SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588
WWW.SULLCROM.COM

125 Broad Street
New York, NY 10004-2498

LOS ANGELES • PALO ALTO • WASHINGTON, D.C.
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October 17, 2016

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

Securities and Exchange Commission,
100 F Street, N.E.,
Washington, DC 20549-1090.

Attention: Mr. Brent Fields, Secretary

Re: List of Rules to be Reviewed Pursuant to Regulatory Flexibility Act – Securities Offering Reform: File No. S7-21-16

Ladies and Gentlemen:

We appreciate the opportunity to comment, in the context of the Commission's review pursuant to Section 610 of the Regulatory Flexibility Act,[1] on the rules comprising the Commission's 2005 Securities Offering Reform initiative. While we believe that the Commission could usefully undertake a comprehensive review of these rules, we are writing to highlight a number of straightforward changes we believe could be easily implemented, to the mutual benefit of issuers and investors. A key consideration, in our view, is that the Commission should be shaping these rules so as to maximize the incentives issuers have to register securities offerings.

I. WKSI Status and Shelf Registration

The Securities Offering Reform rule changes substantially streamlined the offering process for "well-known seasoned issuers," or WKSIs, most notably by

[1] Release Nos. 33-10209, 34-78845, 39-2511, IA-4530, IC-32263 (September 20, 2016).

permitting automatically effective shelf registration with pay-as-you-go filing fees. We think these streamlined procedures have worked very well and should be made available to several additional categories of issuers. In 2005, the Commission largely focused on "market following" in delineating which issuers should have the benefit of automatic shelf registration. As the internet and electronic media have continued to evolve in the decade since Securities Offering Reform was adopted, we think that earlier analysis is decreasingly relevant. And as the Division of Corporation Finance's review program increasingly (and in our view, quite appropriately) focuses on issuers' periodic filings, there is less reason to require staff processing of the routine shelf registration statements of seasoned issuers. We suggest expanding the availability of automatic shelf registration in at least the following ways:

- *Eligibility based on Non-Affiliate Equity Market Capitalization*: We would substantially lower the $700 million threshold for the equity float prong of the WKSI definition (paragraph (1)(i)(A)). We suggest a $250 million threshold, thereby picking up all issuers that would not be smaller reporting companies under the Commission's proposed rules amending those definitions; alternatively, the Commission could halve the current threshold, to $350 million. Any decrease would be an improvement, facilitating market access for more issuers and, importantly from a policy perspective, increasing the likelihood that newly-eligible issuers would register all securities offerings, thus subjecting those offerings to Securities Act disclosure and liability standards.

- *Eligibility based on Issuance of Debt Securities*: We would expand the debt issuance prong of the WKSI eligibility test – requiring issuance in the last three years of at least $1 billion aggregate principal amount of non-convertible securities in registered offerings (paragraph (1)(i)(B)) – to reduce the amount (here we would suggest $500 million) and include registered exchange offers made pursuant to the Exxon Capital line of no-action letters, as long as the original, unregistered offering was for cash. We

see no substantive reason to distinguish the typical Rule 144A offering of debt securities from a registered shelf takedown of debt securities of the same issuer, for this purpose, and once again, expanding the availability of automatically effective shelf registration should increase the proportion of offerings done on a registered basis, and thus subjecting those offerings to Securities Act disclosure and liability standards.

- *Schedule B Issuers*: Because WKSI eligibility is conditioned on the issuer being eligible to use Form S-3 or Form F-3, Schedule B issuers are excluded. At the very least, the Commission should establish a class of seasoned Schedule B issuers that may qualify for use of automatically effective shelf registration. Under the current rules, even Schedule B issuers with significant activity in the U.S. capital markets, wide followings and significant available information may not use automatic shelf registration, for no good reason.

- *Voluntary Filers*: Another consequence of the condition that an issuer be eligible to use Form S-3 or Form F-3 is that voluntary filers cannot obtain WKSI status. We suggest that Form S-3 and Form F-3 be amended to permit voluntary filers which have timely filed their Exchange Act reports to use those forms. Alternatively, the WKSI eligibility test should be amended to include voluntary filers which have timely filed their Exchange Act reports and meet all other eligibility requirements. We see no reason to disadvantage in this manner voluntary filers which do in fact file Exchange Act reports (and which will of course lose their voluntary filer status upon filing a shelf registration statement). And as a policy matter, the rules should be encouraging such issuers to register securities offerings, and thus subject those offerings to Securities Act disclosure and liability standards and the issuers to an Exchange Act reporting obligation going forward. Expanding WKSI eligibility to voluntary filers should have these effects.

- *40-F Filers*: The staff of the Commission has long taken the (in our view, strained) position – based on the fact that the eligibility date determination provisions of

the WKSI definition refer only to annual reports filed on Form 10-K or Form 20-F – that Form 40-F filers are not eligible for WKSI status even if they meet all other requirements of the definition. Since the multijurisdictional disclosure system permits eligible issuers to file annual reports on Form 40-F instead of Form 20-F, we have never understood this interpretive position, see no substantive justification for it, and suggest that the WKSI definition be revised to eliminate it.

II. Communications Rules

A. Factual Business and Forward-Looking Information – Rule 168

Rule 168, the safe harbor for regularly released factual business and forward-looking information, is available to reporting issuers, including unseasoned issuers, but is not available to voluntary filers. We would encourage the Commission to make Rule 168 available to voluntary filers that have timely filed their Exchange Act reports. Because these issuers are responsible for the accuracy and completeness of those reports in the same manner as other filers, and the Rule is conditioned on the timing, manner and form of the covered release of information being consistent with the issuer's past disclosure practice, we do not see why voluntary filers should be excluded from Rule 168. We think this change would support communication that investors find valuable.

B. Pre-Filing Offers – Rule 163

Rule 163 is currently not available for communications made by an underwriter or dealer by or on behalf of a WKSI issuer, prior to the filing of a registration statement. We agree with the Commission's proposal in Release No. 33-9098 (File No. S7-30-09) to eliminate this restriction, and thus allow a WKSI to authorize an underwriter or dealer to act as its agent in communicating about offerings of the issuer's securities prior to filing. Not allowing underwriters or dealers to make such communications reduces the benefit of other Securities Offering Reform changes, and increases the

likelihood that issuers will conduct offerings on an unregistered basis. As noted above, investors benefit when offerings are subject to Securities Act disclosure and liability standards.

C. Conditions to Use of Free Writing Prospectuses – Rule 433

For offerings of issuers that do not meet the eligibility conditions of Rule 433(b)(1), use of a free writing prospectus is conditioned on actual delivery of the most recent statutory prospectus, or (in an electronic free writing prospectus) on delivery by hyperlink to the statutory prospectus. We suggest that the Rule 433(b)(1) category be expanded to include all reporting companies and seasoned Schedule B issuers, thus limiting the prospectus delivery requirement to IPO issuers and first-time Schedule B issuers. As long as information on the issuer is available on EDGAR – as will be the case with reporting companies and seasoned Schedule B issuers – we do not think actual delivery or hyperlinks are serving any substantial purpose, and so can be eliminated.

D. Research Reports – Rules 138 and 139

The research safe harbors under Rule 138 and Rule 139(a)(2) are currently available only in respect of securities of issuers that are reporting companies. For many of the reasons discussed above, we suggest that coverage of the provisions be expanded to include voluntary filers that have timely filed their Exchange Act reports. Fundamentally, we do not see a reason to treat voluntary filers that are actually filing their Exchange Act reports differently under these rules than unseasoned issuers.

We would also urge the Commission to consider expanding Rule 139(a)(1) to cover securities of all reporting issuers. We believe that the benefits to investors, in terms of increased information flow, would outweigh any risks resulting from this change.

III. Securities Act Registration Rules and Amendments

A. Identification of Selling Security Holders After Effectiveness

Rule 430B permits eligible seasoned issuers to add the identities of the selling security holders, and amounts to be registered on their behalf, after effectiveness of the registration statement. We believe that voluntary filers and unseasoned issuers should be allowed the same flexibility. We frankly do not see a public policy reason for restricting this provision to eligible seasoned issuers and excluding others.

B. Automatic Effectiveness for F-4/S-4 Registration Statements

We would urge the Commission to extend automatic effectiveness to registration statements filed by WKSIs on Form S-4 or Form F-4 in respect of issuer exchange offers. Many of the justifications for allowing WKSIs to use automatically effective shelf registration under Form S-3 or Form F-3 identified in the Securities Offering Reform adopting release – including "facilitat[ing] immediate market access and promot[ing] efficient capital formation, without at the same time diminishing investor protection [and] [m]ost significantly . . . provid[ing] the flexibility to take advantage of market windows" – similarly apply to issuer exchange offers registered on Form S-4 or Form F-4. Many issuer exchange offers are currently being effected on an unregistered basis. Automatic effectiveness for these transactions should increase the likelihood that issuers pursue them on a registered basis, thus subjecting them to Securities Act disclosure and liability standards.

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If you would like to discuss our letter, please feel free to contact Robert E. Buckholz at [redacted] or Robert W. Downes at [redacted].

Very truly yours,

Sullivan & Cromwell LLP

Sullivan & Cromwell LLP