THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK, NEW YORK 10036-6689

SPECIAL COMMITTEE ON
MERGERS, ACQUISITIONS AND CORPORATE CONTROL CONTESTS

June 1, 2005

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

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

Re: Proposed Rule: Use of Form S-8 and Form 8-K by Shell Companies
(Release Nos. 33-8407; 34-49566; File No. S7-19-04; RIN 3235-AH88)

Ladies and Gentlemen:

This letter is submitted on behalf of the Association of the Bar of the City of New York's Special Committee on Mergers, Acquisitions and Corporate Control Contests in response to the Commission's request for comments regarding the use of Registration Statement on Form S-8 by shell companies. This letter supplements our letter of June 11, 2004, and reflects discussions with Nicholas Panos and Kevin O'Neil of the Division of Corporation Finance. At the suggestion of Mr. Panos, we have not reiterated all of the points made in our prior letter, and have attempted to provide a "bullet-point" summary of our primary areas of concern, as well as a proposed change in the instructions to Form S-8 that would address those areas.

60-Day Moratorium on Use of S-8 by Former Shell Companies

Our concern with the proposed rules relates to the application of the 60-day moratorium on the use of S-8 to certain types of registrants that have been shell companies within the preceding 12 months. The primary purposes of this proposed rule as stated in the accompanying release are:

- to prevent abuses of Form S-8 to improperly effect capital raising transactions without traditional registration and disclosure under the Securities Act of 1933, as amended (the "Securities Act"); and

- to give employees and the market time to absorb information that will be included in registrant's filings on Form 10, Form 10-SB, Form S-4 and/or Form 8-K.

We believe that the proposed rules would have the unintended and unnecessary effect of suspending the ability of a successor registrant to use Form S-8 in connection with certain bona-fide merger and restructuring transactions (of which we provided several examples in our June 2004 letter). In these transactions:

- Form S-8 is not being used to circumvent registration and disclosure requirements of the Securities Act; and

- sufficient information regarding the predecessor entity or entities typically already exists in the marketplace.

Proposed Revision to 60-Day Moratorium

The following redlined text reflects our suggested revisions to the proposed change to the introductory text of paragraph (a) of 17 CFR 239.16b:

> "(a) Any registrant that, immediately before the time of filing a registration statement on this form, is subject to the requirement to file reports pursuant to Section 13 (15 U.S.C. 78m) or 15(d) (15 U.S.C. 78o(d)) of the Securities Exchange Act of 1934; **(i)** has filed all reports and other materials required to be filed by such requirements during the preceding 12 months (or for such shorter period that the registrant was required to file such reports and materials); **(ii)** is not a shell company (as defined in §230.405 of this chapter); and **(iii)** if it has been a shell company at any time during the preceding 12 months, has filed current Form 10 information (as defined in Instruction A.1(a)(6) to Form S-8) with the Commission at least 60 days previously **or is a successor (by merger or acquisition of all or substantially all of a predecessor's capital stock or assets) to one or more persons that satisfied the requirements of clause (a)(i) immediately prior to the transaction that terminated the registrant's status as a shell company**, may use this form for registration under the Securities Act of 1933 (the Act) (15 U.S.C. 77a et seq.) of the following securities:"

Similar revisions to the proposed changes to the instructions to Form S-8 would also be required. We believe these changes substantially address our concerns as stated above without undermining the goal of the proposed rules to prevent circumvention of the registration and disclosure requirements of the Securities Act and ensure that information regarding the registrant has an opportunity to be absorbed prior to any transaction made in reliance on Form S-8.

Finally, we note that both the proposed rules and our suggested revisions deviate from current practice in M&A transactions, which involves filing the Form S-8 prior to closing (in some cases, as part of the Form S-4 that already is subject to Securities and Exchange Commission review prior to effectiveness). Under our suggested revisions, the surviving entity would still be able to have an effective Form S-8 in place immediately following the closing of the acquisition, but would be required to wait until immediately after the closing to make the filing. It would be helpful if the proposed rules were further revised to enable the practice of filing the Form S-8 prior to closing to continue (for example, by permitting the S-8 to be filed in advance, but not become effective so long as the registrant continues to be a shell company). We regard this as a procedural matter, though we believe preserving current practice will prevent inadvertent violations of the proposed rules in the context of conduct that the proposed rules are not intended to restrict.

Respectfully submitted,

SPECIAL COMMITTEE ON MERGERS, ACQUISITIONS
AND CORPORATE CONTROL CONTESTS

Erica H. Steinberger, Chair