

January 22, 2008

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Concept Release Nos. 33-8860; 34-56803; File No. S7-27-07 on Mechanisms to Access Disclosures Relating to Business Activities in or With Countries Designated as State Sponsors of Terrorism

Dear Ms. Morris:

The Securities Industry and Financial Markets Association (“SIFMA”) appreciates the opportunity to comment on the Securities Exchange Commission (“SEC”) concept release on whether to develop a mechanism to facilitate greater access to companies’ disclosures concerning their business activities in or with countries designated as State Sponsors of Terrorism. We believe the tool that was implemented during the summer of 2007 -- and subsequently suspended¹ -- inappropriately involved the SEC in foreign policy and national security matters, was unfairly detrimental to companies, was damaging to the role the SEC has historically played in enhancing investor confidence in the U.S. capital markets, and provided no new additional public information. It is our view that any similar mechanism including data tagging would have the same inherent flaws.

For the reasons discussed more fully below, we respectfully urge the SEC to refrain from reinstating a website tool for review of information about activities of SEC registrants relating to countries designated as State Sponsors of Terrorism. Moreover, if the SEC should decide to move forward in developing such a mechanism, it should only do so after describing the proposed mechanism in detail in a full rule proposal that is subject to public notice and comment in consideration of the reputational risk inherent in such a tool.

SEC’s Mission Is Not Foreign Policy and National Security Matters

Any SEC mechanism on highlighting disclosures related to State Sponsors of Terrorism is inherently unrelated to the SEC’s primary mission of administering and enforcing the federal securities laws. While SIFMA is firmly committed to maintaining and strengthening the security of the United States, we have consistently opposed the use of the U.S. capital markets to achieve foreign policy goals. As discussed in our letter to the SEC in 2004, it is important to preserve both the SEC’s primary focus on securities regulation and the time-honored materiality standard on which our disclosure-based approach to securities registration has long been based.²

¹ Statement by Securities and Exchange Commission Chairman Christopher Cox Concerning Companies’ Activities in Countries Known to Sponsor Terrorism, 2007-138, Washington, D.C., July 20, 2007, <http://www.sec.gov/news/press/2007/2007-138.htm>.

² “... we also have concerns about the ramifications of the proposed Office for the disclosure-based system that underlies the robust U.S. capital markets. Under the U.S. disclosure-based approach to securities regulation, issuers are required to disclose information that is “material” to an informed investment decision. As a result, the disclosure documents filed by foreign companies with the SEC contain information on activities they have in countries subject to U.S. sanctions to the extent such activities are “material” under established SEC

SIFMA believes that the SEC should leave foreign policy and national security matters to the government agencies charged with, and possessing significant experience in, carrying out those matters: the State, Defense, Commerce, and Homeland Security Departments; the National Security Council; and the Treasury Department through the Office of Foreign Assets Control (“OFAC”) and the Office of Terrorism and Financial Intelligence. It is important to note that the business activities highlighted by the SEC’s website mechanism were not illegal. For some U.S. companies with operations located outside the United States and for non-U.S. headquartered corporations, there exist complex layers of competing laws and regulations covering economic sanctions, making permissible some activities by those firms subject to the legal requirements. Failure to abide by the non-U.S. sanctions laws and regulations can place the foreign subsidiaries of U.S. companies in harm’s way with local law and regulation. The nuances of these conflicting laws and regulations are well understood by the State Department and OFAC, but this expertise does not reside within the SEC.

Accordingly, since the State Department designates countries as State Sponsors of Terrorism and OFAC administers U.S. sanctions laws, the most appropriate government agency to designate what, if any, disclosures or restrictions are required related to activities in any of the relevant countries would be the State Department or OFAC. The SEC should defer to other government agencies in foreign policy matters. Otherwise, using the U.S. capital markets to achieve foreign policy goals might leave U.S.-based issuers that are listed in foreign countries vulnerable to retaliatory requirements imposed by foreign governments.

Unfairly Damaging to SEC Registrants

Any company singled out in a list associated with the term “State Sponsors of Terrorism” will be potentially stigmatized since that term has strong negative connotations. As the web site link established last summer with the title “State Sponsors of Terrorism” contained only a list of countries and a related list of issuers, SIFMA was troubled that any number of a listed company’s constituencies might conclude that the listed company directly or indirectly supports state-sponsored terrorism. Although there were links to excerpts from the listed company’s annual reports, disclosures in SEC filings are often dependent on the context of the entire report and that context can be lost when information is extracted. Language included on the link to each country stating that the annual reports of the listed companies contain “some reference to business” to the country in question was simply not a sufficient cure for the otherwise stigmatizing implication. No amount of clarifying language on a similar mechanism could sufficiently counteract the potential damage to a company included in such a list.

In addition, including any company that merely mentions one of the countries designated as a State Sponsor of Terrorism in its SEC filings is misleading since it will be both overinclusive and underinclusive. In other words, a mechanism based on registrant disclosures can only locate particular identified specific references and would lead to results that would be overinclusive since such references may relate to operations or activities that have either ceased or may never occur. For example, some issuers were included in the website list last summer because of statements in their filings about discontinuing activities in one of the countries named as a State Sponsor of Terrorism. Such disclosure certainly should not merit inclusion in a list that might damage that company’s reputation.

On the other hand, the mechanism would also be underinclusive in that disclosures relating to the sanctioned countries that do not identify those countries by name may not be picked up. In addition, some companies that do have links to business operations in one or more of the countries designated as a State Sponsor of

doctrine. (U.S. companies are already prohibited from doing business in countries subject to U.S. sanctions and, thus, would have no such activities to disclose.) The SEC does not require, and should not change its existing legal standards to require, the disclosure of information that may relate to social or political issues, but is not material to an informed investment decision as that term has been interpreted and applied by the SEC and the courts over time.” SIA letter to SEC Chairman Donaldson, January 20, 2004.

Terrorism might not be included in the list because they are not SEC registrants or because related information was not required to be included in SEC filings as it was not material to the company. For example, Berkshire Hathaway had a stake in PetroChina, which is approximately ninety percent owned by the China National Petroleum Company that has business activities in Sudan. However, Berkshire Hathaway did not mention Sudan in its SEC filings because it determined that the investment was not material to Berkshire Hathaway.³

Moreover, the very references to the sanctioned countries in public company filings may in some cases result from those companies' efforts to provide more complete disclosures regarding their activities in response to comments from the SEC Office of Global Security Risk, even when the activities disclosed pursuant to the comments are immaterial. Perversely, the SEC's initiative might encourage companies to provide less complete disclosure where possible and reward those companies that have chosen to provide either less or more generic disclosure regarding these sensitive matters. Such incentives would run counter to the SEC's stated guiding principles and the objectives of its disclosure regime.

Furthermore, although SIFMA acknowledges that the SEC is committed to strengthening the competitiveness of the U.S. capital markets, the damaging and misleading nature of a website tool emphasizing disclosures related to a State Sponsor of Terrorism will likely further diminish the willingness of foreign multinational companies to access the U.S. public capital markets or remain as registrants. As Rep. Frank noted in a letter dated July 13, 2007 to SEC Chairman Cox, the House Financial Services Committee in developing economic sanctions legislation against Iran had considered and rejected a U.S. listing requirement of disclosure of even multi-million dollar activities in that country at least in part "out of consideration for the competitive standing of the U.S. capital markets." SIFMA's membership is strongly committed to combating terrorist financing and devotes substantial resources to complying with applicable U.S. sanctions and anti-money laundering requirements. However, the list may potentially unfairly stigmatize SIFMA members and other SEC registrants as supporters of the listed countries even though none of the activities highlighted by the website mechanism are illegal. The SEC as the primary regulator of the U.S. capital markets is best served by keeping the potential competitive impact in mind when considering a mechanism that might unfairly damage the reputation of SEC registrants for simply mentioning any of the countries considered to be State Sponsors of Terrorism in their SEC filings.

SEC Materiality Standard Would Be Damaged

SIFMA believes that by establishing the website tool the Commission ventured into the area of merit regulation that it has consistently sought to avoid. Historically, the Commission has deliberately refrained from telling investors which of the complete and accurate disclosures made by its registrants are more material, interesting, or newsworthy. Any effort to correct the flaws in the website tool's methodology by conducting more substantive evaluations, though perhaps ameliorating some of the more damaging aspects of the website, would take the Commission even further down the road of "merit regulation." This is a path the SEC has wisely avoided in the past.

We are not aware of the SEC having previously singled out companies based on disclosures that they have made, unless those disclosures were either materially misleading or otherwise violated the law. With any website tool designed to draw attention to disclosures involving activities in countries designated as State Sponsors of Terrorism, however, the SEC in effect would determine what information should concern investors. Though this

³ It should be noted that Berkshire Hathaway subsequently sold its stake in PetroChina. According to articles published in the Wall Street Journal on October 12, 2007 and October 25, 2007, although investor groups pushing for divestment because of the situation in Sudan declared the sale as a victory that would put pressure on PetroChina's parent company to end business activities in Sudan, Berkshire Hathaway CEO Warren Buffett decided to divest because of price considerations and not because of PetroChina's parent company's ties to Sudan.

kind of judgment may be well-intentioned, it is not consistent with the SEC's materiality standard. Instead, it directly conflicts with the SEC's longstanding disclosure-based regulatory regime, which is designed to elicit material information and then to let investors evaluate the disclosures for themselves. In letters to Chairman Cox last summer, both Rep. Frank and Rep. Bachus criticized the SEC for not including a materiality threshold in its website tool. Should the website tool be re-established, it could also invite criticism from investors asking why the SEC has not published similar information concerning other registrant disclosures, such as any concerning labor policies, carbon footprint, immigration, or other matters.

Information Is Already Publicly Available

If the SEC were to provide any mechanism to access disclosures in documents filed with the SEC relating to business activities in or with countries designated as State Sponsors of Terrorism, it would not be providing any new public information. While the SEC's press release of June 25, 2007 accompanying its first attempt at such a mechanism said that the new tool permitted investors to obtain information directly from company disclosure documents, it did not clarify that those disclosure documents were in fact already publicly available on the SEC's website through EDGAR.

The SEC's website tool listing companies with disclosures related to countries designated as State Sponsors of Terrorism provided information available in registrant filings, but without relevant explanatory details. Accordingly, the tool provided information that was already available to investors if they deemed it material to their investment decisions. Furthermore, any such disclosure mechanism adopted by the SEC would be similarly duplicative of widely available information if based on disclosures made by registrants in required SEC filings.

There is also substantial information about firms that have been found to be in violation of U.S. economic sanctions that is publicly available on the OFAC website. Any investor seeking information about whether or not a firm has violated such laws and regulations can obtain it through that means. OFAC updates its website quarterly to provide information about companies that were fined and whether or not they self-reported their violations to OFAC. This additional source of information obviates the need for the SEC to duplicate efforts in attempting to provide information about economic sanctions violations.

Conclusion

SIFMA is concerned that any website mechanism the SEC might develop to facilitate greater access to companies' disclosures concerning their business activities in or with countries designated as State Sponsors of Terrorism would divert SEC resources from its mission of administering and enforcing the federal securities laws and inappropriately involve the SEC in foreign policy and national security matters. It would also be unfairly damaging to SEC registrants, damaging to the longstanding materiality standard under the securities laws, and would not provide information that is not already publicly available. Data tagging would not solve any of these problems. If the SEC does decide to move forward and develop a mechanism to access disclosures related to activities in countries designated as State Sponsors of Terrorism, SIFMA requests that the SEC describe the proposed mechanism in a full rule proposal subject to public notice and comment in consideration of the reputational risk inherent in such a tool.

We appreciate this opportunity to comment on the SEC's concept release. If you have any questions regarding this letter, please feel free to call Diana Preston at 202-962-7386 or David Strongin at 212-313-1213.

Sincerely,

A handwritten signature in cursive script that reads "Diana L. Preston".

Diana L. Preston
Managing Director and Associate General Counsel

A handwritten signature in cursive script that reads "David G. Strongin".

David G. Strongin
Managing Director