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January 31, 2005

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

File No. S7-38-04
Proposed Rule: Securities Offering Reform
Release Nos. 33-8501; 34-50624

Dear Mr. Katz:

KPMG LLP is pleased to provide our comments on the Securities and Exchange Commission's proposed rule entitled, *Securities Offering Reform* (the "Proposed Rule"). KPMG supports the Commission's efforts to modify and advance significantly the registration, communications and offering processes under the Securities Act of 1933 (the "Securities Act").

General

In the Proposed Rule, the Commission proposes to modernize the existing rules governing certain parts of the registration, communication and offering processes that were originally enacted in 1933. Issuers in today's marketplace are confronted with a need to make decisions and access capital at a much faster pace than was originally anticipated or technologically possible. Through their periodic filings and other means of communication, issuers regularly provide a significant amount of timely information to the marketplace regarding their results and expectations. Independent analyst reports on many issuers are readily available to potential users of that information. The significant enhancements in information availability, especially enhancements in the electronic means of sharing information occurring in the past decade, serve to provide potential users with more complete and timely information on which to base their decisions. Modernization of the securities offering process is a continuous goal in order to allow the markets to work to their full potential and capitalize on the achievements in technology. We believe the Proposed Rule provides improvements and needed relief from certain regulations that are no longer relevant in the current marketplace. We have the following specific comments related to certain aspects of the Proposed Rule. Our letter does not address all requests for comments included in the Commission's proposing release but is

limited to those areas in which we are directly involved as an independent registered public accounting firm or those areas in which we believe we may provide useful input.

Our most significant comments are summarized as follows:

- Reassessment of the accelerated filer threshold is warranted in light of the provisions of the Proposed Rule and the recent activities of the SEC and PCAOB. Raising the accelerated filer public float threshold to coincide with the definition proposed for the well-known seasoned issuer would grant appropriate relief to mid-cap issuers and still provide investors with adequate information on a timely basis. Although advances in technology have provided opportunities for more timely information gathering and dissemination, enhanced reporting obligations and especially the need for more diligence to ensure accuracy and completeness, warrant granting companies with more limited resources the additional time needed to report in the current environment.

- Greater clarity and consideration is needed in the proposals surrounding free writing prospectuses. Since AU Section 711.09 of the PCAOB auditing standards requires the auditor to read all sections of the prospectus, it will be necessary to ensure that there is a clear definition of the communications that constitute the prospectus. Additionally, other provisions of the auditing standards address the auditor's responsibility as an expert and in performing due diligence. Execution of these responsibilities will require a clear definition of the contents of the prospectus.

- If Section 11 liability is attached to prospectus supplements, the final rulemaking should accommodate the necessity for named experts, including independent accountants, to conduct a "reasonable investigation" in connection with the use of their reports in a Securities Act registration statement.

- Eligibility for well-known seasoned issuer status should not be conditioned on a lack of negative financial indicators, such as a going concern auditors' report or the disclosure of material weaknesses in internal control over financial reporting.

- Automatic registration will not reduce the incentive for well-known seasoned issuers to resolve SEC staff comments on a timely basis. Disclosure of issuers' open SEC comments in annual reports is unnecessary (1) because issuers and their advisers are appropriately concerned about material

unresolved comments at the time of effectiveness, and (2) if issuers and the SEC staff adhere to a reasonably strict time frame within which to respond to SEC and issuer comments and responses.

Our responses to certain questions contained in the Proposed Rule follow.

Accelerated Filer Determination

The Proposed Rule seeks to add a new category of issuer, the "well-known seasoned issuer" (WKSI). These are issuers who are followed by sophisticated investors, tend to have a more regular dialogue with investors and must have a minimum $700 million of common equity market capitalization held by non-affiliates, or "public float". We suggest the Commission reconsider its definition of an accelerated filer with an eye towards synchronizing the market capitalization threshold for an accelerated filer with the threshold contained in the definition of a well-know seasoned issuer.

On November 17, 2004, the SEC adopted amendments to postpone for one year the final phase-in period for acceleration of the due dates of quarterly and annual reports for certain reporting companies known as "accelerated filers." The SEC proposed the postponement to allow additional time and opportunity for accelerated filers and their auditors to focus their efforts on complying with the new requirements regarding internal control over financial reporting. Some of the comment letters received by the SEC noted that accelerated filers needed additional time to address difficult analytical issues that may arise in the course of management's internal control assessment while others agreed that the additional time would allow companies to improve the accuracy and reliability of financial reporting.

On November 30, 2004, the SEC issued an Exemptive Order Under Section 36 of the Securities Exchange Act of 1934 (the "Exchange Act") Granting an Exemption from Specified Provisions of Exchange Act Rules 13a-1 and 15d-1 that provided certain accelerated filers with a public float of less than $700 million with an additional 45 days to file management's first report on internal control over financial reporting and the related report of their auditors. The SEC stated in its Order that they were concerned that smaller accelerated filers may not be in a position to meet their Form 10-K deadline. The SEC found the Order was necessary and appropriate in the public interest and for the protection of investors.

We supported the above Order that balances the need for timely financial information for investors with the realities of our complex financial reporting environment. We previously noted this conflict in our May 22, 2002 comment letter regarding the original

acceleration rulemaking. In that letter we noted that the acceleration might have the unintended effect of sacrificing quality for timeliness at a time when renewal of confidence in corporate financial reporting is critical. In that letter, we also suggested increasing the threshold from $75 million to $1.0 billion in market capitalization (our letter referred to market capitalization as a proxy for public float). We renew our suggestion that the public float threshold for accelerated filer status be increased, although we would agree with increasing it to $700 million in order to avoid the confusion of having multiple different thresholds that are all commonly intended to identify "smaller" issuers.

Given the benchmark of $700 million set by the SEC in its Proposed Rule for a well-known seasoned issuer and the group of filers that were granted relief under the SEC's November 30, 2004 Exemptive Order, we suggest modifying the accelerated filer status definition to utilize this same measure. As noted in our May 22, 2002 letter and in the SEC's current proposal, issuers with public float over $700 million comprise the overwhelming majority of total market capitalization and are also the most active when it comes to securities offerings. We believe the well-known seasoned issuer is sufficiently covered by the analyst community and generally has appropriate internal expertise and resources to comply with accelerated filing deadlines. As for the group of companies below the $700 million threshold, we believe they will continue to be challenged by resource constraints, such as internal reporting systems as well as the volume and complexity of new accounting and disclosure requirements in the new financial reporting environment. In addition, they will continue to have a higher degree of reliance on outside advisors than the well-known seasoned issuer. Their audit committees must be accorded sufficient time to carry out their responsibilities and communications to provide meaningful oversight of the financial reporting process. We believe these challenges will continue well beyond the current year for the issuers with public float of less than $700 million. Investor needs are best met with an appropriate balance of timely and accurate reporting. The SEC's recent regulatory actions regarding the content and timing of Form 8-K filings have already improved the timely availability of material information for these companies. For these reasons, we recommend that the Commission revise its definition of an accelerated filer to raise the public float criterion to $700 million.

Free Writing Prospectuses

The Proposed Rule seeks comment on various aspects of the definition and use of free writing prospectuses. The Proposed Rule states that a free writing prospectus, even if filed with the SEC, would not be deemed to be a part of a registration statement subject to liability under Section 11 of the Securities Act. According to the proposed definition, a

free writing prospectus would be considered to be used in connection with a public offering of securities that is, or would be, the subject of a registration statement.

We believe that there should be more clarity in the definition of free writing prospectuses. We are unclear about the relationship and expectations between the free writing prospectus and the expertizing process. AU Section 711.09 of the PCAOB auditing standards states that, "The independent accountant should also read other sections of the prospectus to make sure that his name is not being used in any way that indicates that his responsibility is greater than he intends." Further, AU Section 550.04, although not specifically applicable to Securities Act filings, indicates that the auditor should read other information included in documents containing audited financial statements and consider whether such information, or the manner of its presentation, is materially inconsistent with information, or the manner of its presentation, appearing in the financial statements. If the SEC adopts rules allowing the use of free writing prospectuses that are not part of a registration statement (and not subject to auditor consent) and the information is expected to be used along with information subject to Section 11 liability, we believe that as independent accountants, we may need to be aware of those documents and communications that are considered free writing prospectuses to ensure that we have read all free writing prospectuses that an issuer files so that we can consider any financial information therein in light of previously filed financial statements. Further standard setting by the PCAOB may be required in this area.

Treatment of Information in Prospectus Supplements

The Proposed Rule seeks comment on whether the proposed undertakings are clear as to when issuers would be liable for prospectus supplements. Issuers would be required to agree that information in filed prospectus supplements are deemed part of and included in the relevant registration statement and that new effective dates would occur. For a prospectus supplement filed in connection with a takedown, the supplement is deemed part of and included in the relevant registration statement as of the earlier of the date it is first used after effectiveness or the date of the first contract of sale of securities in the offering described in the prospectus.

If each prospectus supplement represents a new registration statement for liability purposes, it is unclear why the SEC believes that updated consents would not be required from independent accountants. Section 11(a) of the Securities Act imposes responsibility for false or misleading statements in an effective registration statement, or for omissions that render statements made in such a document misleading on, among others, every accountant "who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or

valuation which is used in connection with the registration statement, report, or valuation, which purports to have been prepared or certified by him." Further, Section 11(b) states that an expert whose report is included in a registration statement will not be held responsible for errors and omissions if, "...(i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert..." Section 7(a) of the Securities Act states that if any person is named as having prepared or certified a report or valuation for use in connection with a registration statement, the written consent of such person is required to be filed with the registration statement.

If new Section 11 liability attaches to a prospectus supplement as part of an updated registration statement, we believe that the independent accountants named as experts in the original registration statement or post-effective amendment must be given the opportunity to perform the procedures required under AU Section 711 as part of a reasonable investigation and to reconfirm their ability or desire to be associated with that registration statement. Providing a consent to the use of their audit report is the means by which the independent accountants formally acknowledge their willingness to be associated with a registration statement (i.e., become subject to additional risk associated with new Section 11 liability) and serves as part of the gate-keeping function. Auditors, as well as other experts subject to Section 11 liability, must be given sufficient opportunity to perform a reasonable investigation under Section 11(b)3 of the Securities Act prior to the filing date of any prospectus supplement that creates a new effective date for a registration statement. In recent speeches, members of the SEC staff have focused intensely on the role and responsibility of gatekeepers and the extent to which firm and individual liability is being increased for failures by gatekeepers. It is critical that at this time, there is clarity in terms of gatekeepers' responsibilities and that the desire for more rapid capital formation must be tempered by awareness that a hasty process will not be a more efficient process if it does not take account of the need to carefully execute required diligence activities during the offering process.

We recommend that the final rule clarify the circumstances under which consents would and would not be required, keeping in mind the independent accountants' requirements under AU Section 711. Since AU Section 711 is largely founded on the auditors' assumed responsibilities and liabilities under Section 11 of the Securities Act, it would be appropriate to coordinate amendments to the auditing standards if there are to be changes in the auditor's responsibilities under the proposed rules. We would also like to point out that, as a consequence of each prospectus supplement creating a new effective date for a

registration statement, issuers that currently incorporate by reference Exchange Act reports may be required more often to revise previously issued and filed financial statements to reflect retroactive restatements of financial statements required by generally accepted accounting principles (GAAP), such as reclassifications for discontinued operations treatment and revised reportable segment presentations. Prospectively, the frequency of such required revisions is likely to increase if the Financial Accounting Standards Board's proposed standard to make accounting changes retroactive is adopted. Each consent to the use of the auditors' report constitutes a reissuance of the auditors' report and would require that the financial statements be retroactively revised to comply with GAAP. Currently, shelf offering takedowns necessitate the restatement and reissuance of previously filed financial statements only when there has been a "fundamental change," as contemplated by Item 512(a)(1) of Regulation S-K, in the information set forth in the registration statement.

Requiring the Issuer to File Projections as part of the Registration Statement

The Proposed Rule seeks comment on whether as a condition for the safe harbor regarding regularly released factual business information by non-reporting issuers, the SEC should require such issuer to file projections or other forward-looking information as part of the registration statement and whether those projections be required to be accompanied by an accountant's report. We support the granting of a safe harbor for forward-looking information. However, we do not believe the SEC should require issuers to file projections or other forward-looking information as part of the registration statement as a condition to the safe harbor, whether or not accompanied by an attestation report from an independent registered public accounting firm. Providing financial projections, even for a limited amount of information, relies on a significant amount of assumptions being made, many of which are conjectural and subject to significant lack of predictability. A complete discussion of the factors considered by management in preparing its projections is not likely to be as reliable as the statements and disclosures found in a full set of historical financial statements together with the disclosures currently required by Item 303 of Regulation S-K. Significant additional guidance from the Commission as to the form and content of such presentations also would be required.

Eligible Issuers

The Proposed Rule seeks comment as to whether disqualifying an issuer as a WKSI, and from utilizing free writing prospectuses or incorporating by reference, on the basis of a "going concern" report from the issuer's independent auditor would cause undue pressure to be placed on auditors not to issue those reports. The Proposed Rule also asks whether

the disqualification should instead be based on whether the issuer had net losses or negative cash flows from operations for two or more of the past three annual fiscal periods or a net deficit in net worth at the date of the most recent balance sheet.

AU Section 341 of the PCAOB auditing standards provides guidance for auditors in considering an entity's ability to continue as a going concern. The standard requires that the auditor consider certain conditions and events occurring over time that suggest doubt about an entity's future solvency. Issuing a going concern report involves considerable auditor judgment and since auditors' reports are issued only on an annual basis, it is possible that the going concern criteria would not provide timely evidence as to a WKSI's qualifications. If the SEC's rationale for including a going concern report as a criterion for an "eligible" issuer is liquidity concerns, we believe that a defined performance or financial condition criteria would be more appropriate. Performance or financial condition criteria would result in more consistent eligibility criteria and could be defined in a way to be more current with updates in interim period financial results. We question whether the "going concern" criteria is useful in determining whether an issuer is not sufficiently well-known and seasoned to be eligible for the new offering regime. For example, there are currently a number of high profile companies whose financial difficulties and near bankruptcy status is front-page news on an almost daily basis. We believe that disqualification for a going concern report is not necessary to advance the concept of making a more streamlined offering process available for companies that meet defined thresholds of public awareness.

Additionally, the Proposed Rule seeks comment on whether an issuer's disclosure of a material weakness in its internal control over financial reporting should make an issuer similarly ineligible. We do not believe such a criterion is necessary. The SEC's current requirement for "short form" eligibility is based on a demonstrated track record of timely and complete reporting by seasoned issuers. While the Commission may see some benefit in introducing financial suitability criteria into the eligibility requirements, the existence of a material weakness does not necessarily signify poor financial health. The existence of a material weakness as of the year-end balance sheet date will lead to an adverse opinion on internal control over financial reporting being issued by the auditor; however, an auditor's opinion on the financial statements may be unaffected by the adverse opinion on internal control over financial reporting. In addition, management is likely to remediate control weaknesses on an ongoing basis, thereby making an assessment as of an issuer's year end quickly out of date. Lastly, we do not believe the existence of a material weakness in internal control over financial reporting will affect whether or not an issuer remains widely followed by investors, analysts or media.

Unresolved Staff Comments

The Proposed Rule seeks comment on whether automatic effectiveness should be conditioned on timely resolution of SEC staff comments. The SEC believes that, without its direct involvement in declaring individual registration statements effective, issuers will not be motivated to resolve comments on a timely basis. Since issuers and their auditors are concerned about the potential impact of open SEC comments on the financial reporting in registration statements that become effective whether automatically or by declaration of effectiveness, we believe that automatic effectiveness will not impact issuers' desires or efforts to resolve SEC comments in an expeditious manner.

Currently, the SEC staff performs reviews of Exchange Act documents and sends comment letters to issuers on a regular basis. Issuers, working with their securities counsel and external auditors, work to resolve these comments in a timely manner to remove uncertainty with respect to their financial reporting. Issuers and their professional advisors are mindful of their liability under Section 11 of the Securities Act for errors and omissions in registration statements.

We recognize that some SEC comments require more time than others to resolve. SEC staff comments may relate to complex accounting and reporting issues that require research and analysis and at times require consultation outside of the issuer and the accounting firm. The complexity and uniqueness of some of these issues is evidenced by the fact that certain issues identified by the SEC staff in comment letters to one or more issuers eventually become the subject of consideration by the FASB's Emerging Issues Task Force, Derivatives Implementation Group, or the FASB staff in a FASB Staff Position. Issuers and SEC staff reviewers often devote a significant amount of time to complete their dialogue and arrive at a final resolution. Our experience is that issuers and their professional advisors are reluctant to allow a securities offering to proceed without first resolving open comments that are likely to have a material impact on the financial statements or other information included in a registration statement. We currently have policies in place to carefully consider situations where issuance or reissuance of our report on the financial statements is requested and the issuer has outstanding SEC staff comments. Under certain circumstances, we will not consent to the use of its report when there are material unresolved SEC comments.

To enhance the SEC review process and promote timely resolution of comments, we recommend that SEC staff members be required to adhere to a reasonably strict timeframe within which to respond to correspondence from issuers, while at the same time allowing for the type of thorough consultation that complex accounting matters deserve. Currently, comment letters from the SEC staff to issuers allow specified maximum periods for response. We note that the SEC staff has been reasonable and has

accommodated requests for extensions on responses where additional time was needed by the issuer. We suggest that the SEC staff be required to respond, either orally or in writing, within the same number of days given to the issuer to respond to the SEC staff's comments, subject to a minimum of five working days for the staff.

We do not believe, however, that unresolved comments should be disclosed in any Exchange Act reports (quarterly or annual). The comment process can be an iterative process that may require different layers of questions and answers being provided back and forth, ultimately striving for clarity of response and understanding of the information presented. Disclosing comments without the context of the whole of the discussion could be confusing to the reader. Further, as indicated above, both issuers and their professional advisers are concerned about the potential consequences of unresolved comments, particularly in the context of the liability associated with a securities offering, and therefore it is unlikely that there will be material unresolved comments at the time of the automatic effectiveness of an offering.

In June 2004, the SEC announced that comment letters and issuers' responses would be posted on the SEC web site after the staff review is complete. This information will provide readers an additional opportunity to research an issuer's accounting and disclosure matters.

If the SEC continues to believe it necessary for issuers to disclose unresolved material comments, we believe 180 days, measured from the time that the initial comment is received in writing from the staff, is an adequate timeframe to allow for proper consultations while at the same time meeting the need for resolution of comments that the SEC is seeking, as long as the SEC staff responds within the timeframe suggested above.

Extending Risk Factor Disclosure Requirements

We conceptually support the proposal to extend risk factor disclosure to annual reports on Form 10-K and registration statements on Form 10, including the use of "plain English" standards and the required quarterly updates, as a means of providing valuable information about an issuer's significant risks. However, we encourage the Commission to provide issuers with more clarity relative to the expectations from these and other similar disclosure requirements. In order for these additional disclosures to enhance the contents of Exchange Act reports and provide value by informing investors and the markets, issuers should provide concise, complete and meaningful discussion of the most significant factors that may adversely affect the issuer's business, operations, industry or financial position, or its future performance. These disclosures should avoid unnecessary duplication and use of "boiler-plate" language.

The Proposed Rule also seeks comment on extending risk factor disclosures to Forms 10-KSB and 10-SB. We believe that the risk factor disclosure requirements in Item 503 of Regulation S-K, subject to our comments noted above, should be extended to Forms 10-KSB and 10-SB. Companies who file those forms are generally subject to the same financial reporting disclosures as other registrants, including required disclosures of critical accounting policies and compliance with Sarbanes-Oxley Section 404.

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We would be pleased to discuss our comments with you at any time. Please call Teresa E. Iannaconi at (212) 909-5426 or Melanie F. Dolan at (212) 909-5809 if you have any questions.

Very truly yours,

KPMG LLP