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Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609
Attn: Jonathan G. Katz, Secretary

Re: Securities Offering Reform
Release Nos. 33-8501 and 34-50624 (File No. S7-38-04)

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities of the American Bar Association's Section of Business Law (the "Committee") in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Release Nos. 33-8501 and 34-50624, dated November 3, 2004 (the "Release"). The Release sets forth proposals (the "Proposals") that would modernize the registration, communications and offering processes under the Securities Act of 1933, as amended (the "Securities Act") and continue integration of disclosure and processes with the Securities Exchange Act of 1934 (the "Exchange Act").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the American Bar Association's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the views of all members of the Committee or the Steering Committee. This letter also does not represent the views of any other ABA Section.

We are providing comments on the asset-backed securities aspects of the Release by separate letter.

I. OVERVIEW

Overall, the Committee strongly supports the Proposals. While we do have some suggestions, we believe the Proposals strike an appropriate balance between improving the efficiency of the capital-raising process and modernizing offering communications, while preserving investor protection. Set forth below is an overview of the Committee's comments on the Proposals. A table summarizing each of our principal comments is attached to this letter.

Research. We support the expansion of the research safe harbors, and recommend that they be extended even further. The recent regulatory and structural changes that have reinforced the independence of the research analyst function and that are cited by the Commission in support of the expansion in the Proposals also justify further expansion. Rule 138 (debt research during an equity offering and *vice versa*) should be extended not only from seasoned issuers to reporting issuers, as proposed, but also to voluntary issuers. Rule 139(a)(2) (industry research) should be preserved not only for all reporting issuers, as proposed, but also extended to all issuers, regardless of reporting status. Rule 139(a)(1) (issuer-focused research) should be extended from seasoned issuers, which is the current proposed limitation, to all reporting issuers and to voluntary filers. The research safe harbors should be available to all unregistered private offerings, not only to Rule 144A and Regulation S unregistered offerings.

However, we believe that the proposal to limit research safe harbors to research that is written and contains sufficient information on which to base an investment decision is unduly narrow. We believe the safe harbors should continue to apply to all "information, opinions and recommendations," as they do today, regardless of whether they are oral or written and regardless of whether they contain information sufficient to base an investment decision.

Rule 134 Notices. We strongly support the proposed expansion of the items of information covered by the Rule 134 safe harbor, and suggest that several additional factual items be added, including existence and size of an overallotment option, CUSIP or other security identification, current market price, use of proceeds, prices of comparable securities and brief business description. We also suggest that prospectus access be sufficient, rather than requiring delivery, for Rule 134(d) indications of interest in the case of seasoned issuers.

We believe prohibiting reliance on Rule 134 in initial public offerings until the price range has been included in the registration statement would disrupt current practice. Virtually all issuers issue a press release upon filing and offering participants communicate scheduling and other factual information necessary to get the offering on the calendars of potential investors before commencement of any active marketing campaign. Only the new Rule 134 items should be conditioned on the price range being on file.

Free Writing Prospectuses. We support the Proposals' goal of eliminating Section 12(a)(1) rescission liability for most inadvertent offering communications. In light of the proposal that Section 12(a)(2) liability attach to free writing prospectuses, we believe no filing should be required for any free writing prospectus. At the very least, clarifications should be made in the final rules and the adopting release regarding when filing is required and regarding responsibility for another person's free writing prospectus, in order to increase the likelihood that free writing prospectuses will be utilized. The filing and legend cure provisions should also be expanded to make them more practical and useful.

We urge that the definition of "graphic communication" be revised, or the demarcation between oral and written communications be redrawn, so as not to disrupt current live road show practices. Conference calls, overflow rooms and visual presentations at live road shows should be confirmed as oral. We support the treatment of electronic road shows that permits different versions to be presented to different audiences without all having to be made public. It remains to be seen whether the requirement to make one version available on an unrestricted basis will result in no electronic road shows for some offerings (which we believe will be the decision in some cases outside the IPO context), only a more limited-content public version or both public and institutional versions.

Liability. We recommend that, if there is to be a rule regarding information at time of sale for Section 12(a)(2) purposes, there be added to Rule 159 a definition that time of sale means the time when, under the terms of the contract of sale and applicable state law, the purchaser is obligated to purchase without conditions relating to information that may be conveyed, including a right to disaffirm.

We strongly believe that the most important liability issue the Commission should address is to create a realistic due diligence framework, particularly for underwriters, in the context of fast offerings. We urge the Commission to amend Rule 176 to add the speed of offering as a factor relevant to the investigation that was reasonable in the circumstances and to confirm that information about the issuer gained in prior offerings and outside the offering context may also be considered part of the investigation. We also urge the Commission to extend Rule 176 to Section 12(a)(2). We also recommend that the Commission confirm, as it did in 1998, that reasonable care charged to a seller by Section 12(a)(2) involves less than a Section 11 due diligence investigation.

Shelf Registration Process Reforms. We strongly support the proposal to permit automatic shelf registration and pay-as-you-go for some categories of issuers. We suggest extending the availability to issuers having less than $700 million in common equity public float, a specified ADTV trading volume level or a specified number of significant registered debt offerings in three years. We support the proposed modifications to shelf registration generally, and recommend that some of the additional flexibility permitted for well-known seasoned issuers be made available to all shelf issuers, including pay-as-you-go filing fees, the ability to add classes of securities and subsidiary registrants by automatically effective post-effective amendments and the ability to omit from the base prospectus selling stockholder information and the plan of distribution.

We recommend that ineligibility for WKSI status and automatic shelf registration be prospective only for convictions, settlements and orders, rather than retroactive for three years, and that the ineligibility be based on securities fraud violations (not all securities law violations) by the issuer (not also by subsidiaries of the issuer unrelated to the offering). One purpose would be to avoid an unfair effect on the many industrial companies and financial institutions that did not know to negotiate an exception to loss of WKSI status when they entered into prior settlements. Another purpose is to avoid a disproportional effect on issuers that own Commission-regulated businesses.

Prospectus Delivery Reform. We strongly support the proposed elimination of the requirement that a final prospectus be physically delivered with or before the confirmation of sale. We urge that the exemption be revised, though, so that a late Rule 424 filing by an issuer will not cause retroactive and incurable Section 5 violations for all underwriters that have sent confirmations in anticipation of an issuer's timely prospectus filing.

Further Reforms. In Part III of this letter on page 99 we list some further reforms we believe the Commission should address in the Securities Act area. Our suggestions focus on unregistered and non-public offerings, including resales.

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II. COMMENTS ON THE PROPOSALS

A. COMMUNICATIONS

1. Research Safe Harbors (Rules 137-139)

a. Expansion of Research Safe Harbors Is Justified by Recent Developments

We agree with the Commission that in light of recent reforms and limitations on conduct by analysts in connection with offerings, it is appropriate to expand the availability of the safe harbors for research reports pursuant to Rules 137, 138 and 139. The Committee agrees that recent initiatives have made an important contribution to making research reports more independent and in providing for better disclosure about analyst conflicts of interest, as observed by the Commission. Continued applicability of the antifraud provisions of the federal securities laws to research reports is a further safeguard. As noted below, we believe strongly that the safe harbors should not be *narrowed* so as to apply only to written research containing sufficient information on which to base an investment decision but instead should continue to apply to both oral and written communications and to any information, opinion or recommendation.

b. "Research Report" Definition Is Too Narrow

We strongly believe that the scope of protected communications should not be limited to *written* research reports and should not be limited to communications containing sufficient information on which to base an investment decision, as the proposed "research report" definition would do. First, the safe harbors today are available for any information, opinion or recommendation, regardless of whether it provides information reasonably sufficient upon which to base an investment decision. While that limitation may be appropriate for purposes of confining the universe of communications for which formal certification is required under Regulation AC, it is not appropriate for purposes of establishing the communications that will be protected from alleged Section 5 violations under the Securities Act. A mere statement by a research analyst to "buy," "sell" or "hold" may or may not be reasonably sufficient upon which to base an investment decision, but it nevertheless has been and should continue to be protected under the research safe harbors from being a Section 5 violation if the relevant conditions are satisfied.

Second, the safe harbors today are available for both oral and written communications. Narrowing them to written research reports would be contrary to the spirit of liberalization we understand is behind the Proposals. While under the Commission's proposed definition of "graphic communication" in Rule 405 more communications previously considered oral will now be considered written, there will still be oral communications that should benefit

from the research safe harbors. For example, if a research analyst conducts a live meeting or conference call, that should continue to qualify for the research safe harbors if the relevant conditions are satisfied.

Conversely, we recommend that the Commission confirm that the definition of "graphic communication" does *not* apply for Regulation AC purposes. Investment banks today consider many forms of electronic communication as not written for Regulation AC purposes and therefore not subject to its certification requirements, which were not designed to apply to audio and video communications.

c. *Expansion of Rule 137*

The Commission has proposed expanding the current Rule 137 safe harbor to apply to any issuer, whether or not a reporting company, with certain exceptions. As a consequence, the rule would make clear that a non-participating dealer would be able to publish research on a private company as early as the start of the marketing period for an initial public offering and without having to wait for the effectiveness of the registration statement and pricing of the offering. We support this change because it would facilitate providing more and better information to investors. It also would help place U.S. investors on a more level footing with offshore investors in global offerings in which other regulatory schemes that apply outside the U.S. permit the distribution of research reports at this stage of the offering process.

Additionally, in order fully to implement the spirit of the expansion into the 25-day post-offering period, we encourage the Commission to revise Rule 137 further to state that the publication of a research report by a non-participating dealer is not a "transaction" for the purposes of Section 4(3). We believe the publication of timely research by entities, including dealers, not involved in the initial public offering should be encouraged in the aftermarket as well as during the offering itself.

d. *Expansion of Rule 138*

i. Expansion to all reporting issuers

We concur with the Commission's proposed expansion of the current Rule 138 safe harbor to all reporting issuers, not merely seasoned issuers. Under the new rule, with certain exceptions, all issuers that are current in their periodic Exchange Act reporting obligations would be eligible, as compared to the existing class of issuers that is limited to those qualifying for Form S-3 eligibility (or equivalent foreign private issuer seasoning). This means that even during the first year following an issuer's IPO a broker or dealer participating in an offering of debt securities could continue to publish research on the issuer's common stock, for example, in the ordinary course of its business if the issuer is current in certain of its Exchange Act reporting obligations.

We believe, however, that it is not necessary for the Commission to make Rule 138 available only where issuers have filed all annual and quarterly reports on Forms 10-K and 10-Q or 20-F. Rule 138 applies only to reports concerning a class of the company's securities that is not the subject of the offering in which the broker or dealer is a participant. Because the markets for nonconvertible debt securities and common stock differ, the opportunity to condition the market is lessened. Under these circumstances, research analysts should not be required to determine whether the issuer has filed all of its periodic reports. If, notwithstanding our concern, the Commission adopts this requirement, we commend the Commission for focusing on annual and quarterly reports that have fixed deadlines, making it at least feasible for a broker or dealer to determine whether the filing has been made. It would be impossible for an outside party such as a broker-dealer to know whether an issuer has filed all of its required 8-K filings.

ii. Same types of securities in regular course of business

A new requirement for reliance on the Rule 138 safe harbor would be that the broker or dealer have a history of publishing or distributing research on the types of securities that are the subject of the report in the regular course of its business. The Commission states that this restriction is designed to prevent misuse of the safe harbor to circumvent the provisions of Section 5 and the new free writing rules. We believe it is contrary to the expansionist spirit of the proposed changes to the research rules to add this new condition. The same structural and regulatory changes to reinforce the independence of the research function that underly the expansions make the addition of this condition unnecessary.

However, if this new condition is adopted, it would be helpful if the Commission made clear that it does not contemplate a "track record" on a specific issuer's equity or debt security, but rather the dealer need only be engaged in the business of regularly delivering or publishing research on the particular type of securities for other issuers.

iii. Non-reporting seasoned foreign private issuers

As discussed in D.1.a.iii.a) on page 64, we recommend that Rules 138 and 139(a)(1) be made available to a non-reporting seasoned foreign private issuer whose equity trades in an offshore market, whether or not it qualifies as a "designated offshore securities market."

iv. Voluntary filers

As discussed in D.4.b on page 77, we recommend that Rule 138 be made available for research reports on voluntary filers, in order to treat them the same as unseasoned reporting issuers.

e. Expansion of Rule 139 for Industry Research

The Committee concurs with the Commission's view that the elimination of the "no more favorable" recommendation condition for industry-related reports is appropriate in light of the recently adopted safeguards regarding analyst recommendations. We also support the expansion to permit coverage of an issuer in an industry report even where the specific security has not previously been covered, as long as another security of the issuer has been.

The 1998 Aircraft Carrier proposals would have extended the industry research safe harbor to even non-reporting issuers. The justification at that time was:

> Where the report is not truly focused on the issuer of the securities, which the existing conditions ensure, there appears to be little risk of a report that is distributed regularly being distributed for the purpose of hyping the security. Even if the purpose of the broker-dealer's distribution was hyping, that type of report is unlikely to have that effect, regardless of whether the issuer is reporting or not.[1]

Because that justification continues to apply, we recommend that proposed Rule 139(a)(2) be extended to cover research on any issuer, regardless of reporting status.[2] Even if this change is not made, we recommend that, as discussed in D.4.b. on page 77, Rule 139(a)(2) be extended to voluntary filers, in order to treat them the same as unseasoned reporting issuers.

f. Expansion of Rule 139 for Issuer-Focused Research

Rule 139(a) as proposed to be revised (and redesignated as Rule139(a)(1)) would retain the limitation that the safe harbor for issuer-focused research is available only for seasoned issuers (for example, Form S-3-eligible in the case of U.S. issuers), although it would substitute for the ambiguous "reasonable regularity" condition a requirement intended merely to prohibit initiation of coverage.

i. Elimination of "reasonable regularity" requirement

We support the elimination of the reasonable regularity requirement in favor of the new requirement of a history of publishing or distributing research on securities of the particular issuer. We suggest, however, that the requirement be clarified to confirm that only a single research report need have been previously distributed. Use of the plural "reports" in the text of the rule could be misunderstood to suggest that more than one report must have been

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1 *See* Proposed Rules: "Securities Offering Reform," Rel. No. 33-7606A (Nov. 13, 1998) [hereinafter, the "1998 Aircraft Carrier Proposals"], at text paragraph preceding the paragraph accompanying note 363.

2 The Release incorrectly states, in the second paragraph following the paragraph referencing note 227, that the Proposals would extend the safe harbor for industry reports to registered offerings for all reporting issuers, not only Form S-3/F-3 eligible issuers. In fact, the safe harbor is already available to all reporting issuers. *See* current Rule 139(b). The Proposals would merely continue availability for all reporting issuers.

distributed, which is the very interpretive problem the Release explains the proposed changes are intended to eliminate.

ii. Seasoned issuer limitation

Although we understand the Commission wishes to proceed incrementally, we suggest that it reconsider retaining the limitation of the issuer-focused research safe harbor to research on seasoned issuers. Instead, we believe that the regulatory and structural changes to the research analyst function justify extending Rule 139(a)(1) to any reporting issuer, whether or not seasoned.

As discussed above with respect to Rule 138, it is impossible for a research analyst to know if an issuer has filed all of the required Form 8-K reports, particularly given the recent expansion and acceleration of the 8-K requirements. Additionally, we believe currentness of reporting is not relevant to the issuance of research reports; research analysts should have the ability to inform their customers about the issuer regardless of the currentness of the issuer's reporting.

If this change is made, Rule 139(a)(1) should also extend to research on voluntary filers, as discussed in D.4.b. on page 77.

iii. Non-reporting seasoned foreign private issuers

As discussed in D.1.a.iii.a) on page 64, we recommend that Rules 138 and 139(a)(1) be made available to a non-reporting seasoned foreign private issuer whose equity trades in an offshore market, whether or not it qualifies as a "designated offshore securities market."

iv. Schedule B issuers

As discussed in D.2.a. on page 73, we recommend that Rule139(a)(1) also be made available to seasoned Schedule B issuers.

v. Investment companies and business development companies

As discussed in D.6.c. on page 84, we believe the Rule 139(a)(1) safe harbor for issuer-focused research should also be extended to investment companies and business development companies that satisfy the substantive Form S-3 seasoning tests of one-year reporting history and over $75 million in common equity public float. As we note, this extension is most important for exchange-traded funds.

g. The Exclusions for Blank Check Companies, Shell Companies and Penny Stock Issuers

Under the Proposals, brokers or dealers distributing or publishing research reports on blank check companies, shell companies or penny stock issuers expressly would be excluded

from relying on the safe harbors of Rules 137, 138 and 139. The exclusions apply if the issuer or any predecessor fell into these classifications during the two (139) or three (137 and 138) years. The Commission has indicated it believes these exclusions are necessary because of the risks of abuse that have been historically posed in offerings by these types of issuers. We suggest, though, that the period be the same for all three rules and that the two-year period in Rule 139 be the one used.

As a matter of policy we agree with the Commission's concern about the potential for abuse for these classes of issuers. Other restrictions on use of the safe harbors under the rules (such as the restriction under Rule 139, if retained, that limits the availability of the exemption for issuer-specific reports to Form S-3 or F-3 eligible issuers based on a $75 million common equity public float or the investment grade securities provisions) may as a practical matter make the blanket exemption for these types of issuers unnecessary, at least in some cases. However, given the policy considerations, we do not in principle disagree with the blanket exclusions as proposed.

However, we are unsure whether an independent dealer can as a practical matter determine if one of these exclusions would apply for a specific issuer based on publicly available information. We suggest that the Commission require issuers in that category to identify themselves as such on the cover page of their Exchange Act periodic reports and that brokers and dealers be permitted to rely on that identification for purposes of Rules 137-139 and the free writing prospectus rules.

h. Availability of Rules 138 and 139 to Exempt Offerings

We commend the Commission's proposals to provide that research reports meeting the conditions of Rules 138 and 139 will not be considered offers or general solicitation or general advertising in connection with offerings relying on Rule 144A or directed selling efforts or otherwise inconsistent with the offshore transaction requirements under Regulation S. We believe that these steps will promote a greater availability of research on issuers engaged in these kinds of offerings.

The Committee believes that similar policy considerations apply for offerings conducted in reliance on Rule 506 under Regulation D, Section 4(2) or the so-called "Section 4(1½)" analysis. Certainly Rules 138 and 139 should be available where the offering is limited to QIBs, but we believe they should also be available for any of these other types of exempt private offerings.

Additionally, in response to the staff's request for comment, the Committee believes the Commission should codify the staff position that research published in reliance on Rules 138 and 139 would not be solicitations under Rule 14a-1(l)(2). Research is an activity inherently separate from offering, soliciting, or making a tender offer and is not issued on behalf of any party to the transaction, but rather is issued on behalf of the broker/dealer for the use of its clients (institutional and retail investors). In this regard, we believe that consistent with its efforts to rationalize and coordinate the Securities Act, proxy and tender offer regulatory schemes, the

Commission should make clear that its research safe harbors under the Securities Act apply equally and fully as safe harbors under the proxy and tender offer rules.

2. Ordinary Communications Safe Harbors (Rules 168 and 169)

The Committee generally supports the proposed safe harbors for ordinary communications in Rules 168 and 169, but only if they can be broadened as we suggest below. We suggest that both proposed safe harbors should expressly state they are non-exclusive. Even if stated to be non-exclusive, however, the safe harbors will tend to force behavior in line with their parameters, which we believe are drawn more narrowly than current practice. It is for this reason we believe it important that they be broadened.

a. Regularly Released Factual Business and Forward-Looking Information – Reporting Issuers (Rule 168)

i. Factual business information

We believe the proposed definition of "factual business information" in Rule 168 is too narrow and the Commission should consider broadening it. We are concerned that even if the safe harbor is revised to state expressly that it is non-exclusive, behavior will tend to be confined to the rule's limits.

The definition of "factual business information" excludes information about the registered offering or information released or disseminated as part of the offering activities in the registered offering. These exclusions are confusing. It may be helpful if the Commission defines what constitutes "part of the offering activities" for purposes of the safe harbors.

ii. Forward-looking information

The definition of "forward-looking information" excludes information about the registered offering or information released or disseminated as part of the offering activities in the registered offering. These exclusions are confusing and seem misplaced, particularly in the context of forward-looking information. An issuer's forward-looking statements regarding its liquidity and financial condition likely will include some discussion regarding a pending or anticipated offering, or the issuer's need for additional capital.

The proposed safe harbor is not helpful to issuers that only recently became reporting issuers (newly public companies), in which case there would be no "history" of releasing forward-looking information. This is particularly true if one considers that proposed Rule 169 applicable to non-reporting issuers does not provide a safe harbor for forward-looking information, thereby effectively precluding the development of the requisite history prior to becoming a reporting issuer. We believe that the proposed safe harbor should not place undue emphasis on whether an issuer previously released or disseminated similar forward-looking information. A relatively new reporting issuer may have difficulty meeting the condition that the

issuer have previously released or disseminated similar forward-looking information. What if there has not been a pattern or history of disseminating forward-looking information? Regardless of a prior pattern of releasing forward-looking information, the Commission should encourage that issuers make this kind of information available to investors.

We believe that no specific requirements should be added to the rule on releasing forward-looking information. If the "history" requirement is retained, each issuer should make its own determination as to its "history of releasing information."

iii. Expand covered information to include information required to be submitted to Commission

As discussed in D.1.a.i.a) on page 63, we recommend that the information covered by Rule 168 be expanded to include information a foreign private issuer is required to furnish or customarily furnishes to the Commission under cover of Form 6-K – *i.e.*, information required to be made public or customarily made public in its home jurisdiction, required to be filed or customarily filed with a stock exchange or required to be distributed or customarily distributed to securityholders.

We also recommend that Rule 168 be expanded for domestic reporting issuers to expressly cover information required to be filed or furnished to the Commission by Form 8-K, now that mandatory disclosure is triggered by many more items.

iv. Extend availability to additional issuer categories

As discussed in D.1.a.i.b) on page 63, we recommend extending Rule 168 to listed non-reporting foreign private issuers in the same manner as the existing research safe harbors (Rules 138 and 139(a)) are available to those issuers. As discussed in D.4.a. on page 76, we also recommend extending Rule 168 to voluntary filers so that they will be treated the same as reporting issuers for this purpose.

As discussed in D.6. on page 80, we also favor extending Rule 168 to reporting issuers that are investment companies and business development companies.

v. Other comments on Rule 168

In response to the Commission's question, we believe that there should not be a minimum period for "regular" release of information. Each issuer should make its own determination regarding the timing, history and release of information. Also, in response to the Commission's request for comment, we generally support the definition of "by or on behalf of the issuer" as proposed and believe it would be helpful to create a central definition. We discuss some suggestions that would make it more practical in section E.4.b. on page 97.

b. Regularly Released Factual Business Information – Non-Reporting Issuers (Rule 169)

i. Factual business information

The proposed Rule 169 safe harbor for regularly released factual business information is narrower for non-reporting issuers than for other categories of issuers. The definition of "factual business information" applicable to non-reporting issuers excludes dividend notices. While most non-reporting issuers do not regularly declare and pay dividends to their shareholders, some do, such as "S" corporations. It seems odd, and unnecessary, to exclude this type of communication from the safe harbor.

The reason for the exclusion may have to do with the other way in which the safe harbor for non-reporting issuers is narrower. The condition to the exemption for non-reporting issuers provides that factual business information can be disseminated to persons *other than* in their capacities as investors or potential investors. This distinction about the persons to whom factual business information may be directed seems unrealistic. It could not cover press releases by non-reporting issuers because there would not be a way to direct them away from investors or potential investors. The same would hold true for information posted on a non-reporting issuer's web site.

If the safe harbor as applied to non-reporting issuers will be principally applicable to e-mail or other written communications directed at customers or suppliers, it will have a very narrow applicability indeed. The communications that most non-reporting issuers are concerned about are press and other communications issued publicly during the time leading up to the filing of a registration statement and during the so-called "quiet period." The proposed 30-day safe harbor in Rule 163A should provide some measure of relief. We appreciate that the Commission was attempting to be helpful here, but wonder, given the extremely narrow range of communications that would fit within the factual business information safe harbor, whether the rule will be useful for issuers other than issuers of asset-backed securities filing on Form S-1 (which are considered non-reporting issuers). As previously noted, this Committee will be submitting a separate comment letter on the ABS aspects of the Proposals. If the limitation on potential recipients were eliminated, we believe the rule would be more helpful.

ii. Forward-looking information

The Commission should consider adding a limited safe harbor for forward-looking statements, not covering projections, for all non-reporting issuers. For example, a non-reporting issuer may have a practice of reporting to suppliers and employees not only that it achieved specified results during a completed fiscal period, but also that it expects to achieve certain operating milestones in the upcoming fiscal period. We believe that type of activity can be important to retaining the goodwill of these important constituencies and should be allowed to continue.

Regardless of whether a general safe harbor for forward-looking information by non-reporting issuers is created, we urge the Commission to utilize its authority in Securities Act

Section 27A to create a forward-looking information safe harbor for initial public offerings similar to the liability safe harbor for forward-looking statements contained in Section 27A. It should be the same as the statutory safe harbor, to minimize interpretive issues and anomalies between initial public offerings and other offerings. Even so, we believe the safe harbor will be rarely utilized to include projections in offerings. In response to the Commission's specific request for comments, we believe projections should not be mandated.

3. 30-day "bright-line" safe harbor – Proposed Rule 163A

We strongly support the Commission's proposed establishment, in Rule 163A, of a bright-line communications safe harbor allowing all issuers to communicate without fear of a technical gun-jumping violation during the period preceding the 30th day before a registration statement is filed in a non-shelf offering. As the Commission points out, this new exclusion should "provide greater certainty in the offering process" while "adequately assur[ing] that these [pre-30-day period] communications would not condition the market for a prospective securities offering."[3] However, we believe that the Commission's laudable goals of certainty for issuers and protection of investors could be enhanced were the Commission to adopt the following recommendations.

a. Extend Rule 163A protection to Section 2(a)(3) offers

We are concerned that the Commission's proposed carve-out of pre-30-day communications from the ambit of an illegal "offer" for purposes of Section 5(c) only, without a concomitant carve-out from the broad definition of "offer" reflected in Section 2(a)(3),[4] may ultimately defeat the intended goal of affording issuers greater certitude in planning their offering activities without undue exposure to Section 12(a)(1) liability. By carving out only Section 5(c), and not also a Section 2(a)(3) "offer" (or at least a Section 2(a)(10) "prospectus"), the issuer retains Section 12(a)(2) liability if the communication is deemed an "offer" for purposes of Section 2(a)(3) and therefore potentially a prospectus for purposes of Section 2(a)(10).

This dichotomy would serve only to perpetuate the dilemma issuers now face in assessing whether a particular communication that does not allude directly to a security or proposed offering – and that might not otherwise qualify for coverage under the proposed safe harbors for factual business information and regularly released forward-looking information – nevertheless might be deemed an "offer" for Section 2(a)(3), and therefore Section 12(a)(2) liability. It is difficult to identify any countervailing benefit to investors of denying issuers a broader communications comfort zone given the 30-day cooling off period already recognized by the Commission as sufficient in other settings – including Rule 155's safe harbor for abandoned

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[3] *See* Release at paragraph referencing note 103.

[4] *See* Release at note 102.

or terminated offerings and Rule 254's safe harbor for pre-filing solicitations of interest in Regulation A offerings[5] – to dispel undue market-conditioning concerns.

The Commission's approach in proposed Rule 163A is also structurally inconsistent with the remainder of the Proposals. Proposed Rule 163A would be the only communications safe harbor that does not exempt communications also from Section 2(a)(10) in addition to Section 5(c). Rules 137, 138, 139, 168 and 169 all take that approach.

Although the ongoing communications safe harbors in proposed Rules 168 and 169 would provide some protection, they too contain inherent limitations as previously discussed in A.2 on page 14. In any case, the same risk of a Section 5 violation would exist if, for example, the issuer were simply to refer to the upcoming offering in the sparest, fact-based terms to satisfy an antifraud concern or Regulation FD disclosure obligation, but happened to go beyond that permitted in a Rule 135 notice. Even if the Commission is unwilling to accommodate our requested carve-out from Section 2(a)(3), at a minimum it should consider allowing restricted, offering-related information to be disclosed by an issuer in reliance upon Rule 135 before the 30th day, without destroying the availability of the 30-day exclusion (which prohibits references to the offering) in situations where such information must be made public to satisfy some other disclosure obligation of the issuer. In response to the Commission's question, we can see no valid policy reason for distinguishing between registered and unregistered offerings in this situation.

b. Clarify "by or on behalf of the issuer"

Though we do not disagree with the Commission's decision to limit the benefits of the proposed 30-day safe harbor to issuers,[6] we suggest that the Commission clarify the scope of the "by-or-on-behalf-of-the-issuer" condition to minimize the potential for issuer uncertainty that likely would diminish the utility of Rule 163A as proposed. In this regard, and more fully discussed in E.4.b. on page 97, it would be helpful for the Commission to confirm that it is up to the issuer to define those persons or entities deemed to possess the requisite authority and approval from the issuer to issue information on its behalf for purposes of Rule 163A protected communications. In some cases it should be permissible for the issuer to authorize a prospective underwriter to act as the issuer's authorized representative – a result that the Commission explicitly seeks to prohibit.[7] In sum, we urge the Commission to confirm that the issuer may define appropriate authorized personnel or entities generally.

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[5] *See* Release at note 103.

[6] As the Commission acknowledges in note 106 of the Release, the 1998 Aircraft Carrier Proposals would not have contained this restriction and would have allowed all offering participants to rely on the 30-day bright-line safe harbor.

[7] *See* Release at note 105.

To illustrate one approach that issuers may wish to follow if the Commission makes the requested clarification, an issuer could determine that only those personnel and/or board members empowered to speak for the issuer under its written Regulation FD or other corporate communications policy were authorized to act "by or on behalf of the issuer" within the meaning of proposed Rule 163A.

Such clarification also would have the salutary effect of preventing imputation to the issuer of third-party communications, thus facilitating compliance with the policing condition applicable to the 30-day period immediately preceding the filing of the registration statement. That leads to our next major comment.

c. Clarify steps to prevent republication

We urge the Commission to provide more guidance with respect to what procedures objectively might be considered "reasonable steps within its [the issuer's] control" to prevent further distribution or republication of Rule 163A-eligible communications within the prescribed 30-day "quiet period." The Commission's analysis of when an issuer has control over or responsibility for published media interviews – which analysis we understand from the Release[8] would be the same as that prescribed for treatment as free writing prospectuses – is useful in this regard, but not sufficient.

Accordingly, we recommend that the Commission outline specific guidance – preferably in commentary or instructions included directly in the regulatory text of Rule 163A, or at least interpretively in the adopting release – that would establish the following procedures as presumptively "reasonable steps":

- The posting of press releases and other materials that do not mention the offering on the issuer's website prior to the 30th day before filing should be permitted to be retained and not be considered to involve "republication" even if no special archiving steps are taken. While dating and identification in an archiving section, as contemplated in Rule 433(e)(2), may be appropriate for purposes of avoiding any risk the material would be a free writing prospectus, it should not be necessary to rely on the 30-day safe harbor. After all, any statement raising gun-jumping concerns is likely to have been recent and to be available on the issuer's website in a current folder rather than an archive. Even if the factual information is not "regularly released" or otherwise eligible for the Rule 168 or 169 safe harbor, an issuer should never be compelled to "take down" from its website a press release or other historical communication just because the 30-day period prior to filing has started.

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[8] *See* Release at note 106.

- It should be sufficient for the issuer to follow the Commission's interpretive guidance in the April 2000 release[9] with respect to issuer hyperlinking to third-party e-materials and otherwise policing its own website and other electronic communications when "in registration."
- Conducting a media interview before the 30th day "bright-line" threshold in which the offering is not discussed, and ceasing further involvement thereafter, should not be considered to involve "republication" even if the interview is published during the 30-day period (or after filing) and even if the published interview speculates about an offering or discusses an offering announcement made subsequent to the interview (such as Rule 135 notice or the actual filing.).

In addition, the Commission could more effectively promote certainty and reduce the chilling effect of possible Section 5 strict liability for the issuer by repeating, in commentary or instructions to the rule itself, the concept articulated in note 106 of the Release – that the Commission "does not expect an issuer to be able to control the republication or accessing of previously published press releases."

d. Other comments requested by the Commission

We offer the following additional thoughts in response to some of the Commission's specific requests for comment on proposed Rule 163A.

- *Are the classes of ineligible issuers and offerings appropriate? Should the exclusion not be available to any other type of issuers or offerings? Should the exclusion apply to offerings registered on Form S-8? Should the exclusion be available for non-reporting issuers? Would there be greater potential for abuse with this category of issuers?*

Regarding the classes of ineligible issuers, we believe the existence of a going concern audit opinion should not disqualify any issuer from Rule 163A. As noted in D.7.a. on page 89, we believe this basis for ineligibility will disproportionately burden small business issuers, and should be eliminated from the rule for all issuers.

We also believe the Commission was overbroad in carving out Form S-8 offerings from the scope of the proposed exclusion. Previous Commission action to foreclose abuse of Form S-8 as a capital-raising device sufficiently deters misuse of the exclusion in the employee benefit context, in our view. That the Commission has treated compensatory offerings to employees somewhat differently in other contexts – in many cases with greater flexibility – does not warrant disparate treatment of this particular type of registered offering here, to the detriment of the issuer.

[9] *See* SEC Interpretation: Use of Electronic Media, Rel. No. 33-7856 (Apr. 28, 2000) [hereinafter, "Electronic Media Interpretation"], at Section II.B.

Finally, we urge the Commission to maintain the availability of the proposed 30-day safe harbor for non-reporting issuers – there are adequate countervailing safeguards built into proposed Rule 163A to protect investors in what we agree is the more sensitive IPO context.

- *Should communications in offerings relying on Rule 155 be permitted during the 30-day period without further conditions?*

Yes. Given the stringent conditions to reliance on the Rule 155 safe harbors (for abandoned public to private and abandoned private to public), there would appear to be scant potential for abuse attendant even to parallel offerings.

- *Should Regulation FD continue to apply to these communications as we propose? If not, why not?*

Unless the Commission were to amend proposed Rule 163A to expand coverage to communications that might constitute a Section 2(a)(3) offer even if not considered an illegal offer for purposes of Section 5(c), as suggested above, it is unfair to subject communications that might in hindsight be deemed a Securities Act "offer" to Regulation FD liability.

4. Offering-related Communications

a. Expanded Rule 134

We strongly support the Commission's proposal to broaden the scope of the Rule 134 safe harbor to facilitate the dissemination of more factual communications relating to the issuer and the offering. In particular, we favor the proposed elimination of the reference in the current legend to state securities law as surplusage, along with the requirement to specify whether a particular offering constitutes a new financing or a refunding. Subject to a few limited exceptions, outlined below, we also believe that the Commission has drawn the correct line of demarcation between notice-based communications designed to inform rather than to solicit, and written soliciting materials that appropriately should be treated as free writing prospectuses.

However, we submit that the fundamental policy underpinning of the proposed expansion – to "include information that issuers, underwriters, and investors would find helpful" – would be best served in today's market environment by expanding the list of permissible "notice"-type communications defined not to constitute a written offer or "prospectus." In subsections (i) and (ii) below, we suggest specific informational items that could be added to the Rule that would promote investor understanding without unduly promoting the proffered investment.

In addition, as discussed more fully in subsection (iii) below, we urge the Commission not to retract from today's practice under Rule 134 in IPOs, and instead continue to allow reliance on the existing items of the rule by non-reporting companies and their offering participants before a "bona fide" price range is included in the statutory prospectus. We accept

that solicitation of indications of interest and offers to buy should not proceed in reliance on Rule 134 before a statutory prospectus containing a price range is available.

As discussed in subsection (iv) below, to the extent that the Commission does require that a statutory prospectus precede or accompany a notice used to solicit indications of interest or offers to buy under sub-paragraph (d) of Rule 134, we urge the Commission to dispense with the requirement of physical delivery in the case of unseasoned, reporting issuers (and voluntary filers) as well as WKSIs and Form S-3/F-3 eligible issuers.

Finally, in order to clarify that, as stated in Rule 430B(c), a shelf base prospectus is a Section 10 prospectus for purposes of enabling Rule 134 communications, we suggest adding the phrase "which could be a base prospectus satisfying the conditions of Rule 430B" to the first paragraph of Rule 134 (as well as to the other references in the Rule to Section 10 prospectus, including in Rule 134(d)). That would parallel the approach in proposed Rule 433(b)(2).

i. Suggested expansion of permitted communications

As previously noted, we believe that the Commission has struck essentially the correct balance in the proposed amendments between selling documents that should be treated as permissible free writing prospectuses, and factual written communications that should be carved out of the definition of "prospectus."

At the same time, and in response to the Commission's requests for comment, we recommend that the following additional information be brought within the ambit of the Rule's protective safe harbor. The benefits to investors (as well as to issuers and underwriters) of having access to the following, fact-based informational items far outweigh any minimal risk of market-conditioning:

- Firm commitment or best efforts nature of the underwriting arrangements
- Existence and size of an overallotment option (and how it works)
- CUSIP or other security identification
- Use of proceeds (from prospectus)
- Current market price of offered security
- Prices of comparable securities (as distinguished from the comparables yield information to be added by the Proposals in fixed income area)
- Brief description of business (from prospectus)

If the offering is best efforts, that fact should be permitted to be stated. The overallotment option is information relevant to the size of the offering (already permitted) and firm commitment/best efforts nature of the underwriting (proposed to be permitted). CUSIP and similar information is the electronic age equivalent of the title of the offered securities (already permitted). Use of proceeds is in substitution for the statement about new finanncing or

refunding (previously permitted). Current market price of the offered securities and comparables are analogous in equity offerings to anticipated yield ranges and yields of comparables in fixed income offerings (already permitted). A one or two sentence business description, taken from the prospectus, is customary and should be expressly permitted.

In response to the Commission's specific questions, we believe Rule 134 should be broadened to permit disclosure of more factual information about the underwriters or the syndicate, including but not limited to details on the allocation of shares or other securities among syndicate members and, as noted above, how the overallotment option will work. Similarly, more information about auction mechanics and/or any other online offering procedures, the nuts and bolts of participation in a directed share component of an IPO or other offering, and the meaning of and procedures for soliciting (and accepting) indications of interest and/or conditional offers to buy (with appropriate adherence to Section 5(a)(1)'s ban on pre-effective sales) would benefit potential investors through greater transparency about the offering process. Indeed, it seems doubtful that any of this information, which would render far more transparent the mechanics of the offering process in an underwritten context, could legitimately be viewed as stimulating investor interest in either the security being marketed or the issuer.

There is one final point on Rule 134 information. The Release suggests[10] that the expansion of information permitted under Rule 134 is intended to permit underwriters to convey procedural information about directed share programs. Issuers also communicate with their employees about directed share programs and these communications should be permitted without being characterized as prospectuses. Making explicit reference to directed share programs in paragraph (a)(10) of Rule 134, and indicating that the information may be conveyed by the issuer as well, would help clarify this point.

ii. Expand Rule 134(d) – Indications of interest

The Commission asks whether it should revise the information requirements of Rule 134 regarding solicitations of offers to buy or indications of interest to facilitate dissemination of descriptions of "how and when offers to buy would be accepted, including the methods and timing of notification of the registration statement's effective date, the purchase price of the securities, and how indications of interest would become offers to buy." As just discussed, we believe that such non-offering, fact-based information should not be treated as a solicitation. In any case, we submit that this question has implicitly been answered in the affirmative by the Commission's staff in the *Wit Capital* and related no-action letters.[11] There, the staff allowed such written communications to be made by offering participants in a Rule 134(d) context – even if not necessarily covered specifically by the terms of the rule – because they were "merely instructional and not designed to generate interest in a particular

[10] *See* Release at note 126.

[11] *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).

offering." To our knowledge there has been no abuse by market professionals relying on these letters permitting electronic and other factual communications confined for the most part to the logistics of account opening and participation in an offering (subject of course to the proscriptions of Section 5(a) and the availability of a statutory prospectus at the point of solicitation). Thus, the time is ripe formally to incorporate this type of logistical information into Rule 134's list of permissible communications.

If that is not done, we believe it would be important for the Commission to confirm in the adopting release that the *Wit Capital* line of no-action letters remains available. In this connection, we suggest that the Commission state in the adopting release that brokers following these procedures may modify the Rule 134(d) legend by adding at the end "or notice given after the effective date that the offer is no longer revocable."

iii. Permit continued use of Rule 134 in IPOs before filing price range

The Proposals generally expand the information that may be included in a communication not deemed a prospectus under Rule 134. However, for non-reporting issuers, the Proposals take a step backwards by making the rule available only where the prospectus in the filed registration statement includes a price range. This is not a condition of Rule 134 today. It is customary market practice in filings for initial public offerings to exclude the price range in the initial filing. The proposed changes would disrupt this practice and essentially make Rule 134 unavailable to IPO filers until the price range is included in the preliminary prospectus, which typically occurs only a few weeks before the end of the multi-month IPO registration process.

We understand the Commission's concern that a preliminary prospectus not be disseminated in a marketing campaign until it includes a *bona fide* price range. However, to make Rule 134 completely unavailable until that occurs seems to be an overreaction. Even as proposed to be expanded, the information permitted under Rule 134 is relatively innocuous and should not depend on there having been established a *bona fide* price range reflected in a filed prospectus. For example, under the proposed Rule 134 amendments an IPO issuer could no longer even issue a Rule 134 press release to announce filing of its registration statement. Similarly, underwriters would not be able to e-mail their institutional and other customers with a Rule 134 notice to put the offering on their calendars. Online brokers would be particularly affected in this regard.

Accordingly, we request that the Commission allow Rule 134 communications based on the existing items to commence upon the initial filing, as permitted today. The Commission should condition availability of only the new Rule 134 items, or such of them as it considers necessary, on the filing of the price range.

The one area under expanded Rule 134 where it may make sense to require that there be a *bona fide* price range established is the communications soliciting indications of interest under proposed Rule 134(d). We note that this paragraph already has within it a requirement that the prospectus that must accompany or precede this communication include a price range "where required."

iv. Expand "access equals delivery"

To the extent that Rule 134, as proposed to be amended, would continue to require that a statutory prospectus accompany or precede a covered communication – for example, where indications of interest or conditional offers to buy are being solicited under Rule 134(d) – we urge the Commission to permit notification of the location of the prospectus to suffice to fulfill any physical delivery obligation arising under the Rule. At a minimum, the Commission should permit this "notification-of-access-in-lieu-of-delivery" approach to be used in offerings by those classes of issuers in which offering participants are allowed to dispense with physical delivery under proposed Rules 163 and 164 relating to free writing prospectuses – WKSIs and other seasoned reporting issuers. Moreover, for the reasons discussed more fully in our comments on the foregoing rules (as outlined in the following section), we recommend that the Commission extend this flexible treatment to reporting, non-seasoned issuers and voluntary filers.

b. Free writing prospectuses (Rules 163, 164 and 433)

We applaud the Commission's goal of facilitating the use of written communications outside the statutory prospectus in the capital-raising context – both before, where appropriate, and after the filing of the registration statement – and agree that the time has come to remove "substantial and increasingly unworkable restrictions on [such] communications that would be beneficial to investors and markets and consistent with investor protection."[12] To the extent that the proposed exemptions reflected in Rules 163, 164 and 433 alleviate concerns of both issuers and underwriters regarding the rescission risk attendant to gun-jumping violations under the existing regulatory scheme, we believe the Commission has taken a significant step in the right direction. Moreover, subject to our concern noted below that required filing unduly expands potential liability, we believe the Commission generally has struck the correct balance by proposing to attach the same liability consequences (under Section 12(a)(2) and the various antifraud provisions) to free writing prospectuses as now apply to oral offers.

For the reasons outlined below, however, we respectfully submit that the conditions to reliance on the exemptions proposed to be codified in Rules 163, 164 and 433 are unduly restrictive from the perspective of issuers and underwriters alike, and unnecessary to protect investors. In particular, although we believe a record retention requirement is appropriate, we recommend that the filing requirement for free writing prospectuses be eliminated. The specter of Section 12(a)(2) liability to a broad class of potential claimants resulting from the proposed Rule 163/433 filing obligations would reduce substantially the utility of the proposed exemptions. Accordingly, we believe that the Commission's purpose of encouraging voluntary dissemination of information in written format ultimately will not be served by the free-writing exemptions as currently drafted.

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[12] *See* Release at text following note 55.

We outline below our reasons why filing should not be required at all. If the Commission is unwilling to take that approach, we urge it at least for WKSI offerings. If a filing or other publication requirement is to be retained, we outline ways in which the category of free writing prospectuses to be filed can be made more practical, and suggest other ways to reduce liability. Because of the special issues raised by road shows, we address this topic in a separate subsection (A.4.c. on page 36).

i. Free writing prospectuses should not be filed

We concur that Section 12(a)(2) is the appropriate liability standard for free writing prospectuses, aligning liability for written offers in public offerings with that for oral offers. We question, however, the conceptual correctness under the Securities Act of a public filing requirement. There is no such requirement for oral offers. There is no requirement in the Securities Act that all investors receive or have access to the same information beyond that required in the registration statement and statutory prospectus – only that the statements to any particular investor be materially true, contain what the Commission requires and not be materially misleading. This was by Congressional design.[13] The filing requirement appears driven by a Regulation FD-like philosophy but, unlike Regulation FD, is limited to written offers. We believe Securities Act offerings are appropriately different from day-to-day public communications by reporting issuers. By excepting Securities Act offerings, that principle is correctly reflected in Regulation FD today and would be generally preserved in the Proposals (as discussed in E.3. on page 94).

Quite apart from theory, we believe a filing requirement will have significant adverse practical consequences. By requiring a public filing of a communication designed by an issuer for specific investors, the class of potential claimants is expanded to all purchasers who claim to have seen it in the Commission's public EDGAR file. That expands dramatically the potential liability for the communication. A communication designed for a sophisticated institutional investor may have very different consequences for a less knowledgeable investor. The filing would make the information available to all and produce expanded liability and cross-liability for all offering participants if the filed information were deemed "in connection with the sale" to all investors who could access it.

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[13] In describing the disclosure liability provisions of the Securities Act, the Conference Report stated:

> The Senate amendment imposed liability upon persons making false and deceptive statements in connection with the distribution or sale of a security. The House bill made the liability depend upon the making of untrue statements or omissions to state material facts. This phrase has been clarified in the substitute to make the omission relate to the statements made in order that these statements shall not be misleading, rather than make mere omission (unless the act expressly requires such a fact to be stated) a ground for liability where no circumstances exist to make the omission in itself misleading.

H.R. Conf. Rep. No. 152, 73d Cong., 1st. Sess. (1933), at 26.

We recognize that Rule 165 in Regulation M-A requires the public filing of analogous communications in the business combination context. We respectfully urge that business combinations and capital raising are sufficiently different to justify a different regulatory approach. In a business combination, the communications are made on behalf of one or two issuers to their existing security holders about the terms of a transaction that have already been announced. Perhaps because of the filing requirement, these written communications are generally limited to those suitable for broad audiences. In a capital-raising transaction, the communications are made (a) to potential security holders, (b) as part of establishing the terms of the transaction and (c) through financial intermediaries that have heightened potential disclosure liability but only an underwriting commission benefit. These attributes – exploratory nature of the audience and use of intermediaries with different risk-reward profiles than the issuer – result in a different communications liability analysis in capital raising than in business combinations. For these reasons, filing or other forced publication requirements in capital raising will chill rather than open up written communications.

Even if the Commission declines to eliminate filing of free writing prospectuses in all cases, we recommend that the Commission at least do so in offerings by WKSIs.

If the Commission nevertheless remains concerned about potential abuse, it could test the merits of a less restrictive regulatory approach to free-writing by adopting Rules 163, 164 and 433 as temporary rules – without filing requirements – as it did with great success in the context of Rule 415 governing shelf offerings in 1982. After a one- or two-year period of monitoring use of free writing prospectuses under the temporary rules, including review of free writing prospectuses obtained through supplementary information requests, the Commission would be in a better position to formulate, as in the case of Rule 415, a reasoned judgment whether to make the rule permanent and whether to impose a filing requirement on some or all issuer free-writing.

Accordingly, we respectfully urge that the Commission reconsider the filing requirements altogether for free writing prospectuses. If the Commission is unwilling to do that, we strongly suggest that it implement our recommendations in the remainder of this discussion, to reduce potential liability and cross-liability, such as clarifying "by or on behalf of the issuer," confirming free writing prospectuses are evaluated against the total mix of information, clarifying that an underwriter that does not refer to another underwriter's free writing prospectus in making a sale is not liable for it and expanding the cure provisions.

ii. Clarify and narrow the scope of free writing prospectus filing obligations of issuers

If the Commission declines to eliminate filing of free writing prospectuses for all issuers, as we propose in i. on page 27, the Commission should limit application of these filing requirements in offerings by all types of issuers. We offer the following suggestions for crafting

a more reasonable filing regime for free writing prospectuses covered by proposed Rules 163,[14] 164 and 433.

The basic problem stems from the overly broad requirement that the issuer must file a free writing prospectus of another offering participant that contains any material information about the issuer that has been provided by or on behalf of the issuer (unless the information has been previously filed). We respectfully suggest that this requirement is not practical. First, it subjects the entire document to filing. Second, it requires the issuer continuously to monitor and analyze the free writing activities of all offering participants. Third, it allows no time for issuer analysis because of the requirement that the issuer file this third party material no later than first use.

We believe it should be sufficient protection against evasion of the issuer filing requirement – which we believe to be the purpose of the provision described in the previous paragraph – to require filing only of free writing prospectuses (a) used by the issuer or (b) for which the issuer provided the information for purposes of dissemination by a third party.

It is unfair, in our view, for an issuer to be compelled to assume the risk of Section 12(a)(2) liability for the content of a third-party communication disseminated in some cases before the issuer even has an opportunity to review and correct any possible misstatements, much less file the communication in a timely manner. We do not believe that the Commission's statement that "[t]he issuer would have control over the use [of issuer information as defined] or would know that it provided the information for use" is correct. Much is discussed in due diligence and offering planning sessions that could arguably be information provided by the issuer even though the issuer did not intend the information to be utilized in a free writing prospectus.

To summarize, without further clarification and other modifications that take into account the realities of an underwritten offering, the risk of both direct liability (for late or non-filing) and cross-liability (*i.e.*, for the content of the third-party materials) to which an issuer is exposed under proposed Rule 433 is unreasonable and, in fact, could have the perverse and unintended result of chilling open communication between issuers and underwriters.

If the Commission is not prepared to replace the filing trigger for information provided "by or on behalf of the issuer" with an evasion test, as we propose, we recommend that the Commission at least define with greater precision the meaning of the term "by or on behalf of the issuer" for purposes of each of proposed Rules 163, 164 and 433. As we discuss in A.3.b. on page 19 and E.4.b. on page 97, it would be helpful if the Commission were to confirm that it is up to the issuer to define those persons or entities authorized to speak on its behalf, and to make clear that the Commission will not second-guess the issuer as to what procedures and controls

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[14] Given the likelihood that most WKSIs would prefer to rely on the enhanced shelf offering process to raise capital and would maintain at all relevant times an effective shelf registration statement, we would expect to see little or no pre-filing free-writing by WKSIs (or other WKSI offering participants). Thus, we believe Rule 163 will be little-used.

would be reasonable under particular facts and circumstances. One constructive solution would be for the Commission to state clearly that an issuer will presumptively not be held legally responsible for either the content or filing of an offering participant's free writing prospectus if the issuer obtained an agreement, whether before or after[15] issuance of the free writing prospectus, that the offering participant would not utilize free writing containing material non-public information provided by the issuer.

iii. Confirm free writing prospectuses are not viewed in isolation

We urge the Commission to confirm that a free writing prospectus is not to be evaluated in isolation for Section 12(a)(2) purposes, but instead within the total mix of information that has been conveyed to the investor or to which the investor has access. For example, an underwriter in an offering should have no greater liability if it sends a stand-alone copy of the prospectus summary to an investor, with the full statutory prospectus on file at the Commission, than if the underwriter had instead physically delivered the entire statutory prospectus. In both cases the summary is qualified by the remainder of the statutory prospectus, including the incorporated documents.

iv. Expand the "access equals delivery" model to unseasoned reporting issuers

For the same reasons presented in our discussion of the proposed amendments to Rule 134 (A.4.a. on page 22) and 172 (C.4.a. on page 59), we believe that the Commission should modify the statutory prospectus delivery condition in proposed Rule 433 to allow unseasoned reporting issuers and voluntary filers to rely on the "access equals delivery" (constructive delivery) model. Once a Section 10(b)-compliant prospectus has been filed electronically with the Commission and is freely available via the Commission's web site, as disclosed in the required legend appearing on the face of the written communication, investors should have little if any difficulty in obtaining access to the statutory prospectus. IPOs should be the only category of issuer requiring physical delivery of a statutory prospectus to enable free-writing.

v. Underwriter cross-liability for free writing prospectuses

Underwriters face a dilemma as a consequence of the potential vagueness and overbreadth of proposed Rule 433 – how to determine whether they will have liability for a free writing prospectus (a) filed by the issuer and therefore available to all investors or (b) prepared by another offering participant and delivered to the investor to which the first underwriter sold the offered securities. Even where the underwriter did not refer to the free writing prospectus in making the sale, an investor could claim the underwriter benefited from the market conditioning caused by the issuer's filing or from the offering information in the other underwriter's free writing prospectus. This could lead to Section 12(a)(2) claims against the underwriter for free

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15 For example, it should be permissible to include this agreement in the underwriting agreement, which would be executed only after pricing and therefore after most free writing prospectuses to be used for solicitation purposes would have been issued.

writing prospectuses that did not "belong" to it. We note in this connection that many underwriters will cover overlapping institutional customers.

If the Commission retains any form of filing requirement for free writing prospectuses, we request that the Commission clarify that an underwriter will not have Section 12(a)(2) liability on a free writing prospectus – *i.e.*, will not be deemed to have offered or sold a security "by means of" the free writing prospectus – solely by virtue of an issuer's having filed it. We also request that the Commission confirm that an underwriter will similarly not have Section 12(a)(2) liability on a free writing prospectus created by another underwriter to which the first underwriter did not refer in its communications with the investor.

vi. Eliminate the requirement that free writing prospectuses not be inconsistent with statutory prospectus

Rule 433(c)(1) contains the requirement that a free writing prospectus not contain information that is inconsistent with the statutory prospectus. Failure to satisfy this requirement results in an incurable Section 5 violation. For the reasons the Commission eliminated a similar requirement in 2003 from the free writing rule for investment companies (Rule 482),[16] the Commission should not include one in Rule 433. The availability of the statutory prospectus, and the required legend notifying recipients where to get it, along with disclosure-based prospectus liability for material misstatements and materially misleading statements, should be sufficient. Disclosure issues should not provide the basis for a Section 5 claim. In fact, such an approach is inconsistent with the Proposals.

vii. Establish flexible "cure" provisions for immaterial or unintentional violations of filing and/or legend requirements relating to free writing prospectuses

We support in concept the approach taken in proposed Rules 163 and 164 to preserving the availability of the Section 5 safe harbor in situations involving immaterial or inadvertent noncompliance with the filing and legend requirements (although we offer some suggested clarifications below). However, we believe the rules would better achieve their purpose and requests for clarification about the operation of the cure provisions would be reduced, if the filing and legend requirements were not made conditions of the Section 5 exemption in Rules 163, 164 and 433, but instead were styled as mandatory, but separate, requirements. If that change were made, a defectively implemented cure could potentially give rise to a Commission enforcement action, but would not give rise to private causes of action for rescission by a potentially broad class of investors who may have seen it or had access to it. The Commission adopted this very approach in 1989 when it amended Regulation D to remove the Form D filing as a condition to the Securities Act registration exemptions in Rules 504, 505 and 506, while retaining the filing obligation as a separate requirement in Rule 503.[17] We believe the

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16 *See* Rel. No. 33-8294; 34-48558, IC-26195 (Sept. 29, 2003). In that release the Commission eliminated the requirement that Rule 482 free writing material be limited to information the substance of which is included in the statutory prospectus. No "not inconsistent" requirement was added.

17 *See* Final Rules: Regulation D, Rel. No. 33-6825 (Mar. 14, 1989).

record retention requirements should also not be structured as conditions to the exemption, lest a lost file lead to a retroactive Section 5 violation.

We recognize that Rule 165 under Regulation M-A, providing a Section 5 exemption for certain communications relating to business combinations if the communications are filed, employs a cure provision structure similar to that proposed for Rules 163 and 164 – *i.e.*, filing is a condition of the Section 5 exemption. However, we believe the different contexts justify a different approach in the rules. In a business combination, there are relatively few individuals involved in creating the relevant communications, and the infrequent but important and time-sensitive nature of the transaction likely results in special attention, including extensive involvement by outside legal and other professional advisors. Thus, mistakes are less likely and the need to rely on the cure provisions is fairly small. In a securities offering, there can be many underwriters, each with a large sales force and for which securities offerings are the regular business. These participants necessarily rely on policies and procedures for compliance, but the likelihood of mistakes appears greater in this context. Without a more forgiving cure structure, underwriters may well decide to forgo any use of free writing prospectuses.

Some further clarification with respect to the cure provisions would also encourage greater use of the safe harbors made available by proposed Rules 163, 164 and 433. First, we suggest that the Commission eliminate the proposed requirement that a free writing prospectus without a legend be amended and re-distributed to the original recipients of the communication. Such a requirement is neither necessary nor appropriate to protect investors in connection with free writing prospectuses used before or after the registration statement is filed.

Second, we recommend that the Commission make clear that a "good faith and reasonable effort … to comply" with both the legend and filing requirements would include, but not be limited to, the offering participant's implementation of appropriate compliance policies and procedures. In the case of an issuer, such procedures be similar to the Commission-recommended Regulation FD compliance policies identifying authorized spokespersons and types of permissible communication with persons and entities outside the issuer. For underwriters and dealers, the necessary compliance policies and procedures could be added to supervisory (and other) procedures relating to participation in underwritten public offerings. Offering participants that adopt and consistently follow such procedures also should be given the Commission's assurance (by analogy again to the Commission's assurances in connection with Regulation FD, discussed above) that an employee's failure to comply with appropriate compliance policies and procedures would be treated as an "unintentional" breach of either the legend or filing requirement.

Third, we recommend that the Commission clarify that "discovery" of the violation of a filing and/or legend requirement will be imputable to the particular offering participant only if a responsible senior official involved in the particular offering either knows, or is reckless in disregarding information putting that official on notice, of a possible violation. Absent such a standard, the issuer or underwriter will not be in a position to correct a particular deficiency. To set the bar for this purpose at the level of any "executive officer," as defined for

purposes of Exchange Act Rule 3b-7, would result in far too broad a standard for issuers, and far too narrow a standard for underwriters.

With respect to proposed Rule 163, the Commission asks whether the filing obligation should apply if an issuer fails to file a registration statement within a particular time period after the particular offer made in reliance upon this pre-filing safe harbor. We believe no such penalty would be necessary or appropriate in the case of WKSIs, which are unlikely to abuse the benefits of the safe harbor. WKSIs are in any event far more likely to be in a post-effective, shelf offering mode to the extent that they seek access to the public securities markets for capital-raising purposes.

viii. Establish a "cure" provision for IPO issuers and other participants that inadvertently use a free writing prospectus before a price range is included in the statutory prospectus

We understand the Commission's judgment to preclude use of a free writing prospectus by any participant in an IPO before a price range is disclosed in the statutory prospectus. However, we urge the Commission to adopt a "cure" provision – similar at least in purpose to those discussed in the preceding section – that would foreclose the creation of an automatic Section 12(a)(1) rescission right based on inadvertent or unintentional use of a written extra-prospectus communication prior to inclusion of a price range in the preliminary prospectus comprising part of the registration statement.

A similar cure should be made available in IPOs for persons that fail to accompany or precede the free writing prospectus with a Section 10 prospectus. We urge that this cure be extended also to non-seasoned reporting issuers if our suggestion in b) to dispense with physical delivery for these issuers is not accepted.

ix. Web-based communications

We generally support the policy goals underlying the Commission's proposed treatment, in Rule 433(e), of information appearing on or hyperlinked from an issuer's web site. However, we believe the Commission has drawn the lines too narrowly. The rule should expressly protect from being treated as a free writing prospectus third-party information that the issuer includes via hyperlink to a portion of its web site covered by the rule's exclusion for historical information, at least for reporting issuers. This exclusion should extend beyond links to issuer-prepared documents filed with or submitted to the Commission, given the ubiquitous use made by many companies for investor relations and ordinary business purposes of links to unaffiliated third-party websites containing historical stock prices, trading volumes and other fact-based information regarding the company's business or financial performance. A non-IPO issuer should not be required to "scrub" its historical archive section to the extent it contains linked or republished third party materials that fall within the spirit of the exclusion.

Although the Commission refers in the Release to the applicability of hyperlinking principles to non-issuer offering participants,[18] the text of the Rule is silent – both with respect to imputation of hyperlinked third-party materials to an underwriter, dealer or other offering participant for purposes of Rule 433(e)(1) and with respect to the protections of Rule 433(e)(2) for archived historical material. Some clarification is needed. We suggest that the Commission apply hyperlinking principles to all offering participant materials, as well as the protection of the archiving provision.

x. Media publications

We agree generally with the Commission's judgment in the Proposals about when written or broadcast information relating to an issuer or its offering communicated by media should be imputed to the issuer or other offering participant. Where a participant has prepared, paid or given consideration for a published article, broadcast or advertisement, it should be responsible for the content of the resultant communication.

Still, the analysis can become considerably more complicated where a participant has taken no such affirmative step to entangle itself in or adopt a particular media communication. There are situations where a participant not only should have no duty to deliver – physically or constructively – a statutory prospectus before or with publication of information relating to a participant or the securities offering, but also should have no post-publication filing obligation under proposed Rule 433. Accordingly, we offer the following suggestions:

1. Clarify the meaning of "by or on behalf of" an offering participant. For example, the rule should recognize that an issuer, underwriter or dealer is not responsible for the unauthorized release of material non-public information by any person lacking the requisite authority, where the participant maintains appropriate policies and procedures, as discussed in A.3.b. on page 19 and E.4.b. on page 97.
2. Make clear in commentary or instructions to the rule the principle articulated in note 106 of the Release – that the Commission "does not expect an issuer to be able to control the republication or accessing of previously published press releases" or other information originating with the issuer or any other offering participant.
3. Confine any filing obligation to the specific media publication to which the interview was granted, and not to any republication by other media of information in the original publication.
4. As an alternative to filing the actual published article, permit the issuer or offering participant to file a transcript of the interview, if available.
5. Base the filing deadline on the time a responsible senior official of the issuer has actual knowledge of the publication.

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[18] *See* Release at text accompanying note 200.

6. Extend the filing deadline from one business day to four business days (aligning it with the Form 8-K deadline).
7. Extend the same treatment to *bona fide* media that are affiliated with the issuer as to those that are not affiliated. It should be sufficient protection that the special rule for media publications is limited to publications that are not prepared or paid for by the issuer or offering participant. *Bona fide* media should already have internal procedures sufficient to avoid treating their affiliates differently in their publications.

xi. Rating agency publications

Currently, publications by independent rating agencies are not considered offers that would create gun-jumping or other Section 5 problems for the issuer, even though the issuer may pay the agency a fee for rating the offered securities and cooperate by providing material non-public information to the agency about its business and prospects. The references in Rule 433(f) to media publications being free writing prospectuses if the issuer made payment or provided information could be misunderstood as having some application to rating agency publications, which we believe is not the case. We suggest that in the adopting release the Commission clarify that reports published by a nationally recognized statistical rating organization are not free writing prospectuses (even when the NRSRO is paid by the issuer or receives material non-public information from the issuer) because these reports are not offers within the meaning of Securities Act Section 2(a)(3), unless of course the issuer or offering participant uses the report in making offers, in which case the user may be liable to its purchaser under Section 12(a)(2), but the NRSRO would not be so liable.

xii. Rationalize record retention requirements

Although we believe there should be no filing requirement for free writing prospectuses, we endorse the requirement for record retention. For the same reasons discussed in A.4.b.vii. on page 31 that the legend and cure provisions should not be conditions of the exemption, we recommend that the record retention provision be structured as a separate requirement, rather than as a condition to the exemption.

If the Commission retains a filing requirement for some free writing prospectuses, we believe that a record retention requirement for those communications would be redundant. We therefore recommend that the Commission limit application of the record retention requirement to situations in which an offering participant is not obligated to file under the particular safe harbor.

xiii. Combine Rules 163, 164 and 433

Our discussion of the content and use of free writing prospectuses illustrates the commonality of many of the provisions of proposed Rules 163, 164 and 433. Much of the same regulatory text appears in each proposed rule, and they share a common definition of the term "free writing prospectus." Accordingly, we urge the Commission to simplify the regulatory scheme and thus facilitate compliance by combining the two safe harbors.

c. Road shows (electronic and live)

We support the proposed framework for the treatment of electronic road shows as free writing prospectuses, without filing or public availability of certain versions, as well as the intention of the Commission to preserve the use of traditional live road shows. While concurring wholeheartedly with the Commission's expressed goals of facilitating greater availability of information to investors and the market and eliminating barriers to open communications, we do have several suggestions as to how the Commission might modify and improve the Proposals in this area before adopting them.

i. Background

Road shows are an important source of information for potential investors in many types of offerings, from initial public offerings to rapid offerings of debt by large, seasoned issuers. Road shows (broadly defined) can have different attributes, which have different implications under both the existing and the proposed regulatory frameworks, including:

1. They can be live or recorded (including where made available for replay);
2. All or part of the presentation can be retained (physically or electronically) by the investors, or not retained;
3. Participants (both presenters and investors) can be physically present (that is, in person), or at remote locations;
4. The information can be conveyed orally, visually or both;
5. Investors can have the opportunity to interact with (question) the presenters, or not; and
6. Investors can be invited (and thus the audience can be limited to individuals with certain characteristics, such as being customers of an investment bank) or unscreened (and thus anyone can participate).

Under current practice, different types of offerings necessitate that their road shows have different combinations of these attributes. At one extreme, in the classic "live" IPO road show, senior management of the issuer may travel around the country (and even the globe) for weeks of presentations to institutional investors prior to the pricing of the offering. These presentations are generally conducted in person and provide an opportunity for the investors to interact with the issuer's management. The presentations include various visual communication aids (power point presentations, flip charts and graphs, chalkboards, etc.), which are not retained by the investors. One of these presentations may be recorded and made electronically available to selected institutional investors under the guidelines in the Commission staff's electronic road show no-action letters. These recorded electronic road shows expand the universe of investors with access to management presentations by reaching investors who are in remote locations or otherwise are unable to attend the live presentation.

At the other extreme, in a Form S-3 shelf offering of investment grade debt by a large, seasoned issuer, the offering may be started and completed in only a few days. There will often be a live conference call with institutional investors, with an opportunity for questions. In some instances, there may be an opportunity to contemporaneously view power point slides or other visual aids. "In person" road shows are usually not needed for these offerings, although under present practice there may be one or more live road shows conducted so that a road show can be recorded and made electronically available under the guidelines in the electronic road show no-action letters. Electronic road shows provide an efficient method of reaching a larger audience of investors in these rapid offerings.

Whether a road show is "live" or "electronic," the current regulatory framework for road shows demands that those communications be, and remain, strictly oral. Failure to maintain these communications as "oral" results in a violation of Section 5 with resulting rescission liability under Section 12(a)(1), since at the time road shows are conducted written offers are not permitted other than by statutory final prospectus. As new communication techniques have developed, the specter of irremediable Section 12(a)(1) rescission liability – if a road show communication were to be deemed "written" – has, in turn, led to the development of convoluted and unnecessarily technical practices for road shows, particularly electronic road shows. Although the Proposals effectively address the restraints on electronic road shows caused by the prospect of Section 12(a)(1) violations, the broad proposed definition of "graphic communication" to be added to Rule 405 will exacerbate limitations on permissible practices at traditional road shows unless it is clarified.

As suggested below, we believe the Commission should examine the six road show attributes enumerated above and provide guidance that will, while preserving the essential elements of oral communications, permit greater certainty and more uniform practice. We believe regulation of communications should not and need not be an impediment to innovation. While guidance on the specific issues noted in iv. below is the most important, we believe establishment of principles as noted in v. below would be extremely worthwhile.

ii. Support use of Section 12(a)(2) versus Section 12(a)(1) liability for electronic road shows

As the Commission observed in its 2000 interpretive release on electronic media,[19] "[o]ne of the key benefits of electronic media is that information can be disseminated to investors and the financial markets rapidly and in a cost-effective and widespread manner." This characterization is certainly true of electronic road shows as well, and we applaud the Commission for making it clear that their use will not be an illegal prospectus under Section 5(b)(1). By designating electronic road shows as free writing prospectuses, the Commission would effectively preserve investor rights and protections (through Section 12(a)(2) liability) while facilitating more open communications.

[19] *See* Electronic Media Interpretation, *supra* note 9.

iii. Support limited filing of electronic road shows as free writing prospectuses

To the extent a filing requirement for issuer free writing prospectuses is retained, we also agree with the Commission's determination that at least certain electronic road shows, as free writing prospectuses, need not be filed with the Commission (or made readily available electronically to all investors). As the Commission notes, in its view liability under Section 12(a)(2) is dependent upon what information any given investor has at the time it makes its purchase of the securities. We agree that offering participants should be permitted to decide how and what is communicated to audiences of varying sophistication.

iv. Support preserving traditional live road shows – additional clarification recommended

The Commission states clearly in the Release that "live road shows would continue to be considered oral communications."[20] We strongly support this position. Transforming treatment of any communications practice from "oral" to "written" under the Proposals will necessarily deter its use. We therefore agree with the Commission that it is in the best interests of both investors and offering participants that the regulatory framework encourage interchange and full use of available communication tools. While we understand Instruction 2 of Rule 433 seeks to confirm that live road show practices are not affected by the rule, the reference to "graphic communication" undercuts that goal. We urge the Commission to confirm that existing live road show practices will be considered "oral."

For example, currently there are a number of visual and other "aids" to oral communications that are routinely used during live road shows. These include slides and power point presentations. Road shows might also use other aids such as whiteboards, video clips and charts or diagrams displayed on easels at the front of a room. Under the current framework, all of these devices are simply part of the oral communications at the road show, and none of them constitutes a written offer that would (if considered written) violate Section 5 and result in Section 12(a)(1) rescission liability. These communication aids are extremely important in that they improve the quality and clarity of the disclosure made to investors at road shows. As new communication aids emerge, they too will enhance the effectiveness of oral communications.

Without further clarification, the proposed expanded definition of "graphic" (and thus "written") communications may vitiate, or at least severely complicate, any effort to continue to describe current and future live road show practices as "oral" communications.

Accordingly, the Commission should state unequivocally that these are and will continue to be considered oral communications, despite their form or the medium through which they are transmitted. If the Commission does not provide this type of guidance, there is a risk that the Proposals will lead to less use of traditional live road shows or, at a minimum, less complete communications with investors at those presentations, particularly since use of many

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[20] *See* Release at note 180.

existing and future communication aids raise, or will raise, concerns about whether they are deemed to be oral or are written (and thus required to be filed).

v. Suggestion for defining "road shows"

To address these concerns, we suggest that the Commission consider defining "road shows" by setting forth certain attributes of traditional road show communications that, when present, make that communication oral. We would also welcome the Commission providing in its rulemaking release specific examples of activities deemed to be "oral". Considering the six different attributes listed in the background section above, we suggest that the presence of the first two attributes should be sufficient to render a road show communication oral: (i) the presentation is live (versus recorded at an earlier time), and (ii) none of the presentation is provided to the investor in any form (hard copy or electronically) that is intended to be retained, other than the provision of the preliminary Section 10 prospectus.

The presence or absence of attributes three through six listed above creates artificial distinctions, not necessary to preserve the essential ingredients of a communication being oral. Thus, as to the third attribute, there should not be a requirement for physical presence of the presenters or the investors at the road show. Modern technology and convenience should allow those present at a road show (offering participants and investors) to be connected from different locations, and for information to be conveyed by hearing it or seeing it, or both, directly or remotely – so long as the presentation is live, is not provided in a form intended to be preserved or retained by the investor and is not available for replay. Whether the investor is in an adjacent overflow room watching on a video monitor, in a hotel in a distant city watching via a closed circuit video feed, or at his or her desk watching a live restricted access webcast, the communication should be treated the same as physical presence.

Likewise, as to the fourth attribute listed above, in light of the many ways that participants can be electronically connected and the benefits and effectiveness of visual communication aids, whether the information is transmitted aurally or visually or both should not create a legal distinction. A voice telephone call (by definition from a remote location and which the Proposals appropriately consider to be oral) should be treated the same as a visual presentation transmitted to a remote location, again, so long as it is happening live, is not provided in a form intended to be preserved or retained by the investor and is not available for replay.

As to the fifth attribute above, the Commission has already endorsed in the Proposals that actual interaction among participants (in the form of an opportunity for questions and answers) is not a necessary limitation.

Finally, the sixth attribute above, the screening or limiting of investor participants, does not go to the oral character of a presentation and does not appear to be a necessary limitation. We note in this regard that the Securities Act itself will continue protect against widespread and indiscriminate transmissions of information by defining "prospectus" in Section 2(a)(10) to include radio and television broadcasts and thereby ensuring that such broadcast offering communications remain subject to Section 5.

Amplifying the definition of road show, we suggest that the Commission also give examples of existing communication practices that satisfy the requirements of being oral for purposes of road shows. If the definition of road show were premised on the two attributes suggested above, then examples of communications deemed "oral" for purposes of road shows could include – in each case so long as presented "live," not provided in a form intended to be retained by the investor and not available for replay – (i) power point slides and other visual aids, and (ii) the remote connection of participants (investors and presenters) by live, closed-circuit electronics, whether in the next room or across the country. We note with regard to (ii) that our suggested definition would provide a clear answer to the Commission's question as to whether "overflow" rooms at a live road show should be considered "oral". Clearly they should.

vi. Unfiled free writing prospectus as alternative

As an alternative, the Commission could achieve a similar result to "oral" characterization of live road show practices by providing expressly that a visual aid or other communication tool that is not strictly oral at live road shows will be a free writing prospectus *but will not be subject to filing* with the Commission *even if* it contains material issuer information that, while consistent with the information in the registration statement, was not previously included in the registration statement or in another free writing prospectus related to the offering.[21] This provision would further the goal of keeping electronic and live road shows on equal footing, as the visual and other communication aids used at a live road show would be treated the same as unfiled electronic road shows, and would help the Commission avoid making choices through regulation as to the form and method of communications. In this way, offering participants could continue to make these communications to known and limited audiences without the concerns of a broader distribution of those communications through filing with the Commission.

Under this approach, the proposed recordkeeping rules should require retention of those presentation materials otherwise necessarily reduced to physical or electronic form (*e.g.*, power point slides) but should not require a recording and preservation of the live road show itself. If the Commission does not provide at least this alternative approach, there is a serious risk that the Proposals will lead to less use of traditional live road shows or, at a minimum, more limited communications with investors at those presentations.

vii. Responses to other requests for comment regarding road shows

We have some additional thoughts in response to the Commission's specific requests for comment.

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[21] In order to achieve parity with "oral" treatment, it would be important to exclude filing even where there is new material issuer information. Under the Proposals, as today, that is a permissible activity in a live face-to-face discussion (*i.e.*, a strictly oral communication) and would not trigger any filing. Concerns about not making statements inconsistent with the prospectus disclosure already act as a sufficient check on potential abuse.

- *Will our proposal, if adopted, lead to more widespread use of electronic road shows? To such road shows being available to all potential investors? Should we make it a condition that electronic road shows be available to all potential investors?*

On balance, we believe the Proposals could lead to a decision to forgo electronic road shows in some circumstances outside the IPO context. For example, in a fast shelf takedown of investment grade debt, the time and effort to create a public version and an institutional version of an electronic road show may be perceived as not being justified, particularly given the fact that fixed income offerings are often sold only to institutions.

We concur, though, with the concept embodied in the Proposals that the decision whether to use an electronic road show should remain in the hands of the right decision makers – the issuer and other participants in the offering, as influenced by the needs and demands of potential investors and the market. The ability to create versions that do not need to be filed or made publicly available is also a good measure to preserve certainty for market participants and their ability to tailor their communications to be most worthwhile to a particular audience. For these reasons we would not support a condition that all electronic road shows be available to all potential investors.

- *Should we consider including any of the conditions in the electronic road show no-action letters that we are not including in our proposals? If so, which ones and why?*

As the Commission notes in the Proposals, the current regime that governs electronic road shows has been developed through a series of no-action letters granted by the staff of the Division of Corporation Finance. The staff effectively suspended the evolution of those letters in its Current Issues and Rulemaking Projects outline, dated November 14, 2000, on the grounds that the Commission was considering a more comprehensive treatment of the matter. We certainly commend the staff for their prior efforts to craft a workable model for electronic road shows, but we agree with the Commission that the time has come to withdraw that line of no-action letters and allow electronic road shows to proceed as free writing prospectuses without the burdensome conditions mandated by those letters. As discussed above, we believe the Commission should channel its efforts in this arena to clarifying what constitute the oral aspects of a traditional road show.

- *Is our proposed definition of what constitutes a "bona fide electronic road show" adequate? Is there any reason to discourage transmission of different versions of a road show? For example, could an issuer prepare a road show for some investors and a second, less-informative version for others? Should we otherwise limit this possibility?*

We believe the proposed definition of "bona fide electronic road show" is adequate and should not be substantially revised in the rule text itself. We would, however, welcome more description or clarification in the adopting release that the members of an issuer's management that make the presentation during the bona fide electronic road show do not have to include the same people that make the presentations during other electronic road shows or during

live road shows. We agree that a bona fide electronic road show should not need to provide an opportunity for questions and answers or other interaction as this could easily result in an artificial segment that would not necessarily provide any useful information to the actual investors who are the viewers and intended beneficiaries of the electronic road show.

- *Should an issuer be permitted to edit a retransmitted road show? Should the rule expressly permit editing?*

We believe an issuer, alone or in collaboration with other offering participants, should be permitted to edit a retransmitted road show. In fact, we believe this is a necessary allowance, and implicit in the definition already, given that electronic road shows will be "graphic" communications and the Commission's expansive treatment of technology within that definition. It will always be necessary to have the ability to correct mistakes in or update an electronic road show. Clearly, other types of graphic communications, which may themselves then be used as permitted free writing prospectuses, are susceptible to editing and may even rely on the same.

d. Ineligible issuers

Under the Proposals, "ineligible issuers" as defined in Rule 405 would not be permitted to take advantage of (i) free writing prospectuses under Rule 163, 164 or Rule 433, (ii) the 30-day safe harbor under Rule 163A, (iii) the expanded use of incorporation by reference in Forms S-1 and F-1 and (iv) other provisions applicable to well-known seasoned issuers, such as automatic effectiveness of shelf registration statements (see discussion in C.3. on page 52). In addition, brokers or dealers distributing or publishing research reports on blank check companies, shell companies or issuers engaged in an offering of penny stock would be excluded from relying on the safe harbors of Rules 137, 138 and 139 (see discussion in A.1.g. on page 13).

We believe that the Commission should consider whether each type of ineligible issuer should be treated in the same manner and thereby lose the benefits of each of the provisions. We agree with the Commission that the definition of ineligible issuer should include blank check companies, shell companies and penny stock issuers. We also agree that the definition should encompass issuers that are in bankruptcy proceedings and issuers that have been the subject of a refusal or stop order under the Securities Act. As discussed below, we believe the other attributes of ineligibility should be modified or eliminated.

As a drafting matter, we believe it is a trap for the unwary to describe in the definition of "ineligible issuer" types of ineligible *offerings* (such as business combinations and Form S-8 employee offerings). Instead, these types of offerings should be listed in a new definition of "ineligible offering" that is referred to in the relevant rules.

i. Narrow ineligibility for convictions, settlements and orders

The proposed definition of ineligible issuer also includes issuers that have been, within the past three years, found by a judicial or administrative decree or order to have violated

the federal securities laws or have settled governmental allegations of federal securities laws violations. We believe that these provisions are too broad. We recommend that clauses (ix) (settlements) and (x) (orders) of the proposed definition be revised to more closely track the language of Section 27A(b)(1) of the Securities Act from which the Release states it was adapted. Specifically, we believe that an issuer should be an ineligible issuer only if it violates the antifraud provisions of the federal securities laws, not any provision of the federal securities laws. We believe that focusing on the antifraud provisions will achieve the Commission's objectives, while also recognizing that the effect of broader disqualification provisions will fall disproportionately on issuers that own Commission-regulated businesses such as broker-dealers and investment advisers. In response to the Commission's specific request for comment, we believe that the proposed definition should not be expanded to include settlements with state agencies or violations of state securities laws. Among other reasons, a state settlement may not necessarily be indicative of unfitness to use free writing prospectuses, the 30-day communications safe harbor, the automatic shelf process or other provisions in the Proposals available only to eligible issuers.

We also strongly suggest that clauses (viii) (convictions), (ix) (settlements) and (x) (orders) of the proposed definition be limited to refer only to issuers, as does Section 27A(b)(1), and not also to subsidiaries of issuers. For example, under the existing definitions in Rule 405 it is possible for a partially-owned entity to be characterized as a subsidiary of an issuer even if the issuer does not have the ability to prevent a violation of law or influence the terms of a settlement or decree. Although we believe that the subsidiary concept should be eliminated in its entirety, at a minimum an issuer should only be characterized as an ineligible issuer based on the acts of its wholly owned subsidiaries. If the concept of subsidiaries is retained, the Commission should also clarify the timing issues that will inevitably arise from its implementation. For example, if an otherwise "eligible" issuer acquires a company that is an ineligible issuer, we believe that the eligible issuer should not become ineligible by virtue of the acquisition. Conversely, if a tainted subsidiary of an otherwise "eligible" issuer is no longer a subsidiary of that issuer (*e.g.*, through a sale to a third party), the otherwise eligible issuer should immediately regain its eligible issuer status.

ii. Apply ineligibility prospectively for settlements and orders

There are a significant number of issuers that have previously entered into settlements with government agencies and consent decrees relating to allegations of violations of federal securities laws. These issuers include many large, well-recognized industrial companies and major financial institutions that frequently access the capital markets. These issuers entered into settlements and decrees based on their understanding at the time that their access to the capital markets would not be impaired by the settlement or decree. As proposed, the rules would have the effect of retroactively adding a new material term to existing settlements and decrees by characterizing all of these issuers as ineligible issuers. We believe that this is fundamentally unfair and not good public policy. Although the proposed definition makes it possible for an issuer that is subject to an existing settlement or decree to seek a Commission determination that it is not an ineligible issuer, we believe that requiring these issuers to seek individual

determinations will place an undue burden on these issuers and on the Commission and involve undue delays.

Accordingly, we strongly recommend that clauses (ix) and (x) of the proposed definition apply prospectively for settlements, decrees and orders occurring after the effective date of the final rules. By applying these provisions *prospectively*, issuers will be able to appropriately consider the full impact of entering into a settlement or decree and, in appropriate cases, seek a determination at that time that the issuer is not an ineligible issuer.

iii. Eliminate disqualification for non-current Exchange Act reports

The proposed definition of ineligible issuer also includes any issuer that is not current in its Exchange Act reports. We believe that the currentness of Exchange Act reports should be (as it already is) dealt with in the traditional context of shelf registration, and should not be included in the definition of ineligible issuer. Accordingly, we recommend that clause (i) of the proposed definition be deleted. We note that being current in Exchange Act reports continues to be a condition for use of Forms S-3 and F-3 and of WKSI status.

iv. Eliminate ineligibility for limited partnerships offering securities other than through a firm commitment underwriting

A significant number of issuers, including WKSIs, are organized as limited partnerships. These include a number of master limited partnerships ("MLPs") that own significant petroleum and natural gas pipeline assets as well as operating partnerships utilized by a number of real estate investment trusts ("REITs"). These issuers have significant capital needs, and frequently offer securities without utilizing a firm commitment underwriting. For example, in the past MLPs and REIT operating partnerships have offered securities directly to mutual funds, unit investment trusts, exchange funds and other investors without utilizing a firm commitment underwriting or the services of an investment bank. These are legitimate and necessary capital markets transactions, and we do not believe that these issuers should lose the benefits afforded by the Proposals simply because of their organizational form. Accordingly, we strongly recommend that this ineligibility provision be eliminated from the definition of ineligible issuer.

To the extent the Commission wishes to exclude partnership roll-up transactions as defined in Item 901 of Regulation S-K, those should be specifically referred to in the definition of ineligible issuer, rather than making ineligible all offerings by limited partnerships that are not firm commitment underwritings.

v. Eliminate "going concern" ineligibility for Rule 163A

As discussed in D.7.a. on page 89, we believe ineligibility from use of the 30-day bright-line safe harbor of Rule 163A because of a going concern audit qualification would disproportionately burden small issuers. It should be eliminated as an eligibility criterion from Rule 163A for all issuers.

vi. Commission's specific comment requests

In response to the Commission's specific comment requests, we believe that the disclosure of a material weakness or other internal control deficiency should not cause an issuer to be an ineligible issuer. We do not support adding this item as a criterion to the proposed definition.

B. LIABILITY

1. Information at Time of Sale – Section 12(a)(2) Interpretation and Rule 159

We support the underlying principle of proposed Rule 159 and the Commission's interpretation[22] regarding information at time of sale for Section 12(a)(2) purposes – that a seller's liability under Section 12(a)(2) should be based on information conveyed or made available to the purchaser at time of sale. We believe, however, that a rule codifying this principle needs to provide a definition of "time of sale" that is consistent with today's offering practices and the absence of Congressional intent to create a federal definition of "contract of sale.". For the reasons described below, we believe that if the Commission is to adopt Rule 159, the following definition of "time of sale" should be added to the rule:

> For purposes of this rule, "time of sale" means the time when, under the terms of the contract of sale pursuant to which the purchaser buys the offered securities and under applicable state law, the purchaser is obligated to purchase the offered securities without conditions relating to information that may in the future be conveyed to the investor. Such a condition includes a right by the purchaser to disaffirm based on information conveyed, whether that right is part of the original contract of sale or is subsequently granted to the purchaser.

Although best practice is to have conveyed appropriate information to an investor by the time the investor agrees to purchase the securities, the range of potential timing and significance of developments prior to pricing an offering calls for more flexibility. Certainly in the exceptional case, where a major adverse event has not been conveyed to investors by the time of their agreement to purchase the securities, underwriters wishing to avoid disclosure liability would contact the investor and seek an affirmative reconfirmation of the purchase following disclosure of the event. The Release specifically contemplates this scenario,[23] noting that the seller and buyer may "by agreement revise their sale contract and by agreement enter into a new contract of sale." However, requiring formal cancellation of an agreement and entering into a

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[22] In an area as sensitive as private liability in securities offerings, we believe the Commission should not proceed by interpretation to increase the statutory liability of offering participants without benefit of notice and comment. We urge that the adopting release withdraw the interpretation, or at least state that it is modified to conform to final Rule 159 and to apply only prospectively. The remainder of this discussion will refer only to proposed Rule 159 but applies also to the Commission's interpretation.

[23] *See* Release at note 247.

new agreement is too formalistic, creates impractical burdens and is inconsistent with current practice except in unusual situations.

Instead, the more common scenario involves an event that, while it may be material, is not of major or fundamental significance. In such a case, the underwriter may well rely on an understanding with the investor that upon receipt of additional material disclosure following the initial contract of sale, the investor has the right to disaffirm the transaction. In this case, as in the exceptional case described in the previous paragraph, the basic principle has been observed that the investor has received relevant information before being unconditionally obligated to purchase the securities. It is therefore appropriate in these circumstances that Section 12(a)(2) liability be based on information through the time the subsequent information was conveyed.

Another reason for the approach described in the previous paragraph is to avoid questions whether the original contract of sale was indeed a sale for purposes of underwriter net capital computations, for determining whether the distribution has been completed for Regulation M purposes, for financial reporting and for other purposes.

We believe proposed Rule 159 can and should be adapted to work in the above scenario through the definition we propose. The essential elements of our definition are that the parties have the flexibility to determine the time of sale under state law contract principles, and that the touchstone is the time at which the investor is committed to purchase without regard to any conditions or right to disaffirm based on information conveyed. Without confirmation in the rule itself that underwriters may "reset" the Section 12(a)(2) liability measurement time by unilaterally offering the investor a right to disaffirm the sale based on information conveyed subsequent to the initial contract of sale, underwriters that are uncertain about the status of that approach may feel compelled to delay sales until the information has been conveyed. That will result in "speed bumps," which the Commission has stated it wishes to avoid.

The information that falls into the category of possibly material information that is not major or fundamental is wide-ranging in nature and can arise in almost any type of offering. For example, detailed pro forma financial information will often change from the hypothetical pricing used in a preliminary prospectus once the final pricing terms are known. When pricing is within expectations signaled to investors, underwriters may be comfortable today following the offer of disaffirmance approach previously described. Under Rule 159 as proposed, underwriters could well decide they needed to observe the equivalent of "recirculation" by distributing the revised detailed pro forma information to investors prior to sales in order to avoid potential claims under Rule 159. As another example, there could be a change to the wording of a financial covenant at pricing based on investor input that, while not of fundamental importance, cannot be said with certainty to be immaterial. Yet another example would be the addition of material information regarding a previously disclosed important recent development. In each of these examples, a liability concern by underwriters under Rule 159 as proposed could cause them to delay pricing as compared with today's practice, representing a "speed bump."

In conclusion, it is not realistic to expect that the equivalent of final prospectus disclosure, including pricing-affected information, can be conveyed to investors by the time they agree to purchase, unless the time of that agreement is delayed (thereby creating a "speed bump") or unless subsequent delivery of information coupled with a right to disaffirm is allowed to "reset" the time of agreement for Section 12(a)(2) purposes. In the form proposed, Rule 159 seems likely to have the "speed bump" effect unless the rule expressly acknowledges there is a way, as we suggest, to convey information after the initial contract of sale that will also be taken into account in assessing the underwriters' Section 12(a)(2) liability and that does not require the formal creation of a new contract of sale, while at the same time protecting the investor by allowing disaffirmance based on the additional information.

2. Amend Rule 176 to Address Due Diligence in the Shelf Context and to Apply to Section 12(a)(2)

We strongly believe that the most important liability issue that the Commission should address is to create a realistic due diligence framework, particularly for underwriters, in the context of fast offerings in the current and proposed offering environments. We urge the Commission to implement this initially through an interpretation in the adopting release[24] and ultimately through amendment to Rule 176, which enumerates circumstances that are relevant in determining whether or not a person has performed a "reasonable investigation" within the meaning of Section 11. The failure to deal realistically with the diligence effort that can reasonably be expected of underwriters and other offering participants in the shelf takedown context risks undermining the streamlined registration process the Commission is proposing.

In the past this Committee has urged the Commission expressly to acknowledge in Rule 176 that the time to market for an offering is a relevant factor in considering the extent of investigation that is reasonable for Section 11 purposes.[25] The Commission in fact sought to do so for some types of offerings in the 1998 Aircraft Carrier Proposals. We believe it is more appropriate than ever to do so now, and for all offerings. First, the proposed automatic shelf registration process will result in a greater number of offerings being brought to market quickly, exacerbating the current due diligence problem arising from fast deals. Second, many changes to the Exchange Act reporting system in recent years have strengthened the quality and timeliness of information provided by issuers in the marketplace. These changes justify not only creating

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[24] Unlike interpretations regarding liability under Sections 11 and 12(a)(2), an interpretation of diligence factors would be confirmatory of the meaning of the Commission's own rule.

[25] As this Committee put it in our 2001 letter, dated August 21, 2001, to David B.H. Martin, Director, Division of Corporation Finance [hereinafter, "2001 Letter"]:

> The benefits of "on demand" financing ... are undermined by continuing to impose on financial intermediaries and other "gatekeepers" the responsibility to take the time necessary to do a sufficient due diligence investigation to assure quality disclosure without recognizing and making allowances for their difficulty or even inability to do so.

the proposed automatic shelf registration system, but also acknowledging that a reasonable investigation in a fast offering may involve less than in a slower one.

Also, the need to address this area is made even more important by the Commission's proposal to expand Section 11 liability for a number of offering participants by changing the time when liability is determined, as discussed in the next section. We are concerned that in the absence of a clarification of the due diligence requirement in the shelf context, underwriters and other parties with Section 11 liability exposure, particularly in view of recent court decisions, will slow up the offering process and defeat the efficiencies the Commission is seeking to promote.

Changes to the Exchange Act system cited in the Release[26] include CEO/CFO certifications, expanded and more timely Form 8-K reporting for U.S. issuers, enhanced audit committee responsibilities for listed companies and SRO governance reforms for listed U.S. companies. Although not cited in the Release, one of the most significant reforms is the required audit of internal control over financial reporting required under Section 404 of the Sarbanes-Oxley Act.

Accordingly, we recommend that Rule 176 be amended to add factors that embody at least the following two principles:[27]

- time from commencement of the offering (or, if later, the commencement of the participant's role in the offering) until pricing; and
- extent to which the offering participant gained information about the issuer through means outside the offering in question, including participation in prior offerings, participation in investor presentations by the issuer outside the offering context and review of research analyst reports and discussions with research analysts.

Pending adoption of those rule amendments, we urge the Commission initially to adopt these factors as an interpretation of the Commission's existing rule and an undertaking to support the interpretation through appropriate *amicus curiae* appearances in judicial proceedings.

Finally, as we and others have in the past recommended, and as the Commission itself proposed in the 1998 Aircraft Carrier Proposals, we also urge that persons defending against claims under Section 12(a)(2) be given the benefit of Rule 176 through extension of its coverage to what "reasonable care" would have uncovered for Section 12(a)(2) purposes. This is made even more necessary now by the expansion in the Proposals of permissible communications subject to Section 12(a)(2) liability.

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[26] *See* Release at text accompanying notes 28-33.

[27] Furthermore, we urge the Commission to amend Rule 176 to add all the factors suggested in 1993 in this Committee's "Report of the Task Force on Seller's Due Diligence and Similar Defenses Under the Federal Securities Laws," 48 *The Business Lawyer* 1185 (May 1993), at 1240.

3. Timing of Section 11 Liability in the Shelf Context

The second sentence of Rule 430B(f) would align the measurement time for Section 11 liability of the issuer, signing officers, directors, and experts, on the one hand, with that of underwriters, on the other hand, in the shelf registration context by establishing that time for all participants as the time of the take-down.[28] We support this alignment as to the issuer, signing officers and management directors but, for the reasons described below, we believe it would not be fair to measure the liability of outside directors and experts at that time.

The uniform alignment of Section 11 liability in the Proposals for all parties raises fairness questions for outside directors and experts, who would not ordinarily have an opportunity to review in advance a Form 8-K or prospectus supplement on which Section 11 liability could be based. We think that is a likely possibility that auditors in particular would seek to impose a consent requirement (or the equivalent through a threat to withdraw a prior consent), even where a consent would not be required by the Commission, to ensure an opportunity for appropriate review and bring-down procedures prior to the first contract of sale (in effect, the pricing date) – in other words, prior to the new measurement date for the expert's Section 11 liability under the Proposals.

Currently experts can take the position that Section 11 liability is tested as of the filing of the most recent annual report (or, if more recent, as of the effective date of the registration statement or a post-effective amendment) and not as of any subsequent date, such as the filing of a Form 10-Q or 8-K or the pricing of a take-down. Although auditor bring-down procedures are customary today in connection with a comfort letter, that letter may not be delivered until after the pricing date and possibly not until the closing.[29] Thus, today the pricing would not necessarily have to be delayed while those procedures are performed. However, the Proposals create a liability framework that could accelerate the required completion date for these auditor bring-down procedures to the pricing date and could well result in speed bumps.

Accordingly, on grounds of fairness, as well as avoidance of speed bumps,[30] we recommend that the Commission modify the Proposals so that Section 11 liability in the shelf context is determined for the issuer, signing officers, management directors and underwriters as of the time of first contract of sale (as now proposed), but for outside directors and experts is determined as under the current system.

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[28] In our 2001 Letter, *supra* note 25, we described it as "anomalous" that an underwriter's liability under Section 11 in respect of a shelf registration statement was measured on the state of the facts at the time the underwriter became an underwriter, while the liability of the issuer and other Section 11 defendants was measured on the state of facts at the time the registration statement became effective or the date of the filing of the last annual report.

[29] While generally there is a second "bring-down" comfort letter at closing, in many shelf offerings, particularly fast ones, there is only a single comfort letter delivered at closing.

[30] Even if the Commission declines to accept our recommendations regarding the time of Section 11 liability for experts, it will need to make some accommodation to avoid a speed bump imposed by the auditors as described above.

4. Issuer as Section 12(a)(2) Seller (Rule 159A)

The Release explains that proposed Rule 159A is intended, in effect, to overrule judicial decisions that have held the issuer not to be a "seller" for purposes of Section 12(a)(2), without special circumstances, in a firm commitment underwriting where the issuer neither passes title nor solicits the purchase of its securities.[31] We believe that as drafted proposed Rule 159A could be misinterpreted to apply more broadly, and could be used by aftermarket purchasers as a basis for Section 12(a)(2) claims against issuers during the prospectus delivery period following initial public offerings (25 days in the case of listed issuers) or in registered market-making transactions by issuer-affiliated broker-dealers. Purchasers could claim these transactions were "by means of" the communications made in the original offering. We urge that the rule be clarified to prevent that result.

Also, the application of Rule 159A to "any other communication made by or on behalf of the issuer" is too broad and, we believe, should be deleted. While written free writing prospectuses made by or on behalf of the issuer must generally be filed under proposed Rule 433, oral communications are not. Rule 159A would expose the issuer to potential liability for oral communications by underwriters that are based on the prospectus but about which the issuer may have no knowledge and therefore no ability to correct any misleading aspects.

5. Other Section 12(a)(2) Matters

The Commission should confirm its statement in the 1998 Aircraft Carrier Proposals that Section 11 requires a more diligent investigation than the one charged to a seller by Section 12(a)(2):

> While Section 11 requires a more diligent investigation than Section 12(a)(2), any practices or factors that would be considered favorably under Section 11 also should be considered as favorably under the reasonable care standard of Section 12(a)(2).[32]

6. Relation Back of Shelf Section 11 Information (Rules 412 and 430B)

We believe that it would be more straightforward and comprehensible to confine to Rule 430B all the provisions regarding the relation back of prospectus supplements for Section 10 purposes and Section 11 liability purposes. Subsection (d) of Rule 412, regarding modified or superseded statements, relates solely to the Rule 430B Section 11 liability provisions and can be understood only when read together with Rule 430B. We suggest Rule 412(d) be moved to Rule 430B.

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[31] *See* Release at text accompanying note 256.

[32] *See* 1998 Aircraft Carrier Proposals, *supra* note 1, at text accompanying note 460.

As a separate matter, the new second sentence of Rule 412(a) introduces uncertainty by stating that post-effective statements "may" supersede earlier statements rather than that they "shall be deemed" to supersede them.

7. Other Liability-Related Comments

As discussed in A.2.b. on page 17, we recommend that the Commission create a forward-looking safe harbor for initial public offerings similar to the one contained in Securities Act Section 27A.

We propose in C.4.a.i.a) on page 59 that timeliness of the issuer's filing of its Rule 424(b) prospectus not be a condition to the Rule 172 exemption from prospectus delivery in connection with the confirmation process. The purpose is to avoid converting issuer prospectus filing delays into underwriter rescission liability.

C. CHANGES TO THE OFFERING PROCESS

1. Non-Reporting Issuers and Unseasoned Issuers

a. Classification

The Proposals use the categories of unseasoned issuers and non-reporting issuers to demarcate the applicability of various provisions. Unseasoned issuers are issuers that are required to file reports under the Exchange Act but that do not satisfy the 12-month reporting history and $75 million of common equity public float tests for the use of Form S-3 for primary offerings. Non-reporting issuers are issuers that are not required to file reports under the Exchange Act and are not filing them voluntarily. These categories are familiar and contribute to making the proposal more in the nature of incremental change. We support retaining the $75 million public float test as an appropriate line of demarcation.

b. Use of Free Writing Prospectuses

Under the proposals, unseasoned and non-reporting issuers can use free writing prospectuses only if they are preceded or accompanied by a Section 10 prospectus. As the Commission notes in the Release,[33] this requirement makes broadly disseminated free writing prospectuses impractical unless they are in electronic form with a hyperlink to the statutory prospectus. We question whether such a condition is necessary. For non-reporting issuers, Rule 15c2-8 under the Exchange Act provides that investors will receive a copy of the

[33] *See* Release at note 149.

preliminary prospectus before making an investment decision. For unseasoned reporting issuers, the preliminary prospectus is part of the registration statement, which is on file and available through EDGAR and other sources, and unlike non-reporting issuers there is not the problem of the absence of a price range upon initial filing. If access can equal delivery for final prospectuses, it can also serve that purpose here as well.

The thrust of the Proposals is to apply potential disclosure liability to the content of a non-Section 10 prospectus rather than create rescission rights based on the mere fact that one has been used. That is a welcome development, and it would be consistent with investor protection, given the other safeguards in place, to permit unseasoned and non-reporting issuers to take full advantage of free writing.

c. Change to the Offering Process

We support the expanded use of incorporation by reference in Forms S-1/F-1. We believe, however, that it is not appropriate to condition the availability of this provision on the issuer making its Exchange Act reports available on its web site. The incorporated documents are readily available in the EDGAR system on the Commission's web site. Although most issuers probably do post their Exchange Act reports on their web site, and Item 101(e) of Regulation S-K has the effect of encouraging them to do so, it seems unnecessarily burdensome to require it. It simply adds another requirement without any demonstration that such a requirement is necessary for the protection of investors.

In response to the Commission's question, this expanded incorporation by reference should not be conditioned on timely filing during the past twelve months (or shorter period that the issuer was required to file reports). This condition is appropriate for forward incorporation by reference, because an issuer that has not shown itself able to report on a timely basis should not be permitted to use a system that relies upon the timely dissemination of information. Because this incorporation by reference is backward-looking, and is simply a snapshot in time, the timeliness requirement does not present as compelling a case.

Given the proposed changes that would permit incorporation by reference, we agree that the Forms S-2/F-2 would be superfluous and can be eliminated.

2. Seasoned S-3/F-3 Issuers

a. Extend Selected WKSI Provisions to Seasoned Issuers

We believe that the Proposals relating to seasoned Form S-3/F-3 issuers will enhance the securities offering process for those issuers. We further believe, however, that many of the benefits proposed to be given to WKSIs can be extended to the general category of seasoned issuers as well without jeopardy to the protection of investors and that doing so would improve the efficiency of the capital raising process in registered offerings. This would further

the Commission's goal of encouraging issuers to use registered offerings rather than Rule 144A offerings and traditional private placements, with attendant additional Securities Act protections for investors. We therefore urge that the Commission adopt the following additional enhancements to the offering process for seasoned issuers.

i. Permit use of free writing prospectuses prior to registration statement filing

Seasoned issuers should be permitted to use free writing prospectuses in the 30 days prior to the filing of a registration statement on generally the same basis as is proposed for WKSIs in Rule 163. The most compelling arguments supporting use of free writing prospectuses prior to the filing of a registration statement in the case of WKSIs are not, we believe, those premised on the size or market following of those issuers. They are instead, that (1) investors benefit by more rather than less communication regarding issuers and offerings; and (2) it is unrealistic, in view of the now predominant use of the Internet and other electronic means of communication, to attempt to channel offering communications solely through statutory prospectuses.

The legend that is proposed to be required for all free writing prospectuses would serve as an effective safeguard for investors by alerting them to the fact that there will be an important disclosure document that they should read in connection with the offering and how to obtain that disclosure document. This, together with the ready availability of the registration statement on the EDGAR system, which may be accessed directly on the Commission's website and indirectly through many other means, will provide ample protection for investors. We note that, as would be the case for WKSIs, such free writing prospectuses would be subject to the public dissemination requirements of Regulation FD, thus assuring that the information, if material, will be available to all investors.

ii. Extend "automatic shelf" procedures to seasoned issuers

As we discuss in more detail in C.3.b. on page 56, we believe that the proposed automatic shelf procedures should be available to all seasoned issuers, rather than being limited to WKSIs. In any event, we believe that seasoned issuers should be given the opportunity to use a number of the "automatic shelf" procedures that are proposed for WKSIs, each of which procedures would promote efficiency in the offering process and none of which appear logically related to the size or market following of the issuer.

The procedures that should be extended to seasoned issuers include:

- Pay-as-you-go filing fees; and
- Ability to add classes of securities and new subsidiary issuers to a registration statement by means of a post-effective amendment that becomes effective automatically, rather than being required to file a separate registration statement.

While perhaps not quite as important as the preceding, it would also be desirable to extend to seasoned issuers the ability to exclude from a base prospectus, in the context of shelf registration statements that contemplate prospectus supplements for discrete offerings:

- The designation of whether an offering is a primary or secondary offering;
- The names of selling security holders; and
- The description of potential plans of distribution.

Each of these categories of information is primarily relevant in the context of a specific offering off the shelf registration statement, and investors need obtain this information only in connection with the specific shelf takedown. The current requirement that such information be contained in the base prospectus and that changes in that information (after effectiveness of the registration statement) can be made, if at all, only through post-effective amendments serves primarily as a trap for unwary issuers. In the case of plan of distribution descriptions, it also results in disclosures of a laundry list of potential methods of distribution that do not provide meaningful disclosure to investors with regard to any particular offering. The Commission's proposals to permit seasoned issuers to amend their plan of distribution descriptions by means of incorporated Exchange Act reports or prospectus supplements and to add the names of selling security holders by means of prospectus supplements will be a substantial benefit to issuers in this regard. A more complete solution, however, would be to eliminate the requirement that this information be included in the base prospectus in the first place.

iii. Eliminate three-year blackout risk

Under the Proposals, a shelf registration statement would only be permitted to be effective for three years. In contrast to the case for WKSIs, whose registration statements are proposed to be automatically effective on filing, this rule could have the disruptive effect of creating a market blackout for seasoned issuers whose intended replacement registration statement has not become effective before the expiration of the initial three-year period. This proposed requirement is described in the Release as being a matter of administrative housekeeping that is intended to reduce the number of registration statements that are effective at any particular time rather than being a substantive disclosure or investor protection requirement.

We urge that this proposed requirement be modified to state that a shelf registration statement will remain in effect after the initial three-year period if a designated replacement registration statement has been filed before the end of the three-year period and will continue in effect for the time necessary to obtain effectiveness of the replacement registration statement. In considering this suggestion, it should be noted that the three-year period specified in the Proposals is, as stated in the Release, an arbitrary one. Permitting an extension of that period for the limited time necessary to obtain effectiveness of a replacement registration statement would not appear to jeopardize any investor protections.

b. Retain $75 Million Public Float Test

In response to the Commission's request for comment, we support the retention of the current $75 million common equity public float requirement for eligibility to use Form S-3 for primary offerings and believe that it should not be increased. This requirement has worked well to date and we are not aware of any significant problems that have occurred because of it.

As noted in the Release, the $75 million level for the public float test was selected in 1992 on the rationale that it was a useful indicator at that time of issuers that were sufficiently well-followed to be eligible to use short-form registration. Although we recognize that there has been a general increase in market capitalizations of publicly traded companies since that time, the amount and accessibility of information concerning public companies have increased to an even greater extent since that time. As one of many examples, the substantial increase in the issuer information filing requirements under the Exchange Act as a result of the Commission's own initiatives and the Sarbanes-Oxley Act and the ready accessibility to the securities markets of the information contained in those filings through the EDGAR system and other Internet sources have made it extremely easy for virtually all investors to obtain information about most publicly traded companies.

As suggested by the Commission's request for comment on this point, consideration of empirical data should be an important part of determining whether to increase the current level of the public float test. In view of the absence of current problems arising from the public float test, and consistent with the Commission's pragmatic, incremental strategy in connection with the Proposals, we believe that it would be better to focus on careful consideration of the impacts of the specific changes that have been put forward in the Proposals than to delay that important process by attempting now to gather and analyze the required empirical data on the separate public float question

3. Well-Known Seasoned Issuers – Automatic Shelf Registration

The Committee strongly supports the automatic shelf registration process proposed in the Release. We believe it will improve the efficiency of U.S.-registered capital-raising for eligible issuers, thereby furthering the Commission's goal of drawing more offerings from the Rule 144A and other unregistered markets into the registered market. Investor protection is maintained through retention of the fundamental Section 11/Section 12(a)(2) disclosure liability scheme and the Commission's increased emphasis on review of Exchange Act reports.

We suggest that the Commission expand the category of "well-known seasoned issuer" in three respects:

- Reduce the public common equity float threshold from $700 million.
- Create an alternative qualification test for smaller seasoned issuers having a high trading volume.
- Create an alternative qualification test for debt issuers that have completed a specified number of significant registered offerings in the past three years.

As discussed further in D.2. on page 73, we also suggest that Schedule B issuers be permitted to use the automatic shelf registration process if they meet the substantive requirements for WKSI status based on registered debt issuance. As the Proposals are drafted, Schedule B issuers are precluded merely for the technical reason that they utilize Schedule B

instead of Form F-3 and the SEC Schedule B shelf interpretive procedures[34] rather than the Rule 415 shelf procedures.

a. Retain exempt offerings for WKSIs

In response to the Commission's specific request for comments, we believe automatic shelf registration should remain optional for WKSIs, although we believe it will become the predominant registration process they use. More importantly, we believe strongly that the ability to undertake private placements should be retained for WKSIs. There can always be situations for which the registration process is not appropriate and should not be mandated. These include inability to produce Commission-required financial or other information (such as for acquired companies), substitution of direct investor due diligence for preparation of a complete disclosure document and existence of material non-public information (such as pending merger negotiations) that can be shared confidentially with a few investors but not made public. For these and other situations, WKSIs should retain the flexibility to conduct exempt offerings.

b. Reduce the float test from $700 million

The primary consequence of status as a "well-known seasoned issuer" is eligibility to use the new automatic shelf registration procedure. We see no need to link use of that procedure to whether the issuer is widely followed in the marketplace. Any seasoned S-3/F-3-eligible issuer can already utilize shelf registration to go to market instantly once initial SEC review of the registration statement has been completed, which could have occurred years earlier (up to three years under the Proposals). By precluding some S-3/F-3-eligible issuers from using the automatic shelf registration process, the Commission forces these issuers into the unregistered markets if they have not included the offered security on an already effective shelf or happen to have used up most of the registered securities and not yet filed a new shelf. If these issuers have had the foresight to include the offered securities on a shelf, the offering can proceed without SEC review. Differentiating between seasoned issuers on the basis of their foresight regarding securities they include in their shelf registration statement does not appear to further any policy goal. Instead, it forces some seasoned shelf issuers into the unregistered market, which is contrary to the Commission's goal of incentivizing use of the registration process.

Although we believe all S-3/F-3-eligible issuers should be permitted to use the automatic shelf registration process, we recognize that the Commission nevertheless wishes to proceed cautiously, and may wish to require some higher eligibility standard for WKSI status. The Release implies that the concept behind WKSI status is whether the issuer has a demonstrated market following.[35] We respectfully submit that the concept should instead be the

[34] *See* Rel. No. 33-6424, 1 Fed. Sec. L. Rep. (CCH) ¶ 3850A (Sept. 2, 1982) and Rel. No. 33-6240, 1 Fed. Sec. L. Rep. (CCH) ¶ 3850 (Sept. 10, 1980).

[35] *See* Release at text accompanying note 43.

extent to which information about the issuer reaches the market on an accelerated basis. Given the widespread availability of information through the EDGAR system and pervasiveness and speed of electronic news media and other communications today, we believe the Commission's selection of a following by ten research analysts to be overly conservative. We urge the Commission to use a smaller number, and to select the WKSI public float amount corresponding to that smaller number of analysts.

We also recommend that the Commission reconsider the selected WKSI threshold after the rules have operated for two years. A recalibration for particular types of issuers or types of offerings may well be appropriate in light of experience.

One approach the Commission could consider would be to test, in connection with staff reviews of Exchange Act reports, how quickly the information in those reports was reflect in news media. That would provide additional data in considering what types of issuers should be granted access to the automatic shelf registration process on the basis of rapid market dissemination of information about them.

We concur with the proposal that the common equity public float amount be the same as reported on the cover page of Form 10-K (and computed as of the end of the second quarter). In the interests of mechanical simplicity, using the existing information is desirable. We note that Form 20-F does not currently require this information because foreign private issuers cannot be "accelerated filers," but we nevertheless support adding the disclosure requirement to the cover page of Form 20-F.

c. Permit WKSI status based on trading volume

To the extent the Commission believes a following by the marketplace is relevant to an issuer's ability to use automatic shelf registration, we suggest that trading volume should be an alternative means to qualify. The average daily worldwide trading volume (ADTV) definition of Regulation M is a well-understood measure of trading volume that could be used for this purpose.

We recommend that the Commission's Office of Economic Analysis conduct a study to determine an appropriate ADTV level for WKSI status. In view of the different purposes of the two rules, we believe the level for WKSI status should be considerably below the $1 million level in Regulation M. For procedural simplicity, the same 60-day period in the Regulation M definition should be used. The ADTV level could be measured either at the end of each second fiscal quarter or at a date within 10 days of filing the Form 10-K or 20-F (analogous to the Regulation M approach). The ADTV level at this date could be a required Form 10-K or 20-F cover page disclosure, at least where the issuer wishes to use it as the basis for WKSI status.

d. Permit WKSI status based on number of registered debt offerings in three years

We believe that a measure of market following for debt issuers is the number of significant registered offerings completed within a specified period, not merely the total volume of registered debt. The Commission's Office of Economic Analysis should consider the appropriate number of significant offerings and the minimum level to be considered significant. We note that, for this purpose (as well as for the purpose of the $1 billion/three-year test in the Proposals), a registered offering would also include an *Exxon-Capital* exchange offer.

The $1 billion/three-year test in the Proposals does not differentiate among maturities. An issuer selling $1 billion in one-year registered notes will be a WKSI, with all the automatic shelf benefits of an issuer of $1 billion in 30-year registered debentures. However, we believe the market following for longer-term debt is likely to be greater. Our suggestion to permit WKSI status based on number of significant registered offerings also does not differentiate by maturity, primarily because we believe using a maturity-weighted calculation would be too complicated. However, we believe that a number of offerings test comes somewhat closer than an aggregate issuance test as a proxy for market following.

Whatever approach is taken, we recommend that the adopting release (or the rule) clarify that the dollar amount of registered debt securities for purposes of WKSI eligibility is the amount registered for Securities Act purposes. In other words, if $500 million in principal amount of zero coupon debt securities are issued at a substantial original issue discount for a public offering price of $100 million, the $100 million aggregate offering price amount (not the $500 million principal amount) should be used in determining the aggregate amount of registered debt securities issued in the past three years (or, if our suggested alternate test is adopted, in determining whether the offering reaches the specified significance threshold).

e. Permit WKSI status based on nonconvertible preferred securities

For the same reasons that the Commission has allowed WKSIs to include issuers based on specified debt issuance, we believe WKSI status should also be permitted based on issuance of nonconvertible preferred securities. Such a change would conform the WKSI provisions to Form S-3/F-3 transaction eligibility requirements. Under this approach, an issuer could qualify as a WKSI based on the total over three years of registered debt plus other nonconvertible securities, and could register debt or nonconvertible securities on an automatic shelf in reliance on that status.

f. Ineligible issuers should be narrowed

As discussed in A.3.g. on page 42, we believe the definition of ineligible issuer should be narrowed, including for purposes of determining WKSI status and eligibility for automatic shelf registration.

g. Clarify that WKSI calculation for foreign private issuers includes worldwide float

As discussed in D.1.b. on page 67, the calculation of common equity public float for foreign private issuer WKSIs should be based on worldwide float, as it is for Form F-3 eligibility.

h. Eliminate redundancy in WKSI definition

As discussed in E.4.a. on page 97, we recommend elimination of paragraphs (3), (4) and (5) of the WKSI definition because those elements are already encompassed under paragraph (1).

4. Miscellaneous

a. Prospectus delivery reform (Rules 172 and 173)

We strongly support the Commission's efforts to modernize the Securities Act framework for prospectus delivery. We share the Commission's view that the ready accessibility of the final prospectus upon filing via EDGAR, combined with the fact that the final prospectus generally reaches investors only after the investment decision has been made, justifies an "access equals delivery" model. We believe these justifications apply with equal force to mutual funds, and urge the Commission to reconsider the exclusion of mutual funds from the new prospectus delivery framework. Beyond this suggestion regarding scope, we are concerned that the provisions of the proposed rules that condition the availability of the new framework upon timely filing of a prospectus will unnecessarily penalize inadvertent late filings under Rule 424, and may limit the practical ability of broker-dealers to rely on the framework to satisfy their aftermarket delivery obligations.

i. Timeliness

a) Timeliness of filing should not be a condition to use of Rule 172

Timeliness of a Rule 424(b) filing should not be a condition to the use of Rule 172. The Commission's existing enforcement process provides an adequate incentive to encourage timely filings under Rule 424(b). We see no evidence that late filings under Rule 424(b) are prevalent, and believe that when late filings do occur, they are generally inadvertent. Penalizing underwriters when issuers inadvertently submit a filing after the applicable deadline specified in Rule 424(b) by creating potential rescission rights under Section 12(a)(1) is an unnecessarily harsh sanction. As drafted, the proposals continue today's incentives for underwriters to delay mailing confirmations until the Rule 424(b) prospectus has been filed. Eliminating those incentives for delay should be a goal of the proposals, in furtherance of the goal of reducing systemic risk in the trade clearance and settlement process.

At a minimum, there should be a cure provision that an underwriter can utilize. For example, if the issuer has contractually agreed with the underwriter to make timely Rule 424 filings and the underwriter notifies an appropriate senior officer of the issuer promptly upon becoming aware of the failure of the issuer to make a timely Rule 424 filing, the underwriter's prior mailing of confirmations (and any subsequent mailings) should remain exempt from Section 5 under Rule 172. The exemption should continue for subsequent mailings because it may well not be possible as a computer systems matter to implement differing treatment for confirmations sent before and after a particular time.

b) At a minimum, broker-dealers that are not members of the underwriting syndicate should not be penalized for late filings

If the Commission declines to adopt our recommendation to remove timely filing as a condition for availability of the new framework, it should, at a minimum, remove the link between timely filing and the ability of broker-dealers that are not members of the underwriting syndicate to use Rule 172 to satisfy their aftermarket prospectus delivery obligations under Section 4(3) and Rule 174. Broker-dealers that are not members of the original underwriting syndicate lack the right or practical ability to influence the timing of a Rule 424(b) filing. They should not be penalized for a late filing. Similarly, broker-dealers that are not part of the underwriting syndicate possess limited ability to confirm the timeliness of filings under Rule 424(b). This limited ability to confirm the timeliness of filings would create an unnecessary impediment to use of Rule 172 by such broker-dealers.

ii. Availability of the new framework to investment companies

As discussed in D.6.g. on page 88, we believe Rules 172 and 173 should also be extended to investment companies and business development companies.

iii. Clarify application to Schedule B shelf offerings

As discussed in D.2.d. on page 75, we recommend the Commission clarify that the final prospectus supplement must be filed to utilize the rule for Schedule B shelf offerings, in order to parallel the treatment of Rule 415 shelf offerings.

iv. Consider eliminating dealer prospectus requirements during IPO aftermarket period

We recommend that the Commission consider amending Rule 174 to eliminate even for IPOs the requirement that dealers deliver a prospectus in aftermarket transactions. We understand that requirement is intended principally to ensure availability of information about the issuer to purchasers in the aftermarket shares of a newly public company. With EDGAR and other internet availability of SEC-filed information, we believe there is no longer a need for this requirement, at least with respect to IPO issuers whose shares are listed on a national securities exchange or the Nasdaq Stock Market. In order to comply with current prospectus delivery requirements following an IPO (or, under the Proposals, to comply with the notice requirements of Rule 173), a dealer must maintain a list of all IPOs, including those in which the dealer did not

participate as an underwriter. We question whether this effort is justified for these dealers in light of the ready availability of the information on EDGAR and other internet sources. As a matter of consistency, we suggest the Commission consider eliminating the requirement for all dealers.

b. Clarify that E-Sign Act Does Not Affect Commission Electronic Delivery Interpretations

We urge the Commission to take the opportunity of the Proposals to clarify the effect, if any, of the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"), which became effective in 2000, on the Commission's prior interpretations regarding satisfaction of prospectus delivery and similar documents via electronic means. At a minimum, as discussed below, we believe the Commission should include in the Proposals provisions expressly permitting electronic delivery of prospectuses in accordance with the Commission's pre-2000 interpretations for purposes of satisfying any federal securities law or Commission rule requirement or condition that a prospectus "accompany or precede" a communication.

i. Description of the problem

The E-Sign Act provides that

> if a statute, regulation, or other rule of law requires that information relating to a transaction … be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if [the statute's conditions regarding notice, consent and access are satisfied].[36]

As a result, it is not clear whether, for example, the conditions in proposed Rule 433(b)(1) or existing and proposed Rule 134(d) that the free writing prospectus or solicitation of an indication of interest be "accompanied or preceded" by a Section 10 prospectus would be subject to the conditions of the E-Sign Act, or may instead proceed on the basis of prior Commission interpretations.[37] The Commission did issue an interpretive release dealing with the effect of the E-Sign Act, if any, on the Commission's existing rules regarding retention by issuers of signature authentication documents and certain other records for specified time periods.[38] The issue of whether the E-Sign Act affects what is meant by "accompanied or preceded" was not addressed, however.

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[36] *See* Section 101(c)(1) of the E-Sign Act.

[37] *See* Electronic Media Interpretation, *supra* note 9, at Section II.A.

[38] *See* SEC Investigation: Application of the Electronic Signatures in Global and National Commerce Act to Record Retention Requirements Pertaining to Issuers Under the Securities Act of 1933, Securities Exchange Act of 1934 and Regulation S-T, Rel. Nos. 33-7985, 34-44424, 35-27419 and IC-25003 (June 14, 2001).

We believe this question is ripe for clarification and can be readily resolved by the Commission. The question needs to be resolved because the notice, consent and access conditions of the E-Sign Act are different from those of the Commission's interpretations. For example, the E-Sign Act effectively requires that the consent be given via the same electronic means through which the consented information will be furnished.[39] The Commission's interpretations would permit the consent to be given in a separate written paper agreement, such as account-opening forms, or via a different electronic means than that through which delivery will occur, such as a web-site click agreement to e-mail delivery.

ii. Suggested resolution

The Commission has express authority under the E-Sign Act itself to interpret the effects of the Act's provisions through rulemaking and other general guidance.[40] We ask that the Commission expressly clarify that for purposes of the E-Sign Act, a condition in the federal securities laws that a prospectus "accompany or precede" a communication is not a "requirement" that information be provided in writing, but rather is a condition to the ability to make the particular communication, and therefore that the E-Sign Act does not apply to that prospectus delivery. It would also be helpful for the Commission to confirm that its prior interpretive guidance regarding electronic delivery remains in effect.

Without the requested clarification, we believe the use of electronic delivery of prospectuses will continue to be limited, and some of the intended benefits of increased communications flexibility in the Proposals will not be achieved, at least in the retail setting where the E-Sign Act applies.[41]

D. ISSUES FOR SPECIAL TYPES OF ISSUERS

1. Foreign Private Issuers

In this section we address separately the implications of the Proposals for foreign private issuers, and suggest certain amendments to the proposed rules that will serve the purposes sought to be achieved by the Commission, without inadvertently affecting foreign private issuers in an adverse manner.

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[39] *See* Section 101(c)(1)(C)(ii) of the E-Sign Act.

[40] *See* Section 104(b)(1) of the E-Sign Act.

[41] The E-Sign Act's electronic consent requirements apply only to "consumer" transactions. Section 106 of the Act defines "consumer" as an individual who obtains products or services primarily for personal, family or household purposes.

a. Communications Proposals

i. Regularly released factual business and forward-looking information – Reporting issuers – Rule 168

a) Expand covered information

Rule 168, as proposed, creates a safe harbor for factual business information regularly released by a reporting issuer. Although the proposed categories are broad, we believe that it would be appropriate to add three additional categories in the context of foreign private issuers, consistent with those already mandated under cover of Form 6-K (the "6-K Disclosures"):

- Information the issuer is required to make or customarily makes public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized.
- Information the issuer is required to file or customarily files with a stock exchange on which its securities are traded and which was made public by that exchange.
- Information the issuer is required to distribute or customarily distributes to its security holders.

Where these are mandated disclosure obligations, foreign private issuers have no choice but to disclose this information. Where the information is of a type customarily disclosed, foreign private issuers may be in the same practical situation. We believe it would be inappropriate not to include such mandated disclosures within the scope of the safe harbor. We are of the view that the safe harbor should apply to the 6-K Disclosures.

The changes we propose would, in the case of foreign private issuers, also eliminate the condition that information disclosed pursuant to these items be "regularly released." The elimination of the "regularly released" condition is necessary because changes to laws, stock exchange rules or other requirements may require foreign issuers to disclose or distribute information to security holders or to stock exchanges that was not previously required to be disclosed. We believe these mandated disclosures are similar to "regularly released" information, where the Commission has indicated that it views the regular prior release of the information as a safeguard against an issuer making disclosures intended to condition the market for a particular offering. Disclosures required by law or stock exchange rules, even if not disclosed previously, should not be viewed as potentially manipulative.

b) Extend Rule 168 to listed non-reporting foreign issuers

We believe that Rule 168 should be extended to include disclosures required by law, regulations or stock exchange rules, as well as regularly released factual business information and forward-looking statements, by non-reporting foreign private issuers that have securities traded on a non-U.S. stock exchange ("Listed Non-Reporting Foreign Issuers"). The

effect of extending Rule 168 to these issuers, rather than limiting such issuers to reliance on Rule 169, would be to provide them with the safe harbor for regularly released forward-looking information and to expand the types of covered factual information and permitted recipients of information.

While many of the considerations discussed in the Proposals with respect to proposed Rule 169 may make sense in the context of non-reporting domestic companies, we believe those considerations do not apply in the context of Listed Non-Reporting Foreign Issuers. Many such issuers have a practice, consistent with that of other companies listed in their trading market, of providing investors information about a broad range of factual matters, as well as forward-looking information. Those existing investors may include U.S. investors. While non-reporting domestic companies may not have a valid basis for disclosing the same breadth of information as is disclosed by public companies, we believe these policy considerations do not apply to companies having public investors in other markets. In those cases, the appropriate model for disclosure should be the model applicable to domestic public *reporting* companies.

The same approach has previously been followed by the Commission in current Rules 138 and 139(a), which protect research of non-reporting foreign issuers satisfying the conditions of Rules 138(c)(3) and 139(a)(2), respectively, including minimum float or investment grade securities and 12 months trading on a designated offshore securities market (subject to our comment in iii. below to expand that definition). We believe those same conditions would be appropriate to define the Listed Non-Reporting Foreign Issuers eligible to use Rule 168.

ii. Regularly released factual business information – Non-reporting issuers – Rule 169

We believe that non-reporting foreign companies should be provided a safe harbor with respect to the same three categories of information described above in our comment with respect to Rule 168.

iii. Research safe harbors – Rules 138 and 139

a) Do not limit to "designated offshore securities market"

We support the proposal to retain in amended Rules 138 and 139(a)(1) the availability of the safe harbors for reports on a foreign private issuer that has equity securities trading on an offshore securities market for at least 12 months and satisfies minimum float or investment grade conditions.

However we believe that the availability of amended Rules 138 and 139(a)(1) for foreign private issuers should not depend on whether the primary market for the issuer's equity securities is a "designated offshore securities market". After all, under current rules a dealer can publish a report on the securities of any issuer anywhere in the world, whether its primary market is approved under Regulation S or not. When an issuer that meets the public float test has taken the added step of filing a registration statement covering its equity securities, it appears

anomalous to deny the Rule 138 safe harbor to a dealer (now an underwriter) publishing research in the United States on the issuer's debt securities (which by definition are *not* covered by the registration statement) simply because the primary market for the equity securities is not approved under Regulation S.

Furthermore, a number of offshore markets may exist or emerge that are not "designated offshore securities markets" for Regulation S purposes. These markets may nevertheless be active trading markets and indicative of a legitimate investor base (including in the United States), which justify continuation of issuer-focused research under Rule 139(a)(1).

b) Support extension to Regulation S offerings

We also support the proposed amendments to Rules 138 and 139 that would provide that research reports meeting the conditions of those rules will not be considered an offer for sale or an offer to sell a security or general solicitation or general advertising under Rule 144A, or directed selling efforts under Rule 902(c) for offerings under Regulation S, or be inconsistent with the offshore transaction requirement in Rule 902(h) for offerings under Regulation S. We believe these clarifications will eliminate some doubts regarding the interplay between the distribution of research reports and the restrictions inherent in Rule 144A and Regulation S.

iv. Free writing prospectuses – Rule 433

Although we support in general the Proposals with respect to the use of free writing prospectuses, we believe that the final rules should provide certain clarifications and accommodations to foreign private issuers.

a) Confirmation by the Commission that proposed Rule 433 does not apply to communications connected with offers or sales outside the United States

As provided in Rule 901 under the Securities Act, for purposes of Section 5, offers and sales do not include offers and sales that occur outside the United States. This is the case even if an issuer is engaged in a simultaneous offering in the United States, and regardless of whether an issuer registers only a portion of the securities to be sold in a global offering under the Securities Act (sufficient to cover offers and sales in the United States and anticipated flowback), or whether the entire amount of the global offering is registered. We believe it would be helpful for the Commission to confirm that free writing outside the United States, under circumstances where the issuer has not taken steps to provide for the distribution of such information in the United States, is also outside the scope of the Securities Act and not subject to proposed Rule 433.

We make this suggestion for a number of reasons. First, we believe that a consequence of the proposed Rules should not be to subject communications made outside the United States by foreign private issuers in connection with offerings outside the scope of Section 5 to filing obligations and liabilities in excess of the obligations currently applicable to such issuers. The application of Rule 433 to such communications would bring all such

communications into the United States, and subject the issuer to liability under the Securities Act for such communications. Press releases and press interviews resulting in media reports outside the United States would pose similar difficulties if secondary media reports in the United States (*i.e.,* those resulting from exempt communications outside the United States) were considered subject to Section 5 and therefore to filing under Rule 433. These difficulties include tracking media reports, the implications of Section 12(a)(2) liability on them and translation issues (as noted in b) below).

In addition, the breadth of the proposed definition of "written communication," without a corresponding limitation as to the geographic sphere to which it applies, creates the possibility that foreign private issuers could be required to transcribe and to file with the Commission materials that would not otherwise be considered to be "written" under the laws of other jurisdictions, and possibly to create regulatory problems for such issuers in such other jurisdictions. We note that many foreign offerings are conducted pursuant to exemptions available in foreign jurisdictions for offerings to securities professionals and other institutional investors. Foreign private issuers regularly include legends in the registration statements and prospectuses filed under the Securities Act to assure that offering materials used in the United States are not deemed to be offers in jurisdictions where such offerings are not permitted. The public filing in the United States of offering materials intended for use in private transactions outside the United States could give rise to claims that the offering restrictions of the foreign jurisdictions were not complied with.

We therefore believe it would be appropriate for the Commission to confirm both that the Proposals are not intended to extend the scope of Section 5 to offers and sales outside the United States, and that proposed Rule 433 would not apply to free writing outside the United States, under circumstances where the issuer has not taken steps to provide for the distribution of such information in the United States. Similarly, the Commission should confirm that press communications outside the United States that are covered by Rule 135e are also not within the ambit of Rule 433, even if there is a resulting U.S. media publication.

b) Translation issues associated with foreign disclosures

Proposed Rule 433 would require issuers to file issuer-prepared free writing prospectuses or material information on or before the date of first use, except in the case of final terms of securities (which must be filed within two days). Unless the Commission were to agree with us that offering materials used outside the United States should not be considered free writing prospectuses, we believe this obligation may pose special hardships for foreign private issuers if the information to be filed is required to be translated into English, both because of the time that may be involved in creating any translation, as well as the need for the issuer to confirm the accuracy of the translation.[42] The task may be even more difficult if the free writing prospectus to be translated consists of an archived oral communication in a foreign language.

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[42] Securities Act Rule 403(c) generally requires all Securities Act filings and submissions to be in the English language. Any required foreign language documents must be accompanied by an English translation.

Media reports subject to filing within one business day of publication would be virtually impossible to translate accurately within that time frame.

Finally, under the Proposals, an electronic road show is not required to be filed, except for material issuer information not previously included in the registration statement or in a free writing prospectus, if the issuer makes at least one version of the electronic road show readily available electronically to any potential investor at the same time as the electronic road show, and files any issuer-related free writing prospectus or material issuer information used at an electronic road show (other than the road show itself). It is unclear to us whether information will satisfy the requirement if it is included in the original language in which it was presented, or if it will need to be translated to English.

We recommend an exemption from any translation requirement for free writing prospectuses to deal with information not intended for the United States market that is not in the English language and that the issuer does not translate (or cause to be translated) into the English language. At a minimum, adequate time should be allowed to translate the free writing prospectus into English and review it. We suggest at least 10 business days.

c) Electronic road shows

We believe that, insofar as foreign private issuers are concerned, consideration should be given to the effects of mandating in Rule 433 that foreign private issuers make the bona fide electronic road show readily available on a public website to avoid filing. In many cases, foreign private issuers may make registered public offerings in the United States, while limiting offerings in some foreign jurisdictions to securities professionals or certain institutional purchasers, and restricting sales in other jurisdictions altogether. We believe that accommodation should be made to foreign issuers to permit them to avoid filing electronic road shows if they provide website access of the bona fide electronic road show only to persons who can first certify that they are entitled to have access to it (such as United States investors). In view of the many international securities regimes, and the variety of rules regarding Internet access to securities offering materials, we believe the proposed rule should permit the staff the ability to exercise reasonable discretion in the means by which foreign private issuers can satisfy the "unrestricted" condition.

b. Securities Act Registration Proposals

i. Definition of well-known seasoned issuer

The proposed definition of "well-known seasoned issuer" in Rule 405 provides, as one prong of the test, that the issuer must have a specified market value of its outstanding common equity held by non-affiliates. This formulation differs from the analogous one in Form F-3, which specifically states that float is to be computed on a worldwide basis. In order to avoid any confusion with respect to this standard, we request that the Commission clarify that the market value determination is to be made on a worldwide basis. The formulation in General Instruction B.1 of Form F-3 would work best: "the aggregate market value worldwide of the

voting and non-voting common equity held by non-affiliates of the registrant is the equivalent of [$] million or more." We also suggest that the valuation should be performed as specified in the Instruction to B.1 – by multiplying the number of shares of each class of outstanding common equity held by non-affiliates by the closing price per share on the date of the determination on the principal market on which each such class trades. If the closing price is not quoted in U.S. dollars, the valuation should be translated into U.S. dollars based upon the noon buying rate in New York as certified by the New York Federal Reserve Bank for customs purposes (the "Noon Buying Rate"), or such other exchange rate as the Commission may determine.

The second prong of the definition focuses on whether the issuer has issued in the last three years at least $1 billion aggregate amount of debt securities in offerings registered under the Securities Act. Because debt securities issued pursuant to Securities Act registration statements may be denominated in currencies other than U.S. dollars, we suggest, in order to determine the amount of debt securities issued, that issuers be permitted, for the purposes of the calculation, to convert the amount of foreign currency-denominated debt into U.S. dollars at the Noon Buying Rate on the date of issuance of the debt securities (or perhaps the date of the final prospectus or prospectus supplement relating to the securities), or such other exchange rate as the Commission may determine.

ii. Amendments to Rule 512 undertakings

We endorse the proposal to amend the Rule 512 undertakings to clarify that foreign private issuers may satisfy their undertaking obligations by the use of an incorporated Form 6-K. We believe that Form 6-K should be amended to provide a check box to indicate whether or not the Form is being incorporated by reference into any Securities Act registration statement, with sufficient space to identify the previously filed registration statements into which the Form 6-K is to be incorporated. In the absence of such a method to indicate incorporation by reference, issuers have used a variety of means to effect such incorporation. The standardization of the incorporation references will assist investors confirming the disclosures that are intended to be included in the registration statements.

iii. Application of Form 20-F financial statement requirements to Securities Act registration statements on Form F-3 in connection with delayed or continuous offerings

One of the questions raised by the Commission is whether the undertakings by foreign private issuers to update their financial statements under Item 512(a)(4) should be modified. For the reasons set forth below, we believe these undertakings, and the obligations required by these undertakings, should be modified.

Item 10 of Form F-3 requires issuers to provide the undertakings required by Item 512 of Regulation S-K. The undertaking in Item 512(a)(4), which applies specifically to foreign private issuers engaged in delayed or continuous offerings, requires such issuers to agree to include the financial statements required by Item 8.A. of Form 20-F:

If the registrant is a foreign private issuer, to file a post-effective amendment to the registration statement to include any financial statements required by Item 8.A. of Form 20-F at the start of any delayed offering or throughout a continuous offering. Financial statements and information otherwise required by Section 10(a)(3) of the Act need not be furnished, provided that the registrant includes in the prospectus, by means of a post-effective amendment, financial statements required pursuant to this paragraph (a)(4) and other information necessary to ensure that all other information in the prospectus is at least as current as the date of those financial statements. Notwithstanding the foregoing, with respect to registration statements on Form F-3, a post-effective amendment need not be filed to include financial statements and information required by Section 10(a)(3) of the Act or Rule 3-19 of this chapter if such financial statements and information are contained in periodic reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the Form F-3.

We believe that the Item 512(a)(4) undertaking, as well as the requirements of Item 8.A. of Form 20-F, require amendment. Because the Items contain clear errors and impose obligations that the staff of the Commission has acknowledged are not in many circumstances appropriate, and in certain cases subject foreign issuers to requirements that are more burdensome than those applicable to domestic issuers. In order to address these problems, the staff of the Commission has interpreted these Items informally[43] and in its discussions with the AICPA International Practices Task Force.[44] Notwithstanding this informal guidance, we believe the financial disclosure obligations are unnecessarily confusing. We also believe that the financial disclosure obligations should be set forth in rules adopted by the Commission, rather than in staff interpretations that in some cases appear to contradict the rules.

Without suggesting that the following is a comprehensive listing of the infirmities, we have identified below a number of the issues associated with the Item 512(a)(4) and Item 8.A requirements:

- Item 512(a)(4) contains a reference to Rule 3-19 of Regulation S-X. This rule no longer exists. Although the staff has indicated that Item 8 of Form 20-F supersedes Rule 3-19, there is no specific rule of the Commission that so provides.
- Item 8.A.5 of Form 20-F provides, *inter alia*, that "if at the date of the document the company has published interim financial information that covers a more current period than those otherwise required by this standard, the more current financial information must be included in the document." The staff has taken the view, and we agree, that this disclosure obligation should apply not only in the case of interim financial information, but also in the case of annual financial

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[43] *See, e.g.*, "International Reporting and Disclosure Issues In the Division of Corporation Finance" (October 1. 2003) http://www.sec.gov/divisions/corpfin/internatl/issues1004.htm.

[44] *See* http://www.aicpa.org/download/belt/iptf2003_01.pdf.

information. We would therefore suggest revision of the Form 20-F requirement to capture this obligation.

- The rules provide insufficient guidance as to the meaning of the term "more current financial information" or the means by which an issuer that is required to include more current financial information should do so. For example, issuers may issue a press release or other public announcement containing preliminary information and a subsequent announcement of the more complete financial information. The announcements may include an analysis of the results (not prepared in accordance with the requirements of Item 5 of Form 20-F) and also quotations by company officials and additional information. We request, either by rule or formal interpretation, that the Commission or its Staff confirm that the "more current" information contemplated by the Form 20-F requirement is only the basic financial information released by the issuer, and (unless the issuer determines otherwise) does not include any of the additional disclosure included in the release (such as the analysis or quotations). It would be helpful for the staff to confirm (as it did in the context of the FAQs associated with non-GAAP financial measures) that foreign issuers may either incorporate the financial disclosure by reference to certain sections of the Form 6-K containing the required disclosure, or file a separate Form 6-K that includes the required disclosure.

- A number of matters have been discussed by the Commission's staff with the International Practices Task Force of the AICPA relating to the application of the financial statement requirements to businesses acquired or to be acquired pursuant to Rule 3-05 of Regulation S-X, to separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons pursuant to Rule 3-09 of Regulation S-X, and to pro forma financial information pursuant to Article 11 of Regulation S-X. In many cases, the staff of the Commission has recognized that strict application of these rules would result in obligations on the part of foreign private issuers that are more burdensome than those applicable to domestic registrants, and has interpreted the rules in a manner intended to avoid any unnecessary burdens. Notwithstanding the efforts of the staff, many foreign issuers and their counsel and accountants have questioned their ability to follow informal staff guidance where it appears to contradict the specific mandates of the applicable rules. While we encourage the staff to provide helpful guidance to issuers, we believe it is appropriate for the Commission to review and, where necessary, amend, the rules applicable to financial disclosure obligations in connection with continuous offerings by foreign issuers to avoid inconsistencies between the requirements of the rules and current staff interpretations.

- Item 3.B of Form 20-F requires a capitalization table to be prepared as of a date within 60 days of the effectiveness of a registration statement. However, Item 8 permits the most recent balance sheet (from which a capitalization table is ordinarily derived) to be as much as nine months old. The capitalization table timetable is also significantly more stringent than the 135-day window

customarily used by U.S. issuers in their registration statements. The Commission's staff has stated that it will not object if a foreign private issuer presents its capitalization table as of the same date as the most recent balance sheet required in the registration statement, provided that if there have been significant subsequent changes in the capitalization, such as debt or equity issuances, recapitalizations or special dividends, these changes should be reflected in "as adjusted" columns or footnotes to the table. We believe that the Commission should amend the requirement that the capitalization table be prepared as of a date within 60 days before the effectiveness of a registration statement, and substitute a requirement more consistent with the current staff interpretation. This amendment would eliminate the current confusion created by the rule, including whether changes to capitalization deriving from changes to retained earnings need to be included in an "as adjusted" column.

iv. Changes to Form F-3

We support the proposed changes to Form F-3, and agree that the automatic effectiveness of shelf registrations on Form F-3 by foreign WKSIs may encourage WKSIs to include US persons in rights offerings.

We suggest that the rules permit a foreign WKSI to designate an effective date up to 15 days after filing in order to coordinate with possible home country requirements. This would be the case if, for example, the transaction being registered was not included on a universal shelf, and the foreign issuer desired to complete and file the U.S. portion of the documentation prior to the completion of all aspects of the non-U.S. portion. The additional period of time would permit the issuer the opportunity to file a pre-effective amendment to reflect any unanticipated changes to the transaction or comments from foreign regulators, without giving up the benefits of effectiveness on demand.

v. Implications for the Multijurisdictional Disclosure System (MJDS)

The Proposals do not address MJDS issuers. Canadian MJDS issuers that qualify as WKSIs will probably use Form F-3 and the WKSI procedures for shelf offerings and non-qualifying issuers will use Form F-9 or F-10 for shelfs and other offerings.

c. Additional Exchange Act Disclosure Proposals

i. Disclosure of status as a voluntary filer

We believe foreign private issuers should not be required to indicate voluntary filer status and that Form 20-F should not be amended to require that information because foreign private issuers face difficult, and in some cases insurmountable, problems in determining their status.

Unlike domestic companies, which are able to determine the number of record holders by simple application of Rule 12g5-1 under the Exchange Act, foreign private issuers are subject to the "look through" requirements of Rule 12g3-2(a). This requires not only that foreign issuers perform a more extensive analysis of shareholders, but also, because Section 15(d) obligations of a foreign issuer are suspended only if the issuer has fewer than 300 holders in the United States, means that the foreign issuer is never able to exit the US disclosure system permanently. Instead, it must make periodic assessments of holdings in the United States. To add to this obligation, we have found that it is often difficult or impossible for a foreign issuer to obtain beneficial ownership information from banks, brokers or nominees, and even if the information is provided, it is often not clear whether the account holder is a U.S. person. In some cases, the information may even be inaccurate or contradict information the issuer has received from other sources.

As a result, many foreign private issuers do not have a clear understanding of whether they are voluntary filers under the Exchange Act. They may understandably be hesitant to indicate their status on a periodic report as to which their principal executive and financial officers are required to sign certifications imposing potential civil liability and even criminal penalties. We believe that unless the Commission adopts rules that make the determination of foreign private issuer status more clear, such as by simplifying the rules applicable to the determination of their status, creating a safe harbor for determinations, or mandating that financial institutions regularly maintain and tabulate certain shareholder information and disclose it to foreign private issuers, the mandated disclosure regarding Exchange Act status may present substantive issues to many foreign companies. For those reasons, we believe that disclosure requirement should not apply to foreign private issuers.

Allied to this issue is the issue of deregistration of foreign private issuers from reporting obligations under the Exchange Act. As the Commission is aware, the ability of foreign private issuers that do not maintain a U.S. securities listing and have not accessed the U.S. public capital markets for a lengthy period of time to deregister from or suspend their reporting under the Exchange Act is currently a matter of concern to many foreign issuers, as well as companies that might consider offerings or listings in the United States. We encourage the Commission to adopt rules to permit unlisted foreign issuers that have not accessed the U.S. public capital markets for a number of years to deregister on a permanent basis (unless the issuers should list securities in the U.S. or engage in a public offering).

ii. Disclosure of unresolved staff comments

We understand the rationale for the Commission's decision to treat foreign private issuers the same as domestic accelerated filers for purposes of the required annual report disclosure of unresolved staff comments. However, as a technical matter a foreign private issuer cannot be an "accelerated filer" because one element of that definition in Rule 405 is that the issuer be a Form 10-K filer. This could be readily fixed by adding "(but for the fact that it does not file annual reports on Form 10-K)" after "accelerated filer" in the first sentence of proposed Item 4A of Form 20-F.

2. Schedule B Issuers

a. Issuer-Focused Research (Rule 139(a)(1))

We believe that the scope of Rule 139(a)(1) should be expanded to cover issuer-focused research on seasoned Schedule B issuers. Schedule B under the Securities Act is used by foreign governments or political subdivisions thereof to register securities offerings. Generally, it contains a description of the country and its government, the terms of the offering, and the uses of proceeds. In the Commission's 1998 Aircraft Carrier Proposals, the Commission proposed that Rule 139 be expanded to cover Schedule B offerings, and proposed to allow a seasoned foreign government issuer to communicate freely before filing a registration statement for an offering of securities that exceeds $250 million and that is underwritten on a firm commitment basis.

The Commission's release stated as follows:

> In the case of Form B offerings, we believe that the fact that many analysts would be covering the issuer, and that the investors would be relatively informed already, justifies allowing research to be published around the time of an offering without applying Section 5 restrictions. Thus, the proposed communications rules allow research reports to be a part of the mix of information that investors may see around the time of a Form B registered offering regardless of who publishes those reports. Accordingly, the Rule 139 safe harbor would not be needed in those cases.[45]

We would provide the same freedom (*i.e.*, not applying Section 5 restrictions) for a research report published around the time of an offering by a seasoned foreign government issuer that is registering an offering of securities that exceeds $250 million and that is underwritten on a firm commitment basis. Because the proposed communications rules would provide that offers may be made before filing of such a registration statement, an underwriter or participating dealer would not have to be concerned about research during that period. Similarly, because prospectuses relating to offerings by those foreign government issuers would not have to satisfy the requirements of Section 10, underwriters and participating dealers would not have to be concerned about publishing research reports after a Schedule B registration statement is filed.

We recommend that the test proposed in 1998 be incorporated into Rule 139(a)(1) to permit issuer-focused research on seasoned Schedule B issuers to have the benefit of the safe harbor.

b. Free Writing Prospectuses

It appears to us that under the Commission proposals, unseasoned Schedule B issuers would be treated in the same manner as unseasoned private issuers. We believe the

[45] *See* 1998 Aircraft Carrier Proposals, *supra* note 1, at text accompanying note 355.

Commission should consider whether, in the case of communications by foreign governments, a separate series of rules should apply. We would propose that such governmental issuers have significantly broader latitude in connection with communications than the rules that would apply to private companies. Among other things, because of the generally greater freedom that may be necessary to for governments to announce and discuss offerings of governmental securities, we believe such issuers should not be subject to the same broad filing obligations relating to free writing prospectuses that apply to private companies.

We note that because Schedule B issuers are never eligible to use Form F-3, they will never be eligible to become seasoned issuers or WKSIs. We believe the Commission should consider whether any category of Schedule B issuer should be eligible for some or all of the accommodations made in the Proposal to seasoned issuers or WKSIs. Although we acknowledge that the disclosure obligations of Schedule B issuers are considerably less than those applicable to private companies, we also believe that the largest foreign governments would benefit from immediate access to the U.S. capital markets.

c. Securities Act Offering Process

We believe that Schedule B issuers should be eligible to be treated as well-known seasoned issuers for the purposes of automatic shelf registration. We note that under proposed Rule 462 contained in the 1998 Aircraft Carrier Proposals, the Commission would have permitted seasoned foreign government issuers that file registration statements on Schedule B to designate the date and time of the effectiveness of their registration statements. This issuer could designate that the registration statement be effective automatically upon filing, upon any date and time it specifies, or as designated in a later amendment. Such registration statements would not have been subject to Commission review. The proposal would have been available only for an offering of at least $250 million that also was underwritten on a firm commitment basis, by issuers that had registered an offering under the Securities Act within the three most recent years. As the Commission stated in 1998:

> The prior registration requirements would guarantee that some public information would be available before a foreign government issuer could rely on the Rule. It also would give the issuer an opportunity to become comfortable with the registration process and disclosure standards of the federal securities laws.
>
> The basis for extending automatic effectiveness to these issuers rests on the concept that offerings by seasoned, well-known issuers attract market, analyst and investor attention and recognition. We believe that most investors and analysts would have familiarity with these foreign governments due to their nature and size. The firm commitment underwritten $250 million offering criteria should ensure that their offering also attract significant market, analyst and investor attention. We believe the prior filing requirement would ensure that these issuers had some experience with registration under the Securities Act. These factors would result, we believe, in the generation and dissemination of current public information about the foreign government issuers and their offerings. In this respect, they would be similar to the classes of issuers to

> which we would extend Form B. We are therefore proposing that, like Form B issuers, these Schedule B issuers may designate the effectiveness of their registration statements.[46]

We believe the views of the Commission in 1998 are equally (and perhaps more) valid currently, and we strongly encourage the Commission to permit Schedule B issuers to be included within the definition of well-known seasoned issuers. Automatic shelf registration should be extended to them either through an amendment to Rule 415 or through parallel changes to the Commission's shelf procedure interpretations.[47]

d. Prospectus Delivery Reform

We believe the availability of Rule 172 should be clarified for Schedule B shelf issuers. Subsection (c)(3) of the rule conditions its availability on the filing of a Section 10(a) prospectus. For shelf offerings under Rule 415, Rule 172 requires that the final prospectus supplement be filed. By Rule 172's silence about Schedule B shelf offerings, which do not rely on Rule 415 or Rules 430B or 430C, it is not clear what is required to be filed in order to rely on Rule 172. By analogy we presume it should also be the final prospectus supplement. We suggest the Commission clarify this in the final rule.

3. Asset-Backed Issuers

We are providing comments in a separate letter regarding aspects of the Release relating to asset-backed securities.

4. Voluntary Filers

In general, we believe all the benefits of the Proposals available to reporting non-seasoned issuers should also be available to voluntary filers. After all, the Commission staff's practice is that voluntary filers must file a complete report, if any is filed, including any required Section 302 certifications and the Section 404 internal control audit report. Relevant rules include Rules 168, 138 and 139, as discussed below. To the extent other proposed rules, such as Rules 134, 163 and 433, are extended to permit access in lieu of delivery of a statutory prospectus for non-seasoned reporting issuers, as we suggest in A.4.a.iv. on page 26 and A.4.b.v. on page 30, we believe voluntary filers should receive the same treatment.

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[46] *See* 1998 Aircraft Carrier Proposals, *supra* note 1, at two paragraphs following paragraph accompanying note 249.

[47] *See* note 34 *infra*.

a. Extend Rule 168 to Voluntary Filers

We believe that voluntary filers should be able to communicate forward-looking information to their investors pursuant to proposed Rule 168 on the same basis as reporting issuers. This would be consistent with the Commission's stated approach in the Release that for purposes of the communications and registration process changes a voluntary filer would be treated as an unseasoned *reporting* issuer.[48]

Before assuming the status of voluntary filer, virtually all voluntary filers start out as reporting but unseasoned issuers following the public offering of a class of their securities, most frequently high-yield debt securities. After the public offering, a substantial number of these issuers communicate with their investors in the same manner that other public companies do – they issue quarterly earnings releases and have calls with investors and analysts. Like investors who invest in the more liquid securities of seasoned issuers, the investors in the securities of these issuers and the market analysts who follow them are keenly interested in management's views as to the issuer's future performance. Thus, in conjunction with their reports on their historical quarterly results, many of these newly public issuers provide some forward-looking business information and many provide guidance as to future financial performance to their investors. The Commission has acknowledged that this type of communication is beneficial to investors. Indeed, proposed Rule 168 is designed to promote the continuation of this type of ongoing communication between a company and the market during the offering process by all reporting issuers other than voluntary filers.

Many previously reporting issuers that become voluntary filers do so inevitably because they are issuers of high yield debt that never had more than 300 holders. Others become voluntary filers due to market dynamics or poor performance by the issuer, which results in diminished investor interest, rather than any planned action by the issuer. In any case, the investors that continue to hold, buy and sell the securities of an issuer that has become a voluntary filer undoubtedly desire to continue to receive the same frequency and type of information that the issuer made publicly available when it was a seasoned or unseasoned reporting issuer, including any forward-looking information and guidance released by the issuer. Many issuers that become voluntary filers are required under the indentures relating to their debt securities to continue filing periodic reports with the Commission. Despite assuming the status of voluntary filer, most voluntary filers continue to maintain their investor communications practices.

However, by preventing voluntary filers from relying on the safe harbor of proposed Rule 168 and limiting them to proposed Rule 169, voluntary filers, unlike all other issuers that have completed a public offering, will not be able to continue providing the market with forward-looking information without risk of interfering with their ability to raise capital through a public offering. While a voluntary filer could rely on the 30-day bright line exclusion of proposed Rule 163A, this would limit its ability to file a registration statement to a relatively

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[48] *See* Release at text in paragraph following paragraph referencing note 50.

narrow window each quarterly cycle. Moreover, from the time a registration statement is filed until the offering is completed, a voluntary filer would have no safe harbor to continue providing the forward-looking information to its existing investors and other interested potential investors in its existing securities.

It is difficult to discern how this is beneficial to or protects investors who own the securities of issuers that become voluntary filers. Rule 168 already includes provisions that would prevent a voluntary filer from changing the type of forward-looking information it regularly releases just prior to or during an offering to help market the offering. We think this should adequately protect the market from efforts designed to condition the market for a new offering without unduly inhibiting ongoing communications between voluntary filers and their investors. Moreover, it is difficult to understand why investors in unseasoned issuers would be adequately protected by proposed Rule 168 but investors in voluntary filers would not.

We believe that so long as a voluntary filer has filed all periodic reports during the preceding 12 months (or shorter period during which it has been continuously filing reports) that would have been required if it were a reporting but unseasoned issuer, a voluntary filer should be allowed, like other reporting issuers, to rely on Rule 168 for the release of forward-looking information, subject to all of its limitations.

b. Extend Rules 138 and 139 to Voluntary filers

For many of the reasons previously discussed, we believe Rule 138 and Rule 139(a)(2) (industry research) should be available for research on voluntary filers. As previously noted, the Commission states in the Release that the communications and registration process aspects of the Proposals treat voluntary filers the same as unseasoned reporting issuers. Yet this has not in fact been implemented in the Proposals.

As previously noted, the marketplace will have at least the same Exchange Act information about a voluntary filer that has filed the relevant reports as it will about an unseasoned reporting issuer. A voluntary filer has a *bona fide* base of securityholders that, while relatively small, nevertheless have a reasonable expectation and legitimate need for continuation of research. That existing base, coupled with the availability of Exchange Act information, justifies extending Rules 138 and 139(a)(2) to voluntary filers.

For the same reasons discussed above, if Rule 139(a)(1) (issuer-focused research) is extended to research on all reporting issuers as discussed in A.1.f.ii. on page 13, we believe it should also be extended to research on voluntary filers.

c. Acceptance of Exchange Act Periodic Reports

We believe that the Commission should continue to accept under the Exchange Act periodic reports made by voluntary filers without requiring registration under Section 12(g) of the Exchange Act as a condition to acceptance. Issuers filing periodic reports on a voluntary

basis are required by Commission staff policy, on the same basis as seasoned issuers, to make the disclosures mandated by the Exchange Act forms provided for such reports. Investors in issuers that file Exchange Act reports on a voluntary basis benefit from access to such required disclosure, regardless of the fact that such filings are made on a voluntary basis.

We believe the proposal to require disclosure of voluntary issuer status by the proposed revisions of Forms 10-K and 10-KSB will adequately inform investors of an issuer's status as a voluntary filer. (As discussed in D.1.c.i. on page 71, we believe required disclosure of voluntary issuer status is impractical for foreign private issuers and should not be added as a Form 20-F requirement.)

The largest category of voluntary filers – issuers of high-yield debt securities – are in general contractually obligated, while their public debt securities remain outstanding, to make available to the holders of such securities all periodic reports as would be required to be filed with the Commission if the issuer were a seasoned issuer, and in fact to make them available by filing them with the Commission to the extent that continues to be permitted. Even if Commission filing is not the contractually required means for making the contractually required reports available, voluntary filings via EDGAR are generally the most efficient means of doing so for the issuer, and benefit investors by providing real-time, electronic access. Thus, while an issuer's filing obligations are contractual rather than statutory, a large category of voluntary filers may not, in a practical sense, "cease to file [their] Exchange Act reports at any time and for any reason without notice," without defaulting on (or incurring additional expense to comply with) the contractual obligations owed to their security holders.

Requiring voluntary issuers to register their publicly held securities under Section 12(g) of the Exchange Act as a condition to the acceptance of periodic filings by such issuers would make the issuer's reporting obligation mandatory under Section 13 and therefore require compliance by such issuer with many requirements not currently applicable to voluntary filers.[49] The financial costs to an issuer of such compliance, and other concerns, would create a disincentive for issuers to file Exchange Act reports on a voluntary basis.

As previously noted, most debt issuers are contractually required to continue Exchange Act reporting. If despite that fact the Commission remains concerned that the ability under the Exchange Act of voluntary filers to cease filing reports under the Exchange Act without notice does not adequately protect investors, we would suggest that, instead of requiring registration under Section 12(g) of the Exchange Act, the Commission require voluntary filers to file on Form 8-K (or Form 6-K in the case of foreign private issuers) a notice of intention to cease filing reports not less than 90 days after the notice is filed. This would be consistent with the ability of an issuer registered under Section 12(g) to terminate its registration under Rule 12g-4. In addition, voluntary filers should be able to cease filing reports after all classes of securities in respect of which the filing obligation arose are no longer outstanding. This would

[49] *See, e.g.*, Division of Corporation Finance: Sarbanes-Oxley Act of 2002 – Frequently Asked Questions, dated November 2, 2002, revised November 14, 2002, Questions 1 and 9.

permit voluntary filers that are debt issuers to cease filing after the relevant classes of debt securities have been redeemed in full or paid at maturity without waiting the 90 days.

5. High Yield Issuers

We believe the Proposals should permit some high-yield issuers to qualify as WKSIs on the basis of outstanding debt, even if they have no public equity, and to permit all high yield issuers to utilize Form S-3 after they have been reporting under the Exchange Act (even if voluntarily) for 12 months. Currently, a high-yield issuer that has no public common equity does not qualify for use of Form S-3 (or F-3) and, by virtue of clause (1)(i) of the definition of WKSI in Rule 405, would also not qualify for WKSI status or be able to use automatic shelf registration. Issuers of high-yield debt securities account for a substantial and increasing share of new offerings and Securities Act registration statement filings (albeit most often in the context of *Exxon-Capital* exchange offers).[50]

We recognize that high-yield debt securities are often issued by companies that have a class of equity securities registered under the Exchange Act. Some of those companies satisfy the public float criterion for Form S-3 eligibility (and a few of them will satisfy the public float criterion for WKSI eligibility). However, a substantial number of high-yield issuers do not, and are not expected to, meet the Form S-3 eligibility or public float availability criteria (and a far greater number will not meet the WKSI criteria), notwithstanding that they are frequent issuers of a significant dollar amount of debt securities, all of which trade in the secondary markets following registration under the Securities Act. Those securities are most commonly offered initially in exempt transactions pursuant to Rule 144A in order to take maximum advantage of market timing opportunities. They are subsequently the subject of *Exxon-Capital* exchange offers or resale shelf registrations for which the related registration statements require Form S-1 disclosure.

We believe that the availability of Form S-3, together with the modifications contemplated by proposed Rule 430B with respect to the required content of a base prospectus in a shelf registration, might well serve as a strong inducement to prospective (and, particularly, frequent) issuers of high-yield debt securities not eligible to use Form S-3 to register their *initial* offerings of those securities, rather than conduct those offerings pursuant to Rule 144A with a subsequent registered *Exxon-Capital* exchange offer.

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[50] Those issuers that complete a registered *Exxon-Capital* exchange offer, or bring to effectiveness a resale shelf registration statement, with respect to an issue of high-yield debt securities previously offered and sold pursuant to Rule 144A thereafter are required by Section 15(d) to begin filing the periodic reports required by Section 13 of the Exchange Act, unless already subject to those requirements by virtue of Sections 12(b) or 12(g). As discussed in D.4.b. on page 77, these issuers continue to do so for so long as the securities remain outstanding (and irrespective of the number of record holders of those securities) because of express requirements contained in the related indentures under established market practice dictated by the buyers of those securities, which are generally sophisticated institutional investors.

To the extent that eligibility for WKSI status and Form S-3 is expanded to include reporting issuers of a specified number of registered offerings of high-yield debt securities, an even greater number of these issuers might well be induced to pursue the Rule 415 approach for their subsequent debt offerings, rather than the Rule 144A/*Exxon-Capital* approach. In both cases, we believe that this would be a result consistent with the objectives of the Commission.

We believe that consideration should be given to modifying both the Form S-3 and WKSI eligibility criteria to eliminate (or significantly de-emphasize) the historical distinction between investment grade and high-yield debt securities.[51] The Release does not set forth empirical data with respect to the market following of investment grade debt issuers that would not otherwise be Form S-3 eligible (or able to use Form S-3 for a debt offering) or qualify as a WKSI, but we believe that, in fact, the analyst community's following of high-yield debt issuers is at least equal to that associated with investment grade debt. The vast size of the high-yield debt market and the lack of its reliance upon rating agencies support our belief. Permitting WKSI eligibility based on the number of significant registered offerings, as discussed in C.3.c. on page 58, would be a way to implement this suggestion if that criterion were also extended to Form S-3 eligibility.

6. Investment Companies and Business Development Companies

The Proposals expressly prohibit investment companies, including open-end funds and closed-end funds, and business development companies ("BDCs"), from taking advantage of most of the rules that would increase flexibility for securities offerings. Presumably, the Proposals excluded these issuers because (i) their activities are subject to the Investment Company Act, and (ii) in the case of open-end and closed-end investment companies, they are subject to disclosure requirements under the Exchange Act that differ from those that apply to operating companies. Nevertheless, for the reasons we express below, we believe that:

- Investment companies and BDCs should qualify for the issuer-focused research safe harbor to the same extent as operating companies;
- Investment companies and BDCs should be permitted to rely on the ordinary communications and 30-day safe harbors to the same extent as operating companies;

[51] Although high-yield debt securities can be listed on an exchange (such as the NYSE), thus meeting the reporting issuer eligibility criterion for use of Form S-3, this is rarely done because little or no trading occurs on the floor of the exchange (and because listing would preclude reliance on Rule 144A for a subsequent "add-on" offering of the same class). Even if a high-yield debt issuer already satisfies the registrant criteria for Form S-3 eligibility by being a reporting issuer, the availability of Form S-3 for primary offerings of debt securities is permitted only if the issuer either has (i) a common equity public float of at least $75 million or (ii) is offering debt securities that are investment grade.

- The existing free writing provisions for investment companies and BDCs (Rule 482) should be conformed to those proposed for operating companies (Rule 433);
- BDCs should be allowed to use the new registration process, including shelf registration and forward incorporation by reference, to the same extent as operating companies; and
- Investment companies and BDCs should be eligible for access = delivery in Rules 172 and 173 to delink the confirmation process from delivery of final prospectuses.

a. Background – Regulation of Investment Companies and BDCs

i. Open-end funds

Open-end funds issue redeemable securities, and generally offer their shares on a continuous basis.[52] Material amendments to the registration statement, filed pursuant to Rule 485(a) under the Securities Act, generally become effective on the 60th day after filing, which affords the staff of the SEC's Division of Investment Management an opportunity to review those changes. Funds typically defer effecting changes in fundamental policies or restrictions until they obtain shareholder approval, or until the post-effective amendment has become effective. Funds also "supplement" their registration statements (typically with "stickers" to prospectuses or Statements of Additional Information[53]) pursuant to Rule 497 under the Securities Act, followed by a filing pursuant to Rule 485(a) to amend the registration statement.

Open-end funds redeem their shares at net asset value as next determined after receiving a redemption request. In contrast to operating companies, whose prospectuses are limited to detailed information about their business operations and the offered securities, open-end funds typically also include in their prospectuses extensive instructions on how to purchase, redeem, or exchange shares.

When open-end funds are part of a "family of funds" organized and managed by the same investment advisory organization (as is frequently the case), significant portions of the content of the prospectus and SAI of the various funds in the family are substantially the same. Although Section 12(g)(2)(B) of the Exchange Act excludes shares of investment companies

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[52] Section 5(a)(1) of the Investment Company Act defines the term "open-end company" to mean a management company that is offering for sale or has outstanding any redeemable security of which it is the issuer. The term "redeemable security" is defined in Section 2(a)(32) of the Investment Company Act to mean any security under the terms of which the holder, upon presentation, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

[53] The Statement of Additional Information, or "SAI", is filed as Part B of a fund's registration statement on Form N-1A.

from Exchange Act registration, open-end funds (and closed-end funds) are, by virtue of Sections 20 and 30 of the Investment Company Act and related Commission rules, subject to the same reporting requirements as if so registered – Exchange Act Section 13(a) periodic reports and Schedule 14A proxy statements.

ii. Closed-end funds

Closed-end funds do not issue redeemable securities, so they frequently invest in securities that are not as liquid as those acquired by open-end funds, or securities that are issued by companies in specific industries or foreign countries.[54] Closed-end funds also may issue senior securities or borrow from banks subject to the limitations in Section 18 of the Investment Company Act.

Unlike open-end funds, closed-end funds generally issue their securities in traditional underwritten offerings, and in most cases do not offer their shares to the public on a continuous basis, so sponsors of closed-end funds usually arrange for their shares to be traded in secondary markets, either on an exchange or over-the-counter.

Unlike shareholders of open-end funds, closed-end fund shareholders who sell their stock may receive more or less than the net asset value of the shares. As noted above, Section 12(g)(2)(B) of the Exchange Act excludes shares of investment companies from Exchange Act registration but closed-end funds (and open-end funds) are subject to the same reporting requirements as if so registered – Exchange Act Section 13(a) periodic reports and Schedule 14A proxy statements.

iii. Business development companies

A BDC[55] is defined in Section 2(a)(48) of the Investment Company Act to mean a closed-end fund that:

(i) is organized under the laws of, and has its principal place of business in, any state or states;

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[54] Section 5(a)(2) of the Investment Company Act defines the term "closed-end company" to mean any management company other than an open-end company.

[55] BDCs are governed by Sections 54 to 65 of the Investment Company Act as a result of amendments to the Investment Company Act in 1980. Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, 94 Stat. 2275. *See* H.R. Rep. No. 1341, 96th Cong., 2d Sess. (September 17, 1980); S. Rep. 958, 96th Cong., 2d Sess. (September 18, 1980). Section 6(f) of the Investment Company Act exempts any closed-end fund that has elected to be a BDC from all of the provisions of the Investment Company Act. A BDC cannot change the nature of its business so as to cease to be a BDC, or to withdraw its election, unless it been so authorized by the vote of a majority of its outstanding voting securities pursuant to Section 56.

(ii) is operated for the purposes of making investments in securities described in paragraphs (1) through (3) of Section 55(a) of the Investment Company Act, and makes available significant managerial assistance[56] with respect to the issuers of such securities; and

(iii) has elected[57] to be subject to the provisions of Sections 55 through 65.

BDCs are subject to the Exchange Act reporting provisions, and in fact use Forms 10-K, 10-Q and 8-K for this purpose. By virtue of making the BDC election, a BDC is not considered to be an "investment company" for purposes of the provisions of the Investment Company Act applicable to open-end and closed-end funds. Instead, BDCs are subject to specialized provisions of the Act designed exclusively to regulate their activities and to certain other provisions of the Investment Company Act that are incorporated by reference. Securities Act offerings by BDCs are, through SEC staff practice, registered on Form N-2, the standard form for registering closed-end funds under the Investment Company Act and the Securities Act, and the Forms N-2 are usually processed by the Commission's Division of Investment Management, not the Division of Corporation Finance.

b. Shareholders of Investment Companies and BDCs Would Benefit from the Modernized Structure Reflected in the Proposals

Although we concur that the Commission should not delay adoption of the Proposals in order to reconcile the disclosure regimes for operating companies and those regulated under the Investment Company Act, we believe that many of the Proposals would benefit investment companies and BDCs to the same extent that they would benefit operating companies. Under the Proposals, registered investment companies and BDCs could not rely on:

- the issuer-focused research safe harbor (Rule 139(a)(1))[58]
- the ordinary communications safe harbors (Rules 168-169)
- the 30-day safe harbor (Rule 163A)
- Rule 134
- automatic shelf-registration
- free writing prospectuses (Rules 163, 164 and 433)

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[56] The term "making available significant managerial assistance" is defined in Section 2(a)(47).

[57] Pursuant to Section 54(a), a BDC may elect to be subject to the provisions of Sections 55 through 65 by filing a notification of election on Form 54A if it (i) has a class of securities registered under Section 12 of the Exchange Act, or (ii) has filed a registration statement pursuant to Section 12 of the Exchange Act for a class of its equity securities. A BDC is deemed by Section 54(b) to be subject to Sections 55 through 65 when its election is received by the Commission. When a BDC wishes to withdraw its election, its withdrawal is deemed by Section 54(c) to be effective immediately upon its receipt by the Commission. The Commission is also empowered to revoke a BDC's election when it finds that the BDC has ceased to engage in business.

[58] Also, Rule 138 is not available for investment companies, although it is available for BDCs.

- the de-linking of confirmations and final prospectus delivery (Rules 172 and 173)

Given that open-end funds and some closed-end funds are sold in continuous offerings equivalent to the use of shelf registration for operating companies, and given the similarity of the offering, aftermarket trading and reporting processes for BDCs and closed-end funds with those processes for operating companies, many of the disparities in treatment by the Proposals are not justified. Although some of the disparities already exist (unavailability of some research safe harbors, the inability to use Rule 134, the inability of BDCs to use Form S-3 as a matter of SEC staff practice), some others (the ordinary communications and 30-day safe harbors, de-linking prospectus delivery from confirmations) would be new. Moreover, while Rule 482 could in theory be a satisfactory substitute for free writing prospectuses permitted by Rules 164 and 433, as presently written Rule 482 requires investment companies and BDCs to file underwriter materials and electronic road show materials in addition to issuer free writing material.

c. *Investment Companies and BDCs Should Be Covered by the Issuer-Focused Research Safe Harbor*

For understandable policy reasons, portions of the Proposals require that the issuer meet certain minimum "seasoning" requirements by being eligible for Form S-3. However, neither investment companies nor BDCs are eligible to use Form S-3.[59] Requiring that issuers be eligible to use Form S-3 in order for the issuer-focused research safe harbor to be available (Rule 139(a)(1)) or in order to avoid statutory prospectus delivery with free writing (if Rules 164 and 433 were made available) prevents investment companies and BDCs from having the benefit of these provisions for technical reasons, not substantive reasons.

As an alternative, we recommend that investment companies and BDCs be deemed to satisfy the "seasoning" requirements of Form S-3 for purposes of Rules 139(a)(1) if they have been Exchange Act reporting companies for 12 months and have a common equity public float of at least $75 million.[60]

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[59] General Instruction B.1 to Form N-1A makes that the exclusive form for Securities Act registration by open-end funds. General Instruction A to Form N-2 makes that the exclusive form for registration by closed-end funds. There is no comparable express prohibition on use of Form S-3 by BDCs. Instead, as a matter of SEC staff practice BDCs have been required to utilize Form N-2.

[60] Closed-end funds or BDCs that expect to be listed for trading on the New York Stock Exchange must make a public offering in excess of $60 million to be considered, although in practice most exceed $75 million. Three recent public offerings by BDCs made initial public offerings well in excess of $75 million. The Rule 139(a)(2) industry research safe harbor is available to investment companies (and BDCs) because it applies to all reporting issuers. Oddly, the Rule 138 safe harbor for debt research during an equity offering and *vice versa*, although not important for investment companies, is available only for issuers that file annual reports on Form 10-K (which would include BDCs).

i. Exchange-traded funds

We believe it is most important that Rule 139(a)(1) be extended to cover issuer-focused research on exchange-traded index funds ("ETFs"), which are organized as unit investment trusts or open-end investment companies.[61] ETFs are traded on a stock exchange, just like operating companies. Even if the ETF is seasoned in a substantive sense (12-month reporting history and $75 million equity float), ETF research is not eligible for Rule 139(a)(1) for the technical reason that ETFs offer securities on Forms N-1A and N-8B-2 rather than Form S-3. Given that ETFs are in continuous distribution as an inherent element of their structure and that they depend on broad broker-dealer involvement as authorized participants in that process, most ETF research today cannot benefit from the Rule 139(a)(1) safe harbor. We urge the Commission to address that gap.

A further change would be required to implement this proposal – the condition on non-initiation must be eliminated for ETFs. Because ETFs are in continuous distribution an original authorized participant will not have published any research at time when it was not a participant in the distribution. We believe that ETFs are sufficiently different in their structure and operations that this conditions is unnecessary for them. The principal reason is that the role of an authorized participant is more operations-oriented than distribution oriented. Authorized participants are needed to facilitate the mechanics of issuing creation unit-size blocks of new ETF shares to institutional investors in exchange for the underlying basket of component securities, and *vice versa*. However, the demand for creation units is driven by market price arbitrage opportunities between the share price of the ETF and the net asset value of its portfolio, and not by traditional underwriter selling efforts. In these circumstances the risk of abuse from an initiation research report by a distribution participant is greatly attenuated.

ii. Extend to privately placed BDCs

By virtue of being a BDC, a company is subject to Exchange Act reporting. Thus, a BDC making a private placement must nevertheless file a Form 10 under the Exchange Act to satisfy one of the conditions to its election to be a BDC, thereby becoming an Exchange Act reporting issuer. We believe that, just as an operating company can become eligible for Form S-3 by registering under the Exchange Act on Form 10 and reporting for 12 months, BDCs (and investment companies, in the rare cases where they are privately offered) should be permitted to attain "seasoned" status through registration and filing periodic reports for one year, even without having previously conducted a public offering.

[61] The Release specifically requests comment on this point at text accompanying note 228.

d. Investment Companies and BDCs Would Benefit from Ordinary Communications and 30-Day Safe Harbors

i. Open end funds

Open-end funds are less likely to encounter "gun-jumping" issues than are operating companies (or closed-end fund or BDC issuers, as discussed below) because open-end funds typically do not offer shares during the pre-effective period. Nonetheless, open-end fund families may be disadvantaged if they cannot rely on the ordinary communications and 30-day safe harbors. For example, a fund family that registers a new open-end fund theoretically could be charged with conditioning the market for the new fund through statements made about existing funds bearing a similar investment style or using similar portfolio managers. No benefit to investors would arise from limiting disclosures about existing funds in a complex in order to avoid "gun-jumping" the offering of a new fund.

ii. BDCs and closed-end funds face the same securities offering issues faced by operating companies

Common stock of closed-end funds and BDCs is usually sold in one-time initial public offerings. Most notably and recently, Apollo Management LP raised over $930 million in April 2004 for a BDC that would invest at least 70% of its assets in privately placed debt securities, prompting a number of Wall Street firms to create entities electing to be a BDC.[62]

Because the securities that they issue are sold in one-time initial public offerings, closed-end funds and BDCs have had the same problems with "gun-jumping" that have been experienced by operating companies that make initial public offerings. Unlike open-end funds, closed-end funds and BDCs do not make continuous public offerings where the net asset value per share is recalculated daily and shares cannot be sold at a premium or discount to the net asset value per share.[63] Instead, after the initial public offering their shares trade on a stock exchange or in the over-the-counter markets at fluctuating market prices. Accordingly, Rules 168, 169 and 163A should be available to closed-end funds and BDCs.

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[62] *See* "KKR Set to Sponsor Publicly Traded Fund," *Wall Street Journal*, April 13, 2004, at C5; "Buyout Firm Plans Offering," *New York Times*, April 13, 2004; "Private Firms Use Closed-End Funds To Tap the Market," *New York Times*, April 17, 2004, at C1; "Avoid the Temptation to Run With the Big Dogs," *Washington Post*, April 26, 2004; "Private Equity Goes to Public, Letting Small Investors Play," *Wall Street Journal*; "Investment Fund Files for Offering of $500 Million," *New York Times*, May 12, 2004, at C7; "Gleacher Registers a New Fund," *Wall Street Journal*, May 12, 2004, at C2; "Friend or Foe," *The Deal*, May 17, 2004, at 40.

[63] *See* Section 22(c) of the Investment Company Act and Rule 22c-1 thereunder.

e. The Interplay Between Parts of the Proposals Creates Unintended Consequences for Closed-End Funds and BDCs

Some of the Proposals apply to all issuers (Rule 159, the Section 12(a)(2) interpretation, and the definition of "graphic communication" as a writing, for example), while others are not available to closed-end funds and BDCs (Rules 164 and 433 regarding free writing prospectuses). Because closed-end funds and BDCs would not be able to avail themselves of the same provisions in the Proposals as operating companies, some anomalies would be created.

Specifically, electronic road shows for initial public offerings by a closed-end funds and BDCs would under the Proposals be treated as written under the definition of "graphic communication." However, the exception from filing in Rule 433 would not be available because that rule by its terms is unavailable to investment companies and BDCs. Therefore, the electronic road show would be a Rule 482 advertisement that would have to be filed with the Commission under Rule 497 since the electronic road show/Rule 482 advertisement is, at least in the case of BDCs,[64] not required to be filed with the NASD and would, consequently, not be eligible for the Rule 497 filing exemption for advertising material filed with the NASD.

Similarly, Rule 159 and the Section 12(a)(2) interpretation would base civil liability on information communicated at the time of the sale, but the combined effect of the "graphic communication" definition and operation of Form N-2 (which does not contemplate incorporation by reference of periodic reports under the Exchange Act) means that closed-end funds and BDCs have fewer permissible and practical means to communicate information than operating companies. For example, a reporting closed-end fund or BDC doing a follow-on offering does not have the option of filing a Form 8-K to incorporate new information into the prospectus and by that means disseminate it to investors. As another example, an e-mail created by a broker-dealer with disclosure information regarding an operating company can be constructed in a manner that avoids the need to make a filing under Rule 433, while the same material regarding a closed-end fund or BDC would have to be filed under Rule 497 (or with the NASD), an impractical alternative.

We recommend that Rule 482 be conformed to Rule 433.

f. The Proposals Should Permit BDCs to Utilize Shelf Procedures and Incorporation by Reference

Currently, BDCs and closed-end funds are prohibited from utilizing Rule 415 shelf registration procedures for general capital-raising because of the technical fact that they use

[64] NASD Rule 2210 requires the filing of advertisements and sales literature, including electronic communications, concerning all registered investment companies. However, there is some uncertainty whether an electronic road show prepared and distributed by an investment company issuer rather than by the NASD member would be subject to the filing requirement.

Form N-2 rather than Form S-3.[65] We recommend that Rule 415 and Form S-3-like incorporation by reference be extended to BDCs that satisfy the seasoning requirements of Form S-3 (12-month reporting history and $75 million float).

To achieve the same practical benefits for BDCs that operating companies have with Form S-3, we recommend that the Commission consider permitting BDCs to incorporate by reference into their Form N-2 registration statements their Forms 10-K, 10-Q and 8-K, and to utilize the new shelf registration streamlining procedures for Form S-3 embodied in the Proposals, such as permitting base prospectus material to be included instead as Exchange Act material that is incorporated by reference. (We are not making the same suggestion for closed-end funds because their regular Exchange Act reports are different in scope from Form 10-K and 10-Q, their Exchange Act reports are filed only semi-annually and they do not file current reports on Form 8-K.)

g. *Investment Companies and BDCs Should Be Permitted to Delink Confirmations from Delivery of Final Prospectuses*

Investment companies and BDCs should not be excluded from the modernization of the prospectus delivery process. Like investors in other securities, investment company and BDC investors have ready access via the Internet to investment company offering materials that are filed with the Commission. We acknowledge that investment companies currently are subject to a separate framework governing communications with investors. Even if our recommendations to change that framework are not followed, we see little in that framework to justify a decision not to extend the benefits of the "access equals delivery" regime for final prospectus delivery to investment companies and BDCs. The goal of de-linking the confirmation process from prospectus delivery remains equally valid for investment companies and BDCs. Similarly, the notification provisions of Rule 173 should work equally well in the fund and BDC context. We encourage the Commission to reconsider the exclusion of investment companies and BDCs from Rules 172 and 173.

7. Small Business Issuers

As the Commission notes, there are approximately 2,500 small business issuers.[66] Regulatory reform that fails to differentiate between smaller business issuers and larger issuers creates a disproportionate burden on smaller business issuers and places them at a distinct disadvantage in raising capital. All fully compliant reporting companies benefit from reform that provides greater certainty and more streamlined processes no matter how large or small.

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[65] BDCs and closed-end funds may use Rule 415 for dividend reinvestment plans and rights offerings and interval funds or interval BDCs may use Rule 415.

[66] *See* Release at text following note 453. Small business issuers are those having $5 million or less in total assets at fiscal year end. *See* Securities Act Rule 157 and Exchange Act Rule 0-10(a).

a. Communications

The proposed definition of "ineligible issuer" in Rule 405 includes reporting companies with a going concern opinion. That provision may apply disproportionately to small business issuers, which are generally unseasoned (*i.e.,* common equity public float is under $75 million) and for which the primary effect would be disqualification from the 30-day bright-line safe harbor in Rule 163A and the use of free writing prospectuses under Rules 163 and 433.[67]

While loss of free writing prospectus eligibility may not be unduly burdensome, loss of the 30-day safe harbor would be especially burdensome on a small business issuer, which may not have a following in the financial press and therefore may need to communicate more frequently, including up to a point 30 days before filing a registration statement. For a small business issuer, certainty is extremely important and ineligibility for the certainty of the 30-day safe harbor by virtue of a going concern opinion serves to further place them at a disadvantage in raising capital at a time when it is critically important to do so. In fairness, the going concern ineligibility should be eliminated from Rule 163A for all issuers.

We support the omission from Rules 168 and 169 of a disqualification for ineligible issuers.

b. Offering Process

Small business issuers have relied on short-form registration on Form S-3 and Rule 415 resale shelf procedures to satisfy obligations pursuant to registration rights agreements in connection with private placements or mergers and acquisitions. Private placements are more likely to be utilized by small business issuers, which do not have the availability of shelf registration for primary offerings. The current procedure for filing post-effective amendments subject to Commission staff review is equally burdensome on unseasoned issuers, of which many are small business issuers. The Proposals would allow the use of a supplement to identify new or previously unidentified selling security holders only for seasoned issuers, a distinction that does not appear warranted and places smaller issuers at a competitive disadvantage in bidding for other companies and in securing capital infusions from private investors. Accordingly, we urge revision of General Instruction II.G. of Form S-3 and Rule 430B(b) to permit unseasoned issuers to designate previously unknown selling securityholders by prospectus supplement to a resale shelf registration statement on Form S-3.

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[67] We accept that blank check, shell and penny stock companies may be appropriately categorized as "ineligible issuers."

c. Risk Factors

As noted in E.1.a. on page 90, we favor extending risk factor disclosure to Forms 10-SB and 10-KSB to the extent it is added to Forms 10 and 10-K. Although this disclosure requirement may be disproportionately burdensome to small business issuers, we recognize that the burden is outweighed by investor protection interests.

E. OTHER MATTERS

1. Exchange Act Reports

a. Risk factor disclosure in Form 10-K

The Commission is proposing to require risk factor disclosure in Forms 10, 10-K and 10-Q. We generally support this proposal. However, we believe that issuers should have the ability to determine whether risk factor disclosure is necessary.

The Commission states that the "Risk factor disclosure under the Exchange Act would be the same type of Item 503 disclosure as in a Securities Act registration statement …."[68] Item 503(c) of Regulation S-K requires disclosure of factors that make an offering "risky or speculative." The proposed requirement references Item 503, but adds,

> including 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 the addition of this language to the new Item greatly expands the circumstances under which risk factors must be presented from that currently required under Item 503(c). Rather, the proposed requirement more closely resembles the standard for cautionary language under Section 21E of the Exchange Act, which is elective, or even MD&A disclosure, and thus would be duplicative. As is the case today in Securities Act registration statements, in considering its response to Item 503(c), if an issuer believes that investing in its securities is not risky or speculative, it should not be required to include risk factor disclosure. Likewise, issuers should continue to be permitted to include cautionary language under Section 21E on only a voluntary basis, to the extent the issuer elects to include forward-looking statements in its public disclosure.

We believe that risk factor disclosure pursuant to Item 503(c) of Regulation S-B should be extended to Form 10-SB and 10-KSB, since this disclosure is as, if not more, relevant to investors in the securities of small business issuers.

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[68] *See* Release at paragraph referencing note 372.

b. Disclosure of long-outstanding Commission staff comments

The Commission is proposing to add Item 1B to Form 10-K and Item 4A to Form 20-F to require accelerated filers and equivalent foreign private issuers to disclose unresolved staff comments. If the registrant has received comments from the Commission staff regarding its periodic filings 180 days or more before the end of its fiscal year to which the annual report relates, the Form 10-K or Form 20-F must include disclosure of the substance of any unresolved comments that the registrant believes are material.

The Commission states its belief that the new disclosure is necessary in light of the automatic effectiveness of Forms S-3 and F-3 for WKSIs and other proposals to liberalize the shelf process.[69] The Commission is concerned that additional incentives for the timely resolution of comments on periodic reports will be necessary if those proposals are adopted.

We believe that the new disclosure items are broader than necessary to serve the Commission's stated purpose. Issuers should have the choice of disclosing outstanding material comments or conducting no registered offerings until all material comments are disclosed or resolved.

As a separate matter, in our experience it is not always clear when comments are resolved. For example, if the registrant has provided a supplemental explanation to which the staff has not responded, would the comments be deemed unresolved? Although we believe that the staff should not have a deadline to address issuer responses to outstanding written comments on Exchange Act reports, some process should be available to issuers in the process of preparing an annual report to obtain advice from the staff whether the comment is still outstanding.

In response to several of the specific requests for comment in the Release on this aspect of the Proposals, we have the following responses:

- The 180 days should be calculated not from the date of the initial written comment letter from the staff but instead from the latest date comments were received that relate to or arise from the original comments or issuer responses to the original comments.
- The disclosure should not be extended to quarterly reports.
- Paraphrasing and discussion of the significance of the staff comments should be permitted – we read the proposed requirement for disclosure of the "substance" of the comment to permit paraphrasing.
- We agree that issuers should not have to disclose comments that have been resolved on the basis of being addressed in future Exchange Act reports.
- We agree that the staff should be permitted to waive disclosure, if requested.

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[69] *See* Release at paragraph accompanying note 380.

c. Voluntary filer disclosure

As discussed in D.1.c.i. on page 71, we believe required disclosure of voluntary filer status is impractical for foreign private issuers and should not be added to Form 20-F. We support the new disclosure for Forms 10-K and 10-KSB.

2. Business Combinations

a. Separate Regulatory Schemes

Business combinations, as defined in Rule 165(f)(1), are generally excluded from the primary aspects of the Proposals, including the communication exemption for WKSIs, the 30-day rule, delivery of prospectuses under proposed Rule 172 and notice of registration under proposed Rule 173. Further, an issuer registering a business combination will be considered an "ineligible issuer" as defined by proposed revisions to Rule 405.

We generally support the effort of the Commission to preserve the regulatory scheme for business combinations under Regulation M-A, as that regulation has proven to be effective and widely viewed as a success from a de-regulatory perspective as well as from an investor protection perspective. However, in light of the different regulatory treatment for business combinations and capital-raising transactions, we expect there to be situations that may arise that will create difficulty for issuers to determine which regulatory scheme applies to its offering. This situation currently arises under Rule 165 when an issuer contemporaneously engages in a business combination and a capital-raising transaction that may be used to finance in whole or in part the business combination. The staff has provided some interpretive guidance under Regulation M-A in the Telephone Interpretations Manual.[70] Because the determination of the applicable regulatory scheme will often be a difficult factual analysis, we believe it would be helpful for the Commission to provide in the adopting release its interpretation regarding this determination under the proposed rules. In light of the usefulness of the staff's interpretation under Rule 165, we would expect that the Commission's interpretation under the Proposals would be substantially the same.

In response to the Commission's request for comment, we believe that issuers undertaking registered capital-raising transactions at or around the same time as a business combination transaction should be eligible to rely on the communication proposals for communications made in connection with a capital-raising transaction unrelated to the business combination transaction. There should be no additional limitations on an issuer's ability to rely on the Proposals in these circumstances.

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

b. Specific Text of the Exclusions for Business Combinations Communications

The exclusions for business combinations under proposed Rules 163 and 163A refer to Rule 166. Rule 166 is limited to certain communications before the first public announcement. It appears that the exclusions under Rules 163 and 163A should refer also to Rule 165.

c. Reconsider Existing Staff Interpretations

We encourage the Commission to reconsider existing staff interpretations on communications relating to concurrent capital-raising and business combination transactions. We believe some interpretations may need to be modified to accommodate the communications Proposals. By way of example, it is not unusual for an issuer to refinance existing debt. In these circumstances, an issuer typically offers to sell new debt securities in order to raise funds at or near the time the issuer repurchases outstanding debt. Many times the issuer raises more funds in the debt offering than are necessary to repurchase outstanding debt. Under the staff interpretation discussed above, if the proceeds are not used "exclusively" for a business combination, the issuer is not permitted to rely on the Regulation M-A communications scheme. Similarly, where the communications relate, at least in part, to a business combination (*i.e.*, exchange offer or tender offer), the communications Proposals would not apply. As a result, it is possible that certain communications by an eligible issuer may not be covered by either the communications Proposals or Regulation M-A. We recommend that the Commission clarify its position relating to such communications in the adopting release.

We also encourage the Commission to consider addressing how the Proposals relating to shelf registration (*e.g.*, automatic effectiveness, Rule 430B, etc.) would apply to the "acquisition shelf" registration process. We believe the shelf Proposals, if adopted, should apply equally to acquisition shelf registration statements. Given that the staff's prior interpretive positions on the acquisition shelf process are set forth in two or three no-action letters, we recommend that the Commission take this opportunity to provide guidance to issuers as to how the acquisition shelf process would operate following adoption of the shelf Proposals.[71]

d. Filing of Free Writing Prospectuses and Rule 425 Materials

Pursuant to Rules 165 and 166 of Regulation M-A, written communications must be filed pursuant to Rule 425. As mentioned in the Release, there may be occasions when a company is engaged in simultaneous capital raising and business combination transactions. If a registrant engages in communications that trigger both the filing requirements of Rule 425 and proposed Rule 433, we believe that a single filing that complies with the conditions of both rules

[71] *See* SEC No-Action Letters issued to *Service Corporation International* (available December 2, 1985), *E.H. Crump Companies, Inc.* (available October 18, 1979) and *Beatrice Foods Co.* (available January 17, 1973).

would avoid duplicative filings. Separate 425 and 433 filings would only clutter the EDGAR database making it more difficult for investors to locate public information.

e. Form S-4

As part of the securities offering reforms in the Proposals, we believe the Commission should consider permitting registrants that do not meet the requirements for the use of Form S-3 or F-3 nevertheless to incorporate certain information by reference when filing on Form S-4 or F-4, to compensate for elimination of Forms S-2 and F-2.

In the Proposals, the Commission has proposed the elimination of both Form S-2 and Form F-2, as well as the adoption of amendments to Form S-1 and Form F-1 permitting registrants to incorporate by reference information into their filings on Form S-1 or F-1 from previously filed Exchange Act reports and documents. The Commission has not, however, proposed any corresponding amendments to Form S-4 or F-4 that would allow registrants not meeting the requirements for the use of Form S-3 or F-3 to incorporate that same information by reference. As a result, some reporting registrants that were previously eligible to incorporate information by reference pursuant to Item 13 of Form S-4 would no longer be permitted to do so. Moreover, while these registrants would be eligible to incorporate prior Exchange Act reports by reference into their Forms S-1 or F-1, they would not be eligible to do so in their Forms S-4 or F-4.

We believe that these registrants should be able to incorporate information by reference on either Form S-4 or F-4 to the same degree as they would be permitted to incorporate by reference on Form S-1 or F-1 pursuant to proposed General Instruction VI of Forms S-1 and F-1. If the Commission accepts this request, we urge that similar conforming changes be made to Schedule 14A and all other related rules and regulations.

3. Regulation FD

The Proposals regarding Regulation FD would retain the current exclusion from Regulation FD for communications in connection with securities offerings registered under the Securities Act, other than offerings of the types described in Securities Act Rule 415(a)(1)(i) through (vi). This exclusion has worked well to date and we are not aware that it has been used in any inappropriate manner by issuers. The Proposals would, however, make changes in the language of Rule 100(b)(2)(iv) of Regulation FD that may limit the availability or usefulness of the exclusion. In view of the fact that no abuses of the exclusion have occurred or, in our view, are likely to occur, we believe that the limiting language proposed should be deleted and that certain additional changes should be made as described below.

a. Delete References to "Capital Formation" and "Account of the Issuer"

We support the addition of the introductory language clarifying that the exclusion from Regulation FD applies to offerings of the types described in Rule 415(a)(1)(i) through (vi) if the offerings also involve a registered offering by the issuer. Indeed, as discussed in f. below, we believe that the exclusion should be further expanded. We note, however, that the language proposed for this purpose would specify that the issuer's offering must be "for capital formation purposes" and must be "for the account of" the issuer. We are concerned that the addition of the "capital formation" specification would introduce a needless uncertainty concerning the scope of the exclusion since the phrase is not defined. For similar reasons, we believe that the specification that the offering must be "for the account of" the issuer may result in uncertainty about whether a particular offering qualifies for the exclusion. We suggest that the proposed language be revised to refer simply to an offering "by the issuer".

b. Delete Reference to "Underwritten Offering"

We note that the proposed language relating to combined primary and secondary offerings discussed above would state that the category of such offerings that is excluded from Regulation FD includes "an underwritten offering" that is both for the account of the issuer and of selling security holders. The purpose and relevance of the reference in this statement to underwritten offerings are not clear. It does not appear literally to state that communications in connection with non-underwritten combination offerings are subject to Regulation FD, nor would it be reasonable to infer that underwritten combination offerings are not covered by the exclusion if this reference were not included. In any event, we believe that the introduction of a requirement that an offering be "underwritten" would not be consistent with the underlying reason for the exclusion of communications relating to registered offerings from Regulation FD, namely avoidance of the risks to issuers posed by conflicts between the requirements of the Securities Act and those of Regulation FD. For this purpose, the relevant characteristic of an offering would appear to be whether it is registered under the Securities Act – a requirement that is part of the existing Rule – rather than whether it is underwritten.

c. Delete Introductory Language Regarding Evasion

We also note that the proposed introductory language concludes with the parenthetical phrase ("unless the issuer's offering is being registered for the purposes of evading the requirements of this section"). This specification would seem to be unnecessary in that it is highly unlikely that an issuer would incur the expense and exposure to Securities Act liability of a registered offering solely for the purpose of attempting to evade the requirements of Regulation FD. At the same time, adding the quoted language could add a troubling subjectiveness and uncertainty to the determination of whether the exclusion may be relied upon in a particular case. For these reasons we suggest that it be deleted.

d. Retain Reg. FD Exclusion for Oral Offering Communications

We support retention of the current exclusion of oral communications from Regulation FD. We believe that this exclusion has not resulted in any problems to date and that any such problems are not likely to occur in the future.

e. Do Not Subject Rule 163 Pre-Filing WKSI Communications to Reg. FD

As discussed in A.4.b.i. on page 27, we believe pre-filing communications by WKSIs should not be subject to Regulation FD.

f. Do Not Make Section 5 Violations Also Reg. FD Violations

The Proposal would amend Regulation FD to list the types and means of communications that would be excluded from the regulation. Since the only communications that would not be a violation of Section 5 that would be covered by this exemption are pre-filing communications made by WKSIs, we suggest that the Commission specifically exclude this category of communication from the exemption rather than turn Section 5 violations into Regulation FD violations as well. If our suggestion in e. above is followed, there would be no need even to list these Rule 163 communications as an exception to the exemption.

g. Add Exclusion for Underwritten Secondary Offerings

We believe that *underwritten* secondary offerings off a Rule 415(a)(1)(i) shelf registration statement, on a stand-alone basis and not in combination with a primary offering by the issuer, should be excluded from Regulation FD as well. The reason given in the adopting release for Regulation FD for excluding shelf offerings of the types specified in Rule 415(a)(1)(i) through (vi) was that such offerings are typically continuous offerings which would therefore give issuers a basis for claiming a continuous (essentially permanent) exemption from Regulation FD. This rationale does not apply to the typical underwritten secondary offering. More generally, and for the same reason, we believe that offerings of any of the types specified in Rule 415(a)(1)(i) through (vi) should be excluded from Regulation FD if the offering is not a continuous offering. This broader change could be accomplished by revising the exclusionary phrase at the beginning of Rule 100(b)(2)(iv) to read as follows: "other than a continuous offering of the type described in any of Rule 415(a)(1)(i) through (vi) under the Securities Act . . .".

4. Simplification and Clarification of Certain Rules

We agree with the Commission's incremental approach in the Proposals, and accept that doing so necessarily complicates the structure of the existing and proposed rules. We nevertheless believe that several simplifications can and should be made. These are discussed below.

a. Eliminate Redundancy in Definition of "Well-Known Seasoned Issuer"

The proposed definition of the term "well-known seasoned issuer" in Rule 405 could be shortened by eliminating paragraphs (3), (4) and (5) thereof, the substance of which paragraphs appear to be covered by the other elements of the proposed definition. The requirements of these paragraphs, relating to the issuer being required to file Exchange Act reports and materials and having complied with those filing obligations, is subsumed under the requirement of paragraph (1) of the proposed definition that the issuer be eligible to use Form S-3 for primary offerings of its securities. (We assume in this comment that it is not intended that a subsidiary must itself be a reporting issuer in order to register its guarantees as contemplated by paragraph (2) of the proposed definition.)

The requirement of paragraph (4), that the issuer has filed all the material it was required to file in the last 12 months under Exchange Act Sections 13, 14 or 15(d), also appears to be addressed by the requirement in paragraph (6) of the proposed definition that the issuer not be an "ineligible issuer," since failure to make the specified filings is one element of the definition of that term. As noted in A.3.g. on page 42, we recommend deletion of that requirement from the "ineligible issuer" definition. The substance of the requirement would be retained for the WKSI definition by virtue of paragraph (1).

It also appears that the cross-references in paragraph (1)(i) of the proposed definition to paragraphs (1)(i)(A) and (1)(i)(B) should instead both be to paragraph (1)(ii)(B). The cross-reference to General Instruction I.D. of Form S-3 should be to I.C.; and the cross-reference to General Instruction I.C. of Form F-3 should be to I.A.5.

b. Define "By or on Behalf of the Issuer"

The phrase "by or on behalf of the issuer" is used in several of the proposed rules and is defined essentially identically in each of them. We generally agree with the definition as proposed, but urge that the definition be expanded to include the important concept that a communication will not be considered to have been made by or on behalf of an issuer if the communication is made by a person in a manner that is contrary to the policies and procedures of the issuer, or other relevant organization, that are reasonably designed to prevent issuance of the communication, either at all or by that person or at the time that it is in fact made. In this connection, we note that Rule 101(c) of Regulation FD has a similar provision that specifies that an officer, director, employee or agent of an issuer who discloses material non-public information in breach of a duty of trust or confidence to the issuer will not be considered to be acting on behalf of the issuer. The foregoing approach will allow the relevant entity to define the classes of individuals or even third parties who may communicate on its behalf for purposes of the Proposals.

We also suggest that the text of the rules using the phrase could be somewhat simplified, and the intention that the phrase be interpreted similarly in each case could be emphasized, if the definition were added to the general definitions in Rule 405 and deleted from each of the separate rules in which a separate definitional paragraph has been proposed. The

following are the paragraphs of the separate rules that could be eliminated in this fashion: Rule 168(b)(3) and Rule 169(b)(2), each relating to the ordinary communications safe harbors; Rule 163A(c), relating to the 30-day safe harbor; Rule 433(b)(3), relating to free writing prospectuses; Rule 163(c), relating to permitted pre-filing writings by well-known seasoned issuers; and the note to Rule 159A, relating to the issuer as seller interpretation for purposes of Section 12(a)(2) of the Securities Act.

c. Combine Rules 163, 164 and 433

As discussed in A.4.b.x. on page 35, we believe that proposed Rules 163, 164 and 433 should be combined into a single new rule.

In this regard, we invite the Commission to consider, as illustrating one way these rules could be combined, the draft rules suggested by William J. Williams, Jr. that appear in the Commission's public comment file for the Proposals. Analogous draft rules combining Rules 168 and 169 and Rules 430B and 430C have also been suggested.

d. Combine Rules 168 and 169

There is a substantial degree of overlap in the texts of proposed Rule 168, relating to disclosure of factual business information and forward-looking information by reporting issuers, and Rule 169, relating to disclosure of factual business information by non-reporting issuers. These proposed rules could be combined into a single rule (appropriately recaptioned) that would set forth the safe harbor for permitted disclosures by reporting issuers and, as a separate paragraph, the more limited safe harbor for non-reporting issuers. The substantial overlap in the definitions and conditions in proposed Rules 168 and 169 could be avoided by presenting them in a single rule.

e. Combine Rules 430B and 430C

Rules 430B and 430C both address the base prospectus, prospectus supplements and other disclosures in shelf registration. We recommend they be combined into a single rule.

f. Eliminate Preliminary Notes

Proposed Rules 163, 163A, 164, 168 and 169 each begin with a Preliminary Note that states, in substance, that the provisions of the relevant rule are not available for any communication that, although in technical compliance with the rule, is part of a plan or scheme to evade the requirements of Section 5 of the Securities Act. These Preliminary Notes appear to add a troubling element of uncertainty to the otherwise fairly clear requirements of the relevant rules and safe harbors that would be provided by the proposals. The general position that one must comply with the substance of the law as well as its literal form is not novel, and could be applied to most or all of the Commission's rules and regulations. The inclusion of the proposed

Preliminary Notes to these specific rules, on the other hand, may be taken to suggest that there is a substantial level of ambiguity or uncertainty concerning how one may comply with them. This would seriously undermine the effectiveness of these rules in encouraging greater communication by issuers in the offering process and eliminating the current levels of uncertainty that the proposed rules are intended to address.

For these reasons, we urge that the Commission consider deleting these Preliminary Notes and instead provide any general background discussion on these points that it considers appropriate in the adopting release for the rules.

5. Coordination with NASD Shelf Proposals

We have noted in our recent comment letter to the Commission regarding the NASD shelf offering rules (File No. SR-NASD-2004-022) our concerns about the ways in which the NASD proposal is incompatible with automatic shelf registration for WKSIs.

III. MATTERS FOR FUTURE REFORM

We appreciate the reasons for the Commission's decision to limit the scope of the Proposals and proceed incrementally. Subject to the comments in Part II of this letter, we concur that implementation of reform of the registered securities offering process should proceed without undue delay.

At the same time, we believe that efforts should continue to address the needed reform of other areas under the Securities Act in a timely manner. Principal among these is the need to reform unregistered and non-public offerings, including resales. The Commission has indicated that it expects to address the application of the Securities Act to unregistered or non-public offerings.[72] We urge it to do so.

As a result of the technological and regulatory developments that prompted the Commission's re-examination of the registered offering process and propose the reforms in the Release, we believe that the historical premises underlying the dividing lines between registered offerings and private placements, and between private placements and unrestricted secondary sales, need to be examined, rethought and redefined. For example, if seasoned issuers (especially WKSIs) are making public on a virtually continuous basis the information that is required in a registration statement, the need for registration, or access to the kind of information registration would provide, ceases to be a compelling basis for subjecting offerings to registration requirements or private placement restrictions. The issue then of whether to impose

[72] *See* Release at note 25.

the registration requirements is not driven by disclosure content, but rather whether issuers and sellers should be subject to Section 11 or 12(a)(2) liability in the circumstances.[73]

1. Controlling Persons

Viewing the need for registration as driven by liability rather than disclosure considerations, it is possible that the reach of "control person" in Section 2(a)(11) can be confined (at least in the case of seasoned issuers) to those persons who truly can affect the issuer's public disclosure. Accordingly, we recommend that for purposes of Section 2(a)(11) "control" be defined so that absent (a) 20% or more beneficial ownership of voting securities, (b) 10% or more beneficial ownership of voting securities with representation on the board of directors or (c) status as chief executive officer or inside director, there is a rebuttable presumption of absence of control. This would greatly increase certainty for resales in this situation, saving issuers and selling stockholders money, and facilitate liquidity with corresponding capital-raising benefits for issuers. The approach of a rebuttable presumption is consistent with Section 2(a)(9) of the Investment Company Act, although we note that there the ownership threshold is 25%. A rebuttable presumption was also proposed in 1996 by the Advisory Committee on the Capital Formation and Regulatory Processes.[74] To the extent the rules of the New York Stock Exchange and NASD would find "control person" status, such as for purposes of the rules regarding research and recommendations by broker-dealers of control person securities, in circumstances where the above approach would not, consideration should be given to amending those rules as well.

2. Resale of Restricted Securities

The purpose of Section 2(a)(11) of the Securities Act is to prevent evasion of the disclosure and liability consequences of registration. At least in the case of seasoned issuers, it would seem that a person that (a) is not engaged in the business of distributing securities (either as agent or principal) for issuers or their controlling persons, (b) has acquired securities without a deep discount from their current market value and (c) has held them for a meaningful period should be able to resell them freely. Due to the volatility of markets, this should be sufficient to prove that the holder is an investor and not a distributor and prevent evasion of the registration requirements. Short of this, the Commission should consider liberalizing Rule 144, including shortening the holding periods, increasing the volume limits and loosening the restrictions on selling methods. Again, the improvement of liquidity on resales will have a direct benefit for issuers in their capital-raising activities without adversely affecting the protection of investors.

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[73] We assume that the collection of registration filing fees is not a serious or legitimate consideration.

[74] *See* Report of the Advisory Committee on the Capital Formation and Regulating Processes, at 24 (July 24, 1996).

3. Exempt Purchasers

The Commission should consider adopting under the Securities Act a broad definition of "exempt purchasers" derived from the disparate definitions of purchasers deemed to be sufficiently sophisticated to purchase securities without the protection of various requirements of our securities laws.[75] The class of "exempt purchasers" would be narrower than "accredited investors" under Regulation D and broader than "qualified institutional buyers" ("QIBs") under Rule 144A and would include very wealthy individuals. Sales of restricted securities to, and resales among, these exempt purchasers should be exempt from registration. Information with respect to quotations for and transactions in these securities should be publicly available. After a specified period, these securities should be publicly tradeable. The period could be shorter if the issuer is a reporting or seasoned issuer.

4. "Offers" and "General Solicitation"

In view of the telecommunications and media revolution, the Commission should recognize that it is both unrealistic and unnecessary to restrict communications and, therefore, should eliminate all restrictions on "offers" and "general solicitation" with respect to securities being sold other than pursuant to registration under the Securities Act. Eligibility for exemption from registration should turn on the status of the purchasers and to whom they resell their securities, not the number or status of offerees or the method of reaching eligible purchasers.

5. Regulation D

Regulation D should continue to be available, subject to the following changes: As suggested above, the limitation on "general solicitation" should be eliminated. The limitation to use by issuers should be eliminated so that the safe harbor may be used by affiliates and by dealers intermediating between the issuer or affiliates on the one hand and "accredited investors" on the other. Consideration could be given to updating the requirements of "accredited investor".

6. Regulation S

Regulation S's limitations on "offers" and "directed selling efforts" should be eliminated. Existing legal requirements that sales into the United States must either be registered or satisfy an available exemption should be allowed to operate. If further definition of these requirements is necessary, that could be addressed separately.

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[75] See Securities Act Section 2(a)(15), Rule 144A(a)(1) and Rule 501(a), Exchange Act Section 3(a)(54) and Investment Company Act Section 2(a)(51)(A).

7. Integration

In the 1998 Aircraft Carrier Proposals, the Commission proposed some helpful steps to clarify the application of the integration doctrine, especially as it related to the integration of public and private offerings. It adopted, however, only certain limited reforms in Rule 155 that addressed the ability of an issuer to do a registered offering after an abandoned private offering and, correspondingly, a private offering after an abandoned public offering.

We believe that the Commission can facilitate the capital formation process without sacrificing investor protection by further and more broadly clarifying the application of the integration doctrine, both as among exempt offerings and as between exempt and registered offerings. This clarification could involve:

- Greater certainty as to the application of the various factors relevant to an integration analysis, as well as safe harbors from integration that are not solely time dependent.[76] In addition, the present 6-month safe harbors could be shortened, for example to 30 days under certain circumstances as recognized in Rule 155.
- Clarification of the meaning of "completion" of an offering for purposes of integrating exempt and registered offerings, including the treatment of rights constituting a continuing offering.
- Broadening of the Rule 155 safe harbors beyond abandoned offerings to encompass completed offerings and beyond private offerings to encompass other exempt offerings.

8. Interpretive Matters

The efficiency of the registered offering process can be as much affected by staff administrative and interpretive positions as by formal rules. We believe it would be a worthwhile effort for the staff to review its administrative and interpretive positions that affect the offering process, including disclosure, accounting and Section 5 matters, and the method by which these positions are developed, maintained and reviewed.

As only one example, experienced practitioners have commented on a recent trend to find more sellers to be "underwriters." This issue has come up, for example, in the context of (1) derivatives dealers acquiring issuer shares on settlement of a derivatives contract in connection with establishing a hedge and (2) broker-dealer affiliates wanting to register for resale securities acquired in an exempt offering in which the affiliated broker-dealer did not participate. While denomination as an "underwriter" can have liability and other consequences, a significant practical impact is to render short-form registration on Forms S-3/F-3 unavailable for many issuers by converting a resale registration into a primary offering which has more

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[76] *See* 2001 Letter, *supra* note 25.

stringent eligibility requirements. Without prejudging the outcome, we think it would be useful for the staff to review this issue having in mind the need to balance the consequences of "underwriter" designation with the requisite protection of investors.

*   *   *

We hope these comments are helpful to the Commission and the Staff. Members of the Committee would be happy to engage in further dialogue and bring additional market participants to any discussion of these issues.

Respectfully Submitted,

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Dixie L. Johnson, Chair
Committee on Federal Regulation of Securities

/s/ John T. Bostelman
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(Enclosure)

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SECURITIES ACT REFORM PROPOSALS
Summary of Principal Comments of ABA Committee on Federal Regulation of Securities

Proposed Rule	Comment	Section II Reference	Page No.
Communications			
137-139 [research safe harbors]	Extend "research report" definition to oral statements and any information, opinion or recommendation (even if not sufficient for investment decision)	A.1.b.	9
	Permit brokers and dealers to rely on issuer periodic report identification as blank check company, shell company or penny stock issuer	A.1.g.	12
137 [research by non-participating dealer]	Clarify that publication of research by a non-participating dealer in IPO aftermarket is not a Section 4(3) "transaction"	A.1.c.	10
138 [debt research during equity offering and *vice versa*]	Delete requirement that Exchange Act reports be current	A.1.d.i.	10
	Eliminate new condition for reports on same types of securities in regular course of business	A.1.d.ii.	11
	Extend to voluntary filers	D.4.b.	77
	Change "designated offshore securities market" to any offshore market for seasoned non-reporting foreign private issuers	D.1.a.iii.a)	
139(a)(2) [industry research]	Extend to non-reporting issuers, or at least to voluntary filers	A.1.e. & D.4.b.	12 & 77
139(a)(1) [issuer-focused research]	Change "reports" to "report" to clarify that only the initiation report is excluded	A.1.f.i.	12
	Delete requirement that Exchange Act reports be current	A.1.f.ii.	13
	Change "designated offshore securities market" to any offshore market for seasoned non-reporting foreign private issuers	D.1.a.iii.a)	64
	Extend to unseasoned reporting issuers, voluntary filers, seasoned Schedule B issuers, investment companies (especially exchange-traded funds and closed-end funds) and business development companies	A.1.f.ii., D.4.b. D.1.a.iii.a), D.2.a. & D.6.c.	13, 77, 64, 73 & 84
138 & 139	Extend to all private offerings to accredited investors	A.1.h.	14
168 [factual business information and forward-looking information by reporting issuers]	Define "part of the offering activities" and eliminate exclusion from definition of "forward-looking information"	A.2.a.i	15
	Eliminate "previously released" requirement for forward-looking information	A.2.a.ii.	15
	Expand covered information to include information requiring a Form 8-K or 6-K	A.2.a.iii. & D.1.a.i.a)	16 & 63
	Extend to seasoned non-reporting foreign issuers, voluntary filers, investment companies and business development companies	A.2.a.iv.	16
	Combine Rules 168 and 169	E.4.d.	98
169 [factual business information by non-reporting issuers]	Eliminate limitation on potential recipients	A.2.b.i.	17
	Add protection for forward-looking statements (other than projections)	A.2.b.ii.	17

Proposed Rule	Comment	Section II Reference	Page No.
163A [30-day pre-filing safe harbor]	Extend to protect Section 2(a)(3) offers for all purposes, not just from Section 5(c)	A.3.a.	18
	Clarify “by or on behalf of the issuer”	A.3.b.	19
	Clarify steps to prevent republication	A.3.c.	20
	Eliminate ineligibility from Rule 163A for “going concern” qualification	D.7.a.	89
	Extend to Form S-8 offerings	A.3.d.	21
134 [communications not deemed a prospectus]	Expand items of permitted information to include green shoe, CUSIP, market price, prices of comparables, use of proceeds and brief business description.	A.4.a.i.	23
	For Rule 134(d) indications of interest, expand permitted information (or confirm *Wit Capital*)	A.4.a.ii.	24
	Permit reliance in existing Rule 134 items in IPOs before price range is filed	A.4.a.iii.	25
	Allow access in lieu of delivery for indications of interest in offerings by seasoned issuers	A.4.a.iv.	26
	Add confirmation that base prospectus is sufficient to enable Rule 134 communications	A.4.a.	18
163 [pre-filing free writing prospectuses by WKSIs]	Extend to all seasoned (S-3/F-3 eligible) issuers, not only WKSIs	C.2.a.i.	53
	Combine Rules 163, 164 and 433	A.4.b.xiii.	35
	See also Rule 433 comments below		
164 [post-filing free writing prospectuses]	*See Rule 433 comments below*		
433 [conditions for free writing prospectuses – filing, legend, electronic road shows, media publications]	Clarify existing road show practices are “oral” and draw the oral vs. written distinction based on live and not retained rather than communication method	A.4.c.	36
	Eliminate filing for all free writing prospectuses, or at least for WKSI offerings	A.4.b.i.	27
	Narrow the filing requirements to free writing prospectuses (a) used by the issuer and (b) for which the issuer provided information to evade the filing requirement. Alternatively, narrow “by or on behalf of the issuer.”	A.4.b.ii.	28
	Confirm that free writing prospectuses are evaluated within the total mix of information conveyed to the investor, and not in isolation	A.4.b.iii.	30
	Permit unseasoned reporting issuers and voluntary filers to use free writing prospectuses without physical delivery of the statutory prospectus (the same as for seasoned issuers), so that physical delivery is required only in IPOs	A.4.b.iv.	30
	Clarify that an underwriter will not be a seller in respect of a free writing prospectus created by another underwriter to which the first underwriter does not refer	A.4.b.v.	30
	Eliminate requirement that free writing prospectus not be inconsistent with statutory prospectus	A.4.b.vi.	31
	Restructure so filing, legend and record retention are requirements, but not conditions to Section 5 exemption. Eliminate requirement to redistribute if legend unintentionally omitted. Clarify cure provisions so having	A.4.b.vii.	33

Proposed Rule	Comment	Section II Reference	Page No.
	compliance policies is good faith effort to comply, defects in violation of those policies are unintentional and discovery of defect occurs only when known to a responsible senior official		
	Add a cure provision for IPOs where free writing prospectus is inadvertently used before the price range is included in statutory prospectus	A.4.b.viii.	33
	Expand exclusion from free writing prospectus status for archived and historical information on issuer's web site also to cover third party material hyperlinked from the issuer's archived and historical section	A.4.b.ix.	33
	Clarify/narrow filing conditions for media publications not prepared or paid by issuer, including limiting filing to the original article (not republication), allow instead the filing of a transcript, extend filing deadline to four business days and apply the same rule to affiliated *bona fide* media	A.4.b.x.	34
	Confirm rating agency reports are not free writing prospectuses	A.4.b.xi.	35
	Require record retention only where filing not required	A.4.b.xii.	35
405 – "ineligible issuers"	Make ineligibility for convictions, settlements and orders prospective and limit to securities fraud violations by parent-issuer	A.4.d.i. & ii.	42 & 43
	Eliminate ineligibility for non-current Exchange Act reports	A.4.d.iii.	44
	Eliminate ineligibility for limited partnership offerings other than through firm commitment underwritings	A.4.d.iv	44
Liability			
159 [information at time of sale for §12(a)(2)]	Clarify time of sale means when, under terms of the contract of sale and applicable state law, the purchaser is obligated to purchase the securities without conditions relating to information that may in the future be conveyed, including a right to disaffirm subsequently granted.	B.1.	45
Rule 176 [relevant factors for §11(d) due diligence]	Add factors to reflect what is reasonable takes into account what can be accomplished in the time frame of fast shelf deals and information-gathering efforts from prior offerings and other non-offering activities	B.2.	47
	Expand to address §12(a)(2) "reasonable care" defense	B.2.	47
§11(a) [registration statement liability]	Establish time of liability for experts and outside directors in shelf registration as filing date of most recent annual or quarterly report	B.3.	49
159A [issuer as §12(a)(2) seller]	Clarify issuer is not seller regarding registered aftermarket transactions	B.4.	50
	Exclude "any other communication"	B.4.	50
12(a)(2)	Confirm Aircraft Carrier statement that §11 requires a more diligent investigation than §12(a)(2)	B.5.	50
412 [modified or superseded documents]	Move R.412(d) to R.430B and change "may" to "shall be deemed" in R.412(a)	B.6.	50

Proposed Rule	Comment	Section II Reference	Page No.
Changes to the Offering Process			
405 – “well-known seasoned issuer”	Expand eligibility to less than $700 million public float, specified ADTV trading volume or specified number of significant registered debt offerings in three years	C.3.b.-d.	56–58
	Allow WKSI qualification based on nonconvertible securities	C.3.e.	58
	Clarify it includes worldwide float for foreign private issuers	D.1.b.	67
	Eliminate paragraphs (3), (4) and (5), which are subsumed in (1)	E.4.a.	97
457(r) [filing fees]	Extend pay-as-you-go filing fees to all seasoned (S-3/F-3-eligible) issuers, not just WKSIs	C.2.a.ii.	53
413(b) [registration of additional classes and issuers]	Extend to all seasoned issuers, not just WKSIs, the ability to add new classes of securities and new subsidiaries by automatically effective post-effective amendment	C.2.a.ii.	53
415 [shelf registration]	Eliminate the three-year shelf blackout for seasoned issuers that are not WKSIs by permitting continued use of old shelf for any purpose until restatement shelf becomes effective	C.2.a.iii.	54
430B	Permit seasoned issuers that are not WKSIs to omit from shelf base prospectus the designation of the offering as primary or secondary, the names of selling security holders and the plan of distribution	C.2.a.iii.	54
Forms S-4/F-4 [registration of securities in business combinations]	Conform to changes to Forms S-1/F-1 to permit backward incorporation by reference as substitute for deleted Forms S-2/F-2	E.2.e.	94
172 & 173 [delivery of final prospectuses & notice of registration]	Remove timeliness of Rule 424 filing as a condition to Section 5 exemption	C.4.a.i.	59
	Extend to investment companies and business development companies	D.6.g.	88
	Eliminate Rule 174 requirement that dealers deliver prospectuses (or provide Rule 173 notices) in post-IPO aftermarket trading	C.4.a.iv.	60
E-Sign Act	Interpret a condition that prospectus “accompany or precede” a communication as not a “requirement” subject to E-Sign Act’s procedures	C.4.b.	61
Exchange Act Reporting			
Item 1A of Forms 10, 10-K and 10-Q [risk factors]	Limit risk factor disclosure to that required by Reg. S-K Item 503(c)	E.1.a.	90
	Extend risk factor disclosure to Forms 10-SB and 10-KSB for small business issuers		
Item 1B of Form 10-K and Item 4A of Form 20-F [disclosure of staff comments]	Allow registrants alternative of ceasing registered offerings in lieu of disclosing staff comments outstanding more than 180 days	E.1.b.	91
Voluntary filer check box on Form 20-F	Do not require disclosure of voluntary filer status for foreign private issuers	D.1.c.i.	71

Proposed Rule	Comment	Section II Reference	Page No.
Reg. FD [prohibition on selective disclosure of material non-public information]	Delete references to "capital formation," "account of the issuer," and "underwritten offering" and delete introductory parenthetical regarding evasion	E.3.a.-c.	95-95
	Do not exclude pre-filing WKSI communications under Rule 163 from the Reg. FD offering exemption	E.3.e.	96
	Replace list of types of communications covered by the registered offering exemption with statement exempting all communications in connection with the offering (except pre-filing WKSI communications if that limitation is retained)	E.3.f.	96
	Add exemption for *underwritten* secondary offerings	E.3.g.	96