clarification from the Commission regarding Proposals contained in the Release.

The proposed definition of a WKSI under Rule 405 requires that the issuer have a market value of its outstanding common equity held by non-affiliates of $700 million or more, or has issued in the last three years at least $1 billion aggregate amount of registered debt, in the case of a debt-only WKSI. Foreign private issuers, to a greater degree than domestic issuers, are likely to have a significant amount of their common equity traded on exchanges located outside of the United States. If the public float requirement is an indicator of whether there is a sufficient following of an issuer's stock, additional clarification should be provided as to whether common equity traded on exchanges outside of the United States can be included for purposes of this calculation.

We believe there are essentially three alternatives the Commission may consider:

- all common equity held by non-affiliates could be included in the calculation of the public float, regardless of where it is traded;

- common equity held by non-affiliates and listed on specified exchanges located outside the United States could be included in the calculation of the public float; or

- only common equity held by non-affiliates and listed on exchanges (or qualified interdealer quotation systems such as Nasdaq) in the United States could be used in the calculation of the public float.

As currently formulated, we believe the Release would permit the inclusion of all common equity held by non-affiliates to be included in the calculation of the public float, regardless of where it is traded. Both domestic and foreign private issuers would be able to include their foreign equity in the calculation, which would to some degree be appropriate to

reflect the increasingly global nature of the capital markets and is consistent with the analogous test set forth in General Instruction I.B.1 to Form S-3. The calculation presumably would require that the issuer measure the value of the equity traded on any foreign exchange in reference to exchange rates in effect as of the measurement date of the public float requirement.

If the Commission determines that the current formulation is too expansive, but nevertheless would like to permit issuers to include some common equity held abroad in the calculation, the calculation could include all common equity held by non-affiliates in the United States together with the value of the common equity traded in "Designated Offshore Securities Markets," as such term is defined under existing Securities Act Rule 902(b) of Regulation S. Listing in one of these foreign markets would be a reasonable safeguard against the inclusion of common equity traded on an exchange that may not meaningfully contribute to the coverage of the issuer's stock.

We believe that either of the first two alternative formulations is preferable to the exclusion of all common equity held by non-affiliates outside of the United States, which exclusion would unduly restrict foreign private issuers' access to the United States capital markets by excluding many of them from WSKI status, despite broad and significant followings of their stock.

In any event, we believe the Commission should provide additional clarification as to exactly what may be included in the calculation. The current formulation may be at odds with the stated goal of the Commission to use public float as a proxy for market following.

2. Voluntary Filers

We believe that all of the communications and other benefits available under the Proposals to other reporting issuers should be available to voluntary filers that are not otherwise ineligible issuers, including, for those voluntary filers with the requisite reporting history, seasoned issuer status and, potentially, WKSI status. Voluntary filer status is determined with reference only to the number of record holders, determined in accordance with Rule 12g5-1 for domestic issuers and Rule 12g3-2(a) for foreign private issuers, both of which substantially "undercount" the true beneficial owners of the issuer's securities and, more importantly, the amount of investor and analyst interest in the issuer.

The universe of voluntary filers includes issuers which voluntarily file for numerous reasons. At a minimum, we believe the various exclusions for voluntary filers should not extend to companies that file periodic reports after having accessed the capital markets for the sale of debt utilizing Rule 144A, followed by either a registered *Exxon Capital* exchange offer[13] or the filing of a resale registration statement.

[13] The original letter was *Exxon Capital Holdings Corp.* (avail. May 13, 1988).

The structure of a typical Rule 144A debt transaction includes a follow-on registered *Exxon Capital* exchange offer or, alternatively, a resale registration statement, the result of either of which is that the company will be subject to Section 15(d) of the Exchange Act. For approximately one year they will be required by statute to file with the Commission annual and quarterly reports, among others. Their filing obligations will not end after the statutorily required period, however, as the indentures for almost every Rule 144A debt offering include a covenant requiring the issuer to continue reporting as long as the bonds remain outstanding. The result is that there are a large number of issuers which continue to report under Section 15(d) beyond the period required by the Exchange Act, many of which have been reporting companies for many years. In accordance with the Commission staff's policy, these voluntary filers file complete Exchange Act periodic reports, including Section 302 certifications. In addition, these voluntary filers typically communicate with their investors and analysts in a manner that is virtually indistinguishable from mandatory filers, including regularly releasing earnings and earnings guidance, conducting analyst conference calls, and making presentations at investor conferences.

In discussing the addition of a voluntary filer status box to the cover of annual reports on Forms 10-K, 10-KSB and 20-F, the Commission states:

> "We believe that it is important that investors and other market participants are aware that an issuer is a voluntary filer and thus, may cease to file its Exchange Act reports at any time and for any reason without notice. In addition, our communications and procedural proposals do not permit voluntary filers to become seasoned issuers. Identification of voluntary filers would enable us to monitor their use of our proposed communications rules as well as our other regulatory requirements."[14]

We do not agree with the assumption that voluntary filers are free to cease their filings at any time and therefore represent a risk to investors who, immediately after an offering, might be left with no current public information on the issuer. While some voluntary filers, in both legal and practical terms, could cease filing Exchange Act reports, for contractual and practical reasons many voluntary filers could not take such a step any more readily than an issuer which is required to report. The same market conditions that would support seasoned issuer or WKSI status, namely a significant presence in and following by the securities markets, are the same conditions which dictated that their indentures include a reporting covenant, and which would prevent them in any practical scenario from arbitrarily ending their voluntary filing.

We see no policy basis for denying otherwise eligible voluntary filers the benefits of the new rules. In particular, we believe that voluntary filers should be permitted to:

- Communicate forward-looking information pursuant to Rule 168 on the same basis as other reporting issuers (as noted above, most voluntary filers provide

[14] Release, Part VII.C, second paragraph following text accompanying fn 381, 69 FR 67443.

forward-looking information to their investors in the form of earnings guidance, as part of their MD&A disclosures, and elsewhere in their periodic reports and other public disclosures);

- Utilize the same provisions of proposed Rule 433 relating to prospectus delivery in connection with free writing prospectuses as other reporting issuers;

- Incorporate their periodic reports by reference on Form S-1 and F-1 on the same basis as other reporting issuers;

- Qualify as a seasoned issuer and utilize Form S-3 or F-3 if they are otherwise eligible to do so; and

- Potentially qualify as a WKSI, if they otherwise satisfy the requirements of that test.

The Commission's basis for creating the WKSI status is set forth in the Release:

"[T]he most far-reaching revisions of our communications rules and registration processes should be considered for issuers that have a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace [fn omitted]. We believe that these issuers have an Exchange Act record, a broad following of their Exchange Act filings, and the contemplated attention directed to their Exchange Act reports by the staff of the Division of Corporation Finance that will produce the greatest likelihood of Exchange Act reports that not only are reliable but also are broadly scrutinized by investors and the markets.

"Today, the largest issuers are followed by sophisticated institutional and retail investors, members of the financial press, and numerous sell-side and buy-side analysts that actively seek new information on a continual basis. Unlike smaller or less mature issuers, large, seasoned public issuers tend to have a more regular dialogue with investors and market participants through the press and other media. The communications of these well-known seasoned issuers are subject to scrutiny by investors, the financial press, analysts, and others who evaluate disclosure when it is made."[15]

Given that this is the primary basis for the new WKSI category which affords the WKSI significantly increased flexibility in the communication and registration processes, we see no reason why voluntary filers should not also be able to take advantage of the new more flexible rules when they also have many years of Exchange Act filing history, have been the subject of significant staff attention, and are also followed by the same group of sophisticated institutional and retail investors.

[15] Release, Part II.A, text accompanying and following fn 35, 69 FR 67396.

Accordingly, we strongly urge the Commission to:

- revise proposed Rules 168 and 433, the proposed definition of WKSI in Rule 405, and the instructions to Forms S-1, F-1, S-3 and F-3, to permit voluntary filers with the requisite reporting history to qualify as seasoned issuers and WKSIs under those rules and forms, as applicable; and

- continue accepting periodic report filings from voluntary filers without requiring such issuers to voluntarily register under Section 12(g) of the Exchange Act (which would subject such issuers to, among other requirements, Sections 14 and 16 of the Exchange Act, which impose obligations that are unrelated to, and in our view unimportant to, the purposes of the Proposals).

If the Commission determines that it is not willing to permit voluntary filers to take advantage of these aspects of the Proposals, the Commission should, as an alternative to forced registration under Section 12(g), permit voluntary filers to avail themselves of the benefits of these aspects of the Proposals if they affirmatively commit to the Commission, in the form of an undertaking, to continue filing periodic reports for so long as the underlying debt securities remain outstanding. To implement such an option, the Commission could revise clause (3) of the proposed definition of WKSI in Rule 405 to read:

> "(3) Is required to file reports pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), or has been filing such reports pursuant to Section __ [new Section, to be added] of Item 512 of Regulation S-K, in either case for at least the last 12 calendar months."[16]

As alluded to above, to allay fears of a voluntary filer ceasing to make filings at any time, an undertaking could be added to Item 512 of Regulation S-K which, at the issuer's option, would or could be included in any registration statement by an issuer registering securities, but which is not currently required to, nor by the terms of the offering at issue will be required to, register under the Exchange Act, if it desires to qualify as a seasoned issuer or a WKSI,[17] to the effect that:

> "The undersigned registrant hereby undertakes to file all reports required by Section 15(d) of the Exchange Act, without regard to the automatic suspension of such requirement contained in Section 15(d) of the Exchange Act, for so long as any of the securities that are the subject of this registration statement are issued and outstanding."

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[16] A further refinement to the definition, or to the registrant requirements of Form S-3 or Form F-3, will be necessary in order to ensure that issuers who agree to the undertaking will still be considered to be registrants that are "required" to file under Section 15(d) of the Exchange Act.

[17] We would further propose that for purposes of transition, that current voluntary filers who desire to qualify as a WKSI, the undertaking could be included in a Form 8-K or 6-K filing.

This solution is in line with a principal objective of the Proposals: to make access to the U.S. securities markets more flexible for those issuers who have earned the trust of the Commission and the markets themselves.

E. Other Matters

1. Risk Factor Disclosure

The Proposals extend risk factor disclosure to annual reports on Form 10-K and registration statements on Form 10 and require updated risk factor disclosure in Form 10-Q to reflect any material changes in (but not a restatement or repetition of) risks reported in previously filed Exchange Act reports. Although we generally endorse this requirement, we believe that issuers should continue to be permitted to make their own determinations about whether risk factor disclosure is necessary and what risk factor disclosures are appropriate for inclusion.

In particular, we urge the Commission to apply to risk factor disclosures in periodic reports the existing Regulation S-K Item 503(c) standard, without further expansion. The Proposals create a new Item 1A to Forms 10, 10-K, and Part II of 10-Q that would require issuers to disclose, in addition to the familiar risk factor disclosures required by Item 503(c),

> "the most significant factors with respect to the registrant's business operations, industry, or financial position that may have a negative impact on the registrant's future financial performance."

We are concerned that this language is intended to expand risk factor disclosures beyond those traditionally required. The proposed language appears to be modeled on the standard for cautionary statements under Section 21E of the Exchange Act, but issuers are not required to include those disclosures (although, as a matter of prudence, many issuers do so in order to take advantage of the safe harbor for forward-looking statements). This additional requirement may also lead to potentially duplicative disclosure regarding the existence and reasonably likely effects of trends and uncertainties already required to be disclosed in MD&A. We believe that the Commission should continue to rely on the current requirements in Item 503(c) and to continue to provide general guidance to the issuer community regarding appropriate risk factor disclosure through the comment letter process.

We would also endorse the extension of risk factor disclosure requirements to Forms 10-SB, 10-KSB and 10-QSB. We do not believe such a requirement would be particularly burdensome to small business issuers and the disclosure would be equally relevant to investors in those companies as it is to investors in larger companies.

2. Disclosure of Voluntary Filer Status

We support the Proposal to add a box on the cover page of Forms 10-K and 10-KSB for an issuer to check if it is not then required to file periodic reports under Section 13 or 15(d) of

the Exchange Act. Given the difficulties foreign private issuers have in determining the number of U.S. holders of their securities under Rule 12g3-2(a), we would not support the addition of a comparable box on the cover of Form 20-F.

The Commission should consider revising the cover pages of Forms 10-Q and 10-QSB to provide similar boxes, since an issuer may become subject to the reporting requirements of Section 15(d) at any point during the year if a Securities Act registration statement (including a post-effective amendment) is declared effective. To the extent the Commission's staff will be referring to the voluntary filer box on the cover of Form 10-K or 10-KSB to determine whether an issuer is entitled, among other things, to utilize certain of the Commission's new communications rules, an issuer would have a readily available mechanism to indicate that it has become a mandatory filer after previously indicating in its annual report that it was a voluntary filer.

3. Disclosure of Unresolved Staff Comments

Under the Proposals all accelerated filers will be required to disclose, under revised Item 1-B of Form 10-K and revised Item 4-A of Form 20-F, written comments of the Commission's staff made in connection with their review of Exchange Act reports that the issuer believes are material, that were issued more than 180 days before the end of the fiscal year covered by the annual report, and that remain unresolved as of the date of the filing of the Form 10-K or 20-F. We do not support the required disclosure of such comments for the reasons discussed below.

In our experience the vast majority of comments are resolved in an expeditious manner, and only the most difficult comments remain unresolved after 180 days. Furthermore, offering participants are keenly aware of the potential liability implications of proceeding with a registered offering while material staff comments remain unresolved, including the risk of Section 12(a)(2) and Rule 10b-5 claims, as well as Commission enforcement action, including the Commission's power to issue stop orders. In our view, these considerations provide ample incentive for registrants to resolve staff comments as quickly as possible.

Unresolved comments frequently relate to difficult accounting issues that require detailed factual analysis or raise unsettled technical or policy issues. We do not believe that disclosure of these comments, either verbatim from the staff's comment letter or paraphrased in an effort to provide the substance of the comment, would provide meaningful disclosure to investors. Further, in its decision to delay the release of comment letters and issuer responses for not less than 45 days after the staff has completed its filing review, the Commission has implicitly acknowledged that disclosure of unresolved comments may not be desirable for issuers or for the staff.[18]

Although we appreciate the importance of resolving outstanding Exchange Act comments in a timely manner, it is not clear to us from the Release that the Commission's staff is currently

[18] *See* "SEC Staff to Publicly Release Comment Letters and Responses" (June 24, 2004).

experiencing an unacceptable level of unresolved comments. Rather, it appears from the Release that the Commission is concerned that issuers *may* have an incentive, in light of the financing flexibility provided by automatically effective shelf registrations and other aspects of the proposed shelf registration rules, to disregard staff comments. We would suggest the Commission defer further consideration of this aspect of the proposal until it acquires actual experience with registrants under the new offering regime. Although we believe the staff has ample other means to encourage registrant cooperation with the comment letter process, if the staff experiences an unacceptable increase in the number of unresolved comments, the Commission could, and should, consider further rulemaking to curb those abuses.

Assuming the Commission elects not to defer this aspect of the Proposals, we would recommend that this requirement be applied initially only to WKSIs, which are the only class of issuers entitled to utilize the automatic shelf registrations that motivated this proposal. In addition, we believe the Commission should provide WKSIs with the right to elect either to disclose material unresolved comment in their annual reports or refrain from filing a new automatic shelf registration or utilizing an existing automatic shelf registration for a take-down until either the staff's comments are finally resolved or the WKSI files a Form 8-K including the required disclosure about material unresolved comments.

With respect to the Commission's specific requests for comment:

- If the Commission requires disclosure, we believe disclosure should be limited to unresolved comments that, if resolved adversely to the registrant, would result in either a Form 8-K filing requirement (for example, in the case of asset impairment charges or financial statement restatements) or a material change to the registrant's MD&A or financial statements. Further, we believe issuers should be permitted to make their own judgments about what comments are material (recognizing that this would be a line-item disclosure requirement), as they must do with virtually all of the Commission's other disclosure requirements. As with all other materiality decisions made in the registration process, the ultimate decision regarding materiality should belong to the issuer. We strongly discourage any requirement to disclose all unresolved staff comments, without regard to their materiality.

- We believe material comments are most likely to be presented in a manner that is intelligible to investors if the issuer has the flexibility to paraphrase and explain the staff's comments rather than repeating them verbatim from the comment letter, and to include, if the issuer desires, a statement summarizing the registrant's views. If the staff believes the issuer has paraphrased the staff's position incorrectly, the staff could address that concern in further comment letters.

- We do not believe that issuers should be required to disclose resolved staff comments or comments to be addressed in future filings. These comments and issuer responses will be publicly available on EDGAR and other information services and do not necessitate additional disclosure.

- We do not believe disclosure should be required in quarterly reports, although an issuer should have the option of updating investors as to the status of previously disclosed comments to the extent the issuer deems appropriate.

- While 180 days may be an appropriate time period, we do not believe the initial staff comment letter always includes the precise articulation of the substantive comment and sometimes includes a mere request for information regarding a topic, review of which provokes a later substantive comment. Therefore, we think it is more appropriate for the 180-day period begin to run no earlier than when a substantive unresolved comment is first made.

4. Business Combinations

We generally support the Commission's preservation of the existing regulatory scheme for business combinations as it undertakes significant revisions to the rules governing capital-raising transactions. While we believe that some of the additional flexibility afforded under the new rules for capital-raising transactions (in particular, certain of the communication-related reforms) should be considered for extension to business combination transactions, we would endorse deferring that consideration until the Commission gains more experience with the new rules in the capital-raising context. However, we believe that the Commission should consider revising the proposed rules in certain respects.

Under the proposed revisions to Rule 405, an issuer registering an offering relating to a business combination would be considered an "ineligible issuer" and therefore ineligible to utilize many of the new rules. We believe this result is unnecessary for the protection of investors and urge the Commission to permit issuers pursuing registered capital-raising transactions at or around the same time as a business combination transaction to utilize the same rules that would govern communications made in connection with a capital-raising transaction that is unrelated to a business combination transaction.

For example, an issuer may issue new debt securities in order to raise funds at or near the time the issuer repurchases outstanding debt, or to fund the cash portion of a business combination transaction in which the consideration consists of both cash and issuer stock. In each case, the issuer may seek to raise more funds in the debt offering than are necessary to fund the transaction subject to the business combination rules. In the view of the Commission's staff,[19] if the offering proceeds are not used "exclusively" for a business combination, the issuer is not permitted to rely on the business combinations communications scheme. Similarly, where the communications relate, at least in part, to a business combination (*i.e.*, a merger, exchange offer or tender offer), the new communications proposals would not apply. As a result, it is possible that certain communications by an otherwise eligible issuer may not be covered by

[19] Question C.1., July 2001 Interim Supplement to the Telephone Interpretation Manual, addressing the scope of Rule 165.

either the communications proposals or the business combination rules. We recommend that the Commission clarify its position relating to such communications in the adopting release.

Whether or not the Commission makes the changes we recommend in the preceding paragraphs, issuers will still have to determine which regulatory scheme applies to particular communications. The Commission should consider providing additional guidance to assist issuers in determining which regulatory scheme applies to particular communications made in connection with a capital-raising transaction that is effected simultaneously with or otherwise relates, to some degree, to a business combination transaction. Although as noted above the staff has provided some interpretive guidance in its Telephone Interpretations Manual that guidance had, as its backdrop, the existing "gun-jumping" regime. We urge the Commission to provide in the adopting release its interpretation of how this determination would be made under the new rules.

We also encourage the Commission to apply the Proposals relating to shelf registration (*e.g.*, automatic effectiveness, Rule 430B, etc.) to the "acquisition shelf" registration process. Given that the staff's prior interpretive positions on the acquisition shelf process are set forth in a limited number of no-action letters,[20] the Commission should consider taking this opportunity to provide guidance to issuers as to how the acquisition shelf process would operate following the adoption of the shelf proposals.

While existing Rules 165 and 166 require written communications relating to business combination transactions to be filed pursuant to existing Rule 425, free-writing prospectuses relating to capital-raising transactions will have to be filed under proposed Rule 433. Where communications by a company pursuing simultaneous capital-raising and business combination transactions would trigger the filing requirements of both Rule 425 and proposed Rule 433, a single filing complying with the conditions of both rules would avoid duplicative filings. Similarly, as with Rule 425 filings today, the Commission should consider amending Form 8-K to permit registrants to check a box on the cover to indicate whether any materials contained in the Form 8-K are also being filed pursuant to Rule 433.

Finally, assuming the Commission adopts the proposed revisions to Item 12 of Form S-1 and Item 5 of F-1 to permit unseasoned reporting registrants to incorporate by reference previously filed periodic reports, we suggest revising Forms S-4 and F-4 to permit unseasoned reporting registrants (including voluntary filers) to incorporate by reference previously filed reports when filing on Form S-4 or F-4, to the same degree they would be permitted to incorporate by reference pursuant to proposed General Instruction VI of Forms S-1 and F-1. Absent such revisions, reporting registrants who were previously eligible to incorporate information by reference pursuant to Item 13 of Form S-4 would no longer be permitted to incorporate such information by reference. If Forms S-4 and F-4 are revised in this respect,

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[20] *See Service Corp. Int'l* (avail. Dec. 2, 1985); *E.H. Crump Cos., Inc.* (avail. Oct. 18, 1979); and *Beatrice Foods Co*. (avail. Jan. l7, 1973).

similar conforming changes should be made to Schedule 14A and all other related rules and regulations.

* * *

We appreciate the opportunity to submit this letter and we hope that the comments expressed herein are helpful to the Commission in connection with the important rule-making contemplated by the Release.

Respectfully submitted,

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