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

January 31, 2005

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

Dear Mr. Katz:

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments regarding the proposed reforms to the securities registration and offering rules under the Securities Act of 1933, as amended (the "Securities Act") contained in the Commission's proposals issued on November 3, 2004[1] (the "Proposed Reforms"). Citigroup Global Markets Inc. is a subsidiary of Citigroup Inc., a global financial services company that does business in more than 100 countries. Citigroup Inc. is a significant participant in the capital markets, both as an issuer of securities and, through Citigroup Global Markets Inc. ("Citigroup") and other subsidiaries, as an intermediary and financial advisor in a variety of securities transactions designed to raise capital for outside issuers and investors. Citigroup and its affiliates provide full-service investment and corporate banking and securities brokerage services to corporations, governments and individuals on a global basis. Citigroup is grateful for the opportunity to participate in the reform-making process and applauds the Commission for its efforts to address the concerns raised by practitioners and market participants in connection with the Commission's proposals contained in the 1998 "Aircraft Carrier" Release.[2]

Citigroup, as a member of the Securities Industry Association, The Bond Market Association and the Asset Securitization Forum, has participated in the preparation by those organizations of detailed letters providing comments on the Proposed Reforms. Because these organizations represent the views of the firms that underwrite and make markets in virtually all

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

2 *See* SEC Release Nos. 33-7606; 34-40632; IC-23519 (Nov. 3, 1998).

of the securities distributed and traded in the United States, and that have thereby contributed enormously to the growth and success of the U.S. capital markets, we believe that the views of these organizations and their member firms should be given considerable weight by the Commission. While we note that there are some inconsistencies among the views expressed by these organizations on the Proposed Reforms, we generally support the views expressed by these organizations in their respective comment letters.

We support the objectives of the Proposed Reforms and agree with the manner in which the Commission proposes to implement them. In particular, Citigroup strongly endorses the proposals regarding automatic shelf registration and other shelf reforms as well as those pertaining to the liberalization of communications. However, we have prepared this response with the goal of helping to ensure a seamless integration of the Proposed Reforms as well as ensuring consistency in their application and effectiveness once they are adopted. We have set forth some suggestions below in an effort to focus on what we consider to be some of the most significant issues raised by the Proposed Reforms.

I. NEW CATEGORIES OF ISSUERS

A. Ineligibility for Well Known Seasoned Issuers ("WKSI") Status

The Proposed Reforms would establish a category of "ineligible issuers" that would be prohibited from qualifying for "well-known seasoned issuer," or "WKSI," status as well as from using the proposed communication and registration reforms. As currently proposed, this definition would disqualify most financial institution issuers, such as Citigroup Inc., that have significant broker-dealer or investment advisory businesses from the automatic shelf registration and communications proposals. The advantages of the Proposed Reforms would more likely be denied to issuers in these businesses, since a technical violation of the federal securities laws by a broker-dealer employee would result in a loss of WKSI status. While we generally support a reasonable disqualification, the proposed disqualification is overbroad, and draconian as applied to financial services firms.

A more appropriate standard would be that which appears in the safe harbor provisions in Section 27A under the Securities Act and Section 21E under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). These safe harbors are unavailable for companies that have violated the antifraud provisions of the federal securities laws, which require intent to defraud or recklessness in committing a violation. We believe an intent-based standard would be more consistent with the goals of the Proposed Reforms, which cites the Private Securities Litigation Reform Act of 1995 as support for these disqualifying criteria.

We urge the Commission to narrow the definition of ineligible issuer to cover (i) an antifraud violation (ii) by the issuer itself (excluding its affiliates) (iii) where the violation pertains to the issuer's financial statements, its public disclosures or its periodic filings.

Furthermore, the proposed definition of ineligible issuer would, upon adoption, retroactively, and disproportionately, penalize issuers, such as Citigroup Inc., that have, or whose

subsidiaries have, entered into settlements and decrees and requested and received relief from collateral consequences based on the securities rules and regulations applicable at that time. We believe the Commission should apply the definition prospectively rather than retroactively, so that issuers may have the opportunity to discuss and negotiate with their regulators waivers to this triggering event in regulatory proceedings going forward.

B. Rights Offerings by Foreign Private Issuers

We strongly support the Proposed Reforms' creation of a new WKSI category of issuers. However, we are concerned that the criteria for WKSI status as proposed would not, as suggested by the Commission, succeed in increasing the number of registered rights offerings by non-U.S. issuers because a large portion of rights offerings are conducted by foreign private issuers experiencing economic difficulty. As a result, many foreign private issuers may not satisfy the $700 million public float eligibility criterion for WKSI status due to recent decreases in the prices of their stock. In order to achieve the goal of encouraging more foreign private issuers to conduct registered rights offerings in the United States, and thereby increase participation in such offerings by U.S. investors, the Commission could permit foreign private issuers to satisfy the public float requirement by reference to an earlier time period for purposes of a rights offering. We believe it will also be necessary for the Commission to work with the major U.S. exchanges and over-the-counter markets to ensure that rules regarding rights offerings do not create any "speed bumps" for rights offerings by WKSIs that are foreign private issuers.[3]

II. SHELF REGISTRATION PROPOSALS

A. Extend Flexibility of Certain Automatic Shelf Registration Proposals to All Seasoned Issuers

We believe that certain of the elements of automatic shelf registration should be extended to all seasoned issuers, not just to WKSIs. Notably, all seasoned issuers should have the flexibility to modify a shelf registration statement after it has been declared effective to (i) amend the plan of distribution by means of a prospectus supplement or incorporation by reference from their Exchange Act filings; (ii) add by post-effective amendment additional classes of securities of the issuer and eligible subsidiaries; and (iii) allocate the mix of securities registered among the issuer, its eligible subsidiaries and selling security holders by means of a prospectus supplement or incorporation by reference from their Exchange Act filings. These options will greatly assist issuers looking to access capital markets without sacrificing investor protection.

B. Coordinate with NASD

We strongly support the establishment of automatic shelf registration for WKSIs pursuant to proposed General Instructions I.D. and I.C. of Forms S-3 and F-3, respectively. To

[3] *See, e.g.*¸ NYSE LISTED COMPANY MANUAL § 703.03 (setting forth certain timing and procedural requirements regarding rights offerings related to securities listed on the exchange).

ensure the effect of this proposal is not undermined by other regulators, we encourage the Commission to coordinate the adoption of automatic shelf registration with the efforts of the NASD, Inc., which has also proposed changes to its rules regarding shelf offerings.[4]

III. COMMUNICATION REFORM PROPOSALS

We generally are supportive of the proposed communications reforms but have set forth several suggestions below for improving them.

A. Free Writing Prospectuses

1. Permit Generic Legends

Proposed Rules 163 and 164, as currently drafted, would require specific information to be included in the required legend of a free writing prospectus. For example, any free writing prospectus would need to contain a legend with the issuer's name and a toll-free phone number to contact the issuer. Although we agree with the objectives behind the Commission's legend requirement, we believe that setting forth specific informational requirements may actually deter issuers and underwriters from using free writing prospectuses because the provision of such information will require additional preparation time and because offering participants may want to avoid risking a potential violation resulting from the failure to include the proper legend. It would be preferable for the Commission to permit the inclusion of a generic legend in free writing prospectuses, in which the issuer's name and contact information may be omitted, but in which the contact information and toll-free telephone number of an underwriter's prospectus delivery service is provided instead. In the alternative, the legend could include information as to how and where investors may obtain access to a statutory prospectus (such as the URL address for the Commission's web site). This approach would have the effect of encouraging offering participants to take advantage of their ability to use free writing prospectuses as well as increasing the efficiency with which such free writing prospectuses are delivered without decreasing the amount of useful information available to investors.

2. Discovery of Failure to Comply with Legend Requirement

The Proposed Reforms do not specify who must discover the failure to include the requisite legend in a free writing prospectus in order to trigger the cure provisions. We request that the Commission clarify who must make this discovery before the re-circulation of a free writing prospectus with the proper legend is required. For example, Regulation FD currently requires discovery by a senior official of the issuer or deems discovery to have occurred if a senior official would be considered reckless in not knowing of the failure. We suggest the Commission adopt a similar test for the legend requirements and state that for a registered broker-dealer, discovery has only occurred when there is actual knowledge of the violation by a compliance or senior official who, as a result of his/her position in the firm, would be expected to know and understand the filing and legend requirements of proposed Rules 163 and 164 and the circumstances under which the cure provisions of these rules apply.

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[4] *See* SEC Release No. 34-50749 (Nov. 29, 2004).

3. Permit Filing of Free Writing Prospectus to Cure Improper Legending

As set forth in the Proposed Reforms, proposed Rule 163(b)(1)(ii)(C) would require that a free writing prospectus originally delivered to investors without a proper legend be distributed with the proper legend to all recipients of the original free writing prospectus, even after the contract of sale has been made. We suggest the Commission revise this proposal to permit a cure by filing of an amended free writing prospectus in lieu of requiring the redistribution of the amended free writing prospectus to the initial recipients. This alternative would provide offering participants with practical flexibility in complying with the free writing prospectus requirements, especially when the recipients of unlegended free writing prospectuses cannot be identified, without sacrificing investor protection as a proper disclosure record would be maintained.

4. Electronic Road Shows

a. Presentations During Live Road Shows

Under the Proposed Reforms, all graphic communications that are transmitted electronically from issuers or underwriters to investors would fall under the category of free writing prospectuses and, therefore, any electronic road show used to market securities would be deemed a free writing prospectus. However, the Proposed Reforms do not clarify whether slides and/or power point presentations that are used during a live road show would also be considered graphic communications that would trigger the proposed free writing prospectus requirements. Although we believe it is the Commission's intention that such slides, projected video material and other graphics used, but not distributed to investors, during a live road show, would still be considered oral communications and therefore would not fall under the definition of a free writing prospectus, we urge the Commission to make this clear by explicitly stating so. Failing to make this clarification and requiring issuers to file such slides and presentations, it would result in a significant limitation of the information that issuers would be willing to provide during these live road shows, thereby having the undesired effect of reducing, rather than expanding, the amount of useful information made available to investors during the course of making their investment decisions.

b. Live Telephone Calls

The Proposed Reforms also do not clarify whether slides and/or presentations that are posted on a web site in connection with a live management telephone call would be considered graphic communications that would require filing under the free writing prospectus requirements. We believe that it is also the Commission's intention that such presentations not be treated as graphic communications transmitted electronically as long as investors cannot download or replay them, and we request confirmation of this position in the release adopting the proposals (the "Adopting Release").

c. Audience Overflow Rooms at Road Shows

In the Proposed Reforms, the Commission has inquired whether the use of electronic media to transmit an otherwise oral presentation to an audience overflow room should be considered a written communication and therefore an electronic road show, even if the presentation is not interactive. Issuers and underwriters commonly use overflow rooms during road shows in order to permit flexibility with respect to the size of the audience and to ensure that each of the potential investors attending the road show has equal access to the information presented. We believe that if the information presented through the use of electronic media in such circumstances cannot be replayed or downloaded, its use is ancillary to the presentation itself and should not be considered either a graphic communication transmitted electronically or a written communication.

B. Proposed Amendments to the Rule 134 Safe Harbor

1. Expand Scope of Safe Harbor

We suggest expanding the type of information that would be permitted under Rule 134 to other types of information that are similar in nature, scope and purpose to the information added under the revised Rule 134 in the Proposed Reforms Commission's proposals. We believe a Rule 134 notice should also be permitted to include, among other items, (i) proposed use of proceeds from the registered offering; (ii) the number of years the issuer has been in operations; (iii) whether the offering includes an over-allotment option; (iv) the CUSIP number or other security identification information; (v) if the security being offered is a fixed income security, the spread to Treasury securities; (vi) the issuer's status (reporting or non-reporting; seasoned or WKSI); (vii) the issuer's market capitalization; (viii) market prices and trading volume of the offered securities and (ix) any other terms similar to yield and maturity, such as conversion rights, call provisions, put options and redemption rights. In essence, these terms are similar to those that are currently permitted by Rule 134 as well as those that the Commission proposes to add in the Proposed Reforms, as they identify important details of the offering.

2. Eliminate Price Range Requirement in connection with an IPO

As proposed, issuers that are commencing an initial public offering may be limited in their ability to take advantage of the safe harbor for notices to investors due to the requirement that a preliminary prospectus, which includes a price range, precede or accompany the Rule 134 notice. We do not believe the Commission intended the price range requirement to apply in the case of Rule 134 notices not soliciting indications of interest. In these circumstances, price information for an initial public offering may not be available at the stage when an issuer would want to use a Rule 134 notice—as in the case of a "save the date" notice for an upcoming road show. We request that the Commission confirm this position. We understand, however, that the price range requirement would apply in the context of an initial public offering where the issuer wishes to solicit an indication of interest or communicate a conditional offer to buy a security in reliance on proposed Rule 134(d).

3. Clarify Information Regarding Directed Share Programs is Permitted

The Proposed Reforms confirm that the expansion of information permitted under proposed Rule 134(a)(10) is intended to permit underwriters to convey procedural information

about directed share programs.[5] Because issuers also communicate directly with their employees about these programs, we request the Commission to clarify that directed share program information may also be distributed by an issuer, including more limited communications prior to the availability of a price range.

4. Wit Capital Corporation Line of No-Action Letters

The *Wit Capital Corporation* line of no-action letters[6] and related Commission staff practice permit the use of conditional offers in reliance on Rule 134(d). We do not believe the changes to Rule 134 and the other elements of the Proposals were designed to affect the availability and usefulness of this regime, but believe it is critical that the Commission confirm this to ensure the conditional offer regime remains in place.

C. Research Reports

1. Include Oral Communications in Definition of Research Report

Currently, Rules 137, 138 and 139 do not contain a definition of the term "research report." In light of this omission and attendant ambiguity, the Commission has proposed to import the definition of research report from Regulation AC. We believe the Commission should broaden the proposed definition to make clear that, consistent with the current regime under Rules 137, 138 and 139, the definition of "research report" includes both oral and written communications. To ensure these proposals serve the purpose of increasing the amount of information made available, it is critical that the Commission continue to extend the benefit of the safe harbor to oral communications, such as analyst conference calls, that otherwise satisfy the requirements of the safe harbors.

2. Expand Availability of Rule 139 Issuer Safe Harbor to All Reporting Issuers

The Commission has proposed extending the industry research safe harbor in Rule 139(a)(2) to all reporting issuers. We believe the issuer-specific safe harbor in Rule 139(a)(1) should also be extended to cover all reporting issuers. The Proposed Reforms indicate that the Commission has relied on the recent regulatory and structural changes to the research analyst regime, in part, to justify the proposals to expand the availability of the safe harbors. In light of the enhanced independence of research, investors are better served by the continuation of research during the pendency of a follow-on offering for a non-seasoned reporting issuer than by the loss of coverage that the current rule imposes.

3. Expand Availability of Rules 138 and 139 to All Private Offerings

We support the Commission's proposal to expand the scope of the research safe harbors to Rule 144A and Regulation S offerings. However, we believe the current restrictions on the

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[5] *See* Note 126 of the Release.

[6] *See Wit Capital Corp.* (avail. July 14, 1999); *W.R. Hambrecht & Co.* (avail. July 12, 2000); *Bear, Stearns & Co., Inc.* (avail. July 19, 2000); *Wit Capital Corp.* (avail. July 20, 2000).

use of research reports affect virtually all offerings and not just registered offerings or those conducted in accordance with Regulation S or Rule 144A. As noted above, we also believe that the regulatory and structural changes to the research analyst regime justify expanding the safe harbors to any type of exempt private offering. Whether research is determined to constitute an offer or general solicitation or advertising should not depend on the exemption that is being relied upon.

4. Eliminate "Designated Offshore Securities Market" and Trading History Requirements under Rules 138 and 139(a)(1)

We do not believe the availability of the safe harbors under Rules 138 and 139 for non-reporting foreign private issuers should be predicated on whether the issuer's securities have traded on a "designated offshore securities market," as defined in Regulation S or whether the stock has been traded for a period of 12 months on an offshore exchange. Satisfaction of the public float requirement under Form F-3, coupled with the recent regulatory and structural changes to the rules governing analyst conduct and the dissemination of research reports, will ensure the issuer receives market and analyst coverage such that any research reports do not unduly condition the market for an issuer's securities regardless of the market on which they are traded.

5. Technical Correction to Proposed Amendments to Rule 139

In connection with the proposed amendments to the issuer research report safe harbor under Rule 139, the proposed publication or distribution requirement refers to "research reports." We believe it was the Commission's intent to permit broker-dealers to rely upon the safe harbor if a single research report has been published or distributed in the regular course of its business. For this reason, we request that the reference to "research reports" under proposed Rule 139(a)(1)(iii) be revised to refer to only a single "research report." This revision would still prohibit a broker-dealer from relying on Rule 139 to initiate coverage on an issuer or its securities.

D. Clarify Regularly Released Factual Business and Forward Looking Information Safe Harbors are Non-Exclusive (Rules 168 and 169)

The Commission has proposed safe harbors from "gun-jumping" violations that would permit ongoing communications at any time during the offering process of regularly released "factual business information" by all issuers and "forward-looking information" by reporting issuers. The proposal regarding factual business information would essentially codify the Commission's longstanding position that such communications do not violate Section 5, and we support the Commission's proposal to provide a safe harbor for each of these communications.

However, as the proposals explicitly delineate what information will qualify for protection under the Rule 168 or 169 safe harbors, we believe some uncertainty will remain as to whether certain information falls within the scope of the definitions for "factual business information" or "forward-looking information." As a result, we suggest the Commission clarify

that the proposed safe harbors are non-exclusive and do not represent the sole means of avoiding a Section 5 violation.

IV. LIABILITY ISSUES

A. Liability for Free Writing Prospectuses under Sections 12(a)(2) and 17(a)(2)

1. Clarify Free Writing Prospectus Liability

Proposed Rule 159 would provide that liability under Sections 12(a)(2) and 17(a)(2) would attach for information conveyed to an investor before an investment decision is made. The Commission does not, however, clarify whether prospectus liability for free writing prospectuses would be evaluated on (a) the information contained solely within the "four corners" of a free writing prospectus or (b) the entire body of information "conveyed" to an investor before an investment decision is made. We believe it is the Commission's intent that liability should be based on the entire body of information that has been conveyed to an investor prior to the investment decision. To provide offering participants with greater clarity as to how liability will be evaluated, we suggest the Commission confirm that free writing prospectus liability under Sections 12(a)(2) and 17(a)(2) will not be evaluated solely based on the information provided in a free writing prospectus. Without such confirmation, the fear of prospectus liability determined in isolation may deter market participants from using free writing prospectuses.

2. Provide Non-Exclusive Safe Harbor Defining "Conveyance"

In proposed Rule 159, the Commission intends to codify its view that the determination regarding liability under Sections 12(a)(2) and 17(a)(2) with respect to an oral communication, prospectus or statement will not take into account information that is conveyed after the time of sale (including the contract of sale). According to the Proposed Reforms, a "sale" (including a contract of sale) of registered securities occurs at the time the investment decision is made. We believe this interpretation is intended to distinguish between the information that is made available to investors prior to and as they are making their investment decision and the final prospectus (including corrections or modifications contained in any final prospectus or Exchange Act reports filed after the time of sale) that becomes available after they have made their investment decisions. However, the Proposed Reforms do not clearly address what would constitute information that has been conveyed to an investor or whether such information must actually be delivered to an investor to satisfy this requirement.

The Commission states in the Proposed Reforms that conveyance of information is determined on a facts and circumstances basis. We believe the Commission should provide more detailed guidance as to what constitutes conveyance. With this goal in mind, we suggest that the Commission create a non-exclusive safe harbor for information that will be considered to have been "conveyed" to an investor under proposed Rule 159A. Such a safe harbor, we believe, should include information provided in a registration statement and any preliminary prospectus or prospectus supplement, Exchange Act reports incorporated by reference, other EDGAR filings, press releases that have been widely and publicly distributed, or some other form of

public disclosure reasonably designed to provide broad, non-exclusionary distribution of the information to the public, such as disclosures contemplated by the definition of "public disclosure" in Rule 101(e)(2) of Regulation FD.

3. Underwriter Liability with respect to Free Writing Prospectuses

Although proposed Rule 159A sets forth the circumstances under which an issuer would be liable for information conveyed in a free writing prospectus, the Commission has not clarified the circumstances under which underwriters may be subject to cross-liability due to the actions of other underwriters. We believe the Commission should clearly state that underwriters will only be subject to liability for information in a free writing prospectus not provided by the issuer that they themselves have distributed or if they have approved the distribution by another underwriter of a free writing prospectus containing such information. An underwriter that sells a security to an investor should not be liable for non-issuer information in a free writing prospectus sent to that investor by another underwriter if the initial underwriter did not approve of the distribution of such free writing prospectus.

4. Definition of "Contract of Sale"

Under proposed Rule 159, liability under Sections 12(a)(2) and 17(a)(2) would be based upon the information made available to investors at the time of the "contract of sale." However, the determination of when a contract of sale has taken place is often dependent upon individual circumstances. Underwriters often confirm sales with different purchasers at different times or on different dates. In addition, underwriters can take conditional orders prior to effectiveness and such orders become binding if the potential purchaser does not take further action within some prescribed time after effectiveness and notice of pricing. We believe the Commission should confirm that the time of contract of sale may be determined under applicable state law by mutual agreement between market participants. This would be consistent with market participants having the ability to determine the time for settlement pursuant to Rule 15c6-1(c) under the Exchange Act.

V. PROSPECTUS DELIVERY PROPOSALS

A. Soften Timely Filing Condition Under Rule 172

We strongly support the Commission's proposed Rule 172, which would eliminate the requirement to deliver a final prospectus in connection with a registered securities offering unless requested by an investor. However, we do not believe the timeliness of a Rule 424(b) filing should be a condition for reliance upon Rule 172. The Commission's existing enforcement options provide adequate incentive to encourage timely filings under Rule 424(b). Moreover, we see no evidence that late filings under Rule 424(b) are prevalent, and if they do occur, they are usually accidental. For this reason, it would be unduly severe to make underwriters liable for potential rescission rights under Section 12(a)(1) when issuers inadvertently submit a filing after the applicable deadline specified in Rule 424(b). In practice, underwriters are forced to rely on issuers to file a final prospectus in a timely fashion, and the Commission should allow issuers to cure late filings if they make a good faith and reasonable effort to comply with the filing requirements. In situations where a noncompliant issuer, for some reason, refuses to file or cure

a prior failure to file, the Commission should also provide underwriters with additional time to prepare and file a final prospectus by the underwriters.

This principle applies with even greater force to broker-dealers that are not members of the underwriting syndicate. As a result, we believe the Commission should remove the link between timeliness of filing of a final prospectus and the ability of broker-dealers that are not members of the underwriting syndicate to rely on proposed Rule 172 to satisfy their aftermarket prospectus delivery obligations under Section 4(3) and Rule 174.

B. Clarify Practice for Use of Term Sheets under Rule 172

Under the Proposed Reforms, if a Rule 172 notice is coupled with a term sheet that includes the final terms of the securities being sold, such notice would be treated as a free writing prospectus. This treatment seems unwarranted under the Proposed Reforms, as Rule 172 notices containing final terms would be disseminated only after an investment decision has been made. As a result, the information contained in the final term sheet would not influence an investor's investment decision. To follow the "access equals delivery" principle underpinning proposed Rule 172, we recommend the Commission clarify in the Adopting Release that a Rule 172 notice containing the final terms of the securities being sold be deemed to be written material that has been distributed after delivery of a final prospectus that meets the requirements of Section 10(a) of the Securities Act and, therefore, not a free writing prospectus under the proposed definition in Rule 405.

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We would be pleased to discuss any of the comments in this letter with the Commission or its staff. If we can be of further assistance to the Commission in this regard, please do not hesitate to contact the undersigned at (212) 816-8894.

Very truly yours,

/s/ Edward F. Greene

Edward F. Greene

General Counsel
Citigroup Global Corporate &
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cc: Hon. William H. Donaldson
Chairman of the Securities and Exchange Commission

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