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June 3, 2004

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

**RE: FILE NO. S7-19-04**

Dear Mr. Katz:

We are responding to your request for comments on the Commission's proposal pertaining to Release Nos. 33-8407 and 34-49566 in reference to the prohibition of the use of Form S-8 by shell companies and the amended Form 8-K reporting requirements, when reporting an event causing a shell company to cease being a shell company. Additionally, we are responding to your proposed amendment to §230.405 in reference to adding the definition for a shell company and your proposed amendment to Rule 12b-2 - Revision of the definition of "succession."

As we understand your proposal, the proposed amendments would affect companies that are small entities. Your Exchange Act Rule 0-10(a) defines an issuer to be a "small business" if it had total assets of $5 million or less on the last day of its most recent fiscal year. You further indicate there are approximately 2,500 issuers, other than investment companies, that may be considered small entities. In addition, you state you believe only a small percentage of the small entities are shell companies, which are being defined as registrants with no or nominal operations and with: (1) no or nominal assets; or (2) assets consisting solely of cash and cash equivalents.

If adopted, your proposal would; (i) disqualify a small percentage of the 2,500 companies from using Form S-8; and (ii) would require this same small percentage to file a Form 8-K to report completion of a transaction causing it to become an operating business and cease being a shell company. The Form 8-K would have to include information of the kind required in a long-form filing to register a class of its securities under the Exchange Act and would be required to be filed within four business days after the closing of the

transaction. Additionally, your proposal would define *shell company* and amend Rule 12b-2 to revise the definition of "succession."

These proposals are intended to have the impact of preventing *shell companies* from being utilized for fraudulent and manipulative purposes.

**SECURITIES ACT FORM S-8 PROPOSAL:**

Form S-8 is available to register the offer and sale of securities to an issuer's employees (consultants) in a compensatory or incentive context. There is a clear distinction between offerings to employees (consultants) primarily for compensatory and incentive purposes and offerings for capital-raising purposes. Unfortunately this distinction is overlooked in the aggressive interest of generating unrestricted securities caused by the expense and extensive time required to properly register the securities by means of an SB-2 registration.

***Would prohibiting shell companies from using Form S-8 unduly hinder legitimate shell companies from offering securities to employees?***

We believe the proposed rule falls in line with the intended purpose of Form S-8 in that the securities are intended for compensatory or incentive purposes. In our experience most employees and consultants will wait the proposed 60-day period for the registration of their shares on Form S-8.

***Would adoption of the Form S-8 proposal effectively deter fraudulent and abusive use of Form S-8?***

We believe the continued abuse of Form S-8 stems from the need of certain shell companies for unrestricted securities required to create either; (i) shares available for capital raising; or (ii) shares available for 15c2-11 submittal to NASD for quotation on the Over-the-Counter Bulletin Board (OTC:BB). The sixty-day period is clearly a long enough period of time to make a shell company wait to assist in preventing the abuse of Form S-8. We believe a significant abuse occurs within companies falling outside the definition of a shell company. We are unaware of any disproportionate amount of abuse within shell companies, as it appears to us most of the abuse occurs with operational companies attempting to raise capital or promote their securities with S-8 stock.

***Is the proposed 60-day waiting period too long or too short? Should it be shorter, such as 30 days? Should it be longer, such as 90 days?***

Since the 60-day period is consistent with the 60-day period that passes before a company's registration of a class of securities on Form 10 or Form 10-SB becomes effective under section 12(g) of the Exchange Act, we believe 60 days is the minimum waiting period and 90 days should be the maximum waiting period.

**Cost Analysis of utilizing the alternative of filing an SB-2**

We do not believe *shell companies* or companies ceasing to become shell companies desiring to issue compensatory or incentive securities within 60 days of such succession would file an SB-2 to register securities for such purpose. First, the cost for such a filing is analogous to the Commission's cost of a 10-SB, approximately 133 hours. Second, the time period to obtain effectiveness from the Commission on a SB-2 registration is approximately 90 days, which exceeds by 30 days the requirement of your proposed rule. Therefore, we do not believe it feasible to expect a company, once ceasing to be a shell company, to file an SB-2 for issuing compensatory or incentive securities.

Additionally, we do not believe shell companies will file registration statements to register employee compensation shares or incentive based shares prior to ceasing to be shell companies, in that such companies generally have only a skeleton management team to seek either an acquisition or merger candidate.

As a result of the limited application of the proposal to the small percentage of small businesses, and the availability of S-8 after 60 days from ceasing to be a shell company, we do not believe the costs to the shell companies will be significant.

**Conclusion re: S-8 Proposal**

We believe the S-8 Proposal will eliminate some of the abusive shell company transactions and the 60-day time period is appropriate for compensatory and incentive based security issuances. We do not believe the proposal will have the intended impact of eliminating significant abuses, in that those desirous of utilizing Form S-8 for the unintended purpose of capital formation, will continue to utilize S-8 for that purpose. Even though the cost to shell companies is difficult to quantify, we believe the costs are insignificant because we believe shell companies will wait the 60 days as opposed to filing an SB-2. Conversely, we do not believe the benefit of this proposal is going to significantly protect investors, even after the 60-day waiting period, Form S-8 will continue to be utilized for the fraudulent purpose of capital formation.

**EXCHANGE ACT FORM 8-K PROPOSAL:**

**Our understanding of your Form 8-K proposed amendment is to require shell companies, when reporting an event causing it to cease being a shell company, to file via Form 8-K the same type of information required if it were to file to register a class of securities under section 12 of the Exchange Act.**

The concept of this proposal is to prevent shell company schemes from taking advantage of the lack of adequate financial and other information during the window period of approximately 71 days.

***Will requiring former shell companies to make more complete and detailed filings on Form 8-K when they cease being shell companies help investors in making informed investment decisions and deter fraud and abuse by shell companies?***

We believe this type of information is clearly mandated by the concept of fair and adequate disclosure. Clearly this information falls within the category of information referenced by the letter to Lisa Roberts pertaining to utilizing the "back-door registration."

***Will closing the 71-day window for filing the financial statements of businesses acquired by shell companies in significant acquisitions deter fraud and abuse by shell companies?***

We believe the financial statements of businesses acquired by shell companies are vital to an understanding as to what occurred as the result of a merger or an acquisition by the shell company. We are of the opinion the merger and/or acquisition should be delayed until such financial statements are available to the management of the shell company and ultimately the public investors. We are aware of situations where mergers have occurred, certificates of merger filed, and due to no fault of the shell company, the private company is substantially delayed in filing the financial statements, even beyond the 71-day period referenced.

***Is the non-financial information that is proposed to be required in Form 8-K necessary?***

The information required is critically important in the protection of investors through adequate disclosures. Information relative to the control of management, litigation, shares issued as a result of the merger or acquisition, and related party transactions are as significant in these transactions as the financial statements.

***Because of the manner in which we propose to define "shell company," a company could cease to be a shell company by acquiring substantial assets, even if it has neither acquired nor been acquired by an operating business. Should the proposed Form 8-K disclosure requirements be modified for this type of transaction?***

If the acquisition of substantial assets changes the structure of the shell company, ie management, control and/or major share issuances, then we believe the proposed Form 8-K information is warranted.

***Would adoption of the Form 8-K proposal have any unwarranted or unforeseen adverse consequences, including adverse consequences for the preparation and auditing of financial statements reflecting significant acquisitions of businesses by shell companies? Would it create unnecessary obstacles to legitimate transactions?***

As a general rule, in our experience, companies being acquired by shell companies, whether by acquisition of assets or reverse merger, do not in themselves have significant assets and cash available for the costs incurred in preparing audits and completing the disclosure mandated by the Form 8-K proposal.

We believe the staff has underestimated the cost factors relating to the implementation of this rule. Staff has estimated the report will take approximately 133 hours. We have no disagreement with this number. However, it has been our experience the private merging company, which may be unfamiliar with public company reporting, does not have the competent staff required to generate 75% of the 8-K report items as would be required by a Form 10-SB. Therefore, outside counsel usually completes the balance of the work. Our experience demonstrates approximately 75% of the burden is covered by the work of counsel outside the companies. Thus the cost burden would be $29,925 per proposed Form 8-K filing rather than $9,975. Assuming 63 transactions as reported under Item 2 of 8-K per your analysis, we believe the cost burden would be $1,885,275, not $628,425.

We do not believe the difference in cost; however, would create an unnecessary obstacle to legitimate transactions.

***Should certain shell companies be exempted from the Form 8-K proposal?***

We do not believe any shell companies should be exempted from the Form 8-K proposals.

**Conclusion re: 8-K Proposal**

We concur with the Commission's proposal to amend Form 8-K in that the information required by the amended 8-K proposal is consistent with the notion the federal securities regulations should promote full disclosure.

**AMENDMENT TO RULE 405 - DEFINITION OF SHELL COMPANY**

§230.405 "Definitions of terms'" is being amended to add a definition for shell companies as follows: "Shell company. The term shell company means a registrant with no or nominal operations and with: (1) No or nominal assets; or (2) Assets consisting solely of cash and cash equivalents."

***Is our proposed definition of the term "shell company" too broad or too narrow?***

The use of the term "nominal" will leave open disputes over whether a company is a shell or not, since by definition nominal in itself is a vague term. Its definition includes, not real or actual; merely named, stated or given, without reference to actual conditions, slight, etc. Since these are relative terms, a number of our start-up companies with legitimate plans of operations, or minimal operations, and the first round of equity financing, may be considered by some to be shell companies.

***Should the first "and" in the proposed definition be an "or," so that the definition would encompass a company that has (1) no or nominal operations, (2) no or nominal assets, or (3) assets consisting solely of cash and cash equivalents?***

We agree with the staff's proposed definition. We are hopeful the staff at the Commission will understand this relative nature of the term nominal when attempting to apply the new rules to legitimate start up companies.

**AMENDMENT TO RULE 12B-2 - REVISION OF THE DEFINITION OF "SUCCESSION."**

***Is the proposed revision of the definition of "succession" appropriate****?*

We agree with the revision of the definition of "succession" in eliminating the words "going business," as we agree with the proposed codification of the "back door registration" procedure.

***Should we amend the definition of the term "succession" in Rule 12b-2 to delete the reference to "a going business," so that it would mean the act or right of taking over a predecessor entity's rights, obligations and property despite changes in ownership or management?***

Yes, we believe an amendment to the term "succession" in Rule 12b-2 is in order. It is apparent your staff, via the Richard Wulff letter, of April 7, 2000, to Lisa Roberts, Directors of NASDAQ Listing Qualifications, agrees a change is in order.

***Should we amend Rule 12g-3 and Rule 15d-5 under the Exchange Act to provide that a change in control of a shell company constitutes a "succession" for purposes of those rules rather than, or in addition to, amending the definition of the term "succession" in Rule 12b-2 to achieve the same result?***

As indicated above, we believe the "back door registration" procedure should be codified. As part of the amendment to 12g-3, we would additionally like to see an amendment clarifying Section a. 2. which, states "All securities of such class are held of record by less than 300 persons." We believe this section should clarify an issuer with less than 300 shareholders, who is a voluntary filer, also qualifies for the "back door registration" procedure.

Yours truly,

# Stoecklein Law Group

**Stoecklein Law Group**

**cc Gerald J. Laporte**