Prudential Financial

Felicia Smith
Senior Vice President
Corporate Counsel

Prudential Equity Group, LLC
One New York Plaza, New York, NY 10292-2015
Tel 212 778-6321 Fax 212 778-6160
felicia_smith@prusec.com

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Securities and Exchange Commission
450 Fifth Street, North West
Washington, District of Columbia 20549-0609
Attention: Mr. Jonathan G. Katz, Secretary

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

Gentlemen and Ladies:

Prudential Equity Group, LLC ("PEG") submits this letter in response to the Securities and Exchange Commission's (the "Commission") request for comments on Securities Offering Reform, Securities Act Release No. 8501 (November 3, 2004) [69 F.R. 221 at 67392 (November 17, 2004)] (the "Proposing Release"). PEG provides equity research, sales and trading services to institutions that invest in US equity securities. PEG is a member of the New York Stock Exchange and the NASD, and is registered as a broker-dealer under section 15 of the Securities Exchange Act of 1934 (the "Exchange Act"). As a member of the Securities Industry Association (the "SIA"), PEG participated in the preparation of the letter submitted by the SIA's Federal Regulation and Capital Markets Committees and concurs with the views expressed by the SIA in that letter.

If adopted, we expect the proposals would have a significant impact on securities firms that provide research and trading services. In proposing revisions to its rules governing research safe harbors under the Securities Act of 1933 (the "Securities Act"), the Commission stated its desire "to avoid Securities Act restrictions that discourage research coverage or dissemination where they are not necessary to protect investors."[1] We understand that the proposals generally would enable independent research providers, such as PEG, to provide research coverage throughout the public offering process, commencing at the time that the company proposes to conduct the offering, including research coverage on the company's initial public offering ("IPO"). As a result, investors would benefit from an increase in the amount and quality of objective information available to them prior to the effectiveness of the registration statement—particularly during the pricing of an IPO—and in the period immediately following the public offering when the securities begin to trade in the public markets (the "aftermarket").

[1] Proposing Release at 67419-20.

The Commission's proposals are intended to encourage the release of factual business information by issuers that are obligated to file periodic and annual reports under the Exchange Act ("reporting issuers") and issuers that voluntarily file such reports ("voluntary filers") when such issuers are engaged in a securities offering. Reporting issuers also would be encouraged to continue to provide forward-looking information when they are "in registration". In addition, issuer communications made more than 30 days prior to the filing of the registration statement would not be a prohibited offer for purposes of the Securities Act if such communications did not reference the securities offering and satisfied other conditions of the proposed rule.[2] As a result, these issuers generally should have less reluctance to communicate with research analysts and other market participants based on concerns about violating pre-offering restrictions on communications (*i.e.*, "gun-jumping"). We support the Commission's efforts to eliminate restrictions on communications during an offering, because we believe it will enhance the likelihood that independent research providers would have access to the information necessary to provide investors with objective and timely information on issuers and industries. Consequently, the flow of timely information to investors should be enhanced.

We believe that adoption of the "access equals delivery" model to satisfy prospectus delivery obligations for registered offerings would comport with the reality of how innovations in technology have made it possible for investors and other market participants to access material information on issuers and offerings in a timely and efficient manner. The access equals delivery model could simplify compliance with prospectus delivery rules and substantially reduce (if not eliminate) the costs associated with tracking registered offerings and delivering paper versions of the final prospectus. We believe that the rationale underlying the Commission's proposal to permit broker-dealers to rely on access equals delivery for certain registered offerings also supports the extension of the access equals delivery model to all prospectus delivery obligations under the Securities Act and the Exchange Act.

We are aware that other commenters have suggested that the Commission further revise its prospectus delivery reforms to eliminate a dealer's obligation to deliver a final prospectus during the aftermarket for IPOs that are listed on an exchange or on the Nasdaq Stock Market. As a result of innovations in technology, investors now have timely access to the final prospectus when it is filed with the Commission; however, the dealer is still required to track and monitor IPOs for all listed securities. We concur with the suggestion to eliminate the prospectus delivery obligation under these circumstances, because we believe the administrative burdens on the dealer to track and monitor IPOs for all listed securities outweigh the benefits to investors.

PEG commends the Commission for its thoughtful proposals to adapt securities offering regulations to innovations in capital formation and communications technology, and appreciates the opportunity to comment on the Commission's proposals. While we generally support the rationale and the regulatory approach, as discussed below, we believe that the effectiveness of certain proposed rules affecting research and prospectus delivery could be enhanced.

[2] Reliance on proposed rule 163A would not be available for certain types of transactions (business combination or offering made by a registered investment company or business development company) or issuers (blank check companies, shell companies or penny stock issuers). *Id.* at 67405-06.

A. Research Reports.

IPO Research Coverage

The Research Safe Harbor Should Be Expanded To Include IPOs. PEG agrees with the Commission's proposal to revise rule 137 under the Securities Act to permit research coverage on non-reporting issuers[3] that propose to file a registration statement for an offering, including IPOs. Given our interest in providing timely information on issuers that will be useful to our clients, and the Commission's express desire to "facilitate greater availability of information to investors and the market with regard to all issuers,"[4] PEG encourages the Commission to adopt this revision to rule 137.

We believe, however, that the Commission should continue to make the safe harbor available to brokers or dealers for the "publication or distribution of information, opinions or recommendations" and not solely for "research reports" as proposed to be defined in rule 137, thereby encompassing analysts' conference calls, one-on-ones and other oral communications within the ambit of the safe harbor. Written research reports are only one of the means by which analysts provide research coverage. Indeed, institutional investors expect to speak with analysts, whether or not the analysts' views would provide a reasonable basis upon which to make an investment decision. By operation of the proposed definition of research report, the broker/dealer could publish a written research report that includes "information sufficient upon which to base an investment decision" and have the benefit of the safe harbor (if the other conditions of the rule were met), yet risk exposure to potential Securities Act civil liabilities for oral communications.[5] We believe the likely result would be a decrease in research coverage available to investors unless the safe harbor also includes "information, opinions or recommendations" as currently permitted by rule 137.

In addition, a requirement that such broker/dealer not have received consideration (directly or indirectly) from any participant in the offering in connection with the publication or distribution of *any* research,[6] should be applicable solely to the subject research and should not include consideration such broker-dealer (or its affiliates) may receive or may have received for services or products unrelated to the subject research. Trading commissions and/or fees for the provision of insurance, asset management services, retirement plan administration, copy center services and data center services provided by the broker/dealer or any of its affiliates are examples of products and services that should not be deemed to be consideration for purposes of the safe harbor.

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[3] *Id.* at 67420. Non-reporting issuers do not have any obligation to file Exchange Act reports and do not file such reports on a voluntary basis. *Id.* at 67398.

[4] *Id.* at 67395.

[5] *See* Section 12(a)(2) of the Securities Act [15 U.S.C. §77(l)(a)(2)]. The very nature of telephone conversations, conference calls and similar oral communications preclude an ability to provide the same depth of analysis and nuance that generally would be reflected in a written report.

[6] Proposed rule 137(b).

When a broker/dealer initiates coverage of an issuer preparing to go public or a newly-public issuer pursuant to the proposed safe harbor, we believe that such broker/dealer would satisfy the requirement in proposed rule 137(c) that it "publishes or distributes the research report in the regular course of its business" if such broker/dealer's business includes the provision of research. The broker/dealer may choose to cover all new issues or selectively cover new issues such broker/dealer believes would be of interest to its clients. The fact that the broker/dealer does not cover all or most new issues should not be the sole basis for a determination that the safe harbor would not be available to the broker/dealer because new issues research was not provided in the regular course of such broker/dealer's business. We ask the Commission to confirm our view.

Proposed rule 137 provides that the broker/dealer may rely on the safe harbor to provide research coverage of an issuer that proposes to file a registration statement. As a result, the research may be provided or distributed prior to the time that the issuer files its registration statement for the offering. The Commission should clarify that the broker/dealer's research coverage would not constitute a prohibited pre-filing offer under the Securities Act.

Research Provided or Distributed by Independent Research Providers Should Be Excluded From the Definition of a "Prospectus". The Commission should further revise the rule to expressly provide that research provided or distributed by non-participating broker-dealers[7] would not be a *prospectus* for purposes of the Securities Act, thereby excluding such research from any requirement that it conform to the disclosure requirements of a statutory prospectus under section 10(a) of the Securities Act. We believe that this change would be appropriate because the broker/dealers providing such research would not be participants (directly or indirectly) in the securities offering, and would not be providing or distributing their research on the subject issuer at the behest of any issuer, underwriter or other offering participant.[8] This is particularly the case where non-participating broker/dealers do not engage in any investment banking activities.

In the alternative, the Commission should permit such broker/dealers to rely unconditionally on access equals delivery to satisfy any prospectus delivery obligations related to publication or distribution of independent research. The issuers' preliminary prospectuses (and Exchange Act reports for issuers filing such reports) would be available online on the Commission's website, thereby making material information on the issuer and the offering readily available to the market and the investing public. Thus, the same rationale underlying the Commission's proposal to adopt access equals delivery in the context of the delivery of written confirmations of sale in registered offerings also would apply to the delivery of preliminary prospectuses during the waiting period. We believe this would be a reasonable accommodation that would remove unnecessary restrictions on the provision or distribution of independent research.

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[7] This term includes broker/dealers that are not underwriters, selected dealers or other offering participants.

[8] Proposed rule 137(a) and (b). As is presently the case, broker/dealers relying on the safe harbor would be subject to the rules of the NASD (and the NYSE for its member organizations), which provides standards for the preparation of research.

Aftermarket Research Coverage

Dealers Distributing Independent Research In The Aftermarket Should Not Incur A Prospectus Delivery Obligation. PEG believes that regulatory changes that enable dealers to provide investors with timely, independent research analysis of securities trading in the aftermarket should benefit investors by increasing the amount and quality of objective information available to such investors. However, an independent research provider that also is a securities dealer faces an additional impediment to distributing research in the aftermarket. Section 4(3) of the Securities Act and rule 174 thereunder require the dealer to deliver a final prospectus for transactions in the aftermarket. Because research reports distributed in the aftermarket do not meet the requirements of a statutory prospectus, but are treated as supplementary selling literature, the dealer must ensure that its research report is preceded or accompanied by the final prospectus.

As a practical matter, the independent research provider's ability to distribute its research in the aftermarket depends in large measure on its ability to obtain offering information in a timely manner. Since it is not an offering participant, it faces a competitive disadvantage in obtaining information about the offering and status of offering participants, including prompt notice that the registration statement is effective. Moreover, there would not seem to be any policy reason to continue to treat research prepared by independent research providers as "supplementary selling literature", thereby requiring firms that have no involvement in the offering—particularly those dealers that do not engage in investment banking activities—to precede or accompany their independent research with the issuer's statutory prospectus. [9]

We encourage the Commission to ease the regulatory burdens on independent research providers by exempting such dealers from any obligation to precede or accompany their independent research with the issuer's statutory prospectus, thereby enhancing such dealers' ability to furnish investors with timely and objective information on securities trading in the aftermarket.

[9] To the extent their clients purchased the subject securities in aftermarket trading, such dealers would have a prospectus delivery obligation related to the specific trade. This obligation, however, would be separate and distinct from an obligation to deliver a final prospectus arising out of such dealers' provision of research in the aftermarket.

B. Prospectus Delivery.

The Commission Should Permit Broker/Dealers To Rely on Access Equals Delivery To Satisfy Prospectus Delivery Obligations. PEG believes that dealers should be allowed to rely on access equals delivery to satisfy prospectus delivery requirements for aftermarket trading and transactions effected on securities markets. The Commission acknowledges that in the ordinary course, the final prospectus is available to investors and the market when it is filed with the Commission.[10] In addition to the Commission's EDGAR website, final prospectuses are available online from vendors and, in some cases, from issuer websites. Material information concerning the offering already is available to the investing public. Thus, we believe that the retention of a paper-delivery system, which imposes significant burdens on dealers (including delivery systems and postage), does not provide any additional protection for investors and is not in the public interest.[11]

The Rules' Conditions May Impede Broker/Dealers' Ability to Rely On The Rule. Although the Commission proposes to permit dealers to comply with prospectus delivery obligations for registered offerings by relying on an issuer's electronic filing of the prospectus with the Commission, proposed rule 172 would impose several conditions[12] related to the offering and the conduct of the issuer and underwriters that must be satisfied before a dealer may rely on the "access equals delivery" model. The broker/dealer's ability to rely on access equals delivery to satisfy the prospectus delivery obligation for transactions effected on securities markets also would be subject to similar conditions.[13] We believe these conditions may impede the utility of the proposed rules because it would be very difficult for broker/dealers that were not offering participants to make a determination, in a timely and cost-effective manner, that such conditions have been (or will be) met.

Additionally, given the potential liability for failure to comply with the prospectus delivery requirements, we expect that non-participating broker/dealers would be reluctant to rely on access equals delivery in the absence of establishing systems and internal controls to obtain the information and monitor on-going compliance. These regulatory burdens seem inconsistent with the policy behind adopting the access equals delivery model. Accordingly, we believe the

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[10] Proposing Release at "Section VI.B." at 67438.

[11] We believe that the protection of individual investors does not require the retention of a paper-delivery model. Nonetheless, if there were a legitimate concern that Internet access is not sufficiently wide-spread among individual investors to justify eliminating the paper-delivery model, the Commission should permit dealers to rely on access equals delivery for trades involving institutional investors (whether such institutional investors are acting for themselves or their managed or fiduciary accounts).

[12] For example, the dealer's due diligence would require it to determine that the registration statement is effective and is not the subject of any pending proceeding or examination under section 8(d) or 8(e) of the Securities Act; neither the issuer nor an underwriter or participating dealer is the subject of a pending proceeding under section 8A of the Securities Act in connection with the offering; and the issuer has filed or will file a final prospectus with the Commission within the time required by rule 424 under the Securities Act. *See* Proposed rule 172(c).

[13] Proposed rule 153(b)(2)-(4).

Commission should make it clear that non-participating broker/dealers would not be required to satisfy the conditions set forth in proposed rules 153 and 172.[14]

The Commission Should Clarify The Books and Records Obligations Of Broker/Dealers That Rely On Access Equals Delivery. Since the delivery of paper prospectuses will not be made, the Commission also should propose amendments to Exchange Act rules to clarify the record making and keeping obligations of registered broker/dealers that rely on access equals delivery to satisfy prospectus delivery obligations. Pending adoption of these rules and in lieu of current requirements, broker/dealers should be allowed to rely on the issuer's representation that such issuer has filed—or will file—the final prospectus as required by rule 424(b) under the Securities Act. The Commission should use this interim period to gain experience with access equals delivery before proposing amendments to the record making and keeping obligations of broker/dealers.

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[14] We request that the Commission clarify that upon adoption of the access equals delivery rules, it has abrogated contrary interpretive and no-action positions, including without limitation, those that require broker/dealers to provide links to the prospectus *via* email or other means (*e.g.*, the envelop theory). For ease of administration, the complete list of abrogated interpretations and no-action letters should be included in the adopting release.

In conclusion, PEG supports the Commission's efforts to modernize regulations governing securities offerings by eliminating obsolete paper-based prospectus delivery rules and restrictions on research activities and issuer communications that are not necessary for the protection of investors.

Respectfully Submitted,

/s/ Felicia Smith
Felicia Smith

With a copy to: The Honorable William H. Donaldson, Chairman
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
The Honorable Paul S. Adkins, Commissioner
The Honorable Roel C. Campos, Commissioner
Mr. Alan Beller, Director of the Division of Corporation Finance