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February 15, 2005

Via E-Mail (rule-comments@sec.gov)

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

Re: Securities Offering Reform
Release Nos. 33-8501 and 34-50624 (File No. S7-38-04)

Ladies and Gentlemen:

Deloitte & Touche LLP is pleased to submit this letter in response to the request of the Securities and Exchange Commission (the "Commission") for comments on Release Nos. 33-8501 and 34-50624, dated November 3, 2004 (the "Release"), which sets forth proposals (the "Proposals") intended to modernize the registration, communications and offering processes under the Securities Act of 1933, as amended (the "Securities Act").

INTRODUCTION

We support the Commission's efforts to simplify and modernize its existing rules regarding the registration and offering process under the Securities Act, through incremental changes in the regulatory structure of the Securities Act, rather than through a new system as represented by the Commission's 1998 Aircraft Carrier proposal.[i] We recognize that even incremental change necessitates consideration by the Commission of different types of public offerings by a broad spectrum of public companies issuing a variety of different securities under diverse circumstances.

The need to adequately address all of these different factors, however, results in an increased complexity in the proposed regulatory framework. As the Commission recognizes in the Release, the Proposals incorporate significant changes in public company reporting requirements under the Securities Exchange Act of 1934, as amended (the "Exchange Act") as a result of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[ii] and regulations promulgated thereunder,[iii] which increase the focus on disclosure enhancements as well as certain procedural requirements, such as internal control over financial reporting,[iv] which also have had a significant effect on the role of independent registered public accountants.[v]

Thus, the Proposals cannot be viewed in isolation and need to be viewed in the context of all of the post-Sarbanes-Oxley developments, including the creation and operation of the Public Company Accounting Oversight Board ("PCAOB"). Moreover, the benefits of the improved regulatory system contemplated by the Release would be accompanied by expanded liability. While generally supportive of the Proposals, we are concerned that the intended benefits of certain aspects of the Proposals, such as on-demand financing, could be undermined by the increasing pressures exerted on intermediaries

and professionals such as auditors and attorneys, who have a role in reviewing the accuracy and adequacy of disclosure under a proposed system that may not provide such persons with sufficient opportunity to do so.

COMMENTS ON THE PROPOSALS

A. Definition of Well-Known Seasoned Issuer ("WKSI")

1. Filing History and Market Capitalization

We support further enhancements to the WKSI definition because we believe the Proposal's definition of WKSI is over-inclusive and may require additional specificity and refinement. In addition to the proposed definition's relatively straightforward requirements regarding current reporting and eligibility for primary offerings on Form S-3, we believe that the proposed requirement regarding an issuer's reporting history should be extended from twelve months to a longer period for purposes of allowing the issuer time to establish, in our view, an appropriate periodic reporting history (i.e., greater than twelve months) as well as possibly allowing an issuer's periodic filings to have received at least one review by the Staff before such issuer qualifies as a WKSI.[vi]

We further believe that the proposed requirements regarding minimum market capitalization may require further definition. With respect to the requirements regarding market capitalization, we believe that the Commission should make the requirements apply as of a date based on the time of the offering in question rather than as of the time that accelerated filer status is determined. In addition, with respect to the minimum market capitalization requirement, we believe that the Commission should consider an additional test based upon an operating type measure, such as revenues or total assets, rather than market capitalization alone. We believe such an additional test would help mitigate against the significant risks that can accompany investments in large-capitalization issuers where capitalization represents an unusually large multiple of revenues or total assets.

2. Additional Issues for Consideration

In addition, we believe that the Commission should consider whether additional items or occurrences should disqualify an issuer from WKSI status. We believe that the Commission should consider additional requirements for WKSI status, including certain events that would, due to their nature and significance, automatically render an issuer ineligible for the special benefits proposed to be afforded to a WKSI.

Examples of such events include:

- Certain events triggering a reporting obligation on Form 8-K, such as:

  — receipt of a notice of delisting from a national securities exchange or the NASDAQ;[vii]

  — a change in certifying accountants based on one or more unresolved disagreements;[viii] and

— certain determinations that investors should not rely upon previously issued financial statements, such as pending restatements for which amended financial statements have not been filed; unresolved defaults under debt financing agreements; or comparably significant matters regarding an issuer's results of operations.

- Any restatement as a result of misconduct giving rise to the issuer's right to receive reimbursement of bonus compensation, incentive-based compensation or equity-based compensation of the issuer's chief executive officer and chief financial officer.[ix]

- Clearly defined alternatives to a "going concern" qualification as ineligibility triggers, such as:

  — negative net worth at last balance sheet date; and

  — net losses or negative cash flows from operations for two of the past three fiscal years.

B. Free Writing Prospectus

1. Background on Auditor Association

Under the proposals, anything that may be said orally may be written in a free writing prospectus. Information by or on behalf of an issuer in a free writing prospectus would be filed and be subject to Section 12(a)(2) liability. As an offering document, the free writing prospectus raises an issue of what is the degree of auditor association with the free writing prospectus and, if the auditor is associated with a free writing prospectus, what steps are required under standards of the PCAOB. For example, under applicable professional standards, an accountant becomes associated with financial statements by virtue of performing an audit[x] or by having applied prescribed procedures that permit the accountant to report on the statements or information.[xi] In addition, an auditor's consent to be named in a registration statement automatically triggers association.[xii]

Moreover, although an auditor does not have responsibility with respect to information in a document that is beyond the financial information identified in the auditor's report,[xiii] an auditor is required to read such other information and determine whether it is materially inconsistent with information (or the manner of its presentation) appearing in the financial statements.[xiv] The auditor must then request management to revise the financial statements or the other information presenting the inconsistency. If inconsistency is not eliminated by revision of the other information, the auditor must consider a range of actions from revising the report to withdrawing from the engagement, depending on the circumstances.[xv]

Accordingly, we are concerned that, without further clarification from the Commission regarding free writing prospectuses, auditors could become associated with a free writing prospectus notwithstanding their limited ability to track and, as necessary, review the free writing prospectus documentation before such documentation becomes final. These difficulties are likely to be compounded in the event that free writing prospectuses are prepared by persons other than the issuer (e.g., media publications). Procedures will need to be established to govern free writing prospectuses, either by analogy to or extension of existing review procedures. Finally, to the extent that auditors are

considered associated with a free writing prospectus or underwriters wish to obtain a comfort letter regarding information contained in a free writing prospectus, the issuer may experience additional delay in the offering process. Based on these concerns, we believe that the Commission should adopt additional parameters defining the proper scope and usage of free writing prospectuses and limiting the potential for inadvertent auditor association with free writing prospectuses.

2. Recommendations to Address Association Concerns

Consequently, we believe that the Commission needs to modify the Proposal to clearly specify the auditor's potential liability as a result of association with audited or reviewed financial statements, or other financial information, contained in a free writing prospectus. This can be accomplished by an amendment to Rule 176, which should be revised to apply to Section 12(a)(2) as well as Section 11 and to be updated to address the new offering system[xvi] and what is reasonable under the circumstances.[xvii]

Moreover, we believe the Commission should amend Rule 176 to provide additional clarity for auditors, and not only for underwriters, in light of the "reasonable investigation and reasonable ground to believe" requirement of Section 11(b)(3) and the "reasonable care" standard of Section 12(a)(2). Given the recent Exchange Act enhancements, Rule 176 should specify that an accountant's "reasonable investigation" or "reasonable ground for belief" for purposes of Sections 11(b)(3) and 11(c) include the audit and review procedures that the accountant conducts over time with respect to the issuer, as well as the activities specific to the proposed offering. In addition, Rule 176(h) should be amended to limit an expert's responsibility with respect to free writing prospectuses as to which the expert has not provided consent to be named or associated. Finally, in light of the number and scope of the Commission's recent changes to the Exchange Act system,[xviii] we believe that amendments to Rule 176 should expressly include the rapidity with which the offering is executed, measured as the time from the offering's commencement until pricing.

3. Recommended Limitations on Free Writing Prospectuses

We believe that the proposed filing requirement for free writing prospectuses will create the potential for significant confusion regarding the offering documents concerning a given securities offering and that offering participants will not be able to determine with sufficient clarity whether their free writing prospectuses are "by or on behalf of the issuer." Accordingly, we propose that the Commission reconsider its proposed requirement that free writing prospectuses be filed or, at a minimum, clarify the meaning of "by or on behalf of the issuer."

We further believe that additional modifications are needed in order to simplify the unduly complicated requirements applicable to free writing prospectuses under the Proposals. These modifications could include streamlining the proposed regulations to cover filing requirements, timing requirements in connection with filings, the multiplicity of applicable media, third-party filings of free writing prospectuses and exemptions from filing requirements.

In addition, we believe that the Commission should consider additional modifications to the permitted scope and use of free writing prospectuses that would address some of these difficulties and promote the protection of investors. We believe, for example, that the Commission should consider identifying specific limitations to the information that may be included in a free writing prospectus. One such limitation could be to prohibit the inclusion in a free writing prospectus of any financial

information that is not contained in the registration statement. The Commission should also weigh the adoption of additional limitations on the use of a free writing prospectus, such as a prohibition on use of a free writing prospectus without the express authorization of the issuer.

C. Point of Sale

1. Interpretive Problems

Under the Proposal, uncertainty and ambiguity surround the point of sale and how liability tracks to that moment in time. Proposed Rule 159 purports to establish that information conveyed to the purchaser after the "time of sale" will not be taken into account for purposes of Section 12(a)(2) and 17(a)(2). In light of integrated disclosure and the operation of Rule 412 governing modified or superseded documents, it is not clear how proposed Rule 159 would work in practice.

The Release defines the point of sale as the time of the investor's commitment to acquire the securities, at which time the Release would require the investor to receive all information regarding the sale. However, there are many potentially relevant points at which a sale actually occurs. The Release's focus on the making of an oral contract as one of the relevant points in time introduces additional ambiguity into the offering process as indications of interest, which are not sales, become firmer as the offering progresses to the point where even express investor subscriptions (so-called "firm circles" during the road show process) are understood by underwriters to be binding but subject to conditions (e.g., no new disclosure).

Indeed, proposed Rule 159, as currently drafted, could fail to provide sufficient clarity regarding the point of sale. We believe that uncertainty and ambiguity continue to surround the question of when, in a firm commitment underwriting, the "contract of sale" occurs. On the one hand, the Proposal seems to take the position that the sale would be deemed to occur at the moment of the signing of the underwriting agreement. On the other hand, it is not clear how to reconcile this position with the fact that a firm commitment underwriting agreement (i) contains conditions that must be satisfied or waived before the contract is consummated and (ii) traditionally contemplates the use of a preliminary prospectus under Rule 430A and a pricing sticker under Rule 424(b).[xix] The Proposal leaves these questions unanswered and, we believe, needs to provide additional clarity on this point.

The Release introduces the notion that, although information "after the time of sale" will be disregarded for purposes of Section 12(a)(2), the parties may nonetheless "consider subsequently provided facts or disclosure and by agreement revise their sale contract and . . . enter into a new contract of sale with respect to the offered securities," in which case the relevant moment in time "would be the time of the new contract."[xx] We believe, however, that the proposed requirement of formal cancellation and renewal of the agreement is inconsistent with current practice in all but the most unusual situations.

In addition, we believe more detailed guidance is required with respect to information conveyed to an investor at or prior to the point of sale. Although the Proposal envisions that "one appropriate time" to apply the liability standards of the Securities Act is "the time at which an investor enters into a contract of sale" and "becomes committed to purchase the securities,"[xxi] the precise information conveyed to an investor at a given point in time will differ because there will be multiple points of sale. For example, the information could include information that is contained in the issuer's registration statement; information contained in the issuer's Exchange Act filings that are incorporated

by reference; and free writing prospectuses that have been filed. Given that there may be different points of sale, it is important to clarify which information applies to a point of sale for a given offering so that auditors and other experts can identify the information that is the subject of their review.

2. Proposed Solution to Clarify Point of Sale

We believe that the Commission should address these uncertainties and clarify, by rule or interpretation, which information would apply to each point of sale. In particular, we believe that the issuer should bear the responsibility for expressly determining the scope and content of such information so that the information to be reviewed by auditors and other experts is without uncertainty or ambiguity. We believe that the approach we suggest would provide an important means for all participants in the offering process to understand what information is being used in the offering for purposes of applying the liability standards of the Securities Act.

In addition, based upon the uncertainties regarding when a sale is deemed to occur, and based upon the importance of establishing a clear moment in time at which all parties can agree that a sale has occurred, we believe that the Commission should consider providing in proposed Rule 159 a definition for the time of sale pursuant to which the sale would be deemed to occur under a single contract of sale for purposes of assessing the underwriters' Section 12(a)(2) liability without establishing a new contract of sale, based on the investor's ability to disaffirm the contract in the event that additional information is provided to the investor after the point of sale.

Although the Release contemplates instances in which the seller and buyer may "by agreement revise their sale contract and by agreement enter into a new contract of sale,"[xxii] the Commission should adopt a rule that recognizes the parties' ability to contract for a clear point in time at which the sale would be deemed to occur, without relying on contract revisions, which are unlikely to occur in practice and would not serve the need for clarity and certainty that such a requirement would serve. Under current practice, investors receive additional disclosure after the initial contract of sale, subject to a right to disaffirm the sale transaction. In this case, as in the exceptional case where the parties agree to enter into a new contract of sale, the basic principle has been observed that the investor has received relevant information before being unconditionally obligated to purchase the securities. It is therefore appropriate that Section 12(a)(2) liability be based on information through the time the subsequent information was conveyed.

We believe the Commission should modify proposed Rule 159 to facilitate certainty regarding the point in time at which the sale occurs. Without clarification regarding the point of sale, auditors may need to engage in multiple review procedures for purposes of providing multiple comfort letters to underwriters who are forced in a given offering to be subject to multiple attempts at reaching a specifically demarcated point of sale. Accordingly, the Commission should alter proposed Rule 159 to allow for a single contract of sale for purposes of assessing the underwriters' Section 12(a)(2) liability without establishing a new contract of sale, recognizing that the investor has the ability to disaffirm the contract in the event that additional information is provided to the investor after the point of sale.

D. Proposed Extension of Section 11 Liability

1. Consent Requirement

One of the bedrock principles of Section 11 liability is that an expert cannot be held liable under Section 11 unless the expert affirmatively consents to be named in the registration statement.[xxiii] However, proposed Rule 430B, which would reset the effective date of a shelf registration statement "for liability purposes only," lacks any express requirement that an expert provide a consent as of the new effective date. Thus, if the Commission adopts Rule 430B, auditors would not have advance notice of the new effective date of the registration statement, which would frustrate the very purpose of the consent requirement on which Section 11 is premised. Accordingly, we strongly oppose the current formulation of proposed Rule 430B.

Under Section 11(a)(4), an expert cannot be sued for misstatements or omissions in a registration statement unless the expert has consented to be named in the registration statement and, under Section 7, the issuer is required to include the expert's written consent as part of the registration statement. In the absence of an expert's consent — as the Commission has recently emphasized[xxiv] — plaintiffs cannot sue the expert under Section 11(a). The purpose of the consent requirement, which the legislative history of the Securities Act makes abundantly clear,[xxv] is to put the expert on notice that the registration statement names the expert as having prepared or certified a part of the registration statement. Consequently, the Securities Act expressly contemplated "the exclusion of *any* liability with respect to experts named in the registration statement *unless* they consented to the use of their names."[xxvi]

By putting the expert on notice, the consent requirement requires the expert, as well as the issuer and others subject to Section 11 liability, to consider whether disclosure is complete and accurate as of the effective date of the registration statement. Moreover, the consent requirement ensures that auditors and other experts are appropriately consulted in connection with the disclosures contained in the parts of the registration statement purporting to be made on such experts' authority. However, consent procedures in the context of Rule 430B would lead to delays and protracted due diligence, both of which the shelf registration process was designed to avoid in the interests of capital formation and market efficiency.

The history and application of Rule 436(c) are also instructive in this context because the situation auditors would face with respect to Rule 430B, if adopted as proposed, is analogous to the untenable situation auditors faced prior to the adoption of Rule 436(c). The Commission adopted Rule 436(c) to facilitate the inclusion in filings under the Securities Act of interim financial information so that auditors who consent to being named in a registration statement that includes interim financial information reviewed under SAS 100 are not considered experts with respect to such interim financial information.[xxvii] The Commission's concern was that, if reviewed interim financials are used in connection with registration statements under the Securities Act, "there may be reluctance on the part of accountants to issue reports on the basis of the limited review procedures" specified in what is now SAS 100 because of the auditor's potential Section 11 liability with respect to such information. Absent Rule 436(c), auditors would have been subject to liability exposure under Section 11 because the auditor's "reasonable investigation" for purposes of Section 11(b)(3) "must be premised upon an audit; it cannot be accomplished short of an audit."[xxviii] Accordingly, Rule 436(c) addressed this difficulty by providing that interim financial information is "not considered a part of the registration

statement prepared or certified by an accountant" within the meaning of Section 7 or Section 11 of the Securities Act.

2. Section 11 Liability for Each Shelf Takedown

Liability under Section 11 must be based upon the contents of the registration statement *at the time of effectiveness*.[xxix] Accordingly, as the Commission has stated, "Section 11 ordinarily does not apply to statements omitted from an effective registration statement and subsequently disclosed in a prospectus or prospectus supplement, rather than a post-effective amendment."[xxx] By proposing a new effective date for every shelf takedown, however, the Commission would impose Section 11 liability on all documents incorporated by reference since the last Form l0-K (and for the prospectus supplement) as well as extend the statute of limitations.

We oppose the Commission's proposal to establish the shelf takedown as the effective time for all offering participants, including auditors and other experts. Auditors and other experts normally will not have the opportunity to review in advance the prospectus supplement that would, under the Proposal, form the basis of Section 11 liability. Based on our understanding that the Securities Act does not permit an auditor or other expert to be subjected to Section 11 liability in the absence of such expert's consent, we strongly favor a rule establishing that auditors and other experts will not be subject to Section 11 liability for prospectus supplements because the requirement of a consent will cause undue delay in the offering process. However, in the event that the Commission does extend Section 11 liability to prospectus supplements, we urge the Commission to require that the issuer include with the filing the written consent of the auditor or other expert. We believe that such a consent requirement, in addition to satisfying the Securities Act's minimum requirement for expert liability, will not only ensure that the auditor or other expert has adequate opportunity to undertake appropriate review procedures but also provide an important incentive for issuers to keep auditors and other experts informed at all stages of the offering process so as to reduce the likelihood of undue delay.

Under current practices, pricing in shelf takedowns typically is not delayed for comfort procedures precisely because the Section 11 liability of auditors and other experts is determined as of the filing of the most recent annual report on Form 10-K (or the effective date of the registration statement, if more recent) rather than as of a later date, such as the filing of a Quarterly Report on Form 10-Q or a Current Report on Form 8-K. As a result, shelf takedowns usually do not require such procedures and are substantially faster than if such procedures were required.

3. Recommended Approach for Section 11 Liability

Based on the foregoing considerations, we believe that the Commission should clarify the Proposal so as to avoid any extension of Section 11 liability for auditors or other experts with respect to shelf takedowns. The Commission could accomplish this objective by expressly stating that Section 11 liability for auditors will be determined as of the date of the most recent Annual Report on Form 10-K.

Alternatively, we recommend that if the Commission does extend Section 11 liability as currently proposed, it expressly adopt an affirmative requirement for auditors and other experts to provide their consent to inclusion of their report in the prospectus supplement (or elsewhere in the registration statement) as of the new effective date that the Proposal would establish as of the time of

the shelf takedown. Based on other aspects of the proposal, the necessity of a consent will be heightened because shelf registration will go on for years and the prospectus supplement will be the entire offering document. In addition, with the requirement of a consent, the auditor will need to update its subsequent events review as well as management representation letters. If new Section 11 liability is imposed for each takedown off a shelf, then each takedown would constitute a new offering requiring a separate consent for that specific offering by means of the prospectus supplement for that offering.

E. Clarification on Section 12(a)(2) Liability

As noted above, the free writing prospectus would introduce a number of issues regarding auditor association and potential liability under the Release that we believe require further clarification.[xxxi] We do not understand the Release to suggest in any way that the Proposals would, if adopted, subject accountants or other offering participants to additional liability under Section 12(a)(2) of the Securities Act (i.e., absent unusual circumstances where such persons took affirmative steps to act as the "seller" within the established meaning of that term).[xxxii] However, we believe that the Commission should clarify that the Proposals are not intended to effect any such change in the established liability rules that apply to accountants and other offering participants under Section 12(a)(2).

F. Additional Exchange Act Disclosure Proposals

1. Unresolved comments by the Staff

We suggest that the Commission reconsider its proposal regarding disclosure of outstanding unresolved comments. We believe that WKSI filers have many incentives to respond in a timely manner to comments on their Exchange Act reports and that the procedural changes in the proposal are unnecessary. We respectfully submit that, based upon the Commission's Section 8 and enforcement powers in situations where issuers are not responsive to Staff comments, that such comments would continue to be resolved expeditiously. In addition, the prospect of liability exposure under the antifraud provisions of both the Securities Act and the Exchange Act in connection with material omissions or misstatements provides a significant incentive for issuers to address issues identified in Staff comments. Accordingly, we believe that the Staff can expect issuers to continue to take prompt action to address Staff comments.

If the Commission does require disclosure of outstanding unresolved comments, we believe that such disclosure should be subject to certain basic procedural requirements, such as relief from the disclosure requirement with respect to (i) Staff comments that are not made in writing to the issuer and (ii) Staff responses that are not made within certain prescribed time periods. Also, we believe that issuers will need clarification as to when the 180 day period begins when open comments have arisen from an interactive process.

2. Risk Factor Disclosure

We support the Commission's proposal to extend risk factor disclosure to annual reports on Forms 10-K and registration statements on Form 10, subject to quarterly updates to reflect material changes from those previously disclosed. We concur with the Commission's view that the inclusion of risk factor disclosure in Exchange Act filings would enhance the contents of Exchange Act reports

and provide useful information to investors and the market as well as enhance the ability of issuers to incorporate appropriate risk factor disclosures from Exchange Act reports in Securities Act registration statements. We also believe that inclusion of risk factors in these Exchange Act reports will help provide more consistent disclosure standards between the Securities Act and the Exchange Act and will enhance the protection of investors.

* * *

We hope these comments are helpful to the Commission and the Staff and would be pleased to engage in further discussion regarding these issues. If you have any questions please contact Robert Kueppers at (203) 761-3579 or John Wolfson at (203) 761-3741.

Respectfully submitted,

Deloitte & Touche LLP

cc: Hon. William H. Donaldson
Chairman of the Securities and Exchange Commission

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[i] Release No. 33-7606A (Nov. 13, 1998) [hereinafter "Aircraft Carrier Release"].

[ii] Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

[iii] *See, e.g.*, Release No. 33-8212 (specifying requirements for officer certifications under Sarbanes-Oxley Section 906); Release No. 34-46421 (governing accelerated reporting of insider transactions); Release No. 33-8124 (specifying requirements for design, evaluation and maintenance of effective disclosure controls and procedures as well as related officer certifications under Sarbanes-Oxley Section 302); Release Nos. 33-8128 and 33-8128A (requiring accelerated filing of periodic reports and disclosure regarding electronic availability thereof); Release No. 33-8216 (governing public disclosures of non-GAAP financial measures); Release No. 33-8176 (governing inclusion of non-GAAP financial measures in filings with the Commission); Release No. 33-8182 (requiring comprehensive disclosure regarding off-balance sheet arrangements and contractual obligations); Release No. 33-8230 (requiring electronic filing of reports under Section 16 of the Exchange Act); Release Nos. 33-8177 and 33-8177A (requiring disclosure regarding presence of code of ethics and "audit committee financial expert" under Sarbanes-Oxley Sections 406 and 407); Release No. 33-8185 (governing attorney conduct under Sarbanes-Oxley Section 307); Release No. 33-8340 (requiring disclosure regarding nominating committee functions and communications between security holders and boards of directors); Release Nos. 33-8400 and 33-8400A (requiring accelerated and expanded disclosures on Form 8-K under Sarbanes-Oxley Section 409); *see also infra* notes 4 and 5.

[iv] *See* Release No. 33-8238 (imposing requirements over disclosure controls and procedures, certifications under Sarbanes-Oxley Sections 302 and 906 and disclosure of changes in internal control over financial reporting under Sarbanes-Oxley Section 404).

[v] *See, e.g.*, Release Nos. 33-8183 and 33-8183A (requiring audit committee pre-approval of audit and non-audit services, audit partner rotation, auditor reports to audit committees, additional requirements for auditor independence under Rule 2-01 of Regulation S-X and enhanced disclosure regarding audit and non-audit fees under Sarbanes-Oxley Section 202); Release No. 34-47890 (prohibiting improper influence on conduct of audits pursuant to Sarbanes-Oxley Section 303); Release No. 33-8180 (requiring retention of auditor workpapers for seven years under Sarbanes-Oxley Section 802); Release No. 33-8220 (adopting rules

regarding audit committee independence and requiring self-regulatory organizations to adopt additional requirements regarding independence, complaint procedures, engagement of auditors and other requirements).

[vi] Sarbanes-Oxley Section 408(c) ("In no event shall an issuer required to file reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934 be reviewed under this section less frequently than once every 3 years.").

[vii] Item 3.01 of Form 8-K.

[viii] Item 4.01 of Form 8-K.

[ix] Sarbanes-Oxley Section 304.

[x] AU section 504, *Association with Financial Statements*.

[xi] AU section 722, *Interim Financial Information*.

[xii] AU section 504 ¶ .03 ("An accountant is associated with financial statements when he has consented to the use of his name in a report, document, or written communication containing the statements.").

[xiii] AU section 550, *Other Information in Documents Containing Audited Financial Statements*.

[xiv] *See* AU section 711, *Filings Under Federal Securities Statutes* ¶ .10(a) (noting that the auditor generally should "[r]ead the entire prospectus and other pertinent portions of the registration statement"); *see also* Securities Act Sections 11(b)(3)(A) and 11(b)(3)(C) (governing the affirmative defenses available to Section 11(a) persons as to parts of the registration statement that are, respectively, not expertised and expertized by another expert).

[xv] *See* AU section 504 ¶ .13 ("If the client will not agree to revision of the financial statements or will not accept the accountant's disclaimer of opinion . . . , the accountant should refuse to be associated with the statements and, if necessary, withdraw from the engagement."); AU section 722 ¶ .12 (noting that if "the client refuses to make appropriate adjustment or disclosure in the financial statements for a subsequent event or subsequently discovered facts," the auditor should "consider, probably with the advice of his legal counsel, withholding his consent to the use of his report on the audited financial statements in the registration statement").

[xvi] Recent changes include accelerated filing deadlines for periodic reports, issuer certifications, evaluation of disclosure controls and procedures as well as internal control over financial reporting and changes to the listing standards, among others. *See supra* notes 3-5.

[xvii] *Cf.* Aircraft Carrier Release, *supra* note 1, at notes 459-61 and accompanying text (proposing to amend Rule 176 to address the reasonable care standard of Section 12(a)(2) as well as the reasonable investigation standard of Section 11).

[xviii] *See supra* notes 3-5.

[xix] *Cf.* Alan Dye, *Section 16 Forms and Filings Handbook* (2003 ed.), Model Form No. 154, Reporting Principle No. 4 (noting that "the execution date of an insider's sale of stock pursuant to an underwriters' over-allotment option is the date on which the closing of the option sale occurs" because "[u]nder a typical underwriting agreement, the obligation of both the underwriters and the seller to consummate the purchase and sale of shares pursuant to the over-allotment option is subject to numerous material conditions, many of which are beyond the control of the seller (e.g., delivery of legal opinions, absence of litigation, and absence of a material adverse change in the issuer's business or prospects)" and that "until the closing actually occurs, the rights and obligations of the seller and the underwriters are not fixed").

[xx] Release at note 247 (noting that the Commission's interpretation of Section 12(a)(2), requiring that "information conveyed to the investor only after the time of the contract of sale should not be taken into account," would not "affect the ability of the seller and the purchaser to consider subsequently provided facts or disclosure and by agreement revise their sale contract and by agreement enter into a new contract of sale with respect to the offered securities" and that, for such purposes, "the time of the contract of sale to that purchaser would be the time of the new contract of sale").

[xxi] Release at note 243 and accompanying text.

[xxii] *See supra* note 20 and accompanying text.

[xxiii] Section 11(a)(4) (authorizing suit against an expert only if the expert "has *with his consent* been named as having prepared or certified" part of the registration statement) (emphasis added).

[xxiv] *See, e.g.*, Rule 437a (dispensing with the requirement for issuers to file the written consent of Arthur Andersen LLP and providing, in paragraph (c)(3), that the issuer must "disclose clearly any limitations on recovery by investors posed by the lack of consent" as a result of Section 11(a)(4)'s requirement that an expert cannot be liable under Section 11 unless the expert has consented to be named in the registration statement).

[xxv] During the events leading up to the Securities Act's passage, the House of Representatives had proposed a bill that added experts to the persons subject to Section 11 liability, in contrast to the Senate bill, which had not included experts as Section 11 persons. The Senate accepted the House version but modified it to require the expert's *consent* as a prerequisite to Section 11 liability. *See* H.R. CONF. REP. NO. 73-152, at 26 (1933) ("The

House bill imposed liability upon the underwriters and also upon the experts, such as accountants, appraisers, and engineers, who gave the authority of their names to statements made in the registration statement. The Senate accepted the provisions of the House bill with reference to this matter, but with the modification that, to protect an unauthorized use of the expert's name, written *consent* to the use of his name, as having prepared or certified part of the registration statement or as having prepared a report to which statements in the registration statement were attributed, should be filed at the time of the filing of the registration statement.") (emphasis added).

[xxvi] James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 46-47 (1959) (emphasis added). Landis, one of the principal drafters of the Securities Act, states in his first-hand account of the Securities Act's legislative history, that among numerous changes made to the draft legislation, "[t]he more important were . . . the *exclusion of any liability with respect to experts* named in the registration statement *unless they consented* to the use of their names . . . ." *Id.* (emphasis added).

[xxvii] Release No. 33-6173 (Dec. 28, 1979) (adopting Rule 436(c)).

[xxviii] *Id*. at note 8 and accompanying text (citing AU section 630, *Letter to Underwriters* (later superseded by AU section 634, *Letters to Underwriters and Certain Other Requesting Parties*).

[xxix] Securities Act Section 11(a) (requiring that the misstatement or omission at issue must have been part of the registration statement at the time the registration statement "became effective").

[xxx] Release No. 33-6672 (Oct. 27, 1986).

[xxxi] *See* Part III.B. hereof.

[xxxii] *See, e.g.*, *Pinter v. Dahl*, 486 U.S. 622 (1988).