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<u>SEC Release No. 33-8501</u>

Dear Sirs:

I write with respect to the rules proposed by the Securities and Exchange Commission (the "Commission") in Release No. 33-8501 (the "Proposing Release") for reform of the securities offering process. The proposed rules would modify extensively the registration, communication and offering process under the Securities Act of 1933 (the "Securities Act") and raise very significant policy issues. I will, however, leave those issues to other commentators and will limit my comments to a small number of specific matters.

<u>Limitation of Proposed Rule 168 to Reporting Issuers</u>

Proposed Rule 168 would create a safe harbor for "factual business information" and "forward-looking information" that is released or disseminated by an issuer that is required to file reports pursuant to Section 13 or 15(d) of the Securities Exchange of 1934 (the "Exchange Act"), subject to certain exceptions and conditions. Proposed Rule 169 would provide a similar safe harbor for "factual business information", but not "forward-looking information", released or disseminated by other (i.e., non-reporting) issuers. According to the Proposing Release, non-reporting issuers should not need the exemption for "forward-looking information".

I recommend that proposed Rule 168 be made available to foreign private issuers that meet the requirements of proposed Rule 138(a)(2)(ii). Such a foreign private issuer, which is a public company in its home jurisdiction, is just as likely to release "forward-looking information" as a reporting issuer.

Relationship between Proposed Rules 168 and 169 and Rules 144A and 902

I note that the Commission has proposed amending Rules 138 and 139 to clarify that research reports meeting the conditions of those Rules would not be considered offers or general solicitations or general advertising in connection with offerings relying on Rule 144A and that such research reports would not constitute directed selling efforts or be inconsistent with the offshore transaction requirements of Rule 902 of Regulation S. I support those proposed amendments to Rules 138 and 139.

In addition, I recommend that the Commission take a similar approach in proposed Rules 168 and 169. Given the protections and limitations in proposed Rules 168 and 169, it is difficult to see how the statements subject to those safe harbors would be used to circumvent Rule 144A or Rule 902.

"Filed all materials required by Sections 13, 14 or 15(d)"

1. For a number of years, the Commission has used a standard of "filed all the material required by Sections 13, 14 or 15(d)" of the Exchange Act of 1934 as a standard for compliance by issuers with their reporting obligations.[1] When that standard was used primarily to determine eligibility to use the various registration statement forms under the Securities Act, however, Rule 401(g) significantly limited the practical consequences to issuers and underwriters of an incorrect determination as to whether an issuer met that standard. As that standard is proposed to be used more broadly, such as part of the definitions of "well-known seasoned issuer" and "ineligible issuer", I recommend the Commission consider carefully whether that standard actually is correct.

I proposed that standard be rewritten as "filed all the material required by Section 13(a), 14(c) or 15(d) of the Exchange Act and all the material required by Section 14(a) of the Exchange Act with respect to the solicitation of proxies or consents from its own securityholders". These are the sections of the Exchange Act that mandate disclosure by issuers with respect to themselves. There does not seem to be any sound policy reason why an issuer should lose the benefit of Form S-3 or of any of the reforms contemplated in the Proposing Release for "well-known seasoned issuers" if the issuer has, for example, failed to timely comply with the reporting obligations imposed by Section 13(d) of the Exchange Act (substantial shareholdings), 13(f) of the Exchange Act (holdings by institutional investment managers), 13(g) of the Exchange Act (substantial shareholdings), 13(h) of the Exchange Act (large trader reporting) or 14(d) of the Exchange Act (third party tender offers).

2. Even if the Commission accepts this recommendation, the Commission should recognize that third parties (such as underwriters) cannot accurately determine whether an issuer meets this standard. Proposed Rules 164 and 433, for example, are to be available to underwriters based upon, among other matters, whether the issuer is in

[1] See, for example, Form S-3, General Instruction I.A.3(a).

compliance with its reporting obligations. Given that these proposed Rules, taken together, provide an exemption from Section 5 of the Securities Act (for which an underwriter does not have a due diligence defense), the Commission should ensure that parties other than the issuer itself can safely rely on representations by an issuer that it meets the requirements for the relevant exemption.

3. A more complex, but equally important, matter is the consequences for an issuer of its incorrect reliance on the proposed new exemptions. Consider, for example, the consequences under current law if an issuer has failed to comply with its Form 8-K filing obligations at the time of a registered securities offering. Any claim by a purchaser of the securities is a misdisclosure claim, as to which the purchaser must establish the materiality of the omission and the issuer has the benefit of Sections 11(e) and 12(b) of the Securities Act. If an issuer, however, were to rely on proposed Rule 163, 163A or 164 in circumstances in which the relevant Rule was not available because of a failure on the part of the issuer to comply with Form 8-K filing requirements, a purchaser of the relevant securities would have a Section 12(a)(1) claim, and thus need not prove materiality or loss causation.

I fully support the Commission's theory that the benefits of the proposed reforms should not be available to companies that are not in compliance with ongoing reporting obligations. Equally, however, I do not believe it to be appropriate for the consequences of erroneous, but well-intentioned, reliance on the exemptions to be so severe.

I suggest the Commission adopt a rule stating that, in any private action alleging non-compliance with Section 5 by an issuer, a "qualified well-known issuer" will be deemed to have met the requirements of clauses (1)(i), (4) and (5) of the definition of "well-known seasoned issuer" and be deemed to have not met the requirements of clause (1)(i) of the definition of "ineligible issuer", in each case at all relevant times, unless and until the Commission determines otherwise; for these purposes, a "qualified well-known issuer" will mean any issuer who meets the requirements of clauses (1)(ii) and (3) of the definition of "well-known seasoned issuer".

Definition of "Ineligible Issuer"

1. Each of clauses (1)(viii), (1)(ix) and (1)(x) of the definition of "ineligible issuer" uses the formulation "the issuer or any of its subsidiaries". With respect to subsidiaries, the definition should clarify that these clauses only apply if the relevant subsidiary was a subsidiary of the issuer at the time of the relevant action.

2. In addition, proposed clause (1)(x) of the definition of "ineligible issuer" raises a number of troubling features, particularly in light of proposed clause (3) of that definition. First, to the extent the theoretical basis for proposed clause (1)(x) is Section 27A of the Securities Act and Section 21E of the Exchange Act, proposed clause (1)(x) should be limited to the antifraud provisions of the federal securities laws. Second, it is inappropriate for the Commission to impose a mandatory penalty (i.e., "ineligible issuer" status) on all issuers who settle allegations of violations of the securities

laws. In the settlement process, the Commission (through the staff of the Enforcement Division) can seek agreement to whatever remedies are thought suitable in the circumstances. On what basis can the Commission, through rule-making, then impose a further penalty?

3. Clause (1)(ix) suffers from significant ambiguity. I assume the expression "settlement with any governmental agency" means "a settlement with any government agency charged with the enforcement of the federal securities laws or regulations"; surely clause (ix) is not intended to apply to a settlement with a governmental agency in a lawsuit for damages in which the government agency is a plaintiff because it is a holder of securities. Second, the expression "settlement involving allegations" should read "settlement of allegations". There is also ambiguity surrounding the relationship between proposed clauses (1)(ix) and (1)(x). Which clause covers settlements that are implemented through consent orders? If both, why is clause (1)(ix) so broad while clause (1)(x) is limited to specific remedies? Finally, clause (ix) also should be limited to allegations of violations of the antifraud provisions of the federal securities laws.

Sincerely,

Richard Hall

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