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January 31, 2005

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

Mr. Jonathan G. Katz, Secretary,
Securities and Exchange Commission,
450 Fifth Street, NW,
Washington, D.C. 20549-0609.

Re: Securities Offering Reform–File No. S7-38-04

Dear Mr. Katz:

We are pleased to submit this letter in response to the Commission's request for comments on its Securities Offering Reform proposals as contained in Release Nos. 33-8501 and 34-50624 (Nov. 3, 2004), 69 Fed. Reg. 67,392 (Nov. 17, 2004) (the "Release").

We strongly support the Commission's proposals (collectively, the "Proposals"), which we believe represent an important step forward in modernizing the registered offering process. In our view, the Proposals are likely to achieve the Commission's stated goal of facilitating greater availability of information to investors and the market, eliminating communications barriers that have been increasingly outmoded by technological advances, making the capital formation process more efficient and further integrating Securities Act and Exchange Act disclosure through incremental changes to the Commission's existing regulatory structure.

We recognize that the Proposals build on at least three decades of prior thought and efforts to modernize the securities offering process, including the Commission's 1998 Aircraft Carrier proposals.[1] As the Commission is aware, the "speed bumps" imposed by the Aircraft Carrier proposals, which would have given rise to delays,

[1] *See* Proposed Rules: The Regulation of Securities Offerings, Rel. Nos. 33-7606A and 34-40632A (Nov. 13, 1998), 63 Fed. Reg. 67,174 (Dec. 7, 1998) (hereinafter, the "Aircraft Carrier Release").

uncertainty and additional costs in connection with the capital-raising process, and what we viewed as the inherent unworkability of the Aircraft Carrier proposals, led us to suggest in 1999 that the Commission pursue incremental reform that recognized and reflected advances in communications and information technology that were modernizing and shaping global capital markets.[2] We applaud the Commission's effort to craft the Proposals in a way that balances the need for reform and investor protection and which, for the most part, avoids creating the "speed bumps" that characterized the Aircraft Carrier proposals. However, we strongly encourage the Commission to view the Proposals as one step in an ongoing effort to modernize the securities offering process, and sincerely hope that the Commission will continue to review its existing rules with regard to whether additional reforms would be useful and appropriate.

## SUMMARY

Set forth below is a summary of our comments on the Proposals. Following the summary, we have included detailed comments on many aspects of the Proposals. In some cases, our comments respond to specific questions posed by the Commission in the Release. In other cases, our comments suggest ways in which we believe that the Proposals could be improved or clarified in a manner consistent with the Commission's purposes, based on our review of the Proposals and discussions with our clients.

***Broaden the Class of Issuers That Would Be Considered WKSIs.*** We suggest expanding the class of issuers that may qualify as well known, seasoned issuers, or WKSIs, to include issuers having $375 million in common equity public float, a specified ADTV trading volume level (to be determined by the Commission after study by the Office of Economic Analysis) or a specified aggregate principal amount (but less than $1 billion) of registered debt offerings over a three-year period, at a level to be set after study by the Commission's Office of Economic Analysis but designed to capture about one-third of the issuers of public debt in the relevant test period.

***Narrow the Disqualification for Settlements and Orders***. We recommend that ineligibility for WKSI status based on settlements and orders be narrowed so that it is based on securities fraud violations rather than all securities law violations and so only settlements or orders to which the issuer is party (and not subsidiaries) would impose a disqualification for the issuer. We also suggest that this disqualification apply only with respect to settlements and orders entered after the effective date of the rules.

***Research.*** We support the expansion of the research safe harbors. We agree with the Commission that recent legislative and regulatory reforms have greatly enhanced the independence of research departments at full service broker-dealer firms.

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[2] *See* Letter of Sullivan & Cromwell re: Regulation of Securities Offerings, File No. S7-30-98 (June 10, 1999).

Indeed, we believe that these reforms justify expansion of the research safe harbors beyond what the Commission has proposed. Rule 139(a)(1) (issuer-focused research) should be extended to all reporting issuers and Rule 139(a)(2) (industry research) should be extended to all issuers, regardless of reporting status. The Rule 139 safe harbors should also be modified to permit research regarding Schedule B issuers and exchange-traded index funds. In addition, the research safe harbors should be available to all exempt offerings, not just unregistered offerings in reliance on Rule 144A and Regulation S.

We also believe that it is very important for the Commission to modify the proposals to ensure the application of the research safe harbors to all "information, opinions and recommendations," as under the Commission's current rules. As written, the Proposals would limit the safe harbors to research that is written and contains information sufficient upon which to base an investment decision. Attaching potential 12(a)(2) liability to research analysts' one-on-one discussions and conference calls (which is what the proposed change would appear to do) but not to analysts' research reports will likely reduce or greatly restrict oral communications by research analysts. This seems contrary to the goals of the Proposals and fails to recognize the independence of the research function resulting from the reforms mentioned above.

***Free Writing Prospectuses.*** We support the Commission's general concept of a free writing prospectus designed to allow freer written communications outside the statutory prospectus during the offering process that do not give rise to Section 12(a)(1) rescission liability. We suggest, however, that the Commission expand the category of issuers that may use a free writing prospectus without prior or concurrent delivery of the most recent statutory prospectus to include all reporting issuers, without regard to "seasoning." We also suggest that the Commission amend the cure provisions of proposed Rules 163 and 164 to make them clearer and more useful to issuers and other offering participants. In addition, we suggest that the filing and legend requirements be revised to exist as separate requirements rather than conditions of the Section 5 exemption. We also urge the Commission to eliminate the proposed requirement that a free writing prospectus not be inconsistent with the statutory prospectus. We believe that this requirement, at least without additional clarification, may chill the use of free writing prospectuses.

***Rule 134 Notices.*** We strongly support the proposed expansion of the information covered by the Rule 134 safe harbor. We suggest several additional factual items for inclusion, including additional issuer information and additional information related to the offering, such as the existence and size of a Green Shoe option, a CUSIP number or other security identification code, the current market price of the offered securities and the use of proceeds from the offering. We also suggest that the Proposals be modified to allow the Rule 134 notice to include a hyperlink or URL to an address containing the statutory prospectus where the Rule 134 notice would be required to be accompanied or preceded thereby. We also urge the Commission to allow offering participants to rely upon Rule 134 in initial public offerings prior to the time that the price range has been included in the registration statement. This typically occurs much

later in the offering process than would be necessary for the Rule 134 information to be useful to offering participants seeking to communicate scheduling and other factual information to potential investors before the start of an active sales campaign.

***Road Shows and Oral and Written Communications***. We believe that it is very important for the Proposals to be clear about the regulatory scheme governing live road shows. We ask the Commission to clarify several matters regarding road shows, including confirmation that slides used but not retained by investors at a live road show and broadcasts to overflow rooms at a live road show constitute oral communications. We also request the Commission to acknowledge that a live road show would be treated as an oral communication even if the meeting takes place in virtual rather than physical space. In addition, we urge that the definition of "graphic communication" be revised to more clearly indicate what forms of electronic communication still constitute oral communications.

***New Exchange Act Disclosure Requirements***. With regard to the Commission's proposed requirement that issuers disclose unresolved material staff comments, we suggest that the Commission provide issuers with the choice to disclose or abstain from conducting any registered offerings until all material comments that would have been required to be disclosed are resolved. With regard to the proposed risk factor disclosure, we request that the Commission redraft the proposed Form 10-K item to require only the risk factor disclosure that would be required by Item 5.03(c) of Regulation S-K.

***Liability.*** We recommend that the Proposals be modified to provide that the relevant time for assessing the mix of information conveyed to an investor at the time of sale for Section 12(a)(2) liability purposes should be the time that the investor becomes unconditionally obligated to purchase the offered securities under the state law governing the contract of sale. State law would generally permit the parties to define the time of sale in their contract, and we see no reason why a Commission rule or interpretation should burden that flexibility. We also urge the Commission to address the issue of underwriter due diligence in the shelf context and confirm that reasonable care charged to a seller under Section 12(a)(2) involves less than a Section 11 reasonable investigation.

***Shelf Registration Process Reforms.*** We strongly support the proposal to permit automatic shelf registration, pay-as-you-go filing fees and the ability to add classes of securities and new subsidiary issuers and guarantors to a registration statement by means of an automatically effective post-effective amendment for WKSIs. We request that these benefits also be extended to seasoned but non-WKSI issuers. Alternatively, we urge the Commission to address the potential blackout problem that seasoned but non-WKSI issuers might face under the Proposals by allowing those issuers to continue to use their existing registration statement even after three years have passed so long as a restated shelf registration statement has been filed with the Commission.

***Prospectus Delivery Reform.*** We strongly support the proposed elimination of the requirement that a final prospectus be physically delivered with or prior to the confirmation of sale. However, we request that proposed Rule 172 be revised to clarify that a late Rule 424 filing by an issuer will not cause retroactive and incurable Section 5 violations for all underwriters that have sent confirmations in anticipation of an issuer's timely prospectus filing.

***Business Combinations***. We suggest that the Commission add guidance similar to the guidance provided in the Regulation M-A adopting release that clarifies when a communication would be considered to be in connection with or relating to a proposed business combination transaction for purposes of the Rule 168 safe harbor for regularly released factual business information and forward-looking information. We also suggest that the Commission modify the Proposals to provide that a registration statement on Form S-4 becomes automatically effective 10 days after filing unless a delaying amendment is filed by the registrant, with the expectation that the Commission would provide comments in that 10-day period. This would generally be designed to make the timing of a registered exchange offer comparable to the timing applicable to an all-cash offer (a preliminary proxy statement must be filed 10 days prior to the time that it is first provided to security holders).

***Application to Non-U.S. Issuers***. We suggest that the Commission modify the Proposals to permit well known, seasoned Schedule B issuers to take advantage of the proposed reforms to the shelf registration process. In addition, we suggest that the Commission modify proposed Rule 168 to account for the possibility that a non-U.S. issuer conducting its initial public offering in the United States may for many years have had its securities publicly traded in its home country and in other non-U.S. markets. Non-U.S. IPO issuers that are seasoned in their home country should be treated like unseasoned reporting issuers for purposes of the Rule 168 safe harbors. We also suggest that the Commission modify the proposed Rule 139 safe harbor to accommodate research regarding Schedule B issuers and clarify that, for purposes of proposed Rule 405, a non-U.S. issuer may determine the market value of its outstanding common equity held by non-affiliates on a worldwide basis in a manner similar to that currently provided in General Instruction B.1 to Form F-3.

## ELIGIBILITY

Several aspects of the Proposals would be available only to certain issuers. In particular, the Proposals would establish a new category of issuer, to be known as the "well known seasoned issuer," or WKSI, a classification designed to include only those issuers that have both a reporting history under the Exchange Act and are presumptively the most widely followed in the marketplace. The Proposals would also establish a class of "ineligible issuers" that would be disqualified on the basis of various characteristics, including a "bad boy" disqualification not included in other rules of the Commission in the event that an issuer or any of its subsidiaries within the past three years (a) entered into a settlement with any governmental agency involving allegations of violations of the federal securities laws or regulations or (b) was subject to a judicial or administrative

order (i) prohibiting conduct or activities regarding, or future violations of, the federal securities laws or (ii) determining that the federal securities laws were violated. We set forth below several suggestions regarding the eligibility thresholds that the Proposals would establish.

**Expand "Well Known" Prong of WKSI Eligibility Test**

In the Release, the Commission indicates that the "well known" prong of the WKSI eligibility test is designed to include those issuers that are widely followed by sophisticated institutional and retail investors, members of the financial press and significant numbers of research analysts, all of whom actively seek new information about the issuer on a continual basis. The Commission cites high levels of analyst coverage, institutional ownership and trading volume as useful indicators of the extent to which an issuer is widely followed in the market and ultimately settles on the $700 million public float test as the best single proxy for all of these factors.[3]

We agree with the Commission's basic approach of using a proxy designed to ensure that an issuer is "well known" as opposed to a multi-factored test that might include, among other things, considerations such as percentage of institutional ownership, asset size and the number of covering research analysts. The proxy approach would be far easier to administer both for issuers and other offering participants. While we understand that the Commission has decided to proceed cautiously in creating the WKSI class of super S-3/F-3 eligible issuers, we respectfully urge that the public float test be set at a lower level than currently proposed. We believe that this can be done without jeopardizing the Commission's goal that only those issuers that are widely followed in the marketplace be eligible for WKSI status.

The Commission notes in the Release that, based on the study performed by its Office of Economic Analysis, in most cases issuers with a market capitalization between $75 million and $200 million have between zero and four covering analysts.[4] We understand that analyst coverage is an important factor for the Commission in determining whether an issuer is widely followed in the marketplace and, accordingly, we would not object if the Commission were to set the public float test at a level over $200 million. However, we strongly encourage the Commission to review the data provided by its Office of Economic Analysis with a view towards arriving at a public float test that is not as restrictive as the proposed $700 million test. We believe that a $375 million public float test (five times the current Form S-3/F-3 eligibility level) should prove sufficient.

In addition, we believe that the Commission should consider adding an actively traded securities alternative to the "well known" prong of the WKSI test in order to

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3 *See* Release at text accompanying note 43.

4 *See* Release at note 46.

provide needed flexibility to those issuers with under $700 million in public equity float but that are, as the Commission has recognized in the Regulation M context, nevertheless widely followed in the marketplace. In the Regulation M context, the Commission has acknowledged that securities meeting the definition of "actively traded securities" are followed widely by the investment community.[5] Currently, actively traded securities are those with an average daily trading volume ("ADTV") value of at least $1 million and a public float value of at least $150 million; the Commission's pending proposal to amend Regulation M, would increase the thresholds to $1.2 million and $180 million, respectively.[6] According to the Commission, adjusting the ADTV and public float value thresholds upwards for actively traded securities by 20% as proposed would yield 2,353 issuers, and approximately 31% of all issuers would qualify as having actively traded securities.[7] In view of the different purposes of Regulation M and the WKSI eligibility test, we believe that the Commission should not necessarily assume that the appropriate ADTV value for WKSI should be equal to the ADTV value for Regulation M. We instead recommend that the Commission's Office of Economic Analysis conduct a study to determine an appropriate lower ADTV level to be used for purposes of determining WKSI status.

As an alternative to the $700 million public float test, the Proposals also would allow an issuer to meet the "well known" prong of the WSKI issuer test, with respect to the registration of debt securities only, if the issuer has issued at least $1 billion aggregate amount of debt securities in Securities Act registered offerings during the past three years. Based on the data presented in the Release and our general experience, we believe that the proposed aggregate debt issuance test should be an adequate method of satisfying the condition that an issuer of debt securities be "well known" in the marketplace and, in our view, the Commission should not add additional qualifications. For the same reasons that we request the Commission to consider lowering the $700 million public float test value, we respectfully request the Commission to consider lowering the $1 billion aggregate debt issuance test as well. According to the Release, approximately one-quarter of the issuers that issued public debt in the period 1997 to 2003 would meet the proposed threshold.[8] We suggest that the Commission choose a lower value that

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5 *See* Final Rules: Anti-manipulation Rules Concerning Securities Offerings, Rel. Nos. 33-7375 and 34-38067 (Dec. 20, 1996), 62 Fed. Reg. 520 (Jan. 3, 1997); Proposed Rule: Amendments to Regulation M: Anti-manipulation Rules Concerning Securities Offerings, Rel. Nos. 33-8511 and 34-50831 (Dec. 9, 2004), 69 Fed. Reg. 75,774 (Dec. 17, 2004) (hereinafter, the "Reg. M Amendments Release").

6 *See* Reg. M Amendments Release at paragraph following paragraph referencing note 48.

7 *See* Reg. M Amendments Release at note 48. We do not object to the Commission's inclusion of penny stock issuers as ineligible issuers, and we believe that as currently drafted, section (1)(iv) of the definition of "ineligible issuer" would in most cases operate to exclude penny stock issuers that may nevertheless meet the definition of actively traded securities.

8 *See* Release at text accompanying note 48.

would allow approximately one-third of the issuers of public debt in the relevant period to qualify as WKSIs.

In response to the Commission's request for comment as to whether investment grade debt rating should be part of the basis for WKSI eligibility based on debt issuances, we note that an investment grade condition is already included implicitly in the proposed Rule 405 WKSI definition, as eligibility to register primary offerings of securities on Form S-3 or F-3 is based upon public float or issuance of investment grade securities. Accordingly, a debt-only issuer with no public float presumably would have to be issuing investment grade securities to qualify as a WKSI, regardless of whether that issuer has issued in excess of $1 billion aggregate principal amount of debt securities. We respectfully suggest that the Proposals be revised to permit high-yield issuers to qualify as WKSIs on the basis of a 12-month reporting history and satisfaction of the debt issuance test.[9] In addition, we suggest that the Commission clarify that, for purposes of clause (1)(ii)(B) of the Rule 405 WKSI definition, "offerings registered under the [Securities] Act" includes any registered exchange offer, including those made pursuant to the *Exxon Capital* line of no-action letters permitting registered exchange offers after certain unregistered offerings pursuant to Rule 144A.

**Use Worldwide Float for Non-U.S. Issuers to Determine WKSI Status**

We request that the Commission revise proposed Rule 405 to state expressly that for purposes of WKSI eligibility, a non-U.S. issuer may determine the market value of its outstanding common equity held by non-affiliates on a worldwide basis in a manner similar to that currently provided in General Instruction B.1 to Form F-3. While we believe that this is the Commission's intention, the use of a different formulation than in Form F-3 could lead to uncertainty. We also suggest that the valuation should be performed by reference to the closing price per share on the date of determination as reported on the issuer's principal equity trading market.

**Narrow the Settlements and Orders Component of "Ineligible Issuer" Definition**

As indicated above, the Proposals would establish a class of ineligible issuers that would be disqualified on the basis of various characteristics, including a "bad boy" disqualification not employed in other rules of the Commission where an issuer or any of its subsidiaries within the past three years (a) entered into a settlement with any governmental agency involving allegations of violations of the federal securities laws or regulations or (b) was subject to a judicial or administrative order (i) prohibiting conduct or activities regarding, or future violations of, the federal securities laws or (ii) determining that the federal securities laws were violated.

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[9] We also believe that the Commission should give consideration to modifying the Form S-3 eligibility criteria to eliminate the distinction between investment grade and high-yield debt securities.

We believe that inclusion of the entire universe of federal securities laws is too broad, and we respectfully suggest that the Commission modify this aspect of the Proposals to more closely track the provisions of the statutory safe harbors for forward-looking statements in the Securities Act and the Exchange Act. According to the Release, these provisions were the inspiration for the disqualifications relating to settlements and orders.[10] These statutory safe harbors disqualify issuers on the basis of violations of the antifraud provisions of the federal securities laws. The broader formulation of the disqualification in the Proposals would impose undue burdens upon entities that are subject to comprehensive regulation under the federal securities laws, such as broker-dealers and investment advisers. Even if the Commission does not agree that the disqualification should be limited to the antifraud provisions of the federal securities laws, we strongly encourage the Commission to reformulate the definition in a way that provides some relief to issuers that directly or through subsidiaries are subject to comprehensive Commission regulation because of the nature of their business. One way to achieve this would be to limit the disqualification to antifraud provisions plus those provisions of the federal securities laws that relate to the issuer's status as an Exchange Act reporting company or as a registrant of securities under the Securities Act and thus apply to all registrants equally.

We also urge the Commission to consider limiting the disqualification to orders and settlements to which the issuer itself is subject, rather than including orders applicable to and settlements of the issuer's subsidiaries. This would more closely track the statutory safe harbors, under which disqualification is based only on orders to which the issuer is subject. Relatedly, we suggest that the Commission clarify the effects of an acquisition transaction. We believe that it does not serve the Commission's purposes or the public interest to disqualify an issuer that acquires an entity that is subject to a disqualification.

Finally, the disqualification should apply only with respect to orders and settlements entered after the effective date of the new rules. That will give issuers an opportunity to negotiate a waiver or exemption at the appropriate time. If settlements pre-dating adoption of the Proposals are disqualifying, there are likely to be many disqualified companies, including many major financial institutions that are frequent issuers. We believe that it is not necessary or appropriate in the public interest to apply the disqualification retroactively, especially given that the potentially affected issuers did not have the opportunity to negotiate an exemption at the time of their settlements.

**Exempt Additional Form 8-K Items From Timely Filing Requirement**

The proposed WKSI definition repeats the Form S-3 eligibility requirement that the issuer must have timely filed all materials required to be filed in the

[10] The Release states that the disqualification for federal securities laws violations was drawn from the statutory safe harbors for forward-looking information in Securities Act Section 27A and Exchange Act Section 21E. *See* Release at text accompanying note 163.

twelve months and any portion of a month preceding the date of determination, other than a report required pursuant to Items 1.01, 1.02, 2.03, 2.04, 2.05, 2.06 and 4.02(a) of Form 8-K. We recognize and understand that the Commission has provided a safe harbor from private liability under Exchange Act Section 10(b) and Rule 10b-5 and a safe harbor from loss of Form S-3 eligibility for failure to timely file a Form 8-K responsive to those items because the Commission has identified these items as requiring issuers to make quick assessments of materiality or determinations of whether a disclosure obligation is triggered.[11] We respectfully suggest that the Commission expand the list of excluded Form 8-K items for purposes of determining WKSI eligibility and Form S-3 eligibility to include Item 5.01 (Changes in Control of Registrant) and Item 5.02(b) (Departure of Directors or Principal Officers). These items, like the others cited, also require issuers to make a potentially difficult facts and circumstances analysis and judgment.[12] It seems unduly harsh and burdensome for an issuer to lose WKSI or Form S-3 status if the issuer's judgment is viewed as incorrect in hindsight.

**Retain Public Float Requirement for Form S-3/F-3 Eligibility**

The Proposals would not amend the current $75 million public float level generally required for an issuer to be eligible to use Forms S-3 and F-3 for registration of securities. The Commission, however, seeks comment whether that public float threshold should be revised upward in light of the fact that the threshold amount was established in 1992[13] and the Commission's underlying rationale that issuers eligible to use short form registration should be sufficiently well-followed in the market. We respectfully suggest that the Commission leave the $75 million dollar public float threshold unchanged. Marketplace and technological developments since 1992, including the availability of Exchange Act reports on the Commission's EDGAR system and other Internet-based sources, have helped ensure that information about issuers with at least $75 million in public float is widely available to investors and other market participants.

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[11] *See* Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Rel. Nos. 33-8400 and 34-49424 (Mar. 16, 2004), 69 Fed. Reg. 15,594 (Mar. 25, 2004) at Section II.E.

[12] The Commission has expressly recognized that there is no clear line between discussion about or consideration of resignation and actual notice of a decision to resign for purposes of Item 5.02(b), and that evaluation of communications in this regard must be on a facts and circumstances basis. *See* Division of Corporation Finance: Current Report on Form 8-K, Frequently Asked Questions (Nov. 23, 2004), at Question 24.

[13] *See* Final Rule: Simplification of Registration Procedures for Primary Securities Offerings, Rel. Nos. 33-6964 and 34-31345 (Oct. 22, 1992) (reducing public float value from $150 million to $75 million); *see also* Proposed Rule: Simplification of Registration Procedures for Primary Securities Offerings, Rel. Nos. 33-6943 and 34-30930 (July 16, 1992), 57 Fed. Reg. 32,461 (July 22, 1992).

**Majority-Owned Subsidiaries as WKSIs**

Under the proposed WKSI definition, a majority-owned subsidiary of a WKSI would be considered a WKSI itself in respect of offered securities, even if it does not separately meet the eligibility criteria of the WKSI definition, if (a) the parent WKSI provides a full and unconditional guarantee of the subsidiary's payment obligations and the subsidiary's securities are non-convertible obligations, (b) the offered securities are guarantees of the WKSI parent's obligations or of the non-convertible obligations of another majority-owned subsidiary and the WKSI parent also provides a full and unconditional guarantee of those non-convertible obligations or (c) the offered securities are non-convertible obligations that are fully and unconditionally guaranteed by another majority-owned subsidiary of the WKSI parent that itself is a WKSI. The Commission requests comment whether the proposed definition should instead be limited to wholly-owned subsidiaries.

We support the Commission's proposal to allow majority-owned subsidiaries to qualify as WKSIs in the proposed circumstances and to revise Forms S-3 and F-3 to allow majority-owned subsidiaries to use those forms under the same circumstances. For registration purposes, the difference between majority-owned and wholly-owned subsidiaries of a registrant relates to the information that investors need in order to make an investment decision. The Commission's existing rules, such as Item 3-10 of Regulation S-X, already address this difference adequately.

**COMMUNICATIONS**

**Do Not Restrict Research Safe Harbors to "Research Reports"**

The current research safe harbors apply to "information, opinions and recommendations," and thus extend to eligible oral communications, opinions, recommendations and other information even if sufficient information upon which to base an investment decision is not provided. In what the Commission describes as an effort to ensure consistency between Regulation AC and the research safe harbors, the Proposals would narrow the research safe harbors by limiting them to research constituting "written communications" (as proposed to be defined in Rule 405) that provides sufficient information upon which to base an investment decision. We believe that the research safe harbors should continue to be available for research communications that are oral or do not contain sufficient information on which to base an investment decision. Limiting the research safe harbors to "written communications" seems inconsistent with the Commission's goal of liberalizing restrictions on research during offerings. Attaching potential 12(a)(2) liability to research analysts' one-on-one discussions and conference calls, but not to their research reports, will likely reduce or greatly restrict oral communications by research analysts, which seems contrary to the goals of the Proposals. Extending potential 12(a)(2) liability in this way also fails to recognize the independence of the research function resulting from recent regulatory and structural reforms.

At the same time, we urge the Commission to clarify that research materials that might constitute "graphic communications" and thus constitute "written communications" for purposes of the Securities Act do *not* constitute "electronic communications" for purposes of Regulation AC (or other research rules that the Commission may adopt) under the Exchange Act. Although the definition of "research report" in Rule 500 of Regulation AC includes "electronic communications" as written communications, the Regulation AC adopting release stated that the inclusion of "electronic communications" in the definition was designed to capture written research reports that might be transmitted electronically (such as a PDF of a research report sent by e-mail or a written research report posted to a website in HTML text).[14] There is no indication in the Regulation AC proposing or adopting releases that the term "electronic communication" was intended to capture "graphic communications" such as interactive electronic forums, conference calls, webcasts and replays.[15]

**Expand Research Safe Harbors Further**

We support the Commission's effort to expand the research safe harbors of Securities Act Rules 137, 138 and 139 to permit dissemination of research around the time of an offering under a broader range of circumstances than is currently the case. We agree that recent legislative and regulatory reforms, including Section 501 of the Sarbanes-Oxley Act, the Commission's Regulation AC, the research analyst rules of the New York Stock Exchange and the National Association of Securities Dealers, Inc. and the global research analyst settlement among the Commission, other regulators and twelve leading securities firms (the terms of which we understand have, in many cases, been adopted voluntarily by firms that were not party to the global settlement) have greatly enhanced the independence of research departments at full service broker-dealer firms. In our view, in light of these reforms, the Commission should consider additional revisions to the research safe harbors, in each case designed to make the safe harbor more useful and thus allow a broader mix of information to be made available to investors and the marketplace.

*Rule 139*

We support the Commission's decision to extend the industry research safe harbor (proposed Rule 139(a)(2)) to all reporting issuers. We urge the Commission to

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[14] *See* Final Rule: Regulation Analyst Certification, Rel. Nos. 33-8193 and 34-47384 (Feb. 20, 2003), 68 Fed. Reg. 9,482 (Feb. 27, 2003), at Section II.A.3.b.

[15] Indeed, the definition of "public appearance" for purposes of Reg. AC, as interpreted by the staff, specifically includes communications (*e.g.*, interactive electronic forum, telephone interview between a research analyst and a member of the media or webcast or conference call, even if password protected) that would appear to be deemed "graphic communications" under the Proposals as written. *See* Rule 500 of Reg. AC; Division of Market Regulation: Responses to Frequently Asked Questions Concerning Regulation Analyst Certification, at Questions 12 and 13.

consider similarly extending the safe harbor for issuer-specific research (proposed Rule 139(a)(1)) to all reporting issuers in light of the legislative and regulatory reforms mentioned above and cited in the Release. We believe that these reforms should make the Commission comfortable that the research function is sufficiently independent to ensure that the research product is used to provide information to the firm's customers rather than to hype inappropriately any particular offering of securities. We also encourage the Commission to consider further extending the industry research safe harbor to all issuers, regardless of reporting status, as the Aircraft Carrier proposals would have done.[16] The Rule 139(a)(2) safe harbor should at least be extended to voluntary filers.

In addition, we support the Commission's decision to eliminate the "reasonable regularity" requirement in favor of the proposed requirement that the publishing broker-dealer have published or distributed research about the issuer or its securities previously. The Commission explains that the proposed change is designed to eliminate uncertainty about availability of the safe harbor while continuing to exclude a report initiating coverage from the safe harbor.[17] We suggest, however, that the text of proposed Rule 139(a)(1)(iii), which uses the plural "reports," be modified to clarify that only one prior report about the issuer or its securities need have been published or distributed previously. The use of the plural "reports" suggests that multiple prior reports must have been previously published or distributed. A similar change should also be made to the similar language that appears in proposed Rule 139(a)(2)(v).

*Investment company issuers*

The Commission seeks comment whether the Rule 139 safe harbor should be available with respect to research on an issuer that is an open-end management investment company or other investment company, such as a closed-end management investment company or unit investment trust.[18] Research on these investment company issuers is currently ineligible for the safe harbor because these issuers use Form N-1A, N-2 or N-8B-2 to register securities rather than Form S-3. An additional complication with respect to the availability of the safe harbor under both proposed Rules 139(a)(1) and (a)(2) arises with respect to funds that continuously offer their shares pursuant to effective registration statements. For example, exchange-traded funds continuously offer shares and most major broker-dealers act as authorized participants to distribute newly

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[16] The Commission indicated that "[w]here the report is not truly focused on the issuer of the securities … there appears to be little risk of a report that is distributed regularly being distributed for the purpose of hyping the security [and even] if the purpose of the … distribution was hyping, that type of report is unlikely to have that effect, regardless of whether the issuer is reporting or not." *See* Aircraft Carrier Release at paragraph preceding paragraph referencing note 363. We believe that this reasoning is sound.

[17] *See* Release at text accompanying note 227.

[18] *See* Release at text accompanying note 228.

created units as an essential part of the operation of these funds. Accordingly, the condition that the publishing broker-dealer have published or distributed research about the issuer or its securities previously cannot be satisfied.

We respectfully suggest that the Commission extend the Rule 139(a)(1) and (a)(2) safe harbors to research with respect to closed-end investment companies and exchange-traded funds that satisfy the substantive conditions of the proposed safe harbor other than the "no initiation" condition. As the Commission has recognized, research reports are a valuable source of useful information about issuers and their securities and, as we note above, recent reforms addressing the independence of research departments should satisfy the Commission that the benefits of research on these types of issuers to investors outweigh any remaining concerns that the Commission may have with respect to the research product being used to offer or hype securities. We suggest that the Commission modify proposed Rule 139(a)(1) to eliminate the requirement that the broker-dealer have previously published research on the fund issuer or its securities for issuer-specific reports on closed-end funds and exchange-traded index funds organized as unit investment trusts or open-end funds, and rely on the condition that the fund be "seasoned"–*i.e.*, Exchange Act-reporting on the applicable form (not limited to Form S-3 or F-3) for at least one year and with at least $75 million public float (exclusive of "seed" money that may be contributed to the fund by the sponsor or its affiliates)–even if the fund is continuously offering shares pursuant to a registration statement and the publishing broker-dealer is an authorized participant. We also recommend that the Commission eliminate the previous publication requirement in proposed Rule 139(a)(2)(v) with respect to industry reports on these funds and instead require a waiting period after the launch of the relevant fund before that new fund may be included in an industry research report.[19]

The Commission requests comment as to what advantages or disadvantages extending the Rule 139 safe harbors to research about investment company issuers would offer as compared to Rule 482, which permits investment company advertisements to contain information the substance of which is not contained in the investment company's prospectus. We believe that it would be better to extend the Rule 139 safe harbors because that way, all true research would be subject to the same rules. Rule 482 advertisements are subject to Section 12(a)(2) liability.[20] Especially in light of the recent regulatory and structural reforms designed to ensure the independence

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[19] We note that SRO rules require that a member firm that manages or co-manages an equity IPO refrain from publishing research on the company for 40 calendar days after the effective date of the company's registration statement. *See* NASD Rule 2711(f)(1) and NYSE Rule 472(f)(1).

[20] We note that the Aircraft Carrier proposals, which would have subjected all research to Section 12(a)(2) liability, were widely criticized in this regard as almost certain to have a significant chilling effect.

of the research function at full service broker-dealers, we believe that it is neither necessary nor wise to attach potential Section 12(a)(2) liability to true research.

*Schedule B issuers*

Schedule B under the Securities Act is used by foreign governments or political subdivisions thereof to register securities offerings. The Aircraft Carrier proposals would have expanded Rule 139 to allow for issuer-focused research on a seasoned foreign government issuer during an offering by that foreign government issuer if it was registering an offering of securities that exceeded $250 million and that was underwritten on a firm commitment basis.[21] We believe that the Commission should similarly expand the safe harbor to include research on Schedule B issuers in the Proposals. In light of the fact that significant information about Schedule B issuers is almost always available in the marketplace even if they have not registered securities before in the United States, and in light of the research reforms discussed above, we believe that the Rule 139(a)(1) safe harbor should explicitly include issuer-focused research on Schedule B issuers without regard to offering size or whether the offering is pursuant to a firm commitment underwriting.

*Extend research safe harbors to all exempt offerings*

We support the proposed extension of the research safe harbors to Rule 144A and Regulation S offerings. However, we recommend that the Commission clarify that the research safe harbors are available in connection with *any* exempt offering, whether conducted in reliance on Rule 144A, Regulation S or otherwise, including offerings made in reliance on Securities Act Section 4(2), the "Securities Act Section 4(1½)" analysis or Regulation D. We do not believe that there is a good reason for making the research safe harbor available only for select offerings that are exempt from Securities Act registration requirements.

*Clarify application of Rule 137*

The Proposals would expand the current Rule 137 safe harbor to apply to any issuer (other than certain ineligible issuers), whether or not a reporting company, so that any broker or dealer that is not "participating in the offering" would be free to publish and distribute research in the regular course of business on the issuer without risk of being classified as an underwriter with respect to the offering. We generally support the proposed expansion, and believe that it may facilitate the provision of additional information to investors.

We respectfully suggest that the Commission clarify, in an instruction, that the safe harbor conditions be applied at the time that the research report in question is first published and distributed, and not subsequent to that time. As proposed, it is unclear

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[21] *See* Aircraft Carrier Release at text of proposed Rule 139.

whether the safe harbor would remain available where the broker-dealer satisfied the conditions of proposed Rule 137(a) that it not have participated, be participating or propose to participate in the offering at the time of publication or distribution, but subsequently became an offering participant. Proposed Rule 137(b), which would not allow broker-dealers receiving certain consideration from the issuer or other distribution participants, should be similarly clarified. Proposed Rule 137(b) should also be revised to clarify that the prohibited consideration must be in connection with publication or distribution of the research report and not in connection with unrelated services that the broker-dealer might provide. We believe that these suggestions are appropriate in light of recent regulatory reforms of the SROs and the provisions of the global research settlement.

*Codify staff position regarding Rule 14a-1(l)(2)*

The Commission has requested comment as to whether the Proposals should codify the staff's position that research published in reliance on Rules 138 and 139 would not be solicitations for purposes of Exchange Act Rule 14a-1(l)(2), so that Exchange Act Rules 14a-3 through 14a-15 (other than Rule 14a-9) would not apply. We agree that the staff position should be codified in the Proposals, especially in light of the recent regulatory and structural reforms regarding research cited above.

*Harmonizing look-back periods for "bad boy" disqualifications*

Proposed Rules 137, 138 and 139 all would contain a disqualification for research regarding blank check companies, shell companies and penny stock issuers. We note that, as drafted, the look-back period is three years for purposes of Rules 137 and 138, but two years for purposes of Rule 139. We assume that the Commission intended for the look-back period to be the same for all three safe harbor rules, and we suggest that the two year period be used.

**Free Writing Prospectuses**

We support the Commission's general concept of a free writing prospectus designed to allow freer written communications outside the statutory prospectus during the offering process that do not give rise to Section 12(a)(1) rescission liability. We respectfully suggest that the Commission consider expanding the category of issuers that may use a free writing prospectus without prior or concurrent delivery of the most recent statutory prospectus and modify the "cure" provisions of proposed Rules 163 and 164[22] to provide more practical relief for those who may use a free writing prospectus that does not satisfy all of the conditions of the proposed rules. We also suggest that the Commission confirm that communications outside the United States are not free writing

[22] Proposed Rules 163 (permitting pre-filing free writing by WKSIs) and 164 (permitting post-filing free writing) contain identical conditions for curing unintentional failures to file and failures to comply with the legend requirements.

prospectuses and eliminate the requirement that the free writing prospectus not be inconsistent with the statutory prospectus, as described below.

*Treat unseasoned issuers like seasoned issuers and WKSIs*

As currently drafted, the Proposals would allow WKSIs and seasoned issuers to use a free writing prospectus without delivery of a preliminary prospectus to the investor so long as the issuer's preliminary prospectus (or, in the case of shelf offerings, base prospectus) were on file with the Commission. Unseasoned issuers and IPO issuers would be required to deliver the issuer's most recent statutory prospectus prior to or concurrent with any free writing prospectus. The Commission's justification for treating unseasoned issuers like non-reporting issuers is that, even though unseasoned issuers are reporting issuers, "there is less reason to assume that the issuer would be well followed and thoroughly scrutinized or that plentiful issuer information would exist."[23]

We respectfully suggest that the Commission limit the requirement of prior or concurrent delivery of the statutory prospectus to IPO issuers. We understand the Commission's desire to ensure that investors receive a balanced disclosure document against which the statements in a free writing prospectus may be evaluated in the IPO context. We do not believe that the same investor protection concerns are implicated with respect to unseasoned issuers. The Exchange Act reports of those issuers will be available from the Commission, and it is likely that information about those issuers will be available from a variety of other sources, including research analysts, the media and websites dedicated to coverage of investment issues. The requirement to deliver a preliminary prospectus in advance of or concurrent with the free writing prospectus will add inconvenience and expense, and we expect those burdens may tend to discourage the use of free writing prospectuses.

*Unintentional non-compliance with the free writing prospectus conditions*

Under the Proposals, any immaterial or unintentional failure or delay in filing could be cured if a good faith and reasonable effort was made to comply with the filing conditions and by making the filing as soon as practicable after discovery of the failure to file. The unintentional failure to include a required legend also would be subject to cure by resending an amended, legended communication to all original recipients. The Release, however, does not explain the standard to be used in establishing the "good faith and reasonable effort" condition or what constitutes "discovery" of the failure to file. We respectfully suggest that the Proposals be clarified to make the availability of the cure provisions clearer and more useful to issuers and other offering participants.

As a first step, we suggest that the Commission clarify by example (or otherwise) in the adopting release the types of actions that would constitute a "good faith

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[23] *See* Release at paragraph referencing note 151.

and reasonable effort" for purposes of the cure provisions. We suggest that adoption of compliance procedures reasonably designed to achieve compliance with the filing and legend conditions specifically be included in the list of examples.

We also respectfully suggest that the Commission clarify that "discovery" of a violation of an applicable condition will occur for the issuer or other offering participant only at the time that a senior official responsible for compliance or internal disclosure controls or documents in connection with the offering in question actually knows, or is reckless in not knowing, of the violation.

It would also be useful for the Commission to clarify the meaning of "unintentional" violations of the filing or legend requirements. We believe that an "unintentional" violation should include at least those communications that are made by persons not authorized by the issuer or other offering participant and actions that contravene policies and procedures of the issuer or offering participant. The Commission has already recognized a similar concept in connection with Regulation FD.[24]

Finally, we suggest that the Commission modify the Proposals to provide for the possibility of a cure in two additional situations. First, a cure should be available for IPO issuers and other offering participants that may inadvertently use a free writing prospectus after the registration statement is filed but before a price range is included in the preliminary prospectus. Second, a cure should be available for IPO issuers, unseasoned reporting issuers and other offering participants for unintentional failures to accompany or precede the intended free writing prospectus communication with the statutory prospectus.

We also propose a structural change–that the filing and legend requirements be separate requirements as opposed to conditions of the Section 5 exemption in proposed Rules 163 and 164. This structure would be similar to the Commission's approach in adopting the Regulation D amendments in 1989, which eliminated the filing of a Form D as a condition to the Securities Act registration exemptions in Rules 504, 505 and 506 but retained the filing obligation as a separate requirement in Rule 503.[25] Under this approach, an unintentional error or delay in filing or legending the free writing prospectus could give rise to a Commission enforcement action, but would not give rise to a potential Section 5 violation and related private rescission rights. We note that proposed Rules 163 and 164 reflect the general structure of Rule 165 of Regulation M-A. We nevertheless believe that a restructuring of the operation of the cure provisions in the context of the securities offering process as

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[24] *See* Final Rule: Selective Disclosure and Insider Trading, Rel. Nos. 33-7881 and 34-43154 (Aug. 15, 2000), 65 Fed. Reg. 51,716 (Aug. 24, 2000), at note 44 and accompanying text and note 90; *see also* Rule 101(c) of Reg. AC.

[25] *See* Final Rule: Regulation D; Accredited Investor and Filing Requirements, Rel. No. 33-6825 (Mar. 14, 1989), 54 Fed. Reg. 11,369 (Mar. 20, 1989).

requested above is appropriate due to the different considerations involved in the offering process as compared to business combination transactions. In particular, communications in the business combination context are typically created by the companies that are party to the transaction, not their financial advisors. In addition, fewer parties are authorized to speak in the business combination context and communications are subject to more centralized control. Accordingly, there is a relatively low risk of unintentional violations. In the securities offering context, by contrast, many more communications are made by many more people, such as the sales forces of the underwriters of the offering. Managing the securities offering communications process accordingly is more difficult, and the risk of unintentional violations is greater.

*Confirm treatment of communications outside the United States*

Under Regulation S, communications made outside the United States are not "offers" for purposes of Section 5.[26] We believe that the Commission should confirm in the adopting release that communications made outside the United States do not implicate the free writing prospectus provisions of Rules 163, 164 and 433. Compliance with Rule 901 of Regulation S or the safe harbors under Rules 903 or 904 of Regulation S or Rule 135e should be sufficient for this purpose.

*Eliminate the requirement that free writing prospectuses not be inconsistent with statutory prospectus*

Proposed Rule 433(c)(1) contains a requirement that a free writing prospectus not contain information that is "inconsistent" with the statutory prospectus. We believe that this requirement, at least without additional clarification, may chill the use of free writing prospectuses. The Proposals do not make clear, by way of example or otherwise, the type of information that might be deemed "inconsistent" for purposes of proposed Rule 433(c)(1). Given that the failure to satisfy the proposed Rule 433(c)(1) requirement would result in a Section 5 violation not subject to cure, it should be expected that issuers and other offering participants would be particularly cautious in deciding what "inconsistent" means. We believe that the availability of the statutory prospectus (or delivery where required) and the required legend notifying recipients where to find and obtain it, coupled with Section 12(a)(2) liability applicable to free writing prospectuses, should be sufficient to address the Commission's concerns. We note that the Commission in 2003 considered a similar issue in connection with Rule 482, the free writing rule for investment companies, and did not adopt a proposed requirement that

[26] Rule 901 of Reg. S provides that: "For purposes only of Section 5 of the Act, the terms 'offer,' 'offer to sell,' 'sell,' 'sale,' and 'offer to buy' … shall be deemed not to include offers and sales that occur outside the United States."

free writing material under that rule be limited to information the substance of which is included in the statutory prospectus.[27]

*Allow generic legends*

The form of legend required by proposed Rules 163 (exemption from the prohibition on offers before the filing of a registration statement for offers made by or on behalf of eligible WKSIs) and 164/433 (post-filing free writing prospectuses) would require insertion of the issuer's name. We do not believe that an issuer-specific legend is necessary and respectfully suggest that the Commission modify the proposed form of legend to a more neutral form. We believe that this would have efficiency and compliance benefits for non-issuer offering participants, such as underwriters, that may participate in the registered offerings of multiple issuers. The Commission should require that the issuer be identified elsewhere in the free writing prospectus.

**Limited Public Notices Pursuant to Rule 134**

*Allow use prior to time that a price range is available*

As proposed, Rule 134 would be available only after a registration statement, including a statutory prospectus that includes a price range where required, has been filed with the Commission. Current Rule 134 is available upon the initial filing of a registration statement. Accordingly, an issuer may (and typically will) issue a press release announcing the filing and disclosing other limited information permitted under the current form of the rule, including the names of the lead underwriters.

Under the Proposals, in connection with an initial public offering of securities, Rule 134 would not be available until the price range has been reflected in the filed preliminary prospectus. This typically occurs much later in the offering process. This aspect of the Proposals would significantly disrupt current practice. We believe that it is important for the issuer to be able to make Rule 134 information available to its existing constituencies immediately after filing, and we urge the Commission to revise the Proposals to make Rule 134 available upon filing of a registration statement without regard to whether a price range, where required, is on file.

We understand that the Commission has designed the Proposals, including proposed Rule 134, in a way that seeks to prevent the start of an active sales campaign in an IPO until a price range is available. However, we believe that allowing the customary Rule 134 press release and other Rule 134 information permitted under the current version of the rule is consistent with and will not undermine the Commission's goal. We similarly believe that disclosure of the items that would become permitted Rule 134 information under the Proposals prior to the time that a price range is on file similarly

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[27] *See* Final Rule: Amendments to Investment Company Advertising Rules, Rel. Nos. 33-8294, 34-48558 and IC-26195 (Sept. 29, 2003), 68 Fed. Reg. 57,760 (Oct. 6, 2003).

would not undermine the Commission's goals.[28] We suggest that the Commission address its concerns as to any particular Rule 134 item by providing that the item in question may only be included in the Rule 134 notice if a prospectus with a price range is available as opposed to subjecting the entire universe of Rule 134 information to the price range limitation.

*Additional Rule 134 information*

We support the proposed expansion of the information that may properly be included in a Rule 134 notice. Below are additional suggestions for inclusion as permissible information that we believe are consistent with the Commission's purposes of providing factual information intended to identify key attributes of the issuer and the offering with a view towards facilitating the dissemination of the full information required in the prospectus.

With respect to issuer information, we respectfully suggest that the Commission:

- Add to proposed Rule 134(a)(1):
    - an issuer's number of years in operation,
    - its market capitalization, and
    - its status as a non-reporting, reporting, seasoned or well known, seasoned issuer.
- Revise proposed Rule 134(a)(3) as indicated below, delete examples (i), (ii) and (iv) and move example (iii) regarding asset-backed issuers to an instruction:

> "A brief indication of the general type of business of the issuer, which may include the issuer's industry and segments in which it conducts business, its principal products and/or services, identification of officers and directors and number of employees."

[28] In fact, the usefulness of certain of the new Rule 134 information would be severely limited if the price range condition remains. For example, proposed Rule 134(a)(9) would allow underwriters to include information about the anticipated offering schedule and a description of marketing events. But the price range is typically added just before the start of the road show and offering schedule information and description of marketing events would not be useful unless circulated reasonably in advance of the road show.

With respect to information regarding the issuer's securities and the offering, we respectfully suggest that the Commission:

- Add a new item that allows disclosure of a CUSIP number or other security identification code.
- Add a new item that allows a brief description of the proposed use of proceeds from the offering.
- Revise proposed Rule 134(a)(8) to include:
    - whether the underwriting is a firm commitment or best efforts underwriting, and
    - the existence and size of an underwriters' over-allotment (Green Shoe) option.
- Add a new item allowing disclosure of the recent market price for the offered securities.
- Add a new item allowing disclosure of average daily trading volume (as defined in Regulation M) for the offered securities.
- Add a new item for fixed income securities allowing disclosure of the anticipated spread over specified benchmark securities or rates.

The additional issuer information that we have proposed is intended to be basic, objective and factual, and intended not to go beyond what an investor might be able to obtain from accessing a public financial-related website. Our suggestions with respect to information regarding the issuer's securities and the offering are intended to be similarly factual and non-qualitative. Accordingly, we believe that permitting the factual information that we suggest would not lead the Rule 134 notice to be perceived as a "selling document" but rather would allow for the provision of information that is useful to investors and the marketplace in becoming educated about the basic attributes of an issuer and its offering of securities, to assist investors in determining whether they want to engage in the sales process or instead consider other investment opportunities.

We also suggest that the Proposals be modified to allow the Rule 134 notice to include a hyperlink or uniform resource locator, or URL, to an Internet address where the statutory prospectus may be found in cases where the Rule 134 notice must be accompanied or preceded thereby. As noted in the Release, this would not be permitted under the Proposals.[29]

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[29] *See* Release at note 122 (citing Use of Electronic Media, Rel. No. 33-7856 (Apr. 28, 2000), 65 Fed. Reg. 25,843 (May 4, 2000), at II.B.2).

*Electronic offerings under the Wit Capital procedures*

The Wit Capital line of no-action letters[30] and related Commission staff practice permit the use of electronic offering procedures in reliance on Rule 134(d). We believe that these procedures would remain useful even if the Proposals are adopted. Accordingly, we respectfully request that the Commission expressly confirm in the adopting release that these procedures, including related procedures worked out individually by broker-dealers with the staff, remain unaffected by adoption of the Proposals.

**Road Shows**

*Treatment of live road shows*

The Release indicates that live road shows would continue to be treated as oral communications, but is not clear whether all aspects of current road show practice would be preserved.[31] In the absence of guidance in the Release, the language of Instruction 2 to proposed Rule 433, which states that the rule does not apply to "communications that are not written communications at road shows that are not transmitted or made available by means of graphic communication," adds additional ambiguity as to the treatment of certain aspects of current road show practice. We believe that it is critical for the Proposals to be clear about the regulatory scheme governing live road shows and, accordingly, we seek clarification of the following matters.

*Confirm that slides at live road shows are oral communications*

We note the Commission's request for comment whether visual presentations, such as slides or power point presentations, used but not retained by investors at a live road show should be considered free writing prospectuses. We believe that it is very important for the Commission to clearly indicate in the adopting release what treatment will be given to such materials. If the Commission does view these materials as free writing prospectuses, they would likely have to be filed publicly due to the level of issuer involvement. We respectfully suggest that the Commission confirm that such materials are oral communications, in accordance with current practice. We note that road show slides and other visual materials would remain subject to Section 12(a)(2) liability regardless of their status as oral or written.

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30 *See* Wit Capital Corporation (July 14, 1999), W.R. Hambrecht & Co. (July 12, 2000), Bear, Stearns & Co., Inc. (July 19, 2000) and Wit Capital Corporation (July 20, 2000).

31 *See* Release at note 180.

*Confirm that broadcasts to overflow rooms are oral communications*

In the Release, the Commission also asks whether the Proposals should treat the use of electronic media to transmit a live road show to an audience overflow room as a written communication, even if the presentation to the overflow room is not interactive. For the same reasons that we believe the Commission must clarify the treatment of slides and other materials, we believe that the Commission should also clearly indicate in the adopting release how overflow room transmissions will be treated. The purpose of an overflow room transmission is solely to extend the audience for the live road show where the physical space available cannot accommodate all who wish to attend. Given this purpose, we believe that the Commission should conclude that overflow room transmissions are oral communications.

*Treat live audio and video road shows as oral communications*

Historically, live road shows have taken place in physical space where participants and the audience gather together in a room. Modern communications technologies have advanced to the point that live road shows no longer need take place in physical space. We believe that the Commission's rules should treat all live road shows as oral communications, even those that take place in a "virtual room" established by teleconference or videoconference. This approach would provide offering participants with greater flexibility in structuring their marketing efforts and would better accommodate offerings that the participants wish to conduct on an expedited basis (where time is in short supply, and traveling so that everyone can be present in the same physical space may be impractical). We understand that the Commission may have concerns about access to materials and recordings, but these same concerns are present in present-day road shows. Although the electronic medium used to transmit a live teleconference or videoconference may give rise to different technical concerns, we see no reason that these concerns could not be addressed in a definition of "live" road show. For example, the Commission might require that the presentation be in real-time, with interactive participation between audience and presenters, with no part of the presentation provided to the audience for retention in any form and with copy protection on any electronic materials, so that downloading or copying is not permitted.[32]

*Electronic road shows*

The Proposals would treat electronic road shows as free writing prospectuses, but those free writing prospectuses would not have to be filed (except for issuer information not already on file with the Commission) so long as one version of the

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[32] We note that this approach is consistent with the staff's view of whether real-time video or audio material need be filed under Rule 165 of Reg. M-A. *See* Division of Corporation Finance: Third Supplement to the Manual of Publicly Available Telephone Interpretations, Question I.B.2 (company need not file a transcript of a live video or audio presentation, whether made available over the Internet or by telephone, so long as the presentation does not continue to be made available after it is completed).

road show is made available to the public on an unrestricted basis. The unrestricted version would have to contain a presentation by issuer management and cover the same general areas regarding the issuer, its management and the securities being offered as other versions, but would not have to cover all of the same subjects or provide all of the same information as other versions. We support the Commission's decision to allow road shows to be tailored for specific audiences without requiring public filing of those road shows, which would provide access to the presentation to audiences for which it was not intended.

**Treatment of Telephone Calls**

The text of the Release indicates that live telephone calls, whatever the medium by which they are carried, including the Internet, would be oral communications for purposes of the Proposals.[33] The Release also states that while individual telephone voice mail messages would not be written communications, broadly disseminated, or "blast," voicemail would be written communications.[34] While we believe that we understand the Commission's intent as to the treatment of telephone calls and voicemails, we are not sure that the definition of "graphic communication" in Rule 405, which simply indicates that all forms of electronic media are "written communications," clearly excludes even live individual telephone calls. We respectfully request that the Commission revise the definition to clarify that, as stated in the Release, live telephone calls are not graphic communications, whatever the transmission medium. In our view, the clarification should also extend to live videophone calls, whatever the transmission medium. We also suggest that the Commission clarify that the number of participants in the live telephone or videophone call does not affect the analysis, as long as the call is live and in real-time.

**Treatment of Website Information**

Under the Proposals, information posted to an issuer's website or hyperlinked on its website to a third-party website generally would be considered a free writing prospectus of the issuer if the information was an offer. Issuers will be subject to prospectus liability for such website information, would have to include a hyperlink to a statutory prospectus, where required, and would be subject to filing requirements. However, the issuer would be permitted to segregate historical information on its website if properly identified as such and located in a separate section of the website, such as an "archives" section. The historical archived information would have to be identified as previously published (for example, by being dated) and could not be included in a prospectus or used, identified, updated or modified in connection with the offering or otherwise. If those conditions were satisfied, that historical information would not be considered a "current offer" and thus not a free writing prospectus.

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[33] *See* Release at text accompanying note 61.

[34] *See* Release at note 61.

We generally do not object to the Commission's proposed treatment of issuer website information. However, we believe that the Commission should confirm in Rule 433(e), or at least in the adopting release, that historical information left on an issuer's website, even if not archived, would be analyzed, as today, under a facts and circumstances analysis and may not necessarily be an offer. We also believe that the Commission should provide additional guidance to issuers contemplating or conducting a registered offering so that they may be confident that information on their websites that is intended to qualify for "historical archive" treatment in fact would so qualify under proposed Rule 433(e). We believe that the adopting release should be clearer as to exactly what the Commission expects from issuers in identifying information as historical. Would it be sufficient for issuers to simply date the material, or would something more be required? In addition, we respectfully suggest that the Commission modify the Proposals so that information hyperlinked from an issuer's website to a third-party website is treated as historical information, regardless of whether the information on the third-party's website has been updated, so long as:

- the hyperlink appears in the "historical archives" section of the website and the issuer properly identifies the hyperlink as containing historical information, and
- the third-party has not posted or updated the information to which the hyperlink relates "on behalf of the issuer," meaning pursuant to the issuer's request.

Issuers should review information on their own websites to ensure that all historical information is properly identified and segregated, including any hyperlinks to third-party websites. We believe, however, that issuers should not be required to constantly monitor the content of third-party websites that are hyperlinked from the issuer's website to ensure that information appearing there has not been updated or otherwise changed. Unless the issuer requests or directs the third-party to update information appearing on its website, a hyperlink that the issuer identifies on its website as "historical" should not give rise to potential Section 5 liability for the issuer.

The Release also indicates that hyperlinks *from* a third-party web site *to* an issuer's website may be a free writing prospectus of the third party with regard to the issuer's securities, depending on the facts and circumstances.[35] The Release does not specify the facts and circumstances that would be relevant to making this determination. In our view, the Commission should provide greater clarity in this regard in the adopting release. Customers, suppliers and other third parties may have legitimate business reasons for providing hyperlinks to an issuer's website, and if the Commission does not provide additional guidance, these persons will have to seriously consider whether to maintain hyperlinks to the website of any company that is conducting an offering. We respectfully suggest that the Commission clarify in the adopting release that hyperlinks from a third party website to an issuer's website will not be considered free writing prospectuses if the third party is not an offering participant.

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[35] See Release at note 200.

**Proposal to Require Disclosure of Unresolved Staff Comments**

In order to compensate for the possibility that the reforms that would be implemented under the Proposals would tend to make issuers that are accelerated filers less likely to respond to comments of the Division of Corporation Finance on the Exchange Act reports of those issuers, the Proposals would amend Forms 10-K and 20-F to require all accelerated filers to disclose written staff comments issued not less than 180 days before the end of the fiscal year to which the Form 10-K or 20-F relates and that are unresolved at the time the Form 10-K or 20-F is filed, if the issuer believes those comments to be material. The disclosure, which is intended to provide an incentive for accelerated filers to timely resolve outstanding staff comments on their Exchange Act reports,[36] would have to be sufficient to relate the substance of the staff comments.

The Commission's motivation in proposing the additional disclosure requirement appears to be simply to provide issuers with an additional incentive to resolve staff comments, especially those issuers that qualify as WKSIs and that would, under the Proposals, have an automatically effective registration statement that could not be delayed during the process of resolving outstanding staff comments. We believe that the Proposals should be revised to allow the issuer a choice between disclosure of unresolved material comments on the terms set forth in the Proposals or omitting the disclosure at the time it would otherwise be required but abstaining from conducting any registered offerings until such time as all material comments that would have been required to be disclosed are resolved. We believe that this approach would still provide a sufficient incentive for issuers to resolve outstanding comments while providing issuers with the ability to keep what they might consider sensitive information out of the public domain until the issue has been resolved with the staff.

We also suggest that the Proposals be modified to specify exactly how to calculate the 180-day period, either in the text of the new annual report item or in an instruction. We believe that the 180 days should be calculated from the date of the most recent letter from the staff rather that the date of the staff's initial comment letter. We also suggest that the Commission provide some guidance in the adopting release as to what would constitute resolution of a comment–for example, would the staff have to formally inform an issuer that a comment was resolved or would an issuer be permitted to assume that the staff was satisfied with its supplemental response if the staff did not respond within a reasonable period of time?

**Proposed Risk Factors Disclosure**

Item 503(c) of Form S-K requires a discussion, "where appropriate," of factors that make an offering "speculative or risky." The wording of the proposed new Form 10-K requirement, by contrast, omits the "where appropriate" qualifier and appears to add an additional category of factors that would need to be disclosed, by its reference to

[36] *See* Release at Section VII.B.

disclosure regarding "the most significant factors with respect to the registrant's business, operations, industry, or financial position that may have a negative impact on the registrant's future financial performance." The wording of the proposed new Form 10-K item appears inconsistent with the statement in the Release that the new risk factor disclosure "would be the same type of Item 503 disclosure as in a Securities Act registration statement."[37] We respectfully suggest that the Commission revise the text of the proposed new Form 10-K item to require only the risk factor disclosure that would be required by Item 503(c) of Regulation S-K.

**Clarify Definition of "By or on Behalf of the Issuer"**

The "by or on behalf of the issuer" concept is used in several of the proposed rules, as the Commission recognizes in its request for comment whether a general definition of the phrase should be included in Securities Act Rule 405. We believe that a general definition would be the best way to ensure that the phrase is interpreted consistently in the various contexts in which it is used. A general definition would also simplify the drafting of the Proposals, as the separate definition of the phrase in each of the proposed rules in which it appears could be deleted.

We also request the Commission to consider adding a concept similar to that contained in Rule 101(c) of Regulation FD, which specifies that an officer, director, employee or agent of an issuer who discloses material non-public information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer. In the context of the Proposals, this concept would be expanded to provide that a communication will not be considered to have been made "by or on behalf of an issuer" if made by a person in a manner that is contrary to the policies and procedures of the issuer or other offering participant that are reasonably designed to prevent issuance of the communication at all, by the person or at the time it is made.

**Application of Rule 168 in the Business Combination Context**

As drafted, proposed Rule 168 would exclude from safe harbor protection any communication that included "information about the registered offering or information released or disseminated as part of the offering activities in the registered offering." We believe that, as drafted, Rule 168 likely will not be available at all to a company involved in a business combination transaction when it discloses forward looking information and, in many cases, when disclosing regular factual information. A company involved in a business combination transaction is likely to find it difficult to release regular factual and forward looking information without in some way addressing the business combination transaction.

The Commission considered a similar issue in connection with Regulation M-A. In the Regulation M-A adopting release, the Commission indicated that

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[37] *See* Release at paragraph referencing note 372.

factual business information that relates to ordinary business matters and not a pending transaction would not need to be filed, but the Commission expected that persons would apply traditional legal principles in determining whether a particular written communication is made in connection with or relates to a proposed business combination transaction. In a footnote, the Commission explained that it did not expect parties to file ordinary or routine business communications that refer to the transaction in a "non-substantive way."[38] We respectfully suggest that the Commission add similar guidance to the adopting release, to clarify that its prior guidance may still be relied upon in determining what constitutes a communication made in connection with or relating to a proposed business combination transaction.

## LIABILITY

### Assessing 12(a)(2) Liability at the Time of Sale

The Release sets forth an interpretation that would be codified as proposed Rule 159 regarding the time at which liability under Section 12(a)(2) should be assessed. Pursuant to this interpretation and proposed rule, for purposes of determining whether a prospectus or oral statement includes a materially false or misleading statement, only the information conveyed to the investor by the time of sale will be considered; information provided after the time of sale, including by way of modifications or corrections to previously conveyed information, will not be taken into account. Whether or not information has been conveyed to an investor by the time of sale would remain a facts and circumstances determination.

In sum, the interpretation and proposed rule would require that investors be informed prior to making their investment decision. This represents best practices, and we support the concept behind the Commission's approach. However, we believe that certain clarifications are necessary to avoid what we believe are unintended "speed bumps" in the offering process.

First, we believe that proposed Rule 159 must more clearly state how the terms "time of sale" and "contract of sale" are to be defined. We suggest that the rule clearly state that those terms are defined by state law and not federal securities law, and that the relevant time is when, as a matter of state law, the buyer is unconditionally obligated to purchase the offered securities without any right of cancellation based on additional information conveyed. While we recognize that the Release indicates that the buyer and seller may agree to revise their initial sale contract or enter into a new contract of sale,[39] this process would not give the parties enough flexibility in structuring their initial contractual arrangements. State law would generally permit the parties to define the time

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[38] *See* Final Rule: Regulation of Takeovers and Security Holder Communications, Rel. Nos. 33-7760 and 34-42055 (Oct. 22, 1999), 64 Fed. Reg. 61,408 (Nov. 10, 1999), at note 45 and accompanying text.

[39] *See* Release at note 247.

of sale in their contract, and we see no reason why a Commission rule should burden that flexibility. This approach would better accommodate the need to convey certain information after pricing, especially pricing-related information, such as pro forma financial information, in circumstances where the purchaser is permitted to disaffirm the sale upon receipt of that additional information.

In addition, we believe that it is the Commission's intent that in assessing Section 12(a)(2) liability for any particular communication, the total mix of information conveyed to the investor, whether orally, by means of a free writing prospectus, by access to Exchange Act filings or otherwise, would be considered and that each individual communication is not to be tested in isolation. We respectfully suggest that the Commission confirm this in proposed Rule 159 itself. We also believe that the Commission should clarify what it means for information to be "conveyed" for purposes of assessing Section 12(a)(2) liability. We recognize that this is likely to be a facts and circumstances analysis, but we believe that examples in the adopting release would be particularly useful guidance.

**Underwriter Due Diligence**

The Aircraft Carrier proposals would have amended Rule 176 to provide guidance to underwriters and courts about what due diligence practices might be indicative of a "reasonable investigation" under Section 11, and would have extended then-existing and proposed guidance of Rule 176 to "reasonable care" under Section 12(a)(2).[40] The Aircraft Carrier release indicated that this was based on the fact that underwriters face substantial time pressure in conducting their due diligence investigations, which would only increase if the Aircraft Carrier proposals providing issuers with greater ability to register and complete offerings more quickly were adopted.

We respectfully suggest that the Commission's observations about the opportunity for reasonable due diligence in an expedited offering remain true today and will be even more so upon adoption of the Proposals. Accordingly, we respectfully urge the Commission to address underwriter due diligence by extending the relevant factors under Rule 176 to specifically address "fast deals"[41] and extending the coverage of the rule to "reasonable care" for Section 12(a)(2) purposes. We believe the extension to Section 12(a)(2) is especially important given the applicability of that section to free writing prospectuses, as well as the Commission's interpretation and proposed Rule 159 regarding information at the time of sale serving as the basis against which liability is to be

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[40] *See* Aircraft Carrier Release at paragraph following paragraph referencing note 598. The Aircraft Carrier proposals would have added six specific due diligence practices that the Commission believed would enhance an underwriter's due diligence investigation when participating in an expedited offering.

[41] Unlike the Aircraft Carrier proposals, the extended factors should not specify any particular time frame for what is considered a "fast deal" and should not be limited to particular types of securities.

assessed. We also believe that it would be useful for the Commission to repeat in the adopting release the statement from the Aircraft Carrier release that "Section 11 requires a more diligent investigation than Section 12(a)(2)"[42] in order to avoid any implication that the Commission's view of the matter has changed.

## OFFERING PROCESS

### Shelf Registration Procedures

*Extend automatic shelf procedures to seasoned but non-WKSI issuers*

We strongly support the automatic shelf registration process set forth in the Proposals. We are confident that automatic shelf registration will greatly improve the efficiency of registered capital-raising for eligible issuers. However, we believe that many, if not all, of the automatic shelf registration procedures should be extended to seasoned but non-WKSI issuers.

Most important, we believe that automatic effectiveness should extend to the registration statements of seasoned but non-WKSI issuers. In our experience, one of the principal reasons that issuers pursue Rule 144A offerings rather than registered offerings is the uncertainty as to the timing of the registration process. The suggested changes should, therefore, promote greater use of registration. As the Commission indicates in the Release, most, if not all, information about the issuer is included in shelf registration statements through incorporation by reference of Exchange Act reports. Given the Commission's greater focus on Exchange Act reports and the proposed rule requiring disclosure of material, unresolved staff comments on an issuer's Exchange Act reports, we agree that investors would have sufficient information about the issuer at the time that the registration statement is filed, whether the issuer is a WKSI or a seasoned but non-WKSI issuer. Even if the Commission is not inclined to permit automatic effectiveness of the initial shelf registration statement of a seasoned but non-WKSI issuer, we believe that all updates to the registration statement, including the restated shelf registration statement that would be required after expiration of a three-year period, should be automatically effective.[43]

We encourage the Commission to extend other benefits of automatic shelf registration that promote efficiency in the offering process but that are not obviously related to the most widely followed of the universe of widely followed issuers. We would include in this category:

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[42] *See* Aircraft Carrier Release at text accompanying note 460.

[43] As discussed below, to the extent that the Commission is not inclined to permit automatic effectiveness for seasoned but non-WKSI issuers, we believe that it should revise the Proposals to eliminate the blackout risk that such an issuer would face upon expiration of the three-year period.

- Pay-as-you-go filing fees.
- Ability to add classes of securities and new subsidiary issuers and guarantors to a registration statement by means of an automatically effective post-effective amendment.

*Eliminate potential blackout for seasoned but non-WKSI issuers*

We believe that the Commission should address the potential blackout problem that seasoned but non-WKSI issuers could face under the Proposals. As currently drafted, the shelf registration statement of a seasoned but non-WKSI issuer may be effective for only three years. Such an issuer would, after the three-year period has passed, be unable to sell securities off its shelf registration statement until it has filed and had declared effective a restated shelf registration statement.

We respectfully suggest that the Proposals be modified to eliminate this blackout risk by permitting the seasoned but non-WKSI issuer, as long as it has filed the restatement shelf registration statement prior to the end of the applicable three-year period, to continue to use its existing shelf registration statement until the replacement registration statement is declared effective. We believe that this is not inconsistent with the purpose of the proposed three-year restatement requirement, which, as described in the Release, is simply a matter of administrative convenience designed to allow more precise identification of the contents of a shelf registration statement.[44] Even though the update may contain new information about the classes of securities registered and the issuers that are registrants, the issuer disclosure from the issuer's Exchange Act reports would continue to be available to investors.

*Pay-as-you-go fees in MTN programs*

We suggest that the Commission clarify how pay-as-you-go filing fees would work in the context of MTN programs and other continuous offerings. We believe that an issuer should be permitted to pay a filing fee in advance and make the filing contemplated by proposed Rule 456(b)(1)(iii) for an amount of securities it chooses and sell securities up to the full amount of the paid fee. The administrative burden of the alternative, which would be for the issuer to have to pay a small filing fee and make a related filing each time it sells an MTN or files a pricing supplement under Rule 424 to reflect new interest rates and/or offering prices, which can occur weekly or more frequently, would be significant.

*Prospectus delivery requirements*

We agree with the Commission's conclusion that the link that exists today between delivery of the confirmation of sale and the final prospectus is not necessary, and we support the Commission's decision to decouple the two steps. We respectfully

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[44] *See* Release at text accompanying note 289.

suggest that the Commission modify proposed Rule 172 to correct a flaw that may encourage underwriters to delay sending confirmations of sale until the final prospectus has in fact been filed.

As the Proposals are currently drafted, if an issuer fails to timely file its final prospectus under Rule 424, the exemption from Section 5 set forth in proposed Rule 172(a) would not be available for any confirmation that the underwriters have already sent. The Proposals do not provide a means for underwriters to cure the Section 5 violation that would exist in this situation. Accordingly, underwriters would expose themselves to risk of a Section 5 violation by sending out a confirmation before the issuer filed its final prospectus.

We recommend that the Commission revise proposed Rule 172 to make available the exemption from Section 5(b)(1) without the condition that the final prospectus be timely filed pursuant to Rule 424. The Commission would, of course, have the ability to bring an enforcement action against issuers that do not timely file the final prospectus under Rule 424. If the Commission is not inclined to remove the condition entirely, we suggest that the Commission at least modify the condition so that the exemption is available to any underwriter that is not at fault for the delay or that has a contractual commitment from the issuer to make a timely Rule 424 filing in an underwriting or similar agreement.

**Clarify Effect of E-Sign Act on Electronic Delivery Interpretations**

As we believe the Commission is aware, there has been discussion among practitioners about the interaction between the Electronic Signatures in Global and National Commerce Act (the "E-Sign Act"), which became effective in 2000, and the Commission's seemingly more permissive interpretations regarding satisfaction of prospectus delivery and similar documents through electronic means. We respectfully suggest that the Commission clarify this matter.

The E-Sign Act's consumer[45] consent provisions require conditions regarding notice, consent and access to be satisfied before documents required to be provided or made available to consumers in writing may be provided or made available in electronic form.[46] Because the Proposals do not clearly specify whether certain provisions that "require" delivery of a prospectus or instead merely *condition* the ability to communicate on the delivery of a prospectus (for example, the requirements that a free writing prospectus or a solicitation of an indication of interest be "accompanied or

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[45] The E-Sign Act's electronic consent requirements apply only to "consumer" transactions. "Consumer" is defined as an individual who obtains products or services primarily for personal, family or household purposes. *See* Section 101(c)(1) of the E-Sign Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7006(1)).

[46] *See* Section 101(c)(1) of the E-Sign Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7001(c)(1)).

preceded" by a Section 10 prospectus), it is not clear whether electronic delivery of those documents would be subject to the conditions of the E-Sign Act.

The Commission has express authority under the E-Sign Act itself to interpret the E-Sign Act's electronic delivery provisions through rulemaking or other guidance.[47] We suggest that the Commission state in the adopting release an interpretation that any condition in the federal securities laws that a prospectus "accompany or precede" a communication is not a "requirement" for purposes of the E-Sign Act that information be provided in writing, but rather is a condition to the ability to make the particular communication. The Commission should also include in the Proposals provisions that expressly permit electronic delivery of prospectuses in accordance with the Commission's pre-2000 interpretations[48] for purposes of satisfying any federal securities statutory or Commission rule requirement or condition that a prospectus "accompany or precede" a communication.

**Form S-4**

As the Proposals are currently drafted, the shelf registration statement of an eligible WKSI and post-effective amendments thereto would be immediately effective, but registration statements of a WKSI on Form S-4 would not become automatically effective upon filing with the Commission. We understand that there are different considerations involved in the two contexts, but we believe that the Commission should revise Form S-4 to put business combination transactions that involve a securities exchange offer on par with an all-cash business combination transaction.

Currently, an original registration statement on Form S-4 becomes effective automatically 20 days after filing, so long as certain conditions are met. In practice, issuers will file a delaying amendment and do not go effective until all comments have been resolved with the staff. These comments, however, typically are not provided for a period that is at least 30 days from the time of initial filing, and that may often be significantly longer. We respectfully suggest that the Commission modify Form S-4 to provide that it becomes automatically effective 10 days after filing unless a delaying amendment is filed by the registrant, with the expectation that the staff would provide its comments in that 10-day period. This would make the timing of a Form S-4 registered exchange offer comparable to the timing of an all-cash offer, as a preliminary proxy statement must be filed 10 days prior to the time that it is first provided to security holders.[49]

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[47] *See* Section 104(b)(1) of the E-Sign Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. § 7004(b)(1)).

[48] It would also be helpful for the Commission to confirm that its prior interpretive guidance remains in effect.

[49] *See* Exchange Act Rule 14a-6.

**Application to Non-U.S. Issuers**

*Treatment of Schedule B issuers*

Under the Proposals, to qualify as a seasoned issuer, an issuer must be eligible to use Form S-3 or F-3 for registration of a primary offering of securities. The WKSI definition also includes as one of its conditions this S-3/F-3 eligibility requirement. Schedule B issuers would not satisfy this condition in either case. Therefore, the Proposals would not appear to permit a Schedule B issuer, even one that has been active in the capital markets and is widely followed in the marketplace, to take advantage of the proposed reforms to the shelf registration process. Although Schedule B issuers would benefit to an extent from the relaxation of the rules governing communications during a registered offering, they would be eligible only for the communications reforms applicable to reporting but unseasoned issuers. We see no reason to exclude Schedule B issuers from the benefits of the proposed shelf registration reforms, including automatic shelf registration, and encourage the Commission to revise the Proposals to establish a class of "well known seasoned" Schedule B issuers that may take full advantage of the Proposals. We note that in the Aircraft Carrier proposals, proposed Rule 462 would have permitted Schedule B issuers to designate the date and time of the effectiveness of their registration statements without review in connection with offerings of at least $250 million that were underwritten on a firm commitment basis by a Schedule B issuer that had registered an offering under the Securities Act within the three most recent years.[50]

*Application of Proposals to foreign private issuers*

The Proposals generally treat offerings by "foreign private issuers" in the same manner as offerings by U.S. companies. However, because registered offerings by non-U.S. companies often require the coordination of two separate processes–the home market process and the U.S. process–in certain circumstances, the practical impact of the Proposals will be more significant.

For example, in confidential, time-sensitive transactions, such as shareholder rights offerings and offerings of convertible securities, non-U.S. companies have found it difficult or impracticable to submit to the Commission's public filing and review process. Under the Proposals, non-U.S. reporting issuers that qualify as WKSIs would be able to extend a rights offering or other public securities offering into the United States with no advance notice to the Commission or prior public filing (even if the issuer has no existing registered shelf). In addition, all non-U.S. issuers would benefit from relaxed rules governing communications around the time of a registered offering, making it easier for them to reconcile home country and U.S.-regulated communication practices.

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[50] *See* Aircraft Carrier Release, at sixth paragraph following paragraph referencing note 247.

The Release indicates that the Commission intends that the Proposals will encourage non-U.S. issuers to pursue registered transactions more frequently. On balance, we believe that this may be the case for non-U.S. WKSIs. We have one specific suggestion that would apply to non-U.S. issuers.[51]

*Application of Rule 168 safe harbor to non-reporting non-U.S. issuers*

The Proposals do not appear to take into account the possibility that a non-U.S. issuer conducting its initial public offering in the United States may for many years have had its securities publicly traded in its home country and in other non-U.S. markets. We encourage the Commission to revise the safe harbors to provide that non-U.S. IPO issuers that are seasoned in their home country will be treated like unseasoned reporting issuers for purposes of the Rule 168 safe harbors. The effect of extending Rule 168 to these home country seasoned (but non-Commission reporting) issuers would be to provide them with the safe harbor for regularly released forward-looking information and to expand the types of covered factual information and permitted recipients of information. We note that the Commission has followed a similar approach in current Rules 138 and 139(a), which protect research regarding non-reporting foreign issuers that are seasoned outside the United States.

[51] As we have discussed elsewhere in this letter, we also suggest that the Commission modify the proposed Rule 139 safe harbor to accommodate research regarding Schedule B issuers and clarify that, for purposes of proposed Rule 405, a non-U.S. issuer may determine the market value of its outstanding common equity held by non-affiliates on a worldwide basis in a manner similar to that currently provided in General Instruction B.1 to Form F-3.

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We appreciate the opportunity to comment on the Proposals, and would be pleased to discuss any questions that the Commission may have with respect to this letter. Any such questions may be directed to William J. Williams, Jr. (212-558-3722) or John T. Bostelman (212-558-3840) in our New York office or to Eric J. Kadel, Jr. (202-956-7640) in our Washington office.

Very truly yours,

SULLIVAN & CROMWELL LLP

cc: The Honorable William H. Donaldson, Chairman
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
Giovanni Prezioso, General Counsel, Office of General Counsel
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