September 5, 2008

By Electronic and United States Mail
Ms. Florence E. Harmon
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. S7-18-08
Security Ratings, Release No. 33-8940
Proposed Rules for Nationally Recognized Statistical Rating Organizations

Ladies and Gentlemen:

Incapital, LLC is pleased to have the opportunity to comment on the Securities and Exchange Commission's ("SEC's") recently proposed amendments to various rules and forms under the Securities Act of 1933, as amended (the "Securities Act"), that incorporate ratings of nationally recognized statistical rating organizations ("NRSROs"). Incapital is limiting its comments to certain aspects of the Securities Act proposal--namely those relating to eligibility for use of Form S-3 as those are the proposals that would most significantly affect Incapital's issuers and its broker-dealer network. Incapital agrees with, and supports fully, the views set forth in the comment letter dated September 4, 2008 submitted by the Securities Industry and Financial Markets Association, of which Incapital is a member.

Incapital, LLC is a registered broker-dealer based in Chicago. Incapital is a broker's broker. Incapital is the largest managing agent/dealer in the United States involved in the offering of investment grade non-convertible medium-term notes and other fixed income products (referred to as "InterNotes") issued by Fortune 500 companies to retail investors. Incapital works closely with the majority of the registered broker-dealers in the United States that participate in the issuance to retail investors of new issue investment grade non-convertible securities. Generally, InterNotes are senior unsecured debt obligations that offer a fixed coupon and that have maturities of nine months or more. InterNotes are offered weekly to retail investors and are sold in denominations of $1,000 or multiples thereof. Through its broker-dealer network, Incapital also offers new issue InterNotes in denominations of $25 (often referred to as

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"baby bonds"), as well as trust preferred securities. Through its InterNotes program, Incapital offers debt securities that are issued by a trust and backed by funding agreements issued by a sponsoring insurance company. These securities traditionally are not thought of as "asset-backed securities" but currently are registered on Form S-3 in reliance on the "asset-backed" criterion. From time to time, Incapital also has participated in the distribution through its broker-dealer network to retail investors of repackaged debt securities of various corporate issuers (all investment grade). Since 2001, individual investors have purchased in excess of $210 billion in aggregate principal amount of retail investment grade corporate debt under the InterNotes program and other similar programs. Traditionally, the investment grade corporate debt market has been limited principally to institutional investors. Incapital believes that making investment grade securities accessible to, and available for purchase by, retail investors serves an important purpose for portfolio diversification, estate planning and other similar reasons. More information about Incapital is available through its website at www.incapital.com. More information about InterNotes, including copies of all of the prospectuses for the InterNotes issuers, is available through the InterNotes website at www.internotes.com.

Incapital, members of its broker-dealer network and Incapital issuers all share the SEC's concerns regarding the current credit crisis and the lack of investor confidence that may have resulted, in part, as a result of NRSRO issues. Incapital agrees that it is imperative that market participants and regulators take all necessary actions to restore investor confidence in the capital markets. In that regard, Incapital appreciates the SEC's efforts to address the regulation of NRSROs and the SEC's proposals to eliminate any potential conflicts of interest or the perception of conflicts of interest on the part of NRSROs. Likewise, Incapital supports the SEC's proposals intended to promote greater transparency in the ratings process. However, we do not believe that the SEC's interest in restoring investor confidence in the capital markets and bringing about improvements in the ratings process would be served by the proposed Securities Act rule amendments.

General Comments on the Securities Act Proposal

If It's Not Broken, Don't Fix It

We understand that in its review of the activities of NRSROs, the SEC has observed that the analysis of certain structured finance products by NRSROs, especially certain residential mortgage-backed securities ("RMBS") and collateralized debt obligations ("CDOs") of RMBS, may have resulted in ratings for those structured finance products that did not correctly reflect the potential risks associated with an investment therein. An analysis of many of these RMBS and CDO products requires complex financial models and an in-depth review of computational and static pool data. We appreciate that the RMBS and CDO ratings issues have resulted in a loss of investor confidence in securitization. However, we believe that the ratings analysis issues on which the SEC and others have focused relate principally to these complex structured finance products. There has been no similar issue identified in connection with the ratings of straightforward debt or non-convertible securities. Nonetheless, as we

discuss below, the Securities Act proposal would affect both the asset-backed securities ("ABS") market and the market for investment grade debt and non-convertible securities. Similarly, the proposed amendments under the Investment Company Act and the Advisers Act, as to which we do not provide detailed comments, also would affect the market for investment grade debt and non-convertible securities. The securitization market has come to a halt. However, the market for investment grade debt and non-convertible securities remains an efficient market—why disrupt it with regulation that is over-broad and likely to have unintended adverse consequences?

Wait and See Approach

The SEC already has suggested a number of significant rule changes that would address the conduct of ratings agencies generally, as well as the ratings process for structured finance products specifically.[1] We believe that it would be prudent for the SEC to proceed with the adoption of such rules (reflecting those changes that the SEC believes sensible in response to the issues raised, and recommendations made, by commentators) and to evaluate, after the passage of time, the impact of those changes on the ratings process and on the ratings of structured finance products. Other regulators also have proposed substantial changes to the structure of our financial system, as well as to the regulation and supervision of our financial institutions. At this time it is not clear why it would be sensible to undertake more changes that will have widespread ramifications for various markets that have thus far remained relatively stable during the credit crisis. Market participants are seeking stability in the capital markets. Stability rarely results from undertaking widespread and overarching systemic changes. Such changes will likely result in greater instability and uncertainty.

Over-Reliance on NRSRO Ratings

In its various NRSRO related releases, the SEC has observed that, in making their investment decisions, investors placed undue reliance on ratings. The SEC notes that investors should base their investment decisions on their own diligence and independent analysis. We do not believe that investors unduly rely on NRSRO ratings in making investment decisions. We understand that financial engineering may have resulted in ever more complex asset-backed securities and CDO-type products and that, given the complexity of certain of these products, investors may have placed greater reliance on the analyses conducted by rating agencies than on other factors. However, we also note that the market for these securities was principally an institutional market. Very sophisticated investors that have their own financial analytic tools and models, their own research staff and their own modeling capabilities represented the largest buyers of these securities. These investors had static pool data, computational materials, their own models and other disclosures available to them in making their

[1] We refer to the Statement on Proposal to Increase Investor Protection by Reducing Reliance on Credit Ratings (June 25, 2008); Press Release No. 2008-110 (June 11, 2008); Proposed Rules for Nationally Recognized Statistical Rating Organizations, Securities Exchange Release No. 57967 (June 16, 2008), 73 FR 36212 (June 25, 2008).

decisions regarding the purchase of these products. It is not clear that these investors, which include some of the largest financial institutions in the country, were overly reliant on NRSRO ratings for these products or that they based their investment decisions principally on the NRSRO ratings, without utilizing their internal analytical resources or any of the other tools at their disposal. If one were to assume that the largest and most sophisticated institutional buyers and financial institutions in the U.S. and in the world placed undue reliance on NRSRO ratings in purchasing asset-backed securities, it still would not be sensible to assume that the same dynamics that existed in the ABS market existed in the market for non-ABS investment grade securities. We encourage the SEC to consider the important differences that exist in the investor base for ABS and for investment grade debt and non-convertible securities, the differences that exist in the trading markets for ABS compared to the trading markets for investment grade debt and non-convertible securities, and the differences in the available information regarding these securities, which we discuss below. Given the differences between ABS and investment grade debt and non-convertible securities, we do not believe that investor behavior in respect of these securities is the same. Investors in ABS are likely to have relied much more heavily on NRSRO ratings due to the complexity of some of these structures and the relative lack of information about these products and the assumptions and financial models underlying the cash flows and economics of such transactions.

A number of the proposed changes would require that other third-parties (for example, a money market fund's board, in the case of Rule 2a-7, or an advisor, in the case of Rule 206(3)-3T) make determinations or establish methodologies to determine whether a security "presents minimal credit risks" or is of "investment grade" quality—instead of including the NRSRO investment grade rating reference in the regulations.[2] Why is it logical to assume that these new standards will result in any better credit risk assessments than the NRSRO ratings?

<u>Is a Reference an Endorsement?</u>

Moreover, even if investors, including very sophisticated financial institutions, had placed undue reliance on NRSRO ratings, their degree of reliance on such ratings would not be affected merely by the inclusion of references (or the excising of all references) to NRSRO ratings in various SEC regulations. We do not believe that including references to NRSRO ratings in SEC regulations encouraged over-reliance on the part of investors, or broker-dealers, or investment advisers, or mutual funds, on NRSRO ratings. Broker-dealers and investment advisers have fiduciary and other obligations, which would not have been discharged merely by taking note of the rating of a security in the absence of having undertaken other diligence and analyses. It is implausible that financial institutions and hedge funds that purchased securities for their

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[2] We refer to the proposed amendments under the Investment Company Act and the Investment Advisers Act, References to Ratings of Nationally Recognized Statistical Rating Organizations; Release Nos. IC-28327, IA-2751.

own proprietary or investment accounts did so simply in reliance on the ratings of the securities without independent analysis or that these institutions were encouraged to rely principally on ratings (if, in fact, they did so) merely because NRSRO ratings are referenced in various SEC regulations. We understand that the SEC would like to encourage diligence and analysis on the part of investors. However, encouraging diligence and critical analysis would not support deleting reference to NRSRO ratings in regulations. Investors will be motivated to adopt best practices or internal policies and procedures and new compensation/incentive schemes for a number of reasons quite apart from whether the SEC retains or removes references in its regulations to NRSRO ratings. We do not believe that the references in the Securities Act regulations to NRSRO ratings (or the references to ratings in the SEC's regulations promulgated pursuant to the Investment Company Act and the Investment Advisers Act) suggest any endorsement on the part of the SEC regarding the quality or accuracy of NRSRO ratings. Credit ratings are an important factor that investors should consider and investors will continue to consider NRSRO ratings regardless of the inclusion of, or deletion of, references to ratings in SEC regulation. To that end, we believe that the first set of SEC rule proposals, which relate to the ratings process, will improve the quality of ratings and those rule changes should be sufficient.

Availability of Information

As we noted above, we believe that there are important differences that the SEC should consider between the markets for asset-backed securities and the markets for investment grade debt and non-convertible securities. Although we believe that following the adoption of Regulation AB, there has been ample disclosure in the public filings related to registered asset-backed securities, we recognize that many of these securities are quite complex. As a result of that complexity, investors in such securities may have, on a relative basis, relied in greater measure on NRSRO ratings than on independent analysis. There are other important dynamics that the SEC should consider in distinguishing between these markets. Even under "normal" market conditions, the trading market for asset-backed securities is less liquid than the market for investment grade debt and non-convertible securities. The lack of a liquid trading market results in less price transparency for investors. By contrast, investors may obtain pricing information about fixed income securities from the TRACE system, as well as from other trading systems and interdealer networks. Although issuers of asset-backed securities have certain ongoing reporting requirements pursuant to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), those ongoing public reports contain relatively limited information. The information that is required to be reported relates solely to the special purpose entities that are the issuers of the asset backed securities. Usually, these issuers discontinue or suspend their reporting obligations after a period of time because of the limited number of holders of the securities. By contrast, there is ample detailed information concerning issuers of investment grade debt and non-convertible securities. Similarly, there is research coverage relating to the issuers of investment grade debt and non-convertible securities; whereas, there is relatively little research (other than NRSRO reports) available regarding particular asset-backed securities or even particular asset-backed structures.

Historically, the SEC's regulations relating to investment grade debt and non-convertible securities have been premised on several basic facts, and, these facts, simply stated, have not changed. For example, the exemption in Rule 101 of Regulation M for investment grade non-convertible debt and preferred securities reflected the fact that the market for these securities was less subject to market manipulation largely because these securities traded on the basis of credit spreads and credit ratings. This has not changed. Similarly, just this year, the SEC adopted changes to Rule 144. Included in the changes to Rule 144 were changes to the manner of sale requirements relating to fixed income securities.[3] In making these changes, the SEC recognized again that these markets functioned differently than the market for equity securities.

Investment grade debt and non-convertible securities trade on the basis of credit spreads and credit ratings. This will be the case whether or not the SEC's regulations incorporate a reference to NRSRO ratings. However, under the proposed Regulation M rules, the SEC references WKSI status, which does not necessarily correlate to the actual market dynamics for these securities.[4] Similarly, in the context of other rules, historically, the SEC concluded that it was appropriate to include an "investment grade rating" as an objective minimum criterion (usually only one of several criteria) because an NRSRO investment grade rating signified a certain risk level. Now, the SEC's proposed regulations would substitute NRSRO references with references to determinations regarding "minimal credit risk" or "moderate credit risk," which are more subjective than an objective, published, publicly available NRSRO rating.

Redirecting Offerings to the Private or Offshore Market

We note that the Securities Act proposals would have the effect of causing issuers of asset-backed securities to limit their registered public offerings to qualified institutional buyers ("QIBs") and would have the effect of requiring certain issuers of investment grade debt and non-convertible securities that no longer will be able to rely on Form S-3 to seek other alternatives. Issuers will turn either to private placements exempt from the Securities Act registration requirements or to offshore offerings excluded from the Securities Act registration requirements. This result would seem contrary to the SEC's overall policy objectives of having securities offerings conducted as registered public offerings. Investors would be better served by having issuers register their securities offerings with the SEC. The SEC would have an opportunity to review disclosures. Section 11 and Section 12 liability would apply to public filings. In a different context, we note that in 2007 and early 2008, the SEC adopted a number of rule changes that relaxed the eligibility requirements for the use of Form S-3 for smaller public companies.[5] For smaller public companies, this was a welcome change. In its

[3] We refer to the final SEC Rule, Revisions to Rules 144 and 145; Release No. 33-8869.

[4] We refer to the proposed amendments under the Exchange Act, References to Ratings of Nationally Recognized Statistical Rating Organizations; Release No. 34-58070.

[5] We refer to the final SEC Rule, Revisions to the Eligibility Requirements for Primary Securities Offerings on Forms S-3 and F-3; Release No. 33-8878.

release regarding Form S-3 eligibility, the SEC noted the added efficiency and the many benefits associated with the short-form registration statement and the ability to conduct delayed offerings. The SEC also stressed the limitations associated with the private placement market. The SEC determined that there was sufficient public information regarding smaller public companies that had listed equity securities. We would note that if availability of information is the test for whether Form S-3 should be made available, then, as we note below, we do not see how the proposed rule changes can be reconciled with the SEC's prior actions. We note that traditionally the SEC has concluded that there is greater risk of manipulation or other abuse in connection with equity securities than in connection with investment grade debt and non-convertible securities.

Uncompetitiveness of the U.S. Capital Markets

We appreciate that given the current upheaval in the capital markets, additional regulation or a regulatory overhaul may seem expedient or even necessary. It is also easy to defer addressing concerns regarding market efficiency and market competitiveness for better, or at least, more stable, times. However, we note that, given the interrelatedness of all of the capital markets, market participants in need of funding will look outside the United States for financing alternatives. As we note above, there will be few benefits associated with Securities Act registration for issuers of asset-backed securities. These issuers will be driven to consider the private and offshore markets. Similarly, issuers of investment grade debt and non-convertible securities that no longer meet the Form S-3 eligibility requirements may well be driven to offshore markets.

Detailed Comments on Form S-3 Eligibility

Form S-3 Eligibility for Issuers of Asset-Backed Securities

Currently, issuers of asset-backed securities are eligible to use Form S-3 to file a shelf registration statement for the public offering of ABS on a delayed basis subject to certain conditions. Under existing requirements, an offering of ABS may be eligible for registration on Form S-3 if the securities are rated investment grade by an NRSRO and meet certain other conditions. The SEC proposes to replace the Form S-3 eligibility requirement for ABS offerings with a minimum denomination requirement for initial and subsequent sales and a requirement that initial sales of classes of securities be made only to qualified institutional buyers. Thus, under the proposed rules, ABS offered for cash may be Form S-3 eligible provided (1) initial and subsequent resales are made in minimum denominations of $250,000 and (2) initial sales are made only to QIBs.

The SEC intends that this amendment would limit the use of a short-form registration statement for ABS to offerings made to large sophisticated and experienced investors. However, this approach is inconsistent with regulatory treatment of non-ABS issuers who are not similarly limited. Also, the SEC typically has relied on disclosure criteria that is independent of, and does not vary based on, the nature of the investor. Limiting the use of Form S-3 to QIBs mixes the SEC's analysis of private placements

with that of registered offerings. The distinction for QIBs is based on the belief that they do not require the same protections as other investors when investing in unregistered offerings. Yet, the disclosure protections in the Securities Act are not, and should not be, based on the nature of the investor, but rather the level of disclosure.

As we note above, we believe that the SEC was principally focused on addressing the kinds of asset-backed securities that have been at the root of the credit crisis. However, a number of other securities, for example offerings of trust notes backed by funding agreements (referred to above), will be affected by the NRSRO proposals. Each issuance of trust notes is offered by a separate and distinct statutory or common law trust that uses the net proceeds from the offering of the trust notes to purchase one or more funding agreements sold to, and deposited into, that trust by the depositor (the insurance company). The trust pledges and assigns its interest in each funding agreement purchased with the net proceeds from the issuance of its trust notes to a trustee for the benefit of that trust's trust note holders. In the event of a bankruptcy of the insurance company, the funding agreements would rank equally with loss claims made under the company's insurance policies and annuities and senior to its unsecured debt. Currently, the trust notes are registered on Form S-3 (the trust and the depositor each are reporting companies under the Exchange Act) and are investment grade rated by an NRSRO.

The credit rating for these trust notes is based, in large part, on the inherent credit, liquidity and business risks of the sponsoring insurance company. Because the trust notes are backed by the funding agreements, which are senior obligations of the insurance company, the ratings are tied to the insurance company's ability to repay such obligations. Unlike traditional ABS, there is more of a linkage between these trust notes and the sponsor's soundness. In the traditional ABS structure, the investor has recourse only to the issuing special purpose vehicle and the assets underlying the securities issued by the special purpose vehicle. In most cases, payments on these underlying assets depend not on the sponsor, but on the underlying mortgage loans or other receivables. However, in the event of a bankruptcy of the insurance company sponsor, the funding agreements would rank equally with loss claims made under the company's insurance policies and annuities and senior to its unsecured debt. This provides an investor in the trust notes with a claim that is preferential to those of traditional ABS holders in securitizations.

Limiting sales to QIBs and requiring a minimum denomination of $250,000 would effectively deny the insurance companies access to the retail markets for these trust notes. The InterNotes program trust notes are offered through a network of broker-dealers exclusively to retail investors who would no longer be able to purchase them. In addition, Form S-3 eligibility traditionally has been issuer-focused. Requiring that sales be limited to QIBs and specifying minimum denomination inappropriately shifts the focus from the issuer to the investor. The proposed restrictions on ABS sales seem intended to address the SEC's concern about the particular complexities of ABS. However, the funding agreement backed trust notes are not sophisticated products and should not be subject to these additional restrictions simply because payments depend on an underlying asset. The underlying assets, under these structures, are quite simple.

In contrast to RMBS transactions, for these offerings there is ongoing public disclosure by the depositor, which is a reporting company.

Similarly, we also would ask that the SEC consider the range of other securities transactions that currently are registered on Form S-3 in reliance on the "asset-backed" eligibility criterion that would not be considered traditional asset-backed securities or securitizations. These would include repackagings of investment grade corporate debt securities in order to make sales to retail investors[6], sales of certain hybrid securities (by which we refer to securities structured to obtain Tier 1 regulatory capital treatment from bank regulators or favorable regulatory capital treatment by insurance regulators), and sales of certain trust preferred securities. All of these types of offerings would no longer be able to be registered on Form S-3 unless the offerings were limited to offerings to QIBs.

We urge the SEC to leave the asset-backed eligibility criterion unchanged.

Alternatively, we propose that the SEC amend the proposals so that they do not apply to securities that would not be thought of as traditional asset-backed securities and do not present the risks associated with the asset-backed securities that have been at the root of the credit crisis. We believe it is possible to draw a principles-based distinction among the various types of securities that are currently registered on Form S-3 in reliance on the "asset-backed" criterion.

We suggest that the SEC incorporate the concept of a "seasoned sponsor" or "seasoned depositor" (each being an entity that itself would satisfy the WKSI test) or could look into the assets of the trust (in the case of trust issuers) to see whether the assets themselves had been previously registered with the SEC and rated on a standalone basis as an alternative to the investor focused standards currently proposed.

The SEC also has proposed modifications to Rule 3a-7 under the Investment Company Act of 1940 that permit issuers to sell only to "accredited investors" and QIBs if they wish to avail themselves of the exemption afforded by Rule 3a-7. We suggest that the SEC modify Rule 3a-7 if, and only to the extent that, the SEC modifies the eligibility requirements for Form S-3. We believe that any amendments to Rule 3a-7

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[6] For examples of these repackagings of investment grade corporate debt and treasury securities of the type that we refer to see Morgan Stanley SATURNS, http://www.sec.gov/cgi-bin/browse-edgar?company=&CIK=&filenum=333-64879&State=&SIC=&owner=include&action=getcompany; JP Morgan Select Notes, http://www.sec.gov/Archives/edgar/data/1223444/000106823808000539/selectnotes2003-1_10k.htm; Citigroup, http://www.sec.gov/Archives/edgar/data/894356/000093041304001087/c31295_424b5.htm; Incapital BASICs, http://www.sec.gov/Archives/edgar/data/1271779/000093041304004933/c34202_pos-am.htm; and Core Bonds, http://www.sec.gov/Archives/edgar/data/1176262/000090514803002982/efc3-1258_5420878fms3a.txt.

should mirror the amendments made to the Form S-3 eligibility requirements to avoid any uncertainty that may result from rules that are not consistent.

Form S-3 Eligibility for Non-Convertible Securities

Under existing requirements, Form S-3 eligibility depends on the reporting history of the issuer under the Exchange Act and compliance with at least one of the form's transaction requirements. One such requirement for the registration of non-convertible securities is that the securities be rated investment grade by at least one NRSRO. Instruction I.B.2 provides that a security is "investment grade" if, at the time of sale, at least one NRSRO has rated the security in one of its generic rating categories that signifies investment grade (typically one of the four highest categories). The SEC proposes to revise the transaction eligibility criteria for the registration of primary offerings of non-convertible securities on Form S-3 by revising Instruction I.B.2 so that it no longer refers to security ratings by an NRSRO. Rather, Form S-3 would be available to register primary offerings of non-convertible securities if the issuer has issued, as of a date within 60 days prior to the filing of the registration statement, for cash more than $1 billion in non-convertible securities, other than common equity, through one or moreregistered primary offerings over the past three years.

This approach relies on the alternative WKSI eligibility standard for debt issuers that do not meet the public float eligibility requirements. The SEC believes that this standard can substitute for an issuer's wide following in the market. Under the proposed regulations, various types of investment grade debt and non-convertible securities that currently are eligible for registration on Form S-3 would no longer be eligible to use the short-form. The SEC proposal cites that only six issuers that are currently eligible for the short-form registration statement would be adversely affected by the new regulation.

As we explain above, we believe that there is no reason to amend existing regulation to excise references to NRSRO ratings. The proposed changes will have widespread and it would appear unanticipated effects on the capital markets. The changes will affect more than six issuers. These changes will affect all of the classes of securities that we identify above, including, but not limited to, trust issuances in the context of funding agreement-backed notes, hybrids or trust preferred securities, as well as repackagings.

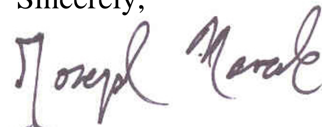
We urge the SEC to leave the investment-grade eligibility criterion unchanged.

Alternatively, we suggest that the SEC consider a different standard than the proposed WKSI standard. For example, perhaps the regulations could incorporate the concept of a "seasoned sponsor" or "seasoned depositor" (each being an entity that itself would satisfy the WKSI test) or could look into the assets of the trust (in the case of trust issuers) to see whether the assets themselves had been previously registered with the SEC and rated on a standalone basis.

Conclusion

We appreciate the difficulties associated with crafting regulations that are intended to restore investor confidence in the capital markets, while not causing additional disruption and dislocation in the markets. We reiterate our recommendation that the SEC adopt the regulations relating to conflicts of interests on the part of NRSROs and additional transparency in the ratings process and let market participants adapt to the changes required by such regulations. We note that at this time broker-dealers and other financial institutions (mutual funds, investment managers, investment advisers, etc.) are all addressing the many regulatory changes that have been announced or implemented in recent months, following the proposals relating to new regulatory initiatives and reviewing their own practices and procedures. All of this requires time and attention. We respectfully suggest that change is best made slowly and deliberately and would suggest that action on eligibility for short-form registration be deferred pending additional study and consideration.

Sincerely,



Joseph J. Novak
General Counsel