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By E-Mail to: rule-comments@sec.gov

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Release Nos. 33-8501, 34-50624, IC-26649 (the "Release"); File No. S7-38-04

Dear Mr. Katz:

We appreciate the opportunity to comment on the proposed rules (the "Proposed Rules") set forth in the Release regarding reforms to the public offering process. Our comments are based on our experience representing issuers and underwriters, although the comments are solely our own and are not intended to express the views of our clients.

We are supportive of the efforts of the Commission to eliminate unnecessary restrictions on public offerings and to modernize the rules related to the offering process in light of technological advances related to the dissemination of information. We also support the Commission's initiatives to integrate further the system of periodic reporting under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and the registration system under the Securities Act of 1933, as amended (the "Securities Act"). We appreciated the opportunity to comment on Release No. 33-7606A, dated November 13, 1998 (the "Aircraft Carrier release"), and are pleased that the Commission has continued to focus on these important issues. We particularly support the Commission's efforts in the following areas:

- Initiatives to promote greater communication and registration flexibility for those "well-known seasoned issuers" with large market capitalizations that are followed closely by investors and analysts, including proposals to:
    - Permit pre-filing offers for well-known seasoned issuers; and
    - Provide for automatic shelf registration for well-known seasoned issuers.

- Proposals to relax "gun-jumping" provisions by providing issuers with a greater range of permissible communications throughout the offering process, such as:

    - A bright-line exclusion providing that issuer communication more than 30 days before a registration statement does not constitute an offer as long as the offering is not referenced;

    - The use of free-writing prospectuses, with cure periods available in the event of the failure to file such free-writing prospectuses; and

    - The continuation of ongoing communication during an offering, including regularly released factual business information and forward-looking information.

- Clarifying and modernizing the offering rules in order to take into account advances in communications technology, including promulgating rules to provide that brokers' and dealers' obligations to deliver prospectuses are satisfied when the issuer files such prospectuses with the Commission.

- Expanding the exemptions under Rules 137, 138 and 139 for research reports.

While we appreciate the Commission's initiatives, including those listed above, we have concerns about the practicality of applying certain of the Proposed Rules. In addition, we have focused on the actual wording of some of the Proposed Rules to make sure that they will accomplish the goals put forth by these reforms.

I. Categories of Issuers

We support the Commission's proposals to permit freer communication between issuers and investors before and during a public offering of securities. We further agree with the proposed general framework pursuant to which the availability of the various proposed safe harbors and exemptions will depend on the issuer's reporting history under the Exchange Act and other factors meant to serve as a proxy for how well the issuer is followed by the market. However, as described below, we propose that the Commission make various changes to the Proposed Rules.

A. "Well-known seasoned issuer" thresholds

With regard to the proposed definition of "well-known seasoned issuer" which would be set forth in Rule 405, we note the following:

- We agree that market capitalization is the correct standard by which to define well-known seasoned issuer status, and is an appropriate proxy for the reliability of public information about the issuer as well as how well the market scrutinizes that issuer's periodic reports. However, we believe that to effect the Commission's policy of facilitating greater availability of information to investors and the market, the threshold amount necessary to qualify for "well-known seasoned issuer" status should be lowered to $300 million for equity securities rather than $700 million. Companies at that level of market capitalization – which is still four times the current Form S-3 threshold – have a sufficient capital base to foster a following among analysts and the investor community.

    - We also believe that any threshold selected should be assessed on a global trading basis using the U.S. dollar equivalent price for jurisdictions where the price of the securities is quoted in a non-U.S. currency.

- We believe that the appropriate standard for debt issuers is the amount of debt on a company's balance sheet that was raised in the capital markets (e.g., in registered offerings, Regulation S offerings or Rule 144A offerings (with or without Exxon Capital exchange offers)), whether or not the debt was issued in the last three years. We propose that as an alternative to the test proposed in Rule 405, an issuer should be eligible to be a well-known seasoned issuer if it has an aggregate outstanding amount of debt securities that is equal to or in excess of the threshold amount and that was issued in the capital markets, regardless of whether that debt was issued in the last three years. Limiting the test to issuances over a three year period could mean that a company that issued 10-year bonds over a course of a few years and, therefore, does not have any refinancing needs over a three year period could find itself outside the definition of well-known seasoned issuer.

- We suggest that an issuer of debt securities that meets the debt threshold amount should be eligible to be a well-known seasoned issuer for purposes of both debt and equity securities even if it has publicly traded equity securities that do not meet the equity securities threshold. Debt issuers of this magnitude are widely followed by market participants. We see no policy distinction justifying different treatment for them from that afforded to other large issuers of debt securities.

- We believe that the proposed threshold for determining well-known seasoned issuer status based on the amount of debt securities issued should be lowered to $750 million from $1 billion. Issuers that have raised $750

million in the capital markets and continue to have these securities outstanding have a significant following in the investor community.

B. "Ineligible Issuer" Definition

We propose that Section (1)(vii) of the proposed definition of "ineligible issuer" be revised so that otherwise eligible issuers that have been the subject of completed bankruptcy or insolvency proceedings may take advantage of the communications safe harbors and gun-jumping provisions being implemented. We note that companies that have recently emerged from bankruptcy proceedings often are better capitalized than their competitors. Consequently, we believe that if they meet the other criteria for eligibility, these issuers should not be deemed ineligible for three years or until they file an annual report with audited financial statements.

C. Voluntary Exchange Act filers

While we support the general proposition that issuers with different Exchange Act reporting histories may be treated differently for purposes of the Proposed Rules, we believe that voluntary filers should not always be treated as reporting unseasoned issuers.

Instead, we believe that a voluntary filer should be treated as a seasoned issuer or even a well-known seasoned issuer if it meets the eligibility requirements (other than being required to file reports) for several reasons:

- First, voluntary filers are subject to the same reporting regime as mandatory filers so that there is no practical difference in the information available to investors;

- Second, many companies are voluntary filers (particularly companies where the only publicly held securities are debt securities) because the manner in which Exchange Act Rule 12g5-1 requires holders of record to be counted, in fact, potentially undercounts beneficial holders;

- Third, debt issuers are often contractually obligated to file Exchange Act reports by the indenture related to the debt with the reporting mandate arising by contract rather than by law; and

- Finally, certain companies may find it difficult, if not impossible, to determine whether they are voluntary filers. This is particularly true of

foreign private issuers seeking to determine whether they have 300 holders resident in the United States for purposes of Rule 12g3-2(a).

As this issue recurs throughout the Proposed Rules, we specifically note the following:

- *Rule 405 (Definition of Well-Known Seasoned Issuer):* A voluntary filer that otherwise meets the criteria for eligibility, including the correct market capitalization, timely Exchange Act reporting for the preceding period (which as discussed below in Section I.D we propose be shortened from one year to six months), and eligibility to register a primary offering on Form S-3 or Form F-3, should be eligible to be a well-known seasoned issuer.

- *Rule 168*: Voluntary Exchange Act filers should be permitted to continue to release regularly released factual business information and forward-looking information pursuant to Rule 168 rather than being subject to the narrower proposed Rule 169.

- *Rule 433:* Voluntary filers should be subject to the same rules as proposed for seasoned issuers regarding prospectus delivery in connection with a free writing prospectus. If they otherwise fit the criteria to be well-known seasoned issuers, voluntary filers should be permitted to use free writing prospectuses prior to the filing of a registration statement containing a preliminary prospectus.

- *Form S-1:* Voluntary filers should be permitted to take advantage of the expanded ability to incorporate certain information by reference to their Exchange Act reports.

- *Form 10K, Form 10-KSB and Form 20-F:* Given the difficulty of determining, in certain cases, whether an issuer is a voluntary filer and because status as a voluntary filer is not a useful indicator of market interest or availability of information, we believe that filers should not be required to disclose whether they are required by law to make Exchange Act filings. The release indicates that the sole purpose for this requirement is "informational." We believe that its benefit would not outweigh the practical difficulties to issuers described above. It will also be misleading, since for practical and contractual reasons these companies often have no intent to deregister.

- *Rules 138 and 139*: As proposed to be amended, Rule 138 would apply to issuers who are "required to file reports and [have] filed all required periodic reports." Since voluntary filers are not required to file reports, they would

never get the benefit of Rule 138. The same problem also applies to Rule 139(a)(2)(i) which covers industry reports.

D. Timely Exchange Act Filings

As a result of the Sarbanes-Oxley Act of 2002 ("SOX") reforms, we believe there has been and will continue to be an increase in the number of issuers that will from time to time be unable to meet their Exchange Act filing deadlines for reasons that the Commission should not wish to penalize. Historically, issuers that were unable to make timely filings were denied the benefit of making filings on Form S-3 and Form F-3 because it was unclear whether information from their Exchange Act reports would be incorporated on a timely basis. With the recent implementation of the SOX reforms, (i) issuers have undertaken additional procedures to enable management to provide the necessary certifications, (ii) issuers are placed under increased scrutiny by auditors when issuing quarterly limited review reports and year end audit opinions, (iii) audit committees have taken a greater responsibility, often hiring independent counsel to review allegations of formal wrongdoing or misconduct and (iv) starting this year, issuers must provide the disclosure required by Section 404 of SOX regarding internal controls and obtain an auditor attestation of management's conclusions regarding internal controls. There are a variety of reasons why issuers' Exchange Act filings may be delayed that did not exist previously. Companies that are unable to meet their filing deadlines while resolving these issues should not be penalized for an extended period for seeking to maintain good corporate governance. As a result, we believe that the historical 12-month standard, as set forth on Form S-3, is too onerous and suggest that the Commission adopt a 6-month standard as long as the issuer has filed an annual report on Form 10-K or on Form 20-F within that six-month period. This would permit a company to show that it was able to get back on track for two consecutive quarters. We note that the issue of timely filings recurs in the rules and Proposed Rules and specifically note the following instances.

- *Rule 405:* We suggest that subsection (5) of the definition of "well-known seasoned issuer" be revised to require timeliness with respect to the issuer's Exchange Act filings only for a period of six months, rather than for twelve, as long as the issuer has filed an annual report during that six-month period.

- *Form S-3*: General Instruction I.A.3(b) to Form S-3 provides that in order to use Form S-3, other than for a certain subset of current reports on Form 8-K, an issuer's filings must be timely with respect to the twelve calendar months and any portion of a month immediately preceding the filing of the

registration statement. We propose that eligibility to use Form S-3 only be conditioned on an issuer's being timely in its filing for a period of six months, as long as the issuer has filed an annual report during that six-month period.

- *Form F-3*: General Instruction I.A.2 to Form F-3 conditions its applicability on the issuer's timely filing of all required material for a period of at least twelve calendar months prior to the filing of the registration statement. We propose that this requirement also be changed to six months, for the above reasons, as long as the issuer has filed an annual report during that six-month period.

E. Business Development Companies

Many of the proposed new rules would not apply to business development companies, or BDCs. These include proposed Rule 163A (30 day safe harbor), Rule 168 (factual business information and forward-looking information safe harbor), Rule 433 (free writing prospectuses), automatic shelf registration, and Rule 139(a) (company research reports). We do not believe that this disparate treatment of BDCs is necessary for the protection of investors. Although we understand that the nature of an investment company sometimes requires different disclosure requirements, we believe that BDCs should be treated the same as standard industrial companies for purposes of the proposed communications exemptions. BDCs face the same gun-jumping concerns as other companies and would benefit from the certainty provided by Proposed Rules 163A, 168 and 433. Similarly, seasoned BDCs should be able to utilize a form of automatic shelf registration.

II. Communications Proposals

A. Regularly Released Factual Business and Forward Looking Information

We applaud the Commission's proposal to enact safe harbors to promote continuing ongoing business communications from issuers to the market. We concur that such regular communications of factual business information and projections are not intended to condition the market and should be permitted even around the time of a registered offering. We note the following:

- *Exclusions from "factual business information" and "forward-looking information."* We believe that the exclusions from "factual business information" and "forward-looking information," as drafted, are overly

broad. As a result, the safe harbor does not permit the full range of communications that the Proposed Rules are intended to capture.

Each of Rule 168 and Rule 169 excludes from its safe harbor "information about the registered offering or information released or disseminated as part of the offering activities in the registered offering." We understand and support the Commission's position that the safe harbor is not meant to be available for communications used as a part of the offering, even when those communications contain only what in other contexts (e.g., a regular earnings release reproduced in offering materials) would be factual business information. However, we are concerned that the exclusion as drafted is overinclusive because it applies to a piece of information rather than to a particular communication of that information.

For example, if an earnings release were issued outside of the offering context, then, under the rules as drafted, it would constitute factual business information and thus be covered by the safe harbor. However, if at a later time, that very same earnings release were redistributed in connection with an offering of securities or the information in that earnings release were included in a prospectus, the information contained in that earnings release would arguably no longer be factual business information under the proposed rules. Specifically, it is not clear whether the treatment of the original earnings release would change and whether the original press release would lose the protection of the safe harbor. We believe that the subsequent use of this earnings release or the information contained therein as part of an offering, following its issuance in the ordinary course of business, should not mean that the information is no longer "factual business information," or that the original earnings release falls outside of the safe harbor. Thus, we would review the exclusions to clarify that while the second use of the earnings release in a different context would not fall within the safe harbor, the status of the original earnings release when communicated the first time should not be affected by its later reproduction in an offering context.

In order to address this concern, we suggest that each of Rule 168(c)(1) and Rule 169(c)(1) be modified to exclude from the safe harbor ". . . information about the registered offering or *any communication that contains* information released or disseminated as part of the offering activities in the registered offering."

Similarly, we suggest that Rule 168(c)(2) should be revised to exclude from the safe harbor ". . . information about the registered offering or *any*

communication containing forward-looking information released or disseminated as part of the offering activities in the registered offering."

We also suggest that a new Rule 168(c)(3) and Rule 169(c)(3) be added, each reading "*If this safe harbor is used with respect to certain information, and such information is later used in a different context that does not qualify for the safe harbor, the use of the information in the later context will not affect the earlier application of the safe harbor .*"

- *Applicability to Foreign Private Issuers.*

  - Information disclosed on Form 6-K. We suggest that Rule 168 be revised to explicitly provide a safe harbor for information required to be disclosed by a foreign private issuer on its Form 6-K reports. Because a foreign private issuer filing Form 6-K reports is making disclosure mandated by the U.S. securities laws, it would be unfair to treat this as other than falling within the safe harbor for "regularly released factual business information."

  - Non-reporting foreign issuers listed on a non-U.S. exchange. We propose that non-reporting foreign issuers with publicly traded securities on a non-U.S. exchange should be permitted to take advantage of the safe harbors provided in Rule 168 for forward-looking information and regularly released factual business information. The release explains that domestic reporting issuers and non-reporting issuers are treated differently because "non-reporting issuers generally are not releasing information in connection with securities market activities." In contrast to non-reporting domestic issuers, non-reporting foreign issuers listed on a non-U.S. exchange are engaged in securities market activities and will be releasing information in accordance with the laws and business practices of their respective markets and jurisdictions of organization.

- *Forward-looking information for non-reporting issuers.* Non-reporting issuers should be permitted under Rule 169 to communicate certain forward-looking information. The regular release of certain forward-looking information to customers and vendors, of a type related to business development and the development of the issuer's products, should be permitted. As currently drafted, the exclusions would preclude this type of communication even when it is not related to the offering of securities. For example, while we could understand the Commission's concern if an issuer was releasing projected financial information in this context, we do not

believe that providing information to customers and suppliers regarding projected product and supply needs should give rise to the same concerns.

In order to implement this suggestion, we suggest that proposed Rule 169(c)(2) (which provides that forward-looking information is not factual business information) be amended to read "Forward-looking information *except statements about the issuer's plans and objectives relating to the products or services of the issuer made in the ordinary course of business*."

B. 30-Day Bright Line Exclusion from Prohibition on Offers Prior to Filing a Registration Statement

We concur with the Commission's view that the 30-day bright line exclusion will minimize unnecessary limitations on issuer communications, and that the 30-day period is sufficient to ensure that such communications will not condition the market for a securities offering.

- We would suggest amending proposed Rule 163A(a) to read ". . . any communication made by or on behalf of an issuer more than 30 days before the date of the filing of the registration statement that does not reference *the* [rather than "a"] securities offering. . .." We do not believe that it was the Commission's intent to exclude from this safe harbor communications that reference an unrelated offering of securities.

- We believe that the concept of "reasonable steps within [the issuer's] control" should be clarified within the rule. We agree with the Commission's statement in the release that it "would not expect an issuer to be able to control the republication or accessing of previously published press releases." We respectfully suggest that this concept be formally codified in the rules as adopted. We believe that if a company treats its previously published press releases consistently and in accordance with historical practice, the use of those releases should not be deemed to violate the safe harbor. For example:

    - Releases that were posted on a company website pursuant to the safe harbor should be permitted to remain on the company website in their original location and form. Such releases should only be deemed to violate the safe harbor if the company effectively republishes by highlighting or altering them during the 30 days preceding the filing of the registration statement. In altering or highlighting such a press release, we believe that the company would

be generating a new communication which would be offering-related.

- If a company regularly sends paper copies of historic press releases to members of the public, it should be permitted to continue to distribute those releases in a manner consistent with its historical practice. It would not be permitted to alter its historical practice (e.g., to send the press releases only to those parties involved in a pending offering).

C. Rule 134

We are supportive of the Commission's proposal to increase the types of information that may be released pursuant to Rule 134. We note that since the time Rule 134 was originally enacted, its use in the market has changed. As the release points out, Rule 134 was originally meant to permit "identifying statements" to communicate to the market that a prospectus was available. However, in current practice the rule is more often used simply as a means of informing the market that the registration statement has been filed.

- Conditioning the use of the Rule 134 safe harbor on the inclusion of a bona fide price range in the preliminary prospectuses will, as a practical matter, greatly diminish the use of Rule 134 releases, particularly in the case of initial public offerings. This will hamper the Commission's stated purpose to expand the types of permitted written offering related communications that may be made by offering participants following the filing of a registration statement. Under current market practice, issuers rarely include a price range in the preliminary prospectus when a registration statement is initially filed. The market for an issuer's securities can change dramatically during the period of Commission review and, as a result, any price range that could be included so early in the offering process could certainly be subject to change. We believe that requiring inclusion of a price range, particularly when it is likely to be changed, would be (i) of limited utility to the market, because it would not serve as a reliable approximation of the final price and (ii) potentially prejudicial to the issuer's ability to conduct the offering, because the market would judge the final price in relation to the earlier stated number. We strongly believe that, as a result, issuers will opt not to use the Rule 134 safe harbor rather than include a price range in the registration statement until the road show is started. We respectfully suggest that the condition that the preliminary prospectus contain a price range be removed.

- In particular, issuers (including IPO issuers) typically issue a simple press release announcing the filing of a registration statement at the time of the initial filing; the proposed requirement that would condition use of Rule 134 on inclusion of a price range would make Rule 134 unavailable for these types of simple press releases.

- We understand from the release that the Commission does not intend to make full term sheets available pursuant to the expanded Rule 134 safe harbor. However, we believe that certain additional types of information, such as (i) whether the securities are to be convertible or exchangeable and (ii) other credit enhancements such as guarantees or collateral, should be permitted.

D. Free-Writing Prospectuses

We support the allowance of communications in the form of the new "free writing prospectus" and appreciate the flexibility it will give issuers to make communications to the market outside of the form of the statutory prospectus. We agree with the Commission's proposed modification to the Section 10(b) filing requirement, which provides that free writing prospectuses used after the registration statement need not be filed as part of that registration statement. We also concur with the proposed amendment to Rule 408 to make clear that a failure to include in a registration statement information included in a free writing prospectus will not be considered an omission of material information.

We do have several concerns about how the free writing prospectus rules as proposed will be applied:

Legends on factual business information and forward-looking information. We support the Commission's proposal to utilize a legend recommending that potential investors read the prospectus, rather than explicitly requiring free writing prospectuses to contain balanced presentations of the information included. We are concerned, however, that the Proposed Rules as currently drafted may require well-known seasoned issuers to continually include legends on their releases of factual business information and forward-looking information. The constant use of legends on all such information will over time effectively minimize the legend's purpose and effectiveness. We believe that to make the inclusion of the legend useful to investors, the rules should clarify in greater detail when a release of "factual business information" or "forward-looking information" is deemed to be a written offer.

- We note that there is a tension in the Proposed Rules, which we touched on briefly in Section II.A., between when *information* is deemed to constitute an offer and when it is not the information itself, but rather, a *communication* of which that information is part that constitutes an offer. We believe that this tension arises from the Commission's efforts to liberalize the gun-jumping rules, in order to promote information flow between an issuer and the market, while simultaneously providing liability for free writing prospectuses. We suggest that there is a need for clear bifurcation in the rules between (i) communications that contain certain information that are released as part of the offering and (ii) the release of the same information in a non-offering context, where it is subject to a safe harbor.

- We suggest that the Commission clarify which communications constitute "written offers" for the purposes of Rule 163, by distinguishing between (i) information that by itself does not constitute an offer and (ii) communications in which that information is included that do constitute offers of securities. Rule 163(b)(1) provides that every "written offer" made by a well-known seasoned issuer in reliance on that rule must bear a legend advising potential investors to read the prospectus. The release indicates that regularly released factual business information and regularly released forward-looking information may be construed as "offers."

  Our concern is that under the rules as proposed well-known seasoned issuers will be forced to include the legend on all releases containing factual business information and forward-looking information, because of a concern that the information used therein will later, in a second context, be deemed an offer. The rules define the information, rather than the communication of which it is part, as the offer. Consequently, we are concerned that a later offering-related use of certain information could be deemed to make that information an "offer" for all purposes, even retroactively reaching back in time to the earlier release.

  In order to address this concern, we would propose adding to Rule 163 a clarifying sentence "*The release of factual business information and forward-looking information by an issuer will not be considered an offer unless the issuer includes or uses such information in an offering, and then only the inclusion or use of the information communicated in connection with the offering will constitute an offer for purposes of such offering.*"

Abandoned Offerings. In addition, we suggest that Rule 163 be clarified expressly to provide that, where a free writing prospectus is used by a well-known seasoned issuer before a registration statement is filed, a well-known

seasoned issuer does not need to file free writing prospectuses in respect of abandoned offerings where no registration statement is ever filed. Proposed Rule 163(b)(2)(i) conditions the ability of a well-known seasoned issuer to use free writing prospectuses on the ultimate filing of those prospectuses along with the registration statement.

Retransmission of free writing prospectus. We concur with the Commission that an issuer should be permitted to cure an unintentional failure to include the legend in a free writing prospectus, as long as a good faith and reasonable effort was made to comply with the condition. We believe that proposed Rule 163(b)(1)(ii)(C) and proposed Rule 164(c)(3) should reflect this good faith and reasonable effort standard rather than require that a free writing prospectus with the legend be retransmitted to *all* potential purchasers. We are concerned that the requirement that a free writing prospectus be retransmitted to all potential purchasers is impractical and may be impossible. For example, if the free writing prospectus were originally disseminated on an issuer's website, requiring the issuer to add the legend to the posting on that website should be sufficient. The issuer should only be required to take reasonable steps to send the free writing prospectus to the same audience and in the same manner as it was originally delivered.

Bona Fide Electronic Road Shows. We support the flexibility in the Proposed Rules to conduct more than one version of the road show as long as each discusses the same general areas of information regarding the issuer, its management and the securities being offered as are included in the bona fide electronic road show filed with the SEC. We respectfully suggest, however, that the definition of "bona fide electronic road show" in proposed Rule 433 clarify the types of differences that are permitted between different versions of the road show and the version filed as a free writing prospectus. We believe that the rule should more explicitly state that areas such as projections and the question and answer segment should be permitted to be different, or even absent, in alternate versions of the electronic road show.

Foreign Private Issuers. The rules regarding free writing prospectuses should be clarified with respect to free writing produced outside of the U.S. by foreign private issuers, to provide flexibility and avoid imposing unnecessary burdens during offerings being conducted at least in part outside of the U.S.

We propose that the following clarifications be made:

- Offers that are made outside the U.S. in reliance on Regulation S should not be deemed to be free writing prospectuses.

- If a foreign private issuer chooses not to rely on Regulation S but instead registers part or all of its offering, Rule 433 should exempt from filing any free writing prospectus which, when filed, would cause that foreign private issuer to be in violation of offering rules in its jurisdiction of domicile.
- The rules should address whether communications made outside the U.S. that are not originally in English must be translated when filed with the Commission, in light of the effect that is likely to have on the timeliness of filing of such communications.

Media Publications and Broadcasts. We believe that proposed Rule 433, as drafted, allocates too much responsibility to issuers for policing the accuracy of media reports. Under proposed Rule 433, an article prepared by the media that is based on issuer information may constitute a free writing prospectus. Consequently, under the proposed rules an issuer will be subject to liability for what a news organization says in its reports. We are concerned about this liability, because reports produced by the media will be inevitably be different from what was presented by the issuer, even if they are based on the media's impressions of information obtained from the issuer. We are concerned that if the Commission takes this position, it will either require that a company issue correcting press releases every time a media report is issued or will result in issuers excluding the media from their road shows and other presentations altogether. We respectfully suggest that the Commission reconsider its proposed treatment of media reports under Rule 433(f).

E. Interaction of Communications Proposals with Regulation FD

We agree with the Commission that an exemption from Regulation FD should not apply to certain material non-public information, such as the publication of regularly released factual business information or regularly released forward-looking information, which falls within the scope of expanded permissible communications under the Proposed Rules. The policy justifications underlying the Regulation FD exemption for offering-related communications are inapplicable to information such as regularly released factual business information which, while it might be included in an offering-related communication, is itself not offering-related.

We are concerned, however, that Rule 163(e), as proposed, is overinclusive and also denies the Regulation FD exemption to those offering-related communications that should retain the exemption. Proposed Rule 163 allows well-known seasoned issuers to make offers of securities prior to filing a registration statement. While these offers might include the type of information

(e.g., factual business information) that should be publicly disclosed pursuant to Regulation FD, they will also include the type of offering-related information (e.g., preliminary discussions of the price of the securities) that is properly within the scope of the Regulation FD exemption. We believe that the Commission should modify Rule 163(e) so that the Regulation FD exemption continues to apply to the portions of Rule 163 communications that are truly offering-related information.

We suggest that proposed Rule 163(e) be revised to read "A communication exempt pursuant to this section *(except with respect to offering-related information)* will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934. . ."

F. Use of Research Reports

We agree with the Commission's proposals to permit a broader dissemination of research around the time of an offering of securities. We note, however, that we have the following concerns with the way the Proposed Rules would be applied in practice.

- We believe that proposed Rule 137 could be construed to prohibit the receipt of consideration by the broker, dealer or person preparing the report in circumstances where the consideration is entirely unrelated to the subject report.

    - Consequently, we propose that Rule 137 be revised so that the first paragraph of Rule 137(b) reads, "In connection with the publication or distribution of any research report, the broker or dealer (or any affiliate) that has distributed the report and, if different, the person (and any affiliate) that has published the report are not receiving and have not received consideration directly or indirectly from, and are not acting, *as to that report or related reports with respect to the issuer*, under any direct or indirect arrangement or understanding with," and so that Rule 137(b)(2) reads "A selling security holder *(in relation to the issuer's securities)*."

- Under proposed Rule 139(a)(2), which applies to industry reports, we believe that brokers and dealers publishing or distributing industry reports should not be required to at the time of the publication or distribution have included similar information about the issuer or its securities in its past reports. The other requirements included in proposed Rule 139, including

that the research report include similar information with respect to a substantial number of issuers in the industry and that the report give no greater prominence to information about the issuer, are sufficient to ensure that information about the issuer is fairly presented. Moreover, the requirement that the broker or dealer be issuing research "at the time of the publication" raises the question of how recently must the latest research have been issued – within the past two months, four months, six months or longer – and what rule should apply if a broker or dealer has historically covered a company but has just recently lost the specific analyst who was covering the company. We respectfully suggest that the phrase "and, at the time of the publication or distribution of the research report, is including similar information about the issuer or its securities in similar reports" be removed from Rule 139(a)(2)(v).

- We also suggest that the term "projections" as used in proposed Rule 139 be clearly defined and such definition should clarify whether there is any specific quantification required. The instructions to proposed Rule 139 state that a projection "constitutes an analysis or information falling within the definition of research report." We would propose modifying the second sentence of Instruction 2 to "When a broker or dealer publishes or distributes projections *containing a quantification of an issuer's future financial performance in reliance* on paragraph (a)(2) of this section. . ."

III. Securities Act Registration Proposals

A. Changes to Form S-3

Selling security holders. We suggest that General Instruction II.G to Form S-3 be revised in part to read ". . . the registrant may, in lieu of identifying all selling security holders prior to effectiveness of the resale registration statement, identify any selling security holders *who consent to the inclusion of their names in the registration statement* and the amounts of securities to be sold by them. . ." As proposed, the General Instruction would require the disclosure of *known* security holders who have not consented to be disclosed. We believe that there is no policy reason for requiring this disclosure, since any additional selling security holder would have to be added by amendment or supplement before it could use the registration statement.

Eligibility of issuers of high yield debt to use Form S-3. We believe that private issuers of high yield debt should be eligible to use Form S-3 for primary issuances of securities if they satisfy the Form S-3 eligibility requirements other than the "public float" requirement. Companies can use Form S-3 for primary issuances of securities if they have a public float of at least $75 million.

However, private high yield issuers may not have any public float because the equity is all held by a few private investors – as a result, private high yield issuers would not be eligible to use Form S-3 even if they had filed periodic reports for at least 12 months.

Liability in shelf registration. We fully support the objectives of the Commission to make it clear when the liability of all deal participants for a takedown off a shelf registration attaches. We would propose that the rules be revised to make it clear that for all deal participants this liability would attach at the time the underwriting agreement is executed for any shelf takedown. This would parallel the provisions under Section 11(d) of the Securities Act.

B. Issuer Undertakings

We have the following practical concerns regarding the conforming revisions to the issuer undertakings required in connection with a shelf registration statement.

Date and time of contract of sale. It should be clarified that for an underwritten offering, the "date and time of contract of sale" referenced in paragraph (a)(5)(iii) of proposed Item 512 should refer to the time when there is a binding agreement between the underwriter and the purchaser.

Primary offering. We believe that the term "primary offering" should be formally defined as sales of newly issued securities (including through an underwritten offering on behalf of the issuer) or securities held by the issuer.

Offering communications in a primary offering. We suggest that the Commission clarify the second paragraph of Item 512(a)(6) to provide "The undersigned registrant undertakes that in a primary offering for the benefit of the undersigned registrant pursuant to this registration statement, regardless of the underwriting method used to sell securities to the purchaser, it will be considered to offer or sell the securities by means of any of the following communications *utilized in connection with that primary offering*:" As drafted, we believe that Item 512(a)(6) could be construed to apply to communications that were not issued in connection with or contemplation of the primary offering that is the subject of the registration statement.

C. Prospectus Delivery Reforms

We support the Commission's proposed promulgation of rules to provide the access equals delivery model. We concur that the wide usage of the Internet

renders obsolete the need to physically deliver prospectuses to all investors and are pleased that the Commission has undertaken to liberalize prospectus delivery requirements.

Conditions to the availability of the proposed Rule 172 safe harbor. We are concerned that proposed Rule 172 imposes responsibilities on the broker or dealer that should rest with the issuer. We specifically note that in order for a broker or dealer to take advantage of the proposed Rule 172 prospectus delivery safe harbor (i) the registration statement relating to the offering must be effective and not the subject of any pending proceeding or examination, (ii) the issuer, or any underwriter or participating dealer must not be the subject of a pending proceeding in connection with the offering and (iii) the issuer must have filed with the Commission a prospectus satisfying the requirements of Section 10(a) (other than omitting price-related information under Rule 430A), or if relying on Rule 430B or Rule 430C has or will file such a prospectus within the time prescribed by Rule 424. We do concur that an underwriter or dealer that is itself the subject of a pending proceeding in connection with the offering should not be able to rely on the safe harbor. However, we believe that an issuer, not an underwriter or dealer, is the proper party to determine whether the registration statement is effective, to make the appropriate prospectus filings and to determine whether there are any other pending proceedings with respect to the offering. Consequently, we suggest that proposed Rule 172(c) be modified to make it clear that these items are the issuer's responsibility and that a broker relying on the rule is not in violation of the safe harbor due to the issuer's failure to fulfill its responsibilities.

Applicability of Rule 173. We note that the modification we suggest to proposed Rule 172 will also affect the applicability of proposed Rule 173. Proposed Rule 173 provides that an underwriter need only send to each purchaser a notice that the sale was made pursuant to a registration statement or in a transaction in which a "final prospectus" would have been required to be delivered in the absence of Rule 172, rather than a copy of such prospectus.

Definition of "preceded by a prospectus" in proposed Rule 153. Proposed Rule 153 provides that the term "preceded by a prospectus," as used in Section 5(b)(2) of the Securities Act, regarding the requirement of a broker or dealer to deliver a prospectus to another broker or dealer as a result of a transaction effected on or through a national securities exchange, means the filing of the "final prospectus" for the related securities. We note that "final prospectus" is not defined in the Proposed Rules, but is defined in the release as "a prospectus meeting the requirements of Securities Act Section 10(a)."

We are concerned that the language of proposed Rule 153, with the above meaning given to "final prospectus," places a burden on the broker or dealer to determine whether the prospectus (i) complies with Section 10(a) of the Securities Act and (ii) was filed by the applicable filing date under Rule 424. Consequently, the rule as proposed places a burden on brokers and dealers that they do not have to bear under current law. We believe that the rule should clarify that the broker or dealer relying on the access equals delivery provisions may rely on any prospectus filed by the issuer, without undertaking the analysis of whether that prospectus technically complies with the requirements of Section 10(a). We would further suggest that the Commission amend the rule to explicitly state that the filing of a subsequent amended prospectus by the issuer does not mean that the broker or dealer was in violation of the "preceded by a prospectus" requirement during the period between the filing of the first prospectus, on which it relied, and the filing of the amended prospectus. The broker or dealer does not control the issuer and, therefore, should not be responsible for the sufficiency of the prospectus on file. The rule should make clear that the law has not changed to the extent that brokers and dealers may expect that what is on file with the Commission is sufficient.

In accordance with our comments to proposed Rule 172, we believe Rule 153(b) also should be modified so that a broker or dealer that is trading securities on a national securities exchange is not charged with determining information that is not within its control. Consequently, we suggest that proposed Rules 153(b)(2), 153(b)(3) and 153(b)(4) be modified to make it clear that, except with respect to any proceedings against the underwriter or dealer itself, these items are the issuer's responsibility and that a broker relying on the rule is not in violation of the safe harbor due to the issuer's failure to fulfill its responsibilities.

D. Automatic Shelf Registration Mechanics

We support the introduction of automatic shelf registration statements for well-known seasoned issuers, in order to allow these issuers to have additional flexibility in registering their securities and raising capital. We recommend, however, that the issuer's eligibility for use of automatic shelf registration pursuant to the market capitalization test not be reassessed with every updated prospectus required by Section 10(a)(3). As highlighted in the above discussion about the well-known seasoned issuer test, the market capitalization standard is a loose proxy for the volume and reliability of information about an issuer in the market. Although the stock price for an issuer may fall during the course of a year, it does not mean that the reliability or quantity of information about that issuer has decreased from the time that the registration statement was filed.

We also believe that an issuer should not be disqualified from using an automatic shelf registration statement because it has not been timely in all of its Exchange Act reporting, if it is current at the time its eligibility is assessed. We can understand the Commission's desire to regularly monitor, in connection with determining continuing eligibility to use an automatic shelf registration statement, whether an issuer is current in its Exchange Act reporting. However, we do not believe that the timeliness requirement of the well-known seasoned issuer definition should be reassessed with every updated prospectus. This would preclude issuers that are current in their filings but may have filed one late current report on Form 8-K from taking advantage of the revised rules.

E. Information Deemed Part of a Registration Statement

We believe that the first paragraph of proposed Rule 158(c) should read "For purposes of the last paragraph of section 11(a) of the Act only, the effective date of the registration statement *with respect to a particular sale* is deemed to be the date of the latest to occur of. . ."

IV. Exchange Act Reports and Registration Statements

A. Form 10-Q

The Commission has proposed that Form 10-Q be revised to provide for quarterly updates to risk factor disclosure. We note that new Item 1A to Part I of Form 10-Q would require an issuer to set forth material changes from those risk factors previously *disclosed on Form 10-K*. However, rather than requiring each 10-Q to have to compare disclosure only to the last 10-K, we propose that Item 1A require the issuer to set forth any material changes in risk factors from its annual report on Form 10-K, as updated by quarterly reports on Form 10-Q or current reports on Form 8-K. This change would eliminate needless repetitive disclosure.

B. Renumbering of Form 20-F

While not covered in the proposing release, we suggest a minor modification to Form 20-F to make it more readable. Currently Form 20-F, when used as an annual report, has several sections that are not applicable, including the first two sections that an investor reviewing an annual report would see, Items 1 and 2. Moreover, the sections that are applicable in annual reports are not organized in a way that is particularly helpful for an investor looking at a company. Accordingly, we propose that the Commission permit an

issuer that is filing an annual report on Form 20-F to reorder the items so that the risk factors, selected financial information, business description and operating and financial review and prospects are included first in the Form 20-F, and so that the issuer is able to reorder the remaining parts. Further, we propose that issuers be permitted to omit entirely from their annual reports on Form 20-F all those Items that they are not required to provide. An issuer would then append to its filing a schedule in which it lists the omitted Items and the location of the other Items. We believe that this would increase the readability of Form 20-Fs used as annual reports.

We appreciate your consideration of our comments. Please contact any of the following persons at our Firm if you have any questions about or require clarification of our comments.

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Very truly yours,

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