NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

NASAA

10 G Street N.E., Suite 710
Washington, DC 20002
202/737-0900
Telecopier: 202/783-3571
E-mail: info@nasaa.org
Web Address: http://www.nasaa.org

June 22, 2004

Jonathan Katz, Secretary
U.S. Securities and Exchange Commission
450 5th Street NW
Washington, DC 20005

Via e-mail to: rule-comments@sec.gov

Re: File No. S7-19-04, SEC Release Nos. 33-8407 and 34-49566
Use of Forms S-8 and 8-K by Shell Companies

Dear Mr. Katz:

The North American Securities Administrators Association, Inc. (NASAA) appreciates the opportunity to comment on the above-referenced proposed rule limiting the use of Form S-8 and Form 8-K by shell companies. Organized in 1919, NASAA is the oldest international organization devoted to investor protection. Its membership consists of the securities administrators in the United States, Canada, and Mexico. The comments reflect input from both our U.S. and Canadian members.

NASAA strongly agrees with the proposals made by the SEC with regard to shell companies. Similar to the experience of the SEC described in the proposal, the states have seen a steady stream of fraud and misconduct in the distribution and manipulation of shares of shell companies and the companies that combine with shell companies.

Most recently, the enforcement units of state securities divisions have received complaints involving newsletters recommending investment in shell companies just prior to business combinations. This latest incarnation of investing in shell companies [the scam] involves profitable companies located in Far Eastern countries with rapidly growing economies, such as China. The solicitations identify these foreign companies as preparing to merge with U.S. shell companies, and suggest that investors buying now will reap large gains when the stock price soars.

SEC rules are particularly appropriate in this area because transactions resulting, directly or indirectly, in the issuance of securities, and involving a merger, acquisition, share exchange, or other combination, are almost universally exempt from registration or notice filings at the state level. Shell companies thus do not notify the state securities administrators in the event of a combination transaction that precedes the reactivation of an operating business and attendant trading activity in the company's securities.

We agree that shell companies should be required to file full disclosure under a Current Report on Form 8-K shortly after a merger/acquisition event. We urge the SEC to amend its proposal to establish a mechanism that identifies those reporting companies that fall into the definition of shell company, and thus are subject to this requirement. Specifically, the event of becoming a shell company should also trigger a current report or other notice to the SEC, and thereby to the state regulators and the public. After all, issuers in other categories such as small business companies or investment companies identify themselves as such in many SEC filings. A check-box could appear on the cover of the periodic reports and other reports that issuers file with the SEC.

NASAA urges the SEC to include an objective category to the definition of a shell company. For instance, the term "nominal" should be tied to a real dollar amount or a percentage of a historical benchmark for the company. An objective test could operate as a presumption, rather than an exclusive standard, in order to prevent overly creative shell companies from avoiding the intent of the definition and the rule.

In addition, a shell company should not be able to create a structure where a non-reporting-company (shell) subsidiary claims an exemption for offerings to "employees" under Rule 701. Rule 701 is not available to reporting companies. Rule 701(b)(3), however, suggests that a subsidiary of a reporting company would be able to claim an exemption under that rule. In fact, it states that the reporting company parent may guarantee such securities. For the same reasons articulated in the Release for prohibiting shell companies from using Form S-8, the proposal should be expanded to include a prohibition for use of Rule 701 by any affiliate of the shell company.

We further note that the issues raised in the Commission's shell company proposal have been addressed in large part in Canada through rules of the provincial securities commissions and exchange policies. For example, under National Instrument 51-102 and TSX Venture Exchange Policy 5.2, information circulars for a change of business or RTO must include prospectus-level disclosure of the entities involved in the transaction, including both historical and pro forma financial statements. The TSE also has rules in its Company Manual relating to changes of business and backdoor listings. The TSX Venture Exchange also has a successful capital pool program that allows shell companies to become listed in a regulated environment and then carefully reviews the disclosure provided regarding the business that is vended into the shell. Under that policy, prior to its qualifying transaction, a CPC can only issue options to directors and officers not employees.[1]

Because the existing securities laws and exchange rules already address the issues raised and the concerns addressed by the changes proposed by the Commission, NASAA recommends that the Commission carefully analyze whether its proposal will be implemented in a manner that is complementary to the Canadian regime.

[1] See TSX Policy 5.2 at http://www.tse-cdnx.com/en/pdf/Policy5-2.pdf; TSXV Policy 2.4 at http://www.tse-cdnx.com/en/pdf/Policy2-4.pdf; and the TSE Company Manual, parts 6 and 7, at http://www.tsx.com/en/productsAndServices/listings/tse/resources/resourceManual.html.

Thank you for consideration of these views. State securities regulators have a long history of working to thwart securities fraud. The investing public always benefits from full disclosure, and this rule proposal fills a gap that exists in this segment of the industry.

Should you have questions about this matter, please feel free to contact Denise Voigt Crawford, Texas Securities Commissioner and Chair of the NASAA Corporation Finance Section, or Timothy Cox, Chief of Securities Registration for the Maryland Division of Securities and Chair of the NASAA Corporation Finance Policy Project Group. Patricia Johnston, Director, Legal Services and Policy Development of the Alberta Securities Commission, also stands ready to provide any assistance necessary.

Sincerely,

Ralph A. Lambiase

Ralph A. Lambiase
NASAA President and
Director, Connecticut Division of Securities