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COMMITTEE ON SECURITIES REGULATION

January 28, 2005

Via e-mail: rule-comments@sec.gov

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609
Attention: Secretary

Re: File No. S7-38-04; Release Nos. 33-8501; 34-50624; IC-26649;
International Series Release No. 1282
Securities Offering Reform

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Securities Regulation of the Association of the Bar of the City of New York in response to Release Nos. 33-8501; 34-50624; IC-26649 and International Series Release No. 1282, dated November 3, 2004 (the "Release"), in which the United States Securities and Exchange Commission (the "Commission") published a notice in the Federal Register to solicit comments on a proposed rule change to modify the registration, communications and offering processes under the Securities Act of 1933 (the "Proposed Rules" or "Proposal"). Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors and academics. Please note that Mr. Mark K. Schonfeld, a member of the staff of the Commission and a member of our Committee, did not participate in the preparation of this letter or the decision by our Committee to submit this letter to the Commission.

Introduction

Our Committee welcomes the Commission's efforts to modernize the securities registration and securities offerings processes. We believe the Proposal provides a thoughtful discussion and analysis of the methods by which these processes may be improved to take advantage of internet technology, which so many institutional and retail investors use today. Our Committee also believes the Commission's proposals overall will provide more timely investment information to investors and further the integration of disclosure under the Securities Act and the Securities Exchange Act of 1934.

While our Committee has conducted a thorough review of the Proposal, we believe that it is appropriate for us to be selective in our comments. We have therefore not commented on those portions of the Proposed Rules that, in our view, will likely attract comment from numerous interested parties.

Our Committee offers the following specific observations and recommendations on the Proposed Rules:

I. Well-Known Seasoned Issuers

The Commission has added a new category of issuer – – a "Well-Known Seasoned Issuer", or WKSI – – that includes issuers with a wide market following (well known) and a reporting history under the Exchange Act (seasoned). We endorse the proposal for the WKSI category of issuer and the comments below address the definitional requirements for a WKSI in proposed Rule 405.

1. Measurement Time

Rule 405 requires that all tests in the WKSI definition be met "as of the last business day of [the issuer's] most recently completed second fiscal quarter prior to the date of filing its Form 10-K or Form 20-F or amendment to its registration statement for purposes of complying with Section 10(a)(3) of the Act." Our Committee believes that the eligibility tests of Rule 405 should be measured as of the date that the relevant event occurs, or, for convenience, within a few days prior to the event (i.e., filing or dissemination). As drafted, a WKSI that was eligible to file an automatically effective registration statement on June 30, 2005 would continue to be eligible to file for the next year even if it failed to file any Exchange Act reports after June 30, 2005. Measuring as of the date the relevant event occurs, or within a few days prior to the event, is consistent with similar existing measurements, such as eligibility to use Form S-3, and is consistent with the principle that current compliance is an indication of "seasoning."

2. Form S-3/Form F-3 Eligibility

To be a WKSI, Rule 405(1)(i) requires that the issuer be eligible to file a registration statement on Form S-3/Form F-3.[1] By this reference, the WKSI definition incorporates General Instruction I.A.5(a), which states that Form S-3/Form F-3 is not available to any issuer if the issuer or any subsidiary has, since the last fiscal year for which financial statements have been included in an Exchange Act filing, "failed to pay any dividend or sinking fund installment on preferred stock." General Instruction I.A.5(b) deals separately with defaults on indebtedness for money borrowed and lease payments, but states that Form S-3/Form F-3 availability is only lost if the default is "material" to the issuer's consolidated financial position. Our Committee does not see a reason why this distinction between preferred stock and debt should exist and believes that the standard for debt is the appropriate standard. Our Committee believes that the materiality modifier in General Instruction I.A.5(a) should be expanded to cover failures to pay preferred stock dividends.

3. Market Value Test

The WKSI eligibility requirements in Rule 405(1)(ii) is met if the issuer has "a market value of its outstanding common equity held by non-affiliates of $700 million or more" as of the last business day of its most recently completed second fiscal quarter. The Commission has solicited comment on a number of issues relevant to this measurement.

Based on a review of the analysis cited by the Commission, our Committee agrees that a public float test is the proper standard and $700 million is not an unreasonable threshold at this time. Our Committee does propose that the Commission undertake to re-evaluate the $700 million threshold at some point in the near future to determine if, based on experience under the proposed threshold, the amount should be altered.

Our Committee believes that the currently calculated public float measure provides an established, verifiable basis that issuers have become accustomed to calculating. Its use is consistent with the logical presumption that companies with larger public floats are well followed. Our Committee does, however, believe that it would be preferable to calculate the public float over an averaging period (for instance, one month) prior to the relevant event.

4. Registered Debt Issuance

Our Committee believes that the condition to WKSI qualification that is based on the issuance of over $1 billion aggregate amount of debt securities in the last three years is a meaningful threshold and that no further condition is necessary at this time. Our Committee believes that issuers of such a substantial amount of debt meet the critical predicate for WKSI status – well known by professionals and others in the public market – on that basis alone, regardless of the credit rating assigned to the debt securities.

[1] Certain of the "Registrant Requirements" in General Instruction 1.A of Form S-3 that are repeated in the WKSI definition are discussed below in connection with that definition.

Given that many issuers have historically issued debt in private offerings followed by resale registrations or exchange offers registered on Form S-3 or Form S-4, our Committee believes that the Commission should clarify that debt securities issued in a registered exchange offer, or that are registered for re-sale, qualify as a debt securities issuance registered under the Act for purposes of Rule 405(1)(ii)(B).

5. Timely Filing of Exchange Act Reports

Rule 405(5) repeats the Form S-3 eligibility requirement that the issuer must have timely filed all materials required to be filed in the year preceding the date of determination (other than specified items of Form 8-K). Our Committee understands the Commission's view that a component of WKSI status goes beyond the need to have information available on a timely basis. Nonetheless, our Committee urges the Commission to consider further expanding the enumerated Form 8-K sections excluded from the timeliness requirements. Premising WKSI status on the current public reporting requirement may cause issuers to make more aggressive disclosure decisions on whether to file a Form 8-K than would otherwise be desirable if the decision could impact their WKSI status. We believe that the rules should encourage full disclosure, rather than unintentionally encouraging aggressive disclosure positions by issuers. Specifically, Items 5.01 (Changes in Control of Registrant), 5.02 (Departure of Directors or Principal Officers; Election of Directors, Appointment of Principal Officers) and 5.05 (Amendments to Registrant's Code of Ethics, or Waiver of a Provision of Code of Ethics) require a facts-and-circumstances analysis and judgments by those involved in the relevant situations. It seems unduly burdensome for an issuer to lose WKSI (or Form S-3) status if those judgments later turn out to be incorrect based on hindsight.

II. Safe Harbors for Ongoing Communications During an Offering

Under proposed Rule 168, a reporting issuer may continue to publish regularly released in the ordinary course "factual business information" during the time of a registered offering. While our Committee believes that voluntary filers are meant to be included in those issuers to which proposed Rule 168 applies[2], we note that the wording of the proposed rule speaks in terms of "an issuer that is required to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934…." While voluntary filers may not be required by the Exchange Act to file current and periodic reports thereunder, they are typically required to do so under contractual obligations (e.g., indenture covenants) and they are responsible for the accuracy and completeness of their filed reports. Therefore, our Committee does not believe investors would be harmed by including voluntary filers that are current

[2] Page 26 of the Release states that "Under the Proposal, an issuer that is filing Exchange Act reports voluntarily would be treated as a reporting unseasoned issuer." In the commentary to proposed Rule 168 included on page 40 of the Release, it is stated that "Our proposed safe harbor would apply to factual business and forward-looking information that has been regularly released in the ordinary course by or on behalf of a reporting issuer." The latter statement does not appear to require that a reporting issuer also be "seasoned" in order to avail itself of proposed Rule 168. Therefore, when viewed collectively, such statements indicate that proposed Rule 168 would be available to voluntary filers. However, as noted above, the actual text of proposed Rule 168 included on page 288 of the Release does seem to suggest that the proposed rule applies to "seasoned" reporting issuers. Such text states that the section is available to "an issuer that is required to file reports pursuant to Section 13 or Section 15(d) of the Securities Exchange Act of 1934…" Because voluntary filers are not required to file Exchange Act reports, the text of the proposed rule excludes such issuers from making the releases contemplated thereunder. For the reasons discussed above, our Committee believes that the Commission should resolve such discrepancy in favor of including voluntary filers under proposed Rule 168.

in their Exchange Act reporting among those issuers who may avail themselves of the safe harbor of proposed Rule 168.

Further, our Committee believes that the Commission should provide an instruction to the proposed rule that would give guidance as to the interpretation of the concept of "regularly released in the ordinary course". Our Committee believes that such guidance would be helpful to issuers when determining what types of information they can provide investors during a registered offering. Without this direction, issuers may hesitate to provide *any* information during such period, a result that would have the unintended effect of limiting information that should be made available to investors.

Our Committee also proposes that the categories included in "factual business information" should be broadened for non-reporting issuers. In Release No. 33-5180 (Aug. 16, 1971), the Commission encouraged issuers in the registration process to continue to advertise products and services as a means of keeping the public informed of their business operations. Our Committee believes that non-reporting issuers in the registration process similarly should be allowed to communicate their plans for new products and services so long as such communications are directed towards industry participants and consumers. Our Committee does not believe such information should fall under the umbrella of the "forward-looking" statements that concern the Commission, especially since it is not targeted at investors.

III. 30-Day Bright Line Exclusion from the Prohibition on Offers prior to Filing a Registration Statement

Our Committee believes that proposed Rule 163A will provide issuers with greater certainty concerning issuer communications. Our Committee believes, however, that the Commission should make two modifications or clarifications to the requirement that issuers take "reasonable steps" within their control to prevent further distribution or publication of the information.

As noted in footnote 106 of the Release, the Commission acknowledges that issuers cannot be expected to control republication or access to previously published press releases. However, the Commission also stated its view that an issuer should not be able to avail itself of the safe harbor for an interview given prior to the 30-day period that appears within that period. Our Committee does not believe that this distinction between third-party re-distribution of published information and interviews is always appropriate. With respect to interviews and other communications with the media that are intended for future publication, issuers should reasonably be expected to obtain and be permitted to rely on some assurance from the publisher as to the anticipated timing of publication, since the ultimate timing of the publication is not "within the control of the issuer." But the Commission should clarify that this standard is satisfied if the issuer had a reasonable expectation that publication will take place more than 30 days prior to the expected filing of the registration statement.

IV. Relaxation of Restrictions on Written Offering Related Communications

Under the existing rules of the Commission, Rule 134 provides the exclusive means for communications other than pursuant to a preliminary prospectus after the filing of a registration statement. Under the proposed rules, the Rule 134 safe harbor for post-filing communications would be expanded. Rule 134 provides a safe harbor from the gun jumping restrictions for limited public notices about an offering after an issuer files a registration statement containing a statutory prospectus. Proposed Rule 134 would permit the use of written communications after the filing of a registration statement without, under specified circumstances, constituting a free writing prospectus that would need to comply with the filing requirements and other conditions of proposed Rule 433. Under the Proposal, Rule 134 would be expanded to permit in a post-filing notice about an issuer and its registered offering the following:

- increased information about an issuer and its business, including where to contact the issuer;
- expanded information about the terms of the offered securities;
- expanded information about the offering, including underwriter information, more detailed information concerning the mechanics of and procedures for transactions in connection with the offering process, the proposed offering timetable and a description of marketing events (e.g., times, dates and admission procedures for road shows);
- expanded information for account opening and submitting indications of interest and conditional offers to purchase in the offering (e.g., informing investors of the procedural aspects of an auction or directed share program); and
- expanded information concerning anticipated credit ratings to be assigned to the offered securities.

Amended Rule 134 would not, however, permit the use of a detailed term sheet concerning the offered securities (which would be permitted as a free writing prospectus under other proposed rule amendments). In addition, the proposed rule amendment would eliminate the existing Rule 134 requirement of disclosure of whether the offering constitutes a new financing or refunding and inclusion in the required legend of a reference to state securities laws.

Our Committee proposes that Rule 134 be further modified to provide that a notification of where a prospectus can be obtained include a reference to a means for receipt of a prospectus by electronic delivery. We believe that this modification would facilitate the electronic distribution of prospectuses or the use of other advanced technology, a result the Commission would appear to endorse given the "access equals delivery" concept described in proposed Rules 153 and 172. Moreover, with the ready availability of prospectuses through electronic means, a practice that will only intensify in the future, we believe that a notification of where a prospectus can be obtained will also reduce printing costs now borne by issuers and streamline the preparation of offering documentation.

Our Committee believes that Rule 134 should not be further expanded to permit a summary of the terms of the offered securities, even if the Rule 134 communication contains a reference to where a prospectus can be obtained. We believe that a summary of the terms of the offered securities is most appropriately contained in a prospectus that is part of a registration statement filed under the Securities

Act or in a free writing prospectus used by an eligible seasoned issuer, an eligible WKSI or other offering participant.

Under the Proposal, Rule 134 would not be available in connection with an initial offering of securities until a price range has been reflected in the filed preliminary prospectus, which typically occurs later in the offering process. This would be a significant disruption of current practice. Our Committee believes that it is important for the issuer to be able to make Rule 134 information available to its existing constituencies immediately after filing. Therefore, we propose that the Commission revise proposed Rule 134 so that it is available upon filing of a registration statement, without regard to whether a price range, where required, is on file.

The Commission has solicited comment on whether Rule 134 should be expanded to include greater detail about the underwriters or members of the underwriting syndicate. We believe that Rule 134 should be expanded to permit the disclosure of that type of information, including information concerning distributors in cross-border portions of offerings. Our Committee believes that the inclusion of that type of information in a Rule 134 communication facilitates the public's understanding of an offering in a way that does not compromise the statutory intent of requiring the principal information concerning an offering to be contained in a registration statement.

We also propose that Rule 134 be expanded to permit a Rule 134 communication to include a description of the anticipated use of proceeds of the offering and related matters, such as an acquisition or other transaction related to the offering. We note that Rule 135 now permits this type of disclosure in connection with written communications relating to proposed offerings. Since this type of disclosure is permitted under Rule 135 in connection with a proposed offering, we propose that Rule 134 be expanded to permit this type of disclosure in connection with a Rule 134 communication after the initial filing of a registration statement.

In light of the previous paragraph, our Committee recommends that the Commission consider expanding Rule 134 to include all communications currently permitted under Rule 135 and eliminating Rule 135 entirely, that is, allowing Rule 134 communications to be made prior to an initial filing. Even with our Committee's recommended expansion of the information permitted in Rule 134 notices, the amount of such information remains restricted. Therefore, we do not believe combining such rules would condition the market for an issuer's securities or pose undue risk to investors who receive pre-filing notices. In the event that the Commission does not combine Rule 134 and Rule 135, our Committee requests that the Commission confirm that an issuer may release a communication that conforms with Rule 135 after the filing of a registration statement.

V. Interaction of Free Writing Communications Proposals with Regulation FD

The Proposal would amend Regulation FD to reflect the changes in the scope of permissible communications during registered offerings and ensure continued protection against selective disclosure. We support the Proposal's more specific enumeration of communications not subject to Regulation FD, which aligns the "registered offering" exclusion with communications that are filed with the Commission as part of an offering, released under Rule 134 or 135 or made orally after the filing of a registration statement.

The Commission also states that it proposes to "narrow" the exclusion to cover only permissible offerings involving capital formation for the account of the issuer. However, the text of the proposed amendments would, in fact, broaden the exclusion to cover permissible communications made in connection with any offering under Securities Act Rule 415(a)(i)-(vi) that also involves capital formation by the issuer. Under Regulation FD as now in effect, communications made in those types of offerings are entirely outside the scope of the "registered offering" exclusion. We believe that the Commission plans to pursue the approach reflected in the text of the proposed amendments in light of its intention stated in the Release to exclude from the operation of Regulation FD permitted communications made in mixed primary/secondary offerings, and our comments below are made on that basis.

We support an expanded "registered offering" exclusion that would also cover communications made in offerings Rule 415(a)(i)-(vi) and, in the case of offerings described in clauses (a)(ii) through (vi), we would not object to the inclusion of a requirement that the offering be accompanied by an issuer capital raising. We would, however, strongly urge the Commission to extend the coverage of the "registered offering" exclusion to all secondary offerings, regardless of whether made as part of an issuer capital raising. Imposing the latter restriction on secondary offerings will cause unnecessary confusion, without any corresponding benefit to investors. For example, would a registered "A/B" exchange offer qualify, given that the fund-raising was completed in the private leg of the transaction?

Indeed, there is no principled reason to distinguish primary and "pure" secondary offerings for purposes of Regulation FD. Registration statements for both primary and pure secondary offerings are electronically available to all. The Commission originally determined not to exclude communications in connection with secondary offerings from Regulation FD, reasoning that "[t]hose offerings . . . are generally of an ongoing and continuous nature. Because of the nature of those offerings, issuers would be exempt from the operation of Regulation FD for extended periods of time if the exclusion for registered offerings covered them."[3] But primary offerings may be no less continuous in nature. The widely-used format of a medium-term note offering is the classic example. The possibility of a continuous exemption in that case is properly addressed by the definition of "securities offering" in Rule 101(g) of Regulation FD, which specifies the time periods during which underwritten and non-underwritten offerings are deemed to occur. This same approach could be applied to registered secondary securities offerings to preclude a continuous exemption from Regulation FD, while acknowledging that communications made as part of those offerings (at least those that are filed with the Commission or are publicly disseminated through the news media) are broadly available to investors on a non-exclusionary basis and do not give rise to a concern for selective disclosure.[4] In this regard, we note that media coverage of registration statements for secondary offerings is no less vigorous than that of primary offerings. Interest in secondary sales has in fact been fueled by the Commission's accelerated reporting deadlines for "insider" sales under Section 16 of the Exchange Act. Given this attention, the easily accessible and public nature of filings for secondary securities offerings and the

[3] Rel. Nos. 33-77881; 34-43154; IC-24599 (Aug. 15, 2000), note 80.

[4] Following this approach would also permit coverage of secondary offerings made on both an underwritten and agency basis, so long as the definition of non-underwritten offering is met. The Release appears to suggest that the Commission intends to limit coverage of secondary offerings to underwritten mixed primary/secondary offerings. As suggested by our proposed approach, we do not believe this limitation to be justified and, in any event, note that it would not be accomplished by the text of the proposed amendments to Regulation FD, which uses the non-exclusive formulation "including."

liability that attaches to issuer information included in those filings, we believe that these offerings and their associated communications should also benefit from an exclusion from Regulation FD.

VI. Liability Issues

In proposing Rule 159 and 412, the Commission is advancing the principle that the time at which an investor becomes committed to purchase securities is one appropriate time to apply the liability standards of Sections 12(a)(2) and 17(a)(2).

Recognizing the Commission's unassailable view that the quality of information should be assessed at the time of the contract of sale (i.e. trade date), our Committee agrees that the proposed rules minimize the "speed bumps" that would otherwise slow down the offering process. Our Committee also agrees that the current "facts-and-circumstances determination" of whether or not information has been conveyed to an investor at or prior to the time of the contract of sale should be retained. Our Committee believes that more detailed "bright lines," such as defining how information must be conveyed or requiring the passage of a certain amount of time between dissemination and contract of sale, are not necessary in this context and eliminate the flexibility for professionals involved in a transaction to make the requisite assessment based on the particular facts of the transaction. Any "bright lines" would, in fact, create the speed bumps that the Commission is working to avoid.

VII. Shelf Registration Proposals

Our Committee believes that proposed Rule 430B provides shelf issuers with a desirable level of certainty regarding the provision of information in delayed offerings made under shelf registration statements and endorses allowing all shelf issuers to amend their plans of distribution through prospectus supplements rather than only through post-effective amendments.

Our Committee endorses the proposed provisions of Rule 430B that permit issuers to add the identities of selling securityholders by either an amendment to the registration statement or a prospectus supplement. Our Committee believes that this approach will enable issuers to satisfy their contractual obligations to selling securityholders. We also agree that this flexibility should be available to all issuers since it is common for non-WKSI issuers to have those contractual obligations and that imposing a rule to the contrary serves no public policy interest.

Our Committee endorses each of the Commission's proposed amendments to Rule 415 and believes that:

- the two-year intention requirement should be eliminated;
- shelf registration issuers should be required to re-file a shelf registration every five years (as opposed to three years under the Proposal);
- immediate takedowns off shelf registration statements should be permitted in reliance on Rule 415 and proposed Rule 430B; and
- restrictions on primary "at-the-market" offerings of equity securities should be eliminated.

Our Committee applauds the Commission's proposal for automatic shelf registration and agrees that, at the current time, the procedures should be limited to WKSIs, although, like the market value threshold for determining WKSI status, our Committee believes that the Commission should re-evaluate automatic shelf registration after a period of time to determine, based on experience, whether a broader group of issuers should be eligible. Our Committee also agrees that an annual reassessment of eligibility at the time an updated prospectus required by Section 10(a)(3) is filed is appropriate, but believes that the public float should be measured as of the date that the relevant event occurs (using an averaging period similar to the initial eligibility determination) and that loss of eligibility should be deferred for a period of three months to allow the issuer to file a Form S-3 registration statement that would be subject to staff review. Otherwise, issuers losing WKSI status would encounter an offering "black-out" unless they have been able to anticipate the loss of WKSI status and file a new Form S-3 registration statement.

Our Committee agrees that the information proposed to be omitted in an automatically effective registration statement is appropriate and would further propose that a description of securities could be omitted from the base prospectus and added in a prospectus supplement at the time securities are issued. Identifying the types of securities to be registered should be sufficient for purposes of Section 5 of the Securities Act at the time of initial registration.

Given that eligibility for automatic shelf registration is reassessed annually without regard to the age of the registration statement, our Committee believes that there is no fundamental reason why a new automatic shelf registration statement would need to be filed after a certain period of time, but if one is to be filed, our Committee believes that the period should be (as proposed by our Committee above for a Form S-3 shelf registration statement) every five years.

Our Committee believes that a WKSI's use of a previously filed automatic shelf registration should be optional, which will preserve the ability of the issuer to undertake unregistered offerings if circumstances dictate without concern that the existence of an automatic shelf or integration concepts would prevent a private offering. The traditional justifications for undertaking private offerings will continue to exist. These include issuers that will wish to undertake private offerings for confidentiality reasons while being cognizant of their Regulation FD obligations and potential acquirors who will proceed to arrange contingent financing for potential acquisitions without the use of a target's financial statements.

VIII. Proposed Amendments to Forms S-1 and F-1

Under the Proposed Rules, Forms S-1 and F-1 would be amended to permit a reporting issuer that has filed at least one annual report and is current in its reporting obligation to incorporate by reference into its Form S-1 or F-1 information from its *previously filed* Exchange Act reports and documents provided that the issuer makes its Exchange Act reports and documents accessible on its web site. This form of incorporation by reference would not be available to "ineligible issuers," including issuers that are not current in their Exchange Act reporting obligations. Additionally, Forms S-2 and F-2 would be rescinded on the basis that the Form S-1 and F-1 incorporation by reference proposal would make Forms S-2 and F-2 superfluous and that Forms S-2 and F-2 have not been widely used for their intended purposes.

The Commission has requested comment on whether the proposal that would permit incorporation by reference into Forms S-1 and F-1 should be expanded to permit forward incorporation by reference of documents not identified in and filed after the effectiveness of the registration statement. Our Committee strongly supports the expansion of the proposal to permit *forward* incorporation by reference. We believe that documents that would be filed with the Commission after the filing of the registration statement are readily available to and commonly used by investors through the EDGAR system. The cost and timing benefits to issuers of permitting forward incorporation by reference greatly outweigh any detriment to investors from the exclusion from the written registration statement of the information contained in the filings that are incorporated by reference.

We believe that the three-year look-back period for determination of the eligibility of an issuer for incorporation by reference is excessive. Our Committee proposes that eligibility be determined based on a review as of the end of the most recent fiscal year for which an annual report on form 10-K has been filed by the issuer. This proposal is based on the view that the prior year's Form 10-K would make adequate disclosure of any circumstance that otherwise would impact the eligibility of the issuer. A longer look-back period is punitive toward issuers, rather than enhancing the disclosure available to investors. Moreover, we urge the Commission to review the proposed definition of an ineligible issuer to reduce the number of circumstances that would trigger ineligibility. For example, due to the recent amendments to the Form 8-K filing requirements, we believe that, at least until issuers gain a greater familiarity with the Form 8-K triggers, there are likely to be a number of issuers that miss a Form 8-K filing obligation. We refer the Staff to our discussion above under "Well-Known Seasoned Issuers – Timely Filing of Exchange Act Reports".

The Commission has requested comment on whether there are any issuers that would be adversely affected by the rescission of Form S-2 or F-2. Our Committee believes that the other proposals made by the Commission, if adopted as proposed, would render Forms S-2 and F-2 obsolete and, accordingly, we support the rescission of those Forms.

IX. Prospectus Delivery Reforms

Our Committee supports the Commission's efforts to facilitate access to information by utilizing advancements in technology. Specifically, our Committee endorses the Commission's "access equals delivery" model for prospectus delivery as detailed in proposed Rule 172.

Under proposed Rule 172, a final prospectus would be deemed to precede or accompany a security for sale for purposes of Securities Act Section 5(b)(2) as long as the final prospectus meeting the requirements of Securities Act Section 10(a) is filed with the Commission as part of a registration statement by the required Rule 424 prospectus filing date. Our Committee believes, however, that proposed Rule 172 should include a "cure" provision so that issuers who miss a required Rule 424 prospectus filing date but file a final prospectus with the Commission prior to closing a transaction maintain their proposed Rule 172 eligibility. This will have no substantive effect given the Commission's proposals with respect to liability issues.

Additionally, given the breadth of proposed Rule 172, our Committee believes that there is significant overlap with Rule 153. Our Committee suggests that the Commission consider combining the two rules by clarifying Rule 172 to ensure that broker-dealer trades fall within its scope. Alternatively, if the Commission decides to retain Rule 153, we believe that the rule should be expanded to include all securities, whether or not listed on a national securities exchange, in view of the general "access equals delivery" concept.

X. Additional Exchange Act Disclosure Proposals

Our Committee supports the Commission's proposal to extend the risk factor disclosure requirements of Item 503 of Regulation S-K to Form 10-K and registration statements on Form 10, with quarterly updates to reflect any material changes, but believes that the requirement should not extend beyond the risk factor disclosure requirements of Item 503 of Regulation S-K.

Our Committee believes that the Commission's proposed approach regarding disclosure of unresolved Staff comments provides an appropriate incentive for issuers to respond to Staff comments in a timely manner.[5] Our Committee believes that the Commission's proposal to require disclosure in annual reports for material comments outstanding for more than 180 days from the Staff's initial written comment letter strikes the appropriate balance, provided that the Staff promptly (within, we suggest, 10 to 20 days of a comment response) follows up on comment responses and timely pursues that process through completion. Our Committee would propose that only issuers with an automatically effective shelf registration statement on file (or that file an automatic shelf registration statement) would need to include the disclosure regarding unresolved Staff comments (either in the most recent Form 10-K or an amendment to the Form 10-K filed before the filing of the automatically effective shelf registration statement).

As to what unresolved comments are to be disclosed and how, consistent with the disclosure process overall, our Committee believes that the issuer should be permitted (without involving the Staff) to determine which unresolved comments are material and should be permitted to paraphrase the material aspects of the comment and the issuer's response and position with respect to the comment. Those determinations, like other disclosure, would be subject to the Commission's review and comment.

Conclusion

Our Committee applauds the Commission for undertaking and prioritizing securities offering reform. The further transformation of the capital markets in recent years has made it clear that a change to the 70-year old regulatory regime is necessary. The Commission's proposals have commendably attempted to make the capital formation process more efficient by facilitating a freer flow of information, most notably by capitalizing on technological advances.

Please note that this letter does not necessarily reflect the individual views of members of our Committee.

[5] Other incentive already exists, including the unwillingness of outside accountants to give "Comfort" on audited financial statements that are subject to unresolved comments.

Members of our Committee would be pleased to answer any questions you may have regarding our comments, and to meet with the Staff if that would be of assistance.

Respectfully Submitted,

/s/ Matthew J. Mallow
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Committee on Securities Regulation

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