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Via Electronic Mail

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

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

Dear Mr. Katz:

We are pleased to submit this letter in response to the Commission's request for comments on the proposed reforms 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 and congratulate you on your considerable efforts in this regard.

We would like to limit our comments to the proposed definition of "Ineligible Issuer" to be added to Rule 405 promulgated under the Securities Act of 1933. While we agree that several of the proposed categories of Ineligible Issuers are appropriate (e.g. issuers that are not current in the reporting obligations, penny stock issuers, shell companies and blank check companies), others are overbroad and would deny the benefit of the Commission's reform proposal to many issuers for whom the benefits of the Commission's proposal are appropriate. In particular, the definition of Ineligible Issuer, as proposed, would include an issuer with respect to which either of the following is true:

- Within the past three years, the issuer or any of its subsidiaries entered into a settlement with any government agency involving allegations of violations of the federal securities laws or regulations; or

- Within the past three years, the issuer or any of its subsidiaries was made the subject of any judicial or administrative decree or order arising out of a governmental action that:

    - Prohibits certain conduct or activities regarding, including future violations of, the federal securities laws;

    - Requires that the person cease and desist from violating any provision of the federal securities laws; or

    - Determines that the person violated any provision of the federal securities laws.

In discussing the definition, the proposing release states that the categories of Ineligible Issuers include issuers that have been viewed historically as unsuited for short-form registration or ineligible for disclosure-related relief. We believe that the two bases of ineligibility described above do not follow from this historical precedent and expand ineligibility beyond the Commission's and Congress' prior approach. Currently, Form S-3 in unavailable to issuers who have failed to file their Exchange Act reports on a timely basis. This is understandable, given the fact that these very reports are incorporated by reference into the registration statement. Similarly, it is easy for us to see why an issuer would be an Ineligible Issuer if it failed to file its Exchange Act reports, as the availability of these reports gets to the heart of what it means to be "well known." But short-form registration and even the automatic effectiveness of certain registration statements do not currently depend on the issuer's and its subsidiaries' history of compliance with the federal securities laws generally. Issuer eligibility to use Form S-3 does not depend on criteria comparable to the two bases of ineligibility described above. Nor does eligibility to utilize an automatically effective registration statement on Form S-8 or pursuant to Rule 462 under the Securities Act depend on issuer criteria comparable to the two bases of ineligibility described above. In all of these cases, it is the availability of information about the issuer that is fundamental to the procedural benefits conferred. The two bases of ineligibility described above do not follow this historical approach.

The proposing release also notes that Congress determined not to extend the safe harbors for forward-looking statements to issuers previously convicted of certain felonies and misdemeanors and issuers subject to a decree or order involving a violation of the securities laws. While this may be true, the two bases for ineligibility described above go well beyond the comparable disqualifying provisions of Section 27A of the Securities Act in several important respects. In the two bases for ineligibility described above, an issuer is deemed "ineligible" if it or any of its subsidiaries is involved in a settlement or is subject to a decree or order involving a violation of the federal securities laws. The exclusion from Section 27A does not extend to settlements, nor does it extend

to subsidiaries. It also applies only to violations of the anti-fraud provisions of the federal securities laws, not the federal securities laws generally.

These differences prompt several observations that the Commission should consider in connection with its rulemaking deliberation. First, making issuer ineligibility under the proposed rules dependent on the conduct of the issuer's subsidiaries will have a disproportionately negative impact on issuers whose subsidiaries are involved in the securities business. Many large and well known issuers are holding companies of financial services subsidiaries that engage in broker-dealer, investment adviser and other activities regulated by the federal securities laws. These subsidiaries are often involved in settlements and subject to orders and decrees regarding the federal securities laws. We would expect that if the definition of Ineligible Issuer were adopted as proposed, most issuers involved in the financial services industry would fall within the definition and would therefore fail to benefit from the Commission's proposed offering reforms.

Second, even if the Commission were to consider limiting the two bases for ineligibility described above to issuers involved in violations of the anti-fraud provisions of the federal securities laws, we believe that the comparison between the safe harbor for forward looking statements and the offering reforms proposed in the Commission's rulemaking proposal is misplaced. The safe harbor for forward looking statements is a safe harbor from private actions based on a fraud claim. It is therefore reasonable to expect that issuers with a history of government action regarding the anti-fraud provisions of the federal securities laws would be ineligible to use the safe harbor for a period of time. However, as previously noted above, the availability of short-form registration and automatic effectiveness for registration statements do not currently depend on similar criteria. Nor does the ability to rely on Rules 134 and 135 under the Securities Act. Instead, they depend upon the timely availability of disclosure regarding the issuer. The quality of that disclosure is already protected by the existing disclosure and liability provisions of the federal securities laws and the rules thereunder (including Section 27A itself).

Finally, we believe that issuer ineligibility based on "settlements" involving "allegations" of violations of the federal securities laws goes beyond not just any analogy to Section 27A, but also beyond fundamental fairness. Many companies, when faced with a government action alleging a violation of federal law will feel compelled to reach a negotiated settlement rather than incur the cost in time and money of a trial or an administrative hearing. These companies should not face the added burden of being an Ineligible Issuer because they accepted a settlement based on allegations where there was no further consent to an order or decree regarding future violations of law and no finding of a violation of law.

For the foregoing reasons, we respectfully suggest that the two bases for ineligibility described at the start of this letter be eliminated from the definition of "Ineligible Issuer." If either or both are retained, we suggest that they at least be limited to conform more closely to exclusions from Section 27A.

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We appreciate this opportunity to comment on the proposed securities offering reforms and would be happy to discuss any questions the Commission or its staff may have with respect to this letter. Questions may be directed to the undersigned at (212) 373-3309.

Very truly yours,

/s/ Raphael M. Russo

Raphael M. Russo