January 14, 2004

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609
United States of America

Via Electronic Mail

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

Dear Mr. Katz:

The Issues and Trading in Securities Committee and the Capital Markets Forum of the International Bar Association are pleased to respond to the Commission's request for comments on the proposed reform of its regulations governing public securities offerings in the United States. We believe that the Commission's proposed rules represent an important step toward modernizing the regulation of the securities offering process to reflect the realities of today's capital markets, where the offering and trading of securities are a truly global business and information and capital move at speeds that were once unimaginable. We also believe that the Commission should demonstrate the same initiative and foresight in pursuing reforms in other areas.

I. The IBA's Perspective

The IBA is a global bar association whose membership includes over 16,000 individual lawyers and over 190 bar associations worldwide. The Issues and Trading in Securities Committee of the IBA includes approximately 1,300 members in 87 countries, while the Capital Markets Forum brings together more than 770 business lawyers, market professionals and regulators in 85 countries. Our comments represent the views of a significant cross-section of the IBA's capital markets expertise.

We expect that the Commission will receive many useful comments on all aspects of the proposed rules from issuers, securities lawyers and other interested parties. Our objective is to provide the Commission with comments that draw on the uniquely global perspective of our organization. Our letter focuses primarily on the concerns of non-U.S.

issuers and the related interests of U.S. investors that invest or may wish to invest in the securities of non-U.S. issuers.

As a threshold matter, we note that the world's capital markets have changed substantially in the past decade. There was a time when a U.S. public offering was viewed as critical to the capital formation process for almost every large public company – whether it was incorporated in Delaware, France or Japan. This perception has changed due to the rapid evolution of non-U.S. capital markets and other factors, and many non-U.S. issuers now consider the costs and burden of extending a public offering into the United States to be disproportionately high. We believe that the resulting tendency to exclude U.S. investors from cross-border offerings results in inefficiency and lost opportunities. With this concern in mind, we applaud the Commission's current rule proposal and we encourage the Commission to consider other rulemaking aimed at increasing the attractiveness of the U.S. securities markets for non-U.S. issuers.

The remainder of our letter is divided into four parts. Parts II and III express our enthusiastic support for the proposed rules and present several limited modifications that we believe will enhance the proposals. Part IV describes the challenges that the U.S. capital markets are facing in attracting public securities offerings and stock exchange listings by non-U.S. issuers. Part V discusses ways in which we believe the Commission can address those challenges effectively.

II. Support for the Current Proposal

The movement by non-U.S. issuers away from U.S. public offerings is unfavorable to investors and the capital markets generally. As the Commission is aware, U.S. investors are frequently excluded from cross-border securities offerings by non-U.S. issuers, including rights offerings by companies in which they already own shares, and even offerings by issuers that already are SEC registrants. Non-U.S. issuers – including some of the world's largest and best-managed companies – would often like to reach out to U.S. investors but perceive the costs of extending public offerings into the United States as outweighing the benefits. We believe that, through measured rulemaking, the Commission can address many of the issues that are causing non-U.S. issuers to shy away from U.S. public offerings while continuing to safeguard the interests of U.S. investors. The Commission's current rule proposals are a significant and important step in the right direction.

The creation of automatic shelf registration for well-known seasoned issuers (WKSIs) will encourage eligible non-U.S. issuers to include U.S. investors in more offerings. In our experience, non-U.S. issuers often find it difficult to reconcile the Commission's registration process with their home country practices and market demands, particularly in the context of confidential or time-sensitive transactions. For example, non-U.S. companies conducting a rights offering often conclude they have no practical choice but to exclude U.S. shareholders from the transaction.[1] Under the

[1] In our experience, non-U.S. companies are less likely than U.S. companies to maintain a shelf registration statement covering their equity securities on file with the Commission. Also, as

proposed rules, WKSIs could easily and without delay include U.S. investors in rights offerings and other time-sensitive capital-raising transactions by filing an automatically effective shelf registration statement.[2]

Non-U.S. issuers will benefit from the Commission's proposed safe harbors for ongoing communications and the 30-day bright-line safe harbor. Issuers contemplating a U.S. offering currently face a lack of certainty regarding the permissibility of corporate communications with shareholders and other parties. This problem is particularly acute for non-U.S. companies that are permitted – or expected – to continue communicating in the normal course with their shareholders in other jurisdictions. The increased certainty provided by the proposed safe harbors for non-offering-related communications would relieve this tension in many situations.

The proposed rules permitting the use of free-writing prospectuses will be helpful in cross-border securities offerings. Many non-U.S. jurisdictions already take a similar, content-based approach to regulating communications during a securities offering. If the proposed rules are adopted, non-U.S. issuers and underwriters involved in a cross-border offering will no longer be compelled to go through the often metaphysical exercise of adopting separate procedures for communicating with U.S. investors during a global offering.

III. Specific Comments on Current Proposal

It is clear to us that the proposed reforms would substantially improve the public offering process in the United States for both U.S. issuers and non-U.S. issuers. We also believe that the suggested modifications described below would further the objectives of the proposed rules, and we urge the Commission to reflect these changes in the final rules.

Non-U.S. issuers that are publicly traded companies in their home markets should be treated as reporting issuers under the proposed safe harbors for ongoing communications. The Commission's proposed safe harbors for an issuer's ongoing communications are more limited for offerings by non-reporting issuers than for offerings by SEC-reporting issuers. For example, the safe harbor for offerings by non-reporting issuers does not cover any forward-looking information or any communications with

---

discussed below, many non-U.S. companies are unable or reluctant to rely on the Rule 801 exemption for rights offerings.

[2] We read the proposed rules as considering an issuer's *worldwide* unaffiliated float – not just its U.S. float – in determining whether it meets the definition of a WKSI. *See* Proposed Rule 405. This reading is consistent with the unaffiliated float test set forth in General Instruction I.B.1 of Form F-3, which refers explicitly to "the aggregate market value *worldwide* of the voting and non-voting common equity held by non-affiliates of the registrant" (emphasis supplied). We note that determining an issuer's U.S. float with any degree of precision would in many cases prove difficult and costly. We urge the Commission to confirm this point when it adopts final rules.

shareholders and prospective investors. We believe that non-U.S. issuers with a substantial public float in their home markets should be permitted to rely on the broader safe harbor for reporting issuers.

We understand the Commission's reasons for proposing a more limited safe harbor for offerings by U.S. non-reporting issuers. As the Commission notes, such issuers "generally are not releasing information in connection with securities market activities," and there is a "lack of [forward-looking] information or history for these issuers in the marketplace." Accordingly, U.S. non-reporting issuers that release information to investors or potential investors or release forward-looking information publicly may be doing so in an attempt to condition the market for a proposed offering rather than for other, legitimate reasons.

This rationale does not apply to non-reporting issuers whose securities have been publicly traded outside the United States for a meaningful period. Although these issuers may be registering securities with the Commission for the first time, they will almost certainly have a history of releasing information, including forward-looking information, to their shareholders and potential investors. Accordingly, these issuers have a legitimate reason to continue releasing such information before and during an offering in the United States.

The final rules should permit non-U.S. issuers that are publicly traded companies in their home markets to rely on the safe harbor for reporting issuers. In particular, we suggest that the final rules follow an approach similar to the Commission's safe harbors for the publication of research under Rules 138 and 139, which contain an alternative test for non-U.S. issuers publicly traded abroad.

The safe harbors for non-offering-related communications should be available in connection with all securities offerings, not just SEC-registered offerings. As proposed, the Commission's safe harbors for ongoing communications and for communications made prior to 30 days before filing of a registration statement would be available only in connection with SEC-registered securities offerings. We believe that these safe harbors should be available in connection with unregistered offerings also, including Regulation S and Rule 144A offerings.

The Commission acknowledges that issuers have legitimate and important reasons to continue their non-offering-related communications with shareholders, customers and suppliers before and during a securities offering. We agree with the Commission that issuers should not be encouraged to suspend such communications due to uncertainty about whether the gun-jumping provisions of the Securities Act could be implicated. We believe that these policy considerations are the same whether or not the offering is registered under the Securities Act. Issuers preparing for or conducting unregistered offerings should not face greater uncertainty regarding the permissibility of their communications with shareholders and other third parties, and foreign private issuers should not be encouraged to exclude their U.S. shareholders from such communications during unregistered offerings.

We do not believe there is any countervailing policy reason to distinguish between registered offerings and unregistered offerings under the safe harbors. The conditions of the safe harbors are designed to extend protection only to statements that present a very low risk of conditioning the market for an offering. We do not see how this risk would be different or greater in the context of Regulation S or Rule 144A offerings.

The final rules should provide that non-offering-related communications do not constitute "offers" for purposes of the gun-jumping or registration provisions of the Securities Act in any type of offering.[3] In addition, the final rules should provide that such communications would not constitute "directed selling efforts" as defined in Regulation S or "general solicitation" or "general advertising" as defined in Rule 502.

The definition of "well-known seasoned issuer" should take into account the issuer's worldwide debt issuances during the past three years – not just its SEC-registered debt issuances. As proposed, the definition of "well-known seasoned issuer" would include, for purposes of debt offerings only, seasoned issuers that have issued at least $1 billion of debt securities in SEC-registered offerings during the past three years. We believe that this alternative test should take into account debt securities issued by a seasoned issuer in unregistered offerings as well.

The Commission's rule defining WKSIs seeks to identify issuers that have "a demonstrated market following." In our experience, seasoned issuers that issue large amounts of debt securities in non-U.S. markets pursuant to Regulation S, or in the Rule 144A market to institutional investors, are likely to attract a substantial following among debt analysts and investor research organizations. These SEC-reporting issuers should not be precluded from relying on automatic shelf registration for debt offerings simply because all or some of their most recent offerings were not registered with the Commission.

Should the Commission decide to retain SEC registration of debt securities as a proxy for a market following, we believe that, at a minimum, the final rules should include a two-step test that considers a non-U.S. issuer's offerings of debt securities in non-U.S. and private markets. For example, the rule could provide that, for purposes of debt offerings, a shelf-eligible non-U.S. issuer that has issued at least $1 billion of debt securities over the past three years on a worldwide basis would be a WKSI so long as a minimum percentage of those securities – such as 10 percent – were offered or sold pursuant to an SEC registration statement.

---

[3] We realize that, as proposed, the 30-day bright-line safe harbor is based on the filing date of the registration statement. If the Commission extends this safe harbor to unregistered offerings as suggested, the relevant date from which to count back 30 days could be the date on which the transaction is first announced to prospective investors.

The revised safe harbors for the publication of research should be available for more types of unregistered offerings. The Commission has proposed to extend the safe harbors for the publication of research to Regulation S and Rule 144A offerings.[4] We believe that the safe harbors should also apply during other types of unregistered offerings by non-U.S. issuers.

In our experience, large non-U.S. issuers sometimes extend offerings into the United States without SEC registration in reliance on Section 4(2) or the so-called Section 4(1½) exemption. We believe that, particularly where sales are limited to qualified institutional buyers ("QIBs"), the publication of research about a non-U.S. issuer that meets the eligibility requirements of Rules 138 and 139 does not create a greater risk of conditioning the market simply because the offering is being conducted in the United States on the basis of these exemptions rather than Rule 144A.

The proposed reforms should be extended to Schedule B issuers. Non-U.S. governments and their subdivisions, commonly referred to as "Schedule B issuers," should benefit from the proposed reform, including the new safe harbors for communications and the automatic shelf registration process.

Schedule B issuers use the Commission's shelf registration system and are frequent and large issuers of debt securities in the U.S. securities markets. Many of these issuers and their securities are "well-followed" by investors and market professionals under any objective standard. However, as proposed, the rules do not address the eligibility of Schedule B issuers for automatic shelf registration. The final rules should provide that, like other issuers, Schedule B issuers that have issued at least $1 billion aggregate amount of debt securities in the past three years may file registration statements that are automatically effective.

We believe that the proposed rules permitting the use of free-writing prospectuses should also apply to offerings by Schedule B issuers. Schedule B issuers are currently subject to the same restrictions on communications during the offering process that the Commission proposes to modify for other issuers. Government issuers have the same, if not a greater, need to communicate freely and continuously in various public forums, including through publications directed at existing and prospective investors. Also, investors would benefit from fewer restrictions on the flow of information in offerings by Schedule B issuers to the same extent as in other offerings. Accordingly, we urge the Commission to include offerings by Schedule B issuers in its final rules permitting the use of free-writing prospectuses.

---

[4] We read the proposed rules as applying to Rule 144A and Regulation S offerings by non-reporting issuers. We suggest that the Commission remove the descriptive term "reporting history provisions" in proposed Rule 138(a)(2)(ii)(A) and proposed Rule 139(a)(1)(i)(B)(1) to provide greater clarity in this regard.

The Commission should take this opportunity to consider other areas in which Schedule B issuers are not adequately addressed in its rules, resulting in anomalies that are not justified by any clear policy consideration. For example, the safe harbors for the publication of research under Rules 138 and 139 are currently conditioned on the issuer meeting the registrant requirements of Form S-3 or F-3 or being a seasoned foreign private issuer in its home market. These conditions are addressed to corporate issuers and do not apply to a Schedule B issuer that does not list its securities on a U.S. exchange. We believe that these safe harbors should be amended to permit brokers and dealers to publish research on seasoned Schedule B issuers to the same extent as seasoned corporate issuers, which we understand would be consistent with views expressed by the Commission's staff in the past.

IV. Challenges Facing U.S. Securities Markets

We note that the rules would address only some of the challenges facing the U.S. securities markets. Over the past several years, non-U.S. issuers have been less inclined to access the U.S. securities markets on an SEC-registered basis or to list their securities on a U.S. exchange. A broad array of factors has driven this trend, including many factors beyond any regulator's control. As discussed below, however, there are certain features of the securities law regime in the United States that in recent years have discouraged many large, well-managed companies from accessing the U.S. public markets or seeking a U.S. listing.

Historically, the most significant cost of SEC registration for non-U.S. issuers has been the preparation of U.S. GAAP financial information and the reconciliation of the Commission's registration process and disclosure requirements with the issuer's home country practices. The Sarbanes-Oxley Act of 2002 and related Commission rulemaking have imposed additional costs and burdens, the most significant of which relate to the internal control reports that will be required with respect to the current fiscal year for most non-U.S. issuers. More recently, some non-U.S. issuers and other interested parties have expressed concerns about the Commission's onerous requirements for de-registration, which make it very difficult for an issuer to exit the Commission's periodic reporting system even where the percentage of its shares that are held or traded in the United States is very small.

While the perceived burdens of SEC registration have increased, the alternatives available to non-U.S. issuers have become more attractive. Securities markets outside the United States – especially in Europe – have developed rapidly in size and depth, providing an acceptable alternative for non-U.S. companies seeking to raise capital. This trend is likely to continue as non-U.S. securities markets continue to expand and consolidate. In the European Union, for example, the recently approved Prospectus and Transparency Directives and other initiatives are aimed at creating a single, efficient set of requirements for accessing a common European securities market.

Even where a non-U.S. issuer believes that it may benefit from reaching out to the U.S. market, the issuer may be able to achieve its objective without SEC registration by limiting its offers and sales in the United States to QIBs – the Rule 144A market. In our experience, depending on the issuer's home jurisdiction and primary trading market, large U.S. institutional investors are often indifferent as to whether a non-U.S. company conducting an initial or follow-on equity offering registers the transaction with the Commission or limits sales in the United States to the Rule 144A market. Furthermore, in today's global economy, most large U.S. institutional investors have the means by which to invest directly in non-U.S. securities markets, often through non-U.S. affiliates and fiduciaries.

V. Suggested Areas for Continued Modernization

In light of the challenges described above, we believe that the Commission should act in the near term to address other areas in which the U.S. securities laws discourage access by non-U.S. issuers to the U.S. securities markets. We believe that the following measures would make the U.S. securities markets more attractive to non-U.S. issuers without compromising the protection afforded to U.S. investors under the Commission's rules.

- **The Commission should act more quickly to adopt principles of mutual recognition, particularly with regards to International Financial Reporting Standards (IFRS).** We recognize that the Commission must act with care in accepting standards established by other regulators and standard-setters. However, we believe that the Commission can act more quickly than it has in the past toward recognizing international standards that have gained widespread acceptance among regulators, investors and professional organizations. The most significant example is IFRS, which will become mandatory for companies in the European Union this year. By recognizing IFRS as an equivalent standard, the Commission would make SEC registration and reporting much less costly and burdensome for the large and increasing number of non-U.S. issuers that prepare their primary financial statements in accordance with IFRS.
- **Practicable de-registration rules should be adopted for non-U.S. issuers.** Under current rules, it is very difficult for a non-U.S. issuer to exit the Commission's periodic reporting system and related corporate governance requirements. Accordingly, non-U.S. issuers that are not already subject to periodic reporting are less likely to register an offering with the Commission or list their securities on a U.S. exchange for fear of committing themselves to these requirements indefinitely. The Commission should adopt rules that permit non-U.S. issuers to de-register their securities in circumstances where, as a matter of policy and fairness, the Commission's interest in subjecting the issuer to its periodic reporting system is limited. For example, if an issuer has not conducted a public offering in the United States in the past three years and has no meaningful U.S. retail investor base, it should be permitted, following

a reasonable notice period, to become eligible for an exemption from Exchange Act reporting pursuant to Rule 12g3-2(b).

- **The exemptive rules for cross-border rights offerings and tender offers should be revised to improve their effectiveness.** In the four years since their adoption, the Commission's cross-border rules have not gone as far as hoped in encouraging issuers and bidders to include U.S. shareholders in cross-border rights offerings, tender offers and mergers. As the Commission is aware, the utility of the rules is greatly limited by the provisions governing the determination of U.S. ownership levels and the requirement that securities held by 10-percent shareholders be excluded from the calculation of U.S. ownership. We believe that, until the Commission takes action to expand the circumstances in which the exemptions are available, U.S. investors will continue to be excluded from cross-border transactions in which their participation would be both advantageous and consistent with investor protection.

- **Non-U.S. issuers should be permitted greater flexibility to communicate with investors in their home country.** Non-U.S. issuers conducting cross-border securities offerings rely frequently on Rule 135e in order to communicate with investors in their home country according to local rules and practices. However, there are circumstances not covered by Rule 135e in which non-U.S. issuers should be able to communicate with investors in their home country without fear of a potential Section 5 violation. For example, non-U.S. issuers may wish to distribute non-English language offering materials to investors in their home country directly or on their website rather than as part of a press release or press conference, including in unregistered offerings where the proposed exemption for free-writing prospectuses would not be available. We believe that the Commission should consider expanding Rule 135e or adopting an additional safe harbor in order to provide more scope for non-U.S. issuers to engage in communications targeted to investors in their home country, including in appropriate cases non-English language materials posted on the issuer's general (i.e., unrestricted) website.

* * *

We hope that the Commission will find our comments helpful. Please direct any questions regarding our comments to any of the undersigned or any member of our drafting committee at the telephone number or e-mail address on the attached contact list.

Very truly yours,

/s/ G. Blair Cowper-Smith

G. Blair Cowper-Smith
Co-Chair, Issues and Trading in Securities Committee

/s/ Daniel Hurstel

Daniel Hurstel
Co-Chair, Capital Markets Forum

/s/ Jaap Willeumier

Jaap Willeumier
Co-Chair, Issues and Trading in Securities Committee

/s/ Andrew D. Soussloff

Andrew D. Soussloff
Co-Chair, Capital Markets Forum

Drafting Committee

Philip J. Boeckman
Jay Clayton
Angel L. Saad
Margaret E. Tahyar

Contact List

Name	Telephone Number	E-Mail Address
G. Blair Cowper-Smith	+1 416 601 7988	bsmith@mccarthy.ca
Daniel Hurstel	+33 1 53 43 4523	dhurstel@willkie.com
Jaap Willeumier	+31 20 546 04 05	jaap.willeumier@stibbe.com
Andrew D. Soussloff	+1 212 558 3681	soussloffa@sullcrom.com
Philip J. Boeckman	+44 20 7453 1020	pboeckman@cravath.com
Jay Clayton	+44 20 7959 8440	claytonwj@sullcrom.com
Angel L. Saad	+44 20 7959 8444	saada@sullcrom.com
Margaret E. Tahyar	+33 1 56 59 36 70	margaret.tahyar@dpw.com
Linda Hesse	+33 1 44 56 44 56	linda.hesse@freshfields.com