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

Dear Mr. Katz:

Credit Suisse First Boston (“CSFB”) commends the Securities and Exchange Commission (the “Commission” or the “SEC”) and its staff for the quality of their efforts in proposing significant reforms to the securities registration and offering rules under the Securities Act of 1933, as amended (the “Securities Act”). We welcome the opportunity to provide the Commission with our comments and suggestions regarding the Commission’s proposals (the “Proposals”).<sup>1</sup>

In addition to our own comments, CSFB representatives have participated in the preparation of comment letters being submitted by the Securities Industry Association, The Bond Market Association and the American Securitization Forum on the Proposals, which we generally support.

CSFB believes it is well positioned to address the Proposals from all aspects of the financial markets. CSFB is a leading investment bank providing institutional securities and wealth and asset management services, both individually and as a part of Credit Suisse Group, a global financial services company (“CSG”). Since 2001, CSG’s shares, in the form of American Depositary Shares, have been listed on the New York Stock Exchange. Both CSFB and CSG (and their affiliates) are frequent issuers of securities in the international capital markets. CSFB also provides, among other things, financial advisory and capital raising services and is a leading underwriter of securities globally. Accordingly, CSFB has carefully considered the Proposals from its position as both an underwriter and an issuer of securities in registered public offerings.

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<sup>1</sup> See SEC Release Nos. 33-8501; 34-50624; IC-26649 (Nov. 3, 2004) (the “Release”).

CSFB firmly supports the Commission’s goals of promoting efficiency, competition and capital formation while maintaining investor protection. Given significant developments in the global capital markets and information technology, we agree with the Commission that some changes to the present system are desirable and that improvements can and should be made. In furtherance of these goals, we would like to make suggestions with respect to the following aspects of the Proposals as they relate to both underwriters and issuers in the registered offering process:

**1. Underwriter-related issues**

- a. Uncertain timing of disclosure deadline
- b. Section 12(a)(2) liability
- c. Free writing prospectuses – generic legends
- d. Prospectus delivery
- e. Research reports – technical correction to proposed Rule 139

**2. Issuer-related issues**

- a. Retroactive ineligibility for entry into settlements
- b. Information on issuer’s website
- c. Disclosure of unresolved staff comments

**Underwriter-related issues**

**Uncertain Timing of Disclosure Deadline**

Proposed Rule 159 would base disclosure liability under Sections 12(a)(2) and 17(a)(2) on the information made available to investors at the time of the “contract of sale.” Unfortunately, it is often not clear when a contract of sale is entered into between an underwriter and its customers. In practice, underwriters may confirm sales with different purchasers at different times or on different dates. In addition, conditional offers can be taken prior to effectiveness and become binding orders if the potential purchaser does not take further action. Accordingly, we recommend that the Commission modify proposed Rule 159 to state, in the rule itself, that “time of sale” and “contract of sale” are defined by state law and not federal securities law, and that such stipulations do not implicate the anti-waiver provisions of Section 14 of the Securities Act and Section 29 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). This approach would allow the time of contract of sale to be determined by mutual agreement between market participants. We believe that market participants should be able to determine the time of contract of sale just as they are able mutually to agree to a time for settlement pursuant to Rule 15c6-1(c) under the Exchange Act. Furthermore, we believe it would be helpful for the Commission to clarify in the release adopting the proposals how these rules would interact with current offering mechanics, such as how the assessment of information

available at the time of contract of sale is intended to impact, if at all, conditional offerings whereby an investor agrees to purchase a security prior to the availability of all information included in a prospectus unless the investor affirmatively indicates its decision not to purchase the securities being offered. We are concerned that without further guidance from the Commission such offerings will be negatively impacted, including by the introduction of “speed bumps” into the current process, due to the uncertainty about what information must be provided at what time.

We also request that the Commission further clarify the implications of the “contract of sale” disclosure deadline for pricing-affected information that is delivered post-effectiveness to investors under Rule 430A and other pricing-affected information (*e.g.*, pro forma financial statements and capitalization tables) that is currently delivered to investors after their investment decision is made. We suggest that the Commission clarify that information delivered pursuant to Rule 430A and similar rules be deemed to be included in the information available to an investor at the time of sale (or contract of sale).

We would also like to request that the Commission revisit the effects that proposed Rule 159 would have on the prevailing market practices for asset-backed securities (“ABS”) issuances. As the Commission has recognized and acknowledged in the adoption of the rules and regulations relating to the issuance of ABS, the offering process in a typical ABS transaction involves active discussions between issuers, underwriters and investors. Issuers and underwriters provide more detailed information on the collateral and the transaction structure as prospective investors provide firm indications of interest in the transaction. As a result, we would like to endorse the recommendations of the American Securitization Forum set forth in Section III.A of their comment letter to the Commission regarding the Proposals as they relate to the application of proposed Rule 159 to ABS transactions.

#### Section 12(a)(2) Liability

Although we support the Commission’s goal in the Proposals to clarify the liability framework with respect to registered securities offerings, we believe additional clarification would be useful. Specifically, the Proposals do not clearly state whether an underwriter will be liable under Section 12(a)(2) of the Securities Act for the use of a free writing prospectus (a “FWP”) by the issuer. In addition, the Proposals are not clear as to what liability, if any, there will be among members of the underwriting syndicate for the use of a FWP by one of the underwriters alone and in the preparation of which the other underwriters took no part. Thus, we request further clarification from the Commission that the use of a FWP by one offering participant does not subject other offering participants that have neither used nor distributed such FWP to liability under Section 12(a)(2).<sup>2</sup>

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<sup>2</sup> We note that the Securities Industry Association, in Section 1(c) of its letter to the Commission regarding the Proposals, has made a similar request for clarification. The Securities Industry Association’s letter also proposes suggestions to clarify the relevant liability framework, which we endorse.

## Free writing prospectuses – generic legends

Proposed Rule 163(b)(1) sets forth specific informational requirements as part of the legend that must be included in all FWPs, including issuer-specific information such as the issuer's name and a toll-free phone number to contact the issuer. We concur with the Commission's objectives underlying proposed Rule 163(b)(1) to ensure that FWPs provide the recipients thereof with a means to obtain more information about an issuer and its securities. We are concerned, however, that the specific legend requirements proposed may have the effect of deterring issuers and other offering participants from using FWPs, as they would require increased preparation time and raise additional concerns about FWPs that were disseminated without the appropriate legend.<sup>3</sup> We believe that a preferable approach that is consistent with the Commission's objectives to liberalize communications in connection with registered offerings and encourage dissemination of FWPs would be to allow a more generic legend, such as one that omits a specific issuer's name and contact information and that instead requires that the issuer be identifiable elsewhere in the FWP and further provides a single toll-free phone number of the prospectus delivery department of an underwriter of the registered offering from which a statutory prospectus may be obtained. We believe that this approach would facilitate the timeliness with which FWPs could be delivered while still identifying the FWP as such, as well as providing an equally convenient means for a recipient of a FWP to obtain the statutory prospectus.

## Prospectus Delivery

### *Consent for Electronic Delivery*

Under the Commission's existing general guidance for electronic delivery,<sup>4</sup> we believe that only a handful of underwriters have relied on electronic delivery to comply with their prospectus delivery obligations due to the difficulties in obtaining the advance informed consents effectively required under the 2000 Release. Although the Commission has addressed the issue of electronic delivery of the final prospectus with the "access equals delivery" approach set forth in proposed Rule 172(c)(3), we note that, with respect to preliminary prospectuses, underwriters would still be required under Rule 15c2-8(b) of the Exchange Act to make physical delivery or continue to comply with the 2000 Release's guidance for electronic delivery. In the general spirit of the "access equals delivery" approach adopted by proposed Rule 172(c)(3) and the underlying rationales for that approach described in footnotes 352 and 353 of the Release, we believe it would be appropriate for the Commission similarly to revise its existing general guidance under the 2000 Release and to allow for electronic delivery without advance consent in all contexts. This would be consistent with the Commission's proposed Rule 433(b)(1)(i)(A), in which delivery by hyperlink of a statutory prospectus that accompanies an electronic FWP satisfies the prospectus delivery requirement under proposed Rule 433(b)(1)(i).

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<sup>3</sup> Although proposed Rule 163(b)(1)(ii) does provide a cure for failure properly to legend a FWP, we believe the cure provisions are not sufficiently detailed to provide adequate comfort as to the ability to cure a non-compliant FWP.

<sup>4</sup> See SEC Release Nos. 33-7856; 34-42728; IC-24426 (Apr. 28, 2000) (the "2000 Release").

Thus, for purposes of proposed Rule 433(b)(1)(i), our recommendation would permit electronic delivery without obtaining from the recipient its prior consent to such electronic delivery. Such revisions to existing guidance would:

- (i) clarify any potential inconsistency between the approach described in proposed Rule 433(b)(1)(i) and the guidance contained in the 2000 Release;
- (ii) encourage underwriters to rely increasingly on electronic delivery of the preliminary prospectus to satisfy their prospectus delivery obligations under Rule 15c2-8(b) of the Exchange Act, which would appear to be consistent with the general goals of the Proposals; and
- (iii) facilitate the direct delivery of preliminary prospectuses to potential investors at the time they are receiving information about the offering via FWPs. In furtherance of this goal, the Commission could make a slight modification to the passive “access equals delivery” approach of proposed Rule 172(c)(3) to require that where preliminary prospectuses must be delivered under Rule 15c2-8, they could be actively delivered via electronic e-mail to potential investors by a hyperlink to the document or a notice that it is available on a website.

#### *Rules 172 and 173*

Under proposed Rule 172(c)(3), a final prospectus would be deemed to precede or accompany a security for sale or for delivery after sale for purposes of satisfying Section 5(b)(2) of the Securities Act if the final prospectus is filed with the Commission by the required filing date under Rule 424(b). Although it is customary for underwriters to require that the issuer timely file the final prospectus pursuant to Rule 424(b), we believe that underwriters (and certainly dealers) will have very little, if any, control over whether the issuer actually makes the filing. Thus, dealers would not be able to rely on a filed final prospectus for their delivery requirements unless they were able to confirm it was timely filed, which would be extremely difficult, if not practically impossible, for dealers to confirm. In addition, the underwriters actually involved in the offering that have sent out confirmations in reliance on proposed Rule 172 would violate Section 5 if the issuer did not timely file the final prospectus. We suggest the Commission allow dealers and underwriters to rely on the final prospectus having been filed, without regard to whether the filing was timely made. At a minimum, the Commission should create a cure mechanism or allow for a cure period for underwriters if an issuer does not file the final prospectus by the required filing date so as not unfairly to penalize underwriters.

We also believe it would be appropriate to provide in proposed Rule 173, which permits an underwriter, broker or dealer participating in a registered offering to deliver to its purchasers, in lieu of a final prospectus, a notice that a sale was made pursuant to a registration statement, that simply delivering a written confirmation of sale meeting the requirements of Rule 10b-10 under the Exchange Act and containing the same statement be deemed to satisfy the notice delivery requirement in proposed Rule 173(a).

## *Market-Making Prospectuses*

Consistent with the Commission's aims to modernize the registered securities offering process and eliminate unnecessary and outmoded requirements, we believe that the Commission should, in connection with the Proposals, eliminate the need to deliver market-making prospectuses. The 1996 Task Force on Disclosure Simplification recommended the elimination of the requirement to deliver a market-making prospectus in certain market-making transactions because it believed the burden on dealers could thus be reduced without sacrificing investor protections.<sup>5</sup> In addition, the Commission acknowledged in its last major proposals to reform the registered securities offering process, the so-called Aircraft Carrier proposals, that this requirement is a "burden."<sup>6</sup> We believe that the evolution of technology has progressed to a level that, consistent with the Proposal's concept of "access equals delivery," the delivery of a market-making prospectus is no longer necessary in today's environment where investors have ready access to all of an issuer's filings with the Commission. The requirement to deliver a market-making prospectus is especially burdensome in connection with offerings by issuers eligible to use only Forms S-1 or F-1, as such prospectuses may not be automatically updated through forward incorporation. In the alternative, if the Commission deems it premature or otherwise inadvisable to eliminate the requirement to deliver a market-making prospectus altogether, we recommend that the Commission allow issuers eligible to use only Form S-1 or Form F-1 to forward incorporate by reference for market-making prospectuses.

### Research Reports – Technical Correction to Proposed Rule 139

We note in the last line of the text of proposed Rule 139(a)(1)(iii) the use of the term "research reports" in the plural, thereby implying that the broker or dealer must have published or distributed *multiple* research reports about the issuer or its securities. We believe that the term should be in the singular form, as we do not believe it is the Commission's intention that the broker or dealer must have published or distributed more than one research report about the issuer or its securities to rely on the safe harbor. This change to the singular would still serve the purpose of preventing a broker or dealer from being able to rely on Rule 139 to initiate coverage on an issuer or its securities, because the requirement would remain that such broker or dealer must have published or distributed at least one previous report on the issuer or its securities.

### Issuer-related Issues

#### Retroactive Ineligibility for Entry Into Settlements

Under the definition of well-known seasoned issuer ("WKSI") in proposed Rule 405, an issuer would not be able to qualify for WKSI status or avail itself of the benefits of a number of the Release's communications proposals if, among other things, the issuer (i) is a blank check company, shell company or penny stock issuer; (ii) is not current in its Exchange Act reports; or

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<sup>5</sup> "The Task Force recommends that the Commission eliminate the affiliated broker-dealer's prospectus delivery obligation that exists for 'regular way' market-making transactions in outstanding securities of a Section 12 reporting company." REPORT OF THE TASK FORCE ON DISCLOSURE SIMPLIFICATION 55 (Mar. 5, 1996).

<sup>6</sup> See SEC Release Nos. 33-7606; 34-40632; IC-23519 (Nov. 3, 1998).

(iii) has filed for bankruptcy or insolvency during the past three years. Although we support most of the circumstances that would make an issuer ineligible for WKSI status, we concur with the Securities Industry Association's view expressed in its comment letter that one such circumstance – the entry into a settlement during the preceding three years by an issuer or any of its subsidiaries with any government agency involving allegations of violations of federal securities laws – should not necessarily or automatically make that issuer ineligible for WKSI status. Although the Proposals expressly provide the Commission with the authority to grant waivers in such circumstances, the Release does not provide any guidance as to under what circumstances the Commission would be inclined to grant such a waiver. Furthermore, many issuers, including many broker-dealers, who have entered into settlements with government agencies in the past three years may not have been willing to do so if they had been aware that such a settlement would result in their ineligibility for WKSI status. Thus, we believe that a preferable and more equitable approach would be to apply this ineligibility criterion prospectively in order that future contemplated settlements can take this factor into account.

In addition, some issuers are regulated by the Commission in capacities such as exchanges, brokers or dealers. An allegation that a broker or dealer has violated the rules of the Commission (or the entry into of a settlement with respect to the same) should have no bearing on whether an issuer *qua* issuer qualifies for WKSI status. WKSI status is largely premised on the availability of substantial information about an issuer in the marketplace. Such information would continue to be available whether or not the issuer has entered into a settlement with the Commission in respect of some aspect of its business. Thus, we believe the Commission should also clarify that ineligibility would result only from violations by a company as an issuer and reporting company, and not from violations by one of its businesses that is in an industry regulated by the Commission, such as a broker-dealer subsidiary.

#### Information on Issuer's Website

Proposed Rule 433 states that an offer of an issuer's securities that is contained on an issuer's or offering participant's web site, or hyperlinked by the issuer or offering participant from its web site to a third party web site, is considered a written offer and, unless exempt, a FWP. Under the Proposals, even historical issuer information that is not properly identified and located in a separate section of an issuer's web site (*e.g.*, archives) could be considered an offer and therefore a FWP. As proposed, this will require that an issuer regularly review the information on its website in order to ensure that historical information is properly segregated. Given the multifaceted functions of issuer websites and varied target audiences for the information contained on such websites, we believe this requirement, without further guidance from the Commission, will pose an undue burden on issuers. Thus, we suggest that the Commission provide in Rule 433(e)(2) that information on an issuer's website will not constitute an offer unless such information actually refers to the terms of the securities to be offered.

#### Disclosure of Unresolved Staff Comments

Proposed Item 4A of Form 20-F and proposed Item 1B of Form 10-K would each require accelerated filers to disclose in their annual reports on such forms unresolved comments from the staff of the Commission that are material and were issued more than 180 days before the end of the fiscal year covered by the annual report. This proposal could force issuers to acquiesce to

staff comments despite the merits of the issuer's position. Thus, we suggest the elimination of this proposal as we believe it is unnecessary in light of the Commission's ongoing ability to take administrative action against issuers, including by issuing a stop order with respect to an issuer's registration statement. In the alternative, we suggest the proposals be amended to allow WKSIs the option of disclosing unresolved staff comments or refraining from any further offerings until the comments are resolved. We feel this approach would address what we believe is the concern underlying the proposed disclosure requirement, namely, the ability of WKSIs to use the proposed automatic shelf registration procedures that contemplate immediate effectiveness without the opportunity for staff review and comment.<sup>7</sup>

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<sup>7</sup> If this proposal is nevertheless adopted, the Commission should clarify to which issuers it applies. The Release suggests that this requirement would apply to all "accelerated filers," and the Commission's release adopting the accelerated filer definition implies that the term accelerated filer is intended to include only domestic issuers. Proposed Item 4A, however, would be a requirement of Form 20-F, the form for annual reports of foreign private issuers. As a result, we seek clarification from the Commission as to whether the requirement to disclose unresolved staff comments is intended to apply to both domestic and foreign private issuers.



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) 325-4321.

Sincerely yours,

/s/ Gary G. Lynch

Gary G. Lynch  
Executive Vice Chairman and Global General  
Counsel

cc: The Honorable William H. Donaldson, Chairman  
The Honorable Cynthia A. Glassman, Commissioner  
The Honorable Harvey J. Goldschmid, Commissioner  
The Honorable Paul S. Atkins, Commissioner  
The Honorable Roel C. Campos, Commissioner  
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