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February 10, 2005

Via E-mail – rule-comments@sec.gov

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

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

Dear Mr. Katz:

Goldman, Sachs & Co. expresses its support for the proposed Securities Offering Reform (Release No. 33-8501). We appreciate having this opportunity to provide our comments on the specific proposals. We are aware of the significant commitment of time and resources made by the Commission and its staff in drafting the proposals.

Reform of the Federal securities laws has always been and should continue to be an iterative and highly cooperative undertaking among the Commission, its staff, market participants and the public. We applaud the incremental approach taken by the Commission and its staff in drafting the proposals, which we believe will provide substantial benefits while minimizing implementation costs, confusion and the risk of unintended consequences.

Important changes in the securities markets, particularly changes affecting the manner and speed with which information is communicated and transactions are executed, have for some time necessitated modernizing the regulatory framework. The proposals appropriately respond to and take advantage of significant improvements in technology as well as Exchange Act reporting standards. Overall, we believe that in the proposals the Commission and its staff have made substantial progress toward insuring that the Federal securities laws will remain up-to-date and will continue to serve their dual purpose of facilitating the efficient operation of the U.S. capital markets, while at the same time protecting investors. We believe, however, certain further incremental changes to the proposals are warranted.

We are a member of the Securities Industry Association's ‘33 Act Reform Task Force. You have already received the SIA's comment letter, dated January 31, 2005. We endorse the detailed comments made in the SIA's comment letter. We are, as well, members of the Bond Market Association and also endorse the comments made by that organization in its comment letter, dated January 31, 2005. Rather than undertake another detailed analysis of and commentary on the provisions contained in the proposals, a task which has already been ably accomplished by the comment letters provided by the SIA and the Bond Market Association, as well as by a number of other commentators, including the letters submitted by the American Bar Association and the Association of the Bar of the City of New York, we would like to address the following selected topics.

1. Free-Writing Prospectuses

a. Cure Provisions for Failures to File or to Include a Legend — We strongly support the notion set forth in the proposals that the inadvertent or unauthorized distribution of a written communication other than the statutory prospectus in connection with a public offering should not result in Section 12(a)(1) rescission rights, inclusion of a risk factor describing such rights or inclusion of the offending communication in the registration statement. We believe that the following suggestions would further the objectives of the proposals. Proposed Rules 163 and 164 both provide that “unintentional” failures to file a free-writing prospectus when required or to include a legend in a free-writing prospectus can be cured so long as (i) a “good faith and reasonable effort” was made to comply, and (ii) as soon as practicable after discovery the free-writing prospectus is filed or the omitted legend is included and the free-writing prospectus is retransmitted, as applicable. Given the substantial number of salespeople involved in marketing a securities offering and the Commission’s stated goal of encouraging greater communications outside of the statutory prospectus, it is more likely that, even after the implementation of sound internal policies and procedures, some mistakes will be made.

i. “*Unintentional” failures to file or to include a legend and “good faith and reasonable effort” to comply* — Because the cure procedures are available only for “unintentional” failures and only so long as a “good faith and reasonable effort” was made to comply with the filing and legending requirements, we urge the Commission to confirm that “unintentional” and “good faith and reasonable effort” should be determined by reviewing the actions and policies of the SEC-registered broker-dealer rather than the individual employee of such firm sending out the free-writing prospectus. We believe that implementing policies and procedures reasonably designed to prevent such failures to file or to include a legend should be the most important factor in determining whether or not there has been a “good faith and reasonable effort” to comply. We also believe the intentional failure by a particular employee to comply with the filing and legending requirements should not be considered intentional if such employee is acting in violation of firm policies and procedures that are reasonably designed to prevent such failures to file or to include a legend.

ii. *“Discovery” of the failure to file or to include a legend* — We urge the Commission to clarify that discovery occurs only when compliance or senior supervisory personnel in a position to know the cure procedures become aware of the failure to file or to include a legend.

b. Cross-Liability Issues — We believe that the proposals do not sufficiently alleviate concerns about cross-liability for free-writing prospectuses used by other offering participants. We strongly urge the Commission to clarify that an offering participant will not be subject to Section 12(a)(2) liability for any free-writing prospectus that such offering participant did not send out or otherwise explicitly use in marketing the offering. To be clear, an underwriter should not be subject to Section 12(a)(2) liability for any free-writing prospectus created by the issuer or any other underwriter, irrespective of whether or not such free-writing prospectus is filed by the issuer or such other underwriter, so long as such underwriter did not send out or use such free-writing prospectus in marketing the offering. Similarly, an issuer should not be subject to Section 12(a)(2) liability for any free-writing prospectus utilized by an underwriter, irrespective of whether or not such free-writing prospectus is filed by an underwriter, so long as such issuer did not create, send out or use such free-writing prospectus in marketing the offering and so long as such free-writing prospectus does not contain "issuer information". Of course, the issuer would be responsible for any free-writing prospectus "adopted" and filed by such issuer.

Without the clarifications noted above, it is likely that issuers and underwriters will contractually prohibit each other from using free-writing prospectuses, and the benefits of greater communications to investors and the market sought by the proposals would not be achieved.

2. Research

a. The Issuer-Specific Research Safe Harbor — We strongly recommend that the proposed Rule 139(a)(1) safe harbor for issuer-specific research be extended beyond seasoned issuers to all reporting issuers because of (i) the recent statutory and regulatory changes and enforcement actions ensuring the independence of research in particular, (ii) the harm to investors caused by the interruption of an important source of insights and information on reporting issuers, and (iii) the improvements in the Exchange Act reporting system applicable to all reporting issuers.

First, Congress, the SEC, the NYSE and the NASD have taken substantial steps to ensure the independence of the research function. Given the structural reforms and increased disclosures required by the Sarbanes-Oxley Act, Regulation AC, the self-regulatory rules approved by the SEC and the global research analyst settlement, we believe the independence of research should be accepted for purposes of proposed Rule 139(a)(1). Second, we also believe that the interruption of research coverage generally is harmful to investors, particularly in respect of issuers that have only recently become reporting companies and may not be as widely covered by analysts, and is inconsistent with the SEC's stated goal of facilitating greater availability of information to investors and the market with regard to all issuers. In particular, once research coverage has been initiated, the disruption of it is a disservice to investors. Because of frequent stops and starts as well as a potentially lengthy SEC review process, research blackouts often begin well before a "follow-on" offering. The result of such blackouts is that investors and the market do not have the benefit of the analyst's views, even in connection with earnings announcements and other significant developments. Finally, we believe that improvements in the content and timeliness of Exchange Act reports, which apply to both seasoned and unseasoned reporting issuers, argue in favor of extending the proposed Rule 139(a)(1) safe harbors to all reporting issuers.

Should the Rule 139(a)(1) safe harbor continue to be unavailable in respect of unseasoned reporting issuers, then we would urge the Commission to include in the Rule a limited research blackout period (e.g., 30 days) prior to the proposed offering date — not the filing date — for offering participants.

b. The "Designated Offshore Securities Market" Condition Relating to Foreign Private Issuers — The availability of the safe harbors in proposed Rules 138(a)(2) and 139(a)(1)(i)(B) for research about non-reporting foreign private issuers is limited to those issuers with equity securities trading on a designated offshore securities market as defined in Rule 902(b). We believe that the Rule 902(b) definition of designated offshore securities market, while a convenient shorthand, does not suit the underlying purposes of the research safe harbors. We recommend that the Commission eliminate the requirement that such trading occur on a designated offshore securities market as defined in Rule 902(b). While the safe harbors seek to allow research during an offering where there is an existing investor base that expects the insights and information research can provide, the limited purpose of designating a particular market under Regulation S is to allow Rule 904 resales in non-prearranged trades executed through the facilities of the market without requiring that the seller form a reasonable belief that the buyer is outside the United States. The factors relevant to designating a particular market for that purpose, such as the trade reporting and governmental oversight, do not adequately correlate to establishing the existence of a legitimate investor base. We note that many offshore securities markets have not been so designated under Rule 902(b).

3. Prospectus Delivery

We support eliminating the link between delivery of the final prospectus and delivery of a confirmation of sale and we agree that filing the final prospectus within the required time should satisfy the obligation to have a final prospectus precede or accompany the security. However, the failure by the issuer to file within the required time should not result in a Section 5 violation for the broker-dealer delivering the confirmation of sale. We do not believe timely filing should be a condition to the Section 5 exemption. Instead, such failures should be addressed through SEC enforcement actions for violations of Rule 424.

We recommend that the Commission take this opportunity to amend Rule 174 to eliminate the current 25-calendar day dealer prospectus delivery requirement for aftermarket sales following an initial public offering where the securities are listed on a national securities exchange or quoted on the Nasdaq Stock Market. The tracking involved in complying with the aftermarket prospectus delivery requirement is difficult and costly, particularly for dealers that did not participate in the securities offering giving rise to the aftermarket prospectus delivery requirement. Such dealers have to maintain and staff a system that tracks on a daily basis every registered initial public offering executed in the United States and code their systems to ensure that a prospectus or, under new Rule 173, a notice is sent to customers for whom, or with whom, such dealers execute trades during the 25-day period. Given the current ease of accessing information with respect to such issuers via EDGAR, the internet generally and other means, the benefits derived from retaining the 25-calendar day dealer prospectus delivery requirement and, in particular, providing such a notice are unclear at best. Should the 25-calendar day dealer prospectus delivery requirement be retained, for the reasons stated above we urge the Commission to eliminate the requirement to provide the Rule 173 notice of registration in connection with such aftermarket sales by dealers generally and, in any event, by dealers that did not participate in the securities offering giving rise to the aftermarket prospectus delivery requirement.

Goldman, Sachs & Co. appreciates the opportunity to comment on the proposals. We hope the Commission will address in the Securities Offering Reform as adopted the suggestions made above as well as the suggestions made in the comment letters of the SIA and the Bond Market Association. We would be happy to discuss with the Commission or its staff any questions that you may have with respect to the comments made in this letter. We ask that you direct any questions that you may have to Michael L. Crowl at (212) 902-4315 or Kenneth L. Josselyn at (212) 902-3761.

Very truly yours,

/s/ Goldman, Sachs & Co.
(Goldman, Sachs & Co.)

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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